

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 241

6 JUNE 2014

PAGES 30305 TO 30441



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1 [PROCEEDINGS ON 6 JUNE 2014]
 2 [09:03] CHAIRPERSON: The Commission resumes.
 3 Before we continue with the evidence, I must make my ruling
 4 on the application for the evidence of Mr X to be presented
 5 on 19 June 2014. I have considered the arguments adduced
 6 in the application brought by SAPS for the evidence of Mr
 7 X, which was to be led on 9 June 2014, next Monday, to be
 8 led instead on 19 June 2014 and have come to the
 9 conclusion, not without considerable reluctance, that the
 10 application should be granted.

11 I say not without considerable reluctance because
 12 I'm acutely conscious of the fact that in terms of the
 13 present extension of the Commission's period of operation,
 14 the last day on which it may hear evidence and argument is
 15 31 July 2014 and, as a consequence, it can ill afford to
 16 lose any sitting days. I'm of the opinion, however, that
 17 it would not be fair to the SAPS to lead Mr X's evidence in
 18 chief on 9 June. I say this because the parties who wish
 19 to cross-examine him will have to give notice to the SAPS
 20 of the documents and video clips, if there are any, to
 21 which they wish to refer to enable the witness to acquaint
 22 himself with the material to be relied on before he
 23 commences his testimony. For that to happen, the parties
 24 must have the opportunity to study the dockets which the
 25 SAPS have provided and other material presently in their

1 possession so as to identify the material to be relied on.
 2 I am told that the witness is illiterate and such
 3 statements as may be put to him will have to be translated
 4 and read to him.

5 Furthermore, he is currently in a witness
 6 protection programme which may well limit the time when he
 7 will be available to the SAPS to consult with him for the
 8 purpose of acquainting him with the cross-examination
 9 material. It is accordingly impossible, in my view, for
 10 the SAPS to be ready to lead his evidence on Monday 9 June
 11 2014.

12 It was suggested by Mr Chaskalson, who opposed
 13 the application on behalf of the evidence leaders, that
 14 SAPS should lead his evidence before they have consulted
 15 with him about this material and that after they have
 16 completed what may be termed his main examination in chief.
 17 He can be further examined after they've had further
 18 consultations with him about the cross-examination
 19 material. I do not think that that would be an appropriate
 20 way of leading his evidence and that to compel this manner
 21 of proceeding would be unfair to the SAPS.

22 In my view it is also important that the
 23 Commissioners and all the parties should be familiar with
 24 this material before he commences his evidence which, as I
 25 see it, can appropriately begin on 19 June 2014, the date

1 mentioned by the SAPS in the application. I am satisfied
 2 that the loss of sitting days can be kept to a minimum as
 3 the SAPS are in a position to call, in Mr X's stead,
 4 Colonel Modiba whose evidence in relation to some of the
 5 events at scene 2 will clearly be of great importance. The
 6 parties must give notice of the material on which they wish
 7 to rely in his cross-examination early on Monday morning so
 8 that he can peruse it before testifying on Tuesday, 10 June
 9 2014, after the evidence of Mr Da Costa is concluded.

10 I anticipate that Tuesday, Wednesday and Thursday
 11 can be used for the rest of the evidence of Mr Da Costa and
 12 that of Colonel Modiba.

13 The Human Rights Commission and the Legal
 14 Resources Centre stressed that the experts whom they wish
 15 to call, Mr White and Mr Hendrickx, will have to be
 16 interposed in the evidence of Mr X either during or after
 17 his evidence in chief, as fixed arrangements have been made
 18 for them to be here from 23 June 2014. It would be best if
 19 they could testify after all the other witnesses but in the
 20 circumstances in which we find ourselves, this will not be
 21 possible and the SAPS have indicated that they have no
 22 objection to the interposition of the evidence of the
 23 experts in the course of Mr X's testimony.

24 It may be, if the extension sought by the
 25 Commission is granted, that the experts' evidence may be

1 able to be led later if it is possible to arrange this but
 2 this is a matter to be considered when and if it arises.

3 So in the circumstances the ruling I give is that
 4 the application is granted.

5 CHAIRPERSON: Still under oath, Mr Da
 6 Costa.

7 MR DA COSTA: Yes, Chair.

8 MICHAEL GOMES DA COSTA: (s.u.o.)

9 CHAIRPERSON: Mr Tip?

10 MR BHAM SC: Mr Chairman, just before Mr

11 Tip continues, we had discussed with you yesterday the
 12 position with the continuation of Mr Da Costa for next
 13 week. We've looked at all of our arrangements, we're not
 14 going to be able to continue with Mr Da Costa next week and
 15 we want to suggest –

16 CHAIRPERSON: Mr Van As will be here,
 17 won't he, and he's been in attendance through most of the –

18 MR BHAM SC: No, he may have been but all
 19 of our arrangements including Mr Van As's own operation, I
 20 mean Mr Da Costa's own operational arrangements, as I'm
 21 instructed by my clients, was structured around him coming
 22 into the witness box this week and completing. Now you
 23 know we were originally meant to have completed with him
 24 yesterday. We're spilling over into today, that's not a
 25 problem but our arrangements were all directed towards Mr

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1 Da Costa coming into the witness box this week and
 2 finishing off this week and that has created a problem. We
 3 can make arrangements for rescheduling the remainder of his
 4 cross-examination and we'll work with the evidence leaders
 5 and the Commission to arrange that suitably but we do have
 6 a problem for –
 7 CHAIRPERSON: Well, I'll have to have
 8 discussions then with the evidence leaders as to whether
 9 there is some other witness who can testify next week in
 10 addition to Colonel Modiba. It may well be that Warrant
 11 Officer Kuhn will be available and perhaps he can testify
 12 then, but anyway these are matters that we don't have to
 13 discuss further in the chamber.
 14 MR BHAM SC: Thank you.
 15 CHAIRPERSON: Mr Tip?
 16 CROSS-EXAMINATION BY MR TIP SC (CONTD.):
 17 Mr Da Costa, let me begin by just briefly reviewing where
 18 we were when we stopped yesterday. We had agreed that in
 19 respect of a whole set of questions relating to Lonmin's
 20 security forces, matter such as training, deployment,
 21 equipment and the like, would be held back by us pending a
 22 review of the Eye cam material which became available
 23 yesterday, do you recall that?
 24 MR DA COSTA: Yes, I do.
 25 MR TIP SC: And once we have had an

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1 opportunity to examine that and to consider it properly,
 2 we'll take decisions about the further information that we
 3 require and from whom we should seek to obtain it and you
 4 can, you have my assurance that unless there is a real need
 5 for you to be recalled by us for that purpose, we will not
 6 seek that you have to present yourself again for those
 7 questions.
 8 MR DA COSTA: That's fine.
 9 MR TIP SC: Now I want, the other aspect
 10 that we had touched on a little and which I'm going to take
 11 up further with you this morning concerns questions
 12 relating to collective bargaining, partly in a theoretical
 13 sense and substantially in terms of what took place at
 14 Lonmin during the relevant period leading up to the events
 15 of 16 August 2012. Now I would like to begin, if I may, by
 16 putting some general principles to you for your comment in
 17 respect of industrial relations in this country and I do
 18 that because it is important to bear in mind some policy
 19 perspectives that would have been applicable at the
 20 relevant time and I put them to you also because of your
 21 position, your seniority at Karee and the fact that you
 22 were involved in the wage negotiations that led to the
 23 conclusion of the collective agreement in December 2012.
 24 MR DA COSTA: In the previous wage
 25 agreement in 2011, not –

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1 MR TIP SC: I beg your pardon, I said
 2 2012. My mistake, 2011, December 2011.
 3 MR DA COSTA: Yes.
 4 MR TIP SC: Yes. So I imagine that
 5 you'll be familiar with these, there's nothing exceptional
 6 about them but if there's anything that you'd like me to
 7 clarify, just indicate that. I may add also just so that
 8 you appreciate where my questions will be directed, it's
 9 not my intention to debate with you whether or not the
 10 events at Marikana in August 2012 can or should be treated
 11 as being an exception to these principles, firstly, you
 12 appreciate that?
 13 MR DA COSTA: Yes, I do.
 14 MR TIP SC: And secondly, I also do not
 15 intend to debate with you the particular questions that
 16 were taken up by my learned friend Mr Budlender in respect
 17 of whether or not Lonmin should have engaged the strikers
 18 on the koppie. You appreciate that too?
 19 MR DA COSTA: That's fine.
 20 MR TIP SC: Yes. Then these are the
 21 principles, there's a small set of them, Mr Da Costa.
 22 Firstly, that the policy and legislative framework of this
 23 country's industrial relations has an express and
 24 deliberate objective of promoting peace in the workplace
 25 and in the conduct of labour disputes. Do you agree with

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1 that?
 2 MR DA COSTA: Yes.
 3 MR TIP SC: If you want me to repeat at
 4 any time –
 5 MR DA COSTA: No.
 6 MR TIP SC: - just say so.
 7 MR DA COSTA: No, no, that's fine.
 8 MR TIP SC: Right.
 9 MR DA COSTA: I'm good.
 10 MR TIP SC: Secondly, it seeks to achieve
 11 this through a comprehensive set of negotiation – I beg
 12 your pardon, negotiating and dispute resolution structures.
 13 MR DA COSTA: Yes, that's fine.
 14 MR TIP SC: At the heart of these is the
 15 recognition of the necessity for collective bargaining
 16 arrangements and in this it respects the position of both
 17 the employers and the employees.
 18 MR DA COSTA: Yes, that's fine.
 19 MR TIP SC: By the same token, our system
 20 of labour relations seeks to promote and protect the
 21 functioning of trade unions and the effective operation of
 22 collective agreements.
 23 MR DA COSTA: Yes.
 24 MR TIP SC: Conversely, there are two
 25 modes of conduct that are fundamentally destructive of

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1 these principles. The first is that unilateral departures
 2 from the content of collective agreements, be it by union
 3 or by an employer, has a destructive effect.
 4 MR DA COSTA: Yes, it would have, ja.
 5 MR TIP SC: You would agree with that.
 6 And the second mode of conduct that poses problems for our
 7 system is that acts of intimidation, destruction of
 8 property, assaults and murder cannot be sanctioned as a
 9 means of enforcing demands.
 10 MR DA COSTA: Yes.
 11 MR TIP SC: You agree with that also.
 12 Now those are the only general principles that I wanted to
 13 put to you as a precursor to examining some of the
 14 background facts that you've set out in your two statements
 15 which I'm going to turn to now and chronologically it will
 16 make sense for me to begin first of all with your
 17 supplementary statement which is XXX2. If I could ask you
 18 to turn to that and I will begin with paragraph 9 on page
 19 148.
 20 CHAIRPERSON: So that's page 3 of exhibit
 21 XXX2.
 22 MR TIP SC: I beg your pardon, Chair?
 23 CHAIRPERSON: I said that's page 3 of
 24 exhibit – page 3 of exhibit XXX2.
 25 MR TIP SC: That's correct, yes.

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1 CHAIRPERSON: It makes it easier for us
 2 who read a record. We haven't got, we won't have the whole
 3 Lonmin bundle which is paginated in the way you've
 4 indicated. We will have exhibit, we will have sets of the
 5 exhibits, XXX2 amongst others and it'll be useful to know
 6 we must look at page 3 there.
 7 MR TIP SC: I take the point, Chair. I
 8 will convert as I go, so it's page 3 of XXX2. Now what you
 9 set out there in paragraph 9 is that subsequent to the
 10 process of dismissals and re-employment in April/May 2011,
 11 you found that AMCU had referred a set of disputes on
 12 behalf of a number of employees who were not re-employed,
 13 to the CCMA.
 14 MR DA COSTA: Yes, that's correct.
 15 MR TIP SC: And you say in the last
 16 sentence of paragraph 9 that the referral of these disputes
 17 was the first time that AMCU made its presence known at
 18 Karee.
 19 MR DA COSTA: Yes, that's the first time
 20 I became aware that AMCU had a presence at Karee.
 21 MR TIP SC: So do we infer from that,
 22 that at no stage before that or even at the time of
 23 referring the dispute, had anyone from AMCU come to you to
 24 introduce themselves or to advise you that they were
 25 seeking members at Karee, anything of that sort?

