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TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 296

10 NOVEMBER 2014

PAGES 38905 TO 39071



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<p style="text-align: right;">Page 38905</p> <p>1 [PROCEEDINGS ON 10 NOVEMBER 2014] 2 [09:12] MR GUMBI: Yes, thank you very much, 3 Chairperson and the Commissioners. Chairperson, with the 4 little time I have I wanted to just make a brief submission 5 on the evidence. I'm not going to go into details on the 6 evidence that was tendered before this Commission, but I 7 would like to make submission. Then I will deal with my 8 recommendation. 9 On the evidence of Captain Thupe, our submission, 10 Chairperson and the Commissioners, is that the Commission 11 must accept his evidence without any doubt. During his 12 cross-examination, we cross-examined Captain Thupe with 13 regard to some of the [inaudible] after the Roots meeting 14 and we submit, Chairperson, that it is he that [inaudible] 15 did not interfere [inaudible] the narrative that led to the 16 production of exhibit L and he never instructed anyone to 17 delete his name, and in that regard we submit, Chairperson, 18 that the Commission must also accept the evidence of 19 Captain Thupe about what happened on the 13th of August 2012 20 when Warrant Officer Lepaaku was killed, and his evidence – 21 CHAIRPERSON: Sorry, what weight do we 22 attach to the differences between his first statement and 23 his later statement, the fact that he didn't mention some 24 very important facts in his first statement, only mentioned 25 them in his second statement? Is that something that's</p>	<p style="text-align: right;">Page 38907</p> <p>1 those research we presented before this Commission. They 2 are well articulated in my heads of argument. 3 Furthermore the issue of suicide in the SAPS is 4 one of the issues that we are making a recommendation 5 before this Commission that it's one of the issues that 6 this Commission must look at when making its recommendation 7 to the President. The issues of occupational stress in the 8 SAPS is one of the issues that we are making a 9 recommendation that this Commission must look at and the 10 issue of high rate of police killings in South Africa, we 11 submit to this Commission that it's one of the issues that 12 was also canvassed by the Goldstone Commission of Inquiry 13 long time ago that in South Africa there is high rate of 14 police killing and it's one of the issues this Commission 15 must take into consideration, based on the fact that we are 16 representing a police officer who was killed on that day. 17 With regard to the evidence of Mr X we submit to 18 you, Chairperson and the Commissioners, that the Commission 19 must accept the evidence of Mr X, especially around the 20 killing and the attack of police. Mr X, he implicated 21 himself – 22 CHAIRPERSON: Can we be satisfied that Mr 23 X was on the scene on the 13th in the light of a number of 24 the facts relied, in particular the fact that the person 25 whom he identified on the photograph as being himself</p>
<p style="text-align: right;">Page 38906</p> <p>1 irrelevant? 2 MR GUMBI: Chairperson, our submission is 3 that the evidence of Captain Thupe when you analyse it, 4 especially when, during his cross-examination when we put 5 some of the narratives, it gives a clear indication that 6 some of the narrative that were retrieved from the hard 7 drive of Lieutenant-Colonel Scott indicated clearly that 8 someone might have interfered with the evidence that was 9 presented before this Commission as far as exhibit L is 10 concerned. Those are our submissions as far as his 11 evidence is concerned. 12 Furthermore, Chairperson, I wanted also to deal 13 with the evidence of the National Commissioner. The 14 National Commissioner when she testified before this 15 Commission, when we cross-examined her we presented some of 16 the research finding from independent institution dealing 17 with the skills of some of the problem that they are in the 18 SAPS. We dealt with this aspect of high rate of police 19 killing in South Africa because we represent Warrant 20 Officer Lepaaku who was killed on that particular day, and 21 we submit to this Commission that one of the issues that 22 they must look at is the high rate of police killing in 23 South Africa and when the Commission make its 24 recommendation to the President one of the issues that they 25 must look at – and I'm not going to deal with those, of</p>	<p style="text-align: right;">Page 38908</p> <p>1 patently isn't, and further the fact that his description 2 of what happened is in variance with the objective facts? 3 He claimed that the shooting started while General Mpembe 4 was still counting. Now how can someone who was there have 5 made a mistake as serious as that? 6 MR GUMBI: Our submission, Chairperson, 7 is that if the Commission rejects his evidence on that 8 particular aspect, we are saying that around the issue of 9 police attack his evidence was never challenged. He 10 described before this Commission how the police were 11 attacked and he even went further and described his role 12 during the attack on the police. We submit that that 13 evidence – 14 COMMISSIONER TOKOTA: Sorry, Mr Gumbi, to 15 cut you. The question is was he there? Can we accept that 16 he was there? You can't say we must accept his evidence 17 insofar as the description of the killing if we do not 18 accept that he was not there. The first question which you 19 must answer is that must we accept that he was there in the 20 light of the evidence that was before us as to whether in 21 fact he is the man pointed out there? 22 MR GUMBI: We submit, Commissioner, that 23 Mr X was there. The – 24 CHAIRPERSON: No, that isn't the 25 question. The question is can we be certain that that's</p>

<p style="text-align: right;">Page 38909</p> <p>1 correct in the light of in particular the two points that 2 I've put to you? If he was there, why does he point out 3 someone on the photograph who manifestly is not he? Why 4 does he give that description of the shooting starting 5 while General Mpembe was counting? We know from the video 6 that that's not what happened. So if he'd been there he 7 would, could he have possibly made that mistake? 8 MR GUMBI: We submit, Chairperson, that 9 in various instances we may have many witnesses witnessing 10 one incident, and witnesses they can give different 11 accounts of what happened on that particular day, but as 12 far as the killing of the police officers, those facts 13 around there, the Commission must accept that he was there 14 because he even went beyond and implicated himself that he 15 participated during the police attack and killing. So we 16 submit that this Commission cannot just reject his evidence 17 entirely. 18 COMMISSIONER HEMRAJ: How do you get past 19 the evidence that's on the video of the group that was at 20 the railway line where he can't be seen in that group? 21 MR GUMBI: I do accept that, 22 Commissioner, that Mr X cannot be seen in that video, but 23 if he implicates himself in saying that I was there, we 24 submit that there is no way that this Commission can reject 25 his evidence in totality. Somewhere along the line this</p>	<p style="text-align: right;">Page 38911</p> <p>1 MR GUMBI: Around the issues of police 2 killing, when we questioned him around these crucial 3 aspects, the facts surrounding the killing of Warrant 4 Officer Lepaaku he couldn't provide any answers. We also 5 cross-examined him on his role, why they went and fetch 6 inyanga, what was the role of inyanga during this incident, 7 and he couldn't explain, provide the reason why the inyanga 8 was called to come, and furthermore even after the police 9 killing we also cross-examined him, you know, with regard 10 to his role, what he said to the protesters at the koppie. 11 He couldn't provide explanation. He was very evasive. He 12 couldn't provide answers to simple questions. So we submit 13 in fact that the Commission and the Commissioners must 14 apply cautionary rule when assessing his evidence that was 15 presented before this Commission. 16 COMMISSIONER HEMRAJ: Isn't your main 17 criticism of him in your submission in paragraph 18.4? 18 MR GUMBI: Is it on page? 19 COMMISSIONER HEMRAJ: It appears on page 20 47. 21 MR GUMBI: Page 47, Commissioner. Yes, 22 it's on page 84. Are you saying on page 84, Chairperson? 23 Commissioner? 24 COMMISSIONER HEMRAJ: Isn't that your 25 main criticism of Mr Nzuzza's evidence?</p>
<p style="text-align: right;">Page 38910</p> <p>1 Commission, we submit must accept his evidence on the 13th 2 of August 2012. 3 The evidence of Mr Nzuzza, because I've been 4 alerted that I only have five minutes left, the evidence of 5 Mr Nzuzza, we submit to this Commission that the Commission 6 must reject his evidence. We submit that Mr Nzuzza was 7 there on the 13th of August 2012 when Warrant Officer 8 Lepaaku was killed, and even during his cross-examination 9 he was very evasive. He couldn't provide answers on simple 10 question and we therefore we submit that this Commission 11 must also reject his evidence and accept that he was there. 12 He knows on the 13th of August what happened and based on 13 our recommendation, Chairperson, going towards our 14 conclusion, recommendation on the conduct of the SAPS we 15 submit that this Commission must make recommendation to the 16 National Commissioner – 17 COMMISSIONER TOKOTA: Sorry, before you 18 get there, you say we must reject Mr Nzuzza's evidence. In 19 what respect must we reject? Must we reject the whole 20 evidence, and if so, on what basis? If not, which aspect 21 are you saying we must reject? 22 MR GUMBI: Around the issues of – 23 COMMISSIONER TOKOTA: Because we have 24 seen him in the video, he was there. He also accepted that 25 he was there.</p>	<p style="text-align: right;">Page 38912</p> <p>1 MR GUMBI: Yes, those are my main 2 criticisms. 3 COMMISSIONER HEMRAJ: Yes. 4 MR GUMBI: That this Commission must 5 apply cautionary rule, and again on his evidence on the 13th 6 of August 2012 we further submit, Chairperson and the 7 Commissioners, that these strikers were carrying dangerous 8 weapons and we submit to you, Chairperson and the 9 Commissioners, that the issues of carrying of dangerous 10 weapons during our public demonstration and gathering is 11 one of the issues that was identified by the Goldstone 12 Commission of Inquiry even before 1994, and I've made 13 reference to footnote 142, that's the commission of inquiry 14 regarding the conduct of members of 32 Battalion that was 15 made on the 8th of April 1992 and furthermore I've made 16 reference to the interim report released by Judge Goldstone 17 on the 21st of December 1992 wherein the Goldstone 18 Commission made it crystal clear that carrying of dangerous 19 weapons is one of the issues that needs to be addressed in 20 South Africa, and we know for a fact, Chairperson and the 21 Commissioners, that in South Africa we do have legislation 22 dealing with that particular aspect of carrying of 23 dangerous weapons. 24 CHAIRPERSON: Yes, I'm told that your 25 time is up, so perhaps you'd like to round off your</p>

<p style="text-align: right;">Page 38913</p> <p>1 argument at this stage.</p> <p>2 MR GUMBI: Yes, Chairperson.</p> <p>3 CHAIRPERSON: We've got your written</p> <p>4 heads, which are very full and comprehensive -</p> <p>5 MR GUMBI: Yes, Chairperson.</p> <p>6 CHAIRPERSON: - which contain I'm sure</p> <p>7 everything which you wish to say really, but you're of</p> <p>8 course entitled to do what you've been doing, is to</p> <p>9 highlight points and to deal with questions put to you from</p> <p>10 the -</p> <p>11 MR GUMBI: Yes, Chairperson. Indirectly</p> <p>12 I've made a recommendation on the SAPS that there must be,</p> <p>13 Commissioners, there must be an internal inquiry probing</p> <p>14 the death of the late Warrant Officer Lepaaku and those who</p> <p>15 are responsible they must face internal disciplinary</p> <p>16 measures.</p> <p>17 As far as the recommendation on the conduct of</p> <p>18 the strikers near the railway line, it is our</p> <p>19 recommendation to the Commission that those strikers that</p> <p>20 they were identified that they were carrying dangerous</p> <p>21 weapons on the 13th before Warrant Officer Lepaaku was</p> <p>22 killed must be identified, must be prosecuted and they must</p> <p>23 face the full might of the law.</p> <p>24 Recommendation on the conduct of the AMCU and</p> <p>25 NUM, it is our respectful submission, Chairperson and the</p>	<p style="text-align: right;">Page 38915</p> <p>1 introductory submission will explore any Lonmin might have</p> <p>2 had any duty to talk to the strikers; what was the source</p> <p>3 of that duty for Lonmin to talk to the strikers. Then I'd</p> <p>4 like to explore two observations, the first one is the</p> <p>5 schizophrenic nature of some of the criticisms levied at</p> <p>6 Lonmin during the proceedings, and secondly I want to</p> <p>7 explore -</p> <p>8 CHAIRPERSON: Are these third points</p> <p>9 now -</p> <p>10 MR BURGER SC: No, no -</p> <p>11 CHAIRPERSON: The first two are -</p> <p>12 MR BURGER SC: These are two observations</p> <p>13 I make.</p> <p>14 CHAIRPERSON: I see, I'm sorry.</p> <p>15 MR BURGER SC: I've made two introductory</p> <p>16 submissions I will make -</p> <p>17 CHAIRPERSON: I've seen these points in</p> <p>18 your heads, but anyway -</p> <p>19 MR BURGER SC: It doesn't follow the</p> <p>20 heads - Chair, I assume you and the Commissioners have read</p> <p>21 the heads and the reply and although I'll refer to the</p> <p>22 heads at some point, I certainly don't intend to reargue</p> <p>23 the heads.</p> <p>24 CHAIRPERSON: I'm just trying - no, I</p> <p>25 appreciate that. I'm just trying to write down the</p>
<p style="text-align: right;">Page 38914</p> <p>1 Commissioners, that the union must face the full might of</p> <p>2 the law. Both NUM and AMCU, they had the lion share of</p> <p>3 membership at Lonmin, they were there, and our submission</p> <p>4 is informed by the decision of the Constitutional Court,</p> <p>5 I've made the references to those case law, wherein our</p> <p>6 Constitutional Court made it crystal clear that if you are</p> <p>7 a union your members they're on strike, whether the strike</p> <p>8 is legal or illegal; whatever damages that occur as a</p> <p>9 result of the conduct of your members, you must face the</p> <p>10 consequences of the conduct of your members. We submit to</p> <p>11 this Commission that this Commission also again they must</p> <p>12 make a recommendation, they must send a clear message out</p> <p>13 there that if you are the union, your members they are on</p> <p>14 strike, be in charge of your members, instil disciplinary</p> <p>15 measures so that at the end of the day we don't have</p> <p>16 intimidation of other employees, destruction of property,</p> <p>17 even loss of life. Those are our submissions to the</p> <p>18 Commission.</p> <p>19 CHAIRPERSON: Thank you, Mr Gumbi. We're</p> <p>20 now going to have argument from Lonmin, Mr Burger.</p> <p>21 MR BURGER SC: Thank you, Chair,</p> <p>22 Commissioners. I intend to address you under the following</p> <p>23 headings: I'll start off with two introductory submissions.</p> <p>24 The one is to consider how the Commission holds a party</p> <p>25 accountable, applying which standard. The second</p>	<p style="text-align: right;">Page 38916</p> <p>1 headings of the points that you're going to cover.</p> <p>2 MR BURGER SC: Yes.</p> <p>3 CHAIRPERSON: So that I can follow them</p> <p>4 more easily.</p> <p>5 MR BURGER SC: Correct.</p> <p>6 CHAIRPERSON: So the first one is how</p> <p>7 does the Commission hold a party accountable. Second one</p> <p>8 is did Lonmin have a duty to speak to the strikers, what</p> <p>9 was the source of such -</p> <p>10 MR BURGER SC: Chair, that I do under the</p> <p>11 heading of introductory submissions.</p> <p>12 CHAIRPERSON: Yes.</p> <p>13 MR BURGER SC: I've got three headings.</p> <p>14 The second heading is two observations. I was now</p> <p>15 listing -</p> <p>16 CHAIRPERSON: Alright, the first one is</p> <p>17 the schizophrenic nature of the criticisms -</p> <p>18 MR BURGER SC: The first one is the</p> <p>19 schizophrenic nature of some of the criticisms levied at</p> <p>20 Lonmin, and the second one is a failure to explore the</p> <p>21 counterfactual. I pick up that learned word from the</p> <p>22 Competition Commission where the counterfactual as I</p> <p>23 understand it means what would have happened if I did what</p> <p>24 you asked me to do. Just consider that for a moment.</p> <p>25 Then under the third heading I'm going to address</p>

<p style="text-align: right;">Page 38917</p> <p>1 two main submissions. One is exploring whether Lonmin 2 should have talked to the strikers, and secondly I'll 3 consider the housing obligations under phase 2. 4 You would have seen, Chair, Commissioners, in our 5 reply in particular we deal with capita selecta. My 6 learned friend Mr Bham will address those capita selecta 7 and he'll pay particular attention to the demand for 8 R12 500, and having appeared in other tribunals I know that 9 a scheme and a structure lasts as long as the first 10 question comes and then it's gone. So I'm painfully aware 11 of the fact that this is but a wish list and no more. 12 May I then start off with the first observation; 13 how does the Commission hold a party – 14 CHAIRPERSON: Let's see how long your 15 scheme can remain intact. 16 MR BURGER SC: How long does the 17 Commission, or how does a commission hold a party 18 accountable, applying which standard. There is a debate on 19 onus in this Commission and the standard of proof, but that 20 seems to me to be largely uncontentious. The Human Rights 21 Commission addresses that in their submissions and they do 22 so at paragraph 32, and I refer to that because it seems to 23 me that that is a good starting point and that's why I say 24 I think it's reasonably uncontentious. They make the 25 following submission in paragraph 2.3.3, they say, "The</p>	<p style="text-align: right;">Page 38919</p> <p>1 having dealt with onus I don't intend to explore that 2 further, it seems to me that the parties are reasonably ad 3 idem on onus. But what about the measure to hold 4 accountable? For example, the LRC says "Mr Ramaphosa 5 should be held accountable for using his political clout. 6 He acted improperly." I'm not sure what this standard is, 7 is that a ethical standard or a moral standard because we 8 never heard the answer to the Kalahari farm example. 9 CHAIRPERSON: Is there a difference 10 between a moral testimony and ethical testimony? 11 MR BURGER SC: Well no, Chair, there's a 12 huge debate on the difference between morals and ethics. 13 My submission is that is not an issue to be explored by the 14 Commission. The structure for the Commission as a measure 15 to decide whether a party is accountable has to be looked 16 at from a different perspective. Firstly, there will be a 17 criminal standard axiomatically, you will have a look at 18 whether, in your view, there's a possibility of a crime 19 having been committed and we know how to deal with that, 20 after all we are lawyers. Secondly, there's a delictual 21 standard and there we have a look at wrongfulness and 22 legality and again we're in – 23 CHAIRPERSON: Wrongfulness and 24 culpability, wrongfulness and legality are the same thing. 25 MR BURGER SC: Yes.</p>
<p style="text-align: right;">Page 38918</p> <p>1 Commission has indicated, without making an explicit 2 ruling, that the standard of proof it will apply in 3 relation to findings of fact is the balance of 4 probabilities," and then they quote a reference to 5 something you said, Chairperson. They say "The HRC submits 6 that this is the appropriate standard to apply to the 7 majority of the issues in dispute between the parties. 8 However, the HRC submits that some flexibility may be 9 justified in relation to those issues." And we agree with 10 that and it seems to us that we also can make common cause 11 with some of our other learned friends who refer to a 12 sufficient evidence to make a recommendation, which would 13 be lower than a balance of probabilities. 14 [09:32] So far so good, in fact in page 36 of their heads 15 the HRC makes the following submission in 2.3.10. They say 16 "Finally the standard of proof applicable to the 17 Commission's decisions on referrals for prosecution must be 18 lower than the balance of probabilities. In international 19 commissions of inquiry there are three recognised standards 20 of proof that can be applied in instances of individual 21 criminal liability." And I want to come back to that, 22 looking at your mandate and see whether the mandate of this 23 Commission for example in the case of the case was to 24 explore the behaviour of Lonmin or the behaviour of 25 individuals in Lonmin and there's a divide there. But</p>	<p style="text-align: right;">Page 38920</p> <p>1 CHAIRPERSON: Wrongfulness and 2 culpability. 3 MR BURGER SC: Correct, well culpability, 4 I mean are you going to hold the party liable? And again 5 we're in known territory for that. But if you have a look 6 at the Commission's mandate, the mandate is differently 7 formulated. In paragraph 1.1.1 of the terms of reference 8 you have a reference to best endeavours and 1.1 says "What 9 you must consider is the conduct of Lonmin in particular 10 whether it exercised its best endeavours." And you find 11 that same theme in 1.3 dealing with AMCU. "The conduct of 12 AMCU, its members and officials and in particular whether 13 it has exercised its best endeavours." And we get that 14 repeated in 1.4 dealing with NUM, very much the same 15 question. But against what standard does one measure best 16 endeavours? My learned friend, Mr Budlender grasped the 17 nettle in his submissions right up front and in the debate 18 of the first day which is reported at page 38 495 the 19 following is recorded and I have to read it because one 20 must engage with this, what is the standard. He says "When 21 we fought and argued in this Commission about 22 accountability, perhaps because the people arguing are 23 lawyers and because the Commission as our lawyers we all 24 tended to lapse by lawyers' habit into legal liability, 25 particularly criminal liability. But we submit that that</p>

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1 would be a mistake because accountability is not only
 2 criminal liability or even civil liability. It's also
 3 holding people accountable for what they did wrong, not all
 4 wrongdoing in that sense is unlawful." I'm not sure I
 5 understand that. How do you hold somebody accountable for
 6 what he has done wrong if you don't define the standard by
 7 which you measure it? But my learned friend goes on and he
 8 gives us an example. He says "The Provincial Commissioner
 9 made a decision on the 15th of August to remove the strikers
 10 from the koppie the following day if they didn't lay down
 11 their weapons and leave. The SAPS in their submission lay
 12 much emphasis on the proposition that the Provincial
 13 Commissioner, that the Provincial Commissioner's decision
 14 was lawful, but even assuming that it is so that it is not
 15 the end of her accountability for that decision and its
 16 consequences. We contend" now this is the Commission by
 17 the evidence leaders as the Commissioners will have seen
 18 from our heads of argument that the decision was reckless,"
 19 well that's easy, if it's reckless, it was by definition,
 20 under the Lex Aquilia, the Romans knew about that. "We
 21 contend, as the Commission would have seen from our heads
 22 that the decision was reckless and it was driven by an
 23 improper political motive. If that is so then she should
 24 be held accountable for that decision whether or not it is
 25 lawful." But how can that be lawful if it was reckless?

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1 How can it be lawful I ask rhetorically if it was motivated
 2 by improper political motives? My learned friend goes on
 3 "If there was a decision actuated by improper motives and a
 4 decision which was reckless that's a matter for which she's
 5 accountable." We agree with that, that doesn't, with
 6 respect, answer the question what is the standard against
 7 which you measure. So let us then consider the submission
 8 which I've alluded to by the LRC. "Hold Mr Ramaphosa
 9 accountable, he acted improperly." So is that improperly
 10 in the context of delict? Was he wrongful, was he
 11 culpable? If those questions elicit a positive answer then
 12 we can engage with it, but I have no ability to engage with
 13 a moral question. He shouldn't have done and that is
 14 perhaps illustrated by the example you put as to the two
 15 Kalahari farmers and I'm not clear that there was a clear
 16 answer to that because it's a question without an answer.
 17 That may be the reason for it.

18 CHAIRPERSON: It may be a question
 19 without an answer, but if there isn't an answer then it's
 20 difficult to apply the standard that we're asked to apply.

21 MR BURGER SC: No, with respect, not. I
 22 submit –

23 CHAIRPERSON: What I'm saying is if one –
 24 I'm not directing the point to you, if the example I put up
 25 about the two Kalahari farmers leads to a conclusion that

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1 the politically well connected farmer wasn't permitted to
 2 contact anyone in the police or anyone high up in the
 3 police because of his political connections. If that's the
 4 answer then of course Mr Ramaphosa I suppose can be
 5 criticised, but if the answer is we can't say that, we
 6 don't know, there's no basis for suggesting that the non
 7 well connected farmer is entitled to do everything he can
 8 to get the police there, but the other one can't.

9 MR BURGER SC: Chair, with respect, I'm
 10 not so confident on the answer to the first question. In
 11 the old dispensation I was living in a constituency and in
 12 the constituency I had a member of parliament whether I
 13 voted for him or not he was my member of parliament. If I
 14 had a marauding crowd attacking my farm and I need the
 15 assistance of the police and the local police station is
 16 dysfunctional, my submission is there is nothing wrong to
 17 phone my MP and say to him will you please help me. Can't
 18 you speak to the Minister of Police and ask him to speak to
 19 the National Commissioner and get something done, I'm being
 20 threatened in my life? What's wrong with that, is that
 21 morally wrong, is that ethically wrong?

22 CHAIRPERSON: Mr Burger, I think you
 23 misunderstand me. What I'm saying is if the answer to that
 24 question is there's nothing wrong with it then of course if
 25 the analogy is applicable to the case of Mr Ramaphosa that

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1 answer can then be applied to his case as well.

2 MR BURGER SC: Yes.

3 CHAIRPERSON: The problem is, as you say,
 4 it's not clear what the answer is we were given by the LRC,
 5 that's my -

6 MR BURGER SC: That's my understanding.

7 CHAIRPERSON: It seems that we have to
 8 have an answer to that question, unless the analogy is not
 9 appropriate which is a different matter, but if it is an
 10 appropriate analogy then we have to have an answer before
 11 we can deal with the submissions that have been put up.
 12 That's the point I'm putting, I don't understand that you
 13 and I differ on that point.

