

**IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE TRAGIC EVENTS AT
MARIKANA DURING AUGUST 2012**

LONMIN'S HEADS OF ARGUMENT – 27 OCTOBER 2014

ABBREVIATIONS

1 We use the following abbreviations in these heads of argument:

- 1.1 “**AMCU**”: the Association of Mineworkers and Construction Union;
- 1.2 “**DMR**”: the Department of Mineral Resources
- 1.3 “**JOC**”: the Joint Operations Centre at Marikana;
- 1.4 “**NUM**”: the National Union of Mineworkers;
- 1.5 “**Lonmin**”: Lonmin PLC’s operations at Marikana consisting of Karee Mine, Western Platinum Mine and Eastern Platinum Mine ;
- 1.6 “**LPD**”: Lonmin Platinum Division, being Lonmin’s main administrative block situated at its mine premises at Marikana;
- 1.7 “**POP**”: SAPS Public Order Policing;
- 1.8 “**RDOs**”: Rock Drill Operators;
- 1.9 “**SAPS**”: the South African Police Services;
- 1.10 “**SLP**”: Lonmin’s Social and Labour Plan

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INTRODUCTION

- 2 On 16 August 2012 at Marikana in the North West Province, a tragedy unfolded when the SAPS killed 34 persons, most of whom were striking Lonmin employees. More than 70 people were injured and approximately 250 people were arrested on that day. Ten persons had also sadly lost their lives in the period from 9 August (when the strike commenced) to 16 August 2012. These devastating events resulted in the appointment of this Commission of Inquiry.

THE APPOINTMENT OF THE COMMISSION

- 3 On 23 August 2012 the President, acting pursuant to the provisions of section 84(2) (f) of the Constitution¹, appointed a Judicial Commission of Inquiry into the Marikana Tragedy.
- 4 Regulation 1 of the Regulations applicable to the Commission published in Government Gazette No. 35730 dated 28 September 2012 (“the Regulations”) defined the “Commission” as meaning *“the Commission of Inquiry into the tragic incidents at or near the area commonly known as the Marikana Mine in Rustenburg, North-West Province, South Africa, referred to in Government Gazette No.35680 of 12 September 2012”*.
- 5 The Commission was directed to investigate matters of public, national and international concern arising out of the events in Marikana during the period 9 - 16 August 2012.

¹Section 84(2) of the Constitution provides, *inter alia*, that “the President is responsible for... (f) appointing commissions of inquiry.” (see pages 116 – 117)

THE COMMISSION'S TERMS OF REFERENCE

- 6 The Commission's Terms of Reference were published in Government Gazette No. 35680 on 12 September 2012.
- 7 Insofar as it relates to Lonmin , the Terms of Reference enjoin the Commission to probe Lonmin's conduct, with particular reference to the following:
 - 7.1 *"Whether it exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between Lonmin and its labour force, on the one hand, and generally among its labour force on the other;*
 - 7.2 *Whether it responded appropriately to the threat and outbreak of violence which occurred at its premises;*
 - 7.3 *Whether it by act or omission created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct;*
 - 7.4 *Whether it employed sufficient safeguards and measures to ensure the safety of its employees and property and the prevention of the outbreak of violence between any parties".*
- 8 The Commission must also *"examine Lonmin policies generally, including the procedure, practices and conduct relating to its employees and organised labour"*.
- 9 The specific matters which the Commission was appointed to enquire into, and report upon, (as set out in paragraph 1 of its terms of reference) is prefaced by an introductory paragraph which requires a causal link between those specific matters and the *"events ... [at] Marikana Mine from 9 August – Thursday 18 August 2012*

which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction to property”.

- 10 The introductory paragraph refers to the appointment of the Commission to investigate into the matters referred to. In other words, the introductory paragraph sets out the ambit of the “*investigation*” for which the Commission was appointed. What follows upon the introductory paragraph are the wide-ranging subject matters of that investigation into which the Commission is required to enquire, make findings and report on and make recommendations. These matters are not separate from and independent of the matters which the Commission was appointed to “*investigate*”. What is required is a causal link between those matters and the tragic events which occurred at Marikana between 9 August 2012 and 16 August 2012.

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- 11.1 The ambit of the matters to be enquired into is wide. This initially led to a separation of the issues into two distinct phases (“*the initial separation*”). The initial separation recognised the causal connection of those matters to the tragic events of 9 – 16 August 2012.

- 11.2 The ruling for the separation of issues was made on 8 November 2012. Nearly two years later, on 25 August 2014, and pursuant to an application by the evidence leaders, the Commission withdrew its ruling of 8 November 2012. This was done less than four weeks prior to the end of the hearing of evidence led before the Commission, and after most of the evidence before the Commission had been dealt with and led on the basis of the initial ruling.

The Commission's determination of 8 November 2012 and its ruling of 25 August 2014

12 On 8 November 2012, the Commission, acting pursuant to the provisions of Regulation 19 of its Regulations, and in order to facilitate its investigation, determined that its hearings will be divided into two phases, the first being to:

- “1. ... examine the events of 9 to 16 August 2012 at Marikana which led to the deaths of at least 44 people, more than 70 people being injured, approximately 250 people being arrested and damage and destruction to property (“the events”).
2. The first phase will be confined to the following issues:
 - 2.1 An investigation of the facts directly relating to and relevant to the events themselves;
 - 2.2 An investigation of the lawfulness of the conduct of the SAPS and its members in fatally shooting 34 people on 16 August 2012 and in injuring strikers who were not fatally wounded;
 - 2.3 An investigation into whether participants in the crowd of strikers at Wonderkop on 16 August 2012 should be held criminally liable for the death of 34 of their fellow strikers and/or in respect of the alleged attempted murder or assault of SAPS members at the scene; and
 - 2.4 The direct causes of, and legal responsibility of any party for the deaths (of) and injuries to any persons and damage to property at Marikana during the period 9 to 16 August 2012”. (Emphasis added.)²

² Transcript 8 November 2012, pp 1154 – 1155 (see page 118)

- 13 This determination served both to delineate the issues to be dealt with in the first phase and to emphasize that the investigation would be directed to the conduct of various parties, but only insofar as such conduct was causally connected to the events at Marikana from 9 – 16 August 2012.
- 14 During the period 8 November 2012 to 25 August 2014, the Commission dealt with the “*first phase*” and evidence was led and witnesses cross-examined on the basis of the Commission’s determination of 8 November 2012. What was to be the second phase of the Commission’s investigation was eventually compressed into a few days of evidence and perfunctorily limited to the evidence of Mr Mahomed Seedat, a non-executive director of Lonmin; and only focusing on Lonmin’s housing commitments. There was no time or mandate to consider or investigate the role of other parties or factors in the socio-economic set-up at Marikana which might have contributed to the tragedy.
- 15 Prior to the ruling of 25 August 2014, the President had amended the Commission’s terms of reference, *inter alia*, by deleting paragraph 1.5 thereof.³ Paragraph 1.5 of the original terms of reference related to the role played by the DMR or any other Government department or agency in relation to the incident (being a reference to the tragic events between 9 – 16 August 2012), and whether such role was appropriate in the circumstances and consistent with their duties and obligations according to law. The deletion of this paragraph rendered a meaningful investigation into the matters intended to be dealt with under phase two impossible.

³ This was probably done *per incuriam*: the intention was to remove the whole phase two component from the mandate

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16.1 Consequently, and based on a preliminary report prepared by Dr Kally Forrest, this resulted, at the very tail end of the Commission's proceedings, into a limited focus on what was presented as Lonmin's housing obligations with reference in particular to para 1.1.3 of the original terms of reference. In this regard, in its ruling of 25 August 2014, the Commission stated that *"[Lonmin's] contention that Lonmin's non-compliance with its legally binding housing obligations cannot be looked at in isolation is also patently without substance. Because Lonmin's obligations in this regard are self-standing and the performance or non-performance by other bodies in this area of housing is not relevant"*.⁴

16.2 It is, with respect, difficult to assess Lonmin's compliance with its housing obligations absent evidence on aspects such as -

- the failure by the State to comply with its Constitutional mandate on housing and the dysfunctional state of the local authority and Provincial Housing Department;
- the probable effects of providing housing to a small portion of the Lonmin work force and the knock-on effect that might have had on wage demands, education and health services; and
- the DMR's position with regard to the provision of housing.

16.3 The Commission also did away with the *"causal link"* by its ruling of 25 August 2014 on the strength of conduct which was *"conducive"* to the *"creation of tension, labour unrest, disunity among its employees or other harmful conduct"*. Relying on the Oxford British World English Dictionary definition of *"conducive"*, (meaning *"making*

⁴ Transcript 25 August 2014, pp 35520 (line 20) – 35521 (line 4) (see page 119)

*a certain situation or outcome likely or possible*⁵) the Commission It is submitted that the word “*conducive*” creates a link between the conduct (by act or omission) referred to in para 1.1.3 of the terms of reference and the outcome referred to therein, being the “... *creation of tension, labour unrest, disunity among its employees or other harmful conduct*”.

- 16.4 Consequently, even the limited enquiry into Lonmin’s housing obligations had to be shown to have this link for it to be relevant to the Commission’s terms of reference. Such link had to be established by evidence, not speculatively or by assumption.

LONMIN’S APPROACH IN THESE WRITTEN SUBMISSIONS

- 17 Much of the spotlight through the Commission’s hearings fell on the conduct of SAPS. Indeed, most of the evidence led at the Commission was that of various SAPS witnesses, including senior police commanders present on the day of the tragedy, the national and provincial commissioners and the then Minister of Police. Many days were spent on evidence of police officers who could contribute little to the enquiry at hand. Cross-examination of these police officers often tended to obfuscate instead of crystallise the issues.
- 18 At times the spotlight fell on what was suggested to be acts and omissions on the part of Lonmin, and a suggested causal link between such acts and omissions and the deaths and injuries to people during the period 9 – 16 August 2012.
- 19 During the cross-evidence of Seedat, there was a focus on the question of what was said to be Lonmin’s housing obligations.

⁵ Transcript, 25 August 2014, p 35520, lines 20-23 (see page 119)

20 In these submissions, we focus principally on the (often contradictory) criticisms levelled against Lonmin by different parties in suggesting that Lonmin was in some way responsible for the tragic events.

21 We do not focus our submissions on criticisms levelled against SAPS, as this will be the subject of scrutiny by a number of the other parties. In relation to socio-economic considerations, it is only Lonmin's conduct, limited to the housing issue, that has received any attention. We deal with this aspect as well in these written submissions.

THE ESSENCE OF THE ALLEGATIONS MADE AGAINST LONMIN

22 During the early part of the proceedings, the Commission was awash with conspiracy theories and suggestions as to possible causes of the Marikana Tragedy. A few of the suggested contributory causes implicating Lonmin were:

22.1 Lonmin's management had negotiated with the RDO's outside collective bargaining structures.

22.2 Lonmin's management granted a discretionary allowance to RDOs on 29 July 2012 outside collective bargaining structures.

22.3 The "toxic collusion"⁶ / "unholy alliance" between Lonmin and SAPS; Lonmin and NUM; "capital" and "labour"; NUM and the "State"; "capital" and the "State"; and between the State and Lonmin⁷.

22.4 Lonmin's inconsistent approach – having initially "*negotiated*" with RDO representatives, and thereafter (from 9 August 2012) refusing to talk to the

⁶"Collude : 1. Conspire, plot, connive; act in secret concert" the New Shorter Oxford English Dictionary

⁷ Exhibit BBB6 pg 2 (see pages 120 – 130, specifically page 121)

striking workers who had embarked on an unprotected strike, thus creating a problem which it later found difficult to resolve.

22.5 Political pressure was said to have been brought to bear by and on behalf of Lonmin which lead to an over-reaction by the SAPS.

23 At a late stage in the proceedings a new suggestion against Lonmin was flighted: Lonmin ought to have closed its mining operations in order to avoid a risk to workers who wished to go to work. The issue though was not explored in any meaningful detail – it was only dealt with through suggestions made in cross-examination, and was put to bed by Seedat in his testimony on the difficulties with and consequences of a closure of the mine.⁸

24 The criticisms levied against Lonmin did not address the following:

24.1 On the one hand, Lonmin was criticised for its engagement (through Mike da Costa) with representatives of the Karee RDOs during the period late June to late July 2012.⁹ This, so it was suggested, created some level of expectation on the part of Lonmin's RDOs. In the same breath Lonmin was criticised for not having engaged with striking workers outside of the collective bargaining structures.

24.2 Whilst Lonmin followed the legal remedies available to it to address the disruption caused by the unprotected strike, it was criticised for having done so. Shorn of any emotion this essentially amounted to a criticism of Lonmin for having acted within the legal framework, more particularly South Africa's labour legislation and the relationship between employer and trade union.

⁸ Transcript, 11 September 2014, page 37794, line 2 – page 37797, line 15 (see page 131)

⁹ The evidence leaders (wisely) distanced themselves from this criticism

- 24.3 During the cross-examination of, in particular, Barnard Mokwena, criticism was levelled against Lonmin for having paid its RDOs less than RDOs were paid by Lonmin's competitors. In the same breath Lonmin was criticised for having granted the RDO allowances which substantially achieved parity in this regard.
- 24.4 Lonmin was criticised for involving the SAPS in what was termed as an essentially "*labour dispute*". It was also criticised for not doing enough to protect its workforce against the incident of violence which occurred between 9 to 15 August 2012.
- 24.5 Lonmin was criticised for not "talking" to the striking workers during the period 9 to 16 August 2012. But little or no attention was paid, in the context of this criticism, to the likely outcome if Lonmin had spoken and had communicated to the striking workers precisely the same message which Da Costa had earlier communicated to the Karee RDO representatives – a communication which resulted in the commencement of the unprotected strike and the events which followed. (The evidence by Da Costa that there would have been no room for negotiation where both sides' position was known, their position was immutable and not negotiable, and that unresolved negotiations would have further inflamed the strikers (and endangered the lives of non-striking workers and management) was left unchallenged.¹⁰)
- 25 Lonmin throughout the period 9 - 16 August 2012 acted within the law and the legal framework prevailing at the time. Attempts were made to force Lonmin to capitulate to demands expressed and made outside of that legal framework by an unruly crowd

¹⁰ A belated suggestion by the evidence leaders in cross-examination that Lonmin's resources could have been re-directed to meet the strikers' demands will be addressed in reply, if it is persisted with.

armed with dangerous weapons. During that period 10 people were killed¹¹ and thereafter on 16 August 2012, striking mineworkers were met by an eight second fusilade at scene one and more excessive force from the SAPS at scene two. To look *ex post facto* for the employer as being the *casus belli*, or as contributor to the tragedy, has no merit.

- 26 The criticism of Lonmin also failed to consider the actions of the striking mineworkers. As the strike escalated, those on strike were not only RDOs, and the expectation for a basic salary of R12 500 was not limited to RDOs. Lonmin was, by that stage confronted with a demand which was not limited to a single category of its workforce. That demand was also said, in evidence, to be non-negotiable. A collective bargaining agreement was in place, and two competing trade unions were vying for membership. The striking workers preferred to make demands outside established structures. Lonmin had never previously encountered such a situation. The untenable situation which Lonmin was by then placed into, was ignored in the criticism levied against it.

THE LEGAL FRAMEWORK OF COLLECTIVE BARGAINING IN SOUTH AFRICA

- 27 The Labour Relations Act 66 of 1995 ("the LRA") is the legal framework which governs collective bargaining in South Africa. Section 1(d)(i) of the LRA states that one of the purposes of the LRA is "*to promote orderly collective bargaining*".¹² It is designed to maintain industrial peace by ensuring that the inherent conflict between capital and labour occurs in a structured and controlled environment.¹³

¹¹ To this day, no-one has taken any responsibility for the brutal deaths of Messrs Fundi, Mabelane, Mabebe, Langa and Twala.

¹² **SA Airways (Pty) Ltd** [2010] 3 BLLR 305 (LC) at para 22 (see pages 132 – 140; specifically page 136)

¹³ **Foodgro v Keil** [1999] 9 BLLR 875 at para 41 (see pages 141 - 147) ; **Ceramic Industries Ltd v NCBWU** [1997] 6 BLLR 697 (LAC) at 701 (see pages 148 – 152 ; specifically page 150)

- 28 Part B of the LRA regulates collective agreements and endorses the principle of majoritarianism. It does so in order to avoid the labour unrest which inevitably flows from an employer collectively bargaining about wages and other conditions of employment with a number of trade unions in the workplace. Such a collective bargaining model is designed to avoid the wage disparities which may result from an employer concluding separate and different wage agreements with a number of trade unions which represent employees within the same bargaining unit. These wage disparities can, in turn, lead to disgruntlement amongst groups of employees and trade unions and, in turn, promote labour unrest.
- 29 The endorsement of majoritarianism is clear from s 23(1) of the LRA, which allows for the extension of the application of a collective agreement between an employer and a majority trade union to non-union employees in the workplace.¹⁴ Section 23(2) of the LRA also binds, for the period of the collective agreement, those employees who were members of the majority trade union at the time the collective agreement was concluded. They remain bound by the collective agreement irrespective of whether or not they continue to be a member of the trade union for the duration of the collective agreement.¹⁵
- 30 The wage agreement which Lonmin concluded with NUM on 2 December 2011 is such a collective agreement (see Clause 2.1 of the 2011 wage agreement). The RDOs, and other employees who subsequently joined the unprotected strike, remained bound by the 2011 wage agreement irrespective of whether they resigned their membership of NUM or were not members of NUM at the time of the conclusion of the 2011 wage agreement. Lonmin was entitled to hold the strikers to the

¹⁴ **Sigwali & Others v Libanon (a division of Kloof Gold Mine Ltd)** [2000] 2 BLLR 216 (LC) (see pages 153 - 158); **Fakude & Others v Kwikhot (Pty) Ltd** [2013] 6 BLLR 580 (LC) (see pages 159 – 165)

¹⁵ **Mzeku & Others v Volkswagen SA (Pty) Ltd & Others** [2001] 8 BLLR 857 (LAC) at para 55 (see pages 166 – 180; specifically page 175); **Vista University v Botha & Others** [1997] 5 BLLR 614 (LC) at 616 (see pages 181 – 184; specifically page 182)

provisions of the 2011 wage agreement. More importantly, Lonmin was under no legal obligation to collectively bargain with the strikers concerning wages (which had been determined until end September 2013) for the duration of the 2011 wage agreement.

- 31 Lonmin and NUM had earlier concluded a recognition agreement on 25 July 2011 ("the NUM recognition agreement"). This collective agreement recognized NUM as the sole bargaining agent for category 3 to 9 employees for as long as NUM represented 50% plus 1 of the employees in the bargaining unit (see clause 3.2 of the NUM recognition agreement"). There is no evidence to suggest that NUM no longer represented the majority of employees in the bargaining unit at the time of the unprotected strike. The fact that the strikers may have lost confidence in NUM or wished to resign their membership of NUM and join AMCU is irrelevant because neither the RDOs nor the strikers formed a separate bargaining unit. They lacked the requisite locus standi to collectively bargain with Lonmin. NUM remained the sole bargaining agent within the bargaining unit at the time of the unprotected strike.
- 32 In any event, Lonmin could not simply cancel the NUM recognition agreement and commence wage negotiations directly with the RDOs (or in an ad hoc forum with AMCU on behalf of the RDOs - as allegedly suggested by Mathunjwa on 16 August 2012). Clause 12 of the NUM recognition agreement sets out the procedure to be followed in order for Lonmin to cancel the NUM recognition agreement.¹⁶ It requires Lonmin to give ninety (90) days' notice of such cancellation to NUM. (Lonmin did give such notice to NUM in 2013 and subsequently cancelled the NUM recognition agreement on the ground that NUM no longer represented the majority of employees in the bargaining unit).

¹⁶ **Baderbop (Pty) Ltd v NUMSA** [2002] 2 BLLR 139 (LAC) (see pages 185 – 203)

33 Accordingly, Lonmin would have breached the NUM recognition agreement if it had collectively bargained with the strikers or AMCU without the consent of NUM. There is no evidence to suggest that NUM would have been prepared to grant such consent at the time of the unprotected strike. To the contrary, these two unions were rivals and even refused to proceed to the koppie in the same vehicle on 15 August 2012. It was only after the Marikana Tragedy that NUM, at the insistence of Lonmin, agreed to AMCU and a delegation of the strikers participating in the wage negotiations which ended the unprotected strike and culminated in an addendum to the 2011 wage agreement.

34 It would have been unwise and unprecedented for Lonmin to collectively bargain with strikers who were participating in an unprotected strike which failed to comply with s 64(1) of the LRA - the dispute had not been referred to the CCMA.¹⁷

The strike also contravened s 65(3)(a) of the LRA as the 2011 wage agreement was binding on the strikers.¹⁸

35 Item 6(1) of Schedule 8 to the LRA - Code of Good Practice on Dismissals and Industrial Action - states that participation in an unprotected strike constitutes misconduct. Item 6(2) requires an employer, at the earliest opportunity, to contact a trade union official to discuss the course of action it intends to adopt.¹⁹ Importantly,

¹⁷ **Columbus Joint Venture v NUMSA** [1997] 10 BLLR 1292 (LC) (see pages 204 – 207)

¹⁸ **Cape Gate (Pty) Ltd v NUMSA and Others** [2007] 5 BLLR 446 (LC) at paragraph 40 (see pages 208 – 212; see specifically page 212)

¹⁹ **Modise v Steve's Spar Blackheath** [2000] 5 BLLR 496 (LAC) at paragraphs 79 to 83 (see pages 213 - 243; specifically pages 228 – 229)

this Code does not require an employer to communicate with employees who are participating in an unprotected strike as to the reason for their unprotected strike.²⁰

36 Lonmin successfully interdicted the unprotected strike in the Labour Court on 10 August 2012. Any collective bargaining with the strikers would have undermined the Labour Court Order and would have set a precedent for other groups of employees wanting to pursue their separate wage demands through an unprotected strike. In other words, the message would have been conveyed that illegal industrial activity and violence reaps results.

37 In the result Lonmin was not under a statutory nor a contractual duty to collectively bargain directly with the strikers or with AMCU on behalf of the RDOs. On the contrary, the NUM recognition agreement prohibited Lonmin from doing so.

38 Lonmin's draft security procedure was no more than a suggested draft protocol that might be followed by Lonmin Security when dealing with employees who are participating in an unprotected strike. This draft procedure proposed that Lonmin Security should attempt to communicate with the strikers to ascertain the reason for the strike. It does not impose a legal obligation on Lonmin to communicate or collectively bargain with employees who are participating in an unprotected strike. In any event, this draft procedure had never been placed before nor approved by Exco.²¹

39 Whether our labour legislation needs amendment, and the contribution of labour legislation to South Africa's recent strike history and the effect that might have on

²⁰ To do so would blur the distinction between a protected and unprotected strike and would also undermine the dispute resolution mechanisms encapsulated in the LRA such as the conciliation of the dispute under the auspices of the CCMA before resorting to a strike.

²¹ Transcript, 15 September 2014, page 38086, line 17 – page 38087, line 12 (see page 244)

employment and foreign investment, are complicated questions falling outside the mandate of the Commission.

THE RDO DEMAND FOR R12 500 – ITS GENESIS AND EVOLUTION

40 On 21 June 2012, approximately 300 people marched to the Central Karee Administration building, where Da Costa's office was. They requested to see Da Costa. He was alerted to the arrival of the group by a member of Lonmin's security team and was advised that the crowd had requested that he meet them outside of his office to speak to them.²²

41 Da Costa sent a message that he would not go out to speak to the crowd. However, he invited them to elect a delegation to come into his offices and speak to him. The two RDO representatives who met with Da Costa were Messrs Magqabine and Mofokeng.²³ Magqabine and Mofokeng were both employed as RDOs at Karee, and were members of AMCU.

42 Da Costa was willing to, and did, speak to the RDO representatives because, as he explained –

“My people standing outside my office with a grievance. It's in my nature as a manager or a leader to, if somebody comes to me with a problem, I'll take the time to listen to and understand their problem and do what I can to find a solution to it. So that was my immediate reaction is let me hear what the issue is.”²⁴

²² Transcript, 3 June 2014, Da Costa, pp 30022 – 30023 (see page 245)

²³ Neither Magqabine nor Mofokeng had testified before the Commission. No reason was offered for them not having testified. They might have assisted the Commission in explaining the origin of the demand for R12500, a matter which was never explained to the Commission.

²⁴ Transcript, 3 June 2014, p 30029, lines 8 – 15 (see page 247)

- 43 Da Costa also explained Lonmin's policy, at the time, about speaking directly to employees, as follows –

“Well, on a line management level, we were actually, we had for some time before that, embarked on a programme to encourage supervisors to speak to employees, to get closer to employees, to understand their concerns, whether their concerns were of a nature that affected the operations and, you know, whether it was around improving their means to do their job and whether it was around personal issues, whatever those may be, we were working with supervisors to become more involved in understanding and getting closer to their employees. And we have set in place processes to escalate issues if a specific supervisor couldn't sort it out but it was, you know, a bit part of those process was that the supervisors were required to give feedback to an employee as soon as possible after a concern was raised. So raise concerns, listen to people and do something about it to create a solution. So that is from a line point of view.”²⁵

- 44 From a collective bargaining point of view, Da Costa explained –

“As far as, you know, from a collective bargaining point of view, well, we had definite structures in place. At that time wage negotiations or collective bargaining, conditions of employment-type issues were discussed on a central bargaining, let me say a company basis, central bargaining and the Unions represented there, the recognised Unions at the time were UASA, Solidarity and NUM. So any of, you know, when it came to negotiating wages and agreeing on, or should I say signing of a wage agreement and that sort of thing, it happened in these, in the central bargaining forum which

²⁵ Transcript, 3 June 2014, p 30030, line 21 – 30031, line 12 (see page 247)

*either happened on an annual basis or depending on the duration of the wage agreement, this central bargaining forum was constituted ”.*²⁶

45 When he met with Magqabine and Mofokeng, and having assumed that there was a grievance, Da Costa advised them of the procedure in place to escalate grievances through line management or through union structures. They, though, felt that their grievance was too serious to be dealt with through line management - they wanted no Union involvement at all. They then told him that they were unhappy with their remuneration and wanted their wages to be increased to R12 500 a month. Da Costa was “*stunned a bit*” and as the conversation developed, realised that they wanted an increase to a R12 500 basic wage, which translated into a 150% increase. Da Costa advised Magqabine and Mofokeng that he was not authorised to deal with the issue himself and would have to escalate this to Exco.²⁷

46 Da Costa was clear that he “*....didn’t negotiate wages with them. They tabled a concern with me which did relate to their basic wage, but at no stage did I engage in negotiations with them*”.²⁸

47 The significance of the meeting between Da Costa and the RDO representatives on 21 June 2012 was that –

47.1 It illustrated Da Costa’s willingness to listen to the RDOs through their representatives.

²⁶ Transcript, 3 June 2014, p 30031, line 13 – 30032, line 3 (see page 248)

²⁷ Transcript, 3 June 2014, pp 30024 – 30026 (see pages 246 - 246)

²⁸ Transcript, 3 June 2014, p 30032, lines 22-25 (see page 248). During the cross-examination of Barnard Mokwena, there was a suggestion put to him that however Lonmin viewed the Da Costa discussions with the RDO representatives, there might have been a perception on the part of the workers that Lonmin was negotiating wages. (See transcript 15 September 2014, pp 37927 – 37929 (see page 250)). However, this ‘perception’ was not testified to by any of the striking mineworkers who had testified, and there is no evidence to back-up such a ‘perception’.