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1 MR DA COSTA: No, up to that time I
 2 certainly not had any correspondence from AMCU, nor had I
 3 met anybody from AMCU at that time, at that time.
 4 CHAIRPERSON: Is it not correct that Mr
 5 Kulukele, I think his first name was Steven, had been an
 6 official of NUM or an office bearer, I don't know about
 7 official, an office bearer of NUM and he was expelled from
 8 NUM and a lot of the trouble thereafter arose because of
 9 the fact that he was no longer – he had been expelled from
 10 NUM and he then effectively, I'm not sure if he founded it
 11 but he was certainly involved in the organisation of the
 12 AMCU branch at Karee, is that correct?
 13 MR DA COSTA: Well, he was in fact the
 14 chairman of the NUM branch committee for Karee ahead of the
 15 2011 strike.
 16 CHAIRPERSON: He was an office bearer of
 17 NUM and then they expelled him.
 18 MR DA COSTA: Yes.
 19 CHAIRPERSON: And then that effectively
 20 was what can call the spark that caused the conflagration
 21 at that point, is that correct?
 22 MR DA COSTA: Of the strike in 2011?
 23 CHAIRPERSON: Yes – yes.
 24 MR DA COSTA: Yes.
 25 MR DA COSTA: Yes, but Mr Kulukele had

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1 not been active around the mine for, I'd say for about four
 2 months or so after his dismissal. It was only late in 2011
 3 that he started making an appearance again and where we saw
 4 him addressing groups of employees and also started
 5 addressing groups of employees in the name of AMCU.
 6 CHAIRPERSON: Yes, well, that's the
 7 point. He was active in the growth of the AMCU support at
 8 Karee.
 9 MR DA COSTA: Yes, he was but –
 10 CHAIRPERSON: And he appears to have been
 11 a magnetic kind of a leader and so I imagine that, the
 12 impression that one gets is that a number of the people at
 13 Karee, the mineworkers at Karee saw him as a leader and in
 14 effect followed him. Would that be an accurate assessment?
 15 MR DA COSTA: That would be a very
 16 accurate assessment in my view. Mr Tip's question to me
 17 was, you know, had AMCU been active, had I been aware of
 18 them at the time that these referrals were made to the CCMA
 19 and at that point I hadn't yet. It was only later in the
 20 year that it became evident that AMCU was active at the
 21 operations.
 22 CHAIRPERSON: When you made your
 23 statement, the affidavit we're looking at, at the moment,
 24 you said these disputes were still pending.
 25 MR DA COSTA: Yes.

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1 CHAIRPERSON: Now, I know that Mr
 2 Kuluokele was one of those who was murdered thereafter, so I
 3 don't know whether his dispute was finalised before he died
 4 but what happened – do you know that – but what happened to
 5 the other gentleman, Mr Mokipfi, is his dispute still
 6 pending or has that been finalised?
 7 MR DA COSTA: Chair, I'm not 100% certain
 8 on that. I would have to, I'd have to check on that. I'm
 9 not certain.
 10 CHAIRPERSON: I'm not sure that it's
 11 directly relevant but it may have some bearing on the
 12 dynamics of what was happening at Karee.
 13 MR DA COSTA: Ja, I can certainly follow
 14 up on that but I'm not certain.
 15 MR TIP SC: Thank you, Chair. Mr Da
 16 Costa, if you'd be – if you'd turn to page 5 of your
 17 statement I would like to ask you one or two questions
 18 relating to paragraph 17 which is now up on the screen.
 19 You deal there with the difficulties that you came to
 20 encounter relating to Schoon tier shift, correct?
 21 MR DA COSTA: Yes, yes, that's correct.
 22 MR TIP SC: And am I correct in
 23 understanding that the working of Schoon tier shift is
 24 really quite an important part of the management of
 25 underground mining activities?

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1 MR DA COSTA: Yes, it is.
 2 MR TIP SC: It's the manner in which, in
 3 a controlled fashion, you ensure that the underground
 4 working environment is kept clear and safe.
 5 MR DA COSTA: Yes. You know, during the
 6 normal course of production activities there is not always
 7 sufficient time to do maintenance work and, you know,
 8 basically cleaning up work and on occasions removal of
 9 excess reduction ore that would have accumulated in the
 10 working areas. So the fact that people volunteered to work
 11 overtime and work these Schoon tier shifts then served as
 12 an opportunity to do that work, ja.
 13 MR TIP SC: Now before the period that
 14 you are dealing with in that paragraph, which is January
 15 2012, had you at Karee or Lonmin generally to your
 16 knowledge experienced any difficulty in attracting
 17 volunteers to work those shifts?
 18 [09:22] MR DA COSTA: No, not really. I mean
 19 there were normally a lot of people who volunteered because
 20 of the overtime payment and in fact it was more a case of,
 21 you know, keeping the number of volunteers to an acceptable
 22 number, you know, a number that was just required to do the
 23 maintenance work that had to be done, is that there were
 24 normally many more people who volunteered.
 25 MR TIP SC: Yes. In short, there was an

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1 oversubscription by employees to do this work.
 2 MR DA COSTA: Yes, generally, normally.
 3 MR TIP SC: Yes. Now what you describe
 4 in paragraph 17 is that in January 2012 you experienced a
 5 significant drop in the number of underground employees who
 6 were volunteering to work volunteer shifts and, the Schoon
 7 tier shifts rather, and on investigation you were informed
 8 that there was a rumour that AMCU had instructed its
 9 members not to work those shifts because AMCU had not been
 10 consulted about them.
 11 MR DA COSTA: Yes, that is, that's true.
 12 Would you like me to elaborate?
 13 MR TIP SC: Yes, I would. Well, perhaps
 14 you could – let me just complete the paragraph. You also
 15 refer to an AMCU pamphlet which was found in one of the
 16 hostels which recorded the message, "No overtime, no Schoon
 17 tier," and that is attached to your statement and the –
 18 CHAIRPERSON: I must say it's attached in
 19 a very illegible form. It was page 157 of the Lonmin
 20 document.
 21 MR TIP SC: Yes.
 22 CHAIRPERSON: And I've got it in front of
 23 me at the moment. I can't read it. I don't know what it
 24 says. I mean presumably it says "No overtime, no Schoon
 25 tier." We don't know if it says anything else.

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1 MR DA COSTA: No, I'm sure we could
 2 arrange a better copy, but it's actually –
 3 CHAIRPERSON: I think that should be
 4 done, frankly. It's no good having an illegible exhibit.
 5 MR DA COSTA: It's actually written
 6 across there in a marking pin in Fanagalo.
 7 CHAIRPERSON: Does it say anything else,
 8 apart from "No overtime, no Schoon tier?"
 9 MR BHAM SC: Mr Chairman, sorry, the
 10 document is – mine is also, my copy is not very clear, we
 11 got it at a fairly late stage. May I make the suggestion
 12 that the witness, to the extent that he can read what's on
 13 there, reads it into the record –
 14 CHAIRPERSON: Yes, yes, I was hoping that
 15 he'd do that –
 16 MR BHAM SC: And we will then make –
 17 CHAIRPERSON: - but we must get proper
 18 copies later –
 19 MR BHAM SC: And we will make, or try to
 20 find a clear copy and make it available.
 21 CHAIRPERSON: It would have been helpful
 22 before the exhibit was handed in that something could check
 23 that it was legible and get us a legible copy, but –
 24 MR BHAM SC: You're absolutely right.
 25 We'll make that arrangements.

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1 CHAIRPERSON: That's water under the
2 bridge, I'm afraid.
3 MR BHAM SC: You're absolutely right, Mr
4 Chairman.
5 MR DA COSTA: I would actually, I'll get
6 a copy, but from my recollection it read something along
7 the lines of "Aisiko overtime, Aisiko Schoon Tier tot
8 tinengela lapa ka lo office," which –
9 CHAIRPERSON: I must say it's a bit
10 clearer on the screen. I don't know whether that screen
11 may be clearer for you than the one in front of me, but
12 perhaps you can –
13 MR DA COSTA: Yes.
14 CHAIRPERSON: You can help us at this
15 stage. It appears to be a notice of a mass meeting and
16 then it says, on an AMCU letterhead, and it says Lonmin, I
17 take it that's Karee Mine –
18 MR DA COSTA: That's correct.
19 CHAIRPERSON: And then –
20 MR DA COSTA: No, no, it says "Aisiko
21 Schoon Tier overtime tot tinengela lapa office," that's –
22 CHAIRPERSON: Now what does it mean?
23 MR DA COSTA: - translated means –
24 CHAIRPERSON: Yes, translated – is this
25 in Fanagalo?

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1 MR DA COSTA: It's in Fanagalo, yes. So
2 translated –
3 CHAIRPERSON: And what does it mean?
4 MR DA COSTA: Translated it means "No
5 Schoon tier overtime until we get our offices, or until we
6 get into the offices."
7 CHAIRPERSON: I see. Part of the
8 complaint of AMCU was that they hadn't been afforded office
9 accommodation. Is that correct?
10 MR DA COSTA: Ja, at that point AMCU was
11 pushing quite hard for sort of further organisational
12 rights and in fact they were trying very hard to get full –
13 CHAIRPERSON: Yes, yes, I know.
14 MR DA COSTA: - full organisational –
15 CHAIRPERSON: No, I know.
16 MR DA COSTA: - organisational bargaining
17 rights at Karee.
18 CHAIRPERSON: No, no, I know that, but
19 the point is one of the immediate concerns was they wanted
20 office accommodation and so this is a –
21 MR DA COSTA: Well, at that –
22 CHAIRPERSON: Is that correct?
23 MR DA COSTA: At that stage they did not
24 even have, there was no agreement that they could have
25 representatives or offices.