14 MR BURGER SC: That's what I'm exploring.
 15 I want to make another submission. You have this very
 16 vague mandate of best endeavours. There must be a question
 17 when do you test best endeavours and my submission is you
 18 test it at the time on the available information. Let me
 19 give you an example. It is not fruitful to ask us now
 20 whether or how one should have exercised one's best
 21 endeavours with the benefit of hindsight. My learned
 22 friend, Mr Semanya, will say to your best endeavours I'll
 23 go there without live ammunition. I will say to you for
 24 Lonmin I would have spoken outside whatever structure there
 25 was. I would have paid whatever amount because I must save

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1 lives. The strikers will say to you we weren't embarked on
 2 an unprotected strike. We see the results, we'll never do
 3 it again. NUM and AMCU will say to you we would have
 4 smoked a peace pipe, we would have co-operated here as old
 5 friends in order to avoid – but that's unhelpful. We can't
 6 do it that – we must test best endeavours with the
 7 knowledge available at the time. That's why we make the
 8 following submissions in our reply and can I go now to the
 9 reply in order to pick up from there? In paragraph 6 of
 10 our reply we address this very issue and in 6.1 we make
 11 what we consider to be a fundamental proposition. We say
 12 "In keeping with South African constitutional democracy the
 13 LRA was promulgated and continues to operate in order to
 14 regulate the relationship between capital and labour in all
 15 its many facets including in the sphere of collective
 16 bargaining. And we've quoted the introduction to the LRA
 17 which is really defined labour relations in this country
 18 since the age of democracy. It was constitutionally
 19 mandated, it's now the test to apply and we ask, with great
 20 respect, whether we have paid enough attention to that in
 21 the past two years and three months in considering what
 22 happened here? We say in 6.2 that framework exists in
 23 order to promote stability in industrial relations and to
 24 guide parties on how they can be expected and are entitled
 25 to act. And we refer to section 1 of the LRA which

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1 provides that its purpose is to advance economic
 2 development, labour peace, we underline labour peace. The
 3 very purpose of the LRA is to provide for labour peace and
 4 that's why we say in 6.3, any suggestion made with the
 5 benefit of hindsight that an employer should act
 6 differently in a particular situation should be assessed
 7 against the backdrop and consideration should be given to
 8 the future implications of the suggested alternative course
 9 of conduct. That's the counter factual argument and I'll
 10 deal with that presently. We go on where we say there is a
 11 contradiction between, on the one hand, suggesting that the
 12 law and our constitutional democracy should be respected
 13 and on the other hand seeking to impose an obligation on
 14 Lonmin to act outside the legal framework and to negotiate
 15 wages with individual strikers embarking on an unprotected
 16 strike and in the face of violence. So we say in exploring
 17 this subject it is an important guideline against which we
 18 must look for a measure as to whether there was best
 19 endeavours. And I must add a caveat here also, there is
 20 submissions made by the evidence leaders, referring to two
 21 security officers of Lonmin, Messrs Kellerman and Botha and
 22 there's a suggestion that they should be criticised for
 23 what happened on the 10th of August. Now on the dichotomy
 24 in that approach, it's again a subject for a bit later, but
 25 if you have a look at the mandate of the Commission, the

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1 Commission's mandate was not to enquire into individual
 2 culpability. The Commission's mandate was particularly
 3 stated to be addressed at the SAPS, at Lonmin, at NUM and
 4 at AMCU and on the earlier days at the Departments. But
 5 that was the brief given to them.
 6 Chair, Commissioners, there is what may be a
 7 helpful reference which was drawn to my attention by my
 8 attorney recently and may I ask copies of that to be handed
 9 out? It's a Canadian commission of inquiry, a judicial
 10 one, His Lordship, Mr Justice Wright. I call it the Neil
 11 Stonechild inquiry and what happened there apparently in
 12 the Saskatoon area of Canada there was an atrocious habit
 13 by the police, so it was suggested, that they will pick up
 14 youngsters who caused problems, go into the night at minus
 15 28°C and drop them. And then pick them up the next
 16 morning, but I'm wrong to say they pick them up, they pick
 17 up the body because they die of hyperthermia. And that led
 18 to the inquiry into the death of Neil Stonechild. And in
 19 that process there was a consideration of the scope of a
 20 commission, a judicial commission of inquiry and it's a
 21 helpful judgment to read, finding to read in toto, but in
 22 the time available I can't do that. May I ask you to have
 23 a look at the paginated pages at the bottom right-hand
 24 corner and 18 is not numbered, but it's 17 an 19. Right-
 25 hand bottom or right-hand foot, I believe –

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1 CHAIRPERSON: Even is bottom left, odd is
 2 bottom right. So we know where the page numbers are, just
 3 give us the page numbers.
 4 MR BURGER SC: 18. One eight, oh it is
 5 in fact on the left-hand side, ja there it is.
 6 CHAIRPERSON: Especially at page 18.
 7 MR BURGER SC: Yes. There's a passage
 8 quoted from Justice Louise Arbour which is known to you,
 9 Chair and I pick it up four lines from the top. Just to
 10 illustrate the caveat that I want to raise. The Commission
 11 says "An example of a commission which determined that
 12 naming names was not needed in order to fulfil the mandate
 13 of the commission is" and they refer to the Arbour
 14 Commission there where she wrote "During the entire process
 15 of the inquiry and in particular in the writing of this
 16 report I have concluded that it would not be fair for me to
 17 embark upon personal attribution of responsibility for many
 18 reasons. Many persons were not called to testify" and I
 19 read this in the context of criticism of Messrs Kellerman
 20 and Botha who were not called by the evidence leaders.
 21 They were available, we've given statements by them, nobody
 22 bothered to call them in the available time. "Many persons
 23 were not called to testify and had, therefore, no
 24 opportunity to address allegations that might have been
 25 made against them. The witnesses who were called were not

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1 meant to be singled out as blameworthy, but were called for
 2 the sake of expediency as the ones who had the most to
 3 contribute to the unfolding of the narrative, many
 4 individuals, who by their own conduct, made errors or whose
 5 actions I found did not meet a legal or policy standard or
 6 expectation are otherwise persons greatly committed to
 7 correctional ideals for women prisoners." This doesn't
 8 apply here. "They were part of a prison culture which did
 9 not value individual rights. Attribution of a personal
 10 blame would suggest personal rather than systemic
 11 shortcomings and justifiably demoralise the staff while
 12 offering neither redress nor hope for a better system."
 13 And a passage I don't have the time to read, but which
 14 you'll find at page 15 is extremely helpful, at the foot of
 15 page 15 and over at 16. "The danger of fingering or
 16 pointing a finger to people who are then not prosecuting
 17 and who has got no ability to clean the slur placed upon
 18 them by an adverse finding."
 19 CHAIRPERSON: I'm not sure if I've said
 20 it in the Commission, I think I have but over and over
 21 again I have stresses that this is not a commission that's
 22 going to hold mini criminal trials and "convict" people.
 23 That would be grossly unfair to the individuals concerned
 24 because we wouldn't really be convicting them, we'd simply
 25 be making findings that they're guilty without the

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1 jurisdiction to do so. If the Director of Public
 2 Prosecutions then who caused the matter to be investigated
 3 was satisfied that there was no case against them and they
 4 weren't prosecuted they would still be branded for life
 5 with a finding made by this Commission which short of
 6 having it set aside on review which may not be so easy, it
 7 would be very unfair. So we don't propose doing that.
 8 What we've been asked to do is something slightly different
 9 and I'm not sure – I'd like to read the full report of
 10 Commissioner Arbour. What we've been asked to do is to say
 11 in the case of certain people there may well be a prima
 12 facie case or what looks on the evidence before us, a prima
 13 facie case. And that must be investigated by the DPP. And
 14 if the DPP is satisfied on the investigation which I take
 15 it in the case of the police persons involved would be by
 16 IPID, in the case of the others I take it, it would be the
 17 SAPS, if the DPP is not minded to prosecute well that'll be
 18 the end of the matter. There wouldn't be a prosecution.
 19 What it is suggested we should do is simply investigate
 20 whether there is enough to merit the referral of the matter
 21 to the DPP. And we would stress, of course, I take it
 22 somewhere that we are not finding people guilty, we are
 23 simply saying there's enough basis for the matter to be
 24 investigated further by the prosecution authorities. Now
 25 I'm not sure how, I think she's now in the Supreme Court of

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1 Canada, I'm not sure how Justice Arbour dealt with that,
 2 but anyway presumably the report is on the Internet –
 3 MR BURGER SC: No let me address that
 4 because it's an important nuance. I do not for a moment
 5 suggest if a police general X gave evidence for ten days,
 6 you will find it was unreliable, he was negligent and in
 7 fact he lied. But you are entitled to say, we are not
 8 going to convict him.
 9 [09:52] But IPID or somebody should investigate here,
 10 there's an investigation going. He'd had an opportunity.
 11 He spoke, he had his chance to say, but it's very
 12 different, and I'm only talking for the two people involved
 13 from Lonmin's side. Take Mr Kellerman; for Mr Kellerman
 14 now to read in a report that IPID or the SAP(!) should
 15 investigate what he had done on the 10th of August, I say
 16 that's unfair because if, as is likely to happen, there's
 17 no prosecution, there's no way that he ever had an
 18 opportunity. He didn't see the ball coming. He was shot
 19 from behind. He didn't know he will stand to be accused.
 20 He gave a statement, he gave a follow-up statement. Nobody
 21 bothered to call him. To now say make a recommendation
 22 that he be criminally investigated would incorrect, and
 23 that's what, as I read Judge Arbour saying, that's exactly
 24 what she says and that's only, that's the caveat that I
 25 raise in this context.

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1 But let me then deal with the second introductory
 2 observation –
 3 CHAIRPERSON: Sorry, just to take that
 4 point further; we know a vast number of shots were fired.
 5 We know a vast number of members of the police service
 6 fired shots. There are contentions that these shots were
 7 fired in circumstances where the shooters – I think that's
 8 actually the correct noun – where the shooters can't rely
 9 on the principle of –
 10 MR BURGER SC: Yes.
 11 CHAIRPERSON: - self-defence or private
 12 defence, despite the fact that that defence has been put up
 13 by the SAPS. There was nothing wrong at all, even on the
 14 basis of the principle for which you contend which you say
 15 Judge Arbour upheld, to say that the shooters, without
 16 specifically identifying them, their conduct should be
 17 investigated. Then there would be no implied finding or
 18 cloud as it were, put over the head of a particular
 19 individual, which is your complaint in relation to Mr
 20 Kellerman. Is that correct?
 21 MR BURGER SC: Indeed.
 22 CHAIRPERSON: And Mr Botha.
 23 MR BURGER SC: Yes. No, I accept that a
 24 hundred percent, and I think the example of the shooters is
 25 very appropriate. You may well hold accountable the

<p style="text-align: right;">Page 38933</p> <p>1 shooters and say they should be investigated, but if there 2 was a shooter called Van der Merwe and he was implicated by 3 evidence to say Van der Merwe shot and he shot party so and 4 so, who's deceased today, and Van der Merwe is then called 5 here but he doesn't come, he's not feeling well, or he's 6 just evading, he doesn't want to give evidence, no reason, 7 he may be mentioned then for further investigation. So 8 it's not a Mead and Persians debate. All I say in looking 9 at individuals from Lonmin's side it would be 10 inappropriate, with respect, to hold individuals liable. 11 We'll have a debate on the security system and that's a 12 debate which comes later –</p> <p>13 CHAIRPERSON: Mr Burger, it wouldn't be 14 appropriate surely to adopt a more favourable approach, if 15 one can use that phrase, in the case of Lonmin people, but 16 not to apply the same approach to others.</p> <p>17 MR BURGER SC: Yes, indeed. Indeed.</p> <p>18 CHAIRPERSON: That would lead to serious 19 well merited criticism if we were to do that. Isn't that 20 correct?</p> <p>21 MR BURGER SC: Well, you will see that we 22 don't cross swords with my learned friend Mr Semanya, 23 although we have no reciprocity from him, but it's 24 counterproductive to fight with the police. I mean it's 25 like clubbing seals; I don't want to do that. We'll</p>	<p style="text-align: right;">Page 38935</p> <p>1 On the contrary, the NUM recognition agreement prohibited 2 Lonmin from doing so." And that takes me to the second 3 possible source of a duty to negotiate, that's contractual, 4 that's that collective bargaining agreement and we address 5 that in our main heads at page 17, paragraph 32. It was 6 suggested from time to time that we should simply have 7 amended the agreement, gone to NUM, amend the agreement and 8 negotiated with the strikers. We say in paragraph 32 of 9 the main heads, "In any event Lonmin could not simply 10 cancel the NUM recognition agreement and commence wage 11 negotiations directly with the RDOs or an ad hoc forum," 12 and we refer to the clauses and the time period for 13 amendment and we say that was not practical.</p> <p>14 What we should consider though is what was the 15 attitude of NUM and AMCU at that time. Did Mr Mathunjwa 16 and Mr Zokwana say to me why don't we amend this agreement? 17 Why don't we have an ad hoc tribunal and solve this problem 18 with the striking workers? Of course that's not the 19 evidence and let's remind ourselves of what the evidence 20 was. What was the evidence of NUM during the strike? We 21 deal with that in our main heads, page 84 and 85. May I 22 read that to you and remind ourselves of that? Paragraph 23 211 we say, "Had the strikers genuinely wanted to engage 24 with Lonmin management on their wage demands they would 25 have chosen any number of representatives to go and</p>
<p style="text-align: right;">Page 38934</p> <p>1 address Lonmin and hold that brief down. 2 I secondly want to consider the source of the 3 duty on Lonmin to talk. You will again see – and I keep 4 going back to your mandate, to the terms of reference, in 5 paragraph 1.1.2 of the terms of reference you're asked to 6 consider the conduct of Lonmin, in particular whether it 7 responded appropriately to the threat and the outbreak of 8 violence which occurred at its premises.</p> <p>9 Now looking for a source we identify in our main 10 heads in paragraph 27 what the obvious starting point is in 11 our submission, and we say the Labour Relations Act is the 12 legal framework and we spend some time in considering that 13 again in the replying affidavit, and we say in paragraph –</p> <p>14 CHAIRPERSON: Replying heads.</p> <p>15 MR BURGER SC: Of our main heads.</p> <p>16 CHAIRPERSON: Yes, and you said you also 17 dealt with that in your replying affidavit.</p> <p>18 MR BURGER SC: I'm sorry, in the replying 19 heads.</p> <p>20 CHAIRPERSON: Your replying heads.</p> <p>21 MR BURGER SC: I'm so sorry. The 22 replying heads, and in the main submission in paragraph 37 23 we've submitted "In the result Lonmin was not under a 24 statutory, nor a contractual duty to collectively bargain 25 directly with strikers or with AMCU on behalf of the RDOs.</p>	<p style="text-align: right;">Page 38936</p> <p>1 negotiate with Lonmin other than on the koppie. Nothing 2 prevented them from doing so. Zokwana's testimony was 3 emphatically to the similar effect. He said, 'Allow me now 4 to put how I would have seen it being easier. Suppose as 5 they did to Mr Da Costa, suppose as they did to Mr 6 Sinclair, that they elected a delegation not on the koppie 7 to say employer, we are here at the gates of LPD, we are 8 five or 10 unarmed. We are your employees, we would like 9 to engage you, and if Lonmin could, if it could be shown 10 anywhere that Lonmin would have declined that situation I 11 would agree with you. My view is that a possibility could 12 have arisen if those workers could have agreed to march to 13 the offices not in thousands but now five and say here we 14 are before you, Manager, here is our case."</p> <p>15 And then later on in 212 Mr Mokwena's attitude is 16 repeated, and in paragraph 214 Mr Mokwena is asked in 17 evidence "Why didn't you talk to the strikers?" He gave 18 the following reasons, he said firstly, the strike embarked 19 upon was an unprotected strike.</p> <p>20 Secondly he said Lonmin's response to the demand 21 for a basic wage of R12 500 had already been communicated 22 through Da Costa. That debate has been had. By the 31st of 23 July they knew that there was a R750 increase, 12 500 was 24 not negotiable.</p> <p>25 Thirdly, EXCO had approved the allowance, thus</p>

<p style="text-align: right;">Page 38937</p> <p>1 bringing parity with wages paid to RDOs at Impala and 2 Anglo. The RDOs would also have received a further 3 increase of 10% in October 2012, which might have put them 4 even in a better relative position.</p> <p>5 Fourthly, had Lonmin engaged with the striking 6 mineworkers on the 10th of August we would have immediately 7 blurred the two types of strike and that would have had 8 far-reaching implications not only for Lonmin, but also for 9 the industry and the country.</p> <p>10 Then most importantly the fifth reason, and I 11 want to pause a bit there, he says, "Both Mathunjwa and 12 Frans Baleni had discouraged me to engage." Now we don't 13 hear about that in the criticisms that we should have 14 spoken to the strikers. Both the two union leaders said to 15 us don't touch them.</p> <p>16 Can I refer you to a letter Mr Mathunjwa wrote on 17 the 10th of August. You'll find that in the bundle we have 18 annexed to our heads at page 652. We see this letter for 19 the first time in the AMCU bundle, but they only give us 20 page 1 of it. Somehow page 2 didn't feature. We then file 21 the complete letter. It is precursed by an earlier 22 telephonic debate between Mr Mokwena and Mr Mathunjwa on 23 that morning and at page 652, the letter is dated 10th of 24 August 2012, Mr Mathunjwa wrote and he says, "Our 25 telephonic conversation today 10 August 2012 refers." He</p>	<p style="text-align: right;">Page 38939</p> <p>1 Mathunjwa is cross-examined and he says they must be 2 addressed through union structures, really the same point 3 that was made in the heads, so I don't have to repeat that.</p> <p>4 There was a passage I wanted to read though, if I 5 may just find that, on NUM. Chair, can I come back to 6 that. It's a – no, here it is. Here it is, 86. Let me 7 just find that. No, it's not this. It's the passage, 8 you'll remember it in the heads, where Mr Zokwana says 9 "I've been in this game for a long time. I've never heard 10 of wage negotiations with armed workers at a koppie." That 11 was his evidence and we've quoted that.</p> <p>12 So I say, and I think I speak correctly as to 13 NUM, NUM's attitude was the same as AMCU; don't speak to 14 the striking workers. I'm told it's paragraph 83 – page 83 15 of our main heads, yes, this is in fact it, paragraph 209. 16 Sorry, 209, this is now the NUM view, "No productive wage 17 negotiations could in any event have taken place at the 18 koppie," we submit, as Mr Zokwana testified as a trade 19 unionist he had never come across a situation where wage 20 negotiations were conducted, as he put it, in a mountain. 21 He said, "and I'm saying this, Chairperson, because there 22 may be strikes in any situation. Always there will be 23 centres where such processes are handled because if 24 there's, I've never seen in my life of a trade union 25 conducting negotiations in a forest, in a river, or in a</p>
<p style="text-align: right;">Page 38938</p> <p>1 says, "As AMCU we propose," and I don't read the whole 2 letter, I read two points, he says, "that whoever will be 3 receiving the memorandum must inform the marchers that by 4 receiving such a memorandum does not set any precedents." 5 He is under the impression that a memorandum will be handed 6 over and he says if it's handed over just tell them this is 7 not a precedent. A bullet down, "This memorandum will be 8 communicated by management to respective recognised unions 9 and a meeting will be coordinated to discuss the contents 10 of the memorandum." Don't talk to them; take the 11 memorandum and go to the unions. Then he says, concluding 12 the letter, "We urge management not to take extreme 13 measures in addressing this predicament by not giving undue 14 recognition to the sinister forces which are not known to 15 ourselves." It sounds like Mr Ramaphosa. That's on the 16 10th of August. Don't negotiate with these people. That's 17 the AMCU formal view, and I'm told I should read the next 18 paragraph, "As AMCU we suspect that there are forces behind 19 this which as leaders we must address amicably." The 20 syntax isn't great, but there it is. So that's the AMCU 21 view.</p> <p>22 What's the NUM view? The NUM view we have spelt 23 out in our heads at page 102, Mr Zokwana speaking, 24 paragraph 266 – oh, sorry, this is still AMCU. I don't 25 have to read that, but at paragraph 266 and 267 Mr</p>	<p style="text-align: right;">Page 38940</p> <p>1 mountain." Now it's colourful language, but the message is 2 clear and we say if you criticise Lonmin for not going to 3 the koppie and do some talking, some wage negotiation, you 4 should address that and in fact say why that is wrong.</p> <p>5 So I'm exploring the sources of my duty to talk, 6 of Lonmin's duty to talk –</p> <p>7 CHAIRPERSON: I'm sorry, Mr Burger, just 8 for the sake of clarity, the criticism as I understand it 9 of Lonmin for not negotiating isn't confined to the 10 suggestion that Lonmin should have gone to the koppie. I 11 understand that's part of the criticism. That's the part 12 you're dealing with now. But there are others who say that 13 what Lonmin should have done, not go to the mountain but 14 negotiate at a safe venue with representatives of the 15 strikers, who after all – this is the point made – after 16 all were deliberately, so it is said, acting outside the 17 union context. They say they don't want the unions to be 18 involved. They were in the same position actually, as you 19 know some of them were actually union members, as non- 20 unionised workers, and the criticism is here you were faced 21 with a strike involving non-unionised, or shall we say 22 perhaps temporarily non-unionised workers, and the 23 contention is that you should have been prepared to 24 negotiate with them, not necessarily on the mountain, not 25 necessarily sub hasta with your co-negotiators armed</p>

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1 because then Lonmin would have to be armed as well and that
 2 wouldn't have been a recipe for successful negotiation.
 3 MR BURGER SC: Yes.
 4 CHAIRPERSON: But that's the criticism
 5 you've got to deal with. It's not enough just to say we
 6 didn't have to go to the mountain. I know some people say
 7 you should have, but others say you didn't have to go that
 8 far, but you should nevertheless have negotiated. That's
 9 the point you've got to deal with, isn't it?
 10 MR BURGER SC: No, we will deal with
 11 that. I'm just developing this argument and my learned
 12 friend Mr Bham will address that. To that argument I will
 13 place, put some rhetorical questions because we must put it
 14 in context. The first question is when should I negotiate;
 15 on the 10th, the 12th, the 14th or the 16th. Secondly, what
 16 should I negotiate about. I've told them, they know I'm
 17 not going to pay R12 500. Up to today I don't pay that.
 18 So that's a dead issue. What do I negotiate with? The
 19 third question I'm asking is the 12 and a half thousand
 20 net, how is that computed? I still don't have any
 21 question up to now – I may get it in reply, I don't know
 22 what any answer to that is. Then I want to say do I now
 23 assume that having a court order that you must disband and
 24 disarm, they will ignore that and I must accept that with
 25 equanimity?

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1 Then I say the last question I want to put
 2 rhetorically, I now negotiate with them, and I'm going to
 3 read you the evidence of Mr Da Costa, we negotiate and we
 4 can't come to an agreement. We couldn't thereafter come to
 5 an agreement. What now? Do they now go home, put down
 6 their weapons, go to their homes and start working again?
 7 Or is there a blow-out on the 10th then instead of the 16th?
 8 So it's with respect a debate which must be contextualised
 9 to be had and we will deal with each of those aspects in
 10 turn.
 11 I'm still exploring the source of this duty to
 12 talk. Before we come to the talks, I'm still busy with the
 13 constitutional component of the talks and we've looked at
 14 statute, we've looked at the contract. We've looked at the
 15 attitude of the two leaders of the two major trade unions.
 16 We don't have to look at the common law because in our
 17 submission the common law was really replaced by the LRA,
 18 so the statute governs here. There's no remaining common
 19 law obligation.
 20 The fourth source we should consider is what I
 21 call the protocol agreement, XXX8. Is there an obligation
 22 in the XXX8 agreement, the protocol agreement, which
 23 obliged me to talk to the strikers as a source? Perhaps we
 24 can ask for that to be put on the screen. Perhaps while we
 25 wait for that let me give you in a nutshell what we –

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1 CHAIRPERSON: We have it, don't we?
 2 Isn't what is now on the screen part of that document?
 3 MR BURGER SC: Is it there? I'm indebted
 4 to – can we go to page 11, please? That's the – 11, top
 5 right-hand corner.
 6 CHAIRPERSON: I think 11 is earlier than
 7 what we have at the moment.
 8 MR BURGER SC: Yes. Yes, thank you very
 9 much, 11. Yes, thank you. So a few observations here.
 10 This is not, this is a security protocol, it's not a Lonmin
 11 protocol. E&DM stands for "Emergency and Disaster
 12 Management," and you'll see it is a mining security
 13 document, Lonmin Mining Security procedures. It is
 14 approved by the Manager: Mining Security. It was written
 15 by Mr Kellerman. That we see from page 4 of this document,
 16 page 14 at the top, Gean Kellerman wrote this document, and
 17 I think the evidence was Mr Blou approved it.
 18 [10:12] On page 13 on the purpose, you'll see this has
 19 got nothing to do with wage negotiations. This is crowd
 20 control. The purpose of this document is "Set out a
 21 uniform procedure for mining security to which all security
 22 members must operate in order to effectively manage and
 23 normalise any form of unrest situation." And 1.1.2, "The
 24 procedure will be utilised as a guideline when managing an
 25 unrest situation in order to minimise the loss of life."