- 47.2 Da Costa communicated in a cordial fashion explaining that he could not deal with wage issues which had to be escalated to Exco. He also explained to RDO representatives that there were grievance procedures which ought to be followed.
- 47.3 Whilst Da Costa listened to the grievance, he made it clear that he was not negotiating wages with Magqabine and Mofokeng.²⁹
- 48 Da Costa undertook to provide Magqabine and Mofokeng with feedback by 2 July 2012.
- 49 Da Costa prepared a memorandum for the Exco meeting held on 28 June 2012. Exco decided it needed more information such as a comparison between Lonmin RDO salaries and RDO salaries at Lonmin's competitors such as Impala and Amplats. The comparative exercise was done. This showed that Lonmin had fallen behind its competitors in wage levels of RDOs. In this regard, Impala was ahead of Lonmin, having regard to the increase it had granted to its RDOs earlier in the year (in consequence of the strike at Impala) and Amplats had already granted their annual increase to its workers.³⁰
- 50 On 2 July 2012, Da Costa, together with Tumelo Nkisi, the then Human Resources Manager at Karee, again met with Magqabine and Mofokeng.³¹ Da Costa advised them that he had not heard from Exco and that he needed more time. They then left. They returned later that day and met with Nkisi as Da Costa had already left. Nkisi

²⁹ In the absence of any evidence to the contrary, Da Costa's evidence in this regard should be accepted.

³⁰ Transcript, 12 September 2014, pp 37890 – 37892 (see page 251)

³¹ Da Costa kept to his previous undertaking to revert by 2 July 2012. His conduct, on behalf of Lonmin, was that of an employer willing to talk, in a setting and conducive to discussion. In this regard, a clear distinction ought to be drawn between a willingness to talk (even if the message transmitted is that appropriate structures should be used for wage discussions), as Lonmin showed it was, and an insistence on capitulation to a demand whose detail remains unexplained, which characterized the attitude of the strikers from 9 August 2012 to 16 August 2012.

suggested that they should give Lonmin a further period of three weeks within which to revert to them. They agreed.

- 51 On 19 July 2012, AMCU held a meeting at Karee. "Steve" indicated that the matter of the increase would be addressed at the upcoming meeting with the region³². The only increase then under consideration was the demand for the R12,500.00^{33, 34}. On or about 23 July 2012, Nkisi met with Jerry Ndamase, the branch secretary of NUM and Madiba Zwanile, the branch secretary of AMCU, to advise them that Da Costa had been approached by the RDOs for more money.
- 52 Ndamase and Zwanile were both non-committal. They advised Nkisi that the RDOs were Lonmin's problem and that Lonmin should therefore address the issues raised by the RDOs. Neither of them had suggested that Lonmin should not communicate with the RDOs, nor did they insist or maintain that such communications should be channelled through NUM and/or AMCU.³⁵ This evidence was similarly not challenged during Da Costa's cross-examination.
- 53 Thereafter, on 23 July 2012, the RDOs returned to Da Costa's office for feedback. Exco had not yet concluded its deliberations on the matter. However, Da Costa had received a mandate, if he thought appropriate, to advise the RDOs of Lonmin's willingness to pay an RDO allowance, with the amount to be clarified at a later stage. Da Costa communicated this to the RDO representatives, who then left and gave feedback to the other RDOs who were outside Da Costa's office.

³² Exhibit CCC3 (see page 252)

³³ Transcript, 14 February 2013, p5328, lines 8-15 (see page 253)

³⁴ It is astonishing, on the evidence presented, that participants to the strike who testified had no idea of any discussions, including at any AMCU meeting, of the amount of R12 500.00 prior to 9 August 2012. One is left to wonder how and why the matter was addressed at an AMCU meeting before its presentation to striking RDOs on 9 August 2012. This particularly because the strikers, outwardly at least, were so keen to distance themselves from any Trade Union involvement.

³⁵ Da Costa's Witness Statement, para 3.32 – 3.34 (see pages 254 - 277; specifically page 264)

- 54 On 27 July 2012, Lonmin's Exco had approved of and signed off on the decision to pay an RDO allowance to all Lonmin's RDOs.³⁶
- 55 The decision to grant the RDO allowance was not a result of any negotiation between Lonmin and the RDOs who had marched on Da Costa's office (or any other RDOs for that matter). The demand placed before Da Costa by the RDO representatives was for a basic wage increase to an amount of R12 500. The RDO allowance was for a significantly lesser amount, and was aimed at achieving parity with Lonmin's competitors. Lonmin did not negotiate the demand for R12 500 with the RDO representatives. Nor did it negotiate the RDO allowance with the RDO representatives. It did not ask if it could implement the RDO allowance. It did so without reference to the RDOs and in a manner which was in no way connected to the demand for a basic wage of R12 500. In other words, the demand for a basic wage of R12 500 and the RDO allowance were two distinct and separate issues. On the former, there was no negotiation between Lonmin and the RDO representatives. On the latter, a unilateral decision was taken in order to achieve parity with Lonmin's competitors.³⁷ None of this was successfully challenged during Da Costa's cross-examination.
- 56 On 30 July 2012, Da Costa again met with the Karee RDO representatives. He gave them feedback on the precise amounts of the RDO allowance which Lonmin would implement.³⁸ Da Costa advised the RDO representatives that their demand for a basic wage of R12 500 would not be negotiated or accepted. On 31 July 2012, Lonmin communicated the RDO allowance formally to the RDOs via

³⁶ It would, of course, have been untenable to simply pay the RDO allowance to Karee RDOs. Similarly, it would have been untenable for Lonmin to deal with any demand by Karee RDOs without reference to other RDOs employed at Lonmin. The knock-on effect would have been obvious.

³⁷ Lonmin did not believe that it was negotiating the issue with the RDO representatives. Whilst there were suggestions that these discussions in effect constituted negotiations, there was no evidence to back-up the suggestion at all.

³⁸ It is important to note again that he did not discuss or negotiate this issue with the RDO representatives – he simply communicated a Lonmin decision to them.

their line management. For just over a week, the situation seemed to have calmed down without any indication that the matter would be taken further.³⁹

57 Prior to communication of the RDO allowance, Nkisi advised Jerry Ndamase (NUM's branch secretary) and Madiba Zwanile (AMCU's branch secretary) that Da Costa had been approached by the RDOs for an increase in their wages. Ndamase and Zwanile were both non-committal and advised Nkisi that the RDOs were Lonmin's problem and that Lonmin should therefore address the issues raised by the RDOs. Neither of them had suggested to Nkisi that Lonmin should not communicate with the RDOs nor did they insist or maintain that such communications should be channelled through NUM and/or AMCU.⁴⁰ This evidence was similarly not challenged during Da Costa's cross-examination.

THE EVIDENCE OF STRIKING WORKERS

58 Much has been made during the Commission's hearings of the attitude adopted by Lonmin management from the 9th August to the 16th August 2012. This was a criticism levelled by lawyers and not congruent with the testimony of striking mineworkers who testified at the Commission.

59 By way of introduction –

59.1 Vusisuzi Mabuyakhulu and Sipete Phatsha are employed by Lonmin as RDOs. Mabuyakhulu has been employed as an RDO at Lonmin since 2008.

³⁹ Da Costa's Witness Statement, Exhibit 0017, paras 4.11 – 4.15 (see pages 254 - 277; specifically pages 269 - 270)

⁴¹ Quite unsatisfactorily during his evidence, Nzuza appeared to try and underplay his role (we shall return to this later).

Phatsha has worked as an RDO for approximately thirty years. He has been employed at Lonmin since 2007.

59.2 Mzoxolo Magidiwana is not an RDO. He is employed as an underground worker in the engineering department. His testimony, in the context of the strike by RDOs, and their demand for a salary of R12 500, illustrates the difficult situation which Lonmin faced regarding the demands made by the strikers during August 2012.

59.3 Mtshamba has been employed as a RDO by Lonmin since 2011. He works at Karee. He was not present at the commencement of the strike, having gone on leave at the end of July 2012. He only returned on the 13th August 2012 and joined the strikers on the Koppie on the 15th August 2012.

59.4 Xolani Nzuza was a significant and visible figure from the 11th August 2012 onwards. He was amongst the leaders of the group of strikers at the Koppie, and appeared to have been the “*second in command*”.⁴¹ Nzuza was employed at Lonmin since 2007 as a winch operator and not as a RDO.

59.5 Both Magidiwana and Nzuza, albeit that they were not RDOs, testified that they, too, demanded an increase in their basic wages to R12 500. It became evident through their testimony that by the time the strike had started on the 9th August 2012, the issue was no longer limited to a R12 500 basic wage increase for RDOs. Other categories of workers had joined in the strike – they, too, wanted a similar increase as that demanded by RDOs.⁴² This would have had a major impact on the affordability from Lonmin’s perspective of the wage demands, an aspect ignored during the limited phase two inquiry.

⁴¹ Quite unsatisfactorily during his evidence, Nzuza appeared to try and underplay his role (we shall return to this later).

⁴² Having regard to the actual evidence of the striking workers, it would thus be a misnomer to narrowly characterise the demand as it eventually unfolded to have simply been a demand by RDOs for an increase in their basic wage to R12 500. Other categories of workers had also joined in the strike and had advanced the same demand.

- 59.6 It appears from the testimony of all the striking mineworkers that the workers who went on strike from 10 August 2012 (following on their meeting of 9 August 2012), had not been informed of the discussions between RDO representatives and Da Costa during June and July 2012. Specifically, they had not been informed that Lonmin management had engaged in discussions with RDO representatives. They were accordingly ignorant of the stance adopted by Lonmin's management regarding the RDO wage demand.⁴³ No expectation existed that management would (again) engage with them. The early criticism of Lonmin's handling of the striking workers turned out to have no factual basis.
- 59.7 The striking RDOs who demanded that Lonmin management should talk to them would also not have been satisfied with mere discussion with Lonmin management – they demanded a capitulation by management regarding the demand for a salary of R12 500 and nothing less. What they wanted to ascertain was when payment would be made to them. Nzuza described the demand as non-negotiable.⁴⁴ Had this demand not been acceded to during “talks”, violence would in all probability have escalated earlier than it did.
- 59.8 By late afternoon on 10 August 2012, the strikers were aware of the interdict granted by the Labour Court. They were aware that they had embarked on an unprotected strike, the consequence of which could have resulted in their dismissal. Yet, they were willing to engage in such conduct, evidently in order to force Lonmin's hand into a capitulation.

⁴³ There was no explanation given to the Commission on the failure to give feedback to striking mineworkers on the Da Costa talks, whether at the commencement of the unprotected strike or at any time thereafter – in light of the criticism against Lonmin that it had “failed to talk” this was rather inexplicable, and was barely considered in evidence.

⁴⁴ Transcript, 28 August 2014, page 35997 (see page 278), line 22 – 35998 (see page 278), line 7; page 36075, lines 5 – 16 (see page 279)

59.9 They demanded a salary of R12 500 (quite when they formulated the demand is not clear). They were unable to shed any light on when that amount was first discussed or decided upon, by whom it was discussed and decided upon, and what the rationale for demanding that specific amount was. The probability is that it may have been deliberately pitched at a level where it could not be met by the employer, with the aim at leading to an impasse.

60 In relation to Magidiwana and Nzuzi, we make the following observations –

60.1 Neither was employed as an RDO. Consequently, the demand for an increase to R12 500 net did not apply to them, as the RDOs had made it clear (and used this as one of their justifications for not involving trade unions).

60.2 Magidiwana and Nzuzi believed/hoped/anticipated that by participating in the strike, they could ride on the wave of the demand of the RDOs R12 500, and secure a similar wage. Yet, the issue of a wage increase to R12 500 for non-RDOs had not been raised either at the time of the strike or prior to its commencement.

60.3 Magidiwana and Nzuzi's testimony illustrates that had Lonmin capitulated on the RDO demand (or for that matter, even discussed the demand after the unprotected strike had commenced) this would have sparked similar expectations by other categories of workers. The danger of a complete collapse of the collective bargaining structures and indeed the entire framework for wage negotiations set-up by the LRA was real.

61 We proceed to consider the testimony of each of the five striking workers.

Mabuyakhulu

62 Mabuyakhulu attended a meeting of RDOs held outside the Wonderkop Stadium on 9 August 2012.⁴⁵ It was confirmed at that meeting that there should be no trade union engaged in respect of the wage demand for R12 500. He gave three reasons for unions not being involved:

62.1 The RDOs belong to different unions.

62.2 The RDOs wished to negotiate only for themselves, without involving other employees.⁴⁶

62.3 The RDOs had complained to NUM about their wages since 2006/7 without any results. Indeed, he testified that NUM had already indicated that it would not be able to discuss wage increases for RDOs only.

63 This illustrates the difficulty created by the nature of the unlawful strike, the process followed and the particular challenges for Lonmin –

63.1 The RDOs, even though they belonged to trade unions, wished to engage Lonmin outside of the collective bargaining structure which had been developed over many years within a legal framework and with statutory backing. Direct negotiation would have had serious implications and would undermine the very fabric of that system. It could have spread beyond Lonmin and have affected the entire industry.

63.2 The approach was inconsistent with demand which had been discussed at an AMCU meeting on 19 July 2012.⁴⁷

⁴⁵ Transcript, 14 February 2014, p 5260 (see page 280)

⁴⁶ His testimony in this regard sharply brings into focus the participation in the strike by non-RDOs and the similar expectations of non-RDOs.

- 63.3 There is an inherent conflict between the position of the RDOs as articulated by Mabuyakhulu (they wished to negotiate a salary increase for themselves) and the testimony of Magidiwana and Nzuza, who are not RDOs but who demanded a similar wage increase.
- 63.4 The unlawful strikers' communication with Lonmin evolved. Initially, and during June and July 2012 when a smaller group of RDOs went to the offices of Da Costa, discussions were held with RDO representatives. From 10 August 2012 onwards, the marchers demanded collective discussion with Lonmin,⁴⁸ reaching the point where they wished Lonmin management to hold discussions with all of them at the Koppie.⁴⁹ Such a process of discussion by the employer with armed strikers taking part in an unprotected strike outside established structures would have been unprecedented.
- 64 Mabuyakhulu's testimony on why unions were not involved was unconvincing. He was challenged on why the matters were not taken up through AMCU. He sought refuge in the existing two year wage agreement concluded by NUM.⁵⁰ This did not justify the rejection of any union involvement, since the matter could have been raised through a representative union (including AMCU).
- 65 There were several other features of Mabuyakhulu's evidence which were unsatisfactory and illustrated the nature of the problem which Lonmin faced –
- 65.1 There had not been report backs on the discussions between RDO representatives and Da Costa during June and July 2012.

⁴⁷ Exhibit CCC3 (see page 252)

Transcript, 14 February 2013, pp 5323 – 5329 (see pages 281 - 283)

⁴⁸ The expected memorandum containing their demands did not materialise, as they "could not write".

⁴⁹ Nzuza also testified that this was non-negotiable.

Transcript, 28 August 2014, page 35997, line 22 – 35998, line 7 (see page 284)

⁵⁰ Transcript, 14 February 2013, pages 5328 – 5329 (see pages 282 -283)

- 65.2 Mabuyakhulu was evasive when asked to explain when the amount of R12 500 was decided upon, and how or by whom it was mooted and calculated. When pressed on the issue, he went into a discussion on what had happened in previous years, and eventually avoided dealing with the issue altogether. What was evident though, is that he could not explain when, where, by whom and on what basis the amount of R12 500 had been arrived at.⁵¹ Nor was anyone else.
- 65.3 It does not appear, having regard to Mabuyakhulu's testimony, that the striking RDOs were aware that Lonmin's management (through Da Costa) had earlier spoken to the RDO representatives.⁵² By 10 August, they were intent on enforcing their demand for R12 500.⁵³
- 65.4 In his witness statement (para 3), Mabuyakhulu stated that when the RDOs gathered at Wonderkop on the morning of 10 August, they had not decided to go on strike. They had only agreed to approach the employer with the R12 500 demand. However, the morning shift did not report for work. The strike had effectively begun. Mabuyakhulu presented the situation as if the march to LPD on 10 August 2012 was intended to, for the first time, convey the demand of R12 500. Yet, this demand had been conveyed to Da Costa, discussions had been held,⁵⁴ and Lonmin's position that it would not negotiate wage matters outside the collective bargaining structures had been communicated to the RDO representatives during June and July 2012. The march on 10 August 2012 was clearly the commencement of an unprotected strike to force Lonmin's hand in the matter.

⁵¹ Transcript, 15 February 2014, pages 5368 – 5372 (see pages 285 – 286)

⁵² Transcript, 15 February 2013, page 5373, (see page 286)

⁵³ Transcript, 15 February 2013, pages 5373 and 5377 (see page 286 and 288)

⁵⁴ Transcript, 15 February 2013, pages 5377 – 5379 (see page 288)

- 65.5 Mabuyakhulu's suggestion that five RDO representatives had entered the Lonmin offices on 10 August 2012 for discussion with Lonmin representatives is not borne out by the evidence. When challenged on this issue, he was unable to substantiate the version.⁵⁵
- 65.6 Mabuyakhulu was aware that the work stoppage was unlawful. It does not appear that the striking RDOs took any notice of the Labour Court interdict that had been granted on that day. Indeed, Mabuyakhulu, when asked about this during cross-examination, stated that "*I hear that for the first time today*".⁵⁶
- 65.7 He could not explain why, on 11 August 2012, three thousand workers had to march on the NUM offices when this could have been dealt with by representatives of the RDOs going to the NUM office.^{57 58}
- 65.8 His suggestion that the RDOs had marched to the NUM offices on 11 August 2012 because they believed that the NUM had advised Lonmin not to talk to the striking RDOs, was clearly false. It is unconceivable that the RDOs would march on NUM offices on the basis of an unsubstantiated suggestion that the NUM had asked Lonmin not to talk to the striking RDOs.⁵⁹ The march was undertaken as a hostile act in retaliation to NUM's opposition to the strike. That is why it evoked such an aggressive response from NUM officials.
- 66 Mabuyakhulu was unfortunately shot on 11 August 2012 and was hospitalised.

⁵⁵ Transcript, 15 February 2013, page 5387 (see page 289)

⁵⁶ Transcript, 15 February 2013, page 5388 (see page 289)

⁵⁷ Transcript, 14 February 2013, pages 5306 – 5307 (see page 290)

⁵⁸ Transcript, 14 February 2013, pages 5311 – 5313 (see page 291)

⁵⁹ Transcript, 15 February 2013, pages 5350 – 5351 (see page 293)

Phatsha

67 Patsha is an experienced RDO, having worked as such for approximately thirty years. He has been employed by Lonmin since 2007.

68 He joined the strike on 10 August 2012.⁶⁰ He could not testify about the march on LPD offices, since he only met up with the striking workers when they were returning from the LPD offices.⁶¹

69 He also could not testify about events preceding the march on the NUM offices on 11 August 2012, or the actual march to the NUM offices. He only met up with the workers as they were returning from the NUM offices. It is then that he heard that “*two strikers had been shot dead*”.⁶² This was clearly a significant source of inflaming an already volatile situation. (Two strikers had been shot and were injured, but no-one had been killed.)

70 In relation to Lonmin, Phatsha testified that “*the workers insisted they wanted to see their employer*”. When asked, in chief, to explain what the workers “... *wanted the employer to come and say or talk about?*”, Phatsha responded that “*what we wanted from the employer, Mr Chairperson, was money in the amount of R12 500.*”⁶³ What Phatsha stated in this regard, should be understood in the context of the following :

70.1 The striking workers were not aware of the discussions between RDO representatives and Da Costa during June and July 2012.

70.2 Phatsha himself first heard about the amount of R12 500 on 10 August 2012.

⁶⁰ Transcript, 20 February 2013, page 5425 (see page 294)

⁶¹ Transcript, 20 February 2013, pages 5428 – 5429 (see page 295)

⁶² Transcript, 20 February 2013, page 5430 (see page 295)

⁶³ Transcript, 20 February 2013, page 5433 (see page 297)

70.3 Phatsha was a member of the NUM; when asked why he did not want the NUM to be involved in the matter, he stated that *“the problem we had as RDOs was that if we forwarded our problems to the Union, that in fact they were not listening to us RDOs”*. Yet, he could not explain or point to any attempt to engage the NUM on the issue, nor was he able to shed any light on when, by whom, how and on what basis the amount of R12 500 was arrived at.⁶⁴

70.4 Phatsha was unaware that Lonmin had been willing to engage with employees through the proper collective bargaining structures. His unawareness of this important fact, and his statement that the striking workers *“... expected the management and the Unions to talk to us”*, emphasises that what was sought was a capitulation by Lonmin, and not any engagement on a possible wage increase.⁶⁵

70.5 Phatsha’s evidence about the weapons he carried to the Koppie on the 15th and 16th August 2012 was revealing. It illustrated that the strikers, when they gathered on the Koppie on the 15th and 16th August 2012, had anticipated and were prepared for confrontation. Their intention was not consistent with seeking constructive engagement or discussion of their demand for R12 500.

70.6 In this regard –

70.6.1 Phatsha testified that on the 16th August 2012, he had a *“panga and an assegai”*.⁶⁶ It transpired that what he actually had was a butcher’s knife and a sharpened iron rod.

70.6.2 Phatsha sought to distinguish what he carried on the 16th August 2012 from what he had on the 10th and 12th August 2012, namely a stick.⁶⁷

⁶⁴ Transcript, 21 February 2013, pages 5478 – 5481 (see pages 298 - 299)

⁶⁵ Transcript, 21 February 2013, page 5521 – 5523 (see page 300)

⁶⁶ Transcript, 20 February 2013, page 5457 (see page 301)

He was at pains, in chief, to explain that having initially carried just a stick, he eventually armed himself with dangerous weapons because “*I wanted to use them to protect or defend myself in case NUM came and attacked us like before*”.⁶⁸

70.7 He admitted that between 11th and 16th August 2012, he did not see any NUM members attacking a striker, nor was there any information suggesting that such an attack might occur.⁶⁹

70.8 His attempt to suggest that each striker took a personal decision to carry weapons without reference to anyone else, was challenged. His answer to this was unsatisfactory.⁷⁰

70.9 His suggestion that the fear of an attack from NUM motivated his carrying of dangerous weapons was explored in a discussion between him and the Chairperson. He was aware that there were police officers present at Lonmin, and that any attack or attempted attack by NUM members could and should have been dealt with by the police officers:

“CHAIRPERSON: And when you went back the afternoon of the 15th, there were police present, were there not? A whole lot of policemen and police vehicles, and so on, in front of the Koppie.

MR PHATSHA: That is correct.

CHAIRPERSON: So why did you take the iron rod at that stage?

MR PHATSHA: Those are the objects I carry when I want to defend myself whenever there is a fight.

⁶⁷ Transcript, 20 February 2013, page 5460 (see page 302)

⁶⁸ Transcript, 21 February 2013, page 5462 (see page 303)

⁶⁹ Transcript, 21 February 2013, page 5470 – 5471 (see page 304); Transcript, 21 February 2013, page 5494 – 5495 (see page 305)

⁷⁰ Transcript, 21 February 2013, page 5498 – 5499 (see page 306)

CHAIRPERSON *Did you expect that there would be a fight?*

MR PHATSHA: *That's not what I expected.*

CHAIRPERSON: *I see, but you thought there might be a fight so just in case there was going to be a fight, you had your two weapons with you is that correct?*

MR PHATSHA: *That is so.*

CHAIRPERSON: *Who did you think the fight might be with?*

MR PHATSHA: *We didn't forecast (sic) (focus?) on the person with whom we would be involved in a fight. There was no specific person.*

...

CHAIRPERSON: *So therefore is it fair to assume that you had these weapons to protect yourself against a possible attack by NUM, NUM people?*

MR PHATSHA: *That is so.*

CHAIRPERSON: *Now how could you fear an attack by NUM if the police were there in fairly large numbers and there were police vehicles there as well? What chance would NUM have had to attack you in those circumstances?"⁷¹*

(emphasis added)

70.10 On the days that Phatsha was at the Koppie, the situation was volatile and characterised by a high level of hostility. According to his evidence Mathunjwa did not convey to the strikers that Lonmin was prepared to listen to their grievances within collective bargaining structures after they had disarmed, dispersed and

⁷¹ Transcript, 21 February 2013, page 5507 line 6 to page 5508 line 16 (see page 307)
See also : Transcript, 21 February 2013, page 5518 – 5519 (see page 308)

returned to work.⁷² Mathunjwa appeared more interested in having a dig at NUM when he spoke to the strikers at the Koppie than in defusing the situation.

71 There is nothing in Phatsha's testimony which suggests that if Lonmin representatives had entered into discussions with the striking RDOs at the Koppie –

71.1 such discussions would have been meaningful and would be conducted with an open mind as to the demand;

71.2 that anything other than a capitulation from Lonmin would have sufficed;

71.3 that Lonmin representatives could have proceeded to the Koppie with any belief that their security could be guaranteed; it is not difficult to understand why "negotiation" over a loud hailer from a SAPS INyala would have been futile.

Magidiwana

72 Magidiwana was not employed as an RDO. He was asked, in chief, whether he had joined the strike in sympathy with the RDOs. His response was "*Yes, I heard that they asked other employees to also join in the strike*".⁷³ However, he also stated that he had heard "*... from some of the workers who said they had been stopped from going to work*". Magidiwana supported the actions of the RDO's "*... because (these) people work very hard*".

⁷² Transcript, 21 February 2013, page 5530 – 5532 (see page 309)

⁷³ Transcript, 26 February 2013, page 5864 (see page 310)

73 In cross-examination, it appeared that he had decided not to go to work because he had heard that workers had been prevented from going to work. The reports of the strikers having prevented other workers from going to work appear to have had a direct impact on his decision not to go to work –

“MR TIP : Now, what I am particularly interested in Mr Magidiwana, is the evidence that you have given about the reports that you heard that certain people had been stopped from going to work, and I am also going to ask you to give us a little more detail about that, if you would. What – can you remember when you received that report and when, as a result of that, you decided not to go to work yourself anymore ?

MR MAGIDIWANA : I heard about it for the first time on the 10th.

MR TIP : Yes. And was that also after you had come home from work?

MR MAGIDIWANA : Yes, Sir,.

MR TIP : And was it a result of that report that you stopped going to work after that ?

MR MAGIDIWANA : It is so, Sir.”⁷⁴

74 Magidiwana testified that he joined the strike because of the RDOs’ demand for R12 500; he also wanted R12 500.⁷⁵ He could not explain where his demand came from and on what basis he anticipated that he could expect a wage increase to R12 500. His testimony indicates that any capitulation to the demands of the RDOs would have had a domino effect, not only on expectations but also as to the means to achieve such an end. (This was out of kilter with the stance adopted by the RDOs

⁷⁴ Transcript, 11 March 2013, pages 6506 – 6507 (see page 311)

See also : Transcript, 11 March 2011, page 6508 (see page 313)

⁷⁵ Transcript, 28 February 2013, page 6009 (see page 312)

(as testified by Mabuyakhulu), that one of the reasons for keeping out trade union involvement was that the RDO demand did not involve other categories of workers.)