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1 CHAIRPERSON: Yes, no –
2 MR DA COSTA: So that was the point –
3 CHAIRPERSON: Mr Da Costa, you're not
4 answering the question directly. I know what you're
5 saying. The point was whether they were entitled to it is
6 neither here nor there; they wanted it and you didn't want
7 to give it to them and –
8 MR DA COSTA: They wanted representatives
9 and offices, yes.
10 CHAIRPERSON: Yes, that's right, but this
11 appears to relate to the demand for office accommodation.
12 MR DA COSTA: Yes.
13 CHAIRPERSON: And they were suggesting no
14 cooperation in respect of Schoon tier and no agreement to
15 do overtime unless they get the office accommodation.
16 That's effectively what this says. Is that right?
17 MR DA COSTA: That's correct.
18 CHAIRPERSON: Okay, thanks.
19 MR TIP SC: Now Mr Da Costa, in paragraph
20 18 of - I think we can leave the exhibit – paragraph 18 on
21 page 5 of your statement, you refer to the unfortunate
22 incident in which one of your employees, Mr Delani, a NUM
23 member who was to work a Schoon tier shift, was assaulted
24 and in fact died of his injuries as a result of that, and
25 that there was then a further drop of people who were

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1 prepared to work Schoon tier shifts.
2 MR DA COSTA: Yes, that's correct.
3 MR TIP SC: Yes, now –
4 CHAIRPERSON: Forgive me Mr Tip, while
5 this is present in my mind maybe I should raise it. In
6 para 17 you say that Mr Nkisi, who was then the Human
7 Resources manager at Karee, told you after there was a
8 significant drop in the number of underground employees who
9 were volunteering to the Schoon tier shifts, that there was
10 a rumour that AMCU had instructed its members not to work
11 Schoon tier shifts because AMCU had not been consulted
12 about these shifts, and then you refer to the pamphlet
13 found in one of the hostels from which it appears that the
14 basis – never mind what the rumour was, the fall in the
15 number of people prepared to do volunteer Schoon tier
16 shifts appears to have been prompted more by the problem in
17 relation to office accommodation than the lack of
18 consultation. Would that be correct?
19 MR DA COSTA: Yes, I agree.
20 MR TIP SC: Mr Da Costa, at the same time
21 that you were experiencing these difficulties with Schoon
22 tier shifts there was also a change in respect of working-
23 in arrangements. Is that correct? That working-in
24 arrangements being also a system that I understand had been
25 in place for many, many years where shifts were worked in

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1 during the year so as to enable employees to have longer
 2 breaks over Easter and at the end of the year, just in
 3 summary. Is that right?
 4 MR DA COSTA: Yes, that's right. So at
 5 that point in time those working-in arrangements were just
 6 not adhered to at Karee.
 7 MR TIP SC: You mean the point in time of
 8 the period February 2012, March/April 2012? That –
 9 MR DA COSTA: Yes, that March/April 2012,
 10 yes.
 11 MR TIP SC: Yes, now you deal with that
 12 in some depth in paragraph 21 and 22. In paragraph 21 at
 13 page 6 you refer to the fact that Lonmin had concluded
 14 working-in agreement with NUM in February 2012, with NUM,
 15 Solidarity and UASA, correct?
 16 MR DA COSTA: Yes, that's correct.
 17 MR TIP SC: And that embraced the whole
 18 of the Lonmin mining operation.
 19 MR DA COSTA: Yes.
 20 MR TIP SC: The Karee, Western, Eastern –
 21 MR DA COSTA: That's correct.
 22 MR TIP SC: Yes, then in paragraph 22 you
 23 make the point in the second sentence, "A significant
 24 number of underground employees at Karee did not work any
 25 additional shifts during February and March 2012. I was

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1 told by Nkisi that AMCU had instructed its members not to
 2 work these shifts because Lonmin had failed to consult AMCU
 3 before concluding the working-in agreement with NUM,
 4 Solidarity and UASA." Now let me ask you this, Mr Da
 5 Costa: was it only at Karee that these difficulties were
 6 experienced, or was that presenting itself across the board
 7 at Lonmin?
 8 MR DA COSTA: No, it was only at Karee.
 9 The other operations were working according to the
 10 agreement.
 11 MR TIP SC: And at that time was it only
 12 at Karee to your knowledge that AMCU had an influential
 13 presence?
 14 MR DA COSTA: Yes, they were only active
 15 at Karee at that time, as far as I know.
 16 MR TIP SC: Now I want to ask you to
 17 assist us with a general question. What one has here is a
 18 picture where longstanding working arrangements in the case
 19 of the Schoon tier shifts, a lawfully concluded agreement
 20 relating to working-in arrangements are in effect breached
 21 at Karee and on your information that this involved AMCU
 22 instructing members not to perform those shifts. Is that a
 23 fair summary?
 24 MR DA COSTA: That's a fair summary, yes.
 25 MR TIP SC: Did Lonmin address that

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1 position, and in particular did you at Karee address that
 2 position? And I want to put this to you for your comment,
 3 that what one is confronted with is the situation where
 4 there are active intimidation, one person has been killed
 5 and those are evidently intended to discourage other
 6 employees from working those shifts –
 7 MS BARNES: Chair, sorry to interrupt.
 8 There's no evidence of active intimidation in this
 9 affidavit or elsewhere in this context. There's a
 10 reference in paragraph 18 to the death of a Mr Delani.
 11 CHAIRPERSON: What do you say about that,
 12 Mr Tip?
 13 MR TIP SC: I'll content myself for the
 14 moment –
 15 CHAIRPERSON: Well, let's, why not ask
 16 the witness –
 17 MR TIP SC: Well, let me –
 18 CHAIRPERSON: Sorry, Mr Tip. Why not ask
 19 the witness? You've put something to him as a fact –
 20 MR TIP SC: Yes, let me –
 21 CHAIRPERSON: - which wasn't covered by
 22 the affidavit or his evidence so far.
 23 MR TIP SC: Yes, let me –
 24 CHAIRPERSON: Now if it's incorrect then
 25 you can put it to him and he may agree with it. If he

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1 doesn't agree then of course the objection will be well-
 2 founded, but at this point the objection is well-founded
 3 because you were referring to stuff you didn't have.
 4 MR TIP SC: I've got it, Mr Chair. I
 5 know that I had not put that proposition without proper
 6 attention. Can I ask you to go to paragraph 25 of your
 7 affidavit? You will see there that you say that
 8 "Despite the fact that AMCU was afforded certain
 9 organisational rights," in paragraph 25, "it nonetheless
 10 retained its obstructive attitude towards the working of
 11 overtime at Karee. In addition workers who wanted to work
 12 overtime were threatened with violence. Unfortunately such
 13 threats of violence culminated in the murder of Mr Simya
 14 Talo Delani on 21 April 2012. I am aware of other
 15 employees being assaulted after working overtime.:
 16 CHAIRPERSON: Yes. No, I think the point
 17 of the criticism was that you were talking about an earlier
 18 stage in 2011, whereas that passage refers to things that
 19 happened, or appears to have happened after the 15th of
 20 December 2011 if one looks at paragraph 24. I'm not saying
 21 it's a serious problem, but technically I think Ms Barnes
 22 is right.
 23 MR TIP SC: Well, let me correct myself
 24 in case I did make an error there. I had I thought
 25 positioned my questions in respect of the period from

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1 January 2012. That was when you first experienced
 2 difficulties with Schoon tier and more or less
 3 simultaneously difficulties with the working of overtime by
 4 way of the working-in agreement. Is that correct?
 5 MR DA COSTA: Yes, that is correct.
 6 MR TIP SC: And it's in relation to that
 7 period that you in paragraph 25 describe a number of
 8 reports that came to your attention concerning intimidation
 9 and one murder.
 10 MR DA COSTA: That's correct.
 11 MR TIP SC: Yes, I don't know if Ms
 12 Barnes is satisfied with that.
 13 CHAIRPERSON: Whether she's satisfied or
 14 not doesn't matter. I've got to be satisfied, and I am.
 15 So please carry on. I say that not intending any
 16 disrespect to Ms Barnes, but I mean you obviously showed
 17 her more respect than I did. Anyway, carry on.
 18 MR TIP SC: Then if I may come back to
 19 the question, Mr Da Costa, what one has here depicted in
 20 your affidavit is a picture where a lawful agreement,
 21 properly concluded with NUM, UASA and Solidarity, is being
 22 breached, a longstanding practice of working voluntary
 23 Schoon tier shifts is being undermined, and your
 24 information is that AMCU is instructing members to do that.
 25 Now with that information did you react at all as Karee or

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1 Lonmin generally to that circumstance? And let me repeat
 2 what I had put to you also, that it appears on the face of
 3 it to be a circumstance where an objective that is sought
 4 to be secured by in this case the union AMCU, has as its
 5 accompaniment intimidation, assaults, and other enforcement
 6 techniques. Are you able to assist us with that question?
 7 Have I put it sufficiently clearly for you?
 8 MR DA COSTA: I think so. Let me try to
 9 answer it. In terms of the intimidations and assaults and
 10 so on, I mean we obviously reported those to the South
 11 African Police Services, where there were witnesses
 12 involved and only generally people were reluctant to come
 13 forward as witnesses in these assault cases, and mostly we
 14 found that, you know, that the people who were assaulted
 15 couldn't identify who it was. Nonetheless, cases were
 16 opened at the South African Police Services for them to
 17 investigate and very much so in terms of the murder case as
 18 well. So that was the one angle.
 19 The other angle was then to engage with the AMCU
 20 national office and most of these engagements were in
 21 writing, to inform them that these events were taking place
 22 on our operations and that we were of the view that, you
 23 know, from the information that was coming out, that AMCU
 24 was involved in leading quite a lot of this, and the
 25 responses that we got back on every occasion was that this

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1 was not AMCU involved in it. Even times when we presented
 2 demands on AMCU documentation it was refuted and said these
 3 are, this is the, your employees, it's the, it's your
 4 people that are doing this, AMCU has no involvement in
 5 this, and that they're certainly not leading it. They were
 6 saying they had no involvement in it.
 7 MR TIP SC: And that according to what
 8 you set out in paragraph 23 on page 7, Mr Kwadi advised you
 9 that Mr Mathunjwa had denied any involvement in such
 10 overtime ban, but could not explain the AMCU pamphlets
 11 which advocated such an overtime ban. Is that what you
 12 have in mind in respect of what you've just told the
 13 Commission?
 14 MR DA COSTA: Ja, that he just, he didn't
 15 offer any explanation and wouldn't offer any explanation.
 16 MR TIP SC: And did you as Lonmin then
 17 leave the situation as it was for the time being at least?
 18 MR DA COSTA: Well, basically yes. I
 19 mean there were no legal challenges or anything like that.
 20 COMMISSIONER HEMRAJ: Mr Da Costa, these
 21 incidents of intimidation, would they all be recorded as a
 22 matter of course in the occurrence book at Lonmin? Could
 23 we find a record of them there?
 24 MR DA COSTA: They should be. Yes, they
 25 should be. I haven't checked it, but you know, the sort of

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1 general procedure when these incidents happened is that it
 2 is reported to the security control rooms and so on, so I
 3 would imagine they would have recorded it.
 4 MR TIP SC: Perhaps just to conclude this
 5 portion of the narrative, Mr Da Costa, if I could ask you
 6 to go on to paragraph 26 of your statement at page 7 of
 7 XXX2, paragraph 26 and 27, it's not necessary to read it
 8 all out, I'll summarise it, but in essence you describe
 9 that on 5 May 2012 Lonmin entered into an addendum to the
 10 to the agreement that it had with AMCU at that stage,
 11 relating to working in arrangements.
 12 [09:42] That those arrangements were more or less
 13 identical to the arrangements set out in the agreement
 14 concluded with NUM, UASA and Solidarity and after that
 15 employees again started, evidently quite happily, to
 16 perform working in shifts.
 17 MR DA COSTA: Yes, that's correct.
 18 MR TIP SC: So really what has happened
 19 is that there has been a series of active intimidation,
 20 including violence and one killing in order to substitute
 21 AMCU for NUM with precisely the same working arrangements
 22 is that right?
 23 MR DA COSTA: Ja, I wouldn't say
 24 precisely, the only difference between the two agreements
 25 really was that the AMCU agreement was for one year and the

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1 other agreement was for two years, but otherwise it is
 2 substantively -
 3 MR TIP SC: Yes.
 4 MR DA COSTA: - quite the same.
 5 MR TIP SC: In paragraph 27, in fact, you
 6 used the phrase "AMCU agreed to conclude a working-in
 7 agreement on almost exactly the same terms as the working-
 8 in agreement which Lonmin had previously concluded with
 9 NUM.
 10 MR DA COSTA: Yes.
 11 MR TIP SC: Yes. I want to go on to
 12 matters that you deal with in your initial statement which
 13 is 0017. You deal there - generally in that statement, Mr
 14 Da Costa, you deal quite fully with the events pursuant to
 15 21 June 2012 in the approach of the RDO representatives -
 16 I'll call them that - in respect of the RDO demand for
 17 R12 500. You've also dealt with that quite fully in your
 18 evidence-in-chief and I'm not going to traverse all those
 19 facts. There are just particular aspects that I'd like you
 20 please to clarify for us. If you could turn to paragraph
 21 3.35 at page 11 of that statement. You say there that -
 22 I'll just read it if I may - "My decision to communicate
 23 directly with the RDOs was therefore motivated by the
 24 following" and you set out five sub-paragraphs. I want to
 25 just look briefly at each one of them. First of all 3.35.1