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1 Page 15, the document has to be reviewed. We see
 2 in paragraph 3.2, "Responsibilities and authorities," and
 3 at 3.2.3, "Annual maintenance reviews of all mining
 4 security procedures and standards and associated security
 5 procedures and standard documentation will be conducted and
 6 updated where necessary." No wonder that the Lonmin EXCO
 7 didn't know about this. Mr Mokwena said he'd never seen
 8 this document.
 9 Page 16, "Industrial action: unrest situation,"
 10 4.1.1 says, "Any unrest situation must be managed within
 11 the boundaries as set out by the prescribed procedures."
 12 4.1.3, "This procedure will serve as a guideline for
 13 managing industrial action as each individual type of
 14 incident will warrant the Manager: Mining Security" – this
 15 is now Mr Blou or Mr Sinclair – "to apply his or her
 16 discretion."
 17 And then the important page, which is page 19 of
 18 this document, it's page 20 – no, not 20, page 14 of this
 19 document, page 24 at the top, this is how you deal with an
 20 unprotected strike, and if you read paragraph 8.3,
 21 "Unprotected industrial action," what is said in so many
 22 words is the manager must go to the strikers, he must then
 23 speak to them and get them to a safe area. He must then
 24 get a committee from them to give him a memorandum and he
 25 must take the memorandum then to management. There's no

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1 wage negotiation here. He didn't get near this because he
 2 couldn't. This envisages that at the intersection on the
 3 10th when security goes and say to the strikers will you
 4 just stop here, I want to talk to you, they listen to him.
 5 They just walked past him. They walked to LPD. So this
 6 thing simply does not unfold. You'll see in 8.3.5 "The
 7 parties involved in the industrial action must be confined
 8 to a central location." Now there's no chance that he
 9 could confine them to a central location. "A management
 10 committee" – this is wrongly typed also, I should read it
 11 in its correct order, 8.3.6 should read, "A grievance
 12 committee will be identified that will engage with the
 13 management committee that will include the manager." They
 14 never got there, and then of course 8.3.11 rather quaintly,
 15 "Upon unsuccessful concluding of the talks all members
 16 partaking in the industrial action will be removed from the
 17 security area and will not be allowed to return until such
 18 time as the dispute has been resolved." It's got nothing
 19 to do with what happened on the 10th of August. It wasn't,
 20 it couldn't have been applied and if it had been applied it
 21 wouldn't have led to any talks about R12 500.
 22 That's why we say in our reply on page 23 the
 23 following on this suggestion that somehow the protocol
 24 agreement was not complied with. Page 23 of our reply we
 25 say in paragraph 55, "There are a number of facts which

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1 need to be considered in this regard. Firstly, the
 2 securities procedure document had not been considered, let
 3 alone approved by EXCO." In fact I think the evidence was
 4 they didn't know of it. 2, "The Da Costa discussions took
 5 place with Karee RDOs. Through those discussions Lonmin's
 6 response to the demand of R12 500 was communicated.
 7 Notwithstanding that, the strike took place." Chair, you
 8 will remember that the evidence of Mr Da Costa was that
 9 when he conveyed the 750 allowance to the RDOs on the 31st
 10 of July, they're not very happy about it but he thought
 11 that's the end of the debate. They went away and for a
 12 week nothing happened. So certainly as far as Da Costa is
 13 concerned, his perception is the 12 and a half thousand
 14 debate has been had. He couldn't negotiate with them. It
 15 was 150% more than the 5 400 they were earning. They've
 16 got the allowance. They're now on par with Impala and the
 17 other mines in the neighbourhood, and that's the end of it.
 18 Then we say in 55.3, "Lonmin Security had on 10th
 19 August engaged with the striking workers who refused to
 20 hand over a memorandum containing their demands because
 21 they say they were illiterate and could not write. Lonmin
 22 was moreover well aware of the R12 500 wage demand since a
 23 number of the striking workers were displaying placards."
 24 There's no point for Mr Sinclair to say to the people what
 25 do you want. He must just read. He can read. They want

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1 12 and a half thousand. Management at LPD knows they want
 2 12 and a half thousand. Everybody on Lonmin's side know -
 3 there's no debate about that. That debate has been had,
 4 that concluded on the 31st of July. To now quote a protocol
 5 accepted by the security division as a measure against
 6 which to measure my client as to whether he had his best
 7 endeavours is with respect a misplaced reliance on the
 8 document.
 9 Can I read that debate, and I don't know what
 10 time you want to have the tea. This is a convenient time
 11 for me.
 12 CHAIRPERSON: If it's convenient for us
 13 to take tea now I'll -
 14 MR BURGER SC: Indeed.
 15 CHAIRPERSON: - accept your suggestion.
 16 MR BURGER SC: Indeed, Chair.
 17 CHAIRPERSON: We'll adjourn for 15
 18 minutes.
 19 [COMMISSION ADJOURNS COMMISSION RESUMES]
 20 [10:45] CHAIRPERSON: The Commission resumes.
 21 Yes, Mr Burger?
 22 MR BURGER SC: Thank you, Chair. We're
 23 busy dealing with the possible source of an obligation
 24 resting on Lonmin to talk and we will submit to you that
 25 the three areas to look at are the Constitution, the LRA

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1 and the collective bargaining agreement and I was just
 2 concluding on what I referred to as the protocol agreement.
 3 May I refer to a debate between you, Chair, and my learned
 4 friend Ms Pillay on the first day of the argument? It is
 5 in the record at page 38534 and it debates XXX8 and what
 6 one should make of it and my learned friend Ms Pillay is
 7 making submissions and she says, "Ultimately the question
 8 was, in terms of what document was Lonmin security
 9 arranging the operations and on the evidence of both Mr
 10 Sinclair and Mr Blou it was exhibit XXX8. So we would
 11 submit" – and she says it was drafted by Blou, it was
 12 drafted by Kellerman, approved by Blou. That's not really
 13 the important point. Then she says lower down, "That is
 14 our submission, Chair, and in fact the document does
 15 reflect in a footer to the document that there is a signed
 16 version of it available" – "So we would submit that within
 17 that evidence, against that totality of evidence the
 18 Commission, the Commission should find that in fact the
 19 document does bind Lonmin security and that they do arrange
 20 their operations" – and now you say, sir, "Well, whether it
 21 binds them
 22 or not is possibly a technical point but the
 23 question is it whether it was accepted by them as being the
 24 appropriate procedure to follow. Whether it was
 25 technically binding may be an interesting question that I

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1 don't propose wasting time on but if they regarded it as
 2 the appropriate to follow, why didn't they follow it?"
 3 Now, may I just engage with that debate? That document, if
 4 it binds anybody it binds the security department at
 5 Lonmin. They could make no contribution to the wage
 6 demands of the strikers. They could but be a nuntius
 7 between an unruly crowd and management. That role they
 8 were denied because the strikers wouldn't give them a
 9 memorandum, so they had nothing to call, to take to
 10 management and secondly, the strikers wouldn't go, as per
 11 XXX8, to that safe area, nominate a party to talk and if
 12 the talks break down, put down their weapons and go home.
 13 That process, the counterfactual is in fact destructive of
 14 any suggestion of an obligation arising from the protocol.

15 CHAIRPERSON: May I ask you two questions
 16 flowing from what you've said, unless you are still busy
 17 with this topic –

18 MR BURGER SC: No.

19 CHAIRPERSON: - in which case I'll –
 20 there are two points. The first is, you talk about them
 21 laying down their arms and going home. Now by going home
 22 are you suggesting that they had to bring the unprotected
 23 strike to an end because as I understand it an unprotected
 24 strike is not illegal. There are certain consequences that
 25 flow from unprotected strikes which, in this respect, they

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1 differ from protected strikes but are you saying they
 2 should have laid – I understand about them laying down
 3 their arms, I haven't got a problem with that but are you
 4 suggesting they should have put down their arms and gone
 5 back to work?

6 MR BURGER SC: No, what I'm suggesting is
 7 that the scenario envisaged by XXX8 is a scenario where the
 8 security interacts with a crowd and the crowd then is
 9 unarmed and after the negotiation is proceeded with, the
 10 crowd goes back to their homes and go back to work. So
 11 what the protocol envisages is legality under the
 12 Constitution, not people ignoring a court order, not people
 13 running wild and within 48 hours going to start killing and
 14 burning. That's not envisaged and that was never the
 15 purpose of security to address. In fact I've made a
 16 calculation and I think it's on the evidence, there were
 17 about 60 people in the security component of Lonmin after
 18 they demilitarised a few years before. There are about
 19 38 000 employees. That gives us one security officer for
 20 every 630 workers. Now, one asks oneself, how do you now
 21 deal with an unruly crowd who is armed and who ignores the
 22 law, you're one on 630.

23 There's a suggestion we should have had a bigger
 24 contingent but the suggestion goes undefined. How many
 25 people? Then there's a suggestion we should have acquired

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1 Nyalas. Can you imagine Mr Sinclair leading a bunch of
 2 Nyalas onto the crowd armed with his rubber bullets and – I
 3 mean it's really, it's something which, if that's the
 4 counterfactual, it can't be seriously advised.

5 So all I'm saying is, XXX8 was never envisaged or
 6 designed even by security to give standards to test what
 7 happened between the 9th and the 16th of August in this
 8 tragedy, the scale was just not –

9 CHAIRPERSON: I understand that argument.
 10 Now let me put my other question to you. You were talking
 11 about possible sources of the obligation, that's the way
 12 you phrased the question.

13 MR BURGER SC: Yes.

14 CHAIRPERSON: Now I take it, it may well
 15 be argued by the SAPS that when the police are called in to
 16 deal with a disturbance, a breakdown of law and order and
 17 so forth on premises, if they then say, they go to the
 18 person who is in charge of the premises in fact who
 19 summoned them to put down the outbreak of disorder and they
 20 say to them, look here, we've got a very tricky situation,
 21 the only way we see it being solved is if you're making,
 22 doing something that we're asking you to do. We must tell
 23 you that without bloodshed and so forth we see it's very
 24 difficult to solve the problem. Would you please, in these
 25 special circumstances, agree to speak to the strikers? Now

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1 that's perhaps a not entirely accurate summary of what
 2 happened but I think the gist of it is incorporated in what
 3 I've said. Now, what may well be argued is that the
 4 request by the police, not just Constable Plod but by, I
 5 think it was Major-General Mpembe and other generals,
 6 request by top ranking police officials to Lonmin, please
 7 to negotiate. We've got this very difficult law and order
 8 problem here and it's difficult for us to solve it without
 9 bloodshed unless you comply with our request. Of course it
 10 doesn't follow that if they had, that there wouldn't have
 11 been bloodshed but the argument put up is, it would have
 12 made it much easier for the police and we will never know
 13 whether there would have been the bloodshed if the request
 14 had in fact been complied with. I don't know whether Mr
 15 Semenya is going to argue that but that's a point that
 16 seems to me to be a point, if I may put it this way, that
 17 merits an answer.

18 MR BURGER SC: Let me just remind you of
 19 the facts before the Commission on that very issue. The
 20 police say, wouldn't you talk to the strikers because it's
 21 a dangerous situation and there may be risk to life here.
 22 They speak to Mr Barnard Mokwena. He says to them, we live
 23 – and I'm sophisticating it but this is what he says – we
 24 live under a rule of law, we have an Act to apply, we have
 25 a collective agreement in place. Those people with the

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1 weapons, they're bound to it under the law, under the
 2 Constitution of this country. I cannot talk to them now, I
 3 have exhausted that debate. They know I can't pay them
 4 R12 500. They know I can't talk to them in the face of a
 5 sword. They know I can't talk to them while they are
 6 ignoring a court order. It will be inappropriate because
 7 I'll set an example which would not only make my mine
 8 ungovernable but the platinum belt. Those are the facts.
 9 Now you can ask me on those facts, do you
 10 criticise? The question is probably, criticise whom? You
 11 criticise the strikers. There was a question by the
 12 Commissioner and a very valid question at some stage to
 13 say, didn't SAPS do anything right then? I want to pose
 14 that question as to the striking workers. Their cause may
 15 be a very good cause but their actions, what did they do
 16 right? They ignored a court order, they carried weapons,
 17 they killed people, they burned property, they run amok on
 18 the mine. Now Lonmin has said but you must protect, over a
 19 38 kilometre stretch you must protect your equipment and
 20 your people. How do I do this with a marauding crowd
 21 running around? So with great respect, sir, to put the
 22 facts to me on what the police had said without considering
 23 Mr Mokwena's answer and that answer wasn't an answer only
 24 for the police, he had said that to the nation on the 15th,
 25 he had explained on SAfm why we couldn't talk and that's

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1 very much the line we adopted. You can't talk to these
 2 people, you've got nothing to talk to and my learned friend
 3 Mr Bham will deal with that in more detail. What do you
 4 talk about? About paying them R12 500 net? RDOs or all?
 5 Lonmin or the platinum belt? Platinum or gold? Where do
 6 you go on this? I don't know.
 7 I've said I want to make two very brief
 8 observations after having dealt with the two introductory
 9 submissions. The first submission is the contradictory
 10 nature of the criticisms of Lonmin. I remember seeing a
 11 BBC television series by Mr Hain where there's a snippet by
 12 the President. They asked the President what happened at
 13 Marikana. He said, and I'm paraphrasing, axiomatic, Lonmin
 14 spoke to the workers and this is what you get, don't speak
 15 to the workers.
 16 Remember my learned friend Mr Budlender starting
 17 off with Da Costa to say, I don't criticise you for
 18 speaking to the workers, in fact you did the right thing.
 19 Today I face an argument to say Da Costa was right but you
 20 should have spoken to the workers later on. So what do we
 21 do? What do we do? There's an ambivalence in the
 22 criticism which in fact does not take account of the
 23 situation in which Mr Da Costa spoke, where that debate led
 24 us to and what we faced after the 10th of August on the
 25 site.

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1 Then there's a criticism in the heads by the
 2 evidence leaders of Mr Kellerman and Mr Botha. They
 3 overreacted, they shot birdshot in order to protect workers
 4 but there's another criticism that we didn't protect the
 5 workers –
 6 CHAIRPERSON: Is that someone with a cell
 7 phone that's misbehaving? Would you please turn it off?
 8 Or the earphones are too loud perhaps but we can't carry on
 9 with this heckling going on from the right side by, either
 10 from a cell phone or from headphones that are not on. Yes,
 11 please carry on, Mr Burger.
 12 MR BURGER SC: Thank you, sir.
 13 CHAIRPERSON: Carry on.
 14 MR BURGER SC: There's the criticism that
 15 we either over-protected our workers or we under-protected
 16 them. And we point out these, the duality in the criticism
 17 finally in para –
 18 CHAIRPERSON: Sorry, Mr Burger, I can't
 19 concentrate. What is the problem? Where is that noise
 20 coming from? We can't – I think the answer is someone's
 21 headphone is probably turned on too loud. We've now got
 22 the headphones back, so that's why we're back where we were
 23 previously. Please turn the headphones down and if the
 24 person concerned hasn't got the headphones on his or her
 25 head, then please turn them off completely because it's

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1 very difficult to concentrate on the argument when there's
 2 heckling going on at the side. Mr Burger –
 3 MR BURGER SC: Thank you, sir.
 4 CHAIRPERSON: Let's carry on and let's
 5 see whether the problem has disappeared.
 6 MR BURGER SC: Just in conclusion on this
 7 observation in our heads, main heads in paragraph 24.2 on
 8 page 13 we say, "Whilst Lonmin followed the legal remedies
 9 available to it" –
 10 CHAIRPERSON: I'm sorry, Mr Burger. I'm
 11 going to adjourn now and I'm not going to come back until I
 12 am assured that we're not going to have this problem in
 13 future.
 14 [COMMISSION ADJOURNS COMMISSION RESUMES]
 15 [11:05] CHAIRPERSON: The Commission resumes. I
 16 am informed that the problem with the loud interruptions
 17 from someone's headphones has now been solved. I'm pleased
 18 to hear that but could I please, I'd like to make an appeal
 19 to all those concerned who are listening on headphones.
 20 It's important for us to hear the argument and the same
 21 will apply when other counsel are arguing, we want to hear
 22 every word that they say. We don't want to be distracted
 23 by something which prevents us from concentrating fully on
 24 what's being said. So please do your best to ensure that
 25 this kind of problem doesn't arise again. Yes, Mr Burger?

<p style="text-align: right;">Page 38957</p> <p>1 MR BURGER SC: Thank you, Mr 2 Commissioner. We really, I don't have to read it but we 3 conclude on this observation in our main heads in paragraph 4 24.2 and 24.3 where we deal with the ambivalence in the 5 criticism levied at Lonmin throughout the proceedings. 6 The second observation deals with the 7 counterfactual. What is not explored and what we will have 8 to explore today is, if there was a duty to talk, what 9 would the talks have been about? What would have happened 10 if the talks deadlocked? What was the size of the security 11 personnel and equipment to be to properly protect the mine 12 against the striking workers? How would the closing of the 13 mine have been implemented and over which period, because 14 the evidence is it takes about three weeks – 15 CHAIRPERSON: Sorry, Mr Burger, the 16 problem hasn't been solved. Has the source of the problem 17 been identified and eliminated? Can we proceed now? Yes, 18 Mr Burger? 19 MR BURGER SC: Sir, for a moment I 20 thought you said the counterfactual on the closing of the 21 mine hadn't been solved and I was worried but I'm delighted 22 that it's only a technical problem. 23 CHAIRPERSON: That's a debate that's 24 going to come up later in your argument, I take it. 25 MR BURGER SC: Sir, with respect, we say</p>	<p style="text-align: right;">Page 38959</p> <p>1 Mr Bham will be – was that they didn't know about the 2 discussions with the Karee RDOs. So where does this 3 perception come from? And the evidence leaders say it 4 comes from a Karee, a Lonmin/Karee OB, a document where 5 somebody had written in, "Negotiations between Da Costa and 6 Mkhize and two reps from the RDOs" and another entry in a 7 book. That's the one source and then they say Mr Boo's, 8 what they call a supplementary statement confirms that and 9 they quote Mr Boo as saying, "At the third such meeting 10 management offered us an increase of R750. This small 11 victory was achieved without the involvement of any union. 12 Management had agreed to negotiate directly with the RDOs." 13 What is remarkable of Mr Boo's evidence is, he 14 was on the list to give evidence and we wanted him to give 15 evidence. He was never called. What he did is he filed a 16 supplementary statement. Whether that was signed, I don't 17 know, mine is unsigned. Who settled it for him, I don't 18 know. Why I couldn't cross-examine him on this statement, 19 never explained, but the evidence leaders now wish you to 20 rely on a supplementary statement by a witness not called 21 and reject Da Costa who was never properly challenged on 22 his statement over and over again that he made it clear to 23 the representatives of the RDOs that he couldn't negotiate. 24 Yes, Mr Boo was one of these RDO 25 representatives. He was in the meeting on which Da Costa</p>
<p style="text-align: right;">Page 38958</p> <p>1 the criticism is often of a pay back the money later 2 nature, both in its bluntness and in its level of 3 engagement. Let me then deal with the first major debate, 4 should Lonmin have talked to the strikers, and I've 5 anticipated that debate. In fact we point out in our main 6 heads that Lonmin did speak to the Karee RDOs and that is 7 the evidence of Mr Da Costa which you'll find in paragraphs 8 47 and 56 of the heads. But we know on the evidence before 9 you Chair, Commissioners, that process had run its course. 10 There were talks and that talks had come to a dead end. 11 R750 and R12 500 would not be paid. That you find in our 12 heads in paragraphs 45, 46 and 55. 13 The evidence leaders in their heads deal with 14 that and I must briefly refer to that. They deal with that 15 in their heads at page 650 in paragraph 1209. They make 16 the following submissions and I have to deal with this in 17 some detail. They say in 1209 at page 650, "We submit that 18 whether or not Lonmin intended to engage in wage 19 negotiations with the RDOs or not, the perception of the 20 strikers and other role players was that this was a 21 negotiation." And then we ask ourselves, where does that 22 come from because Da Costa was outspoken that that could 23 not have been the perception. He had made it quite clear 24 that he couldn't negotiate and the evidence of the 25 individual strikers who gave evidence and my learned friend</p>	<p style="text-align: right;">Page 38960</p> <p>1 gave evidence. He is not called but his version is now 2 preferred. And then the evidence leader says Lonmin's 3 claim that there is no evidence to support the assertion 4 that the workers perceived that the process amounted to a 5 negotiation, is unfounded. Well, that debate was also had 6 during the evidence and during the evidence, sir, you will 7 remember that there was – I think it was put by my learned 8 friend Ms Barnes as to the perception that there were 9 negotiations. That debate you find on, I don't know what 10 the day is, the record is 37926 and it's got a long 11 starting up but I pick it up from page 37027 opposite the 12 line 22. My learned friend Ms Barnes says, "Well, Mr 13 Mokwena," she's busy cross-examining him, "the difference 14 really is that it's not happening within the structures, 15 it's happening outside the structures, that the RDOs are 16 saying, we want more money, we want 12 500, they are 17 engaged with, meetings are held and then they're told okay, 18 we'll give you an extra 750 a month. Now how is that not a 19 wage negotiation from their perspective?" My learned 20 friend Mr Bham has been overruled before on this, he says, 21 "Mr Chairman, before the witness answers, I've raised this 22 previously in a similar context when Ms Pillay had put a 23 similar question about perception of witnesses. I am going 24 to raise it, you had made a ruling on that but I am going 25 to raise it again. We're now being, a question is being</p>

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1 put about perception of witnesses, a question is being put
2 about perception of witnesses. We have had a number of
3 parties, of individuals who were involved in the strike who
4 gave evidence, they led none of this evidence about that
5 being their perception and I'm going to again object to the
6 question. There isn't a factual foundation for this. The
7 evidence is backed up" – "In fact the evidence to back up
8 this perception hasn't been forthcoming." And the
9 objection is then disallowed but over the page you revisit
10 that disallowance and you say at page 37930, "I must say I
11 think, to be

12 fair to him, he's correct. You've got, Mr
13 Budlender got a concession that the workers may have seen
14 it that way but higher than that one can't take it and he
15 is quite correct in saying that there was no direct
16 evidence to that effect." That's really the only point we
17 make, there was direct evidence to the effect that it was
18 explained to the strikers that these were not negotiations
19 and that they had a perception to the contrary is not borne
20 out by the evidence.

21 Another problem with the talking, and I'm now
22 dealing with whether we should have talked to the strikers,
23 is that no-one could explain how the R12 500 was made up.
24 Now I would have thought the first starting point, if one
25 sits around a table and you debate a wage claim, is for the

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1 demander to say, I want 12 500 net and this is how I make
2 it up. We haven't heard that to this day. We don't know
3 whether there's a housing allowance in there. What we
4 know, it is net. So it, probably cost to company is about
5 20 000 a month but we just don't know that.

6 What we do know is it was not negotiable. That's
7 quite important. That you know from our heads where we
8 refer to that at page 43. The evidence is that claim was
9 not negotiable.

10 In paragraph 80 at page 43 it's cross-examination
11 by my learned friend Mr Motau and he is cross-examining Mr
12 Magidiwana. We say in paragraph 80, "It was again clear
13 that there was no desire for talks with Lonmin. The demand
14 was for capitulation by Lonmin" and Mr Motau says, "So
15 according to what you're saying, if Lonmin had sent a
16 representative to the koppie to say to you, let us engage
17 but not at the koppie, let us set up a process by which
18 your demand will be assessed and evaluated, you would not
19 have agreed because you say that the employer in the same
20 vein ought to have told you whether they are putting the
21 money or when are they going to deposit the money.
22 Correct." Remember the evidence, Chair, is they say all we
23 want to know is when do you deposit the R12 500. Mr
24 Magidiwana says, "I'm saying, sir, if they said look
25 gentlemen, the money will be put in on such and such a day,

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1 I would have had no problems. If he asks us to go to work,
2 I would have done so." And Chair, you say "You're not
3 answering the question. I think it, to be fair, because
4 you didn't understand, the proposition being put to you by
5 counsel for Lonmin is that if Lonmin had said if the
6 strikers on the koppie go back to work, then Lonmin will be
7 prepared to discuss with them whether they would give them
8 extra money and give them the 12 500 they were asking for.
9 In other words, the words are used, Lonmin would engage
10 with them on the demand, not would accede to the demand and
11 pay the 12 500. So what you're being asked is, if you had
12 been told on the 16th that Lonmin's attitude is, leave the
13 koppie, go back to work and we would then start talking to
14 you about whether we would give you the 12 500 that, what
15 would your attitude have been? That's the question." He
16 says "That I would not have entertained."

17 So we don't know how the amount is calculated and
18 we know they're not going to talk on the amount. Now one
19 asks oneself, what do you talk about? You're now outside
20 structures, you're dealing with people armed and ignoring a
21 court order and they say to you, this is what we want, we
22 can't tell you how it's calculated, tell us when you pay it
23 into my Capitec account and I'll be happy. Well, we say
24 it's just an unrealistic request.

25 And I explored that with Mr Da Costa in re-

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1 examination and I don't have to go there but you'll find it
2 in the record at page 32953. You will remember, sir, I
3 said to Mr Da Costa, let us assume we have a duty to talk,
4 let us assume, come to the crystal ball and let us do the
5 talking, how does it go? And I take him through the whole
6 scenario and he says, it's going nowhere. It's going
7 absolutely nowhere. Now if that's the evidence, sir,
8 that's unchallenged. If that's the evidence what, with
9 great respect I ask, is the point on criticising Lonmin for
10 not talking to the strikers? What is the counterfactual?
11 If there had been talks here it would have caused ripples
12 into the mining industry which we would have today
13 struggled to unravel and it would not have led to the
14 avoiding of the tragedy on, in particular, the 16th.