75 As was the case with Mabuyakhulu and Phatsha, Magidiwana could not explain the basis of a demand for R12 500 –

“MR NGALWANA : You worked as a general tramming or in the general tramming and transport division and you say you were striking for R12 500, is that correct ?

MR MAGIDIWANA : Do you want me to explain or just to say it, what do you want me to do ?

.

MR NGALWANA : I want you to confirm whether or not you as a general tramming and transport worker were striking for R12 500,00 a month ?

MR MAGIDIWANA : Yes.

MR NGALWANA : If that is indeed so, did you tell your lawyer that ?

MR MAGIDIWANA : Can you please repeat ?

MR. NGALWANA : Did you inform your counsel that you personally were striking in order to get R12 500 ?

MR MAGIDIWANA : Do you mean you yourself, as you are there, you don't know that the workers were striking to earn R12 500 ?

CHAIRPERSON :Answer to the question, don't waste time, play the fool, answer questions directly that you have been asked.

MR NGALWANA : I am sure you have had sufficient time to formulate an answer now, Mr Magidiwana. I will ask you again, did you tell lawyers that you as Mr Msoxolo Magidiwana join the strike in order to get R12 500, you personally, as a general tramming and transport worker ?

MR MAGIDIWANA : Yes.

CHAIRPERSON : Can I ask you a question about that, as a general tramming and transport worker, were you earning the same as the RDOs or less ?

MR MAGIDIWANA : They were earning a bit more.

CHAIRPERSON : So did you now want to earn the same as the RDOs were going to earn ? They were wanting R12 500, were you striking so that you would be paid the same as the RDOs you were getting even though previously you were getting less than they were ?

MR MAGIDIWANA :The only difference that would be in the salaries would only be the tax because after they had been taxed then they would have more salary than mine." (sic)

76 At no stage did he explain on what basis he, through the RDO strike could have expected an increase similar to the RDO. Magidiwana had no idea of the context of

the strike he participated in. He knew nothing about, nor had he been informed about the discussions with Lonmin management during June and July 2012. The simple, yet emphatic stance, which he communicated was that he wanted R12 500. It was not a question of Lonmin and the striking workers talking about that figure. It was a demand induced by violence and to be met through capitulation.⁷⁶

77 In response to a question during examination in chief regarding the address made by Mathunjwa to the striking workers at the Koppie on 16 August 2012, the following was stated :

“MR MAGIDIWANA : He said, ‘Employees, where I am coming from ... No attention is paid to me and it has been decided that you are going to be killed. The situation is not good. I am asking you to go to your places of residence’. By then he was kneeling down.

MR. MPOFU : Right, and what was the response of the workforce, or rather, the protestors ?

MR MAGIDIWANA : They said : ‘Here we are not going to leave before the employer comes and gives us an answer, because all we want is money and further that we are not fighting.’⁷⁷

and

“MR MOTAU SC : And you told the Commission that the RDOs appealed to other workers like yourself who were non-RDOs to join the strike, correct ?

MR MAGIDIWANA : Exactly.

⁷⁶ Transcript, 11 March 2013, pages 6511 – 6514 (see pages 313 - 314)

⁷⁷ Transcript, 26 February 2013, pages 5869 – 5870 (see pages 315 - 316)

MR MOTAU SC : And can I ask when people were asked to join the strike was there any specific action which was requested of them to do ?

MR. MAGIDIWANA : Yes.

MR MOTAU SC : What were they requested to do ?

MR MAGIDIWANA : That all the employees of Lonmin should demand money from Lonmin.

MR MOTAU SC : And you say that this is the request that you got wind of at least on the 10th ?

MR MAGIDIWANA : It is so, yes.”

78 His testimony is thus inconsistent with that of Mabuyakhulu who was at pains to emphasise that the demand for R12 500 was specific to RDOs, to the exclusion of other categories of workers.

79 Perhaps not surprisingly, Magidiwana could not explain his anticipation of R12 500, and its implication in monetary terms.⁷⁸

80 It was again clear that there was no desire for talks with Lonmin. The demand was for capitulation by Lonmin:

“MR MOTAU SC : So according to what you are saying, if Lonmin had sent a representative to the Koppie to say to you, let us engage, but not at the Koppie, let us set-up a process by which your demand will be assessed and evaluated, you would not have agreed, because you say that the employer in that same vein ought to have told you whether they’re putting the money or when are they going to deposit the money, correct ?

⁷⁸ See transcript, 12 March 2013, pages 6570 – 6571 (see page 316); 6578 – 6582 (see page 317 - 318).

MR MAGIDIWANA : I am saying Sir, and if they said, 'Look, gentlemen, the money will be put in on such and such a day, I would have had no problems. If he asks us to go to work, I would have done so.

CHAIRPERSON : You're not answering the question. I think to be fair, because you didn't understand. The proposition being put to you by counsel for Lonmin is that (if) Lonmin had said, if the strikers on the Koppie go back to work, then Lonmin will be prepared to discuss with them whether they would give them extra money and give them the R12 500 they were asking for. In other words, the words used are, Lonmin would engage with them on the demand. Not would accede to the demand and pay the R12 500. So what you being asked is, if you had been told on the 16th that Lonmin's attitude is, leave the Koppie, go back to work and we would then start talking to you about whether we would give you the R12 500, what would your attitude have been, that's the question.

MR MAGIDIWANA : That I would not have entertained."

81 When one considers the effect of the evidence of Messrs Mabuyakhulu, Phatsha and Madigiwana, the following, (from Lonmin's perspective) emerges –

81.1 The suggestion that Lonmin had negotiated outside the collective bargaining structures, and thereby created "the beast", is without foundation. Indeed, it's clear from the collective evidence of these three workers that they were not even told of the discussions which had been held between RDO representatives and Lonmin's management during June and July 2012.

- 81.2 They were unaware that Lonmin had communicated to RDO representatives (during June and July 2012 through Da Costa) that Lonmin was not willing to deal with wage issues outside of the existing collective bargaining structures. It was not communicated to them that Lonmin management had been willing to talk to RDO representatives, and had done so.
- 81.3 What was demanded of Lonmin from 10 August 2012 was not “talks “. It was capitulation. Lonmin was expected to capitulate on a salary demand whose origin and rationale to this day remains unexplained, in a manner which would not only have undermined existing collective bargaining structures but would have created a wave of expectation amongst other categories of workers (such as Magidiwana).
- 81.4 The atmosphere at the Koppie, where it is suggested Lonmin’s representatives ought to have proceeded to engage in talks with the striking workers, was volatile and dangerous. The evidence of Phatsha that his attempted justification on why he carried dangerous weapons on the 15th and 16th August was unconvincing. The mood and anticipation was one of violent confrontation.
- 81.5 There is no suggestion that housing or the housing allowance played any role in the unrest.

Mtshamba

- 82 Mtshamba worked at Karee Mine and had gone on leave at the end of July 2012. He returned to the Marikana area on 13 August 2012. He did not go to work on the 14th August. Instead, on the 15th August he proceeded to the Koppie because he “... *heard there was a meeting taking place on the mountain on the 15th”*.⁷⁹

⁷⁹ Transcript, 18 August 2014, page 35117, line 21 – 35118, line 6 (see page 319)

- 83 There was no indication from his evidence-in-chief that Mtshamba was aware what the strike was about. He did though state, in testimony not supported by the other strikers, that *“it was not only the issue of the R12 500. Even the R12 500 that we wanted, we did not expect the employer to bring it on that day. We expected talks to be conducted concerning that amount and we would accept a different amount than the R12 500, because after the strike, we went back to work without the R12 500. But we agreed to go back to work”*.⁸⁰ This testimony of Mtshamba was not supported by any of the other striking mineworkers. The other witnesses presented the demand for R12 500 as a *“non-negotiable”*. They gave no indication that they were willing to talk about or were negotiable on the issue of their demand for a basic wage of R12 500.
- 84 Mtshamba also stated that *“if Lonmin had taken a step or decision that Mr Da Costa did come and talk to the workers instead of calling the police, but Lonmin decided to call the police to come and shoot the people”*.⁸¹ The oddity of this testimony by Mtshamba is that there was nothing to indicate that he had any knowledge about or involvement in the earlier discussions with Da Costa. He also could not point to any instance when striking mineworkers were advised of the Da Costa talks. In addition, Mtshamba did not explain why workers went on strike notwithstanding the fact that Da Costa had engaged with RDO representatives and had conveyed Lonmin’s position to them. It is not obvious how he could responsibly give the evidence quoted above.
- 85 Mtshamba added a third element to his testimony when he argued that *“... but on the day of this tragedy if Lonmin people were scared to come to us, as they alleged they were scared, people would be killed, management would be killed, or people, they would be at loggerheads with the workers, they would have taken the leaders,*

⁸⁰ Transcript, 18 August 2014, p 35150, lines 4 – 10 (see page 320)

⁸¹ Transcript, 18 August 2014, p 35150, lines 10 - 12(see page 320)

*take them to a safer place, the police would have been there, go and talk to them at a safer place. It would have been better if they went and spoke, listened to each other instead of calling the police”.*⁸² This evidence is contradicted by the evidence of Magidiwana and Nzuza (which is dealt with in more detail later below) both of whom were clear that one of the demands of the striking mineworkers, namely that Lonmin come to talk to them at the Koppie was a non-negotiable.

86 Eventually though, Mtshamba’s evidence on all these key points fell apart –

86.1 Insofar as he relied upon Lonmin not taking the same stance as Da Costa had done in his engagement with RDO representatives prior to 9 August 2012, Mtshamba’s evidence could not have related to any period prior to 15 August 2012 since he was not present. His evidence on the Da Costa talks was sketchy. He testified that he was not part of the group that had marched to Da Costa’s office but had only heard about *“these things from my colleague who worked with me at the mine”*.⁸³ He professed to be unable to identify the *“colleague”*.⁸⁴

86.2 Even in recounting what he was told by his *“colleague”*, he stated that the issue was ... *that the RDO’s salary or wages at Anglo and the other mines on that side was more than ours. And that they had also gone to Mr Da Costa’s to complain about the RDOs wages.*⁸⁵ Mtshamba testified that he was not told how much the RDOs at the other mines were getting paid. However, when he was asked whether he *“... would have been satisfied if Lonmin paid*

⁸² Transcript, 18 August 2014, p 35151, lines 1 - 13(see page 320)

⁸³ Transcript, 19 August 2014, p 35391, lines 21 – 22 (see page 320)

⁸⁴ Transcript, 19 August 2014, p 35391, line 25 – p 35392, line3 (see page 320)

⁸⁵ Transcript, 19 August 2014, p 35392, lines 3 – 6 (see page 320)

*to you as an RDO what RDOs were paid at any mines ?”, his response was emphatic – “I would have been very happy”.*⁸⁶

87 This is precisely what the RDO allowance decided upon by Lonmin was directed towards. Mtshamba ought to have been “very happy” with no reason to strike.

88 Mtshamba was also asked where the figure of R12 500 had come from. He stated that he heard about that figure for the first time “while I was on leave”.⁸⁷ Again, quite how he would have heard about the figure whilst he was on leave rather than in the report back to him (to which he vaguely testified) on the Da Costa talks, remained a mystery. More importantly, though, he had no idea how the figure had been arrived at. His evidence on this figure is incongruent with his testimony regarding what he was told the issue was, namely parity with RDOs at other platinum mines.

89 The mystery in Mtshamba’s evidence though did not end there. He was asked about his impression of the issue at hand when he went to the Koppie on 15 August 2012. The following exchange occurred during his cross-examination –

“MR MTSHAMBA : I arrived on the 13th, got an explanation about things that were happening, I was told that Mr Da Costa agreed to give R750 to the RDOs at Karee. Now RDOs from Western also wanted an increase. Now all the RDOs came together, decided to come together and ask or demand an increase from Lonmin as a whole.

MR BHAM SC : If I understand what you’re saying, and I just want to understand this very carefully, at the end of July if Lonmin had said to you they were paying you a salary of an RDO, which the other mines are paying

⁸⁶ Transcript, 19 August 2014, p 35392, lines 13 – 20 (see page 320)

⁸⁷ Transcript, 19 August 2014, p 35392 lines 24 – 25 (see page 320)

to their RDOs, you would have been very happy if I hear your words correctly?

MR MTSHAMBA : Yes, I said so.

MR BHAM SC : And when you came back on 13th August what was explained to you was that the reason for the discontent and therefore the strike was that the increase, the RDO allowance increase which Mr Da Costa had communicated was limited to the RDOs at Karee and all of the RDOs at Lonmin also wanted the same increase ?.

MR BHAM SC : And you thought that because only you as a RDO at Karee or the group of RDOs at Karee were getting what Mr Da Costa had offered, but that the other Lonmin RDOs were not getting that, the strike was therefore justified ?

MR MTSHAMBA : Mr Chair, you should remember that I'm not the one who took a decision about embarking on a strike. I was coming from leave when I got there the strike was on.

MR BHAM SC : I'm going to ask that question one more time. What was explained to you when you came on the 13th, when you joined the strike – were there people who were on strike who were unhappy because what Mr Da Costa offered was only offered to the Karee RDOs and all of the other Lonmin RDOs wanted the same offer made to them.

MR MTSHAMBA : Yes, that is what I said.⁸⁸

90 On the reasons for going on strike, Mtshamba was wrong in every respect. On his evidence, there was no justification for a demand for R12 500, nor could he explain the origin of this amount. He wanted parity with what RDOs at other mines were being paid. The RDO allowance gave him that and that ought to have left him “very happy”. On the 15th August, he somehow gained the impression that the issue was that the other RDOs at Lonmin also wanted the same allowance. The RDO allowance though was not limited to Karee RDOs – the allowance applied to all Lonmin RDOs. What then remained the issue as far as Mtshamba was concerned ? That question was never really answered by him nor why he had gone on strike, other than for him stating that when he came back from leave “*the strike was already on*”.⁸⁹

91 Mtshamba, as was the case with the other strikers who had testified, could not explain where the figure of R12 500 was discussed. Equally, he could not satisfactorily identify any report back on the Da Costa talks.⁹⁰

92 Mtshamba left us none the wiser as to why he had joined the strike. From his perspective there should have been nothing further for Lonmin to talk to the strikers about, since the very issue that he was “very happy” with, had already been resolved. And that issue had been resolved on the basis that all RDOs at Lonmin would get the RDO allowance, and not just the Karee RDOs.

93 A question which keeps looming large, is the basis upon which the demand for R12 500 was made, the circumstances in which it had arisen and the driving force behind that demand. After over two years of evidence, not a single person from

⁸⁸ Transcript, 19 August 2014, pp 35393 – 35394 (see page 321)

⁸⁹ Transcript, 25 August 2014, p 35397, lines 16 – 23 (see page 323)

⁹⁰ Transcript, 25 August 2014, p 35401, lines 6 - p 35403, line 6 (see page 324)

those who were involved in the strike was able to explain any of this, nor did any person from amongst the strikers come forward in order to leave the Commission any the wiser on what was presented, not only as the central issue, but was testified to by a significant figure from amongst the strikers, Nzuza, as “*non-negotiable*”. Someone was probably seeking a reason to strike, and chose a figure which that person or entity knew could not be met by the employer.

Nzuza

94 Nzuza, in his cross-examination by both Mr Budlender and Mr Semenya (for the evidence leaders and SAPS respectively), did not give the impression that he was willing to talk openly and frankly. Instead, he was argumentative, evasive on important issues and did not engage frankly.

95 This should be of great concern to the Commission since his role as a leader, and (at least unofficially) the second in command of the strikers at the Koppie, placed him in a position to be of greater assistance to the Commission than he ultimately turned out to be.

96 However, what Nzuza let slip is of significance. It starts with the circumstances in which Nzuza joined the strike:

“MR MPOFU : Alright, and then on the – so you went on night shift on the evening of the 10th, when the following day would be the 11th.⁹¹

MR NZUZA : Sir, I'd been doing night shift all along as until the 10th, the evening, when I was on my way to work that I came across people along the way, that was on my way from my residence. The only of the place where I'm staying, Sir, together with another old man, are both RDOs of Sotho

⁹¹ By then the strike had already started – on his own version, Nzuza did not join the strike at the outset.

speaking. I heard them talking and they were saying there was no, nobody was going to work. I said to them I haven't heard about this, I am going to work. There were no buses then, Chairperson, and there's a road which leads from there to the workplace and this road goes through some forests there which was the way to Fourbelt, where I was working.

Along the way I met, came across, four people. They asked me where I was going to. I said to them I'm going to work. One of them happened to know me. He said 'I know this person'. They were not standing very close to me, a distance of about 5 metres, they stood and spoke to me. They made me pass. I was not very far away from them; after stones were thrown at me from them I turned around and ran to the house. That's where I further heard in the house that there's nobody going to work, there would be a meeting in the stadium the following morning, the result of which I woke-up and then went to the meeting."

97 On his testimony, Nzuza did not intend to join the strike when it started. He only did so after he was "stoned" by the four people he had come across, as he was on his way to work. He intended to go to work, was not aware of the strike and had no intention of going on strike and did not know about any demands made on Lonmin for an increase in wages to R12 500.⁹² When he did join the strike on the 11th August, he did not know the reason for the strike.⁹³

98 When he eventually joined the strike and was told about the demand for R12 500, he understood this to be a demand which was not limited to RDOs: "*I know the workers who wanted that money*".⁹⁴

99 Nzuza was also clear on what the striking workers wanted to hear from management:

"MR BHAM SC : The demand was a salary of R12 500.

⁹² Transcript, 28 August 2014, pp 35986 – 35987 (see page 325 - 326).

⁹³ Transcript, 28 August 2014, pp 35989, lines 2 – 8 (see page 327)

⁹⁴ Transcript, 28 August 2014, p 35990, line 6 – p 35991, line 2 (see page 328)

MR NZUZA : Yes.

MR BHAM SC : And you said that the workers were waiting for a report on when the employer would be able to give us the money, that must be the R12 500.

MR NZUZA : Yes, that's we were waiting for to hear when are we getting that money.

MR BHAM SC : And if you were told that Lonmin would not agree to give you the R12 500, the strike would have continued ?

MR NZUZA : That's the part I don't understand.

MR BHAM SC : I'm not sure why you don't understand it. Would the strike have come to an end if Lonmin management had come and said to you, we are here to talk to you, but we're not going to give into your demand of R12 500 ?

MR NZUZA : But Lonmin did not come, so I'm not going to respond to an example.

MR BHAM SC : I am asking again, one last time, and, Mr Nzuza, I'm going to suggest to the Commission if you don't answer the question openly, that you're deliberately evading the question. So I'm going to give you the opportunity one more time to answer the question. If, at the time, Lonmin did not agree to the demand for R12 500, would the strike have continued ?

MR NZUZA : Yes, the strike would continue.”

(emphasis added)

100 His testimony leaves little room for speculation as to what might have occurred had Lonmin spoke to the striking workers. Anything short of a capitulation would have resulted in the strike continuing.

101 Indeed, that was not the only non-negotiable as testified to by Nzuza. The following passage of his evidence is important in this regard –

“MR BHAM SC : Is it fair to conclude from what we were shown from all those video clips that there were two non-negotiables for those of you who were on the Koppie at the time ? The first was that you wanted Lonmin management to come to the Koppie. And the second was that you wanted your demand for payment of R12 500 to be met.

MR NZUZA : Yes, that’s what we wanted.

MR BHAM SC : And if you didn’t get what you wanted, the strike would have continued ?

MR NZUZA : Yes, I have already said so.”⁹⁵

(emphasis added)

102 There are other aspects of Nzuza’s evidence relevant to criticisms levelled against Lonmin, particularly in regard to Lonmin’s characterisation of the conduct of striking workers subsequent to the 10th August 2012 and the attitude adopted by striking workers towards those who wished to go to work. This will be dealt with later herein.

⁹⁵ Transcript, 28 August 2014, p 35997, line 22 – p 35998, line 7 (see page 329)
See also, transcript 28 August 2014, page 36075 (see page 330)

Summary of the evidence of striking mine workers who testified.

103 Much has been said about Lonmin's decision not to engage with striking mineworkers from the 10th August 2012 to 16th August 2012. This criticism must be assessed against what emerges from the evidence of the striking mineworkers who did testify –

103.1 As a starting point, it is important to note that not one of the striking mineworkers who were involved in the discussions with Da Costa testified. Da Costa's evidence is accordingly unchallenged. Da Costa was willing to talk to RDO representatives on the demand for R12 500, which illustrates the fallacy of the criticism that Lonmin had refused to engage with the RDOs on their demand for R12 500 in a peaceful setting.

103.2 It was only after Lonmin had communicated its decision on the demand for an increase in the basic wage to R12 500 that the workers embarked on an unprotected strike. Why would they have done so ? To force Lonmin's hand to capitulate, or to force an impasse which would topple NUM as the majority union?

103.3 There is no indication that workers who went on strike commencing with the nightshift on 9 August 2012 had received any feedback on the fact that Da Costa had engaged in discussions with RDO representatives. Again, the reason for this failure to report back on the Da Costa discussions was left unexplained. Had it been made known, a widely supported unprotected strike would have been unlikely.

103.4 Where, how and on what basis the demand for R12 500 had emerged, remains a mystery; this, after almost two years of evidence being led before the Commission.

103.5 From the perspective of striking workers, it was capitulation on the demand for R12 500 or a continuation of the strike. The manner in which SAPS had dealt with striking mineworkers on 16 August 2012 was outside the control, or influence of Lonmin, and clearly unforeseen. The SAPS operation also did not take place on Lonmin's property.

104 It is only upon a proper appreciation of the significance and import of the testimony of striking mineworkers that the events as they unfolded from 9 August 2012 can be fully appreciated, having regard to the Commission's terms of reference. We now turn to consider the unfolding of those events on a day-by-day basis.

THE 9TH TO 16TH AUGUST 2012

(a) Thursday, 9 August 2012 and Friday, 10 August 2012.

105 The Karee RDOs, having at the end of July received a response from Da Costa to their demand for a basic wage increase to an amount of R12 500, gathered at the Wonderkop Stadium on 9 August 2012. The meeting was organised by the RDOs themselves.⁹⁶ The RDOs resolved to march to LPD the following day to repeat their demand for an increase in their basic wages to R12 500. It does not appear from the testimony of any of the striking mineworkers who testified before this Commission that the mineworkers who had resolved to go on strike had been told on the previous

⁹⁶ Exhibit 'OO18' (see pages 331 - 351)

discussions with Da Costa. In addition, the strike was not limited to RDOs, nor was the demand advanced only on behalf of RDOs.

- 106 On Friday, 10 August 2012, approximately 3000 striking mineworkers gathered at the Wonderkop Stadium again. They had not reported for the morning shift. The unprotected strike had effectively begun.
- 107 Having regard to the previous discussions between Karee RDO representatives and Da Costa, and the stance adopted by Lonmin and communicated to the RDO representatives, the unprotected strike was an attempt to force Lonmin's hand on the issue. It was an attempt to force Lonmin's hand to capitulate on the issue. Anything less would not have ended the strike.
- 108 The marching strikers headed in the direction of LPD. At the time, the police presence was minimal, despite numerous attempts by Lonmin personnel to secure a greater police presence.⁹⁷ The Lonmin security was unable to deal with the situation, which by then called for the involvement of POP.
- 109 Upon arriving at the Wonderkop four-way stop, the march stopped and Messrs Sinclair, Blou and a SAPS Commander approached the crowd, which had no discernible leadership. A group of approximately six people stepped forward, and speaking in fanagalo, indicated that they wished to speak to mine management. Sinclair requested that they put their demands in writing. They responded that they were illiterate, could not write down their demands and reiterated that they wished to speak directly to management. Through Sinclair, the SAPS Commander and Blou, this message was communicated to mine management, including Abey Kgotle. Mine management refused to speak to the striking workers. The decision was taken after telephonic consultation with Barnard Mokwena and Albert Jamieson. Had

⁹⁷ Blou statement, paras 12 and 13 (see pages 352 - 363, specifically pages 354 - 355)

Lonmin management spoken to the striking mineworkers on the day, that would not have brought the strike to an end. On the contrary, nothing short of capitulation to the R12 500 demand would have satisfied the striking mineworkers.

- 110 This decision by Lonmin's management not to speak to the striking mineworkers was the subject matter of much discussion and criticism directed at Lonmin.

(b) Saturday 11 August 2012

- 111 On Saturday, 11 August 2012, the RDOs once again gathered at Wonderkop stadium. They proceeded to march to the offices of the NUM. Lonmin security officers went to warn NUM officers that the strikers intended to march on the NUM office. No satisfactory explanation was forthcoming from the striking mineworkers who testified as to the need for the march, certainly in such large numbers. The march added to the growing climate of fear and intimidation. The evidence of the Lonmin security officer Louw is pivotal to describe these events, as well as the events on Sunday, 12 August 2012.⁹⁸

- 112 NUM officials had accompanied workers to work. The NUM officials were "happy to escort the workers".⁹⁹ There was a measure of tension, but Louw thought "that everything would be fine".

- 113 Once the marchers were in close proximity to the offices of the NUM, an altercation ensued and NUM officials shot at the strikers. Two of the strikers sustained gunshot wounds. Mabuyakhulu was shot in the back, and on his unchallenged testimony, was thereafter assaulted by persons he identified as having NUM affiliation. The injured strikers were taken to hospital for treatment.

⁹⁸ Louw's statement, 16 August 2012 and (DDDD1) (see pages 364 -366); 22 October 2012, pp 1 & 2 (AAAA36) (see pages 364 - 370);

Transcript, 24 July 2012, pages 33044 – 33048 (see pages 371 - 372)

⁹⁹ Transcript, 24 July 2014, pages 33048 – 33051 (see pages 372 - 373)

114 There were no fatalities. We make this point not to justify the actions of those who shot at the marching workers, but because of later statements, to the effect that there were fatalities. These statements served only to exacerbate an already volatile situation.

115 Later that day, and as a result of the incidents involving the NUM officials, the marchers decided to gather at the Koppie where, as AMCU's lead counsel put it in his opening address, *"they thought they felt safe"*¹⁰⁰. By then they were heavily armed.

(c) Sunday 12 August 2012

116 On the morning of Sunday, 12 August 2012 the mine was quiet. Vendors had disappeared. Something was brewing. The strikers had returned to the Koppie. The first encounter between Lonmin security personnel and striking workers had sinister overtures. Louw got the impression that a decoy was being employed. When he and his colleague were attacked subsequently a portion of the crowd had become militaristic in their approach. They were very aggressive. They carried weapons. Their body language had become "attacking and hostile".¹⁰¹

117 They again proceeded to march to the offices of the NUM, apparently to revenge the shooting of their colleagues the previous day. When the strikers were in close proximity to the offices of the NUM, they encountered Lonmin security officers who tried to prevent them from proceeding.¹⁰²

118 The strikers resisted and attacked the security personnel. In the process they hacked to death two Lonmin security officers (Messrs. Fundi and Mabelane). Earlier Louw and Vorster, two Lonmin security officers, narrowly escaped with their lives.