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1 you say, "The RDOs request for a higher wage appear to be
 2 confined to RDOs working at Karee." Do you see that?
 3 MR DA COSTA: Yes I do.
 4 MR TIP SC: Now when you entered into
 5 some interactions with these I
 6 RDOs and when you put forward a recommendation to
 7 exco, would I be correct to understand that you were
 8 dealing with all RDOs at Lonmin, not merely those at Karee.
 9 MR DA COSTA: When I put forward the
 10 proposal, the proposal was in terms of all RDOs at Lonmin.
 11 The reason for that, though, was that my thinking was if we
 12 were going to implement this RDOs at Karee, we would want
 13 to implement it across the business to avoid the next group
 14 of RDOs bringing a demand to one of the vice presidents.
 15 MR TIP SC: Yes. Well one can perhaps
 16 put it a little more strongly. If Lonmin had increased the
 17 remuneration of RDOs at Karee, there would have been a
 18 serious - serious tensions and disputes immediately raised
 19 by the RDOs at the other divisions, wouldn't there?
 20 MR DA COSTA: Yes, there would have been.
 21 MR TIP SC: Yes. So why was this a
 22 consideration that you took into account in deciding that
 23 you would deal with these RDOs?
 24 MR DA COSTA: Well, I mean the fact that
 25 they were my employees and that I was in charge of Karee

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1 and therefore I - I felt it to be the right thing to have
 2 these discussions with them.
 3 MR TIP SC: Yes. I may respectfully just
 4 echo what my learned friend Mr Budlender said to you
 5 yesterday. He didn't criticise you for talking to your
 6 RDOs and nor do we. It would have been a very
 7 unsatisfactory attitude on your part not to talk to them at
 8 all, but the real question is what happened pursuant to
 9 those talks and how that was managed. I'm not going to
 10 dwell on these points, but I do want to put it to you that
 11 for you to say that a reason for communicating directly
 12 with them is that the higher wage demand appear to be
 13 confined to RDOs at Karee is not very persuasive, with
 14 respect, because it inevitably had to be done on a Lonmin
 15 wide basis. You agree with that.
 16 MR DA COSTA: Ja, ultimately it had to be
 17 done on a Lonmin wide basis but, you know, when the
 18 discussions first started it appeared that it was the RDOs
 19 at Karee.
 20 MR TIP SC: Yes. Now you were - you and
 21 -
 22 CHAIRPERSON: But the way I understand
 23 it, you were at Karee.
 24 MR DA COSTA: Yes I was.
 25 CHAIRPERSON: You really had no business

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1 talking to RDOs at the other two mines, did you?
 2 MR DA COSTA: Nor did I, no.
 3 CHAIRPERSON: No I know, but you had no
 4 business to.
 5 MR DA COSTA: No.
 6 CHAIRPERSON: You were the man in charge
 7 at Karee, people from Karee came to speak to you and that's
 8 why you spoke to them.
 9 MR DA COSTA: That's my point yes.
 10 CHAIRPERSON: Ja that's your point.
 11 That's the point you're making is the 3.35.1 -
 12 MR DA COSTA: Yes.
 13 CHAIRPERSON: Is that correct?
 14 MR DA COSTA: Yes and -
 15 CHAIRPERSON: It's not sinister. In
 16 fact, it would have been strange if you talk to other RDOs
 17 from elsewhere in the Lonmin operation.
 18 MR DA COSTA: Ja, and I mean the demand
 19 was coming from the RDOs at Karee. Yes, my recommendation
 20 was to extend the - let's call it the solution that I was
 21 proposing to this - to extend that to the other RDOs but at
 22 no stage did any demand or request or anything else come
 23 from any other groups of people. It was - I mean, let me
 24 say, at no stage while I was speaking to the RDOs did a
 25 request come from anywhere else, it was from the RDOs at

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1 Karee, but ja.
 2 MR TIP SC: Well let me follow it up, if
 3 I may just pose one or two questions pursuant to those just
 4 put to you by the chairperson. When you say in paragraph
 5 3.35 that your decision to communicate directly with the
 6 RDOs was influenced by the various reasons that you've
 7 advanced, I'm treating that as communication that went
 8 beyond the discussion that you had on the 21st of June and
 9 embraced the further meetings that you had and
 10 communications to them. Do you follow what I'm saying?
 11 MR DA COSTA: Yes, I follow.
 12 MR TIP SC: And was that the sense in
 13 which you used the phrase - that you dealt with it in that
 14 paragraph of your affidavit.
 15 MR DA COSTA: Yes.
 16 MR TIP SC: Yes. You see why it's
 17 important to pause and to examine what you say there is
 18 then the following. You see these RDOs for the first time
 19 on 21 June 2012.
 20 MR DA COSTA: Yes, that's correct.
 21 MR TIP SC: Shortly thereafter you sent a
 22 memorandum with recommendations to exco.
 23 MR DA COSTA: Yes.
 24 MR TIP SC: And exco then considers the
 25 position on the basis of recommendations that they would

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1 deal with it on a Lonmin wide basis, is that not so?
 2 MR DA COSTA: That is so.
 3 MR TIP SC: Yes, but you were still
 4 communicating only with the RDOs at Karee, correct?
 5 MR DA COSTA: Yes, that's correct.
 6 MR TIP SC: During the same period there
 7 was no communication of a related nature to the RDOs at
 8 Eastern Platinum or Western Platinum.
 9 MR DA COSTA: Ja, not up until the
 10 decision was finalised and it was then communicated
 11 countrywide, which was round about the 2nd of August or
 12 somewhere around there.
 13 MR TIP SC: Yes, and that is the concern
 14 that I raise with you because you were doing this - in you
 15 I mean Lonmin generally. There was a pattern that we've
 16 just - well not a pattern, an arrangement of interaction
 17 that I've just described - you were doing that in the
 18 context where you knew, because you had been, of course,
 19 party to the negotiations, a collective agreement entered
 20 into in December 2011 which related to the entirety of
 21 Lonmin.
 22 MR DA COSTA: Yes, I knew about that and
 23 I pointed it out to the RDOs during my discussions with
 24 them as well.
 25 MR TIP SC: At what stage? What did you

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1 point out?
 2 MR DA COSTA: That there was a collective
 3 agreement in place and that we couldn't reopen the wage
 4 negotiations and that I would try to address their concern
 5 of not being remunerated adequately but that, you know, to
 6 - if they wanted to demand an increase in their wages, the
 7 right forum would be the collective bargaining processes
 8 that were in place.
 9 MR TIP SC: I follow that, Mr Da Costa,
 10 and it certainly is very clear from your statement that you
 11 did say that to the RDOs. The point that I'm making is a
 12 slightly different one. It is that there was communication
 13 between you and from the exco through you to the RDOs at
 14 Karee. There was that kind of interaction, but in respect
 15 of the RDOs at Eastern Platinum and Western Platinum, there
 16 were no equivalent discussions of any nature, is that
 17 correct?
 18 MR DA COSTA: That's correct.
 19 MR TIP SC: And it's in that context that
 20 I say to you that's a problem than a situation where you
 21 have a collective agreement that relates, inter alia, to
 22 remuneration of RDOs that applies to the whole of Lonmin.
 23 You are now having discussions with a single division. Do
 24 you not see a difficulty in that from the collective
 25 bargaining perspectives that I put to you at the beginning

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1 of our discussion this morning?
 2 MR DA COSTA: I think from our
 3 perspective I was giving feedback to the people that had
 4 brought the concern to me. So, you know again, and maybe
 5 in hindsight it would have - you could argue that there
 6 should have been communication in the other areas as well.
 7 MR TIP SC: Well -
 8 CHAIRPERSON: Sorry, sorry to interrupt
 9 Mr Tip, that wasn't of course your responsibility, your men
 10 - if I can call them that - came to you and spoke to you
 11 about it. You sent it to exco. Said to exco look here,
 12 please give my men some money, not necessarily the full
 13 amount they want, but you'll have to - by implication -
 14 you'll have to give it to the other people - the other
 15 mines as well because otherwise they'll be very
 16 discontented and there will be problems, but if that was
 17 going to be discussed with the people from Eastern and
 18 Western, you wouldn't have done the discussion, it would
 19 have been your equivalents at those two mines is that
 20 correct?
 21 MR DA COSTA: Ja, that's correct.
 22 CHAIRPERSON: Who were they?
 23 MR DA COSTA: Larry Dietrich was running
 24 Westerns at that time. Ja, at that time there were another
 25 three vice-presidents. Larry Dietrich, Gerrit van Rensburg

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1 and Tsidiso -

2 CHAIRPERSON: And they would have been

3 the appropriate people to have done what you did at Karee

4 with their workers at their mines, is that correct?

5 MR DA COSTA: Well they would have been

6 if they were directed to do so.

7 CHAIRPERSON: Excuse me, yes, but it

8 wasn't for you to tell them to do it.

9 MR DA COSTA: No-no it wasn't for me to

10 tell them.

11 CHAIRPERSON: Yes.

12 MR TIP SC: Mr Da Costa I'm going to try

13 to be more precise, so when I say you - and I intend to

14 broadcast that to Lonmin, I will say Lonmin rather than you

15 - but the questions that I've been putting to you certainly

16 are in relation to what you did with the communications

17 with the RDOs at Karee. To your knowledge, when exco

18 considered your recommendation there had been no

19 communication to exco through any of the managers to whom

20 you've just referred, from RDOs at Eastern Platinum or

21 Western Platinum. As far as one can tell, they were not

22 party to this interaction at all. One wonders if they were

23 aware of it.

24 MR DA COSTA: No, there was no

25 communication -

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1 MR TIP SC: Yes.

2 MR DA COSTA: - at that stage, no.

3 MR TIP SC: So that what has taken place

4 here is that through you to Lonmin in its form of the exco,

5 a set of interactions relating to the remuneration of an

6 important body of RDOs at Karee, which then is decided

7 unilaterally by exco and is then made binding on RDOs

8 across all Lonmin divisions, correct?

9 MR DA COSTA: Yes, that's correct.

10 MR TIP SC: Now from the perspective of

11 collective bargaining integrity, would you consider that to

12 have been a satisfactory way of dealing with things?

13 MR DA COSTA: It's not ideal.

14 MR TIP SC: Its not ideal. Is it in any

15 way satisfactory?

16 MR DA COSTA: I'd say in theory, no it's

17 not.

18 MR TIP SC: And in theory when it comes

19 to industrial relations, really one immediately crosses the

20 bridge to practice does one not? In practice it wasn't

21 good.

22 MR DA COSTA: Well one does, but you

23 know, very often what one finds in practice is not quite as

24 simple as it is in theory. So, you know, it's - while I

25 say it wasn't ideal, you know given the circumstances and

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1 potential consequences of not doing anything at the time,

2 one needs to consider that as well.

3 MR TIP SC: Yes. You're quite right, Mr

4 Da Costa, and that is why I said it was entirely

5 appropriate for you to interact with those RDOs when they

6 came to you on 21 June, but the real question is, what was

7 done with that and there one has to look at some of the

8 central propositions of labour relations that I put to you.

9 Let me move on and try to develop the issue, and I think it

10 may be fitting if we look at your recommendation to exco.

11 We will find that in exhibit XXX3 at paginated page 3 of

12 that bundle. Now this was touched on in your evidence on

13 Tuesday, but I want to take up the same points in a

14 slightly different fashion. You would - if I may ask you

15 to look at page 4 you will see there proposal. You have

16 it? This is your proposal to exco.