15 I must deal with a submission by the evidence
16 leaders here at page 652 of their heads, an important
17 submission they make in paragraph 1212. They make a
18 submission in paragraph 1212, it reads thus, "We submit
19 that, given the dichotomy in approach by Lonmin to the
20 issue of engaging with workers on work-related issues" –
21 what they mean by a dichotomy I suspect is, Da Costa spoke
22 to the RDOs at Kareedouw, at Karee, why wouldn't you speak
23 to the striking workers on the 10th? Point 2, "Given that
24 Lonmin had entertained the RDOs' demand in the way that it
25 did, given that Lonmin was well aware that the RDOs had

<p style="text-align: right;">Page 38965</p> <p>1 lost confidence in NUM, it was not inappropriate for Lonmin 2 to adopt" – I suppose it must be, "it was inappropriate," 3 there's a double negative there – "it was inappropriate for 4 Lonmin to adopt an intransigent approach after the 9th by 5 refusing to talk to the workers outside established 6 bargaining structures." Now comes the submission, "A 7 predictable result of Lonmin's intransigent refusal to 8 engage with the workers outside established collective 9 bargaining structures was that workers resorted to 10 increasing desperate and violent measures in order to force 11 Lonmin to once again engage." So what do you do as a 12 worker? You go on an unprotected strike. You arm yourself 13 and you start injuring people. If the employer does not 14 talk to you then, he gets criticised by the evidence 15 leaders. "Lonmin should have avoided further violence from 16 the strikers." Well it is, with respect, a startling 17 submission and perhaps nobody deals with it better than my 18 learned friend Mr Tip where he addresses the very same 19 debate in his reply and may I borrow from him, he won't 20 mind if I do it because no doubt – 21 CHAIRPERSON: As long as you pay it back, 22 I'm sure he won't mind. 23 MR BURGER SC: Yes, yes, that's the one 24 party I haven't been accused of having an unholy alliance 25 with, so I'm still a free agent there. In the reply by NUM</p>	<p style="text-align: right;">Page 38967</p> <p>1 Now he's talking about SAPS, I'm talking about the evidence 2 leaders and I find that an unpalatable premise working 3 from, to suggest that we should have spoken in order to 4 avoid further violence – 5 CHAIRPERSON: Well, can I put it to you 6 this way, it applies both to the NUM contention in relation 7 to SAPS, the intention it raised as far as your client - by 8 the evidence leaders against Lonmin. What seems to 9 underlie this and I'm not being facetious when I put it 10 this way but it seems to be an accurate way of stating the 11 proposition, we've heard the evidence from General Mzembe 12 and we've seen the documents that support it, that in 13 public disorder situations the doctrine of appropriate, 14 situational appropriateness applies. In certain, that 15 means in certain circumstances to bring the disorder to an 16 end you've got to not enforce the strict letter of the law 17 in every respect. That appears to be a well-accepted 18 principle of situational appropriateness. Now this 19 argument is an application of that doctrine, in effect, to 20 Lonmin. 21 [11:24] And what had been said, this is something 22 obviously you say is inappropriate, but what's being argued 23 is that just as the police were faced with a situation 24 where they had to apply the doctrine of situation of 25 appropriateness in order to avoid further bloodshed or</p>
<p style="text-align: right;">Page 38966</p> <p>1 – I hear objections, perhaps I am accused of that but it is 2 a moving target, sir, but in his reply in paragraph 18 my 3 learned friend Mr Tip makes the following submission – 850, 4 where do I find this? No, it must be in the main heads, 5 no, it must be in his main heads. Sorry, my reference is – 6 it must be in his main heads. Paragraph 18 – 7 CHAIRPERSON: If it's not in his reply, 8 it must be in his main heads. What paragraph in the main 9 heads? 10 MR BURGER SC: Ja, that's not - page 850, 11 where do I find that? Reply, NUM, NUM reply, no, it's 12 paragraph 2 of the NUM reply. It is in the reply, my 13 reference is wrong. Paragraph 2 of his reply. I found it. 14 Ja, paragraph 2 of his reply he says, "NUM was opposed to 15 unprotected strike action. More than that, it was opposed 16 to the enforcement of such a strike through intimidation 17 and violence. Conversely, NUM fully supported the right of 18 those who wished to go to work to be able to do so. Hence 19 NUM was willing to provide escort assistance in 20 circumstances where it was apparent that Lonmin itself was 21 unable to do so to a sufficient extent. It seems to NUM 22 that there is an unarticulated premise underlying these 23 contentions by SAPS, namely that strikers who break the law 24 must not be resisted for fear that they become angered by 25 such resistance. We consider that an unpalatable premise."</p>	<p style="text-align: right;">Page 38968</p> <p>1 unnecessary bloodshed, a similar obligation would have 2 rested upon Lonmin, temporarily in a flexible way in order 3 also to stop bloodshed to enable the police to bring the 4 situation into control. I think that's – whether it's a 5 good principle or not is another matter. That seems to me 6 to be the point that's being put to you or made against you 7 by the evidence leaders and by SAPS. Now I take it you'll 8 respond by saying it's not correct to approach the matter 9 in that way, but I'd interested to know whether you are 10 prepared to elaborate on that submission. 11 MR BURGER SC: Chair, that's why I took 12 some time in order to explore what my duties are, my duties 13 under the Constitution, under the Labour Relations Act and 14 under my agreement with my trade unions. I'm asked to do 15 something, where does the duty arise from because if the 16 duty is said to be you must talk to the strikers in the 17 unprotected strike that runs contrary to the constitution, 18 contrary to the LRA and contrary to my agreement. Can it 19 be then a duty to act outside the rule of law? To act 20 outside of legality, my submission is it can't be. I can 21 understand a proposition to the police to say don't be 22 technical, you deal with an unruly crowd, if they shout out 23 too loudly and the local by-law says it must be 5 decibels 24 and they say – don't be technical with them, but the debate 25 with Lonmin is a very different debate. And what we, with</p>

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1 respect say is incorrect, is not only to postulate a duty
2 to talk where none exists, but then to say if you don't go
3 there you're the instigator of the violence. You are the
4 perpetuator of the violence, that can't be wrong because
5 what does that invite now?

6 CHAIRPERSON: No, Mr Burger, I'm not sure
7 that that's the argument that you have to deal with. I
8 don't think that the evidence leaders or SAPS contend for a
9 moment that the strikers are not subject to very, very
10 serious criticism. I don't think they would contend for a
11 moment that the instigators of the violence – some of the
12 instigators of violence not all the instigators of violence
13 are to be found in the ranks of the strikers. But they
14 say, if I understand the argument, if I'm wrong I'd be
15 corrected, that in order to deal with that violence it was
16 necessary for the police to be flexible, to apply the
17 doctrine of situation of appropriateness and they seem to
18 be saying that a similar obligation where they had
19 addressed a request to Lonmin, a similar obligation rested
20 on Lonmin. Whether I understand the argument correctly
21 we'll discover in due course, but the question is that if
22 that is the argument whether that argument is one that we
23 can uphold. That's really the point you're busy with at
24 the moment.

25 MR BURGER SC: Yes our submission is

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1 out on the evidence the implicit criticisms I should have
2 spoken to them, I should have had talks with them, but
3 I've addressed that, talks about what, when to pay them
4 12 500, that would be a match to the dynamite. To call
5 them and say I'm not going to pay it to you and don't ask
6 me when, it's off. Well then we've got real trouble, but
7 that point is a different point I've made now.

8 MR TOKOTA SC: Sorry, Mr Burger, do you
9 think if the strikers were to say, for example to Lonmin,
10 if you refuse to talk to us, telling us about the
11 bargaining structures and so on we will continue killing
12 people, we will destroy property, we will do anything
13 unless you come, until such time that you come to us? Do
14 you think that Lonmin would still be justified and say no
15 you can do what you want, I'm not going to go outside these
16 parameters, Constitution, LRA and the agreement?

17 MR BURGER SC: Yes indeed that is my
18 submission, that's my submission. If what you put to me
19 yields a different answer. If the answer is I must then
20 talk, let's go into tomorrow and we have a strike and it's
21 an unprotected strike and the workers kill people and they
22 want quite an unrealistic wage. What do they do? It's
23 quite simple, they say to the employer if you don't come
24 and talk to me outside of structures, outside of the LRA
25 I'll just go on killing. Can you imagine what that – but

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1 you're right. Let me not be unfair to my learned friends.
2 This is their argument, a predictable of Lonmin's
3 intransigent refusal to engage the workers outside of
4 established bargaining structures was that the workers
5 resorted to increasing desperate and violent measures. I
6 challenge that.

7 CHAIRPERSON: I'm sorry, that doesn't
8 constitute a contention that Lonmin were instigating the
9 strike that's a paraphrase you gave which isn't correct.

10 MR BURGER SC: No, with respect, what is
11 suggested is that there was a predictable result of
12 increased violence.

13 CHAIRPERSON: It may be a predictable
14 result, but that doesn't make it instigators.

15 MR BURGER SC: Well then I challenge the
16 predictability of that result. If we have now got labour
17 relations where it's a predictable result that if you don't
18 talk to an unprotected strike where strikers are armed and
19 killing people we're in more trouble than we are already.
20 It can never be correct, it can never be a mechanism to get
21 an employer into talks by starting to injure people, to
22 carry weapons, to ignore court orders and then say if you
23 don't talk to me watch out it's going to increase. It is,
24 with respect, a startling proposition and that's where I
25 cross swords with them. My learned friend, Mr Bham points

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1 that's just, there's no rule of law then. There's no
2 constitutional right to strike. That's not a right to
3 strike being exercised, that's running wild. So that
4 answer I'm quite confident to submit to you no what Lonmin
5 will do is, in a previous time he'll phone his member of
6 parliament and say there's big trouble here. The marauding
7 people here say they're going to go on killing if I don't
8 pay them a ransom and MP please speak to the Minister of
9 Police and tell him to send out the police quickly. My
10 local police station is closed up, the security protecting
11 it is not at work, but that scenario can never be one to
12 say concede. Pay the money extorted or pay the 12 500 and
13 solve the problem.

14 Let me now deal with Mr Ramaphosa's mea culpa on
15 behalf of my client. We deal with this in our replying
16 submissions in paragraph 24.1. You will remember from his
17 argument Mr Ramaphosa adopted the attitude that he accepts
18 that Lonmin should perhaps have engaged with the strikers
19 and spoken with them and he accepts criticism implicitly on
20 behalf of Lonmin for not doing that. We say in our reply
21 the following, we say "A recurring theme in criticism
22 levied against Lonmin is that it should have negotiated
23 with the strikers." Deputy President Ramaphosa accepts
24 this criticism in the heads filed on his behalf. We've
25 addressed this criticism in some detail in our principal

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1 heads, but let's repeat the following. "1. There is no
2 engagement with the question what the outcome might have
3 been if the demands of the strikers were not met." The
4 President, Mr Ramaphosa does not say to us had you spoken
5 what would have been the outcome of the talks? He doesn't
6 go there. There is no suggestion by him as to where such
7 negotiations should have taken place, with whom
8 representing the strikers, with RDOs or with the whole
9 workforce. What preconditions would have been in place?
10 You'll pay me the 12 500 in time, I don't negotiate or what
11 is being spoken about and when should it have taken place?
12 On the 9th or on the 15th? He doesn't go there. If we want
13 a beneficial bystander here we want to call a seasoned
14 negotiator on how to act in these circumstances. One
15 couldn't do better than Mr Ramaphosa, his credentials
16 impeccable as a negotiator in wage negotiations. So what
17 we say, if you accept, Chair, that you test my best
18 endeavours on the facts available at the time and you say
19 to the theoretical negotiator what does one do in these
20 circumstances? We know what he did. He phoned the
21 Minister, he says to the Minister get the Minister of
22 Police and get these criminals under control, that's what
23 he did. But we have a now 20/20 vision, let's test that
24 one. We say without the benefit of hindsight his motive
25 then, namely, to stabilise the situation and to bring the

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1 acts of violence to an end cannot be faulted and I say this
2 with all the responsibility I can muster, I cannot
3 criticise Mr Ramaphosa for doing what he did. He did what
4 I submit a responsible businessman would have done in those
5 circumstances, try to stabilise a situation, get the police
6 in.
7 After the events of the 13th of August, the
8 killing of the five people it would have been unprecedented
9 to expect wage negotiations between Lonmin and the strikers
10 outside of established collective bargaining. But now he
11 makes the following submission or it's made on his behalf.
12 "Mr Ramaphosa accepted that he might have sought to use
13 such influence as he had over the directions of the company
14 to seek to change the approach of Lonmin management in this
15 respect. However, in his assessment of the situation the
16 most immediate priority was to stabilise the situation."
17 Now what does that mean? He says "If you ask me on my
18 knowledge at the time my judgment was that we should
19 stabilise. If you ask me today well perhaps Lonmin should
20 have spoken." We say it's sort of a hinkende criticism.
21 Firstly, it's hindsight. Secondly, it doesn't address the
22 counterfactual and thirdly, it comes from the very person,
23 who at the time, didn't do what he now says should have
24 been done. And quite importantly, the evidence leaders
25 does not suggest that Mr Ramaphosa did not exercise his

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1 best endeavours. They do not suggest that he didn't
2 exercise, now we say then, with great respect, to now argue
3 that Lonmin should be criticised for not having spoken to
4 his strikers is a bridge too far.

5 MR TOKOTA SC: Can I ask you this? If
6 Lonmin were to go to the koppie and say I'm not prepared to
7 negotiate the wage on the koppie and in the atmosphere in
8 which you are, but all I've come here for is to negotiate
9 that you lay down your arms then we can arrange a suitable
10 venue where we can talk without the arms. Would that have
11 a been an negotiation outside the three spheres which
12 you've mentioned?

13 MR BURGER SC: No, no that would have
14 been fun, it would have led nowhere. I'm not sure they
15 would have got out of the Nyala on that because it would be
16 dangerous with that message to get out. But they speak out
17 of the Nyala with a loudhailer, they'll be laughed at, but
18 it wouldn't have been in breach of anything. It would be
19 in breach if they go back and they start negotiating, but
20 of course you don't reach that stage. What the strikers
21 might well have said to them, remember there's a fight
22 between AMCU and NUM at that stage. Mr Mathunjwa is there
23 and he is saying to the strikers you've got a good case and
24 it's the enemy who holds you here. So they would probably
25 have said to Lonmin what do you want to talk about. I

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1 don't know what Lonmin on your example says, presumably we
2 want to tell you we can't pay you 12 500, end of the
3 debate. Or they say to you, you must first tell us what
4 the 12 500, how it's made up and then we'll consider, end
5 of the debate. Or you must first tell me is this the
6 12 500 by the RDOs or everybody, end of the debate.
7 Because the strikers don't know, half of them think it's
8 RDOs, the other half thinks it's a free for all. So that
9 scenario is just going nowhere. That's why the counter
10 factual is so important here.

11 CHAIRPERSON: In looking at the counter
12 factual as you call it, is it not relevant to look – I know
13 there may be differences but is it not relevant to look at
14 what happened afterwards? After the 16th, in fact well into
15 September there were talks. There were talks with people
16 who weren't from the unions, there were talks involving
17 AMCU who weren't covered by the collective agreement. The
18 pillars of the temple of collective agreement and the LRA
19 system in this country didn't collapse as you suggest. The
20 platinum industry had the problems later, but that's
21 another question. Mr Mokwena's case was we can't do the
22 things we've been asked to do, it will cause chaos in the
23 country. Tear up the LRA Act, destroy the collective
24 bargaining system, paralyse the platinum industry, none of
25 those things happened in September. There were discussions

<p style="text-align: right;">Page 38977</p> <p>1 which did all those things which actually brought about a 2 settlement. So I'm not so sure that your counter factual 3 as you put it is as compelling as you suggest. But I 4 understand you may well wish to say to me there are 5 differences between what happened in September, those 6 things differ from what the counter factual would have been 7 if we hadn't had the shootings on the 16th. I understand 8 that and I'd be interested to hear your argument on that. 9 MR BURGER SC: I'd say you've anticipated 10 my argument. These things are incomparable. We have 34 11 bodies after the 16th, everybody shifts their position now. 12 The strikers now talk below 12 500, Lonmin now talk for 13 whatever you want to talk to them about. NUM and AMCU is a 14 bit more tricky, but NUM is very happy to go in there. In 15 the end even AMCU arrives rather belatedly and they now say 16 – but this is a different situation, it was suggested at 17 some stage that I have overplayed the impact of that 18 tragedy. Can one ever overplay the 16th of December in this 19 country? It is a new – 20 CHAIRPERSON: The 16th of December – 21 MR BURGER SC: 16th of August. 22 CHAIRPERSON: There were other killings 23 on the 16th of December earlier, but we're busy with the 24 16th of August. 25 MR BURGER SC: Well I've made mistakes</p>	<p style="text-align: right;">Page 38979</p> <p>1 reminded before we go to tea that in hour heads at page 44, 2 Commissioner, that question was asked of Mr Magidiwana what 3 would you have done if you didn't get an undertaking for 4 12 500 and he said that was unacceptable. So perhaps I'm 5 even wrong to suggest that there could have been a debate 6 at the koppie. If it was anything less than the loudhailer 7 saying end of the month R12 500 and no doubt they would 8 have left the koppie by then. That was just not an option 9 available. It's a perhaps a convenient time, Sir. 10 CHAIRPERSON: 15 minutes. 11 [COMMISSION ADJOURNS COMMISSION RESUMES] 12 [12:06] CHAIRPERSON: The Commission resumes. Mr 13 Burger. 14 MR BURGER SC: Thank you, Chair. Just in 15 concluding the debate on the, the submissions on the first 16 issue; my learned friends point me out that the question 17 posed by Commissioner Tokota was in fact the question you 18 posed to Mr Magidiwana which we've quoted on page 44 of the 19 heads where you put that very carefully on how talks could 20 have happened at the koppie, what might have been 21 suggested, and the answer came back, that wouldn't have 22 been entertained. So we don't have to – 23 CHAIRPERSON: The other point that flows 24 from that is how typical were the views of Messrs 25 Magidiwana and Nzuza? You quoted both of them and no doubt</p>
<p style="text-align: right;">Page 38978</p> <p>1 before, let me confess to that one. But it's quite a 2 serious point. It is a new ball game after the 16th, the 3 world is looking at us, we're all upset. To now say well 4 go back, you should have spoken to them at the koppie on 5 the 14th, I think it's quite unrealistic, with respect, to 6 suggest that. And to suggest that we settled, we didn't 7 settle on the terms on the table by them, we didn't pay 8 them 12 500 and tell them when we'll pay – as I understand 9 it today still they don't get 12 500. So it is a different 10 debate altogether and it is unhelpful to see what happened. 11 If that would be helpful we'll go into a five month strike. 12 Why? Because of intransigent positions accepted by an 13 employer and employee, so the whole country is bleeding. 14 So 20/20 is not going to help us in order to unravel the 15 tragedy, with respect. Or what I was debating is the duty 16 to talk, a moment with me please. 17 CHAIRPERSON: I was proposing to take the 18 tea adjournment at quarter to 12, it's two minutes off 19 that. If you'd like – 20 MR BURGER SC: Let me just take this up. 21 CHAIRPERSON: I'm in your hands. 22 MR BURGER SC: Thank you. 23 CHAIRPERSON: What I'm saying to you is 24 when it's convenient to take the adjournment let me know. 25 MR BURGER SC: Thank you, Sir. I'm just</p>	<p style="text-align: right;">Page 38980</p> <p>1 the passages you cite support your submissions. But the 2 point that interests me is that – obviously one forms prima 3 facie views of people in the course of the Commission, that 4 may be incorrect and presumably we'll here argument on 5 that, but it may be said that neither of them was really a 6 typical person. Nzuza behaved in a particular manner. 7 Even at the inspection in loco he revealed aspects of his 8 personality which were not previously apparent. Magidiwana 9 also was someone who gave evidence that he wasn't there 10 until the last day and then he was seen on the videos and 11 so on. Now it may well be said, and I'm not saying it is, 12 that's why I'm asking the question, that there may well 13 have been other perhaps more influential strikers who would 14 have taken a more conciliatory approach, a more flexible 15 approach, and wouldn't have drawn a line in the sand with 16 the point of an assegai and said it's 12 500 paid into my 17 bank account today, or nothing. So I'd like to hear you on 18 that. 19 MR BURGER SC: Yes. So in his heads my 20 learned friend Mr Mpfu in paragraph 16 said the following, 21 he said, "They chose their witnesses carefully to provide a 22 spread of evidence." I don't have access to the strikers. 23 They're represented by counsel. Counsel obviously can't 24 call a thousand people. What counsel does is he calls 25 representative samples in order to assist the Commission to</p>

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1 give them the views of the people. We can but deal with
 2 that. Mr Nzuzwa says he was the second-in-command. Mr
 3 Magidiwana is on that score a pivotal witness. There may
 4 be other people with other views. I have no doubt there
 5 will be others, but at the end of the day we have to deal
 6 with the facts before us and my learned friend Mr Bham will
 7 take some time in considering each of the witnesses called
 8 from the strikers, and whether there are others, well, we
 9 don't know.

10 CHAIRPERSON: I understand the argument.
 11 MR BURGER SC: Yes, thank you.
 12 CHAIRPERSON: But look forward to hearing
 13 what Mr Bham has to say.
 14 MR BURGER SC: Then phase 2 the housing
 15 debate, can we again start by just considering briefly the
 16 terms of reference. The terms of reference in paragraph
 17 1.1.3 and 1.1.6 find particular application. In 1.1.3 in
 18 the context of Lonmin you're asked to consider, "Whether it
 19 by act or omission created an environment which was conducive
 20 to the creation of tension, labour unrest, disunity amongst
 21 its employees, or other harmful conduct," and in 1.1.6,
 22 "Whether by act or omission it directly or indirectly
 23 caused loss of life or damage to persons or property."
 24 Chair, in November 2012 you ruled phase 1 to be
 25 inquired into and that was directly linked to the events of

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1 the 9th and the 16th of August, and I remember in the early
 2 stages of the Commission when we were all still finding our
 3 feet I listened with a very careful ear as to whether the
 4 evidence related to that period or whether it was June of
 5 2012 and it would fall outside. That was all taken over by
 6 rationality and we inquired, but we kept inquiring into
 7 that causal context.

8 Then there was a ruling made on the 25th of August
 9 2014 and you ruled on phase 2. By then we had a
 10 complication because 1.5 had been taken out of your terms
 11 of reference. Whether that was done per incuriam I don't
 12 know, but what I submit is that you take 1.5 out of the
 13 terms of reference on Lonmin and you very much blot your
 14 copy book; you can't inquire because you can't inquire into
 15 one party in what is by definition a multi-party inquiry.
 16 You can't really inquire into any of the social ills there
 17 without for example considering migrant labour. That's the
 18 elephant in the room. But that's not your mandate, so you
 19 can't inquire into that. You can't inquire into that
 20 without inquiring into collective bargaining in the
 21 country, but that's a - so the whole debate gets very
 22 limited if you take 1.5 out.

23 But we argue, one of the submissions we make is
 24 to say to you in phase 2 you shouldn't be unfair to Lonmin,
 25 and that's a theme which has permeated this Commission and

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1 I think I speak for all our colleagues that we're confident
 2 that you've leant over backwards, I think sometimes too
 3 far, to give fairness to everybody. So I don't criticise
 4 that, but we said that watch out in phase 2, don't deal
 5 with component parts of a case which cannot be considered
 6 in isolation in unfairness to us, and we say that because
 7 there were practicalities at the time. We had spent two
 8 years on phase 1. Lonmin was given - I don't remember, I
 9 think 11 days or so to produce all our evidence on phase 1
 10 and 2. So we had a list of witnesses, we had to cull from
 11 that. In cooperation with the evidence leaders we - and
 12 then we had to make place for phase 2 and initially we
 13 thought it would be the two Human Rights people. But then
 14 it turned out but we just don't have time for that, and Mr
 15 Seedat was a bit of a latecomer and we said, we agreed with
 16 our learned colleagues, we should use Seedat on that, but
 17 it was a very limited inquiry. In the end we had the space
 18 to call one witness on phase 2, that was Mr Seedat. He was
 19 in the box I think for something like three days, if I'm,
 20 on the outside. That was what we could produce and we say,
 21 we remind you of by the time you make a ruling on that
 22 phase 2 you said, "Fairness can't be considered now; we can
 23 only consider fairness at the end." And this is now the
 24 time to come and this is the time in which I would like to
 25 revisit that debate.

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1 We raise fairness in our heads and because it's
 2 such an important subject may I just remind you it is in
 3 the main heads on page 110 and paragraph 289. There we
 4 make the following observations, we say, "By way of
 5 introduction phase 2 is a sophisticated and wide-ranging
 6 inquiry. The time allocated to consider it was
 7 disproportionately skewed to the prejudice of the only
 8 remaining party whose conduct is being scrutinised in phase
 9 2. 2, To inquire into the housing aspect of phase 2 in
 10 isolation distorts the exercise and will yield a skewed
 11 result. 3, We submit it is unfair to Lonmin to probe only
 12 one witness" - that's Mr Seedat - "and not allow cross-
 13 examination of expert reports filed by the likes of Dr
 14 Forrest et al. In fact as we understand what came our way
 15 the idea was that Dr Forrest would file a preliminary
 16 report. We will then have an opportunity to deal with it
 17 and she will then with the heads of the evidence leaders
 18 file a final report, and she says that will be sent not for
 19 you to make recommendations but it will be sent to the
 20 President, to assess the President. So far so good, and
 21 that may be a very valuable suggestion, but we haven't even
 22 seen the final report. It may be around, but I haven't
 23 seen it.