¹⁰⁰ Transcript, 1 to 31 October 2012, page 170 lines 5-14 (see page 374).

¹⁰¹ Transcript, 24 July 2014, pages 32999 – 33004 (see pages 375 -376); pages 33053 – 33064 (see 377 - 380) and 33095 (see page 381)

¹⁰² Transcript, 24 July 2014, pages 33154 – 33163 (see pages 382 - 384)

No arrests were ever made for these killings. Two Lonmin security vehicles were burnt in the process. The situation was spiralling out of control. The SAPS presence was completely inadequate, notwithstanding repeated requests by Lonmin for assistance from as early as 10 August 2012. There were more killings to follow.

119 Fundi and Mabelane were murdered and their bodies thereafter brutally mutilated, and then burnt. Not a single word of explanation, nor any sign of regret or remorse has been forthcoming from those responsible for these murders or any of the strikers, neither in the immediate aftermath, nor during the hearings of the Commission. The attacks on Louw and Vorster and the brutal killings of Fundi and Mabelane gives a clear insight into the mood and temperament of the striking mineworkers at the time, and the lack of remorse shown subsequently.

120 Zokwana contacted the SAPS Provincial Commissioner's office in an attempt to secure an increased SAPS presence at the mine. Dissatisfied with the response received (in that SAPS had insufficient manpower to assist), he, (Zokwana), spoke telephonically with the Minister of Safety and Security and raised his concern that many lives would be lost should the SAPS presence not be increased at the mine. The Minister promised Zokwana that he would endeavour to ensure that there was a sufficient deployment of SAPS personnel at the mine to prevent further deaths¹⁰³. In stark contrast with the vociferous approach to the later communication between the same Minister and Mr Ramaphosa, this evidence was not challenged or criticised in cross-examination on behalf of the widows and the injured strikers. The different approaches to similar factual scenarios is inexplicable absent opportunism in the criticism of Ramaphosa.

121 Later that evening, Mr Mabebe was killed. Early the next morning Mr Langa was killed.

¹⁰³ Transcript, 31 January 2013, page 4434, lines 6-20 (see page 385)

(d) Monday, 13 August 2012

- 122 On Monday, 13 August 2012, Mathunjwa delegated AMCU's national organiser and general secretary to go to Lonmin and meet with Lonmin management and the AMCU branch committee.
- 123 Later that day, a contingent of about 100 heavily armed strikers marched from the Koppie to Karee shaft. As AMCU explained in its opening address, the *"strikers marched to Karee to demand that mineworkers still working, join the strike"*¹⁰⁴.
- 124 Nzuza testified to this march. He initially described the march as one steeped in innocence. He suggested that they were merely on their way to Shaft K3 to *"... see if there were workers at the shaft"*. When asked by the Chairperson what they would have done if they had seen workers at the shaft, he stated *"we would have done nothing"*.¹⁰⁵ However, he confirmed that the late Mr Noki (one of the leaders of the strike), had said to Lonmin's security personnel that *"... we have come here to stop workers from working, because we want them all on the mountain"*. Eventually he testified –

"MR NZUZA : Yes, he was talking to the security telling them we've come to ask the workers to stop working. They should go to the mountain, we want R12 500.

MR BHAM SC : And the real intention of going to K3 was to stop workers from working ?

*Mr NZUZA : Yes."*¹⁰⁶

¹⁰⁴ Exhibit OO18: para 22.5. (see pages 331 - 351)

¹⁰⁵ Transcript, 28 August 2014, page 35993 (see page 386)

¹⁰⁶ Transcript, 28 August 2014, p 35995, line 23 – p 35996, line 3 (see page 387)

125 It was quite apparent that the intention of those strikers who had marched towards Shaft K3 on 13 August 2012 was to prevent those who wished to work from exercising their right to do so. A few weeks later, on the 5th September 2012, Nzuza was part of a group of people who also marched to a shaft where they encountered Thirion. A video recording the events was shown during Nzuza's cross-examination on 28 August 2014 (despite an objection thereto on behalf of the injured and arrested persons).¹⁰⁷

126 Nzuza was one of the persons shown speaking in the video. He said:

*"Don't tell us engineering has no people, because whites are people. All places, whether it is engineering or mining officials, they are people and we don't want them here. Just go and tell Barnard Mokwena the shaft will burn if they don't evacuate the people. We are not playing."*¹⁰⁸

127 When challenged, Nzuza was evasive. He was given the opportunity to deal with the suggestion put to him that what he had stated on the 5th September was reflective of the attitude of the group of marchers heading towards Shaft K3 on 13 August 2012. He simply evaded the question. What followed was an exchange between Nzuza and the Chairperson, during which Nzuza suggested that if they had arrived at Shaft K3 on 13 August and had seen people working, they would have done nothing at all but would just have turned around and gone back to the Koppie. He went as far as suggesting that they would not have said anything to anybody at Shaft K3. Nzuza's evidence on this aspect is false. Quite clearly, those who had marched towards Shaft K3 on 13 August 2012 did not go there to see whether there were people working. The intention was as set out by the late Mr Noki, namely to stop people from working. And the hostility which was apparent in Nzuza's exchange with

¹⁰⁷ Transcript, 28 August 2014, pages 36054 – 36073 (see pages 388 - 393)

¹⁰⁸ Transcript 28 August 2014, p 36005, lines 17 – 25 (see page 394)

Thirion on 5 September 2012 is reflective of the mood which would have prevailed on 13 August 2012 towards non-striking workers at Shaft K3.

- 128 After confronting Lonmin security and turning back, the striking mineworkers were intercepted by members of SAPS under the leadership of General Mpembe. After negotiations with the strikers for them to surrender their weapons, Mpembe eventually ordered them to surrender their weapons. They demurred, got up and walked past the SAPS towards the Koppie.
- 129 On their way back to the Koppie, some of the strikers changed direction towards an informal settlement, the police used tear gas and stun grenades to prevent them from entering the settlement, and another tragedy ensued.
- 130 In the fracas that ensued, the strikers killed two members of the police. A third was seriously wounded. The police were robbed of two 9mm pistols, one R5 rifle, one shotgun and one police hand radio. This created an additional source of danger in interacting with the strikers.
- 131 One striker was found dead at the scene. The second was found about three hundred meters further, behind the informal village. A third person was found dead in the village with stab wounds. By then the striking workers were heavily armed, aggressive and volatile. SAPS intervention was more urgently required than ever before.
- 132 The National Commissioner and General Petros arrived at the mine at about 18h00. She was briefed on the situation, and left again by about 23h00. She alleges that she gave no operational instructions. The plan facilitated by Col. Scott was conceptualised on the morning of Tuesday, 14 August 2012. There is no evidence of any outside political pressure or interference in the formulation of SAPS' operational

plan and or its implementation. (On SAPS' initial version neither the National nor the Provincial Commissioners made any contribution to developing the plan.)

(e) Tuesday, 14 August 2012

- 133 From Tuesday, 14 August, until the morning of Thursday 16 August 2012, SAPS and union leaders, engaged with the strikers with a view to persuading them to disarm and leave the Koppie. These efforts were unsuccessful.
- 134 AMCU held a press conference in which they dealt, *inter alia*, with the events surrounding the strike. They issued a factually inaccurate and inflammatory media statement.¹⁰⁹
- 135 Later that day, the badly mutilated body of Mr Twala, a NUM shop steward who had been employed by Lonmin was discovered just behind the Koppie, not far from where the strikers were gathered.¹¹⁰
- 136 A meeting took place in the late afternoon of 14 August 2012 between General Mbombo and senior Lonmin employees. It was recorded without Mbombo being aware thereof. An agreed transcript of the meeting has been filed with the Commission.¹¹¹ Mbombo dealt with this meeting in an amplified affidavit.¹¹² The purpose of the meeting was to encourage Lonmin to communicate with its employees in order to diffuse the situation. She explains her reference to a discussion with the Minister of Police and disclosed that the Minister had referred to “*receiving information*” from Ramaphosa during this conversation.¹¹³

¹⁰⁹ Exhibit 002, pp 260-263 (see page 395)

¹¹⁰ The report on this incident had a strong impact on Mokwena.

Transcript, 12 September 2014, pages 37900 – 37902 (see pages 399 - 400)

¹¹¹ Exh JJJ192 (*bis*) (see pages 401 - 422)

¹¹² Exh LLL1, paras 61 and 62, pages 20-23 (see pages 423 - 446)

¹¹³ Exh LLL1, para 62.6, p 22 (see page 444)

- 137 She could not recall the Minister telling her that Ramaphosa had pressurised the Minister of Police into addressing the situation at Marikana.¹¹⁴ During her subsequent cross-examination, Mbombo denied that the Minister had told her that he had been “pressurised” by Ramaphosa; she sought to explain her use of the word.¹¹⁵
- 138 The telephone conversation between the Minister and Ramaphosa did not influence the decisions which Mbombo took at Marikana.¹¹⁶ She denied that other political considerations [such as Julius Malema and Themba Godi might intervene in the matter] influenced her judgment in instructing SAPS to implement the DDA option on 16 August 2012.¹¹⁷
- 139 Mbombo denied that she had allowed political considerations to influence her decision to implement the DDA option on 16 August 2012.¹¹⁸
- 140 The transcript must be seen in context. As Mbombo correctly pointed out, the parties were not conducting a formal meeting, but were discussing issues which did not affect her decision to implement the DDA option on 16 August 2012.¹¹⁹ Lonmin wanted SAPS to arrest persons who were orchestrating and participating in the violence.¹²⁰ This stance is in keeping with Lonmin’s attitude throughout the events of 9 to 16 August 2012, namely that it required assistance from SAPS in dealing with the violence which marred this strike. Mbombo echoed these sentiments when she confirmed that the SAPS were not involved in the labour dispute, but were concerned with the violence.¹²¹

¹¹⁴ Exh LLL1, para 62.6, p 22 (see page 444)

¹¹⁵ Transcript, 4 February 2014, page 21323, lines 11-19 (see page 447); Exh LLL1, para 62.6, p 22 (see page 444)

¹¹⁶ Transcript, 4 February 2014, page 21530, lines 12-17 (see page 480)

¹¹⁷ Transcript, 4 February 2014, page 21542, lines 10-14 (see page 449)

¹¹⁸ Transcript, 4 February 2014, page 21565, lines 5-6 (see page 450)

¹¹⁹ Transcript, 4 February 2014, page 21537, lines 4-11; Transcript, 4 February 2014, page 21562, lines 16-20

¹²⁰ Exh JJJ192 (*bis*), p 2, lines 10-24 (see pages 401 - 422)

¹²¹ T21555/24 to T21556/3

141 The transcript does not suggest an improper relationship between Lonmin and the SAPS. Instead it shows that Mbombo wanted to do no more than ascertain what steps Lonmin intended taking in the immediate future so as to ensure that it did not compromise tactical options which were being considered by the SAPS. Mokoena told Mbombo during this meeting that Lonmin intended issuing an ultimatum to the strikers but would be guided by the steps which the SAPS intended taking to resolve the situation.¹²²

143 The co-ordination between SAPS and Lonmin security personnel in respect of any ultimatum was not relevant to the planning and implementation of any proposed SAPS operation. This is borne out by what happened on 16 August 2012 when armed Lonmin security personnel escorted medical personnel to scene two after the shooting of strikers there.¹²³

144 The transcript, whilst containing a number of unguarded statements by especially Mbombo, does not evince an untoward relationship between Lonmin and the SAPS. It confirms Annandale's evidence that Lonmin had acted as a responsible corporate citizen by providing logistical assistance to the SAPS so as to allow the SAPS to deal with the violence at Marikana.¹²⁴

145 The earlier suggestion of a "toxic" relationship between Lonmin and SAPS and the criticism of the Ramaphosa emails lose sight of the following:

145.1 It is the right of (corporate) citizens to call upon organs of state to protect life and private property threatened by criminal elements;

145.2 Ramaphosa's interaction with the responsible Minister is as unremarkable as that of Zokwana;

¹²² Exh JJJ192 (*bis*), page 3 line 15 to page 4 line 8 (see pages 401 - 422)

¹²³ Exh JJJ27.9472 (see page 451)

¹²⁴ Transcript, 15 May 2013, page 9780, line 3 (see page 452)

145.3 There is no evidence of political pressure having been brought on any police officer (Phiyega? Mbombo? Mpembe?), nor can there be responsible criticism of the co-operation given by Lonmin at the mine as the violence unfolded.

(f) Wednesday 15 August 2012

- 146 On Wednesday, 15 August 2012 Mathunjwa took part in the SAfm radio interview, together with the President of the NUM, Zokwana and Mokwena. The volatile relationship between the NUM and AMCU became evident during the course of this interview. The two Unions were clearly caught up in a turf war.
- 147 At the conclusion of the interview, both Mathunjwa and Zokwana committed to go to the Koppie to address the strikers.
- 148 Following upon this commitment by Mathunjwa and Zokwana, Mpembe organised a meeting with both of them to discuss the logistics of how they were going to go to the Koppie. The Koppie had earlier been declared a police controlled zone.¹²⁵
- 149 A meeting took place at approximately 14h00 at LPD. It was attended by Mpembe, Captain Moolman from SAPS, Zokwana and his delegation, Mathunjwa and his delegation as well as Mokwena, Kgotle, Kwadi and Peega from Lonmin.
- 150 At the meeting, Mpembe emphasised the need for both Mathunjwa and Zokwana *“to convince their members to leave the weapons wherever they were and to disperse”*.¹²⁶ He stated that, his priority at that stage was *“to disperse and disarm the people in a peaceful manner and arrest only those that resisted the call to voluntarily*

¹²⁵Exhibit OO4, p23, lines 22 to 24. (see pages 453 - 483 ; specifically page 475)

¹²⁶General Mpembe’s witness statement: para 34 (see pages 484 - 508; specifically).

disarm".¹²⁷ Lastly, he indicated that he *"embarked on these negotiations with the sole intention to disarm the people in a peaceful way"*.¹²⁸

151 At the conclusion of the meeting, the leadership of both unions were transported separately to the Koppie in a police Nyala from which they were to address the strikers.

152 Zokwana went first. He attempted to address the strikers but they would not listen to him.

153 Contrary to Mpembe's instruction, Mathunjwa started off his speech by telling the strikers that he was coming to them for the very first time; he was talking to them *"from behind the locks"*,¹²⁹ that they (the strikers) *"are not animals, you are human beings, children of God, people who are born from the same mother"*¹³⁰. Mathunjwa's introductory remarks clearly increased the strikers' sense of feeling aggrieved, particularly towards the police. He was in electioneering mode and intent on waging a turf war for new membership. He wanted to become part of any wage negotiation which might have ensued.

154 In this context he said:

*"...The employer should give the guarantee that he will talk to us as your union and he said the people that you chose"*¹³¹...

*The employer said he binds himself to agreeing that if things would go back to normal that the employees would go back to work. The union that they select, he would be prepared to talk to...*¹³² (emphasis supplied)

¹²⁷ General Mpembe's witness statement: para 34 (see page 499).

¹²⁸ General Mpembe's witness statement: para 35 (see page 499).

¹²⁹ Transcript, 20 November 2012, page 1815, lines 12-14 (see page 509).

¹³⁰ Transcript, 20 November 2012, page 1816, lines 10-11 (see page 509).

¹³¹ Transcript, 20 November 2012, page 1818, lines 1-3 (see page 509).

¹³² Transcript, 20 November 2012, page 1818, lines 8-11 (see page 509).

155 Mathunjwa would soon seek an undertaking from Lonmin that it would be prepared to talk to AMCU as the representative of the strikers once they returned to work. Mathunjwa arrived at Lonmin on the morning of Thursday 16 August 2012 to seek a commitment that Lonmin would not “*come with your technicalities once that strike is off when we want to entertain you with those issues of those workers then you come with the issue of saying AMCU you are not a bargaining agent*”.¹³³.

156 The following interchange between the Chairperson and Mathunjwa on this score is instructive:

“CHAIRPERSON: I must tell you I get the impression and it may be the wrong impression and I have got to be, as my colleagues say, we have got to be fair, we will listen to all sides and try to understand what people are saying. And if we have impressions, we must put them to the people so that they can deal with them. I must tell you I get the impression that you were trying to use the situation to create a position where you would be given the least, on this specific issue, the opportunity or the right to negotiate on behalf of the AMCU members at least, who were on the koppie in regard to a matter in respect of which you didn't have negotiating rights, namely wages. Now that [sic] the impression I get. It's only a prima facie impression, first impression, it may be wrong but I'm putting it to you so that if that impression is incorrect you can put me right...I want to give you an opportunity to do yourself justice in giving me as full and comprehensive and persuasive an answer as you can”¹³⁴.
(emphasis added).

¹³³ Transcript of the meeting of 16 August 2012: p1, lines 29 to 30 to p2, lines 1-2 (see pages 510 – 521; specifically pages 511 - 512).

¹³⁴ Transcript, 30 November 2012, page 2529, lines 2-23 (see page 522).

157 After the tea adjournment, the Chairperson gave Mathunjwa the opportunity “to answer the question I asked you before the short adjournment was taken”¹³⁵.

158 Contrary to the suggestion, Mathunjwa made no serious effort to give the Chairperson “as full and comprehensive and persuasive an answer”. He answered (dishonestly, we submit) as follows:

“MR MATHUNJWA: Yes. I was not saying that AMCU wanted to be a bargaining agent at Lonmin. Hence we knew that we are not recognised for bargaining and I was not using the situation for that reason as I have said”¹³⁶.

159 Not satisfied with what was plainly a bare denial, the Chairperson immediately asked Mathunjwa if there was “anything else you wanted to say on that point”¹³⁷. “Nothing”¹³⁸, was Mathunjwa’s retort.

160 The skirting of the issue was not a product of inadvertence or inattention, but flowed from the conceptual deficiencies at the very centre of the answer which Mathunjwa was trying to provide.

161 In summary then, Mathunjwa tried to use his speech to create a position where AMCU would be given the right to negotiate on behalf of the strikers who were on the Koppie in respect of matters which he did not have negotiating rights, namely wages. Once he could not achieve that, he had no incentive to ask the striking workers to disarm and disperse.

162 After returning from the Koppie, Mathunjwa and Zokwana separately gave feedback to Mpembe. Zokwana told Mpembe that the strikers would not listen to him and that

¹³⁵ Transcript, 30 November 2012, page 2530, lines 1-3 (see page 522)..

¹³⁶ Transcript, 30 November 2012, page 2530, lines 4-7 (see page 522).

¹³⁷ Transcript, 30 November 2012, page 2530, lines 8-9 (see page 522)..

¹³⁸ Transcript, 30 November 2012, page 2530, line 10 (see page 522)..

he was therefore unable to convey Mpembe's message for them to disarm, disperse and return to work.

- 163 Mathunjwa told Mpembe that he had told the strikers that he intended engaging with management and that he would return to the Koppie the next day in order to give feedback to them. Mathunjwa made no mention of the Lonmin management having to furnish an undertaking before he could give feedback to the strikers. He was engineering a situation where he could be party to negotiate wages with management outside the collective bargaining structures; in return he would convince strikers to disarm and go back to work. He was in the enviable position that he had the ear of the strikers, something which NUM clearly did not have. He could defuse a volatile situation if he was guaranteed to be part of the solution.

(g) Thursday, 16 August 2012

- 164 Mathunjwa alleges that on the morning of 16 August 2012, he, together with Nkalitshana and Mphahlele went to LPD to attend a meeting, the purpose of which was to discuss the details of how the workers would return to work in terms of mine health and safety processes.¹³⁹ This meeting, so alleges Mathunjwa, was agreed upon between him, on the one hand, and Kgotle and Kwadi of Lonmin on the other hand during the de-briefing session which took place in the evening of 15 August 2012 (after Mathunjwa's visit to the Koppie), between Lonmin management, AMCU and SAPS.
- 165 For the following reasons it is highly improbable that Lonmin would have agreed to meet with Mathunjwa on the morning of 16 August 2012 to discuss mine health and safety processes:

¹³⁹Exhibit NN: para 58 (see pages 523 - 550; specifically 539 - 540).

165.1 As Kgotle stated in his witness statement, he could not have scheduled a meeting for 08h00 on Thursday morning with Mathunjwa, because he had undertaken to assist with the provision of facilities for SAPS to hold a press conference at LPD that morning.¹⁴⁰

165.2 The strikers had only been away from work for five days. There would have been no need for them to undergo an induction process upon their return to work. In any event, even if they were required to undergo an induction process, they would have known where to report to for the induction process, namely at their shafts.

165.3 The Mathunjwa version is not borne out by what he had told senior SAPS officers. To them he held out that the strikers would spend the night at the Koppie, but would disperse peacefully at 9h00 the next morning. There was no mention that Lonmin management had to co-operate for this to happen.

165.4 There is no evidence that Mathunjwa discussed their return to work with the strikers, or that he had their mandate to discuss the issue. The strikers would not consider returning to work unless Lonmin capitulated on the demand for R12 500.00. Nzuza was emphatic in this regard.

166 On the morning of 16 August Mathunjwa arrived unannounced at LPD, not to discuss the mine health and safety processes, but to seek a commitment (which he colloquially referred to as a “guarantee” during his address to the strikers on 15 August 2012) from Lonmin that once the employees returned to work, AMCU would be allowed to negotiate wages on their behalf. [This is borne out by the express contents of the transcript of the meeting which Mathunjwa had with Kwadi and Phega of Lonmin in the morning of 16 August 2012 at LPD¹⁴¹. His suggestion, for example,

¹⁴⁰Exhibit OO16: para 8.13 (pages 551 - 567 ; specifically page 564)

¹⁴¹Exhibit OO13 (see pages 510 – 521).

during his discussion with Kwadi that he (Kwadi and/or Lonmin) had to “*prove now...that you will not come up with your technicalities, once the strike is off*”¹⁴² bears this out.]

- 167 Indeed, as the discussion between Mathunjwa and Kwadi progressed, Mathunjwa, had the following to say:

“MR MATHUNJWA: ...There is no issue that the grievances will be addressed through the structure. I am raising the issue of technicality that AMCU – you will be saying AMCU is not a bargaining agent. That is where we need to address those issues before. That other issue is not – if we have got a commitment that those technicalities will not be raised, we want to solve the problem, fine, we are going to the mountain...” (emphasis added).

- 168 When later on during their discussion Kwadi suggested to Mathunjwa that he (Kwadi) understood Mathunjwa to be saying that he would only go to the mountain on condition that he got some guarantee that Lonmin would negotiate with AMCU on the demands of the strikers, Mathunjwa answered in the affirmative:

“MR KWADI: Okay, Joseph I think it is clear to me what you are saying. You basically saying you will go to the mountain on condition that you get some kind of a guarantee that the company will negotiate with AMCU on the demands of the people that are on the mountain. That is what you are saying, it is...

*MR MATHUNJWA: Or whether AMCU will be part of the demand. I mean according to those people whom they want to negotiate on their behalf, yes”.*¹⁴³ (emphasis added).

¹⁴²Transcript of the meeting of 16 August 2012: p1, lines 29 to 30 (see pages 510 – 521).

¹⁴³Transcript of the meeting of 16 August 2012: p3, lines 12 to 19 (see pages 510 – 521).

169 The following interchange during the same meeting between Mathunjwa, on the one hand, and Kwadi and Patrick Phega, on the other hand, illustrates the point graphically:

"PATRICK[PHEGA]: You know, bargaining arrangement you do not have that platform.

MR KWADI: Yes, yes.

MR MATHUNJWA: Exactly.

MR KWADI: Yes.

MR MATHUNJWA: That is the reason I said let me call you early and raise that technicality that might arise at the end of the day". (emphasis added).

170 Mathunjwa's explanation as to why he went to LPD on 16 August 2012 was a ruse. As the unequivocal contents of the transcript of the discussion which he had with Kwadi and Phega show, Mathunjwa was there to seek a commitment from Lonmin that once the employees returned to work, AMCU would be allowed to negotiate on their behalf.

171 We spend some time on these events because they are destructive of AMCU's suggestion that it was Lonmin's failure to "talk" to the strikers which led to the *impasse* (and the subsequent shootings!!)

172 SAPS held a press conference at 09h30 at LPD. At the press conference, Mbombo announced, amongst other things, that SAPS would be implementing an operational plan that day to disarm the strikers. She did not reveal any details to the press nor was Lonmin privy to any details of what that plan actually entailed.

- 173 Mathunjwa's mind-set in this regard was further illustrated with the exchange which he had with Seedat on 16 August 2012 when he said to Seedat *"Give me a place at the negotiating table and I'll get the workers off the mountain"*.¹⁴⁴ Although Mathunjwa denied that he uttered these words to Seedat, there is a consistency between Seedat's version, the content of Mathunjwa's letter to Mokwena on 10 August 2012, and the telephone conversation between Mathunjwa and Mokwena which proceeded the letter on the same day.¹⁴⁵
- 174 What followed thereafter, in the course of a SAPS operation which Lonmin was not involved in, was the tragedy which led to the deaths of 34 people, all of whom were shot by still unidentified members of SAPS.

CAUSATION

- 175 The Commission delineated the Phase One issues with a specific emphasis on the causal link between the conduct of any party and the tragic events between the 9th to 16th August 2012.
- 185 A causal nexus between conduct and damage or harm is required for a delict. A person is not delictually liable if his action or omission has not caused damage or harm.¹⁴⁶
- 186 Even though the inquiry of the Commission is not a delictual one, the principles of delict in assessing the causal link between cause and effect is useful for setting out the approach to be adopted by the Commission.
- 187 The question of whether there is a causal nexus in a particular case is one of fact, to be answered in light of the available evidence.¹⁴⁷

¹⁴⁴ Transcript, 11 September 2014, pp 37696 – 37697 (see page 568)

¹⁴⁵ Transcript, 12 September 2014, pp 37893 – 37894 (see pages 569 - 570)

¹⁴⁶ First National Bank of South Africa Ltd v Duvenhage 2006 (5) SA 319 (SCA) (see page 571 - 577).

(a) Factual causation

188 There can be no question of delictual liability if it is not proved that the conduct of the wrongdoer *caused* the damage to the person suffering the harm.¹⁴⁸ Whether an act can be identified as a cause, depends on a conclusion drawn from available facts and probabilities. The method employed by the courts, although frequently expressed in terminology such as *conditio sine qua non* and *novus actus interveniens*, is to inquire whether one fact follows from another. Put differently, the question asked is whether the consequence would have resulted without the relevant conduct.

(b) The *conditio sine qua non* theory

189 In International Shipping Co v Bentley¹⁴⁹, the court formulated the *conditio sine qua non* approach as follows:

“The first[enquiry] is a factual one and relates to the question whether the defendant’s wrongful act was a cause of the plaintiff’s loss. This has been referred to as ‘factual causation’. The enquiry is generally conducted by applying the so-called ‘but for’ test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis plaintiff’s loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff’s loss; aliter, if it would not

¹⁴⁸Protea Assurance Co Ltd v LTA Building SWA Ltd 1988 (1) SA 303 (A) (see pages 578 - 590).

¹⁴⁹1990 (1) SA 680 (A) 700 (see pages 591 - 611).

so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise."