17 MR DA COSTA: Oh okay.

18 MR TIP SC: Yes, you've got it there.

19 MR DA COSTA: Yes.

20 MR TIP SC: "Feedback will be given to

21 the two representatives who met with the vice-president as

22 follows" and the first bullet point, "Lonmin has well

23 established processes for the negotiation of wage increases

24 and other conditions of employment and is not in favour of

25 ad hoc negotiations taking place outside of those

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1 processes." The first point, correct?

2 MR DA COSTA: Yes.

3 MR TIP SC: And then you say, "Should the

4 company agree to a separate wage increase for rock drill

5 operators in this way, it would set a precedent for other

6 employee groupings to expect something similar", correct?

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

8 MR TIP SC: And then a little further

9 down the page you say, you see the paragraph beginning,

10 "The feedback outlined above is not likely to resolve the

11 matter and more work will be required over the next few

12 weeks in this regard. The following is proposed" - first

13 bullet point - "engage both the NUM and AMCU at national

14 level to inform them of this development and to solicit

15 their opinion on the matter", and over the page, page 5, in

16 the last paragraph, the last bullet point you repeat that

17 advice. That proposal. You say, "Engage with the NUM and

18 AMCU at Marikana to reach an agreement on the matter."

19 CHAIRPERSON: Now you're repeating the

20 advice. You're actually taking it further. You're

21 suggesting that there should be engagements with two unions

22 both nationally and at the level of Marikana.

23 [10:02] MR TIP SC: Chair, yes, yes.

24 CHAIRPERSON: That is right, isn't it, Mr

25 Da Costa?

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1 MR DA COSTA: Yes, it is, that's right.
 2 CHAIRPERSON: Yes.
 3 MR TIP SC: Now the chairperson remarked
 4 on Tuesday and if I may respectfully echo it, that that
 5 appears to have been sound advice on your part and I want
 6 to say to you this morning, Mr Da Costa, that indeed that
 7 reflected a proper appreciation of a fundamental aspect of
 8 collective bargaining, which is that you had to engage with
 9 the unions here. It includes AMCU given its presence at
 10 Karee at that stage, that was sound, but that nationally
 11 there had to be interaction with the unions and implicitly
 12 in that proposal was of course the recommendation that it
 13 should not be done unilaterally. Is that a fair summary of
 14 what you were conveying to Exco?
 15 MR DA COSTA: Well, I think what I was
 16 conveying to them is that it would be prudent to solicit
 17 the opinion of the national offices of the unions in terms
 18 of these demands that were being tabled, so in terms of the
 19 first engagement that I was proposing.
 20 MR TIP SC: Yes, you see there are a
 21 couple of crisp points to be made. There is a collective
 22 agreement which in place which has been concluded through
 23 national negotiations. When I say national, negotiations
 24 by NUM and the other unions at a national level. In other
 25 words the national office bearers of NUM –

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1 MR DA COSTA: Yes –
 2 MR TIP SC: - conducted the negotiations,
 3 NUM's national resources went into its assessment of the
 4 demands and the negotiation process, what could be
 5 accepted, etcetera, etcetera, correct?
 6 MR DA COSTA: Yes, that's correct.
 7 MR TIP SC: Yes, and that is vital, is it
 8 not, when one is dealing with remuneration issues, that
 9 where something arises it should go back to the appropriate
 10 level, in this case national level. You put it fairly
 11 mildly, you say their opinion but really it is an
 12 engagement at an appropriate level with the collective
 13 bargaining agents, correct?
 14 MR DA COSTA: Ja, I thought it prudent to
 15 solicit their opinion at least, that's what I said.
 16 MR TIP SC: No, that's quite right and I
 17 want to say that not only was it prudent, it is, your
 18 approach as set out there accorded with the requirements of
 19 sound labour relations. You needn't comment on that, you
 20 should – Mr Budlender advises me on how to phrase it, it is
 21 a free compliment but it is really an endorsement seriously
 22 made on behalf of NUM that that would have been the correct
 23 way. I am not going to ask you to comment, I don't want to
 24 put you in any sort of embarrassing situation. Let us move
 25 on to what in fact happens. We know and I'll try to deal

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1 with this quite summarily, Exco decides that it will grant
 2 an allowance. It does not follow the recommendations that
 3 you've made about engagement at a national level, correct?
 4 MR DA COSTA: I cannot say that, I don't
 5 know if those negotiations took place or not.
 6 MR TIP SC: Well, I can assure you they
 7 didn't and you certainly heard nothing to suggest that they
 8 did, is that right?
 9 MR DA COSTA: No, I'm not aware of that
 10 discussions took place –
 11 MR TIP SC: If they had been you would
 12 surely –
 13 MR DA COSTA: Well, I don't know –
 14 MR TIP SC: - have been informed?
 15 MR DA COSTA: Ja, not necessarily but you
 16 know where I was sitting I didn't deal with the national
 17 offices, ja.
 18 MR TIP SC: That's right, I'm not going
 19 to dwell on that, Mr Da Costa, but what –
 20 CHAIRPERSON: I take it you can actually
 21 put it if necessary, on behalf of NUM that they weren't
 22 consulted, if that's correct.
 23 MR DA COSTA: I've –
 24 CHAIRPERSON: If they weren't consulted
 25 on the national basis, and you could also put it, I assume,

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1 if it is correct, –
 2 MR TIP SC: Yes, I thought –
 3 CHAIRPERSON: - that they weren't even
 4 engaged with at the Marikana level, is that correct, is
 5 that so?
 6 MR TIP SC: Yes, I thought that I had
 7 done that at least in part, but perhaps I should be more
 8 explicit when I said I can assure you that it didn't
 9 happen, but let me put it to you absolutely crisply, that
 10 at national level there was no interaction with NUM in
 11 respect of the RDO demand for R12,500 or the decision by
 12 Exco to grant allowances on the scale of 750, 500 and 250
 13 that you're aware of, it didn't happen?
 14 MR DA COSTA: Not that I'm aware of.
 15 MR TIP SC: Yes, and let me at the same
 16 time then deal with the position at the local level, at the
 17 Karee level, which is that you mention in your statement
 18 that the decisions were conveyed by you Mr Jerry Moloi that
 19 there had also been some interaction with Mr Jerry Ndamase
 20 who is a branch secretary of NUM and my instructions there
 21 are quite clear and I think they are reflected in your
 22 statement, that those were in effect communications to them
 23 of the decision that had been taken by Exco and the
 24 responses from both Mr Moloi and from Mr Ndamase was, well,
 25 we can't stand in the way of extra money for any workers,

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1 but we have a real concern that you have stepped outside
 2 the collective agreement and the bargaining arrangements,
 3 is that correct?
 4 MR DA COSTA: That's correct, I said so
 5 in my statement.
 6 MR TIP SC: Yes, you did. Now what I'm
 7 going to ask you to deal with, Mr Da Costa, is this, that,
 8 again with reference to the set of collective bargaining
 9 principles that I outlined to you at the beginning of this
 10 morning which you, with respect correctly endorsed, is that
 11 when one has a collective bargaining arrangement and in
 12 particular a collective agreement that covers the
 13 remuneration and other working conditions of a set of
 14 employees for there to be a unilateral change to that, that
 15 creates problems and it does in fact create the precedent
 16 that you're warned against in your recommendation to Exco,
 17 do you agree with that?
 18 MR DA COSTA: Yes, it does, so in the
 19 ideal world you would ideally not want to make unilateral
 20 changes.
 21 MR TIP SC: You see you experienced in
 22 fact a knock-on effect of precisely this quite soon
 23 thereafter. You've described to us the approach of the
 24 team leaders to you on 5 or 6 August 2012 in which they had
 25 demands.

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1 MR DA COSTA: Yes.
 2 MR TIP SC: They wanted an improvement of
 3 their categories.
 4 MR DA COSTA: That's correct, yes.
 5 MR TIP SC: And it must have been clear
 6 to you, I think, that they had come to you as a discreet
 7 employee group in the wake of the results of the RDO
 8 approach to you, would that be fair?
 9 MR DA COSTA: Yes, that's fair, the
 10 amount of support they had was way less than what the RDOs
 11 had, but that's a fair comment.
 12 MR TIP SC: Yes, and because the RDOs had
 13 a lot of support their approach to you was met with the
 14 announcement of an additional allowance, the team leaders
 15 were in a different category, they were simply reminded
 16 that there is a wage agreement in place and they were sent
 17 away and that was the end of this, is that right?
 18 MR DA COSTA: That's right.
 19 MR TIP SC: Now I would like to deal next
 20 with an aspect –
 21 CHAIRPERSON: Just make, sorry, can I
 22 just check something, whether the present one is correct in
 23 relation to the point you've just made. I take it the RDOs
 24 were in a stronger position than the other people to whom
 25 Mr Tip has just referred, because as a result of the

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1 increases given by Impala and Anglo, there was a danger
 2 that your RDOs could leave your employ and go to the other
 3 mines, the other employers and get more money, so they had
 4 that sort of bargaining chip as it were which the others
 5 didn't have, is that correct?
 6 MR DA COSTA: It was –
 7 CHAIRPERSON: Because Impala and Amplats
 8 had raised the amounts for RDOs, that you people were put
 9 in a position where your RDOs had, apart from what other
 10 weapons they might have sought to employ which weren't
 11 perhaps as appropriate as the threat just to leave your
 12 employ and go where the money was higher. That's correct,
 13 isn't it?
 14 MR DA COSTA: No, that was certainly a
 15 major consideration, yes.
 16 MR TIP SC: Thank you, Chair. If I might
 17 follow up on that with respect and take you back to your
 18 statement, OO17, paragraph 3.35.4. In the latter part of
 19 that, this is, just to put it back into context, Mr Da
 20 Costa, these are, this is part of the set of reasons that
 21 you put forward for communicating directly with the RDOs
 22 and in the second part of that you say, "I was aware of the
 23 fact that Impala, Platinum, Implats and Anglo American
 24 Platinum, Anglo Plats, had experienced similar problems
 25 with their RDOs which had resulted in them paying more

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1 money to their RDOs. I was unaware of the mechanisms which
 2 had been used for this," and then in the following
 3 paragraph, subparagraph you say, "I was also aware that
 4 Lonmin was paying a lower wage to RDOs as at July 2012 when
 5 compared to the wages paid to RDOs by Implats and Anglo
 6 Plats." Now what very compellingly comes across from those
 7 two portions, Mr Da Costa, is that part of the reason for
 8 your communicating with the RDOs directly were these
 9 concerns about the commercial realities and in particular
 10 the commercial realities comprising the competitive
 11 equation between Lonmin and Implats and Anglo Plats, is
 12 that correct?
 13 MR DA COSTA: Ja, it was a major issue
 14 that I was considering, yes.
 15 CHAIRPERSON: Well, that's the point you
 16 make in 3.36.
 17 MR TIP SC: Yes, if you go to 3.36 –
 18 MR DA COSTA: Yes, yes.
 19 MR TIP SC: There is an additional point
 20 to be found in 3.36 which I'll take up with you at the same
 21 time, you will see there that you say, "Since properly
 22 trained and competent RDOs are scarce within the platinum
 23 mining industry I deemed it prudent to give careful
 24 consideration to the RDO's request and therefore escalated
 25 this matter to Exco." So one has really three

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1 considerations that are intertwined here, there is first of
 2 all the experience at the other mines, your competitors,
 3 Implats and Anglo Plats with their RDOs, that's number one.
 4 MR DA COSTA: Yes.
 5 MR TIP SC: Number two is that you're
 6 aware of the fact that Lonmin is paying a lot of wage and
 7 that of course may lead to a drift to the other companies
 8 of your RDOs and thirdly, you're aware that the work that
 9 RDOs do is considered to be scarce. That is done by
 10 competent skilled and experienced RDOs, that work is
 11 scarce, correct?
 12 MR DA COSTA: Ja, I wouldn't say the work
 13 is scarce, but –
 14 MR TIP SC: Oh, I'm sorry –
 15 MR DA COSTA: - but it is a scarce skill,
 16 yes.
 17 CHAIRPERSON: Skills are scarce, the
 18 skilled people –
 19 MR DA COSTA: Are scarce.
 20 CHAIRPERSON: Are scarce?
 21 MR DA COSTA: Yes, that's correct.
 22 MR TIP SC: Yes, thank you, I put it very
 23 clumsily, it is the people who are scarce, that's the
 24 concern, right?
 25 MR DA COSTA: Yes.