24 So I have to address you on phase 2, not having
 25 had the opportunity to talk to Dr Forrest. I'm not talking

<p style="text-align: right;">Page 38985</p> <p>1 of cross-examination. I thought until this morning it was 2 a lady. I'm told it's not a lady, it's a man, but Dr 3 Forrest – 4 CHAIRPERSON: Dr Forrest – I don't know 5 where you get that from. Dr Forrest is a lady and she in 6 fact – 7 MR BURGER SC: Then it is a lady, then 8 sorry, then let's stay with the female side of Dr Forrest – 9 CHAIRPERSON: She always dresses as a 10 lady, was looking like a lady. I don't know what one – 11 MR BURGER SC: No, you know, and I was 12 then incorrectly informed, but it shows you that I haven't 13 had any access to probe anything that was said and that's 14 quite a disadvantage for a cross-examiner certainly. So we 15 say the unfairness to Lonmin should the Commission make a 16 recommendation on Lonmin's housing in isolation, we will 17 address under different headings. Firstly the 1.5 which 18 was culled out, and may I remind you, Chair, of what Dr 19 Forrest had said in her report, which is very helpful on 20 this aspect. She had said the following in the Forrest 21 report, my pagination is 1366. I think it comes from a 22 previous time, but she is here addressing housing, section 23 5, and at page 56 of her report she says, "Lonmin cannot be 24 held solely responsible for the deplorable state of their 25 housing in which its migrant workforce resides. The</p>	<p style="text-align: right;">Page 38987</p> <p>1 researcher will file her comprehensive phase 2 report with 2 the Commission together with the evidence leaders' written 3 argument. The Commissioners will not be asked to make any 4 findings on the basis of this comprehensive report, but 5 they will be requested to forward it to the President 6 together with their report so that the government 7 departments and the agencies that are ultimately tasked to 8 investigate all the issues that were to be traversed in 9 phase 2 can have the benefit of the research." And again, 10 with respect, we agree, and that's why you would have seen 11 in our reply we associate ourselves with the HRC's 12 suggestion as to how that subject should go forward. 13 I've made the submission that the opportunity 14 given to Lonmin to deal with the case against them both by 15 way of cross-examination, the absence of a final report by 16 Dr Forrest, no engagement with the answers to our response 17 to the preliminary report – there may be an answer to it, 18 but I haven't seen it and we haven't had an opportunity to 19 address that in argument – to the three days given to Mr 20 Seedat to traverse things which sometimes fell outside of 21 his period of employment at Seedat, that would be 22 unfortunate. 23 In any event - I've made the submission also - 24 thirdly, that migrant labour and collective bargaining 25 should be all part of that inquiry.</p>
<p style="text-align: right;">Page 38986</p> <p>1 provisions of decent housing in the Marikana area is 2 primarily a government responsibility and in view of the 3 removal of paragraph 1.5 of the original terms of reference 4 the failures of national, provincial and local government 5 in this regard are no longer a matter which the Commission 6 is empowered to investigate. To the extent that this 7 chapter addresses the culpability of Lonmin in relation to 8 housing it may present something of a one-sided picture," 9 softly put. And I must interpose here, let me not for a 10 moment see to defend the atrocious housing conditions of 11 the Lonmin employees at Marikana. We've made that position 12 clear; it cannot go on and it's inexcusable. So that's not 13 the debate. The debate is whether you can at this stage 14 inquire into that as part of what really is a larger 15 inquiry which should be launched with perhaps a different 16 commission at a different time with a very different terms 17 of reference, and it should be explored sooner rather than 18 later. 19 Dr Forrest says the following at page 1314 of 20 this document, which is page 4 of her interim report, and 21 again we associate ourselves with her views. She says, 22 "This research report is the product of a small part of the 23 total research conducted in phase 2 process. In order not 24 to waste the resources that were devoted to phase 2 both 25 before and after the deletion of clause 1.5 the phase 2</p>	<p style="text-align: right;">Page 38988</p> <p>1 There's another risk, Chair, that if there were 2 to be recommendations or observations or holding of 3 accountable Lonmin in the context of housing that may 4 bedevil a future inquire because do they then take that as 5 part of their recommendations? Do they revisit the whole 6 debate and see whether this partial conclusion fits into 7 what is a much larger picture? Or - an even greater risk – 8 does the powers that be then believe that housing has been 9 inquired into and one can put that away and you can get on 10 with your life, so to speak? Those would all be very 11 unfortunate results of any finding or recommendation or 12 holding accounting at this stage of what Lonmin might have 13 done or not have done in the context of housing. 14 Then just in conclusion – 15 CHAIRPERSON: Could I put two points to 16 you in that regard? I understand your main argument is, 17 one of your main arguments is it will be unfair for us to 18 engage in this investigation at all? If that's our view, 19 well that's the end of the matter at this stage, but what 20 would obviously happen, as you've indicated, is that all 21 the work that Dr Forrest and her assistants did would be 22 sent to the Presidency and with a suggestion that the 23 matter be looked at further and whether they appoint 24 another commission or they send it to the National Planning 25 Commission, whatever they do, these are matters over which</p>

<p style="text-align: right;">Page 38989</p> <p>1 we would have no control. But there are two points I think 2 that have to be made in response to what you've said. The 3 first is if we were to engage in investigation into 4 Lonmin's compliance or non-compliance with its housing 5 obligations, if we were to do that – I don't say we will – 6 we would have to make it clear that this is a very small 7 part of a very big question and it's not to be assumed for 8 a moment that that's accepted that problem has now been 9 dealt with, that the relevant box can be ticked and people 10 can move on. The rest of the housing problem, I think is 11 alluded to in the passage from Dr Forrest's report you 12 read, remain to be investigated. That's the first point. 13 In regard to the possibility of a second 14 commission or other tribunal or body or task team or 15 whatever expression might be used, of course you know a 16 commission report has got no binding force. A commission's 17 report is simply the answer of the commission to the 18 questions posed by the President in respect of which he 19 would like advice and no future commission if there were 20 one, or task team or whatever body it was that was called 21 upon to look into the matter would be bound in any way by 22 anything we say. They'll say well, we note with interest 23 what the Commission has said, we venture to disagree, we – 24 give their reasons to why they disagree or they say we 25 agree with some parts, disagree with others, but the point</p>	<p style="text-align: right;">Page 38991</p> <p>1 to a commission to explore housing in the larger context, 2 then with request, one asks oneself what is the purpose of 3 this Commission making some prima facie views known? 4 Making prima facie views known without the benefit of for 5 one moment exploring migrant labour. Just consider that 6 for the moment. You criticise housing of Lonmin 7 theoretically, but you do not look at what is really at the 8 source of the problem, comes from – I don't know, 1886, 9 when did we discover diamonds? Migrant labour, that's the 10 problem. 11 You have a problem here which is a problem 12 inextricably interwoven with your local, provincial and 13 national Department of Housing and their performance in the 14 North West province. You can't look at Lonmin without 15 taking that into account, but you can't take that into 16 account. 17 Now again we would submit that it's really of 18 very limited benefit for you to embark on that, on the SLP 19 inquiry into whether Lonmin complied with SLP. With 20 respect, you can hardly have that debate if you don't have 21 a debate with the regulator of the SLP, the DMR, because 22 they're pivotal, they do it on a quarterly basis they look 23 at that. There is a constant debate between Lonmin and the 24 DMR on those issues. 25 [12:26] At some stage there comes a section 93 charge, Mr</p>
<p style="text-align: right;">Page 38990</p> <p>1 I'm making to you is that anything we say, if we say 2 something - it's not to be regarded as a given at this 3 stage we will – anything we say would only be of an 4 advisory nature. The advice would bind nobody, it would 5 merely be given in response to a request that we advise on 6 certain questions. So I think that two of the points 7 you've made may well fall away in the light of what I've 8 said. 9 MR BURGER SC: Yes. 10 CHAIRPERSON: You may wish to comment 11 further on what I put to you. 12 MR BURGER SC: Yes, if I may – 13 CHAIRPERSON: But again you understand 14 that's just a prima facie response – 15 MR BURGER SC: Yes. 16 CHAIRPERSON: - to what you say. 17 MR BURGER SC: No, if I may. Chair, 18 Commissioners, we're not confident that you can make a 19 meaningful recommendation to the President - and I know 20 it's not binding – on the available evidence, on what 21 you've heard of the case and the lack of exploration by us 22 of the real issues, we're not confident that you can make a 23 responsible recommendation even to the President. If you 24 do it – and he's going to refer that in any event, as I 25 think around this table we're reasonable in agreement on,</p>	<p style="text-align: right;">Page 38992</p> <p>1 Seedat says it's a very sinister document that; it involves 2 a director who had to be paid some money to get out of the 3 way, never challenged, but in that answer we say to the DMR 4 we cannot build 5500 houses, it's not on, it cannot be 5 done. No reaction. Comes the next inquiry and they say 6 well, is the schooling okay and do you do training 7 sufficient. Dead quiet on that. Now with great respect, 8 how does one responsibly criticise Lonmin for non- 9 compliance with the social and labour plan without hearing 10 the protagonist, the DMR, who is if anything absent in this 11 inquiry, taken out of this inquiry? How does one fairly do 12 that? That's why we say it would really be most unhelpful 13 to nibble at that and for what it is worth advising the 14 President, and so I think again we agree that you can't 15 bring out binding findings, that you cannot convict people, 16 but we shouldn't underestimate the weight which is going to 17 be attached by the public at large to a report finalised by 18 this Commission. The country has waited for it for a long 19 time. It's going to be scrutinised for a long time, 20 hopefully by the authorities also, but certainly by the 21 rest of the country, and I'm not sure that the rest of the 22 country will see the sophistication that this is only a 23 recommendation. This is only in the sense of phase 2, 24 ampersand. There are bigger things coming. I'm just now 25 nibbling on one issue out of context, without addressing</p>

<p style="text-align: right;">Page 38993</p> <p>1 the real issues. We think that is an unwise process to 2 follow, with great respect. 3 Can I then conclude on this issue by the 4 counterfactual; assume for the moment that there is going 5 to be a finding, assume for the moment that we are going to 6 be criticised in a vacuum, what is the counterfactual here? 7 Because then the Commission will have to address the 8 reality; what if 5500 houses had been built, what effect 9 would that have had on the tragedy? Remember we employ 10 28000 employees and we've got 10000 contract workers. 11 Let's forget about the contract workers and think away that 12 the government should provide housing to them. But of the 13 28000 we employed we've now built houses for five and a 14 half thousand. What about the other 20 and a half 15 thousand? Is that going to take away their complaints? Is 16 that going to create trust between the employer and the 17 employee? I wouldn't have thought so. That's never 18 addressed. 19 Another question; we know on the facts available 20 from Dr Forrest that the schools in the Rustenburg area are 21 insufficient. Health is insufficient. Social services are 22 insufficient. What would have been the effect of bringing 23 in five and a half thousand, not individuals, households 24 into that area on electricity, on water, on education, on 25 hospitals? We don't know. We know that with three houses</p>	<p style="text-align: right;">Page 38995</p> <p>1 please. 2 MR BHAM SC: I'm going to do that. The 3 first of the topics is the demand for the amount of 4 R12 500. I'm going to go into aspects of that demand. The 5 second topic is intended to be the perception of strikers. 6 I'm going to say a lot less on it than I had intended to 7 say because in part it was dealt with by Mr Burger. The 8 third topic is the 10 August shooting and the criticism of 9 Mr Botes – 10 CHAIRPERSON: Sorry, the? 11 MR BHAM SC: The 10 August shooting – 12 CHAIRPERSON: 10th of August? 13 MR BHAM SC: Ja, and the criticism of Mr 14 Botes in that regard. This was a discharge of rubber 15 bullets and teargas. The fourth aspect is the 16 characterisation of the strike. The fifth topic is the 17 capacity of Lonmin Security and the sixth – sorry, I said 18 seven topics, it's six topics, and the sixth topic is the 19 suggestion that Lonmin ought to have shut down its 20 operations and the nuance criticism under that topic that 21 Lonmin ought not to have actively encouraged its workers to 22 go to work. 23 If I might start with the very first topic, and 24 that's the demand for R12 500 - 25 CHAIRPERSON: So in fact you've only got</p>
<p style="text-align: right;">Page 38994</p> <p>1 it was a disaster. How it would be with 5500, one just 2 doesn't know. And again I don't give that as an absolution 3 of the problem. What I say is, and we've been overruled on 4 this, but to make then a causal link between those facts 5 and the tragedy is really a rather tenuous link. To think 6 if you had built the 5500 houses there would have been a 7 peaceful workforce, no debate. I would have thought if I 8 were to be a Lonmin worker and I had a house now, I will 9 need more money, not less money. I know I'm a householder, 10 I have to pay electricity and rates and taxes and Lewis 11 Stores and all new things coming up, which is good, but it 12 doesn't take away the debate on wages, which is a very live 13 debate. So we with respect submit that that is a debate on 14 the counterfactual also not to be had. 15 So I've gone as quickly as I can through my part 16 of the debate. If there are any questions will you please 17 put it to me? My learned friend Mr Bham will deal with 18 some of the other outstanding issues. 19 CHAIRPERSON: You'll be disappointed to 20 hear we've got no questions for you, Mr Burger. Mr Bham? 21 MR BHAM SC: Thank you, Commissioners. I 22 want to address you on seven topics. Each of them is 23 individual discrete topics to be slotted into the framework 24 of the argument presented by my learned friend Mr Burger. 25 CHAIRPERSON: Give me the headings</p>	<p style="text-align: right;">Page 38996</p> <p>1 six topics? 2 MR BHAM SC: It's six topics and under 3 the first point, or rather the first topic, the demand for 4 R12 500 I've got six points I wish to make. I'm going to 5 go through them one at a time. 6 The demand for R12 500 we know was ultimately the 7 driving force which created the impasse between Lonmin as 8 the employer one the one hand, and the striking workers as 9 the employee on the other. Much has been said about the 10 conduct of different parties, but little has been delved 11 into in relation to the R12 500. We would submit that 12 there are six crucial aspects regarding that amount which 13 one should take into consideration when one looks at the 14 criticism of Lonmin and its so-called failure to talk, 15 which has been dealt with widely already by Mr Burger. 16 The very first aspect is that you will have found 17 in a number of the heads of argument that when context to 18 the events between the 9th and the 16th is set out reference 19 is made to the Impala strike and what happened to Impala 20 earlier in the year. The one aspect which has not been 21 highlighted and which you need to have regard to is that 22 the demand at Impala as for R9 000. By the time it got to 23 Lonmin by its RDOs that went up to R12 500. Of course if 24 the demand was in the same terms as the demand made at 25 Impala the allowance would have taken care of that and</p>

1 there would have been no continuation of the strike, or not
 2 a strike in the first instance. So how the amount went
 3 when one looks at the context of Impala from 9 000 to
 4 12 and a half thousand, a rather dramatic jump, we're not
 5 left any the wiser and those who could have told us that
 6 had not come before the Commission to address you on that.

7 The second point is to look at the various
 8 discussions between RDO representatives and Mr Da Costa.
 9 Now we know he was first approached on the 21st of June. He
 10 then reported back together with Mr Nkisi to RDO
 11 representatives from Karee on the 2nd of July. On the 23rd
 12 of July he indicated to them in the further meeting in
 13 principle Lonmin's willingness to pay an RDO allowance. On
 14 the 30th of July 2012 on his evidence, and there's no
 15 counterevidence in this regard, he stated to them that
 16 Lonmin would not negotiate the 12 and a half thousand, it
 17 was inappropriate and Lonmin would not accede to it, but he
 18 made it clear that that issue was not open for negotiation
 19 and he's given the reasons for that, and on the 31st of July
 20 the RDO allowance was communicated. In between that we now
 21 from the evidence that on the 19th of July there was an AMCU
 22 meeting at Karee where the demand, and this was the only
 23 demand on the table at that point in time, was meant to
 24 have been discussed. We don't know much more about that
 25 meeting because we were not party to it and those who could

1 have testified on it did not come and testify.
 2 But throughout the hearing of this Commission we
 3 have been given no explanation at all of how the amount of
 4 R12 500 was arrived at, when it was decided to be an
 5 appropriate figure to put up, and by whom. That failure to
 6 furnish this Commission with that explanation is most
 7 significant because the amount demanded was significantly
 8 higher than what was put up at Impala and in fact it was an
 9 increase sought in the basic wage by approximately 150%.
 10 All that you have before you, Commissioners, is what Mr Da
 11 Costa said was communicated to him about the amount of
 12 R12 500 and in the bundle that we've given to you of our
 13 heads of argument and the attachments, if you go to page
 14 247, it's a passage I'd like to read to you because this is
 15 the high water mark of the explanation of R12 500, it's Mr
 16 Da Costa's rendition of what was said to him and this has
 17 never been contradicted. At page 30027 on the 3rd of June
 18 you, Mr Chairman, had asked Mr Da Costa, "Did you ask them
 19 how they reached the figure of 12,5?" He says, "I did."
 20 You say to him, "What was their response?" He says, "I
 21 did, Chair, I did. I said that's a very high figure and in
 22 fact if you went to that sort of basic wage you'd be
 23 earning significantly more than some of the supervisors.
 24 The reply to me was 'Well, that's, you know this is just,
 25 it was a good number.' They thought that this was a number

1 that would kind of reward them for the work they were doing
 2 so it was, they just felt it was a good number. I asked
 3 them," and now he quotes his discussion with them, "How
 4 did you calculate it? Did you base it on anything?' They
 5 said," and this is the high water mark of the evidence,
 6 "No, we don't do calculations. It's just a, it's a good
 7 number.'" So the central issue which drove the events all
 8 that you know is that what was said to Mr Da Costa is that
 9 the number, the amount we're seeking is a good number.
 10 There was absolutely no attempt to explain that, to go into
 11 it in order to assess its reasonableness, its affordability
 12 and the like.

13 The third aspect of their demand, and this is
 14 significant because of how the composition of the strike
 15 force had changed, the third aspect is that the RDOs wish
 16 to negotiate the increase only for themselves. So when
 17 Karee RDOs had first approached Mr Da Costa it was just an
 18 increase for RDOs, and in fact when Mr Mabuyakhulu, who is
 19 an RDO, had testified he had given three reasons for not
 20 involving unions and one of those reasons is that the
 21 demand for R12 500 was limited to RDOs. That of course
 22 changed, as I'm going to demonstrate to you.

23 The fourth aspect in relation to the demand for
 24 R12 500 and the Da Costa discussions is that the content of
 25 those discussions does not appear to have been reported

1 back to the striking mineworkers when they went on strike
 2 and thereafter. In other words when you heard the
 3 testimony of a number of mineworkers who went on strike
 4 which came before you and you're now told that they were
 5 carefully selected so as to be a representative sample of
 6 the mineworkers, what stood out in relation to each of them
 7 is at worst they did not know of the Da Costa talks at all.
 8 At best, even if they knew of the fact of those talks, they
 9 did not know of the content of those talks. Each of the
 10 workers was asked, each of the witnesses was asked about
 11 this. At page 287 in the bundle before you Mr Mabuyakhulu
 12 had stated when he was asked about the Da Costa
 13 discussions, he said at the hearing when he was asked about
 14 it that that was the first time he heard about it.

15 Mr Phatsha in his testimony had stated that he
 16 was unaware of the Lonmin position as adopted by Mr Da
 17 Costa. In other words there was o report back on that. Mr
 18 Magidiwana, who was not an RDO, could point to nothing
 19 which suggested that he had any knowledge of those
 20 discussions, nor could he point to any report back of those
 21 discussions. None of them could tell you where the
 22 discussions, or where the figure had actually come from.

23 Mr Nzuza, who had joined the strike not when it
 24 commenced, in fact on the day it had commenced he was going
 25 to work, he had intended to go to work and you know his

<p style="text-align: right;">Page 39001</p> <p>1 evidence that he was stoned on his way and he then joined 2 the strike on the next day; he could point to nothing which 3 suggested that he knew of the engagement between the RDO 4 representatives and Mr Da Costa at the time, or of the 5 content of that, and then you come to the last of those 6 witnesses, Mr Mtshamba, who was an RDO. Now Mr Mtshamba 7 had gone on leave at the end of July. There was no report 8 back to him on those talks. He had simply heard from a 9 colleague that there had been an allowance. When he came 10 back on the 13th he on the next day went to the koppie, 11 again without knowing what the issues were at all. So he 12 didn't know about the content of the talks, and his 13 testimony was significant in two regards; in the first 14 instance he believed that the issue was that Lonmin RDOs 15 were getting paid less than their counterparts at the other 16 mines. So he wasn't told that the allowance was meant to 17 bring parity and that his complaint and concern was 18 addressed as a result of the allowance. When he, and in 19 fact he said that with that outcome he was very happy, and 20 those were his words. When that issue had passed him by he 21 then stated that he believed that the strike had continued 22 by the time he had returned from leave on the 13th because 23 the RDO allowance was limited to Karee RDOs – well, nobody 24 had told him that the allowance was across the board. 25 Now to the extent that it can be said that there</p>	<p style="text-align: right;">Page 39003</p> <p>1 dealing with a demand for R12 500, the expectation of which 2 was in the minds of workers beyond RDOs. 3 If you look at the evidence, Mr Magidiwana speaks 4 to this and this is at page 313 of the bundle in front of 5 you, there's the portion of his evidence, if I might just 6 go to that. At page 6511 of the transcript, 11 March 2013, 7 where he speaks about the fact that he too expected R12 500 8 and he said when it was first said that this is not now no 9 longer an RDO issue but it includes every employee at 10 Lonmin. So his evidence before you is by the time they had 11 gone on strike it included more than just RDOs, every 12 employee at Lonmin, and Mr Nzuza who also testified on this 13 at paginated page 327 of your bundle stated the following, 14 he was asked about why he anticipated as a winch operator 15 R12 500 out of an RDO strike and he said, his testimony 16 was, "I know the workers who wanted that money." He was 17 asked, "Which workers?" He says, "I was told the workers," 18 and then he was asked, "Which category of workers?" and he 19 simply referred them to the workers. So in other words 20 this demand which started off by one category of workers at 21 a single shaft had developed into a demand by all workers 22 in that category, but when the strike had started it 23 included workers outside of that category and it created an 24 anticipation of such an increase for all workers across the 25 board, and that is when one considers what Lonmin would</p>
<p style="text-align: right;">Page 39002</p> <p>1 was a grievance on the part of the striking mineworkers 2 because Lonmin had not spoken to them at all, or had chosen 3 not to speak to them, leaving aside the content, in other 4 words if you can divorce that grievance from what they were 5 going to talk about, then the fault of that would appear to 6 have been amongst those who had engaged with Mr Da Costa 7 not reporting back on the fact that there was such 8 engagement or about the content of the engagement. So 9 rather than shift the blame on to Lonmin for their lack of 10 knowledge, for the workers' lack of knowledge of what 11 Lonmin had actually done, one should consider the evidence 12 before you and it's rather astonishing that there was no 13 report back to those who had gone on strike when they had 14 gone on strike or at any time thereafter that there were 15 discussions with Mr Da Costa and what the content of those 16 discussions were. 17 The fifth point we make is that the demand 18 started as an RDO demand and for lengthy periods in this 19 Commission what was referred to was an RDO demand for 20 R12 500 which was a result of the peculiar and specific 21 conditions of RDOs. But we now know that amongst the 22 strikers were non-RDOs who had exactly the same 23 anticipation, to be paid 12 and a half thousand. In other 24 words you were no longer dealing when you had hit the 25 period 9 to the 16th of August with an RDO demand. You were</p>	<p style="text-align: right;">Page 39004</p> <p>1 have been confronted with at that point in time. First of 2 all it was confronted by a demand for an amount which was 3 not explained. Secondly it was confronted by a demand for 4 an amount which started with one category of workers at one 5 shaft. It was then met, having given its response to that, 6 with an unprotected strike by workers which included 7 amongst its numbers workers who were not RDOs. So the 8 issue was just growing and growing and growing and to this 9 day you have absolutely no explanation either for the 10 amount or for why workers then went into an unprotected 11 strike in relation to that amount, and finally for why it 12 spread beyond simply RDOs and why the anticipation was 13 created beyond RDOs. 14 [12:45] The final aspect, and probably most important 15 aspect of that figure which had started without any 16 explanation other than it was a good number, was the 17 testimony which was in clear terms, that it was not 18 negotiable. In other words we keep talking about what 19 Lonmin might have spoken about. What you hear from the 20 evidence that was now put before you was that from the side 21 of the strikers in that period they had decided that that 22 figure was not negotiable. Mr Phatsha spoke to this, Mr 23 Magidiwana spoke to this, and my learned friend Mr Burger 24 has given you those passages. 25 Mr Nzuza spoke to this, and I'm going to give you</p>

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1 three passages because it cropped up three times in his
 2 evidence. The first appears at page 328 of the paginated
 3 bundle put before you. In the transcript it's the 28th of
 4 August 2014 at page 35991 when I asked him, "So if I
 5 understand you correct, what the workers were waiting for a
 6 response to when they would get the money they were
 7 demanding?" He says, "Yes, that's what I'm saying." I
 8 then said to him, "And that is what they wanted, a report
 9 back on when they would get the money?" and he says, "Yes,
 10 that's what they wanted." The issue then cropped up again
 11 at paginated page 329, transcript 28 August 2014, page
 12 35997, starts at line 22, and what's significant about this
 13 is this cross-examination came after we were shown the
 14 video footage of various members from amongst the strikers
 15 addressing the group of strikers at the koppie. So a whole
 16 number of them spoke and I then said to him, I put the
 17 following to him, I said, "Is it fair to conclude from what
 18 we were shown, from all those video clips that there were
 19 two non-negotiables for those of you who were on the koppie
 20 at the time, the strikers? The first was that you wanted
 21 Lonmin management to come to the koppie and the second was
 22 that you wanted your demand for payment of R12 500 to be
 23 met?" He says, "Yes, that's what we wanted," and I then
 24 put to him, "And if you didn't get what you wanted the
 25 strike would have continued?" and he says, "Yes, I've

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1 already said so." In other words from their perspective
 2 there was absolutely no evidence to suggest from those who
 3 had spoken that they were negotiable on that. In fact on
 4 the contrary they stated in direct terms that they were
 5 non-negotiable. He emphasises this again at page 36075 on
 6 the same day of the transcript when he was asked whether it
 7 was a non-negotiable, he says yes.
 8 Now of those who had testified from the strikers,
 9 the only one who sought to state something different was Mr
 10 Mtshamba, and if you go to page 320 of the bundle you'll
 11 see what he seeks to suggest is that if only Lonmin had
 12 come to talk, we didn't want the amount at that point in
 13 time, we would have spoken. But of course there's a
 14 fundamental difficulty with what Mr Mtshamba had to say.
 15 In the first instance it contradicted the evidence of Mr
 16 Phatsha, it contradicted the evidence of Mr Magidiwana, it
 17 contradicted the evidence of Mr Nzuzza. That's the first
 18 aspect. The second aspect is he wasn't there when the
 19 strike started. He came to the koppie quite late in the
 20 day. The third aspect is for him to say we were quite
 21 negotiable was quite difficult to fathom because he did not
 22 know the issues when he got onto the mountain. In fact
 23 even when he testified he did not know the issue regarding
 24 the strike, the issue that motivated the strike, so much so
 25 that he misstated what he thought the strike was about. In

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1 the first instance he said he wanted parity with workers at
 2 other mines and when he was asked whether he would have
 3 been happy with that he said very happy. Well, that's what
 4 the RDO allowance had given to him. In the second instance
 5 he said when he did come back from leave and join the
 6 strike he knew nothing about the discussions, he didn't
 7 know why they were on strike. He went there because they
 8 were on strike and he thought, because he was told, that
 9 the strike was because the other RDOs, in other words those
 10 who were not at Karee, were not given the RDO allowance.
 11 Now he was wrong in every respect. So for him to come and
 12 say that he could say that the workers would happily have
 13 engaged on different terms with Lonmin management, they
 14 didn't want the 12 and a half thousand at that stage, you
 15 can't take that evidence anywhere because he didn't know
 16 the issues of the strike. He came in quite late in the day
 17 and he didn't even know about the Da Costa discussions.
 18 That then leaves you in relation to the amount of
 19 R12 500 with three fundamental issues. The first is it's a
 20 figure which was not only fundamentally higher than the
 21 Impala demand, but it was also unexplained. You don't know
 22 where it came from, how it came, and on what basis it was
 23 presented.
 24 The second is that having initially started as an
 25 RDO demand by Karee RDOs it had by the time the strike had

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1 commenced on the 9th of August and throughout the period
 2 under investigation by this Commission spread to workers
 3 other than RDOs. In other words it was now not only an RDO
 4 issue, it has gone well beyond that, and the third and most
 5 important is that the strikers from their perspective, and
 6 they testified before you on that, were intractable on that
 7 position. It was a non-negotiable. In other words from
 8 their perspective for things to come to an end, for the
 9 strike to come to an end and for that reason the events
 10 which unfolded as part of the strike Lonmin would have had
 11 to capitulate on their demand. The question you've got to
 12 ask yourself is whether it would have sufficed for them in
 13 so capitulating to have capitulated merely to the RDOs
 14 because they were now dealing with categories of employees
 15 who were wider than the RDOs. So it probably would have
 16 meant not just the RDOs but beyond the RDOs as well.
 17 I'm going to move on to the next topic and –
 18 CHAIRPERSON: Do you want to take lunch
 19 now or do you want, can you finish the topic by 1 o'clock?
 20 MR BHAM SC: I can finish the topic in a
 21 couple of minutes because my thunder was stolen by my
 22 learned friend Mr Burger. I've just got a couple of things
 23 to add. This is on the perception of –
 24 CHAIRPERSON: Oh dear, oh dear, we don't
 25 encourage theft of that kind, do we? Alright, carry on.