190 In the case of "*positive*" conduct (*commissio*) on the part of the alleged wrongdoer, the conduct must be "*removed*" in the mind to determine whether the relevant consequence would still have resulted. In the case of an omission (*omissio*) the *conditio sine qua non* requires that a hypothetical positive act be "*inserted*" into the particular set of facts – this can probably also be regarded as the mental "*insertion*" of the defendant's omission. If hypothetical positive conduct of the defendant could have prevented the damage, the wrongdoer's omission was the factual cause of the damage. This inquiry requires a retrospective analysis of what would probably have happened, based upon the evidence and what could have been expected in the ordinary course of human endeavour.

191 Factual causation thus concerns a particular kind of link or connection between at least two facts or sets of facts: the link exists when *one fact arises out of another*. In other words, if fact X is the reason why fact Y exists, or exists in a particular form, or has come into existence at a particular time, it may be said that X is a factual cause of Y. The existence of a factual causal chain is demonstrated by the proved relevant facts of each case.

(c) Legal causation

192 The question of legal causation arises when determining which harmful consequences actually caused by the wrongdoer's wrongful, culpable act he should be held liable for.¹⁵⁰ It is sometimes stated in general terms that the wrongdoer is not liable for harm which is "*too remote*" from the conduct, hence the term "*remoteness of damage*" for legal causation or imputability of harm.

¹⁵⁰ Fourways Haulage v SANRAL 2009 (2) SA 150 (SCA) 163-164 (see pages 612 - ; specifically pages 622 – 623); International Shipping Co, supra, at 700-702 (see pages 591 – 611).

193 The present approach of the courts to legal causation has been set out fairly extensively by the Appellate Division in a criminal case, S v Mokgethi¹⁵¹, which was thereafter confirmed in several cases dealing with private law¹⁵².

194 In S v Mokgethi, Van Heerden JA pointed out that there is no single and general criterion for legal causation which is applicable in all instances. A *flexible* approach was suggested.

*"The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice"*¹⁵³.

195 However, the existing criteria for legal causation (such as direct consequences and reasonable foreseeability) may play a subsidiary role in determining causation within the framework of this elastic approach. Van Heerden JA commented on this approach as follows:

"I doubt whether a legal system can do without a dominant elastic criterion for determining legal causation. As is clear from the passages quoted above, policy considerations are relevant, and [the Court must guard] against the alleged wrongdoer's liability exceeding the boundaries of reasonableness, fairness and justice. The various criteria [for legal causation] seem to me not to be significantly more exact than a criterion (the flexible criterion) according to which [the Court determines] whether a sufficiently close link exists between an act and a consequence with reference to policy considerations. I am not saying that one, or even more than one, of the criteria may not be

¹⁵¹1990 (1) SA 32 (A) 39 (see pages 625 - 639; specifically page 631).

¹⁵²OK Bazaars (1929) v Standard Bank of SA Ltd 2002 (3) SA 688 (SCA) 699 (see pages 640 - 650; specifically page 649); International Shipping Co, supra.

¹⁵³At 40-41 (see pages 591 - 611).

employed on a subsidiary level in the application of the flexible criterion to a specific type of factual situation; but merely that none of the criteria can be used [exclusively] as a more concrete measure of limitation in all types of factual situations, and for the purpose of any form of legal liability”¹⁵⁴.

196 Whether one regards reasonable foreseeability (or any other test for legal causation – such as direct consequences) as a subsidiary test, or simply as a factor in determining legal causation, the Appellate Division’s formulation and application of the flexible approach makes it clear that these tests or factors merely function as aids in answering the basic question of imputability of harm.

THE CENTRAL COMPLAINTS AGAINST LONMIN

197 We conclude by revisiting separately each of the central complaints against Lonmin in Phase One. To a greater (the injured strikers) or lesser (SAPS) extent, other parties also raised these criticisms: in what follows we deal with all the criticisms. As stated earlier, the complaints against Lonmin were often contradictory and not based on evidence nor linked to the deaths of and injuries to people and damage to property between 9th to 16th August 2012.

198 In assessing the complaints against Lonmin, regard should constantly be had to the testimony of Nzuza and the other striking mineworkers from which it is clear that during the period 9th to 16th August 2012 (at least), nothing short of a capitulation by Lonmin to the demand for a basic wage of R12 500 (a demand which, by that stage, was not limited to RDOs) would have resulted in an end to the strike. Lonmin could not have been expected to capitulate on that demand. The strike as it had unfolded would have continued. In fact, unsuccessful wage negotiations might have increased levels of unrest. There is no evidence to suggest that if the strike had so continued in circumstances where Lonmin had, again, communicated to the strikers its refusal to

¹⁵⁴ At 40-41 (see pages 591 – 611).

meet their demands for a basic wage of R12 500, the events might have taken a different course.

(a) The first complaint

199 Lonmin failed on two occasions to call a meeting with all the stakeholders at Lonmin, being the NUM, UASA, Solidarity and AMCU itself. Mathunjwa alleges that he first made the request for the meeting during the course of a telephone conversation between himself and Mokwena on 20 July 2012.¹⁵⁵ The second request for a meeting of all the unions, alleges Mathunjwa, was contained in his letter to Mokwena dated 10 August 2012.¹⁵⁶

200 As far as the July 2012 request for a meeting was concerned, throughout the course of their engagements with Da Costa in July 2012 the RDOs insisted that they did not want any union involvement in their demand for a wage increase. In any event, once it became clear that the RDOs' demand pertained to a wage increase, this disqualified AMCU from any involvement in any meeting that might have been called by Mokwena. As Mathunjwa conceded, AMCU had no right to negotiate wage demands:

"MR BURGER: ... AMCU couldn't, couldn't negotiate on wages, is that correct?"

MR MATHUNJWA: That's correct¹⁵⁷.

201 Mathunjwa cannot have it both ways. Either AMCU was involved in the R12 500.00 issue or it was not. If, as he was at pains to show, AMCU was not involved in the issue, then Mathunjwa cannot explain why he sought the meeting. More importantly though, the complaint has no context. Given the nature of the issues, any failure to

¹⁵⁵ Exhibit NN, paras 12 to 13 (see pages 523 - 550).

¹⁵⁶ Exhibit NN, paras 15 to 20(b (see pages 523 - 550)).

¹⁵⁷ Transcript, 29 November 2012, page 2491, lines 19-22 (see page 651).

call a meeting was in no way causally connected to the unlawful strike by the RDOs or any of the events of 9 – 16 August 2012. Put simply, the complaint is not only ill-founded, but it goes nowhere on the issues being investigated by the Commission.

202 As we have already indicated, Mathunjwa's second request for a meeting between Lonmin and all the stakeholders was contained in his letter to Mokwena dated 10 August 2012.¹⁵⁸ His letter is clear as to what the meeting was going to be about:

"However as AMCU we propose:

- *That whoever will be receiving the memorandum must inform the marchers that by receiving such memorandum does [sic] not set any precedence*
- ...
- *This memorandum will be communicated by management to respective recognised Unions and a meeting will be coordinated to discuss the content of the memorandum*¹⁵⁹. (emphasis added).

203 It is clear from the contents of Mathunjwa's own letter that the purpose of the meeting would have been to discuss *"the content of the memorandum"*, and that no direct negotiation with the strikers should be embarked upon.

204 The workers who participated in the illegal march on Friday, 10 August 2012 to LPD did not hand over any memorandum. As Mokwena indicated during the SAfm interview:

"...At no point did we receive any memorandum of [sic] piece of paper to say this is who we are and these are our concerns, somewhere towards

¹⁵⁸Exhibit OO1 (see pages 652 - 653).

¹⁵⁹Exhibit OO1, p1 - only the first page of this letter was inserted in the documents submitted on behalf of AMCU (see page 652).

*midmorning they then were dispersed by the police. That's when it all started...*¹⁶⁰

205 There was accordingly no need for Mokwena to convene a meeting with the unions since the marchers did not hand over any memorandum. As Mathunjwa himself indicated in his letter, the purpose, if not the sole purpose of the meeting, would have been *"to discuss the content of the memorandum"*.

206 Bishop Seoka had a similar complaint: despite the Koppie having been cordoned off by SAPS, he expected Lonmin to have negotiated with SAPS to try and persuade the latter to allow Lonmin management and himself to go back to the koppie to speak to the strikers. This is evident from the following interchange between the Chairperson and the Bishop:

"CHAIRPERSON: Bishop, can I ask a question at this stage?...I understand you to be telling us this morning that your complaint against Lonmin on this part of the case, was that they didn't then, having been told that the police had cordoned off the area, didn't then go back to the police and say, never mind the fact that you cordoned it off, we have the Bishop here, who is preparing to act as a kind of a negotiator, and allow him and us to go back, under your protection as it were, to speak to the workers. Am I correct? Is that basically what you are saying?"

RT REV SEOKA: Yes, Sir."

207 The Bishop's criticism of Lonmin is without substance. His expectation that Lonmin should, at that stage, have tried to persuade SAPS to allow Lonmin management and himself to go back to the Koppie, was unrealistic and ill-informed. Had his request been acceded to, it might well have led to further loss of life, this time suffered by

¹⁶⁰ Transcript of the SAfm interview: p3, lines 15 to 20 (see pages 654 - 707; specifically page 656). See also on this score, Exhibit OO15 (Mokwena's witness statement): para 4.3. (see pages 708 - 733 ; specifically page 714)

Lonmin management. What he would have discussed with the striking workers other than their demand for R12 500 per month was not explained.

- 208 Zokwana testified that, had he been a Lonmin manager, he would not have gone to the Koppie given the killings that had taken place and the fact that the strikers were armed:

“MR ZOKWANA ...but if I was a manager in Lonmin – I’m not a manager in Lonmin – after people have been killed and I’m required to engage in negotiations with a group of more than 3000 with the armoury described, if you ask me as a person, are you willing to negotiate, I would not go.

Chairperson, I want to say this that I’m answering as a person, I’m not Lonmin management but if I was in that position I would have to think about my own kids, I would have seen others being killed and I would know that the instruments used were those that were being carried, and being commanded to go to the koppie alone without a police escort would have made me to do otherwise. In my view then there is no elements for negotiations under those conditions was impossible”.¹⁶¹

- 209 No productive wage negotiations could in any event have taken place at the Koppie. As Zokwana testified that, as a trade unionist, he had never come across a situation where wage negotiations were conducted *“in a mountain”*:

“MR ZOKWANA: ...And I’m saying this, Chairperson, because there may be strikes in any situation, always there will be centres where such processes are handled because if there’s – I’ve never seen in my life of a

¹⁶¹ Transcript, 7 February 2013, page 4788, lines 17-25 to page 4789 lines 1-5 (see page 734).

trade union conducting negotiations in a forest, in a river or in a mountain¹⁶²...” (emphasis added).

210 There is another reason why it would simply not have been prudent for the Lonmin management to have gone to negotiate with the strikers on the Koppie: the gathering was unlawful. The strikers were armed with dangerous weapons. As the Chairperson remarked during Zokwana’s cross examination by SAPS’ lead counsel:

“MR SEMENYA SC: Ja, but sticking around the group of people at the Koppie, we know that that was an illegal gathering even on your assessment, correct?”

MR ZOKWANA: As a union, if we want to have a gathering at the roads of the municipality, we want to march, if we want to have a gathering of the union we do apply and if in that context, I will say therefore the gathering was illegal.

*CHAIRPERSON: It was illegal for another reason, they had weapons. You can’t have a gathering of armed people like that, that’s not permitted under the law, so it was illegal for that reason also. I think that’s the main reason Mr Semenya is putting to you”.*¹⁶³

211 Had the strikers genuinely wanted to engage with the Lonmin management on their wage demands, they would have chosen any number of representatives to go and negotiate with Lonmin other than on the Koppie.¹⁶⁴ Nothing prevented them from doing so. Zokwana’s testimony was emphatically to similar effect:

¹⁶² Transcript, 7 February 2013, page 4795 line 25 to page 4796 lines 1-4 (see pages 735 - 736).

¹⁶³ Transcript, 1 February 2013, page 4548, lines 23-25 to page 4549, lines 1-10 (see pages 737 -738).

¹⁶⁴ Unarmed and away from the Koppie; they would have identified whom they represent and what their mandate was; they would have explained their demand(s).

“MR ZOKWANA: ...Allow me now to put how I would have seen it being easier. Suppose, as they did to Mr Da Costa, suppose as they did to Mr Sinclair, that they elected a delegation, not on the koppie, to say employer, we are here at the gates of LPD, we are five or 10 unarmed, we are your employees, we would like to engage you. And if Lonmin could, if it could be shown anywhere that Lonmin would have declined that situation, I would agree with you...

My view is that a possibility could have arisen if those workers could have agreed to march to the offices, not in thousands but now five and say here, we are before you, manager, here is our case. I'm sure, I don't think Lonmin could have seen anything wrong with that...”¹⁶⁵

212 It bears emphasis here that Zokwana's unchallenged testimony was consistent with the stance that was adopted by Lonmin throughout the period, 9 to 16 August 2012, namely that it (Lonmin) was willing to engage with its employees within the collective bargaining structures, once they disarmed and returned to work. By way of illustration, and as we have already indicated, during the briefing session with Mpembe on 15 August 2012, Mokwena had, *inter alia*, the following to say about Lonmin's willingness to meet with its employees:

“MR MOKWENA: Our position General is, as Lonmin management our position is as follows ... We are willing to engage our employees within the structures that are known. In a very safe environment where there no weapons. Not on the mountain. So we are willing to meet our employees through their structures, through their leaders to discuss any issue. Not when they are armed. Not when they are actually outside the Lonmin property.

¹⁶⁵ Transcript, 7 February 2013, page 4795lines 17-25 and page 4797lines 3-9 (see pages 739 - 740).

So when the workers are back, disarmed, tomorrow, tonight, through their leaders we will meet them. That is our position. So we are not against meeting, discussing issues with their [sic] employees through their right structures. We are prepared to do that...”¹⁶⁶

213 The unprotected strike was a result of Lonmin communicating its response to the Karee RDO's demand for a basic wage of R12 500. In other words, the very stance adopted by Lonmin in this regard, namely to refuse to capitulate on the demand for a basic wage of R12 500, is what prompted the unprotected strike in the first instance. The inference is that the unprotected strike was directed towards forcing Lonmin's hand on the demand for R12 500. If Lonmin had spoken to the striking mineworkers, whether on 10th August 2012 or in the days which followed, and communicated to them a message similar to that which had been communicated by Da Costa, the strike would not have come to an end.

214 Mokwena gave five reasons for Lonmin not having spoken to the striking mineworkers on 10 August 2012 and thereafter –

214.1 The strike embarked upon was an unprotected strike.

214.2 Lonmin's response to the demand for a basic wage of R12 500 had already been communicated through Da Costa. Lonmin was not going to change its stance in this regard.

214.3 Exco had approved the RDO allowance, thus bringing parity with wages paid to RDOs at Impala and Anglo.¹⁶⁷ The RDOs would also have received a

¹⁶⁶ Transcript of the briefing session with Mpembe on 15 August 2012: pp27 to 28 (see pages 741 - 771 ; specifically pages 767 – 768)). See also, transcript of the SAfm interview: p51 (see pages 654 - 707).

¹⁶⁷ Mtshamba's evidence in this regard (dealt with earlier herein) is quite important.

further increase of 10% in October 2012 in accordance with the 2010 Wage Agreement.

214.4 If Lonmin had engaged with the striking mineworkers on the 10th August 2012, *“... we would have immediately blurred the two types of strike and that would have had far-reaching implications, not only for Lonmin, but also for the industry and for the country”*.

214.5 Both Mathunjwa and Frans Baleni (the President of NUM) had *“... discouraged me to engage”*.¹⁶⁸

215 None of this was seriously challenged, other than by assertion of a likely or possible different course of events which might have unfolded had Lonmin *“merely talked”* (sic) to the striking mineworkers. But this assertion is naïve: Lonmin's decision to reject the demand for a basic wage of R12 500 led to an unprotected strike. By repeating the same message, Lonmin would not have caused an end to the strike - the demand for R12 500 was intractable and fixed at the time. The strike would have continued; there is no evidence to suggest that the growing tension and conduct of the striking mineworkers and the nature of the SAPS operations would have been any different had the strike continued upon Lonmin repeating Da Costa's message to the striking mineworkers.

216 In addition, what has for long been presented as a demand by RDOs, can no longer be sustained as such. Those on strike were not only RDOs. They included people such as Nzuza and Magidiwana. Neither of them in any way suggested that those on strike who were not RDOs would have been satisfied if the RDO issue alone was discussed or resolved. In other words, the very participation of non-RDOs illustrated the danger of trying to negotiate a wage increase for one category of workers – this

¹⁶⁸ Transcript, 12 September 2014, pages 37897 – 37898 (see pages 772 - 773)

would necessarily create an expectation for other categories of workers, and in the platinum mining industry as a whole.

217 There is one additional point on this score. The Bishop's suggestion that Lonmin should have tried to persuade SAPS to allow Lonmin management and himself to go back to the koppie, quite naively overlooks the extent to which the strikers felt particularly aggrieved at that stage towards both Lonmin and the NUM. This was partly the result of the inflammatory speeches which had been made by the AMCU officials and Mathunjwa himself earlier on Thursday 16 August 2012.¹⁶⁹

218 As we indicated earlier, during Nkalitshana's address to the strikers on Thursday, 16 August 2012, he had, *inter alia*, the following to say:

*"Speaker: But comrade, what we get is oppression from the employer, together with this union that is claimed to be big, that celebrates thirty years of oppressing you and you get nothing at the end"*¹⁷⁰.

219 Mathunjwa's speech afterwards, was in similar vein:

"President: ... Comrade, we arrived in the morning here because we said, we want to talk with the employer again at eight o'clock. We arrived, as AMCU, but we met with the employer around to eleven. We easily saw the reason for that. It was because big organisations were not there, comrade. They are not seen. That is why we were not attended. Because they say, we are a small organisation that knows nothing".

220 Apart from the fact that Mathunjwa's speech on this score was characterised by falsehoods, its deliberate effect was to increase the strikers' sense of aggression towards both Lonmin and the NUM. As Zokwana summed up

¹⁶⁹ Slides 172 and 173 respectively of Exhibit L depict the strikers singing and brandishing their weapons in the afternoon of Thursday, 16 August 2012 (see pages 774-775).

¹⁷⁰ Transcript of Mathunjwa's address on the koppie: p4 (see pages 776 - 790).

the position during the course of his testimony, it would have been very difficult for Lonmin to negotiate with strikers whose passion had been inflamed:

*MR ZOKWANA: ... It is not a very good environment to engage in negotiations with people who may have been lied to...*¹⁷¹

221 The Bishop testified that General Mbombo had made it plain to him soon after his arrival at the JOC that SAPS' concern was security and that "*security is not negotiable*".¹⁷² SAPS had already taken a decision to implement stage 3 of the operational plan. Stage 3 is implemented "*where negotiations are deemed unsuccessful or no longer feasible by higher authorities and a tactical option needs to be employed*".¹⁷³

222 To sum up, on the objective facts, the Bishop's suggestion that, despite the Koppie having been cordoned off, he still expected Lonmin to have tried to persuade SAPS to allow Lonmin management and himself to go to the Koppie, was without merit. What his contribution might have been was left unexplored.

223 As these events unfolded the National Commissioner (and the Minister) played little part, and gave no direction or instruction. The National Commissioner was simply kept informed of what was happening.¹⁷⁴

(b) The second complaint

224 A second complaint is that Lonmin had negotiated with the RDOs outside of the collective bargaining structures.

¹⁷¹ Transcript, 7 February 2013, page 4796 line 25 to page 4797 lines 1-2 (see page 791).

¹⁷² Transcript, 14 November 2012, page 1363, lines 3-14 (see page 792).

¹⁷³ Exhibit L: slide 78 (see page 793).

¹⁷⁴ FFF3 paragraphs 23 & 24 (see pages 794 - 803; specifically page 800); cf FFF3A.

- 225 We have indicated that the first time that the RDOs made their demand for a wage increase to R12 500 was on the 21st June 2012 when they marched to Da Costa's office. When it became clear to Da Costa that the RDOs were there to demand a wage increase, he immediately indicated to them, first, that there was a procedure for negotiating salaries and, second, that the issue they were raising had properly to be dealt with through the established central bargaining structures.
- 226 The RDOs objected to dealing with their demands in the manner proposed by Da Costa. They indicated, explicitly, that they did not want any union involvement in the matter. The representatives of the RDOs, namely Magqabine and Mofokeng, went on to express the view that trade union involvement would only be appropriate if the issue they were raising affected the entire workforce. They stated that the issue they had come to see Da Costa about affected only RDOs at Karee, and that for that reason, the trade unions should not be involved.
- 227 At the conclusion of the meeting of 21 June 2012, Da Costa pointed out to Magqabine and Mofokeng that he had no authority to deal with what was plainly a wage demand and that he would provide them with feedback on 2 July 2012.
- 228 On the 2nd of July 2012, when Da Costa met with the RDOs' representatives in order to provide them with feedback, he once again pointed out to them that there was a two year wage deal which was still in place and that the next wage negotiations would be held towards the end of 2013. Da Costa also pointed out to the RDOs that Lonmin was concerned that if it started separate wage negotiations with the RDOs, it would be required to also negotiate with other categories of the employees as well.
- 229 The RDOs' response to Da Costa was swift: if other categories of employees had similar issues, they could also deal with Da Costa directly.

230 Da Costa did not negotiate with the RDO representatives. He listened to their demand and advised them that the issue, by its very nature, was to be dealt with and negotiated upon in the appropriate Collective Bargaining Structures. Far from negotiating with the RDOs, on their wage demands, Lonmin's consistent attitude was that this could only be dealt with in the established structure. Talking to a party and advising that party of the correct forum for wage negotiations does not constitute wage negotiations.¹⁷⁵

231 It was the RDOs themselves who insisted on communicating directly with Lonmin to the exclusion of the trade unions. This is also borne out by the fact that the gathering of the workers on 9 August 2012, as well as the illegal march to LPD on Friday, 10 August 2012, were both organised by the RDOs themselves. In this regard, AMCU had the following to say in its opening address:

"18. On Thursday 9 August 2012 RDOs from Lonmin convened a meeting outside the Wonderkop stadium. The meeting was not called by a union.

19. On Friday 10 August 2012 the following occurred:

19.1. Early in the morning RDOs from Lonmin gathered to march to LPD...

19.2. During that morning Mr Mokwena telephoned Mr Mathunjwa to inform him that employees were marching illegally to present a memorandum to management.

¹⁷⁵ In *Metal & Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC) the following was stated – "... to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise or agreement (see Concise Oxford Dictionary 5 ed)" (at 493 H –I) (see pages 804 - 822; specifically page 819).

19.3. *Mr Mathunjwa made inquiries. He learnt that the march was organised by RDOs...The RDOs said that their demand and march had nothing to do with the unions. They did not want unions to be involved*".¹⁷⁶ (emphasis supplied).

232 There is no merit in the contention that Lonmin negotiated with the RDOs outside of the collective bargaining structures or that those circumstances led to the tragedy. There is in any event no evidence at all from the striking mineworkers that they had perceived the Da Costa discussions to constitute any form of negotiation. Not surprisingly, Da Costa was warmly complimented during cross-examination for having spoken to the RDOs!

233 The RDO allowance which Lonmin granted was not a result of any negotiation. It was a unilateral Lonmin decision in order to bring itself into line with what other platinum mines were paying their RDOs. The allowance was neither sought by the RDOs nor discussed between their representatives and Lonmin. The decision was communicated to the RDOs, not for negotiation but as a decision which would be implemented.

c) The third complaint

234 A third complaint, raised by Mathunjwa, was that Lonmin had reneged on a commitment allegedly made on 15 August 2012, namely *"that the workers must*

¹⁷⁶Exhibit OO18 (AMCU's Opening Address): paras 18 and 19.1 to 19.3 (see pages 331 - 351). see also on this score, Exhibit NN: para 20(a) (see pages 523 - 550).

*renounce violence and return to work peacefully and then Lonmin would engage with their grievances*¹⁷⁷.

235 He testified as follows in this regard :

“MR BURGER: ...I put to you that this tragedy could have been avoided by Mr Mathunjwa on the noon of the 16th of August at the koppie, if he hadn’t been so inflammatory and so derogatory of NUM in talking to the workers”.

*MR MATHUNJWA: I am disputing that. I am still maintaining that this massacre could have been avoided, if your client never engaged the workers outside the bargaining structure and if your client hasn’t reneged into[sic] its commitment of the night of the 15 August 2010 [sic]*¹⁷⁸.

236 Mathunjwa’s contention that Lonmin reneged on its commitment of 15 August 2012 to negotiate with the workers once they returned to work is plainly contrived and is contradicted by the nature of the alleged commitment and the contents of the transcript of the briefing session of 15 August 2012. There is no reason why such “commitment” would have had to be confirmed by management to the workers (via AMCU) on the morning of 16 August 2012. Mathunjwa wanted to negotiate a seat at the negotiating table by using the striking workers as a bargaining chip. He failed and in the process squandered an opportunity to defuse the situation.

237 Lonmin’s consistent willingness to engage with its employees on condition that they return to work was neatly encapsulated by Mokwena, first, during the course of the SAFM interview, second, during the course of the briefing session on 15 August 2012 with General Mpembe and importantly, throughout the period up to the shootings.

¹⁷⁷Exhibit NN: para 40 (see pages 523 - 550).

¹⁷⁸Transcript, 30 November 2012, page 2522, lines 1-9 (see page 823).

238 Mokwena, speaking for Lonmin, had this to say during the SAFM interview:

“MR MOKWENA: Yes Xolani, our position as management is as follows, we agree people must be disarmed, we want to release the buses to go collect workers for them to go to work, we want to meet the structures of the unions to discuss any grievances or concern in the most civilised manner without panga’s and without guns, we can do it now, we can do it as soon as possible¹⁷⁹”.(emphasis supplied).

239 Later that afternoon, Mokwena repeated Lonmin’s stance to Mpembe:

“MR MOKWENA: Our position General is, as Lonmin management our position is as follows...We are willing to engage our employees within the structures that are known. In a very safe environment where there are no weapons. Not on the mountain. So we are willing to meet our employees through their structures, through their leaders to discuss any issue. Not when they are armed. Not when they are actually outside the Lonmin property.

So when the workers are back, disarmed, tomorrow, tonight, through their leaders we will meet them. That is our position. So we are not against meeting, discussing issues with their[sic] employees through their right structures. We are prepared to do that...¹⁸⁰ (emphasis added).

(d) The fourth complaint

¹⁷⁹Transcript of the SAfm interview” p51 (see pages 654 - 707).

¹⁸⁰Transcript of the briefing session of 15 August 2012: pp27 to 28 (see pages 741 - 771).

240 At the heart of the injured and arrested persons' case is the allegation that there was an untoward relationship between Lonmin and SAPS. This "toxic" relationship, contends the injured and arrested persons, *"was causative of the massacre"*.¹⁸¹

241 Their counsel had the following to say in this regard during the course of his cross examination of General Annandale:

"MR MPOFU: ...well, you definitely know from the statement, our opening statement, that one of the issues that we referred to is the relationship between Lonmin and SAPS as having been, had a causal effect, or we call it a toxic relationship (sic), so a death-causing effect as it were. That's just our version (sic). What I want to know from you is that at least what you are aware of is that the National Commissioner on the 13 appealed for a partnership – that's what she chose to call it – a partnership between Lonmin and SAPS. Is that correct?"