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1 MR TIP SC: Now let me just put it to you
 2 broadly and then we can look at some detail. I want to
 3 suggest to you that those three considerations are
 4 precisely the sorts of considerations that ought to have
 5 gone into a proper collective bargaining forum and that
 6 they should have informed the position that Lonmin
 7 eventually came to in respect of its final offer in respect
 8 of wages and other remuneration conditions for RDOs. Would
 9 that be a fair statement?
 10 MR DA COSTA: Ideally, yes.
 11 MR TIP SC: Well, you say ideally again,
 12 but in truth, in practice, at that time should that not
 13 have been the case?
 14 MR DA COSTA: Well, I mean one of the
 15 other points I make is that thee RDOs were specifically
 16 telling me that they did not want union involvement, you
 17 know, so while it might have been, as I said, ideally the
 18 correct way to deal with this, if I had gone ahead and
 19 dealt with it in that way there was a fair prospect that
 20 these RDOs would become upset by that as well. That's why
 21 I'm saying, you know ideally, in the ideal world that would
 22 be the way to do it but unfortunately in practice when
 23 you're dealing with complex problems the ideal solution
 24 doesn't necessarily always just fit on top of it.
 25 MR TIP SC: It was really a problematic

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1 position, Mr Da Costa, because if that is your attitude to
 2 an approach from RDOs then how can it be any different from
 3 the situation where underground loco drivers come to you
 4 separately and say, well, we don't want unions or team
 5 leaders or underground engineers? Whatever the case may
 6 be, can a company that has an established relationship with
 7 an established trade union ever properly countenance a
 8 situation where it decides to deal with a group of
 9 employees separately because those employees say, we don't
 10 want any unions involved. Is that acceptable, can it ever
 11 be acceptable?
 12 MR DA COSTA: Well, it is a very
 13 difficult situation.
 14 MR TIP SC: Well, it is not difficult
 15 with respect, because there are all those principles that
 16 we went through earlier this morning which established the
 17 way in which labour relations in this country is regulated
 18 at a policy, structural and legislative level, correct?
 19 MR DA COSTA: Yes, that's correct.
 20 MR TIP SC: Yes, and Lonmin has over the
 21 years until these events, broadly subscribed fully to those
 22 arrangements and to those principles, is that also correct?
 23 MR DA COSTA: Yes, it is correct.
 24 MR TIP SC: Well, let me just put some
 25 specific detail to the propositions that I'm debating with

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1 you now and I'll remind you that the question that I put to
 2 you which has yet to be fully answered by you, is that the
 3 three ingredients that I have articulated here,
 4 competition, lower wage, the experience of RDOs at other, -
 5 the experience of other mines with RDOs and the criterion
 6 of scarcity, that those are all matters that should go into
 7 the collective bargaining forum. Let me take you to
 8 aspects of what took place in the bargaining that led to
 9 the conclusion of the agreement in December 2011. Now –
 10 CHAIRPERSON: Can I just raise, deal with
 11 the points you've dealt with to some extent already, Mr
 12 Tip, just to make sure I've got it clear in my mind? The
 13 difference between your treatment of the team leaders which
 14 you deal with in paragraph 5.1 of your first affidavit,
 15 that's this one, OO17, and the way you dealt with the RDOs,
 16 it is actually quite clear, isn't it? You're effectively
 17 said to the team leaders as it appears, I would think from
 18 the penultimate sentence of paragraph 5.1, that this can't
 19 be dealt with in this way. It's got to be dealt with as a
 20 collective bargaining issue through the union. I take it
 21 that's what you say it means. I expressed the view, you're
 22 talking about the team leaders, I expressed the view that
 23 the issues they raised were salary negotiation issues and
 24 it was inappropriate for them to approach me directly as
 25 they had done, the issues - Is that correct, you were

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1 effectively taking the collective bargaining point and
 2 negotiations to the union point, you're putting it to them
 3 and they accepted it, is that right?
 4 MR DA COSTA: That's correct, yes.
 5 [10:22] CHAIRPERSON: That is in stark contrast
 6 to the approach you adopted with the RDOs, is that right?
 7 Because the RDOs, you didn't take that point with them, you
 8 didn't say it was inappropriate for them to approach you
 9 directly as they'd done. You spoke to them, dealt with the
 10 matter. I'm not criticising you for doing it, I'm just
 11 pointing out there is this contrast, right?
 12 MR DA COSTA: I did, though, point out to
 13 them that it was, what they were doing was inappropriate.
 14 CHAIRPERSON: Yes.
 15 MR DA COSTA: That this was not the
 16 correct procedure but yes, I then continued to listen to
 17 their – which I listened to the issues of the team leaders
 18 as well.
 19 CHAIRPERSON: Yes, yes, I understand but
 20 I mean you did something about what the RDOs said and it
 21 didn't really matter what the team leaders said, possibly
 22 for the reasons you've touched on but I take it from the
 23 point of view of the RDOs, the RDOs would have said to you
 24 look here, if you pressed them on the union point they
 25 might have said, well look, the only union that can

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1 negotiate salaries for us is NUM, we know and you know that
 2 NUM aren't in favour of an increase for the RDOs because we
 3 heard what happened at Amplats - at Implats, you probably
 4 heard the same. So therefore we have to do it the way
 5 we're doing it. Isn't that something that you would have
 6 anticipated they would have said if the point had been
 7 directly discussed?
 8 MR DA COSTA: Well, it is. You know the
 9 other issue regarding the RDOs that probably doesn't come
 10 out clearly in my statement is that I also knew or I didn't
 11 know for sure but I thought that if I simply did nothing
 12 about the issue – not that I wanted to but if I had just
 13 said to them, no, this is a collective bargaining issue,
 14 please go away, I can't talk to you, go and speak to your
 15 union. I don't want to speak to my union, no, no, just go,
 16 that's the way it works, go and speak to your union, go
 17 away. The risk of them being very angered, walking out of
 18 my office and started unprotected strike action the very
 19 next day was very, very high, particularly with a group of
 20 people like the rock drill operators that are traditionally
 21 quite a volatile group of people. That risk was very high,
 22 which was something I was considering as well.
 23 CHAIRPERSON: I understand that. Those
 24 points didn't arise with the team leaders.
 25 MR DA COSTA: No.

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1 CHAIRPERSON: You could afford to tell
 2 the team leaders to go away and go through the union but
 3 effectively, for the reasons you give, couldn't have
 4 afforded to take the same stance with the RDOs.
 5 MR DA COSTA: That's right.
 6 CHAIRPERSON: And to some extent your
 7 position had been weakened by the fact that Implats and
 8 Amplats had also apparently done things directly with the
 9 RDOs as far as we can see.
 10 MR DA COSTA: Well –
 11 CHAIRPERSON: Weakened the ground a bit
 12 under your feet.
 13 MR DA COSTA: Well, Implats had suffered
 14 quite a lengthy period of industrial action just around
 15 that time as well. It was also round about six weeks or
 16 so, at which time they then also basically unilaterally
 17 increased the wages across the board. So yes, I mean there
 18 was a lot going on in the industry at that time.
 19 CHAIRPERSON: I think I was unfair to
 20 Amplats. I think it appears from your memorandum to EXCO
 21 that Amplats were considering things –
 22 MR DA COSTA: That's correct.
 23 CHAIRPERSON: - but Implats had already
 24 implemented them, that's correct.
 25 MR DA COSTA: Yes, that's right. So

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1 there was a lot of this going around the – there was a lot
 2 of instability in the industry at the time. It was a very,
 3 very difficult time.
 4 MR TIP SC: Let me just divert for a
 5 moment to Implats and check your understanding of it. The
 6 Commission has some evidence of a general sort concerning
 7 it. That, those difficulties began because Implats
 8 unilaterally gave an extra increase to miners, are you
 9 aware of that?
 10 MR DA COSTA: Yes, I'm aware of that.
 11 CHAIRPERSON: Just make sure we
 12 understand the distinction. By miners you mean what I
 13 would call certificated miners.
 14 MR TIP SC: Certificated miners.
 15 CHAIRPERSON: A miner technically in the
 16 mining industry is someone who's got a certificate and can
 17 do blasting and that kind of thing, whereas people who
 18 haven't got certificates are not, quote, "miners" unquote,
 19 in mining parlance, are mineworkers. Is that correct?
 20 MR TIP SC: You're –
 21 CHAIRPERSON: Are you talking about
 22 miners in the strict sense?
 23 MR TIP SC: I was talking about miners
 24 with a capital M, as one also says, but these –
 25 MR DA COSTA: I understand –

<p style="text-align: right;">Page 30361</p> <p>1 CHAIRPERSON: - are the certificated 2 persons, these are the ones who are in charge of blasting 3 operations, they have the certificate that permits them to 4 conduct blasting. It's a very discreet and comparatively 5 small sector of the workforce. 6 MR DA COSTA: Yes, it is and also 7 reasonably scarce. 8 MR TIP SC: Yes and perhaps Implats was 9 motivated by those considerations also but the point is 10 simply that as a matter of chronology they gave unilateral 11 increases and that then spilled over to RDOs also seeking 12 increases, likewise outside of the bargaining framework, 13 correct? 14 MR DA COSTA: Yes and then there was, 15 they embarked on unprotected industrial action and an 16 unprotected strike – 17 MR TIP SC: Yes. 18 MR DA COSTA: - and my understanding is 19 Implats ultimately resolved that by increasing wages in 20 most categories quite significantly. 21 MR TIP SC: Well, it did so. Your 22 understanding is correct but along the way there were 23 approximately 60 serious injuries and four deaths at 24 Implats. You're aware of that? 25 MR DA COSTA: Unfortunately, yes.</p>	<p style="text-align: right;">Page 30363</p> <p>1 MR DA COSTA: Well, yes, we gave, we also 2 – 3 CHAIRPERSON: Sorry, Mr Tip, you 4 undertake in future to say Lonmin when you meant Lonmin and 5 you when you meant Mr Da Costa. You've now said you, I 6 think you mean Lonmin. 7 MR TIP SC: I understand – 8 MR DA COSTA: Sorry. 9 MR TIP SC: - my apologies, yes, Lonmin. 10 MR DA COSTA: I understand it as Lonmin. 11 Yes, we did decide to give an allowance to a single group 12 of employees. Ironically enough, as I've said just now, 13 one of my considerations in terms of recommending that 14 allowance was to try to, exactly to try to avoid the 15 situation where there was going to be an unprotected strike 16 and all the anarchy that we've seen going ahead of it and 17 where our case is different is that the industrial action 18 was triggered or the unprotected industrial action was 19 triggered by the very group that we had offered the 20 allowance to or that we had given the allowance to and not 21 by the rest of the workforce initially. The rest of the 22 workforce joined eventually. 23 CHAIRPERSON: No, we understand that but 24 what we also know, to be fair, you, you Mr Da Costa, that 25 you'd also recommended, however, that both at the national</p>
<p style="text-align: right;">Page 30362</p> <p>1 MR TIP SC: Yes. The point is, Mr Da 2 Costa, that what took place at Implats had as its trigger a 3 decision by the company to award unilateral increases to a 4 particular sector without going through the union 5 structures and without regard to the existence of 6 collective agreements, is that right? 7 MR DA COSTA: I'm sorry, just repeat 8 that? 9 MR TIP SC: Yes, certainly. 10 MR DA COSTA: Sorry. 11 MR TIP SC: I'm putting to you that the 12 trigger for the unfortunate events at Implats was the 13 decision by that company to unilaterally award an increase 14 to a particular sector of its workforce, the certificated 15 miners, outside of the union structures, without reference 16 rather to the union structures and outside of the terms of 17 the governing collective agreement. 18 MR DA COSTA: Yes, that's correct. 19 MR TIP SC: And that led to a great deal 20 of strife of a prolonged sort and the loss of life and 21 destruction of property. 22 MR DA COSTA: That's correct. 23 MR TIP SC: Now were you not doing 24 precisely the same thing at Lonmin in June and July of 25 2012?</p>	<p style="text-align: right;">Page 30364</p> <p>1 and the local level both unions should be involved, which 2 presumably was something that Implats hadn't done and if 3 that had been followed we don't know what would have 4 happened but we can speculate. 5 MR DA COSTA: No, we don't know and I 6 wasn't advocating that we should enter into negotiations 7 with the unions. I was advocating that they should be 8 consulted in terms of this, which I believe at a Marikana 9 level I did consult but that's beside the point. What – 10 you know, I'm saying where our situation was different to 11 Impala was, it was the very group that we'd given the 12 allowance to that initiated the industrial action and 13 ironically that is what we were trying to prevent by 14 implementing this allowance so that we didn't get into that 15 position. Unfortunately it was rejected and we did get 16 into that position. 17 CHAIRPERSON: Mr Tip, are you going to 18 move on to another point now? 19 MR TIP SC: I'm going to – 20 CHAIRPERSON: I was proposing to take the 21 comfort break at this point but obviously it'll have to be 22 done at a time which is convenient for your cross- 23 examination. I don't want to interrupt you in the middle 24 of a point. 25 MR TIP SC: Thank you, Chair. I will be</p>