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1 MR BHAM SC: And he was talking of the
 2 rule of law. He's dealt with the topic fully where there
 3 was a suggestion of what strikers might, or workers might
 4 have perceived Lonmin to be doing during the Da Costa
 5 discussion. So he's dealt with it fully –
 6 CHAIRPERSON: The negotiation question?
 7 MR BHAM SC: The negotiation –
 8 CHAIRPERSON: Would they have thought,
 9 perceived –
 10 MR BHAM SC: Ja.
 11 CHAIRPERSON: - Lonmin has negotiated
 12 with them. That is the point he dealt with very fully.
 13 MR BHAM SC: I can just make one further
 14 observation to what has already been stated in that regard
 15 and that is this; from the workers who had come to testify
 16 they had all said without fail that they had received no
 17 report back on the Da Costa talks. They either were
 18 unaware of the fact of those talks or at the very least
 19 were unaware of the content of those talks. They didn't
 20 know what Lonmin had communicated, how those talks went,
 21 and the like. Now you simply cannot have a perception if
 22 you are amongst that group of strikers of what Lonmin was
 23 doing or what Lonmin objectively was communicating if you
 24 didn't know of the existence of that communication or the
 25 content of that communication.

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1 We're now no longer talking in the early days
 2 when you could put probabilities in anticipation of
 3 something being said. We're talking at the conclusion of
 4 these hearings. We're talking at a stage when all of the
 5 evidence has been led and when I had raised the objections
 6 which my learned friend Mr Burger had referred you to about
 7 there being no positive evidence on that perception, that
 8 was the one leg to it. It now goes beyond that because
 9 you've got positive evidence of a lack of knowledge of the
 10 fact of those discussions and the content of those
 11 discussions and once you've got that evidence before you,
 12 to sit and harp on this topic of what their perception
 13 might be on the basis of evidence presented before this
 14 Commission is simply to go down a path of speculation of
 15 what some people might or might not have thought when those
 16 very people did not even know about the aspect they're
 17 meant to have a perception on. I'm ready to go on to the
 18 next topic. My learned friend Mr Burger has not stolen my
 19 thunder on that and I'll deal with it after lunch.
 20 CHAIRPERSON: How long will this topic
 21 take?
 22 MR BHAM SC: What I'm left with now is
 23 not going to take too long. We've dealt with it in our
 24 replying –
 25 CHAIRPERSON: Alright, we'll take the tea

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1 adjournment, and then we –
 2 MR BHAM SC: Yes.
 3 CHAIRPERSON: Sorry, I'll get it right
 4 the second time. We'll take the lunch adjournment and
 5 we'll resume at quarter to 2.
 6 MR BHAM SC: Thank you very much.
 7 [COMMISSION ADJOURNS COMMISSION RESUMES]
 8 [13:51] CHAIRPERSON: The Commission resumes, Mr
 9 Bham.
 10 MR BHAM SC: Thank you, Commissioners.
 11 The next topic that I want to go onto is dealt with in our
 12 replying heads at page 856 and that's the shooting of 10
 13 August 2012, page 856. The topic commences at paragraph 33
 14 and is dealt with until paragraph 36. The reason we deal
 15 with the topic is because what is said by the evidence
 16 leaders in relation to that incident. Now you'll recall
 17 the incident very briefly. It's an incident Mr Botes had
 18 spoken to when on the evening of the 10th of August they
 19 discharged their firearms with rubber bullets and teargas
 20 in order to disperse a group of people who they said were
 21 intimidating people who were on their way to work. The
 22 evidence leaders say the following at paragraph 1217 of
 23 their heads of argument. They say "The shootings that
 24 occurred on the evening of the 10th by Lonmin security
 25 personnel which are addressed elsewhere in these

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1 submissions were not adequately explained by Lonmin. We
 2 submit that Lonmin had failed to place any facts before
 3 this Commission except for the bland allegations that the
 4 strikers were intimidating workers to show that the
 5 shooting incidents on the evening of 10th August were
 6 justified." They then say "On this basis and in light of
 7 Major Govender's evidence that in his view there was no
 8 basis for SAPS to act against the strikers. We submit the
 9 Commission should make findings that the shootings were
 10 unjustified." There are two aspects to that criticism, the
 11 first is that it is stated that Lonmin simply put up bland
 12 evidence and the second that look at what Major Govender
 13 had said about the conduct of the strikers. We would
 14 submit to you, Commissioners, that the evidence leaders are
 15 incorrect in both regards. In the first instance you've
 16 heard evidence about the atmosphere of intimidation which
 17 had prevailed at that point in time. In fact there's an
 18 oddity about what the evidence leaders say in this regard
 19 because elsewhere in their heads they make much about the
 20 context of Impala. They say that Lonmin ought to have been
 21 alerted to how things could develop because of what
 22 happened at Impala. They say to you in relation to
 23 Lonmin's what they say was a state of unpreparedness from a
 24 security perspective that Lonmin ought to have been ready
 25 because of what happened at Impala. And yet when a witness

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1 comes and says that which occurred at Impala also
 2 characterised the events of the 10th of August. They say to
 3 you it's a bland statement. Now you can't have it both
 4 ways, it's one way or the other.

5 CHAIRPERSON: But why were the entries
 6 about that incident removed from the occurrence book? And
 7 why did Mr Botes, in his evidence, transfer them to the
 8 11th?

9 MR BHAM SC: Sorry I missed the second
 10 part of the question.

11 CHAIRPERSON: I think it was Mr Botes in
 12 his statement described those events, but put them on the
 13 11th and there was a fair amount of circumstantial evidence
 14 in the statement which made it appear that it was indeed
 15 the 11th when these things happened. In a later, a very
 16 late stage the - in the affidavit say oh dear he's made a
 17 mistake, these things happened on the 10th. No explanation
 18 really as to how he made that mistake. When you read that
 19 together with two other, the one I've mentioned, namely,
 20 the omission from the occurrence book and secondly the fact
 21 that Mr Sinclair who was also to some extent on the 10th
 22 doesn't mention it at all in his statement. Now why do we
 23 have those factors?

24 MR BHAM SC: You're absolutely right in
 25 relation to raising the questions on the deletion in the

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1 occurrence book and Mr Sinclair has said. Let me state it
 2 clearly now because there is criticism about that, Mr
 3 Sinclair was responsible for deleting items from the
 4 occurrence book wrongly, incorrectly and I'm not going to
 5 defend that. He was just wrong in doing that. We found
 6 that out at a very late stage, he's no longer working at
 7 Lonmin, I can say that now. And he's no longer working
 8 Lonmin because of what emerged regarding the tampering of
 9 evidence.

10 CHAIRPERSON: What inference does one
 11 draw from - sorry you are going to get there, sorry.

12 MR BHAM SC: I'm dealing with this
 13 sequentially.

14 CHAIRPERSON: Forgive me, please argue
 15 the way you want to.

16 MR BHAM SC: I'm terribly sorry, I mean
 17 to come there. Now if all that you had before you was an
 18 incident which occurred on the 10th which was recorded in
 19 the occurrence book, which was then deliberately deleted
 20 and you can only come to that conclusion in relation to Mr
 21 Sinclair then I might have been sitting here wondering how
 22 I deal with that. But that's not the only evidence you
 23 have before you. So the first question is was there a
 24 shooting on the 10th, the answer to that is yes. The second
 25 question is on the facts before you can you simply dismiss

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1 what Mr Botes had to say about acts of intimidation? The
 2 answer to that is no. We know there was a background of
 3 Impala, we know what happened there and you're being urged,
 4 in relation to that background, to have regard to the
 5 nature of violence which occurred at that strike. Now if
 6 that had happened at Impala and you're being asked to take
 7 into account that background why is it improbable that
 8 there was a similar occurrence of intimidation on the
 9 night. The third aspect is yes Mr Botes did say he heard,
 10 but what you do know is that on the day there were
 11 incidents of unrest and intimidation. How do you know
 12 that? Quite independently of what Mr Botes has said you've
 13 got to look at the cross-examination of Major Govender, an
 14 aspect which has been left out in the manner in which the
 15 evidence leaders have assessed Major Govender. Let's do
 16 that because you'll find that three critical aspects comes
 17 from his evidence. The first is that he stated and he
 18 spoke to -

19 CHAIRPERSON: This is paragraph 35 of
 20 your -

21 MR BHAM SC: Yes but if you look at the
 22 transcript, on the 14th of August, page 35090, there are
 23 three points I'm going to make about this. The first is he
 24 spoke to an email he received on that evening from the
 25 police reporting on events which occurred on that evening.

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1 Now this quite independent of anything which Sinclair did
 2 and which Botes spoke to. So it's an outside source
 3 talking about what occurred on the day. And that email
 4 which came from within police sources said to Mr Govender
 5 who said he had no reason to doubt it, the following.
 6 Emanating from the march that took place on Friday 2012
 7 August the 10th the situation has thus become violent in
 8 that employees of Lonmin who were from work at
 9 approximately 20h00 on Friday evening were attacked and
 10 assaulted by a group of employees suspected to be AMCU
 11 members. Now let's leave aside the suspicion of where they
 12 came from because that's just a question of suspicion.
 13 What is stated there as a fact is that an incident of
 14 assault had taken place, intimidation. The second is that
 15 he was then asked to confirm that on that evening there was
 16 a group of people armed with knobkerries who were standing
 17 on the very path that people would pass to go to work. He
 18 said yes they were standing with knobkerries, he was asked
 19 why would they have been present, he said he asked them and
 20 they said they're waiting for a taxi. Well they
 21 disappeared shortly after that and this was an exchange
 22 between yourself, Mr Chairman and him when you said to him
 23 well did it not strike him as strange that people who said
 24 they were waiting for a taxi disappeared before the taxi
 25 had come, waiting incidentally, with knobkerries as it so

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1 happens on a path where people who wish to go to work would
 2 have to pass. That's the second aspect. The third aspect
 3 relating to why he did not agree with Botes on taking
 4 action to disperse of them. He admitted eventually that he
 5 did not have any training to manage a crowd control. In
 6 other words assessing the situation was beyond the ambit of
 7 his training. So what do you have from that, you have from
 8 that yes the completely unsatisfactory and unjustifiable
 9 conduct on the part of Sinclair regarding the deletion from
 10 the occurrence book. There's no question about that, but
 11 does that mean the incident didn't occur and does that mean
 12 the discharge of the firearm was unjustified? It cannot
 13 mean that because you've got independent evidence of a
 14 report of unrest on the day where workers who were coming
 15 away from work were assaulted. You've got the confirmation
 16 by Major Govender of a group of people who were standing in
 17 a very strange place you might say on a Friday evening
 18 armed with knobkerries. One might ask why and giving an
 19 explanation which didn't make sense. And you've got Major
 20 Govender's final concession that his training did not
 21 permit him to assess the situation at that point in time.
 22 So we would submit to you, Commissioners, that you simply
 23 cannot disregard what Botes says about the fact of the
 24 occurrence and why the firearm was discharged. And that
 25 what he says is supported by what Major Govender had

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1 conceded during his cross-examination, cross-examination
 2 which is entirely omitted in reference in the assessment by
 3 the evidence leaders of the situation.
 4 COMMISSIONER HEMRAJ: Mr Bham, what do
 5 you make of the fact that Major Govender didn't see the
 6 crowd or the group of people in possession of any sharp
 7 weapons?
 8 MR BHAM SC: No you're absolutely right,
 9 but he did see them in the possession of knobkerries
 10 firstly. Secondly he saw then standing at a place you
 11 would not expect people to be standing at that time of the
 12 evening.
 13 COMMISSIONER HEMRAJ: What do you make of
 14 the fact that while he was there they didn't do anything
 15 that he thought was actionable?
 16 MR BHAM SC: He says he did not believe
 17 the situation was intimidating. He was told that they were
 18 there to intimidate people who were going to work. We do
 19 know that it was reported when the people were assaulted on
 20 that evening. The simple point of the matter is that do
 21 you wait until people are beaten up before you try to
 22 disperse the crowd of people who want to beat others up?
 23 Or do you assess the situation in order to try to prevent
 24 the occurrence? And Commissioner Hemraj, you know in many
 25 senses what we're faced with when my learned friend, Mr

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1 Burger, had referred to the schizophrenic criticism of
 2 Lonmin is we're damned if we do and we're damned if we
 3 don't. If they had done nothing and that very group of
 4 people had assaulted people going to work we would have
 5 been criticised for not having prevented that. Because we
 6 urge a measure to prevent the assault of other people,
 7 having assessed the situation which by all accounts
 8 objectively would appear to be an unusual situation where a
 9 group of people are standing for a purpose they couldn't
 10 explain. And you acted in order to prevent people who wish
 11 to go to work or who were coming away from work from being
 12 assaulted, you're criticise for that.
 13 CHAIRPERSON: What inference do you draw
 14 from the deletion of the entries and the fact that Botes
 15 transfers this to the following night? If you apply the
 16 balance of probabilities standard would it be – I'm not
 17 asking this as a rhetorical question, I'm just asking for
 18 information, would it be appropriate to draw an inference
 19 that what Sinclair was trying to hide was that there had
 20 been an excessive reaction, over vigorous reaction by
 21 Lonmin in dealing with the situation?
 22 MR BHAM SC: It was made the first point
 23 what Sinclair – it wasn't the only entry he deleted. On
 24 every occasion when firearms were discharged he deleted
 25 that. Now his motivation behind that appeared to be to

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1 delete all those references. So not to justify whether it
 2 was an over reaction or under reaction, the mere fact that
 3 there was a reaction he sought to delete. And as I said
 4 you simply cannot condone him for doing that. We have not
 5 sought to do so and we say you can't do that. But against
 6 that before you draw any inferences, when you draw
 7 inferences you draw inferences on the totality of the
 8 facts. Amongst the totality of the facts is that there
 9 were medical reports which showed that people had been
 10 assaulted on the 10th, injured and assaulted on the 10th and
 11 that was part of the evidence. The shooting reports that
 12 we made available, well before the time Botes and Sinclair
 13 came into the witness box had made reference to the
 14 incident as having occurred on the 10th. The email to
 15 Captain Govender which referred to people having been
 16 assaulted on the 10th is another factor. The fact that
 17 there were people standing around in unusual circumstances
 18 who gave a false answer is another factual incident. So
 19 the point I'm making is if the only fact before the
 20 Commission was that on the day an incident had occurred and
 21 Sinclair went and deleted the item well then on that fact
 22 because that's all before the Commission you would have
 23 drawn an inference as you suggest. But that's not the only
 24 fact. In other words you're now seeking to draw an
 25 inference based on a particular fact of an individual whose

<p style="text-align: right;">Page 39021</p> <p>1 deletion and whose activity in deleting items was not 2 restricted to that particular issue –</p> <p>3 CHAIRPERSON: I'm not seeking to draw any 4 inferences, I'm just asking what inferences can be drawn 5 and it may be that there are two inferences you can draw. 6 The first inference is the strikers were behaving 7 inappropriately, intimidating people who wanted to go to 8 work and the second inference you may draw is that the 9 response of Lonmin to that situation was excessive which is 10 why Botes moved it to the Saturday night and Sinclair 11 removed that entry together with others. But I'm not 12 saying one must draw an inference, I'm not seeking to draw 13 any inference, I'm just asking you for assistance on what 14 inferences, if any, can be drawn.</p> <p>15 MR BHAM SC: I'll try to do that. In 16 relation to the inference you mentioned, the second of the 17 two inferences which is whether it was excessive conduct or 18 not then I move points to make. First of all you've heard 19 not testimony from anybody who's come to say that the 20 extent of the shooting was excessive in relation to what we 21 had done. The second is you've not heard any evidence of 22 people who had sustained any injuries of a nature as a 23 result of that conduct which would suggest excessive 24 injuries or rather excessive conduct on the part of Lonmin. 25 And the third thing and we go back to that is all of the</p>	<p style="text-align: right;">Page 39023</p> <p>1 CHAIRPERSON: These aren't people who 2 alleged that they were attacked by intimidating strikers.</p> <p>3 MR BHAM SC: No, no we may be at cross 4 purposes, those would have been in relation to people who 5 were shot at on the day. Now there are a couple of things. 6 First of all they don't draw the nexus between that 7 incident as you say and secondly there was not evidence led 8 at this Commission about the nature of their injuries and 9 the extent of the shooting which would suggest that you can 10 draw an inference of the excessive use of force. In other 11 words we're sitting now with the Commission which has sat 12 for just on two years with extensive evidence having been 13 lead, with time having been given for evidence to be led in 14 order to allow us to draw inferences from facts put before 15 the Commission. To draw inferences from facts which are 16 not before the Commission is to draw inferences from 17 speculation when you've got the facts, when you've got the 18 facts. And so consequently in relation to that incident I 19 would submit to you that only is there insufficient 20 evidence to draw an adverse inference against the incident 21 of shooting on the day, of course you can comment and you 22 should about the deletion from the occurrence book because 23 it is just unacceptable. But what you can't do is 24 translate that into an inference to be drawn against the 25 incident having occurred and the justification for the</p>
<p style="text-align: right;">Page 39022</p> <p>1 objective evidence points to the fact that there were a 2 group of people with intent at that point in time. And 3 that intent was not a pleasant intent towards people who 4 either were wanting to go to work or they had come from 5 work. Now if, as you were told by Botes, he made a mistake 6 and he admitted that mistake, the firearm register did not 7 make the same mistake, it made exactly the full disclosure 8 and that had been made available. Ultimately you've got to 9 be careful in drawing inferences in being coloured by one 10 fact and unpalatable from our perspective an unacceptable 11 fact of the deletion from the occurrence book. There's no 12 doubt about it. As I said to you already that if you had 13 that and nothing else then I might have had a difficulty in 14 arguing the point. But we're not sitting with only that 15 and the reason why you can't draw any inference of 16 excessive use of force is because there is no evidence from 17 you either in the form of anybody who was there at the time 18 who said it was excessive. Or of any reports of injury of 19 a sort being sustained which would suggest excessive use of 20 force. So you simply don't have that evidence before you.</p> <p>21 COMMISSIONER HEMRAJ: There is a docket 22 with two persons alleging to have been shot on that night, 23 but whether there's a sufficient nexus between that 24 shooting and Botes is not very clear to me.</p> <p>25 MR BHAM SC: That's the first point –</p>	<p style="text-align: right;">Page 39024</p> <p>1 incident. Nor is there sufficient for you to draw an 2 inference about any excessive force. May I then go onto 3 the next topic and this is dealt with in our replying heads 4 at 858?</p> <p>5 CHAIRPERSON: The characterisation –</p> <p>6 MR BHAM SC: The characterisation – I'm 7 going to be fairly –</p> <p>8 CHAIRPERSON: Sorry 858 you say.</p> <p>9 MR BHAM SC: On the point and 858 of our 10 heads, our replying heads starting at paragraph 39 and we 11 made the submissions primarily because of the persistent 12 attack against Lonmin particularly on behalf of the injured 13 and arrested and the families. And the criticism is that 14 Lonmin ought not to have characterised the strike as acts 15 of criminality. The criticism though conflates two 16 separate issues and those two issues are the advancement of 17 a demand for a particular amount which is a matter to be 18 dealt with between employer and employee and the second is 19 the manner in which the parties advancing the demand had 20 conducted themselves. Now I don't want to suggest for one 21 moment that every single person carried out acts which were 22 outside of the framework of the law. But the reality of 23 the matter is that the manner in which events had unfolded. 24 Forget the demand for the time being, we now talk about the 25 manner in which the demand has unfolded. So let's move</p>

<p style="text-align: right;">Page 39025</p> <p>1 away from the strike, a very simple, trite proposition of 2 human nature I'll put to you, that if I ask you for 3 something legitimate, but I come and punch you on the nose 4 in order to try to get it. You may examine the legitimacy 5 of my request on the one hand, but you're going to take 6 very unkindly to that bleeding nose on the other hand. Now 7 I put a simple example and I don't put it facetiously, the 8 simple point is that when the events were characterised as 9 criminal they were characterised as criminal because of 10 unfolding events and the conduct in the process. By that 11 stage Mr Fundi and Mr Mabelane were killed. 12 [14:11] We have seen photographic evidence of their 13 bodies, it was gruesome, it was brutal. By that stage Mr 14 Mabebe and Mr Langa were killed. Questions still remain 15 about precisely who had killed them, but it seems to be 16 generally accepted that they were killed from people who 17 were amongst the group of strikers. In other words there 18 was conduct from people amongst the group of strikers which 19 had moved from legitimate, a legitimate manner to advance a 20 demand to an unlawful and criminal manner in advancing the 21 demand. That doesn't make the demand criminal, it makes 22 the manner in which it is being done criminal. 23 CHAIRPERSON: The flipside of course the 24 possession by a significant number of strikers of dangerous 25 weapons which in itself –</p>	<p style="text-align: right;">Page 39027</p> <p>1 President, Mr Ramaphosa, to characterise that conduct as 2 criminal is just amazing, frankly. The manner in which 3 certain people had conducted themselves, the hard evidence 4 of what had happened from the 10th onwards, you simply 5 cannot, you cannot characterise that conduct and its 6 outcome in any other manner. At the very least it's a fair 7 characterisation and doesn't justify the criticism of that 8 characterisation. 9 The next issue that I would like to deal with is 10 at page 859 of our heads of argument and that goes to the 11 capacity of Lonmin Security. Now in this regard there were 12 a number of matters which were dealt with in respect of 13 which Lonmin Security was criticised and the essence of the 14 criticism was that you were inadequately equipped to deal 15 with the events which unfolded and consequently 16 inadequately equipped to deal with injuries to persons who 17 were injured in that period. When I say persons who were 18 injured I'm talking of between the 9th and the 13th when Mr 19 Mabelane, Mr Fundi, Mr Langa and the like, and Mr Mabebe 20 were killed, and all of that is because you failed in a 21 broader duty you might have had. That entire debate in the 22 first instance overlooked evidence given by Mr Blou which 23 wasn't challenged, and that evidence was that in 2005 a 24 process had commenced for Lonmin to demilitarise its 25 operations. In other words to move from dealing with</p>
<p style="text-align: right;">Page 39026</p> <p>1 MR BHAM SC: Well, there's more than 2 that – 3 CHAIRPERSON: - in itself is an offence 4 and they were engaging in public gatherings, armed with 5 these dangerous weapons. That in itself is an offence, 6 wasn't it? So it's not correct to say that this 7 unprotected strike was not accompanied by criminality. 8 MR BHAM SC: It goes beyond that because 9 you've now got evidence from Mr Nzuzza, who was the second 10 in command, and you'll recall my exchange with him in 11 cross-examination, in your bundle attached to our heads 12 it's at page 394, where on his behalf and through him he 13 was quick to say that those who were responsible for the 14 deaths of Mr Fundi, Mr Mabelane, Mr Mabebe and Mr Langa and 15 Mr Twala should be criminally charged. Then when I tried 16 to cross-examine him on that we got involved in a long 17 debate with my learned friend Mr Mpofu on whether they'll 18 be convicted and not and the like, but the simple truth of 19 the matter is Mr Nzuzza could only have said that if 20 anybody's found responsible for those deaths they ought to 21 be criminally charged on the basis of his own appreciation 22 that whoever was responsible in that conduct acted 23 incorrectly and that conduct was conduct of a criminal 24 nature. Now once that comes from him, to suggest that it 25 was wrong for Mr Jamieson and thereafter the Vice</p>	<p style="text-align: right;">Page 39028</p> <p>1 events on this scale to dealing with crime and the like on 2 a lower level. So if the question is asked was Lonmin 3 equipped to deal with the events as they unfolded, the 4 answer is obviously not. They weren't. 5 But the question cannot stop there. Lonmin, and 6 the question that should be asked is ought Lonmin to have 7 been in a position from a security perspective to deal with 8 these events. Could it have been expected of Lonmin, and 9 can it be expected going forward of companies to have a 10 sufficiently sophisticated and extensive security network, 11 including armed guards all over the show in extensive 12 numbers, to deal with the events as they unfolded? And we 13 would submit to you that cannot be expected of them. It's 14 a wide area, it's a significantly extensive event and it is 15 precisely why you have the South African Police Services 16 with their constitutional mandate to deal with events on 17 this scale and of this nature. 18 CHAIRPERSON: Mr Ngcukaitobi referred to 19 a judgment which I was responsible for in a matter in which 20 Mr Burger appeared in the SCA, dealing with the obligation 21 of an employer to provide a safe area for his employees to 22 work in, which obviously involves obligations to provide 23 some kind of protection. Now the main criticism on this 24 part of the case relates to the refusal of the board of 25 Lonmin to accede to motivated requests – I would have</p>