242 Having been challenged to explain this rather bland suggestion, he proceeded to explore thirteen examples with Annandale of what he contended was evidence of toxic collusion.¹⁸²

243 The theoretical construct of this whole contention, namely that there was something untoward in the National Commissioner's appeal for a partnership, is unsustainable. It proceeds on the false premise that the "partnership" which the National Commissioner was referring to, was unique to Lonmin. It was not. As Annandale testified, SAPS functions on the principle of partnership policing, community policing and sector policing. Thus, testified Annandale, the partnership which SAPS had with

¹⁸¹ Opening statement of the injured and arrested persons: para 9.2 (see pages 824 - 828 ; specifically page 831).

¹⁸² (He was compelled to do so after an objection had been raised to the suggestion of a "toxic relationship" without any evidence being produced to support this sensationalist submission from the bar)

Lonmin, was no different to the partnerships which SAPS experiences everyday throughout South Africa.

244 We turn now to deal with each of the thirteen ways in which the Lonmin/SAPS partnership allegedly manifested itself to support a submission of an untoward relationship.

245 First, it was suggested to Annandale that the partnership manifested itself through the installation of Sinclair as the liaison person to manage the partnership. Annandale conceded under cross examination by Lonmin's lead counsel that the appointment of a liaison person was an indication of a functional and responsible co-operation between Lonmin and SAPS, particularly given the fact that there are more than 30 000 people employed at Lonmin and that the police contingent was at its peak round about 800.¹⁸³

246 Second, it was suggested that the partnership involved the identification (by Lonmin) of individuals who were suspected of crimes and information in relation thereto. Annandale testified that there is regular interaction between Lonmin and the SAPS and an exchange of information relating to criminal activity in the neighbourhood. He explained, in answer to a question by the Chairperson, that there is a standard obligation upon each member of the public to co-operate with SAPS. There was nothing untoward in Lonmin's co-operation with SAPS.¹⁸⁴

247 Third, it was suggested to Annandale that the fact that the police JOC was established within Lonmin's premises was yet another indication of the existence of a toxic relationship between Lonmin and SAPS. As Annandale explained, during the (2010 soccer) World Cup, SAPS on different occasions used facilities at the stadiums for the establishment of their JOCs. In any event, paragraph 2(j) of Standing Order

¹⁸³ Transcript, 15 May 2013, page 9780 (see page 832)

¹⁸⁴ Transcript, 15 May 2013, page 9781 line 2 (see page 832)

262 makes it mandatory for the police to establish the JOC at *“the scene of an incident or event”*. There was nowhere else where the JOC could sensibly have been established other than at Lonmin’s premises.¹⁸⁵

248 Fourth, it was suggested to Annandale that the joint use of the CCTV material by Lonmin and SAPS was a manifestation of the untoward relationship between them. Annandale testified that there was an obligation on Lonmin to provide SAPS with the CCTV footage where such footage was evidence of criminal activities. One would have hoped that this practice would not merit even a debate.¹⁸⁶

249 Fifth, it was suggested that the joint deployment of the Netcare medical staff contracted to Lonmin, with SAPS medical staff, was an indication of the existence of a toxic relationship(!). Annandale testified, first, that public order police do not have medical personnel of their own, and identified instances where there had been a deployment of medical personnel by other role players.¹⁸⁷

250 Sixth, it was suggested to Annandale that the presence of Botes, a Lonmin employee in the SAPS JOC was an indication of the existence of a toxic relationship between Lonmin and SAPS. Annandale explained that there were more than 30 other role players who were not SAPS members but who were present at the SAPS JOC. That is why, testified Annandale, it is called a Joint Operations Centre. More importantly, during the Special JOCCOM meeting, Botes was excused from the JOC because that meeting was exclusively about the planning of police action. Operational and strategic planning, testified Annandale, was the domain of the SAPS.¹⁸⁸

251 Seventh, it was suggested that the use by SAPS during the operation of what counsel incorrectly, but doggedly referred to as the ‘Lonmin chopper’, was another

¹⁸⁵ Transcript, 15 May 2013, page 9782, line 3 (see page 832)

¹⁸⁶ Transcript, 15 May 2013, page 9783 (see page 833)

¹⁸⁷ Transcript, 15 May 2013, page 9784 (see page 833)

¹⁸⁸ Transcript, 15 May 2013, page 9785 (see page 833)

indication of the existence of a toxic relationship between Lonmin and SAPS. As confirmed by Mr De Waal, Protea Coin Group's ("PCG") COO, in his letter dated 19 November 2012 addressed to Danie van Tonder, the helicopter which was used by Mpembe during the operation was a B3 helicopter which is owned by PCG. The fact that some of the police officers may have referred to it as the 'Lonmin chopper', *"doesn't make it a Lonmin chopper"* (as observed by the Chairperson). Second, the request for use of the B3 helicopter during the operation was made by Mpembe himself, directly to De Waal, without the involvement of the Lonmin personnel. This was also confirmed by Annandale during his testimony. Third, the B3's costs, incurred during the operation, were carried by PCG and not by Lonmin.¹⁸⁹

252 Eighth, it was suggested to Annandale that the fact that the police used a Lonmin employee, as their interpreter when they were interacting with the strikers was another indication of a toxic relationship between Lonmin and SAPS. This contention is, with respect, puerile. As Annandale testified, SAPS do not have the capacity to employ an interpreter who speaks fanagalo. The use of a Lonmin interpreter was accordingly not out of the ordinary.¹⁹⁰

253 Ninth, it was suggested to Annandale that the fact that on the 15 of August 2012, when the union presidents were escorted to the Koppie, some of the Lonmin executives (in particular, Kwadi) travelled with the police, together with the union presidents, was indicative of the existence of an untoward relationship between Lonmin and SAPS. As Annandale testified, Kwadi was instrumental in facilitating the meeting between Mpembe and the union presidents. Mpembe, testified Annandale, deemed it important that this thread be maintained by ensuring that Kwadi was fully apprised of further developments.¹⁹¹

¹⁸⁹ Transcript, 15 May 2013, page 9786-8 (see page 833), Exhibit GGG26

¹⁹⁰ Transcript, 15 May 2013, pages 9789 to 9790 (see page 834)

¹⁹¹ Transcript, 15 May 2013, page 9790 (see page 834)

- 254 Tenth, it was contended that the fact that on 13 August 2012, the National Commissioner was briefed by Lonmin and the SAPS was also indicative of the existence of a toxic relationship between Lonmin and SAPS. The National Commissioner and her delegation were first briefed by members of SAPS. Later that day (i.e. on 13 August 2012), they were briefed by both members of SAPS and Lonmin. Annandale testified that this is a standard practice and allows the first hand disclosure of information which would normally remain in the background.¹⁹²
- 255 Eleventh, it was suggested that the fact that Botes was present at the 06h00 JOC meeting on 16 August 2012 was indicative of a toxic relationship between Lonmin and SAPS. Annandale testified that Botes was an official representative during the JOC and JOCCOM meetings and that he was afforded specific feedback opportunity with regard to information relating to the number of employees who had reported for work, incidents of intimidation and possible routes followed by the strikers.¹⁹³
- 256 Twelfth, it was suggested to Annandale that the NUM attended meetings twice a day with SAPS and Lonmin management. These meetings, so it was suggested, were also indicative of a toxic relationship between Lonmin and SAPS. It is not clear why meetings which also involved a third party, namely the NUM, would be indicative of a toxic relationship between Lonmin and SAPS. In any event, as pointed out by Advocate Tip, these were regular Lonmin security briefings in the mornings. At times, a SAPS officer would attend these briefings. There were no joint meetings with SAPS per se.¹⁹⁴
- 257 Lastly, it was suggested that *“the most symbolic of these in terms of significance”* is the fact that when the strikers were shot by the police on 16 August 2012, the overall commander, namely Mpembe, *“was in the ‘Lonmin chopper’/Coin chopper, and not at*

¹⁹² Transcript, 15 May 2013, page 9791, line 2 (see page 835)

¹⁹³ Transcript, 15 May 2013, page 9792 (see page 835)

¹⁹⁴ Transcript, 15 May 2013, page 9792, line 3 (see page 835)

the JOC". This statement is based on a distortion of the facts. First, there was no 'Lonmin chopper' in the air during the course of the operation on 16 August 2012. Second, the suggestion that Mpembe's presence in the Protea Coin helicopter during the shooting incident- clearly a co-incidence- could conceivably be an indication of the existence of a toxic relationship between Lonmin and SAPS, is contrived.¹⁹⁵

258 Lonmin called for SAPS' presence as events unfolded from 10 August 2012. Quite clearly, from the moment the strike started, there was a need for greater police presence. Lonmin security personnel did not, and could not, have been expected to have had the capacity to deal with the unfolding situation and the events as they developed. There was a large group of strikers. The atmosphere was growing increasingly volatile – which had not previously been experienced by Lonmin. On 11 August 2012, there was the attempted march on the NUM offices. Two striking mineworkers were shot and injured. On 12 August 2012 the situation got decidedly worse. Two Lonmin security guards were brutally killed, and that was followed by people having been attacked and injured at Shaft K3 and the deaths of Mabebe and Langa, which preceded the five deaths (of SAPS members and striking mineworkers) on 13 August 2012.

259 The fact that Lonmin had requested police assistance to deal with the unfolding situation and had made facilities available to SAPS was indicative of a normal relationship between Lonmin on the one hand and SAPS on the other hand. Coming onto Lonmin's premises, SAPS would have required the use of Lonmin premises. SAPS would also have required information from Lonmin's security staff (which it obtained from the likes of Botes and Sinclair). All of the evidence points towards SAPS having taken its own operational decisions to deal with the unfolding situation.

260 The submission of a "toxic relationship" was accordingly devoid of a factual content.

¹⁹⁵ Transcript, 15 May 2013, page 9793 (see page 835)

(a) The fifth complaint

- 261 There is no obligation on an employer to negotiate or collectively bargain with employees who participate in an unprotected strike. To do so, would set a precedent which would allow disgruntled employees to embark on a wild cat unprotected strike in future to compel their employer to meet their wage demand.
- 262 Negotiations with striking workers without the permission of the responsible union(s) would also be in breach of the recognition agreement between Lonmin and NUM. This agreement obliged Lonmin to negotiate wages and other conditions of employment with NUM and prohibited Lonmin from entering into negotiations with trade unions which did not meet the requisite threshold level of 35% across the Marikana operations.
- 263 The wage agreement between Lonmin and NUM was also binding on the striking mineworkers. Lonmin would have been well within its rights to refuse to entertain the RDO wage demand and insist that there be a return to work. This is especially so since Lonmin had obtained a Labour Court order on 10 August 2012 which interdicted participation in the unprotected strike.
- 264 Lonmin advised the strikers that, should they disarm and return to work, it would consider their demands and grievances through established structures and channels. This message was conveyed to the strikers by the SAPS and should have been conveyed to the strikers by Mathunjwa when he addressed the strikers at the Koppie on 15 August 2012.
- 265 Lonmin conveyed this message to Bishop Seoka on 16 August 2012. It went as far as to inform the Bishop that it would even meet with a delegation of strikers should they agree to disarm, disperse and return to work. This initiative was derailed by the

SAPS advising that the Koppie had become an operational zone and the Bishop would not be allowed to return to the Koppie.

266 AMCU did not want Lonmin to engage directly with the strikers. It instead wanted to negotiate wages with Lonmin on behalf of the strikers. This much is apparent from Mathunjwa's letter to Mokoena on 10 August 2012 as well as the conversation between Mathunjwa and Lonmin during the morning of 16 August 2012.

267 The following extract from the transcript of this conversation (Exh OO13) is instructive:

"MR MATHUNJWA: No I mean fine. That is why we said Barnard [Mokwena] must be in because there is a commitment that the grievances of the workers who are on this strike will be addressed through Union structure[s]. We fully support. I am raising the issue of technicality because I know you guys. I have dealt with you, I know you have got a forked tongue, if I may say it without insulting you, you have got a forked tongue like this. It took us almost 2 years to conclude a simple Recognition Agreement with technicalities that are not found there. So I know UButi why I am raising this point. There is no issue that the grievances will addressed through the structure, I am raising the issue of technicality that AMCU – you will be saying AMCU is not a bargaining agent. That is where we need to address those issues before. The other issue is not – if we have got a commitment that those technicalities will not be raised, we want to solve the problem, fine, we are going to the mountain. So you must get Barnard about that issue and get a mandate. But if he is not committing himself to that one, let him discharge his police to go and kill those people as Zokwana and Barnard was their mandate yesterday. If we were not there those people could

have been killed yesterday. That will be your intention. So we will not stop you in your intentions.

MR KWADI: Okay, Joseph [Mathunjwa] I think it is clear to me what you are saying. You [are] basically saying you will go to the mountain on condition that you get some kind of a guarantee that the company will negotiate with AMCU on the demands of the people that are on the mountain. That is what you are saying, it is ...

MR MATHUNJWA: Or whether AMCU will be part of the demand. I mean according to those people whom they want to negotiate on their behalf, yes." (emphasis added)

268 Lonmin therefore found itself in an invidious position. The strikers were dissatisfied with NUM, the recognized trade union. They were favourably disposed to AMCU, a trade union not recognized by Lonmin for collective bargaining purposes. The strikers wanted to speak to Lonmin at the Koppie while being in possession of dangerous weapons and firearms, having killed various individuals since 12 August. AMCU was not prepared to assist in resolving the impasse unless Lonmin agreed to give AMCU "a seat at the table" in wage negotiations.

269 The strikers wanted a basic wage of R12 500 per month and were not interested in a lesser wage. Lonmin could not afford, nor was it prepared or required to, pay such an all or nothing wage of R12 500 to its underground employees. The demand was pitched at a level unheard of in the mining industry in 2012 for RDOs.

The sixth complaint

270 During the period 12 to 15 August 2012, there were email communications between Jamieson and Ramaphosa, as well as communications by Jamieson to the Director-

General of the DMR and to the Minister. (As it turns out, Jamieson's letter to the Minister had not been read by her.)

- 271 The essence of the criticism relates to the characterisation of the conduct of striking mineworkers both by Jamieson and the present Deputy President. The tenure of Jamieson's communications, in seeking police intervention as events at Marikana unfolded from 10 August 2012 onwards, was to characterise the conduct as "*criminal/destabilisation*".¹⁹⁶ The Deputy President, for his part, made reference to "*dastardly criminal acts*".¹⁹⁷ Both statements were factually correct and, so it is submitted, justified in the circumstances.
- 272 In essence, the criticism was based on the suggestion that the situation included a "*labour dispute*" and that this aspect had been left out or omitted in the characterisation.¹⁹⁸ The attack was logically flawed: the communication with the responsible Ministers was not aimed at facilitating a wage agreement or to address the housing needs of the strikers: it was an endeavour to explain that assistance was required from organs of state to protect life and property against striking workers who had been responsible for a number of deaths in the previous 72 hours.
- 273 During stringent cross-examination on their characterisation of events at the time, and in particular by counsel acting for the injured and arrested, both the Deputy President and Jamieson convincingly defended their characterisations.
- 274 The implicit suggestion was that Jamieson had characterised the events to induce the Deputy President "*.... to influence the politicians*".¹⁹⁹ But the objective facts were that from 11 August, events began to take a nasty turn at Marikana which quite

¹⁹⁶ Transcript, 9th September 2014, p 37370 lines 12 – 15 (see page 836)

¹⁹⁷ Transcript, 12 August 2014, page ... lines 7 – 12 (see page 837)

¹⁹⁸ Transcript, 9 September 2014, pages 37380 – 37382 (see page 838)

¹⁹⁹ Transcript, 10 September 2014, p 37526, lines 12 – 16 (see page 839)

clearly required greater police intervention. By 11 August, striking mineworkers attempted to march onto the NUM offices, and the levels of tension between the NUM and striking mineworkers was high. National TV news was on the scene by 15 August.

275 It was purely in respect of security matters that Lonmin sought outside help in the form of a SAPS presence at Marikana. A peaceful labour dispute would not have required Jamieson to secure a sustainable police presence at Marikana.

276 The intervention sought by Jamieson arose out of and was related to the conduct of striking mineworkers. It did not relate to wage demands:

“MR JAMIESON : I would more describe it as it had become. It had moved from becoming a labour dispute, I agree with that and that was you know from Karee to the and that was an issue of wages or a demand ???? It then, over the weekend, crossed the line to become something else, but I won't put one on top of the other or that, I would characterise it as twin-headed. You had two situations there, you had a labour dispute on the one hand and you had escalating violence on the other hand.

MR MPOFU : Yes, fine.

MR JAMIESON : And quite bad.

MR. MPOFU : Yes, thank you.

MR JAMIESON : So twin-headed would be the way I would describe it.

MR MPOFU : I am happy with twin-headed, I call it hybrid which I think is the same thing. (sic) Twin-headed is fine but it was not a single-criminal issue.

MR JAMIESON : Correct.

MR. MPOFU : Ja. So your characterisation then which was reduces it to a single-headed issue was wrong to that extent.

MR JAMIESON : To the extent that the subject matter is a security situation and what I was asked to was escalate the violence issue and the police issue to the DMR, actually to the extent I was dealing with it, it doesn't say that it wasn't being dealt with as an industrial dispute. Barnard and the guys at the mine were continually dealing with that."²⁰⁰

277 It is still difficult to understand the criticism of the characterisation by both Jamieson and the Deputy President of the criminal conduct which resulted in the deaths of Messrs Fundi, Mabalane, Mbebe and Langa on the 12th August and early morning on the 13th August 2012. The situation on the 13th August worsened with the death of two police officers and the death of three strikers and thereafter the death of Mr Twala on 14th August 2012.

278 The manner in which Jamieson and the Deputy President responded to those deaths and the characterisation of the conduct in relation thereto is not dissimilar from what was said by Nzuza in his evidence:

“MR MPOFU : Yes and those who lost their lives ?

²⁰⁰ Transcript, 9 September 2014, pages 37381 – 37382 (see page 840)

MR NZUZA : What is very hurting, Chairperson, people died there who had done nothing wrong. Who did the wrong things by not listening to what others were advising them to do. I am hurt about the security officers who died, who were placed there where they were not supposed to have been and some other people who were removed there and other people put in. I would be happy, Sir, if the people who killed the securities would be arrested. I also refer to the deaths of the other people. If it is found that the police were wrong in doing this, they should also be prosecuted because for two years now, I was made to go to a police station to sign for something that I had not done wrong.

MR MPOFU : Thank you, and if the people who killed the two policemen and Mr Langa and Mr Mbebe are found, what should be done to them if they are correctly identified?

MR NZUZA : The people that killed the police and the security officers with their evidence should be arrested, Chairperson.

MR MPOFU : And did you, as the people who were leaders there at the Koppie, at any stage ask or allow anybody to commit criminal offences ?

MR NZUZA : Not at all, Chairperson, I make this example. People did certain things, but we always stood by what we said, that we are fighting nobody.”

279 It would have been irresponsible on the part of Lonmin's management if they did not seek SAPS' assistance to prevent a further escalation of violence.

Conclusion

280 We have dealt with what we have identified, in the course of evidence and cross-examination over a lengthy period of time, as being the main elements of criticism against Lonmin in Phase One. There may well be other issues which arise in heads of argument filed on behalf of the various parties. To the extent necessary, we shall respond to such other aspects as they are articulated.

281 In assessing the conduct of Lonmin, regard should be had to the difficult almost impossible position Lonmin had been placed in. It was confronted with a demand made by a particular group of employees, in an amount which Lonmin deemed not to be affordable. The demand was made outside of the recognised wage negotiation structures. Even if there were workers who had lost confidence in the NUM, there remained the danger of creating a unstructured and uncontrolled environment around wage negotiations which would have destroyed a system built-up carefully over many years and regulated by the LRA. Criticism of the manner in which Lonmin conducted itself would essentially amount to criticism of Lonmin for having acted within the legal framework.

282 There is yet a further fundamental aspect. That is the suggestion that it was through Lonmin's conduct that events unfolded in the manner in which they did, with the consequences which eventuated during the period 9th to 16th August 2012. This is a non-sequitur.

283 Ultimately the manner in which events unfolded and the manner in which those events were dealt with (in the one instance by the striking mineworkers and in the

other event by the manner in which SAPS dealt with them), was not due to anything done by Lonmin. In this sense, Lonmin was neither responsible for, nor caused, any of the deaths of people or injuries to people which so tragically occurred during that period. The move from a criticism of decisions taken by Lonmin during that period to harm caused to persons is unwarranted.

THE ADDITIONAL ISSUES PURSUANT TO THE RULING OF 25 AUGUST 2014

284 Earlier herein we dealt with the Phase One ruling of 8 November 2012, which shaped the running of the Commission up until 25 August 2014.

285 On that date, and in circumstances dealt with earlier herein, the Commission withdrew the ruling made on 8 November 2012. As the Commission stated, in so withdrawing its ruling of 8 November 2012, the Commission had envisaged that during the “*second phase*”, it would “...*turn its attention to the other topics covered by its terms of reference. These included those set out in sub-paras 1.1.3, 1.1.6 and 1.5 of the proclamation which set-up the Commission*”.²⁰¹

286 It was apparent from the Commission’s ruling of 25 August 2014 that the Commission relied in substantial part on a preliminary report prepared by Dr Forrest, in particular chapter 5 thereof dealing with “*Lonmin’s Housing Obligations*”. In substantial part the evidence leaders sought to cross-exam Mokwena and Jamieson on matters dealt with by Dr Forrest in this regard. The withdrawal of the 8 November 2012 ruling was primarily motivated by a desire to probe “*Lonmin’s Housing Obligations*”.

²⁰¹ Transcript 25 August 2014, page 35517, lines 1 – 5 (see page 841)

287 In the course of dealing with Lonmin's objection to the withdrawal of the ruling (a discussion on which appears fully at pp 35516 – 35521 of the transcript of 25 August 2014), two issues arose –

287.1 First, the Commissioners moved away from the basic premise underlying its ruling of 8 November 2012 which required a causal link between conduct and outcome. The Commission considered the provisions of paragraph 1.1.3 of the terms of reference and relied upon the more flexible concept of “conducive”.

287.2 Second, the Commission, in this context, dealt with the contention advanced on behalf of Lonmin that *“an examination of the question as to whether Lonmin's failure to comply with its housing obligations was ‘conducive’ to the creation of tension, labour unrest, etc would be unfair in the time available, but stating that ‘it is in our view not possible to say whether there will be unfairness. That is a question which can only be answered at the end of the inquiry. If the matter has, in the opinion of the Commission been adequately canvassed, it will be able to make a ruling.....”*²⁰²

288 At the outset, and having regard to what was stated by the Commission as recorded at page 35521 in the transcript of 25 August 2014, and the evidence which has now been completed, it is clear that the extended ambit of issues dealt with pursuant to the ruling of 25 August 2014 were not adequately canvassed and does not place the Commission in any position to make rulings beyond the issues delineated in the ruling of 8 November 2012.

289 By way of introduction :

²⁰² Transcript 25 August 2014, page 35521 lines 4 – 13 (page 842.)

- 289.1 Phase Two is a sophisticated and wide ranging inquiry : the time allocated to consider Phase Two was disproportionately skewed to the prejudice of the only remaining party whose conduct is being scrutinised in Phase Two.
- 289.2 To enquire into the housing aspect of Phase Two in isolation distorts the exercise and will yield a skewed result.
- 289.3 It is unfair to Lonmin to probe only one witness of Lonmin on Phase Two (under severe time constraints) and not allow any cross-examination of the “expert” reports filed by the likes of Dr Forrest et al. Another unfortunate result of this process is that the housing debate has spilled into the daily press - courtesy of one of the evidence leaders’ “experts” - and issues which may have to be considered by the Commission are now raised and opined upon by all and sundry.
- 289.4 The Commission does not have the mandate, expertise or time to probe the appalling conditions under which miners in the Rustenburg area and other parts of South Africa are living, nor how that problem is to be addressed on a local, provincial or national level.
- 290 The question of Lonmin’s housing obligations was not dealt with in the cross-examination of Mokwena and Jamieson. Only Seedat was questioned, and essentially on the following topics –
- 290.1 The nature and meaning of what was stated by Lonmin in its 2007 SLP. The question is whether Lonmin had made a commitment to provide 5500

houses, or whether its commitment extended only to a facilitation for the construction of such homes.

290.2 The economic circumstances in which there was reference in the 2007 SLP to the construction of 5500 houses.

290.3 The effect and impact of the 2008 financial crises on Lonmin's obligations under the SLP. Is the financial crash of 2008 to be understood merely as part of the normal mining cycle, or was it cataclysmic and unforeseeable (it clearly was unforeseen).

290.4 How Lonmin adjusted its obligations in respect of housing, and after 2008, and the DMR's (implicit) consent thereto.

290.5 If Lonmin had not complied with its SLP undertakings, whether the Commission was the appropriate forum to address that issue or whether this was a matter to be dealt with by the DMR in terms of the relevant legislation.

290.6 Finally, the payment of dividends by EPL and WPL, in the context of Lonmin's contention that it did not have the financial resources from 2008 to carry out a programme of building 5500 homes by 2011.

291 We do not know to what extent these issues will be dealt with by the evidence leaders in argument. Our argument in reply may accordingly be more comprehensive than what follows hereafter.

292 There is no evidence which in any way suggests that any act or omission by Lonmin in relation to housing “*was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct*”. This, in itself, suggests the end of the inquiry on the topic and the relevance for present purposes of the evidence which was canvassed through Seedat regarding Lonmin’s housing obligations.²⁰³ In the preliminary report of Dr Forrest, she simply asserts a causal nexus:

“The conduct and statement of the strikers in August 2012 make clear that a large proportion of the migrant mineworker labour force of Lonmin was profoundly alienated from the company. The living conditions of Lonmin’s migrant workers must have contributed to that alienation.”

(emphasis added)

293 Her assumption raises more questions than giving answers:

293.1 What conduct and which statements of which strikers during August 2012 are being referred to?

293.2 Does Dr Forrest rely upon any actual evidence placed before the Commission, and if so, on what evidence ?

293.3 What does she mean by the phrase “*alienated*”, and what relevance does it have to the terms of reference ? They wanted R12 500 per month net, and no union involvement. A major demand was that Lonmin should “talk” to them! On what basis does she conclude that “*...a large proportion of the migrant mineworker labour force of Lonmin was profoundly alienated from the company*”?

²⁰³ That the housing conditions of miners generally, including Lonmin employees, leave much to be desired is accepted. This Commission is however not the forum for that debate.