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1 taking this a little further but I will be looking at a
 2 different aspect so it's perfectly convenient for me to
 3 adjourn now.
 4 CHAIRPERSON: We'll take the first break
 5 now for quarter of an hour.
 6 [COMMISSION ADJOURNS COMMISSION RESUMES]
 7 [10:54] CHAIRPERSON: The Commission resumes. We
 8 took a bit longer than we thought we would because we were
 9 discussing the way forward in consequence of the fact that
 10 Mr Da Costa is not available next week. Before I remind
 11 him he's under oath I must thank the representatives of
 12 Lonmin who have made legible copies available to us of, I
 13 think it's annexure B to the affidavit of the witness. It
 14 would have been helpful if it had been punched, but that's
 15 something we can attend to ourselves. I don't want to
 16 sound ungrateful. You're still under oath, Mr Da Costa.
 17 MICHAEL GOMES DA COSTA: Yes, Chair.
 18 CHAIRPERSON: Mr Tip.
 19 CROSS-EXAMINATION BY MR TIP SC (CONTD.):
 20 Thank you, Mr Chair. Mr Da Costa, I had with reference to
 21 your statement identified a couple of those things that I
 22 said ought to have come up in the bargaining sessions, the
 23 collective bargaining sessions towards the agreement
 24 concluded in December 2011. You recall that?
 25 MR DA COSTA: Yes.

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1 MR TIP SC: And I want to take you into a
 2 couple of aspects of what in fact took place in the course
 3 of those negotiations, particularly having regard to the
 4 welcome fact that you were part of them. Could I ask for
 5 transcript of portion of Mr Gcilitshana's evidence to be
 6 displayed at page 3810 of the transcript. It's the 23rd of
 7 January 2013. I believe it's day 35. You've got 3810.
 8 I'm going to take you into that shortly, Mr Da Costa, but
 9 just by way of background you will recall that one of the
 10 clear demands that NUM made in the course of these
 11 collective negotiations was specifically in respect of the
 12 RDOs where there was from the very start a demand that the
 13 RDOs should be rolled up from category 4 to category 7.
 14 You remember that?
 15 MR DA COSTA: It is quite a long time
 16 ago. I don't remember it clearly, but ja, it's quite
 17 possible, yes.
 18 MR TIP SC: Well, it would have been a
 19 significant change in the circumstances of RDOs, would it
 20 not have been?
 21 MR DA COSTA: If they were rolled up from
 22 group 4 to group 7?
 23 MR TIP SC: Yes.
 24 MR DA COSTA: Yes, yes, very significant.
 25 MR TIP SC: Yes, they would have earned a

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1 substantial amount more, correct?
 2 MR DA COSTA: Yes, that's correct.
 3 MR TIP SC: And if they had been shifted
 4 up to a category 7 then there would not have been the
 5 difficulty that presents itself when one is contemplating
 6 differential remuneration rates within a particular
 7 category. You follow what I'm saying?
 8 MR DA COSTA: I do.
 9 MR TIP SC: Yes, so the demand that RDOs
 10 be moved from 4 to 7 was an important one?
 11 MR DA COSTA: It would have created other
 12 complications nonetheless, but ja.
 13 MR TIP SC: Well, such as what?
 14 MR DA COSTA: Such as competing with the
 15 grades of supervisors and the like. So –
 16 MR TIP SC: Well yes, but NUM was dealing
 17 with the position of RDOs and the RDOs we have heard here
 18 and you've confirmed it also, the RDOs, it is recognised,
 19 performed particularly hard, dangerous, uncomfortable and
 20 critically important work.
 21 MR DA COSTA: Certainly physically
 22 demanding work. Dangerous, I've seen it referred to as
 23 being dangerous work, but in, you know in truth I'd say
 24 hazardous work. Hazards in that environment are fairly
 25 well controlled, so it's not necessarily dangerous, and –

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1 CHAIRPERSON: What's the difference
 2 really between hazardous and dangerous? Isn't hazardous
 3 really a synonym for dangerous?
 4 MR DA COSTA: I don't –
 5 CHAIRPERSON: It can maybe –
 6 MR DA COSTA: I don't think so, Chair.
 7 CHAIRPERSON: Maybe it connotes
 8 dangerousness at a sort of lesser level than might
 9 otherwise be the case, but surely there is an element of
 10 danger in it, surely?
 11 MR DA COSTA: There's an element, and
 12 what I'm saying is in the environment where hazards are
 13 well controlled it's less dangerous. So, and that's my
 14 point. The mining environment is a very, very controlled
 15 environment and the other point to consider –
 16 CHAIRPERSON: It might [microphone off,
 17 inaudible] is a dangerous one. It's hazardous, it's
 18 dangerous. It may be well controlled, but that doesn't
 19 mean there aren't accidents and people don't die and there
 20 aren't fatalities and so forth in the mine. Isn't that so?
 21 MR DA COSTA: No, as I –
 22 CHAIRPERSON: So on a, if you're on a
 23 scale of 1 to 10 of dangerousness, maybe you're at the
 24 lower end of the scale, but you're still on the scale,
 25 aren't you?

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1 MR DA COSTA: Yes, I –

2 CHAIRPERSON: So it is dangerous work,

3 albeit attempts are made, presumably generally with a fair

4 degree of success, to ensure that no-one is injured. Would

5 that be fair?

6 MR DA COSTA: Yes, that's fine, but the

7 other point that I would just like to make is that it's not

8 the RDOs that work in a particular area or environment on

9 their own. I mean the entire stoping crew works in the

10 same environment. So to say that their work is, if you

11 want to say it's dangerous, if it's more, to say that their

12 work is more dangerous than any other member on the stoping

13 crew, I don't necessarily with it. So I do agree that it's

14 a physically demanding job and that's why it is relatively

15 difficult to get people to want to do that job.

16 CHAIRPERSON: While we're on the point,

17 can I ask you something that's not directly relevant, that

18 flows from what you've just said. Most of the RDOs are

19 illiterate. Is that right?

20 MR DA COSTA: Ja, they –

21 CHAIRPERSON: And that's why they can't

22 be promoted to be certificated miners for example because

23 you've got to be literate to pass exams and be able to do

24 reading and writing in respect of blasting. Is that

25 correct?

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1 MR DA COSTA: That's correct, and they're

2 probably, that grouping is probably a little more

3 illiterate than the rest of the people, but –

4 CHAIRPERSON: Ja, no, no –

5 MR DA COSTA: - there's also a fair

6 amount of illiterate people –

7 CHAIRPERSON: Ja, no I understand.

8 MR DA COSTA: - in the other occupations

9 as well.

10 CHAIRPERSON: I understand that. You

11 also have programmes on the mines to enable people to be

12 educated and acquire literacy skills and so forth, don't

13 you?

14 MR DA COSTA: Yes, Adult Basic Education

15 Training, yes.

16 CHAIRPERSON: That's right. Am I correct

17 in thinking that it may be more difficult for RDOs to

18 participate in those programmes and benefit from them

19 because of the fact they spent a long, hard, physically

20 exhausting day down in the mine doing the rock drilling?

21 MR DA COSTA: Ja, it might be. I mean

22 their work is more physically demanding than the other

23 categories.

24 CHAIRPERSON: Sorry Mr Tip, it wasn't

25 directly relevant, but it flows from other things that

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1 arise in this Commission, but I just wanted the benefit of

2 your views on the matter while we're discussing it before I

3 forgot. Anyway, thank you for what you've said.

4 MR DA COSTA: Okay, Chair.

5 MR TIP SC: Thank you, Chair. Mr Da

6 Costa, I am going to take a few precious minutes from my

7 decreasing allocation just to underline the proposition

8 I've put to you concerning the hazardous and the dangerous

9 nature of the work that RDOs in particular do, and I'm

10 going to do so by referring to the fact that Mr Zokwana,

11 then the president of NUM, testified before this Commission

12 and gave a very well-informed account of the nature of the

13 work of RDOs. He himself had done it, not as an RDO but in

14 order to understand what the work entailed, and his

15 description was with respect a graphic and compelling one

16 and he said in essence the following, that all work

17 underground is dangerous, but that the most dangerous and

18 the most taxing is the work of the RDOs, and he gave two

19 examples to illustrate that, apart from the physical

20 stresses of working in an environment where you have a

21 heavy machine in your hands, you have water spraying all

22 over the place, he drew the attention of the Commission to

23 these two aspects, that rock drillers confront the risk

24 that there may be unexploded charges in the wall that they

25 are about to drill into that might have been missed by the

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1 certificated miner, and if they hit one of those charges

2 then they are the ones who bear the immediate brunt and

3 inevitably fatal consequent of it exploding. You agree

4 with that?

5 MR DA COSTA: Yes, I agree with it.

6 MR TIP SC: And the second particular

7 danger that he described to this Commission was that by the

8 very nature of what the RDO does he works at the extremity

9 of the stope, he works on the cliff face that has to be

10 developed and at that point the ceiling, the rock ceiling

11 is not as well supported as it will be once the rock

12 drilling has been completed, the blasting has been done and

13 the clearing away has been done. Would you agree with that

14 also?

15 MR DA COSTA: Yes, I'll agree with that.

16 MR TIP SC: And therefore those are two

17 particular hazards that RDOs face that others do not.

18 Agreed?

19 MR DA COSTA: I agree that they face

20 those hazards for longer periods during their shift, yes.