<p style="text-align: right;">Page 39029</p> <p>1 thought well motivated requests – by their own security 2 staff to give them extra equipment which would enable them 3 to protect the workers, and in particular to protect the 4 security guards. I don't know that the argument goes so 5 far as to suggest that Lonmin should have turned their 6 mining premises into an armed camp. The main thrust of the 7 criticism is their own security people foresaw the need to 8 have armoured vehicles and certain other equipment to 9 protect the security staff who would be performing the 10 functions of protecting the ordinary staff, and that was 11 turned down and the impression gained is that the board 12 preferred to expose their security people to the risk of 13 being killed or seriously injured rather than to depart 14 from, even to the extent request depart from the policy of 15 demilitarisation which had been adopted I think in a 16 slightly different security environment in 2005. I'm not 17 saying that's a good argument, but I'm just putting to you 18 my understanding of the case that you have to answer on 19 this point.</p> <p>20 MR BHAM SC: I'm quite fortunate that the 21 part that one of the persons involved in that SCA case is 22 sitting next to me and he's just told me that the SCA case 23 was directed towards protection of workers against acts of 24 sexual harassment. But let's assume it goes slightly 25 wider –</p>	<p style="text-align: right;">Page 39031</p> <p>1 MR BHAM SC: Can I deal with both of 2 those aspects? In relation to the first one the principle 3 that it's a duty of the employer to protect a safe working 4 environment, one would hope that every employer does so, 5 whether it's in a small household context or it's a larger 6 factory context. But you've got to ask yourself what the 7 limits of that protection are. Let's take it at its 8 lowest. I'm an employer in a household context. I've got 9 staff working for me. The best I can do is to employ armed 10 reaction, perhaps a security guard in the street and the 11 like. Am I expected to do more than that? If my home is 12 then invaded by five or six armed people and in that 13 context there's inadequate security, have I failed in my 14 duty? Am I meant – how far am I meant to go in the 15 provision of that? On the fact of this case it is one 16 thing to state a bland statement of an employer's 17 obligation. It is quite another thing to apply that 18 statement to what occurred in this instance because then 19 you would have to say that in this instance there was an 20 obligation on Lonmin to have sufficient security to have 21 protected everybody in its premises, some 38 square metres, 22 against the type of incidents and in the circumstances 23 which prevailed at this point in time.</p> <p>24 CHAIRPERSON: No, no, Mr Bham, that's not 25 the point that you have to answer. The point you have to</p>
<p style="text-align: right;">Page 39030</p> <p>1 CHAIRPERSON: No, but the principle – 2 that's quite correct –</p> <p>3 MR BHAM SC: I'm going to deal with the 4 principle –</p> <p>5 CHAIRPERSON: Your learned friend's 6 recollection is absolutely correct, but the principle laid 7 down in that case, not laid down as a new principle by the 8 way but based on earlier authority, was that an employer 9 has a duty towards his employees to provide them with a 10 safe working environment. Now obviously one can't impose 11 absolute liability on an employer in respect of that 12 obligation. The most one can expect is reasonableness, but 13 the point you're arguing – whether it's a good point or a 14 bad point we'll have to decide at the end of the day, but 15 the argument put up on behalf of the LRC was that it was 16 reasonable for – and also the evidence leaders too I think 17 – was reasonable for Lonmin to comply at least to the 18 extent of providing armoured vehicle and other equipment. 19 The answer in respect of the armoured vehicle was where 20 we've got the contractors who are some distance away and if 21 there's a need to get an armoured vehicle we can phone them 22 and they will send a vehicle. Of course how soon the 23 vehicle would arrive, would have arrived, what would have 24 happened before the vehicle got there, are matters that are 25 left to ones imagination.</p>	<p style="text-align: right;">Page 39032</p> <p>1 answer deals with the failure to provide adequate equipment 2 and adequately protected vehicle for the security staff, 3 not the whole staff, the security staff who would have to 4 go and deal with violence and disorder and so forth, and 5 it's a refusal of a request by Lonmin's own security staff 6 who say, Mr Sinclair and Mr Botes I think it was who 7 addressed I think on more than one occasion specific well 8 motivated request to the board for the expenditure that was 9 required to provide the equipment that they suggested was 10 necessary to deal with not remote possibilities but 11 foreseeable contingencies about which they were concerned. 12 That's the case you've got to answer.</p> <p>13 MR BHAM SC: Sorry, Mr Chairman, you 14 asked, you put two propositions, or two issues to me. I 15 dealt with the first one and I was getting on to the second 16 one, which you've just repeated. So I now want to get on 17 to the second one. In other words the first proposition 18 you put to me was the wider proposition of providing 19 security at the workplace, and I dealt with that. In 20 response to my answer on that you put the second 21 proposition to me, which I'm now getting to, which is the 22 second of two proposition you had put to me, and that is 23 that the question is simply framed as that; at the very 24 minimum was Lonmin required to provide the additional 25 equipment for its security personnel which they had asked</p>

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1 for repeatedly, and you heard Mr Blou and a number of other
 2 people say, which included hard-skin vehicles, as it was
 3 referred to here.
 4 There are a number of aspects to that. The first
 5 aspect to that is in relation to what occurred here,
 6 because you've got to ask yourself firstly the criticism
 7 arises from the deaths of Messrs Fundi and Mabelane, tragic
 8 circumstances, so that criticism and that issue can't go to
 9 the deaths of Mr Mabebe and Mr Langa. It goes to Mr – and
 10 now you've got to ask yourself what the evidence was before
 11 you in that regard. Let's start off with your question,
 12 but I want to go beyond that to look at the evidence as
 13 well because we can't ignore the evidence in this regard.
 14 In the first instance, yes, it is true that the
 15 Lonmin Security personnel had asked for better equipment,
 16 more sophisticated equipment, and even hard-skin vehicles.
 17 It is also true that Lonmin made a business decision and
 18 did not provide them. But in relation to the deaths of
 19 Messrs Fundi and Mabelane you've got to ask yourself the
 20 question because that question only arises as a result of
 21 their deaths, their tragic deaths, and in the attempt to
 22 suggest that if Lonmin had done something differently in
 23 that regard a different result might have eventuated.
 24 Now there are a couple of aspects to that. You
 25 can't ignore the evidence of the very security people who

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1 spoke to the need for more security equipment, who said
 2 that they had never previously experienced a situation
 3 where if they stood in front of oncoming workers who were
 4 on strike and asked them to disperse they were met with a
 5 violent reaction.
 6 The second aspect that they spoke to was that
 7 they never expected at all that they would be attacked.
 8 They said previously if they discharged rubber bullets or
 9 the like, even though there might have been a small number
 10 of them, it would have resulted in people having dispersed.
 11 They said that. So their evidence was that as well. And
 12 the third thing, and it is in part disregarded by the
 13 evidence leaders, but significantly what was stated by Mr
 14 Msibi that he said when they got there they were asked by
 15 Mr Mabelane to form a line. He said he thought that
 16 unwise. He was concerned about whether it ought to have
 17 occurred. They picked up the danger signals sufficiently
 18 early to have gotten away. Tragically Mr Fundi and Mr
 19 Mabelane were caught in their car at that point in time.
 20 Now the formation in the line, would that have been
 21 different if there was a hard-skin vehicle?
 22 The second point is you criticise what they had
 23 done in the operational decision they took on the 12th. At
 24 the same time we've heard criticism about their conduct on
 25 the 11th when there was the march on NUM. In other words

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1 they did nothing other than going to alert NUM, and in fact
 2 during the cross-examination of one of our witnesses the
 3 question was raised well why didn't you try to do anything
 4 more to stop these marchers from going to the NUM offices
 5 where all the records and the like were kept. The
 6 difficult truth, and it is the difficult truth because two
 7 Lonmin employees were tragically killed on that day, is
 8 that there are instances in which members of security
 9 forces in situations of this sort are at risk precisely
 10 because of what they're confronting. They're the first
 11 line of their defence. Yes, it would have been very good
 12 for the security staff and they still want it, they've been
 13 asking for it time and again, to have had better equipment
 14 and hard-skin vehicles. Would that on the facts of this
 15 case at that point in time have yielded a different result?
 16 You can't come to that conclusion.
 17 So in other words you can criticise Lonmin for
 18 not having had hard-skin vehicles. You've got to ask
 19 yourself how many hard-skin vehicles, used by whom. Do you
 20 need it in addition to what you've contracted for with Coin
 21 Security? All of those questions remain unanswered in the
 22 bland statement that if they had Nyalas and if they had
 23 different type of clothing there would have been a
 24 different result. Regrettably in this instance that
 25 criticism serves only to do one thing and that is to shift

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1 focus from the true cause of the deaths of Mr Mabelane and
 2 Mr Fundi, and that is the violent conduct on the part of
 3 certain people who they tried to stop, who they called out
 4 to stop, and who attacked them and left them in the state
 5 we saw, we were subjected to those photographs. That was
 6 the intent with which they were killed.
 7 Now if you just look at the outcome of the manner
 8 in which they were killed, you've got to ask yourself
 9 whether if they had been better protected with the intent
 10 that was shown on the day a different result would have
 11 eventuated. The state of their bodies regrettably doesn't
 12 give you the result that justifies the criticism.
 13 COMMISSIONER HEMRAJ: Mr Bham, what do
 14 you say about what happened at K4 Shaft where there was
 15 just one security person, where there was knowledge that
 16 the strikers might be marching in that area, there had been
 17 recent incidents of intimidation and violence and there's
 18 just one person –
 19 MR BHAM SC: You ask the question quite
 20 correctly, and again it goes now back to the first part of
 21 my answer. You remember there were two propositions, so
 22 the second proposition was on equipment. The first, the
 23 proposition you now put to me and the example you put to me
 24 goes to the extent to which protection can be offered. Now
 25 first of all that shaft was at a distance from where the

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1 events had occurred. It is true, and in fact we saw from
 2 Mr Nzuza's evidence when he tried to downplay the reason
 3 for them marching towards the shaft on that day, it is true
 4 that there was the possibility of elements from amongst the
 5 strikers heading towards other shafts. The question that
 6 you've got to ask yourself is given that the Lonmin
 7 Security staff was in total 60 people, and given where the
 8 focal point of the problem was at that point, which had
 9 already completely stretched that limited resource, what
 10 more could have been done at that point in time? Now you
 11 could ex post facto say they should have employed more
 12 security guards, they should have had more contractors and
 13 the like, but the reality of the matter is, Commissioner
 14 Hemraj, they were not equipped to deal with an outbreak of
 15 violence and attacks at that level over the whole mine,
 16 which is extensive. In other words you ask the question
 17 about K3 Shaft – K4, my apologies, about K4 Shaft. At that
 18 point in time you probably have found a similar limited
 19 security presence at a number of other operational areas
 20 which were away from where the koppie was and the central
 21 focal point. If you were to suggest that they ought to
 22 have beefed up security at K4 Shaft, first question is to
 23 what extent, what would have prevented it, and it could not
 24 have been limited to K4 Shaft. It would have been across
 25 the operational areas, and now you begin to get again into

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1 the debate of how extensive a security ought they to have
 2 provided at that point in time. Is the obligation on them
 3 to provide security to deal with events which is beyond the
 4 ambit of what they're capable of dealing with? Or does it
 5 at some stage cross the line between what they're capable
 6 of and the responsibility of the South African Police
 7 Services?
 8 So you can't look at the incident at K4 in
 9 isolation because you would then have to find, most
 10 unfortunate that it happened at K4, but K4 wasn't the only
 11 one which was so thinly staffed. But is so thinly staffed
 12 a criticism? You can only make the criticism if you're
 13 going to find that they ought not to have demilitarised.
 14 It gets back to that entire debate. There ought to have
 15 been a lot more security capable of dealing with incidents
 16 all over the show in what geographically is an extensive
 17 area, when the resources, limited as they were, that they
 18 had were employed to deal with the focal point of where the
 19 problem area had lie.
 20 [14:31] So again what I'm submitting to you is that the
 21 criticism and any adverse finding against Lonmin in
 22 relation to K4 would overlook the fact that that occurred
 23 at K4 but could as easily have occurred at one or other of
 24 the operational areas, and to say that you had to focus
 25 only on K4 would be to predict it was going to happen at K4

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1 when you knew it might happen at other areas, but what was
 2 the extent of your resources to protect each of those
 3 areas.
 4 The final aspect I want to deal with is dealt
 5 with by reference to an extensive quote in our replying
 6 submissions –
 7 COMMISSIONER HEMRAJ: Just before you
 8 move on, the ICAM report identifies other areas that Lonmin
 9 itself admits they felt short, not related to capacity.
 10 What do you say about that?
 11 MR BHAM SC: No, there are two aspects.
 12 Remember when they talk of having fallen short, not
 13 relating to capacity, they're talking of having fallen
 14 short in a number of respects which have not been raised as
 15 being related to the cause of any of the deaths. In others
 16 words what I'm dealing with is where the death did occur,
 17 because those are the facts and that's the ambit of the
 18 investigation, in this instance the death at K4, and the
 19 issue in relation to K4 was the limited security personnel.
 20 In other words those aspects you refer to, Commissioner
 21 Hemraj, which the ICAM report referred to as having been
 22 inadequate are not aspects which in any way arise in the
 23 debate about the number of people who were at K4 at the
 24 time.
 25 COMMISSIONER HEMRAJ: Yes, but moving

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1 away from K4, the other criticisms that arise in the ICAM
 2 report, what do you say about those? I'd be obliged if
 3 you'd deal with them.
 4 MR BHAM SC: I don't make any submissions
 5 beyond what we've already stated, for this reason,
 6 Commissioner Hemraj; your mandate goes to the deaths of
 7 people, injury to persons and the destruction to property.
 8 Now absent any aspect being linked to the items you, or the
 9 matters you are investigating, I haven't considered that.
 10 We haven't dealt with that because it simply is outside of
 11 your mandate. In other words you may in your operations
 12 generally have numerous shortcomings on numerous matters,
 13 but we're not investigating all of that, which would
 14 include insecurity. What we're investigating is such
 15 shortcomings as may have contributed to the deaths to
 16 persons and injuries to persons and damage to property
 17 which forms the subject matter of this Commission's
 18 mandate. That's what we focussed our evidence on. That's
 19 what we focussed our investigation and inquiry on.
 20 COMMISSIONER HEMRAJ: Yes, that is as I
 21 understand it and there are instances in the ICAM report
 22 which do deal with breaches of protocol and security that
 23 do lead to whether the employees were properly protected.
 24 MR BHAM SC: Again, sorry, I don't mean
 25 to turn the debate around. In relation to the specific

<p style="text-align: right;">Page 39041</p> <p>1 deaths of persons and injuries to persons I'm not aware of 2 any aspect of that ICAM report which becomes relevant in 3 respect of the deaths that we're looking at, and that's why 4 I don't make the submission. And if I'm wrong on that, 5 Commissioner Hemraj, perhaps I'll be pointed to a specific 6 instance, but I'm not aware, and that's why we've focussed, 7 we've tried to focus – a lot has been said in this 8 Commission, there's been a lot of evidence, there's been a 9 lot of references in many exhibits that have been put up. 10 We've tried to focus on what the terms of reference of this 11 Commission are in order to assist the Commission in what 12 it's got to deal with and that's why, I'm not aware, and if 13 there's something specific perhaps it will be drawn to my 14 attention, but I'm not aware of the causal link between any 15 of those other shortcomings and the matters being 16 investigated by the Commission. 17 Sorry, may I go to the last issue that I'm going 18 to deal with, and that's dealt with at page 861 of our 19 replying heads of argument, paragraph 49 onwards, and this 20 deals with the failure to close the mine. There's a subtle 21 nuance, the additional issue, and that was a criticism 22 about having positively called on people to go to work. 23 Let's deal with the first issue and that's the 24 failure to close the mine. Now we've quoted extensively in 25 paragraph 50 of our heads of argument the passage from Mr</p>	<p style="text-align: right;">Page 39043</p> <p>1 services were maintained, then the prospect of closing the 2 mine down at that point in time was not only impractical, 3 but impossible in that time period, impossible without 4 creating substantial environmental concerns in relation to 5 water pumping, concerns such as explosions because of the 6 methane build-up. So it simply was not possible. 7 He spoke in addition to the financial 8 implications of closure and again that aspect was not 9 challenged. So the first part of closure of the mine and 10 the fact that some people would have had to work was dealt 11 with by him in a manner which was not challenged. 12 The second part is if you were in those 13 circumstances in response to the growing conduct on the 14 part of those who were on strike to close the mine, you're 15 simply sending out a message for the future that the more 16 unruly the behaviour becomes, the greater the onus is 17 placed on the employer in order to close down its 18 operations. 19 The final aspect was the criticism for Lonmin 20 having put out the message encouraging people to go to 21 work. Now there are two aspects that I want to, or two 22 submissions I want to make in that regard. The first is 23 that it has to be implied in that criticism that Lonmin 24 ought to have kept quiet and therefore by its silence 25 discouraged people from going to work. Of course that's</p>
<p style="text-align: right;">Page 39042</p> <p>1 Seedat's evidence, which was not challenged, and that was 2 first of all the time period within which the mine could 3 have been closed, it would have taken us out of the 9th to 4 the 16th in any event. Secondly the practicalities of 5 closing the mine, and thirdly and most importantly the 6 implications of closing the mine and the extent of the 7 problems that would have been created. 8 So he deals with it at two levels, the first is 9 the need for essential services to be maintained and the 10 second the financial aspect, and in relation to essential 11 services being maintained he points to fundamental aspects 12 such as water pumping, ventilation, cage taking people up 13 and down, more significantly the methane build-up and the 14 fact that electricity was still running, but there were 15 real dangers of not only substantial damage, but aspects 16 such as flooding, aspects such as explosion because of the 17 methane build-up, and water pumping, which would have had 18 to be considered if you were simply going to close down the 19 mine, and what he testified to, and he was not challenged 20 on that, was that if you were to take each aspect, if you 21 were to take essential services, if you were to take the 22 concentrators next to the shaft, if you were to deal with 23 the smelters that are a fundamental part of the operation 24 and the base metal refinery and the number of people who 25 would have to go to work in order to ensure those essential</p>	<p style="text-align: right;">Page 39044</p> <p>1 the same as closure. That's the same as saying you ought 2 to have closed. 3 The second aspect to that in relation to the 4 items that the Commission is investigating is that there is 5 absolutely no evidence that those who unfortunately were 6 harmed, killed or injured were harmed, killed or injured – 7 and I'm not talking, I'm talking of people in the first few 8 days – because they had heeded the call to go to work or 9 because they were on their way to work because they wanted 10 to go to work, because NUM had encouraged them to go to 11 work, or the like. So you again enter into a realm of 12 speculation. But the fundamental point is the flipside of 13 that criticism is that Lonmin ought to have closed its 14 operations and the evidence given on the impossibility of 15 closing it and the impracticality and the dangers to close 16 it were never challenged. 17 Commissioners, I'm now at the end of what I wish 18 to say. If there are any questions I'm happy to deal with 19 them, but those are my submissions. Before I give up the 20 mike may I just turn to my right to find out if there's 21 anything else I need to deal with? 22 CHAIRPERSON: Yes, that sounds like a 23 sensible proposal. 24 MR BHAM SC: I've been given the all 25 clear to put the mike off now.</p>

<p style="text-align: right;">Page 39045</p> <p>1 CHAIRPERSON: I notice you didn't ask 2 your attorney, you only asked your leader. Yes, thank you, 3 Mr Burger and Mr Bham, for the arguments on behalf of 4 Lonmin. Thank you. Do we have – who is going to speak on 5 behalf of the Mabebe, Mabelane and Langa families? Yes, Mr 6 Ramphele, and we've also got the Bapo Ba Mogale, do they 7 want to go first? Mr Ramphele, have you come to terms with 8 your learned friends from Bapo Ba Mogale as to who's going 9 to speak first?</p> <p>10 MR RAMPHELE: The reason why I would ask 11 them to go first is because there are some of the issues 12 that have been raised by Lonmin and in which I have to 13 confer with my brother –</p> <p>14 CHAIRPERSON: So you'd like the Bapo Ba 15 Mogale Community –</p> <p>16 MR RAMPHELE: To go first, yes.</p> <p>17 CHAIRPERSON: - representatives to speak 18 first?</p> <p>19 MR RAMPHELE: Thank you.</p> <p>20 CHAIRPERSON: Yes, please put your name 21 on record, Sir.</p> <p>22 MR DEWRANCE: Thank you, Commissioner. 23 My name is Myron Dewrance, I'm from the Johannesburg Bar. 24 I appear with my learned colleagues Naidoo and Boudle.</p> <p>25 CHAIRPERSON: Thank you.</p>	<p style="text-align: right;">Page 39047</p> <p>1 The preliminary report puts it clearly that the 2 Lonmin has failed in its social labour plans in the 3 providing of housing since 2007. Lonmin has provided some 4 justification for not doing that, but our criticism is 5 basically, is directed at the government because in terms 6 of section 26 of the Constitution there's a duty on 7 government to provide housing and to ensure that there's 8 progressive realisation of the right to housing. The 9 report suggests that there's been an interview with the 10 local municipality, which in terms of the housing laws is 11 the responsible organ of State for development of housing 12 and development of townships. The Director of 13 Infrastructure at Madibeng Municipality suggests that 14 there's not sufficient funding, as well as the suggestions 15 also that the municipality in Rustenburg doesn't have 16 sufficient funding to provide housing. The report creates 17 a bleak scenario in the sense that there's no water, 18 sufficient water, there's not sufficient roads, not 19 sufficient health care, and all of that is indicative of, 20 or normally associated with poverty.</p> <p>21 Now the report also suggests that associated with 22 the socioeconomic problems which are referred to also, 23 there's an increase in drug problems. There's an increase 24 of abuse against women and children and the unemployment 25 levels are hovering at 74% in the communities. In fact in</p>
<p style="text-align: right;">Page 39046</p> <p>1 MR DEWRANCE: Mr Commissioner –</p> <p>2 CHAIRPERSON: I think it will be helpful 3 if you spelt your surname for the benefit of the 4 transcribers.</p> <p>5 MR DEWRANCE: D for Daniel, E-W-R-A-N-C- 6 E.</p> <p>7 CHAIRPERSON: Thank you. Alright, please 8 commence with your argument.</p> <p>9 MR DEWRANCE: Thank you, Mr Commissioner. 10 Our argument will be very brief. Mr Burger will be yet 11 again accused of stealing thunder. Our written response 12 relates to the preliminary report by Professor Whittaker – 13 I mean Forrester, where she invites comments on the 14 contents of the report. Our arguments will basically 15 focus, primarily focus on the housing issue in Marikana. 16 The presence of Lonmin, like with any other mine, invites 17 migrants to the area for people to seek employment. 18 There's no criticism against that because that's how 19 Johannesburg started and that's how Kimberley started.</p> <p>20 The effect of the migrancy is that – and the 21 report also states it clearly that the land of the Bapo Ba 22 Mogale has been invaded illegally or occupied illegally. 23 That is identified as Wonderkop where in 2012 the majority 24 of Lonmin employees resided, as well as in Nkaneng. That 25 also consists of informal settlements.</p>	<p style="text-align: right;">Page 39048</p> <p>1 Segwaelane the migrants outnumber the local Bapo Ba Mogale 2 by 20 to 1. So this is a recipe for disaster and it 3 appears to us that the local government has done very 4 little – I wouldn't say nothing, our written submission 5 says nothing, but I would say very little because there is 6 indication that they have addressed some of the issues. 7 They've done very little to address the problem.</p> <p>8 We would submit that – and we referred the 9 Commission in our heads of argument to the relevant case 10 law in the Blue Moonlight case that an excuse that there's 11 not sufficient funding is not acceptable. There's a 12 continuous duty on a municipality, on a government to 13 review its policies to ensure that there's progressive 14 realisation of socioeconomic rights, especially in the 15 context of socioeconomic rights. It may be a bit unfair in 16 criticising the municipality for them not being, they're 17 not here. I don't think they've been given an opportunity 18 to have a look at our written submissions as well as the 19 report from Professor Whittaker, and therefore we're in 20 agreement with the South African Human Rights Commission 21 and Mr Burger that an additional inquiry or an additional 22 mechanism be set up to address all of the issues, 23 especially the issues of socioeconomic, the fulfilment of 24 socioeconomic rights. In fact the report suggests that a 25 government agency or relevant government department will be</p>

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1 established to address the issues raised in the report and
 2 also the relevant replies made to this report, and that's
 3 basically, Commissioners, our participation and our
 4 submissions in this respect. If there's any questions
 5 we'll be glad to field them.

6 CHAIRPERSON: Thank you. No, thank you,
 7 we have no questions. What you've said is very clear and
 8 easy to understand.

9 MR DEWRANCE: As it pleases.

10 CHAIRPERSON: Mr Ramphele, would you like
 11 us to take the tea adjournment now, give you a chance to
 12 look at your notes and get instructions, and then we can
 13 come back at about just after 3 o'clock and you can have
 14 until 4 – we'll come back at quarter past 3 and then you
 15 can have a clear run until 4 o'clock. Would that be
 16 acceptable?

17 MR RAMPHELE: Chair, that is quite good
 18 for me.

19 CHAIRPERSON: Quite?

20 MR RAMPHELE: Very good decision for me.

21 CHAIRPERSON: Sorry, I didn't hear you.

22 MR RAMPHELE: I say –

23 CHAIRPERSON: Very good decision?

24 MR RAMPHELE: I appreciate that very
 25 much.

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1 CHAIRPERSON: I see, yes. Thank you very
 2 much. We will adopt that, adjourn till quarter past 3.

3 [COMMISSION ADJOURNS COMMISSION RESUMES]

4 [15:19] CHAIRPERSON: Yes, Mr Gumbi, the
 5 Commission resumes.

6 MR CHASKALSON SC: Sorry, Chairperson, we
 7 just thought it may be a good idea to explain to the public
 8 and the press that Mr Ramaphosa's representatives are not
 9 going to be addressing oral submissions because there've
 10 been a series of inquiries made to us as to why his
 11 representatives are not here now.

12 CHAIRPERSON: I understood Mr Budlender
 13 had been in contact with the attorneys. I wasn't sure what
 14 the final position was and I was asked by a member of the
 15 press what was happening and I referred her to Mr
 16 Budlender, but is there now confirmation that counsel for
 17 Mr Ramaphosa will not be addressing the Commission? Mr
 18 Budlender?

19 MR BUDLENDER SC: Chair, that's correct.
 20 We've received a letter stating that they stand by their
 21 written submissions and their original heads of argument
 22 and then their reply and there's nothing that they wish to
 23 add to that.

24 CHAIRPERSON: Thank you. Well, Mr
 25 Chaskalson, that leaves us with the problem that you

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1 raised. Mr Ramphele.

2 MR RAMPHELE: Thank you, Chair.

3 CHAIRPERSON: I don't know what I called
 4 upon you as Mr Gumbi. Mr Gumbi of course has addressed us
 5 earlier this morning and last week and I don't know what
 6 day it is with the Commission, but I'm sorry. I'm not sure
 7 whether Mr Gumbi's cross or you're cross with the mistake,
 8 but anyway, Mr Ramphele the floor is yours until 4 o'clock.