- 293.4 Dr Forrest states that the living conditions of Lonmin migrant workers *"must have contributed to that alienation"*. On what basis does she come to that conclusion ? If 5 500 workers had been given houses, would that have appeased the remaining 20 500? Or satisfied wage demands of the 5 500 house owners? And what about the wage demands of the remaining 20 500??
- 294 Dr Forrest was not called as a witness before the Commission. There was thus no opportunity to cross-exam her or test the contents of any part of her report, including chapter 5 thereof. A response to her interim report has been prepared and submitted. Her final report is still awaited.
- 295 As for the evidence which was actually led, there was a substantial amount of debate on *"Lonmin's housing obligations"*, Lonmin's *"dividend policy"* and commissions paid to foreign entities. Seedat and Lonmin's CFO, Simon Scott, dealt with each of these issues. Seedat dealt in some detail with Lonmin's financial position, the impact of the 2008 financial collapse (which was not limited to Lonmin) the manner in which WPL and EPL were able to operate primarily because of loans sourced and provided by Lonmin plc in foreign markets, the fact that Lonmin shareholders, through Lonmin plc in the form of two significant rights issues, had put more funds into the two operating companies since 2007 than had been paid out to shareholders by WPL and EPL in the form of dividends. Loans were also made to Incwala.
- 296 None of these issues were dealt with in any depth, nor was housing properly considered (such as the responsibility of local government), or was there proper investigation of the impact of the 2008 financial collapse (not only on Lonmin, but on

all other companies). There was simply not enough time to probe any of these matters meaningfully.

297 Seedat demonstrated that, by comparison with its competitors in the platinum mining industry in South Africa, Lonmin's dividend policy was conservative, and Lonmin's cash flow position at the time precarious.

298 We would invite the Commission to find that the issues which the Commission intended be dealt with consequent upon its ruling of 25 August 2014 have not been adequately canvassed, and that no meaningful finding on Lonmin's housing obligations and their impact on the events of 9 - 16 August 2012 can be made.

299 In any event, the Commission has no evidence which would suggest that any act or omission by Lonmin created *"an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct"*.

S.F. BURGER SC

A.E. BHAM SC

M. VAN AS

**Chambers,
SANDTON
27 October 2014**

**IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE TRAGIC EVENTS AT
MARIKANA DURING AUGUST 2012**

LONMIN'S REPLYING SUBMISSIONS : 3 NOVEMBER 2014

INTRODUCTION

1. Provision has been made for replying submissions to be filed. In this reply we intend only to address new criticisms and different angles of incidence explored by parties in their primary heads, all from the perspective of Lonmin. We do not engage in a debate on the actions of either SAPS or the strikers, or for that matter the unions.
2. As most of the criticisms raised against Lonmin have already been addressed in our primary heads of argument, we do not intend to revisit those submissions.
3. We also do not comment on each of the written submissions separately. Except for certain submissions made by the evidence leaders, we deal with phases and issues collectively. We commence by making two introductory observations.

INTRODUCTORY OBSERVATIONS

(a) The Legal Framework and the Rule of Law

4. In Lonmin's primary heads, we have dealt with the legal framework for collective bargaining in South Africa.¹
5. Other than in the written submissions of the NUM, and cursorily in the SAPS's written submissions, this legal framework, and its implications in the

¹ Lonmin's heads, pages 15 - 20

assessment of the events of 9 - 16 August 2012 at Marikana, has been left unexplored.

6. We emphasise the following:

6.1 In keeping with South Africa's constitutional democracy, the LRA was promulgated and continues to operate in order to regulate the relationship between capital and labour in all its many facets, including in the sphere of collective bargaining. The introduction to the LRA spells this out. The LRA intends, *inter alia*,

"... to give effect to section 27 of the Constitution;

to regulate the organisational rights of trade unions;

to promote and facilitate collective bargaining at the workplace and at sectoral level;

to regulate the right to strike and the recourse to lock-out in conformity with the Constitution; ...

to provide simple dispute procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established) ...;

to establish the Labour Court and the Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;

...

- 6.2 That framework exists in order to promote stability in industrial relations and to guide parties on how they can be expected and are entitled to act. Section 1 of the LRA provides:

"that its purpose ... is to advance economic development, labour peace ... and to promote – orderly collective bargaining; ... and the effective resolution of labour disputes."

- 6.3 Any suggestion made with the benefit of hindsight that an employer should act differently in a particular situation should be assessed against this backdrop, and consideration should be given to the future implications of the suggested alternative course of conduct. There is a contradiction between, on the one hand, suggesting that the law and our Constitutional democracy should be respected, and on the other hand seeking to impose an obligation on Lonmin to act outside that legal framework and to negotiate wages with individual strikers embarking on unprotected strike, and in the face of violence.

- 6.4 There is no suggestion that Lonmin acted outside the framework established by the LRA. On the other hand, Lonmin was faced with conduct on the part of strikers which was not only outside of the framework provided for by the LRA, but in defiance of a court order. Negotiations in these circumstances would have sent a message of encouragement to employees to engage in conduct outside the existing framework to achieve their aim. This would create an arena of uncertainty in the relationship between capital and labour.

- 6.5 None of this is explored by the parties criticising Lonmin for not “talking” to the strikers.
7. On a wider front, the rule of law is involved. In circumstances where a strike turns violent and is characterised by high levels of intimidation, damage to property and injury and deaths of persons, it is not the role of the employer to equip itself to deal with and to contain such conduct. That is the role of the SAPS.
8. Where an employer employs a large workforce, it cannot be expected of him to establish an internal security force to deal with the type of events which were experienced by Lonmin in the period under discussion. That responsibility falls squarely within the Constitutional mandate of SAPS, being the primary organ of State responsible for maintaining and upholding the rule of law and protecting the public and property.
9. In considering the framework of the LRA and the rule of law, a question which the Commission squarely faces is whether a party which acts within its rights, should be criticised for not “talking” to the strikers. On the evidence, the strike had been started and continued not in order to force Lonmin into “talks”, but to obtain a basic wage increase to R12 500 per month. Nothing less would have satisfied the strikers during the period which the Commission is inquiring into.

(b) The Terms of Reference and the Conduct of the Commission

10. In Lonmin's primary heads, we deal with the appointment of the Commission, its terms of reference as well as the ruling of 8 November 2012 and 25 August 2014. We add one additional observation.
11. During the period 8 November 2012 to 25 August 2014 when most of the evidence relating to Phase 1 was dealt with, the Commission operated pursuant to a ruling which drew a direct causal link between the evidence received and the events of 9 - 16 August 2012. The Commission had ruled that the first phase would be confined to the direct causes of legal responsibility of parties for the deaths of and injuries to any persons and damage to property during the said period.
12. The Commission's terms of reference insofar as it relates to the conduct of Lonmin generally, are wider. Yet, the ruling of 8 November 2012 was the basis upon which the Commission's hearings were conducted up to 25 August 2014.
13. Notwithstanding this, there has been a suggestion by a number of parties that Lonmin bears responsibility for the events which occurred during the said period. Under rubrics such as *"Lonmin's failure to talk"*, *"toxic collusion"*, *"missing out on lost opportunities offered to Lonmin by the likes of Muthunjwa and Bishop Seoka"*, and suggestions that Lonmin had taken *"inadequate security steps"* to protect people during the said period, submissions have been advanced that the Commission should find Lonmin responsible, whether directly or indirectly, for the loss of life or damage to persons or property.

14. These submissions assume a causal nexus between Lonmin's alleged failures to engage with the strikers and the events in question. But without the counterfactual, and exploring questions such as:

- what would have been discussed;
- what offer was likely to be made by Lonmin to the strikers;
- what offer was likely to be accepted by the strikers (RDOs or everyone?);
- what would have been the result of an inability to reach agreement between the parties;

the causal connection between the failure to engage and the tragedy is absent. Perhaps not surprisingly, none of the counterfactual questions posed above are addressed by any of the criticising parties.

15. The absence of a causal connection between the refusal to negotiate and the tragedy is illustrated on a different approach:

15.1 Two Lonmin security staff members were brutally murdered on 12 August. This related to and arose from the conduct of the strikers - there has yet to be an explanation regarding why, in the context of the demand made for wage increases, the strikers chose to conduct themselves in a manner which led to the deaths of Messrs Fundi and Mabelane.

15.2 Five of the fatalities were a result of the confrontation between SAPS and the strikers on 13 August 2012. Lonmin was not a party to that

confrontation and could in no way have impacted upon what actually occurred, nor foreseen it. It was the conduct of striking mine workers and SAPS which characterised the confrontation - it arose from the manner in which the conduct in the strike unfolded, not the demand for R12 500 itself.

15.3 Directly flowing from the conduct of the strikers, were the deaths of Messrs Mabebe, Langa and Twala. Again, this was causally unrelated to any omission by Lonmin.

16. In view of the ruling of 5 November 2012, there is no evidence to suggest that Lonmin was the direct cause of or bore legal responsibility for any of the deaths of or injuries to persons and damage to property which occurred during the period under consideration.

CAPITA SELECTA

(a) The Demand for R12 500 in context

17. A number of parties, in contextualising the events of August 2012, examined the strike at Impala earlier that year, including the levels of violence which characterised that strike and the ultimate decision by Impala to grant its RDOs an increase in their wages.

18. No reference is made in this context to the wage increase demanded by the RDOs at Impala. It was in an amount of R9 000 per month, not R12 500 with which Lonmin was subsequently confronted.

19. The basis upon which the R12 500 was demanded was not explained. The persons who initially engaged in discussions with Da Costa could not explain the origin and the basis of calculating the demand. Indeed, not one of the striking mine workers who had testified was able to shed any light on this demand.²
20. There was no direct evidence of a causal link between the Da Costa discussion and the 10 August strike. One possibility is that the strike had been embarked upon because Lonmin did not yield to the demand for R12 500, and that the strike would only have been averted if Lonmin had agreed to the demand. Nzuza stated this in so many words.³
21. This is difficult to reconcile with the testimony of the strikers that at the commencement of the strike, there had been no feedback given on the Da Costa talks: the body of striking mine workers was neither informed of the fact of those talks nor of the content thereof, nor of the outcome. To this extend, any misapprehension on the part of the striking mine workers that Lonmin had not in any way engaged with RDOs on their demand for R12 500 is a result of them not having been informed of the fact of Da Costa's talks.
22. All that is before the Commission is that Da Costa was told that the R12 500 was a "good number".⁴ The danger of Lonmin giving in to such a demand is self-evident. In considering the demand Lonmin would have had to

² The primary heads filed on behalf of the injured and arrested persons suggested in paragraph 16 that, with the exception of Bishop Seoka, witnesses were carefully selected to provide a spread of evidence covering the vast majority of the main events under investigation by the Commission.

³ Transcript, 28 August 2014; page 35997, line 22; page 35998, line 7 and page 36075, line 5 – 16.

⁴ Transcript, 3 June 2014, page 30028, lines 8 - 10

understand the makeup, and the implications for the remaining Lonmin workforce in the event of such an increase being granted.

23. As events unfolded, what started as a Karee RDO demand for a wage increase, eventually metamorphosed into a strike which involved RDOs from across Lonmin's operations and other categories of workers. Consequently, the characterisation of the demand for R12 500 as being one by RDOs, fails to take into account evidence that the strikers were not limited to RDOs.

(b) Negotiating with the strikers: to talk or not to talk

24. A recurring theme in criticisms levied against Lonmin is that it should have negotiated with the strikers. Deputy President Ramaphosa accepts this criticism in the heads filed on his behalf.⁵ We have addressed this criticism in some detail in our principal heads: at the risk of being repetitive, we stress that:

24.1 There is no engagement with the question what the outcome might have been if the demands of the strikers were not met by Lonmin; it is highly unlikely that they would have put down their arms and gone back to work.

24.2 Nor is there a suggestion as to where such negotiations should have taken place, with whom representing the strikers (RDOs or all involved?), what preconditions had to be in place - to be debated in the "talks about talks" which would have had to proceed such negotiations

⁵ Paragraph 56.1 to 56.3 and 56.6

- and when these negotiations should have been commenced (before or after the first killings took place?).

24.3 Mr Ramaphosa, a seasoned negotiator in conditions of labour unrest in this country, never once suggested negotiation with the strikers as an option in August 2012. We submit the reason being that he did not consider it appropriate at the time.

24.4 Without the benefit of hindsight his motive, namely to stabilise the situation and to bring the acts of violence to an end,⁶ cannot be faulted.

24.5 After the events of 13 August it would have been unprecedented to expect wage negotiations between Lonmin and the strikers outside established collective bargaining structures. The ambivalence in the heads filed on behalf of Mr Ramaphosa is illustrated by the submission made in paragraph 56.3:

"Mr Ramaphosa accepted that he might have sought to use such influence as he had over the direction of the company to seek to change the approach of Lonmin management in this respect. However, in his assessment of the situation, the most immediate priority was to stabilise the situation and to restore peace and order."

24.6 His most recent criticism of Lonmin's approach -

("Mr Ramaphosa was critical of the approach of Lonmin to seek to discipline and dismiss the strikers rather than to negotiate with them")⁷

⁶ Ramaphosa's heads, paragraph 56.4

is accordingly unjustified.

25. The criticism against Lonmin on the Da Costa talks vacillates between criticism of Lonmin for having engaged in discussions with Karee RDO representatives, to praise for having done so. The praise for Lonmin for the Da Costa talks comes essentially from the injured and arrested persons. That praise though is a poisoned chalice, because it is then used as a foundation for later criticism against Lonmin for not similarly engaging in talks during the period 9 - 16 August 2012.
26. The criticism in turn ranges from the suggestion that by engaging in the Da Costa talks, Lonmin acted outside the collective bargaining framework, to a suggestion that in entering into "negotiations", Lonmin communicated to the striking workers that it was willing to "negotiate" outside of the collective bargaining structures.
27. Both in the praise for Lonmin on the Da Costa talks and in the criticism against Lonmin regarding the Da Costa talks, there are fundamental mischaracterisations of these talks, based in part on attempts to draw inferences and in part on attempted concessions sought (unsuccessfully) of Lonmin's witnesses, in particular Da Costa.
28. Da Costa was adamant that:

⁷ Ramaphosa's heads, paragraph 56.2

- 28.1 he was not engaging in “negotiations” with the RDOs. He had told them that Lonmin would not negotiate their wage demands outside of recognised structures. The objective facts in this regard support Da Costa: while the RDO representatives spoke to him about a R12 500 wage demand, he did not negotiate this figure with them at all; an RDO allowance was granted; there was never any suggestion, let alone negotiations, about this; the decision was a unilateral one by Exco. Even though the RDO demand for R12 500 prompted a review by Lonmin of the wages which other platinum mines were paying to their RDOs at the time, the consequent RDO allowance had nothing to do with the R12 500: the benchmark used was the wages at neighbouring platinum mines;
- 28.2 at no stage did the RDOs revert to Lonmin on the RDO allowance. They embarked on the strike because their demand for R12 500 had not been agreed to;
- 28.3 when Da Costa agreed to talk to RDO representatives, he did so because these were employees for whom he was responsible. He explained why he could not negotiate their demands with them; ultimately, when he communicated the RDO allowance, he stated that this was to bring parity with wages earned by RDOs at other platinum mines.
29. It is also unrealistic to expect that Bishop Seoka’s belated intervention might have led to a negotiated truce.

30. At the time when Bishop Seoka sought to intervene, there had been two essential developments. First, the SAPS had taken operational control of the area around the Koppie. Second, there was no indication that the striking mine workers would have been satisfied with anything less than Lonmin conceding their demands.
31. Mathunjwa sought to take advantage of the situation for the benefit of AMCU. This was preceded by his letter of 10 August 2012 to Mokwena where he had referred to the striking mine workers as “sinister forces”, and exhorted Mokwena not to engage with any persons outside of union structures.

(c) Perception of the strikers

32. A separate theme emerged in the criticism of Lonmin: it is submitted that the perception of RDOs was that Lonmin was willing to engage in “negotiations”. In circumstances where parties were allowed to and did in fact lead evidence, not a single striker was asked about their “perceptions” regarding the Da Costa talks. The suggestion of what the mine workers may have “perceived” was not supported by the only persons who could have spoken to such “perceptions”, namely those RDO representatives or the Karee RDOs who were involved in the discussions with Da Costa.

(d) The shootings of 10 August 2012

33. On the evening of 10 August 2012, Lonmin security shot at persons using rubber bullets. Botes testified that the shooting occurred to deter striking mine

workers from intimidating workers who were walking from the hotel complex to the Rowland shaft.⁸

34. The evidence leaders criticised Lonmin in this regard by stating that:

*"bland references to strikers intimidating workers are insufficient grounds to justify shooting at people."*⁹

They rely upon the evidence of Captain Govender in this regard.

35. The following emerged during the cross-examination of Captain Govender:

35.1 He could not explain why there would be individuals standing around at 18h30 armed with knobkierries, in an area where workers would pass on their way to report for duty.

35.2 He could not explain why individuals who stated that they were waiting for a taxi happened to move away a few minutes later without any taxi arriving.

35.3 His explanation is inconsistent with the acts of violence against non-striking employees which was reported to him later that evening.¹⁰

36. Finally, he conceded that he did not have any training of crowd control, and that he had underestimated the situation when Botes had asked him to assist

⁸ Transcript, 29 July 2014, page 33435, lines 4-10

⁹ Evidence leaders' heads, page 107, paragraph 198

¹⁰ Transcript 14 August 2014, pages 35090 - 35101

in dispersing the crowd who would be intimidating workers wishing to go to work.¹¹

37. The adverse findings suggested by the evidence leaders to be made against Lonmin relates to these shootings,¹² which involve Messrs Botha and Kellerman.¹³ What is not addressed is:

37.1 the nexus between these incidents and the events from 12 - 16 August;

37.2 who, if anyone, was injured in the incidents, and the extent of any injuries suffered;

37.3 why there was no request for any of the protagonists (Botha, Kellerman or any of the strikers involved) to testify, nor efforts to explore the circumstances leading to the shootings.

38. We accordingly submit that there has been an insufficient investigation of the events around the shootings on 10 August 2012 for the Commission to arrive with any confidence at a finding or a recommendation adverse to Lonmin.

(e) Characterisation of the strike

39. In the primary heads submitted on behalf of the injured and arrested parties and the families, there remains a persistent attack against Lonmin for the characterisation of the strike by, *inter alia*, Jamieson. Mr Ramaphosa is similarly criticised.

¹¹ Transcript 14 August 2014, pages 35100 - 35101

¹² Evidence leaders' heads, paragraphs 1217 - 1223

¹³ Evidence leaders' heads, paragraphs 183 - 201

40. From 10 August 2012, violence began to creep into the events unfolding at Marikana. This included deaths of non-striking mineworkers, Lonmin security personnel and police officers.
41. In those circumstances Lonmin was justified in its characterisation of the conduct of the strikers as “criminal”.
42. Lonmin was also acting within its rights to call upon SAPS to deal with matters which fell squarely within SAPS’s constitutional mandate.
43. The criticism is ultimately directed towards suggesting that the characterisation resulted in political pressure having been placed on Ministers and ultimately SAPS, to break the back of the strike. This thesis was not supported by evidence from any of the senior SAPS officers on site.
44. The criticism is also opportunistic if compared to the criticism levied at Lonmin for having failed to provide a security service able to provide a safe environment for employees; and it leaves unexplored similar requests made by Mr Zokwana of NUM.

(f) Capacity of Lonmin’s security

45. The request for SAPS’s assistance should be viewed against Lonmin’s security capacity. Blou testified that Lonmin had, during 2005, taken the decision to demilitarise its security. That decision was implemented. The effect of demilitarisation was that Lonmin did not have the capacity to deal with events as they unfolded in the period 9 - 16 August 2012.

46. The criticism that Lonmin had failed to take adequate steps to provide security to employees during that period do not deal with the effect of demilitarisation, nor are there any positive suggestions regarding what Lonmin might or ought to have done to deal with the strikers and the ensuing violence. The sole suggestion made was that Lonmin ought to have purchased vehicles such as Nyalas. Why private entities should acquire paramilitary vehicles to do crowd control involving their employees and others, is difficult to follow. What is also not explored is how many security personnel would have been required to control the 2000 to 3000 armed and hostile strikers during the relevant period.
47. To the extent that Lonmin is criticised for the deaths of Messrs Mabelane and Fundi, the evidence was that these deaths occurred in circumstances where Lonmin security personnel, based on past experience, did not and could not have anticipated that they would be attacked in the barbaric manner that happened. The criticism fails to address the fundamental tragedy of the deaths of these two men: they were murdered, needlessly and without any justification, by a group of strikers who were busy marching onto the NUM offices. Any attempt at placing blame on Lonmin simply serves to shift focus away from those who were directly responsible for these barbaric acts of violence.
48. Similarly, the attacks at K4 shaft, the deaths of Messrs Mpembe and Langa, and that of Mr Twala cannot be attributed to any act or omission on the part of Lonmin. These persons were killed by strikers who had run out of control.

The killings were barbaric and senseless. To seek to apportion blame on Lonmin is unwarranted.

(g) Shutting down mining operations

49. The evidence leaders suggest that Lonmin's failure to close the mine after the murder of Messrs Fundi and Mabelane required further investigation, and should be referred to the SAPS(!) and the NDPP.¹⁴
50. The problem with the criticism of Lonmin in this regard is that none of the submissions engage with the unchallenged evidence of Seedat on the topic:

"Mr Seedat : I'll deal with the practicalities first and then I'll go onto the financials. A shaft, at all times, needs to be maintained. So even when you're not producing, you need essential services. On average a shaft like K3 will need between 150 and 200 people on 3 shaft to maintain it. There's water pumping, there's ventilation, there's electrical, the shaft, you're using the cage to take people up and down, you have to keep all of those things going. Let me give you one real example of what could happen. If your ventilation stops, in some shafts you could have potentially, methane build-up. You still have electricity, you have the potential of a blast. On the shallower shafts you have water, the water table is higher than the shaft, you have water ingress into the shaft. If it's not pumped regularly it can decant out of the shaft and create environmental problems. You've got 11

¹⁴ Evidence leaders' primary heads, paragraphs 1307 -1308

shafts, so you're talking of 11 times, whether it is 150 or 200, you're talking ?? 2000 people you need.

Let's take it further. Next to each shaft is a concentrator. The concentrator takes the ore, crushes it, mills it, puts it into a liquid solution and then you do the separation and you get roughly the rough cut of the PGMs and the other products. You can't just switch that off overnight. You've got to drain it in an orderly way, otherwise if you just stop, the material settles and you're going to spend days, weeks, de-blocking the system when you have to restart it, at significant cost. That's the concentrator.

From the concentrator the material goes to the smelter. Now, the smelter operates, there's two furnaces in the case of Lonmin, the smelter operates at temperatures above 1000°. These are highly sophisticated electrode furnaces. In other words, you have positive and negative electrodes in the material in between and it arcs and it creates heat and these are water-cooled units. When we have to maintain one of these furnaces, we have to shut it down and that it takes two weeks and if you want to keep it alive but not producing because you're in this crises situation, you still need people there to maintain it. You've got water systems around it, if those water systems fail you can either have water ingress into the furnace and there's an explosion or you have water not cooling and you can have the furnace failing as well. So not practical to turn the furnace off overnight.

The same with base metals refinery. The base metals refinery is right next to the smelter, the furnaces and similarly it puts all of these products in suspension, through the various circuits and then produces, separates from there the different components and it's a base metal – they're associate minerals that are pulled out there. So you can't just shut that overnight. You have got to do it over a good few days. So those are the practical reasons why you couldn't just, let's say on that Monday the 13th, switch off the lights and let's leave, take everybody out of harm's way. You can't do that, you need the essential service people.

I spoke earlier about Lonmin's financial position. In the midst of this, as I mentioned – well, prior to this, we had gone on a road show to test the market for a bond, not successful. One was not being produced, but when this stopped, when the strike started you had stock piles of ore and you had material in process. To enable Lonmin to maintain its liquidity to a level that satisfies its covenants with the bank, Lonmin literally over a period drained all of that product and produced finished product and sold it and that's how it managed to keep on the right side of its financial covenants. If you recall the last extended strike, legal strike that we had in the country, the analysts were saying that this how many of the companies had managed to keep themselves financially afloat, they'd been draining their system, using up their work in progress.

So those are really the reasons why, I mean I say that with a bit of cynicism but the guys, the people who are on strike, those that lived in the hostels still went back to the hostels to have their meal. So if we had sent the people there doing the cooking away as well, because you can't selectively – you'd create a further problem for yourself. So not a real practical solution that could have been implemented, you know, within a couple of days or in some cases within a couple of weeks.”¹⁵

(emphasis added)

51. Neither SAPS nor the evidence leaders grapple with these realities.
52. In addition: the employer would have to distinguish between those who did not come to work because they were on an unprotected strike, and those who did not come to work because of the “shutdown”. How, in these circumstances is the employer able to distinguish, and who gets paid and who does not get paid during the period in question? There would be a real argument that the employer would be responsible for paying all employees once it closed down the operation. A greater inducement to prolong the strike is difficult to envisage.

(h) The Securities Procedures Document

53. A debate is raised around the Counter Industrial Action Response Procedure (“the securities procedures document”) which was produced as exhibit “XXX8” during the proceedings.

¹⁵ Transcript, 11 September 2014, pages 37794 to 37797.

54. It is submitted that Lonmin had failed to follow its own procedural requirements in dealing with the strike which commenced during the nightshift of 9 August 2012.

55. There are a number of facts which need to be considered in this regard:

55.1 The securities procedure document had not been considered, let alone approved, by Exco.¹⁶

55.2 The Da Costa discussions took place with the Karee RDOs. Through those discussions Lonmin's response to the demand of R12 500 was communicated. Notwithstanding this, the strike took place. No "talks" which would have repeated Lonmin's response would have changed the course of events. The evidence of the striking workers in this regard was clear - it was either capitulation by Lonmin, or a continuation of the strike.

55.3 Lonmin security had, on 10 August 2012, engaged with the striking workers, who refused to hand over a memorandum containing their demands because, so they said, they were illiterate and could not write. Lonmin was moreover well aware of the R12 500 wage demand since a number of the striking workers were displaying placards which stated that they were demanding such a wage.¹⁷

55.4 Lonmin security, to the extent that it was necessary to do so, substantially complied with the securities' procedures document in that

¹⁶ Transcript, day 267, page 33962, lines 11 - 14

¹⁷ Exhibit W3

they determined the reason for the unprotected strike and conveyed this reason to Lonmin Human Capital. Lonmin Human Capital's reasons for not engaging with the striking employees are fully traversed in Lonmin's principal heads of argument.

PHASE 2 ISSUES

56. The evidence leaders do not suggest any findings or recommendation adverse to Lonmin by the Commission arising from the evidence led in respect of Phase 2. That is understandable in view of the limited extent to which Phase 2 issues could be explored.

57. The criticism levied against Lonmin in this context have been addressed in the primary submissions, but we add the following:

57.1 The suggestion that an adverse inference should be drawn based on Lonmin's failure to call further witnesses on its SLP housing obligations ignores the time constraints imposed on Phase 2 evidence, the absence of a final report by Dr Forrest, the absence of any evidence on this issue by DMR, and the agreement with the evidence leaders that Seedat would be the Lonmin witness to address Phase 2 issues.¹⁸

57.2 The criticism is repeated that Lonmin had the financial ability to meet its SLP obligations in the post 2008 era: what is ignored though is

¹⁸ It was generally understood that of the three Lonmin witnesses who could testify in the time available (Jameson, Mokwena and Seedat), Seedat was the most suitable person to speak to Phase 2 issues. It was then agreed with the evidence leaders that Seedat would be the witness giving evidence on Phase 2, which would allow more time to explore Phase 1 issues with Jameson and Mokwena.