9 MR RAMPHELE: I think I would not have
 10 any problems with that, but I think Mr Gumbi would. Chair,
 11 thank you. I represent Mr Langa, Mr Mabebe and Mr
 12 Mabelane.

13 CHAIRPERSON: I think you represent the
 14 estates or families of those persons.

15 MR RAMPHELE: The families, that is
 16 correct. The families of the deceased Mabebe and others.
 17 Our representation, Chair, is going to basically start with
 18 looking at whether the police by their conduct created
 19 tension that led to the deaths of our clients and whether
 20 because of that conduct the police we can say should be
 21 found liable. The second will be in relation to Lonmin.
 22 We will then shortly discuss the conduct by NUM and the
 23 concessions that were made by AMCU. As you would know,
 24 Chair, much of our case was made out or at least that's
 25 what we think, in the cross-examination of the witnesses

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1 that were before the Commission and this representation is
 2 to address these concessions that were made. We start with
 3 the duty of the police in terms of the Constitution which
 4 says that the object of the police service is to prevent
 5 combat, investigate crime, maintain public order, protect
 6 and secure the inhabitants of the Republic and their
 7 property and to uphold and enforce the law. Now we look at
 8 the conduct of the police and whether this conduct actually
 9 is in line with the objectives set out in Section 205. And
 10 we say that it is common cause that on the 10th of August
 11 there was dissatisfaction and workers going to the LPD and
 12 there was about 2000 to 3000 of them. And we believe that
 13 as a result of this conduct the police then developed a
 14 contingency plan. That contingency plan if we're not wrong
 15 is exhibit U. The contingency plan is the contingency plan
 16 of 10 August 2012. Now we contend that that plan is
 17 testimony to the realisation by the police of the
 18 seriousness of the situation that they were dealing with.
 19 According to that plan the risks that were perceived and in
 20 writing in that plan that there was probably damage to
 21 property, there were intimidations, there were persons
 22 flocking together, I don't understand seizure, but it also
 23 says one of the threats was seizure. The operational plan
 24 then has got operational orders that are attached to it and
 25 in clause 3.2 of the plan it says "The orders are that the

<p style="text-align: right;">Page 39053</p> <p>1 POP will parade, JOC will be activated at 7 o'clock on 2012 2 08 10 and remain operational for the duration of the 3 strike." And then it also goes on to say "All incidents 4 must be reported to the JOC on an hourly basis." This plan 5 in clause 3.2.5 it says "No personnel may report off duty 6 without being given an instruction to withdraw." 3.2.4 "No 7 deviation from duty will be allowed without authority of 8 the JOC." We know that this beautiful plan that actually 9 realised the danger, that danger that was clearly 10 foreseeable to people in that area which included Langa, 11 Mabebe and Mabelane. And that this plan that was supposed 12 to be executed to protect them just – there's no evidence 13 that this plan was implemented. There were no reports on 14 hourly basis, there was not report to the JOC and the 15 Commission has not been furnished with any such report. 16 Now it is clear just from the plan that was appreciated by 17 the police, that they appreciated the danger, they knew 18 what to do and they did not do what they knew was supposed 19 to be done according to their constitutional duty. Now the 20 first recommendation hereto is that the Commission must 21 find that the police in their omission to implement their 22 own plan on the 10th or from the 10th of August 2012 created 23 conditions that resulted in heightened tensions in 24 Marikana. 2. The omission to implement the plan created 25 lawlessness where strikers were aware that they were not</p>	<p style="text-align: right;">Page 39055</p> <p>1 third recommendation is that those that are found to have 2 been derelict of their duties to implement this plan must 3 be brought to book because as a result of this we're 4 talking about 44 lives. 5 The second submission that we make is there is a 6 duty to secure non-striking workers. And this duty in 7 relation to the 12th of August actually was very clear 8 because there were multiple reports of attacks of people 9 going to work, we've just heard and this is uncontested of 10 people that were being attacked and of some attacks that 11 happened where people would ordinarily pass either to or 12 from work. These people were not on strike. We have a 13 constitution that says freedom of association must be 14 promoted or must be protected and in my heads I have tried 15 to show that the freedom of association that has protected 16 includes the freedom of choice not to go on strike. And 17 that is the right that the police have a duty to protect. 18 So what we have is we heard that on the 12th of August, in 19 the morning at 7:00 there was Nyala and a Kombi of 20 policemen that was around the area where the strikers were 21 busy with their rituals. We do not know who was in this 22 Nyala. We do not know what instruction these people that 23 were in the Nyala were given. We do not know why they 24 withdrew from that when we have evidence of Lieutenant- 25 Colonel Visser clearly indicating that on the 12th, in the</p>
<p style="text-align: right;">Page 39054</p> <p>1 monitored and this bolstered their courage and they almost 2 felt invincible. And this weakened a late intervention 3 that was tried to be mastered. The fourth was that this 4 omission encouraged the marauding by angry strikers, free 5 to harass and as we have seen, shoot, injure and in our 6 case killed our clients with no intervention of the police 7 because there was a plan, that plan was supposed to say in 8 this hour this is what is happening. And that plan was not 9 implemented. But this plan also says that the plan has to 10 be implemented on a 24 hour basis. Again a realisation of 11 the importance of the task at hand that they could not let 12 their eye off the ball. Yet the police failed to execute 13 this plan. We say this was a duty on the police to 14 protect, if the police are aware that duty has to be 15 activated by taking action as in the case of Marikana and 16 then they go on further to actually put and draw up a plan 17 with all components that one needs for people to be secured 18 and fail to then implement that plan. They have failed in 19 their duty. But the second recommendation we make hereto 20 is that the police must publicly publish information on 21 what actually made them not to implement the plan. Who is 22 responsible for omission of a situation that we can clearly 23 call a constitutional challenge to our country, developed 24 primarily by an omission which we cannot leave with 25 explanation. So this omission has to be explained. The</p>	<p style="text-align: right;">Page 39056</p> <p>1 morning they had received reports of people having been 2 injured the previous day. Of shootings that were reported 3 to the police. Now here you have a police Kombi with 4 persons inside and Nyala, they appreciate a situation 5 developing that may result in the loss of life. They don't 6 call backup if they feel that they are outnumbered, they 7 don't give an indication of what dangers are here and they 8 withdraw because they were there at 7:00. It might happen 9 that just an hour or so after their withdrawal Mabelane and 10 Fundi and the others were put in a situation where Mabelane 11 was then killed. And we're saying that that withdrawal 12 without an explanation and I suppose the President 13 correctly says public nationally and internationally have 14 concerns about how we as South Africans – are we safe? 15 Would the police actually be spectating our demise? And in 16 this particular instance we would be asking would they be 17 withdrawing in the same manner that they withdrew when the 18 Nyala and the Kombi withdrew on the 12th leaving the 19 security of Lonmin to deal with a situation that they 20 actually are completely not trained to deal with. Is that 21 now upholding Section 205 of the Constitution? Is that 22 upholding the right to life and I say in this particular 23 situation the police just failed to do their duty. 24 CHAIRPERSON: Assuming you are correct in 25 asserting that there was a breach of duty by the members of</p>

<p style="text-align: right;">Page 39057</p> <p>1 SAPS is there evidence on which a finding can be based that 2 there was a causal connection between that breach and the 3 deaths of Messrs Mabebe, Mabelane and Langa and presumably 4 each of those has got to be dealt with separately because 5 the circumstances of their deaths were different. But what 6 evidence – you don't address this in your heads, what 7 evidence is there of a causal connection between the breach 8 of which you complain by members of SAPS and the deaths of 9 the three persons in respect of whose estates, on behalf of 10 whose estates and families you appear before us? 11 MR RAMPHELE: Okay thanks, Chair. 12 There's uncontested evidence that at 7 o'clock there was 13 Nyala and a Kombi. By that time we don't have any evidence 14 that the strikers had gathered the courage to actually 15 confront the police and stop them from doing their duty. 16 CHAIRPERSON: How big is the property 17 that had to be patrolled? The area over which – which 18 contains the mines, the Lonmin mines how big is that area? 19 What is the area that would have to be patrolled, the Kombi 20 that you are talking about, the Nyala they obviously can't 21 be all over the property all the time. So the mere fact 22 that they were withdrawn doesn't in itself lead ineluctably 23 to the conclusion on the balance of probabilities that if 24 they had still been there – this is what Mr Burger calls 25 the counter factual. If they had been there is there a</p>	<p style="text-align: right;">Page 39059</p> <p>1 relation to the death of Mr Mabelane and Mr Fundi, that may 2 well have been a focal point which should perhaps have been 3 patrolled with a fair degree of regularity, but what about 4 Mr Langa and what about Mr Mabebe? In any event, I'm 5 putting the question to you because I'd like to hear your 6 answer. 7 MR RAMPHELE: You see the plan, the plan 8 clearly indicated the area that was supposed to be covered. 9 Clause 1.2 of the plan says, "The area where the operation 10 is to take place, namely Western Platinum Mine, Karee Mine, 11 and Eastern Platinum Mine, which falls within the policing 12 precinct Marikana SAPS," and there is no evidence that 13 these areas that you are referring to do not fall within 14 this venue. So in their plan they made a plan that covers 15 the eastern part, or the Eastern and the Western Platinum 16 Mine and therefore an argument that may come, which I think 17 will be a fair argument, that we could not be there, the 18 question would then come but in your plan that is the area 19 that you cover. So you had to be there, or your plan was 20 then supposed to say because of our capacity we can only 21 cover east and not west. So there is a causal connection 22 between the omission to cover the area that is in the plan 23 when it comes to Mabebe. 24 When it comes to Langa it will be a slightly 25 complex matter and there I would have difficulty because</p>
<p style="text-align: right;">Page 39058</p> <p>1 basis for saying that the deaths wouldn't have occurred? 2 In other words as I put it to you earlier, what evidence is 3 there of a causal connection between the breach of which 4 you complain and the deaths of these three gentlemen? 5 MR RAMPHELE: Okay. I want to believe 6 that there was only – and there is no evidence that the 7 persons that they were spectating, doing their rituals were 8 more than one group. There is no evidence that it was 9 another group that attacked Mabelane. If the threat came 10 from that group there was no need for them to be anywhere 11 else but where these people are. And that is the evidence 12 that we have that the strikers went through a ritual and 13 then they started moving and in that movement they met with 14 Voster, they met with Louw, they attacked a Coin Security 15 armoured vehicle and then Mabelane. So – 16 CHAIRPERSON: I'm sorry to interrupt you, 17 I put to you the facts in respect of each of the three 18 deaths differ and it may be that it's easier to find a 19 causal connection between the breach of which you complain 20 if it's established and the deaths of Mr Mabelane and Mr 21 Fundi than it is in the case of the other two deceased 22 persons. On behalf of whose families you are appearing, 23 namely Mr Mabebe and Mr Langa. 24 [15:39] The area around the hostel, the area around the 25 NUM office, the area where the activities took place in</p>	<p style="text-align: right;">Page 39060</p> <p>1 they were not in the venue that is put forward in the 2 contingency plan. Thank you, Chair. May I then go 3 forward, Chair? 4 CHAIRPERSON: Yes. 5 MR RAMPHELE: Thanks. But I also in my 6 submission will say that it is not necessary in this 7 situation for the police to have known Mabelane or Mabebe. 8 If they fell within the area of operation then those, at 9 least there must be evidence before the Commission that 10 attempts were made and those attempts failed and those 11 attempts were in line with a feasible plan that was 12 prepared by the police. 13 But I also want to venture to respond to a 14 further question that you asked; what about Langa? Now 15 assuming that there was no plan but there is knowledge by 16 the police that the workers of Lonmin are probably, or 17 possibly going to be facing intimidation or even be killed 18 on their way to work, the Constitution – and in the 19 interpretation of our Constitution we say that this right 20 to life is a right that we cannot denigrate or derogate. 21 COMMISSIONER TOKOTA: Sorry, Mr 22 Ramphele – 23 MR RAMPHELE: The Constitution – 24 COMMISSIONER TOKOTA: Sorry, Mr Ramphele, 25 I suppose this complaint of this failure of the police to</p>

<p style="text-align: right;">Page 39061</p> <p>1 implement the contingency plan you covered in cross- 2 examination. In other words you gave them an opportunity 3 to explain why, did you? 4 MR RAMPHELE: Yes, yes I did. 5 COMMISSIONER TOKOTA: What was the 6 explanation? 7 MR RAMPHELE: There was no explanation. 8 There was no explanation given. I asked one of the police 9 officers that are involved in the training of the police 10 whether in their training they're aware that a plan that is 11 properly developed can just be omitted and not be carried, 12 and there was no clear explanation before the Commission on 13 how – 14 CHAIRPERSON: Haven't you got a stronger 15 point than that? Captain, or I think he's a Major, Major 16 Govender was listed in the plan as being someone who's 17 playing an important role and his evidence was he was never 18 even told about the plan, never told he was mentioned in 19 the plan, never told what he was supposed to do. So the 20 failure to implement the plan is illustrated not only by 21 the evidence that you've dealt with in cross-examination of 22 other witnesses, but Major Govender's own evidence is very 23 strong in your favour as far as that's concerned. 24 MR RAMPHELE: Is it in agreement with me 25 that there was an omission, how that omission took place</p>	<p style="text-align: right;">Page 39063</p> <p>1 Ranto. Now part of that statement has got very concerning 2 sort of actually facts and that is Mr Ranto realised that 3 Lonmin Security would not be able to deal with the 4 strikers. He actually says "I then called Mr Govender and 5 asked Mr Govender for support to say we will not be able to 6 deal with this situation. You have more than a thousand 7 strikers," and in his statement he says Mr Govender was 8 disgruntled, he showed disgruntlement at this. There was 9 no clear indication whether they would get the support they 10 needed. He called Lieutenant-Colonel Merafe and he says 11 Lieutenant-Colonel Merafe was sarcastic. That is how he 12 describes the response that he got, and this sarcasm and 13 disgruntlement, if one reads the statement, comes from the 14 manner in which he perceived the local police station was 15 treated and he said well, why – I think something was said 16 like why don't you go to the province so that, you know, 17 because we always receive instructions from the province 18 when it comes to you. 19 Now this statement clearly indicates that there 20 was an issue with the local police station and maybe, and 21 it is something that again it would be good if, and we 22 recommend that the police be permitted to make a full 23 account of why the absence on the 11th and the 12th, 24 because – 25 CHAIRPERSON: When Major Govender gave</p>
<p style="text-align: right;">Page 39062</p> <p>1 was not put before the Commission? 2 CHAIRPERSON: [Microphone off, inaudible] 3 MR RAMPHELE: Because that is – 4 CHAIRPERSON: All I'm saying to you is 5 the evidence in relation to the plan and the non- 6 implementation of the plan, an important item of that 7 evidence relates to the evidence of Major Govender who is 8 listed in the plan as someone who'll be responsible for 9 Visible Policing and according to his evidence he was never 10 even told about the plan, not told about the role he was 11 supposed to play. That's a point in your favour. 12 MR RAMPHELE: Thank you, Chair, I always 13 appreciate your assistance. So what we submit as 14 recommendation is that in the same manner that we have 15 stated that there has to be full disclosure by the police 16 on what actually happened for them to actually not take 17 their responsibility in the manner in which they themselves 18 had indicated they were prepared to do. 19 But I also would like to bring to the attention 20 of the Commission one of the statements, I think it was a 21 statement that was submitted by senior counsel Tip in one 22 of the bundles that he submitted. Unfortunately, Chair, 23 you will excuse me with the issue of the exhibits, but in 24 that bundle that was submitted there is a statement by one 25 of the Lonmin officials called Mr Ranto, I think it's Lucas</p>	<p style="text-align: right;">Page 39064</p> <p>1 his evidence you didn't question him about it, did you? 2 MR RAMPHELE: [Microphone off, inaudible] 3 CHAIRPERSON: I say when Major Govender 4 came and gave evidence you didn't question him about this 5 point, did you? 6 MR RAMPHELE: Well, I do not think that, 7 Chair, we are in a court of law where if you have that a 8 witness is not questioned, therefore the matter must rest, 9 when there's a clear omission, especially on the side of 10 the State. You see, Chair, well obviously I wouldn't be 11 having that authority here but there is authority on 12 commissions that if there's a submission, especially 13 against an obligation by the State, it would be cumbersome 14 for the Commission to expect the complainant, or the cross- 15 examiner to have followed the procedures that one would 16 follow in a court of law. So the fact that he was not 17 questioned should not be reason for the Commission to say 18 there is no evidence that there was contestation about 19 this. There is still an obligation in terms of the 20 Constitution and the public needs to know because Ranto 21 clearly demonstrated a response of disgruntlement and 22 clearly Merafe was not prepared to do as he would normally 23 do because of the situation, the public should know are the 24 internal fracas of the SAPS going to compromise the right 25 to life of the public, and that we recommend is something</p>

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1 that the Commission must put to the SAPS because beyond
 2 this Commission it is in our interest to know that the
 3 Constitution and its values are actually protected by the
 4 police.
 5 CHAIRPERSON: I understand. I see you've
 6 got 10 minutes left. You haven't touched the part of your
 7 heads in relation to the liability of Lonmin. Are you just
 8 going to take those as read? It's quite full written
 9 argument on that, but –
 10 MR RAMPHELE: Yes.
 11 CHAIRPERSON: You haven't mentioned it at
 12 all in your oral address. Anyway, you've got 10 minutes
 13 left.
 14 MR RAMPHELE: Well, I think we didn't
 15 start at quarter past, Chair. We took a bit of time, I
 16 think about five to six minutes waiting for my time by the
 17 break.
 18 CHAIRPERSON: You were given three
 19 quarters of an hour –
 20 MR RAMPHELE: 45 minutes.
 21 CHAIRPERSON: - and you started at 20
 22 past.
 23 MR RAMPHELE: Yes.
 24 CHAIRPERSON: I'll give you another 10
 25 minutes tomorrow morning. That means in other words you

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1 can carry on now till 4 –
 2 MR RAMPHELE: Okay, thank you, Chair.
 3 CHAIRPERSON: - 10 minutes tomorrow
 4 morning and that –
 5 MR RAMPHELE: Thank you, Chair, but I
 6 think I'll do the 10 minutes. Let's see. So our
 7 submission, Chair, is that there was a duty on the part of
 8 the police to protect that area. Actually in my heads I go
 9 on to say that the State, where there's a possibility of
 10 lives of citizens being threatened, must investigate, take
 11 measures to protect, and in this case the life that was
 12 threatened was located at Marikana. It was directed at
 13 non-strikers or at those persons that would be in
 14 confrontation with the strikers. So the target was clearly
 15 identifiable. The area was clearly identifiable. Not only
 16 do you have that; you have a Police Act that was amended to
 17 say and if a crime needs national response then we have
 18 someone who is going to make sure that there is national
 19 response on the crime.
 20 Now from the 10th for the duration I don't think
 21 that this was given that type of attention and I want to
 22 submit that even Langa, because of even international best
 23 practice which says that they must investigate if there's a
 24 possibility of threat to life of a citizen, they must have
 25 looked at the villages and the workers in those villages

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1 and how they would be protected in this instance, because
 2 it was clear that they were targets.
 3 Let me go to Lonmin, and – well, before I finish,
 4 one of the recommendations, Chair, is that, and I know that
 5 you don't make absolute decisions but the issue of damages
 6 that it would be – maybe fair is not the right word, but
 7 you would understand what I mean – it would be useful if
 8 the Commission were to make a finding on the liability of
 9 the police in relation to this and further if there's an
 10 issue of say amount or quantum then it could be directed to
 11 a further body, because I believe that having to expect
 12 that these poor families should go through another process
 13 of trying to prove what has, what we've been trying to
 14 prove in the last two years in this Commission would be
 15 cumbersome on them.
 16 I'll go to Lonmin and in relation to Lonmin it's
 17 interesting because very interesting propositions were made
 18 by Lonmin. Maybe I should start with the first proposition
 19 that – and we have evidence of Da Costa who says "I was
 20 speaking to the workers, the executive had taken a decision
 21 not to speak to them," and you are being asked by the legal
 22 representatives of Lonmin to make a finding that the
 23 strikers did not want to speak to management, they wanted a
 24 deposit in a Capitec bank account, I think it's a bit not
 25 too far but it's actually seriously denigrating. The

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1 strikers say that we would like to speak to the management
 2 of Lonmin, we don't want to speak to anyone else. That is
 3 what they said even when they went to LPD. At no stage did
 4 they say this interaction is only going to take place once
 5 we have a deposit in Capitec. I think not only is this
 6 denigrating, it actually shows just how we view the dignity
 7 of workers. We even go on to say well, they don't know
 8 what they're talking about; this 12 500, they don't know,
 9 show in that is embedded they can't even count it properly,
 10 so why should we speak to them?
 11 So the Commission like this is the commission for
 12 truth, restoration and justice, and I think it is a
 13 Commission that builds a country. So if an attitude like
 14 that brings about tension that then results in non-strikers
 15 like Langa, like Mabebe, like Mabelane, having to actually
 16 bear the brunt of this attitude, obviously the values of
 17 our Constitution are eluding us.
 18 But let me go back to the issue of safety of
 19 workers so that I speak to the workers that I represent. I
 20 think in relation to safety of workers, in our cross-
 21 examination of Mr Mokwena we agreed that yes, something
 22 more could have been done. There was a lot more that could
 23 have been done. If workers come from five, six villages,
 24 what stops Lonmin from saying we are going to make sure
 25 that we get extra security to secure the buses from these

1 villages to the shaft and secure the shaft until knock-off
 2 time? It is a simple thing. You don't require much more.
 3 What stopped Lonmin from going to the radio and saying we
 4 are going to identify points at which we are going to
 5 collect workers, and we are going to make sure that those
 6 workers are safe, and not putting them in a situation where
 7 Langa at 3 o'clock in the morning has got to be alone going
 8 through to the shaft because he heard that there was this
 9 call that this strike is not lawful?
 10 [15:59] This strike is not lawful; if you follow it then
 11 you are actually probably dismissible as an employee, and
 12 it doesn't make sense to say that no, we don't have
 13 evidence that they didn't hear. Mr Mokwena was here, he
 14 says there was a TV everywhere in Lonmin and that TV was
 15 sending the same message. How do we then come and say no,
 16 maybe they were not influenced by radio? But again the
 17 issue is not whether they heard or whether we have
 18 evidence. It is not possible, they are not here to say
 19 that.
 20 The standard of proof that my learned brother
 21 Budlender SC spoke about is reasonable suspicion that this
 22 might have happened. Now can we reasonably say that we
 23 don't have suspicion that they heard that they were
 24 supposed to go to work, otherwise there was an unprotected
 25 strike, when we know by evidence that Lonmin and NUM held

1 says you have a duty to protect, and that fortunately is
 2 the judgment that you, Chair, gave in MTN and it was argued
 3 quite competently by Mr Burger. I see you want to say
 4 something, Chair?
 5 CHAIRPERSON: No, I just want to say it's
 6 4 o'clock. Would you like to continue with this very
 7 interesting part of the argument at 10 o'clock tomorrow
 8 morning? Sorry, for 10 minutes from 9 o'clock tomorrow
 9 morning.
 10 MR RAMPHELE: Correct, Chair. Thank you
 11 very much, Chair.
 12 CHAIRPERSON: Alright, we'll adjourn till
 13 9 o'clock tomorrow morning.
 14 [COMMISSION ADJOURNED]
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1 meetings in villages to say this strike is unprotected, go
 2 back to work, you must not heed the strike?
 3 So the duty of safety of workers by Lonmin is
 4 clear in the evidence that is before you. There is no
 5 logical conclusion that one can arrive at to say that there
 6 is no connection between the announcements that were made
 7 that you go to work and then the response of the deceased
 8 to actually heed to that announcement. There is absolutely
 9 no reasonable conclusion that one can bring about.
 10 In the OB of Lonmin there was an announcement
 11 made in the North West radio, in Radio Metsweding, we know
 12 that the TV screens of Lonmin were sending the same
 13 message. Now a worker would clearly be having a serious
 14 problem if this message that was so widely broadcasted did
 15 not come about. We're not saying that Lonmin, if the
 16 option was to close the mine then that is the only option.
 17 No, no, no, no, I don't think that the duty of care was
 18 does Lonmin have the resources to engage a bus company -
 19 they don't have buses but we know they do - to actually
 20 take out one of the buses, to hire extra security because
 21 they don't want to be militarised and they have 28000
 22 workers, and because they have 28000 workers they want to
 23 come to the Commission and say oh, we have too many
 24 workers, we can't protect them. The law says if you have a
 25 worker you must protect. So each one of the 28000 the law

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<p>ability 38922:12 38929:17</p> <p>able 38966:18 39063:3 39063:5</p> <p>absence 38987:15 39063:23</p> <p>absent 38992:10 39040:8</p> <p>absolute 39030:11 39067:5</p> <p>absolutely 38964:7 38999:10 39004:9 39006:2 39013:24 39018:8 39030:6 39044:5 39070:8</p> <p>absolution 38994:2</p> <p>abuse 39047:24</p> <p>accede 38963:10 38997:17 39028:25</p> <p>accept 38905:11,18 38907:19 38908:15 38908:16,18,19 38909:13,21 38910:1 38910:11 38932:23 38941:24 38947:15 38973:17</p> <p>acceptable 39048:11 39049:16</p> <p>accepted 38910:24 38947:5 38948:23 38974:12 38978:12 38989:8 39025:16</p> <p>accepts 38972:17,19,23</p> <p>access 38980:22 38985:13</p> <p>accompanied 39026:7</p> <p>account 38954:22 38963:23 38980:17 38991:15,16 39015:7 39063:23 39067:24</p> <p>accountability 38920:22 38921:1,15</p> <p>accountable 38914:25 38916:7 38917:18 38919:4,5,15 38921:3 38921:5,24 38922:5,9 38932:25 38988:3</p> <p>accounting 38988:12</p> <p>accounts 38909:11 39019:7</p> <p>accurate 38952:1 38967:10</p> 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