Seedat's unchallenged testimony, referring to the affidavit prepared by Mr Simon Scott, illustrating that shareholders in Lonmin Plc contributed substantially more than what had been received by way of dividends during the relevant period.¹⁹ In addition, shareholders of WPL and EPL had financial covenants to comply with: in the case of *Shanduka*, this was to ensure that it could meet its loan obligations for its investment in WPL and EPL, and in turn enabling those entities to comply with their Charter obligations as to BEE shareholding. Lonmin had raised loans in foreign markets at a low rate to meet the BEE requirements. Those loans had to be repaid, which could only be done through declaring dividends by the two operational companies. In the process Lonmin Plc shareholders not only had a negative return on capital, but eventually had to invest more money into the operating companies than their dividend received.

PHASE 2: CONCLUDING REMARKS

58. Having made these submissions, the stark reality is that living conditions of miners generally and of employees of Lonmin in particular are unacceptable. It cannot continue if we hope to learn from and prevent another Marikana type tragedy.
59. The system of migrant labour lies at the root of most of these ills; it permeates the mining industry in South Africa, more particularly on the Rustenburg platinum belt and at WPL and EPL.

¹⁹ Exhibit SSSS 11.

60. We accordingly support the recommendations in this context made by the SAHRC as contained in part 4 of their submissions.

S.F. BURGER SC

A.E. BHAM SC

M. VAN AS

**IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE TRAGIC EVENTS AT
MARIKANA DURING AUGUST 2012**

LONMIN'S REPLYING SUBMISSIONS : 3 NOVEMBER 2014

INTRODUCTION

1. Provision has been made for replying submissions to be filed. In this reply we intend only to address new criticisms and different angles of incidence explored by parties in their primary heads, all from the perspective of Lonmin. We do not engage in a debate on the actions of either SAPS or the strikers, or for that matter the unions.
2. As most of the criticisms raised against Lonmin have already been addressed in our primary heads of argument, we do not intend to revisit those submissions.
3. We also do not comment on each of the written submissions separately. Except for certain submissions made by the evidence leaders, we deal with phases and issues collectively. We commence by making two introductory observations.

INTRODUCTORY OBSERVATIONS

(a) The Legal Framework and the Rule of Law

4. In Lonmin's primary heads, we have dealt with the legal framework for collective bargaining in South Africa.¹
5. Other than in the written submissions of the NUM, and cursorily in the SAPS's written submissions, this legal framework, and its implications in the

¹ Lonmin's heads, pages 15 - 20

assessment of the events of 9 - 16 August 2012 at Marikana, has been left unexplored.

6. We emphasise the following:

6.1 In keeping with South Africa's constitutional democracy, the LRA was promulgated and continues to operate in order to regulate the relationship between capital and labour in all its many facets, including in the sphere of collective bargaining. The introduction to the LRA spells this out. The LRA intends, *inter alia*,

"... to give effect to section 27 of the Constitution;

to regulate the organisational rights of trade unions;

to promote and facilitate collective bargaining at the workplace and at sectoral level;

to regulate the right to strike and the recourse to lock-out in conformity with the Constitution; ...

to provide simple dispute procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established) ... ;

to establish the Labour Court and the Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;

..."

- 6.2 That framework exists in order to promote stability in industrial relations and to guide parties on how they can be expected and are entitled to act. Section 1 of the LRA provides:

"that its purpose ... is to advance economic development, labour peace ... and to promote – orderly collective bargaining; ... and the effective resolution of labour disputes."

- 6.3 Any suggestion made with the benefit of hindsight that an employer should act differently in a particular situation should be assessed against this backdrop, and consideration should be given to the future implications of the suggested alternative course of conduct. There is a contradiction between, on the one hand, suggesting that the law and our Constitutional democracy should be respected, and on the other hand seeking to impose an obligation on Lonmin to act outside that legal framework and to negotiate wages with individual strikers embarking on unprotected strike, and in the face of violence.

- 6.4 There is no suggestion that Lonmin acted outside the framework established by the LRA. On the other hand, Lonmin was faced with conduct on the part of strikers which was not only outside of the framework provided for by the LRA, but in defiance of a court order. Negotiations in these circumstances would have sent a message of encouragement to employees to engage in conduct outside the existing framework to achieve their aim. This would create an arena of uncertainty in the relationship between capital and labour.

6.5 None of this is explored by the parties criticising Lonmin for not “talking” to the strikers.

7. On a wider front, the rule of law is involved. In circumstances where a strike turns violent and is characterised by high levels of intimidation, damage to property and injury and deaths of persons, it is not the role of the employer to equip itself to deal with and to contain such conduct. That is the role of the SAPS.
8. Where an employer employs a large workforce, it cannot be expected of him to establish an internal security force to deal with the type of events which were experienced by Lonmin in the period under discussion. That responsibility falls squarely within the Constitutional mandate of SAPS, being the primary organ of State responsible for maintaining and upholding the rule of law and protecting the public and property.
9. In considering the framework of the LRA and the rule of law, a question which the Commission squarely faces is whether a party which acts within its rights, should be criticised for not “talking” to the strikers. On the evidence, the strike had been started and continued not in order to force Lonmin into “talks”, but to obtain a basic wage increase to R12 500 per month. Nothing less would have satisfied the strikers during the period which the Commission is inquiring into.

(b) The Terms of Reference and the Conduct of the Commission

10. In Lonmin's primary heads, we deal with the appointment of the Commission, its terms of reference as well as the ruling of 8 November 2012 and 25 August 2014. We add one additional observation.
11. During the period 8 November 2012 to 25 August 2014 when most of the evidence relating to Phase 1 was dealt with, the Commission operated pursuant to a ruling which drew a direct causal link between the evidence received and the events of 9 - 16 August 2012. The Commission had ruled that the first phase would be confined to the direct causes of legal responsibility of parties for the deaths of and injuries to any persons and damage to property during the said period.
12. The Commission's terms of reference insofar as it relates to the conduct of Lonmin generally, are wider. Yet, the ruling of 8 November 2012 was the basis upon which the Commission's hearings were conducted up to 25 August 2014.
13. Notwithstanding this, there has been a suggestion by a number of parties that Lonmin bears responsibility for the events which occurred during the said period. Under rubrics such as "*Lonmin's failure to talk*", "*toxic collusion*", "*missing out on lost opportunities offered to Lonmin by the likes of Muthunjwa and Bishop Seoka*", and suggestions that Lonmin had taken "*inadequate security steps*" to protect people during the said period, submissions have been advanced that the Commission should find Lonmin responsible, whether directly or indirectly, for the loss of life or damage to persons or property.

14. These submissions assume a causal nexus between Lonmin's alleged failures to engage with the strikers and the events in question. But without the counterfactual, and exploring questions such as:

- what would have been discussed;
- what offer was likely to be made by Lonmin to the strikers;
- what offer was likely to be accepted by the strikers (RDOs or everyone?);
- what would have been the result of an inability to reach agreement between the parties;

the causal connection between the failure to engage and the tragedy is absent. Perhaps not surprisingly, none of the counterfactual questions posed above are addressed by any of the criticising parties.

15. The absence of a causal connection between the refusal to negotiate and the tragedy is illustrated on a different approach:

15.1 Two Lonmin security staff members were brutally murdered on 12 August. This related to and arose from the conduct of the strikers - there has yet to be an explanation regarding why, in the context of the demand made for wage increases, the strikers chose to conduct themselves in a manner which led to the deaths of Messrs Fundi and Mabelane.

15.2 Five of the fatalities were a result of the confrontation between SAPS and the strikers on 13 August 2012. Lonmin was not a party to that

confrontation and could in no way have impacted upon what actually occurred, nor foreseen it. It was the conduct of striking mine workers and SAPS which characterised the confrontation - it arose from the manner in which the conduct in the strike unfolded, not the demand for R12 500 itself.

15.3 Directly flowing from the conduct of the strikers, were the deaths of Messrs Mabebe, Langa and Twala. Again, this was causally unrelated to any omission by Lonmin.

16. In view of the ruling of 5 November 2012, there is no evidence to suggest that Lonmin was the direct cause of or bore legal responsibility for any of the deaths of or injuries to persons and damage to property which occurred during the period under consideration.

CAPITA SELECTA

(a) The Demand for R12 500 in context

17. A number of parties, in contextualising the events of August 2012, examined the strike at Impala earlier that year, including the levels of violence which characterised that strike and the ultimate decision by Impala to grant its RDOs an increase in their wages.

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21. This is difficult to reconcile with the testimony of the strikers that at the commencement of the strike, there had been no feedback given on the Da Costa talks: the body of striking mine workers was neither informed of the fact of those talks nor of the content thereof, nor of the outcome. To this extend, any misapprehension on the part of the striking mine workers that Lonmin had not in any way engaged with RDOs on their demand for R12 500 is a result of them not having been informed of the fact of Da Costa's talks.
22. All that is before the Commission is that Da Costa was told that the R12 500 was a "good number".⁴ The danger of Lonmin giving in to such a demand is self-evident. In considering the demand Lonmin would have had to

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understand the makeup, and the implications for the remaining Lonmin workforce in the event of such an increase being granted.

23. As events unfolded, what started as a Karee RDO demand for a wage increase, eventually metamorphosed into a strike which involved RDOs from across Lonmin's operations and other categories of workers. Consequently, the characterisation of the demand for R12 500 as being one by RDOs, fails to take into account evidence that the strikers were not limited to RDOs.

(b) Negotiating with the strikers: to talk or not to talk

24. A recurring theme in criticisms levied against Lonmin is that it should have negotiated with the strikers. Deputy President Ramaphosa accepts this criticism in the heads filed on his behalf.⁵ We have addressed this criticism in some detail in our principal heads: at the risk of being repetitive, we stress that:

24.1 There is no engagement with the question what the outcome might have been if the demands of the strikers were not met by Lonmin; it is highly unlikely that they would have put down their arms and gone back to work.

24.2 Nor is there a suggestion as to where such negotiations should have taken place, with whom representing the strikers (RDOs or all involved?), what preconditions had to be in place - to be debated in the "talks about talks" which would have had to proceed such negotiations

⁵ Paragraph 56.1 to 56.3 and 56.6

- and when these negotiations should have been commenced (before or after the first killings took place?).

24.3 Mr Ramaphosa, a seasoned negotiator in conditions of labour unrest in this country, never once suggested negotiation with the strikers as an option in August 2012. We submit the reason being that he did not consider it appropriate at the time.

24.4 Without the benefit of hindsight his motive, namely to stabilise the situation and to bring the acts of violence to an end,⁶ cannot be faulted.

24.5 After the events of 13 August it would have been unprecedented to expect wage negotiations between Lonmin and the strikers outside established collective bargaining structures. The ambivalence in the heads filed on behalf of Mr Ramaphosa is illustrated by the submission made in paragraph 56.3:

“Mr Ramaphosa accepted that he might have sought to use such influence as he had over the direction of the company to seek to change the approach of Lonmin management in this respect. However, in his assessment of the situation, the most immediate priority was to stabilise the situation and to restore peace and order.”

24.6 His most recent criticism of Lonmin’s approach -

(“Mr Ramaphosa was critical of the approach of Lonmin to seek to discipline and dismiss the strikers rather than to negotiate with them”)⁷

⁶ Ramaphosa’s heads, paragraph 56.4

is accordingly unjustified.

25. The criticism against Lonmin on the Da Costa talks vacillates between criticism of Lonmin for having engaged in discussions with Karee RDO representatives, to praise for having done so. The praise for Lonmin for the Da Costa talks comes essentially from the injured and arrested persons. That praise though is a poisoned chalice, because it is then used as a foundation for later criticism against Lonmin for not similarly engaging in talks during the period 9 - 16 August 2012.
26. The criticism in turn ranges from the suggestion that by engaging in the Da Costa talks, Lonmin acted outside the collective bargaining framework, to a suggestion that in entering into “negotiations”, Lonmin communicated to the striking workers that it was willing to “negotiate” outside of the collective bargaining structures.
27. Both in the praise for Lonmin on the Da Costa talks and in the criticism against Lonmin regarding the Da Costa talks, there are fundamental mischaracterisations of these talks, based in part on attempts to draw inferences and in part on attempted concessions sought (unsuccessfully) of Lonmin’s witnesses, in particular Da Costa.
28. Da Costa was adamant that:

⁷ Ramaphosa's heads, paragraph 56.2

- 28.1 he was not engaging in “negotiations” with the RDOs. He had told them that Lonmin would not negotiate their wage demands outside of recognised structures. The objective facts in this regard support Da Costa: while the RDO representatives spoke to him about a R12 500 wage demand, he did not negotiate this figure with them at all; an RDO allowance was granted; there was never any suggestion, let alone negotiations, about this; the decision was a unilateral one by Exco. Even though the RDO demand for R12 500 prompted a review by Lonmin of the wages which other platinum mines were paying to their RDOs at the time, the consequent RDO allowance had nothing to do with the R12 500: the benchmark used was the wages at neighbouring platinum mines;
- 28.2 at no stage did the RDOs revert to Lonmin on the RDO allowance. They embarked on the strike because their demand for R12 500 had not been agreed to;
- 28.3 when Da Costa agreed to talk to RDO representatives, he did so because these were employees for whom he was responsible. He explained why he could not negotiate their demands with them; ultimately, when he communicated the RDO allowance, he stated that this was to bring parity with wages earned by RDOs at other platinum mines.
29. It is also unrealistic to expect that Bishop Seoka’s belated intervention might have led to a negotiated truce.

30. At the time when Bishop Seoka sought to intervene, there had been two essential developments. First, the SAPS had taken operational control of the area around the Koppie. Second, there was no indication that the striking mine workers would have been satisfied with anything less than Lonmin conceding their demands.
31. Mathunjwa sought to take advantage of the situation for the benefit of AMCU. This was preceded by his letter of 10 August 2012 to Mokwena where he had referred to the striking mine workers as “sinister forces”, and exhorted Mokwena not to engage with any persons outside of union structures.

(c) Perception of the strikers

32. A separate theme emerged in the criticism of Lonmin: it is submitted that the perception of RDOs was that Lonmin was willing to engage in “negotiations”. In circumstances where parties were allowed to and did in fact lead evidence, not a single striker was asked about their “perceptions” regarding the Da Costa talks. The suggestion of what the mine workers may have “perceived” was not supported by the only persons who could have spoken to such “perceptions”, namely those RDO representatives or the Karee RDOs who were involved in the discussions with Da Costa.

(d) The shootings of 10 August 2012

33. On the evening of 10 August 2012, Lonmin security shot at persons using rubber bullets. Botes testified that the shooting occurred to deter striking mine

workers from intimidating workers who were walking from the hotel complex to the Rowland shaft.⁸

34. The evidence leaders criticised Lonmin in this regard by stating that:

*“bland references to strikers intimidating workers are insufficient grounds to justify shooting at people.”*⁹

They rely upon the evidence of Captain Govender in this regard.

35. The following emerged during the cross-examination of Captain Govender:

35.1 He could not explain why there would be individuals standing around at 18h30 armed with knobkierries, in an area where workers would pass on their way to report for duty.

35.2 He could not explain why individuals who stated that they were waiting for a taxi happened to move away a few minutes later without any taxi arriving.

35.3 His explanation is inconsistent with the acts of violence against non-striking employees which was reported to him later that evening.¹⁰

36. Finally, he conceded that he did not have any training of crowd control, and that he had underestimated the situation when Botes had asked him to assist

⁸ Transcript, 29 July 2014, page 33435, lines 4-10

⁹ Evidence leaders' heads, page 107, paragraph 198

¹⁰ Transcript 14 August 2014, pages 35090 - 35101

in dispersing the crowd who would be intimidating workers wishing to go to work.¹¹

37. The adverse findings suggested by the evidence leaders to be made against Lonmin relates to these shootings,¹² which involve Messrs Botha and Kellerman.¹³ What is not addressed is:

37.1 the nexus between these incidents and the events from 12 - 16 August;

37.2 who, if anyone, was injured in the incidents, and the extent of any injuries suffered;

37.3 why there was no request for any of the protagonists (Botha, Kellerman or any of the strikers involved) to testify, nor efforts to explore the circumstances leading to the shootings.

38. We accordingly submit that there has been an insufficient investigation of the events around the shootings on 10 August 2012 for the Commission to arrive with any confidence at a finding or a recommendation adverse to Lonmin.

(e) Characterisation of the strike

39. In the primary heads submitted on behalf of the injured and arrested parties and the families, there remains a persistent attack against Lonmin for the characterisation of the strike by, *inter alia*, Jamieson. Mr Ramaphosa is similarly criticised.

¹¹ Transcript 14 August 2014, pages 35100 - 35101

¹² Evidence leaders' heads, paragraphs 1217 - 1223

¹³ Evidence leaders' heads, paragraphs 183 - 201

40. From 10 August 2012, violence began to creep into the events unfolding at Marikana. This included deaths of non-striking mineworkers, Lonmin security personnel and police officers.
41. In those circumstances Lonmin was justified in its characterisation of the conduct of the strikers as “criminal”.
42. Lonmin was also acting within its rights to call upon SAPS to deal with matters which fell squarely within SAPS’s constitutional mandate.
43. The criticism is ultimately directed towards suggesting that the characterisation resulted in political pressure having been placed on Ministers and ultimately SAPS, to break the back of the strike. This thesis was not supported by evidence from any of the senior SAPS officers on site.
44. The criticism is also opportunistic if compared to the criticism levied at Lonmin for having failed to provide a security service able to provide a safe environment for employees; and it leaves unexplored similar requests made by Mr Zokwana of NUM.

(f) Capacity of Lonmin’s security

45. The request for SAPS’s assistance should be viewed against Lonmin’s security capacity. Blou testified that Lonmin had, during 2005, taken the decision to demilitarise its security. That decision was implemented. The effect of demilitarisation was that Lonmin did not have the capacity to deal with events as they unfolded in the period 9 - 16 August 2012.

46. The criticism that Lonmin had failed to take adequate steps to provide security to employees during that period do not deal with the effect of demilitarisation, nor are there any positive suggestions regarding what Lonmin might or ought to have done to deal with the strikers and the ensuing violence. The sole suggestion made was that Lonmin ought to have purchased vehicles such as Nyalas. Why private entities should acquire paramilitary vehicles to do crowd control involving their employees and others, is difficult to follow. What is also not explored is how many security personnel would have been required to control the 2000 to 3000 armed and hostile strikers during the relevant period.
47. To the extent that Lonmin is criticised for the deaths of Messrs Mabelane and Fundi, the evidence was that these deaths occurred in circumstances where Lonmin security personnel, based on past experience, did not and could not have anticipated that they would be attacked in the barbaric manner that happened. The criticism fails to address the fundamental tragedy of the deaths of these two men: they were murdered, needlessly and without any justification, by a group of strikers who were busy marching onto the NUM offices. Any attempt at placing blame on Lonmin simply serves to shift focus away from those who were directly responsible for these barbaric acts of violence.
48. Similarly, the attacks at K4 shaft, the deaths of Messrs Mpembe and Langa, and that of Mr Twala cannot be attributed to any act or omission on the part of Lonmin. These persons were killed by strikers who had run out of control.

The killings were barbaric and senseless. To seek to apportion blame on Lonmin is unwarranted.

(g) Shutting down mining operations

49. The evidence leaders suggest that Lonmin's failure to close the mine after the murder of Messrs Fundi and Mabelane required further investigation, and should be referred to the SAPS(!) and the NDPP.¹⁴
50. The problem with the criticism of Lonmin in this regard is that none of the submissions engage with the unchallenged evidence of Seedat on the topic:

“Mr Seedat : I’ll deal with the practicalities first and then I’ll go onto the financials. A shaft, at all times, needs to be maintained. So even when you’re not producing, you need essential services. On average a shaft like K3 will need between 150 and 200 people on 3 shaft to maintain it. There’s water pumping, there’s ventilation, there’s electrical, the shaft, you’re using the cage to take people up and down, you have to keep all of those things going. Let me give you one real example of what could happen. If your ventilation stops, in some shafts you could have potentially, methane build-up. You still have electricity, you have the potential of a blast. On the shallower shafts you have water, the water table is higher than the shaft, you have water ingress into the shaft. If it’s not pumped regularly it can decant out of the shaft and create environmental problems. You’ve got 11

¹⁴ Evidence leaders’ primary heads, paragraphs 1307 -1308

shafts, so you're talking of 11 times, whether it is 150 or 200, you're talking ?? 2000 people you need.

Let's take it further. Next to each shaft is a concentrator. The concentrator takes the ore, crushes it, mills it, puts it into a liquid solution and then you do the separation and you get roughly the rough cut of the PGMs and the other products. You can't just switch that off overnight. You've got to drain it in an orderly way, otherwise if you just stop, the material settles and you're going to spend days, weeks, de-blocking the system when you have to restart it, at significant cost. That's the concentrator.

From the concentrator the material goes to the smelter. Now, the smelter operates, there's two furnaces in the case of Lonmin, the smelter operates at temperatures above 1000°. These are highly sophisticated electrode furnaces. In other words, you have positive and negative electrodes in the material in between and it arcs and it creates heat and these are water-cooled units. When we have to maintain one of these furnaces, we have to shut it down and that it takes two weeks and if you want to keep it alive but not producing because you're in this crises situation, you still need people there to maintain it. You've got water systems around it, if those water systems fail you can either have water ingress into the furnace and there's an explosion or you have water not cooling and you can have the furnace failing as well. So not practical to turn the furnace off overnight.

The same with base metals refinery. The base metals refinery is right next to the smelter, the furnaces and similarly it puts all of these products in suspension, through the various circuits and then produces, separates from there the different components and it's a base metal – they're associate minerals that are pulled out there. So you can't just shut that overnight. You have got to do it over a good few days. So those are the practical reasons why you couldn't just, let's say on that Monday the 13th, switch off the lights and let's leave, take everybody out of harm's way. You can't do that, you need the essential service people.

I spoke earlier about Lonmin's financial position. In the midst of this, as I mentioned – well, prior to this, we had gone on a road show to test the market for a bond, not successful. One was not being produced, but when this stopped, when the strike started you had stock piles of ore and you had material in process. To enable Lonmin to maintain its liquidity to a level that satisfies its covenants with the bank, Lonmin literally over a period drained all of that product and produced finished product and sold it and that's how it managed to keep on the right side of its financial covenants. If you recall the last extended strike, legal strike that we had in the country, the analysts were saying that this how many of the companies had managed to keep themselves financially afloat, they'd been draining their system, using up their work in progress.

So those are really the reasons why, I mean I say that with a bit of cynicism but the guys, the people who are on strike, those that lived in the hostels still went back to the hostels to have their meal. So if we had sent the people there doing the cooking away as well, because you can't selectively – you'd create a further problem for yourself. So not a real practical solution that could have been implemented, you know, within a couple of days or in some cases within a couple of weeks.”¹⁵

(emphasis added)

51. Neither SAPS nor the evidence leaders grapple with these realities.
52. In addition: the employer would have to distinguish between those who did not come to work because they were on an unprotected strike, and those who did not come to work because of the “shutdown”. How, in these circumstances is the employer able to distinguish, and who gets paid and who does not get paid during the period in question? There would be a real argument that the employer would be responsible for paying all employees once it closed down the operation. A greater inducement to prolong the strike is difficult to envisage.

(h) The Securities Procedures Document

53. A debate is raised around the Counter Industrial Action Response Procedure (“the securities procedures document”) which was produced as exhibit “XXX8” during the proceedings.

¹⁵ Transcript, 11 September 2014, pages 37794 to 37797.

54. It is submitted that Lonmin had failed to follow its own procedural requirements in dealing with the strike which commenced during the nightshift of 9 August 2012.

55. There are a number of facts which need to be considered in this regard:

55.1 The securities procedure document had not been considered, let alone approved, by Exco.¹⁶

55.2 The Da Costa discussions took place with the Karee RDOs. Through those discussions Lonmin's response to the demand of R12 500 was communicated. Notwithstanding this, the strike took place. No "talks" which would have repeated Lonmin's response would have changed the course of events. The evidence of the striking workers in this regard was clear - it was either capitulation by Lonmin, or a continuation of the strike.

55.3 Lonmin security had, on 10 August 2012, engaged with the striking workers, who refused to hand over a memorandum containing their demands because, so they said, they were illiterate and could not write. Lonmin was moreover well aware of the R12 500 wage demand since a number of the striking workers were displaying placards which stated that they were demanding such a wage.¹⁷

55.4 Lonmin security, to the extent that it was necessary to do so, substantially complied with the securities' procedures document in that

¹⁶ Transcript, day 267, page 33962, lines 11 - 14

¹⁷ Exhibit W3

they determined the reason for the unprotected strike and conveyed this reason to Lonmin Human Capital. Lonmin Human Capital's reasons for not engaging with the striking employees are fully traversed in Lonmin's principal heads of argument.

PHASE 2 ISSUES

56. The evidence leaders do not suggest any findings or recommendation adverse to Lonmin by the Commission arising from the evidence led in respect of Phase 2. That is understandable in view of the limited extent to which Phase 2 issues could be explored.

57. The criticism levied against Lonmin in this context have been addressed in the primary submissions, but we add the following:

57.1 The suggestion that an adverse inference should be drawn based on Lonmin's failure to call further witnesses on its SLP housing obligations ignores the time constraints imposed on Phase 2 evidence, the absence of a final report by Dr Forrest, the absence of any evidence on this issue by DMR, and the agreement with the evidence leaders that Seedat would be the Lonmin witness to address Phase 2 issues.¹⁸

57.2 The criticism is repeated that Lonmin had the financial ability to meet its SLP obligations in the post 2008 era: what is ignored though is

¹⁸ It was generally understood that of the three Lonmin witnesses who could testify in the time available (Jameson, Mokwena and Seedat), Seedat was the most suitable person to speak to Phase 2 issues. It was then agreed with the evidence leaders that Seedat would be the witness giving evidence on Phase 2, which would allow more time to explore Phase 1 issues with Jameson and Mokwena.

Seedat's unchallenged testimony, referring to the affidavit prepared by Mr Simon Scott, illustrating that shareholders in Lonmin Plc contributed substantially more than what had been received by way of dividends during the relevant period.¹⁹ In addition, shareholders of WPL and EPL had financial covenants to comply with: in the case of *Shanduka*, this was to ensure that it could meet its loan obligations for its investment in WPL and EPL, and in turn enabling those entities to comply with their Charter obligations as to BEE shareholding. Lonmin had raised loans in foreign markets at a low rate to meet the BEE requirements. Those loans had to be repaid, which could only be done through declaring dividends by the two operational companies. In the process Lonmin Plc shareholders not only had a negative return on capital, but eventually had to invest more money into the operating companies than their dividend received.

PHASE 2: CONCLUDING REMARKS

58. Having made these submissions, the stark reality is that living conditions of miners generally and of employees of Lonmin in particular are unacceptable. It cannot continue if we hope to learn from and prevent another Marikana type tragedy.
59. The system of migrant labour lies at the root of most of these ills; it permeates the mining industry in South Africa, more particularly on the Rustenburg platinum belt and at WPL and EPL.

¹⁹ Exhibit SSSS 11.

60. We accordingly support the recommendations in this context made by the SAHRC as contained in part 4 of their submissions.

S.F. BURGER SC

A.E. BHAM SC

M. VAN AS