21 MR TIP SC: Yes. Right, thank you.

22 Well, let's not dwell further on that. Since you don't

23 recall, despite having been involved in those negotiations,

24 that NUM had presented as one of its incoming demands that

25 RDOs be rolled up from category 4 to 7, I'm going to take

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1 you back a few pages in the record to 3806, please. Page
 2 3806, thank you. This is Mr Gcilitshana giving evidence
 3 and he, I'm sure you'll recall, was the chief negotiator
 4 for NUM in the course of those negotiations.
 5 MR DA COSTA: Ja, I do recall that.
 6 MR TIP SC: The national office bearer of
 7 NUM.
 8 MR DA COSTA: Yes.
 9 MR TIP SC: Yes, and I was leading him
 10 with reference to a statement which reflected also the
 11 minutes of the various negotiation sessions that had taken
 12 place and at line 4 I say to him, "I'm looking now at
 13 paragraph 26 of your statement and is it so that RDOs
 14 received particular attention in these demands?" Mr
 15 Gcilitshana says, "Yes, correct. They have been looked
 16 after." I say, "What was the demand?" "The demand was to
 17 move them from category 4 to category 7." "Would a shift
 18 of that kind have significant remuneration implications?"
 19 "Yes, the intention you ask to improve their salaries,
 20 taking into account the kind of work that they are doing."
 21 Does that bring the discussions back to your recollection,
 22 Mr Da Costa?
 23 MR DA COSTA: As I said, it was quite a
 24 long time ago. I can't remember the specifics of the
 25 conversations that we had there. I'm not disputing it.

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1 I'm just saying I can't recollect properly.
 2 MR TIP SC: Well, I can assure you from
 3 the documentation that underlies the statement that there
 4 was indeed a demand on behalf of RDOs, properly mandated at
 5 a mass meeting before the negotiations began, that they be
 6 rolled up from category 4 to category 7, and it is to be
 7 seen repeatedly through the minutes, and I'm afraid that I
 8 must express some surprise that you say that you don't
 9 recall it, because I should have thought that a demand of
 10 that kind relating to RDOs would have remained with you,
 11 particularly given the events that unfortunately have taken
 12 place subsequent to these negotiations.
 13 MR DA COSTA: You know to, I mean to be
 14 fair, there are a lot of demands that are raised during
 15 wage negotiations and I just can't, I can't remember. I'm
 16 not disputing it. It may, if it's in the minutes it must
 17 have been raised that way.
 18 MR TIP SC: Mr Chairperson, Mr Wesley has
 19 dutifully informed me that I have five minutes left.
 20 CHAIRPERSON: Yes.
 21 MR TIP SC: Is there any prospect of a
 22 little extension? It will be difficult for me even –
 23 CHAIRPERSON: [Microphone off, inaudible]
 24 what do you mean by "little extension"?
 25 MR TIP SC: About a 30-minute extension.

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1 CHAIRPERSON: What topics do you wish to
 2 cover? Don't tell me the detail, but just subject
 3 headings.
 4 MR TIP SC: The subject headings are
 5 essentially aspects of the negotiations that took place. I
 6 can just go through the excerpts quite quickly. Then there
 7 is a separate category relating to security aspects of the
 8 days leading, immediately following on the start of the
 9 strike, and the approaches that were made to the South
 10 African Police Service to intervene. Perhaps 30 minutes, I
 11 can shorten, I've been –
 12 CHAIRPERSON: They sound like important
 13 topics which –
 14 MR TIP SC: With respect, Chair, yes.
 15 CHAIRPERSON: And I have asked questions
 16 and taken some of your time up, so I think in the
 17 circumstances I would be hesitant creating much of a
 18 precedent, but I have in the past given extensions to
 19 others and you've asked me very nicely, so not quite as
 20 belligerently as I'm sometimes asked, so – not that that's
 21 a factor that – but I will give you the extension you seek.
 22 Please, not more than the period you asked for.
 23 MR TIP SC: It will not be more than 30
 24 minutes and I'm relieved that I approached you in the
 25 correct way, Chair. Mr Da Costa, I'm going to take you to

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1 a few particular aspects of the discussions in those
 2 negotiations as reflected in Mr Gcilitshana's evidence,
 3 which I may say was not in any way challenged, and let us
 4 go to page 3808. This is still Mr Gcilitshana in evidence,
 5 as I said based on the minutes, and at line 4 I ask him,
 6 "Were you able to succeed – with that particular demand,
 7 being the roll up from category 4 to category 7 for RDOs?"
 8 "We could not succeed." "Did you however succeed in
 9 obtaining a percentage increase at least in respect of the
 10 wages of RDOs?" "That's correct." Then at line 16 Mr
 11 Gcilitshana says, "If one can also go back to the RDOs
 12 issue, on the reason, for the reason not being, for the
 13 reason not for the RDOs" – well, let me just paraphrase it
 14 a little – "for the reason for the RDOs not to have been
 15 upgraded to category 7, the company indicated that they are
 16 busy with a programme of developing youths in the
 17 surrounding communities who can be able to be prepared to
 18 take the job of the RDOs because we have been taking RDO
 19 role as a scarce skill." That is the company. Now does
 20 that ring a bell, Mr Da Costa?
 21 MR DA COSTA: No, the fact that we were
 22 doing these programmes rings a bell. I mean we do that,
 23 yes.
 24 MR TIP SC: Yes, alright. So Mr
 25 Gcilitshana reflects the position correctly there, and do

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1 you recall that in the course of the negotiations the
 2 company responding to the contentions NUM had put forward
 3 that this was a scarce skill, said well, we're actually not
 4 really that troubled by that because we've got these
 5 community programmes? Is that right?
 6 MR DA COSTA: It, it's quite possible,
 7 ja.
 8 MR TIP SC: Yes.
 9 CHAIRPERSON: Did you succeed in reducing
 10 the scarcity of RDOs by these programmes?
 11 MR DA COSTA: Not entirely, no. No,
 12 Chair.
 13 CHAIRPERSON: What? Not entirely, or not
 14 at all? Have you got any of the local people working as
 15 RDOs?
 16 MR DA COSTA: There are some, yes.
 17 CHAIRPERSON: How many?
 18 MR DA COSTA: I don't -
 19 CHAIRPERSON: A big number, a small
 20 number?
 21 MR DA COSTA: No, the, it's certainly not
 22 the majority of the rock drill operators, no.
 23 CHAIRPERSON: I see.
 24 MR TIP SC: Well, we won't debate that,
 25 Mr Da Costa. I'm going to move on to page 3809. Mr

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1 Gcilitshana was there dealing with the discussions at the
 2 sixth meeting, which was perhaps the penultimate session of
 3 the negotiations, and he says at line 17, I'm reading from
 4 his statement and I say, "If I can record what you said in
 5 this paragraph, NUM informed the company that if the
 6 position of the category 4 employees, namely the RDOs, was
 7 not addressed, they would become a time bomb.
 8 [11:13] In the language of Mr Gcilitshana NUM propose
 9 that their basic wage be increased by" - and there was a
 10 discussion of percentages. Then at line 25 I say, "Now
 11 what was your thinking at that time? Why was it that you
 12 used a phrase like time bomb in what you said to the
 13 company at that concluding negotiation meeting. I was
 14 advising the company on the scarce skills of the demand by
 15 the RDO's taking into account that, if I can take you
 16 back, in 2009 when the company was restructuring or
 17 retrenching, some of the RDO's wanted to take voluntary
 18 separation packages. They were not allowed. The reason
 19 was that they were doing the scarce skills, therefore they
 20 can't take a separation package, therefore that remained
 21 with the RDOs as we collected that month that remained on
 22 the mines of the RDOs that their job was a scarce skill.
 23 Now you were at Karee by 2009, do you recall that as a
 24 matter of fact?
 25 MR DA COSTA: Yes, I was at Karee just at

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1 the time when these retrenchments were taking place when I
 2 arrived at Karee. It would have been so that we wouldn't
 3 want to retrench production people and RDO's specifically,
 4 I would think would be a scarce skill yes.
 5 MR TIP SC: Yes. In other words Mr
 6 Gcilitshana's recollection of it is correct.
 7 MR DA COSTA: I think so.
 8 CHAIRPERSON: He was challenged in cross-
 9 examination by counsel for Lonmin was it?
 10 MR TIP SC: It was not challenged but it
 11 is always useful to get confirmation of correctness from
 12 the other party, Chair. Now there are other passages, I'm
 13 not going to spend time on that. What I want to put to you
 14 is this, Mr Da Costa, that it is transparent from these
 15 passages in the negotiations - dealing with the
 16 negotiations with Lonmin that led to the 2011 collective
 17 agreement - that NUM addressed the position of RDO's
 18 specifically and with purpose in relation to the work they
 19 do, in relation to the scarcity that the skills entail,
 20 that it said to the company, to Lonmin, you are dealing
 21 here with a time bomb, do something, and that Lonmin, in
 22 fact, didn't. They received the increases that were
 23 accorded all category for employees correct?
 24 MR DA COSTA: No I can't remember if they
 25 received anything higher up. I can check the agreement but

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1 my recollection was that the RDOs received a slightly
 2 higher increase. One of the issues here is that we were
 3 opposed to the mechanism of the roll up of categories.
 4 That mechanism of increasing the rock drill remuneration
 5 and following this, we also then relooked at our production
 6 bonuses and specifically rock driller operator production
 7 bonuses. Rock drillers get an additional production bonus
 8 to other categories of employees, so I do recall that
 9 happening.
 10 MR TIP SC: Right. Mr Da Costa, it may
 11 well be that there was a small differential but that is of
 12 no real consequence because what I'm really talking about
 13 in respect of the RDO's was that major considerations had
 14 been put to you by NUM on their behalf and that, in
 15 substance, the position of the RDO's was not treated
 16 differently. Now that leads directly into the real
 17 question that I want to ask you to assist us with. That
 18 was Lonmin's position as at the end of 2011. Why did you
 19 take a different attitude to the RDO's who approached you
 20 in June 2012 where you said but these are scarce skills and
 21 they are not paid as much as other companies and so on, and
 22 those factors, you said, weighed on your mind when you said
 23 well this is something that needs to be escalated. It
 24 weighed sufficiently on the minds of the persons who
 25 comprised the exco of Lonmin to grant additional

<p style="text-align: right;">Page 30381</p> <p>1 allowances. Why was it not addressed at the time that NUM 2 was before you in a collective bargaining forum and those 3 factors not given proper recognition by Lonmin? 4 MR DA COSTA: Well I believe at the time 5 that we were conducting the wage negotiations at the end of 6 2011 our salary scales were quite competitive. In fact, I 7 think we were paying more than Impala and probably just 8 slightly less than Anglo if I recall correctly. Between 9 the time that we concluded our wage agreement and June 10 2012, a lot had transpired in that area. In the platinum 11 belt. Impala, at that stage, had given significant 12 increases to their rock drill operators. I mean we've been 13 through this. Anglo was busy with their people and the 14 environment was very different. We conducted the wage 15 agreement in a fairly stable industrial relations 16 environment, but by the time we got to May, June 2012, the 17 environment in that entire platinum belt had changed 18 significantly, having been precipitated by the events that 19 had occurred around Impala. 20 MR TIP SC: Well, Mr Da Costa, I need to 21 move on to a different topic and that is, as I had 22 indicated, some aspects relating to the security issues and 23 related matters after the strike began on 9 and 10 August. 24 In your statement you don't say anything about the night of 25 the 10th of August. There is evidence before this</p>	<p style="text-align: right;">Page 30383</p> <p>1 MR DA COSTA: Yes, Mr Russo-Bello was 2 acting as the head of the mining division at that point 3 yes. 4 MR TIP SC: Yes, and in paragraph 5.6 he 5 refers to the fact that he authorised the hiring of the 6 Protea Coin helicopter and then, in that paragraph he says 7 the following, "I perceived a risk of damage to 8 infrastructure. I was aware that the capacity of our 9 security force was limited and that it was unable to 10 contain major unrest at the mine." That is on the 11th 11 August. Would you agree with Mr Russo-Bello's assessment 12 of Lonmin security capacity? 13 MR DA COSTA: I think so yes. 14 MR TIP SC: Is there any doubt in your 15 mind? 16 MR DA COSTA: No. 17 MR TIP SC: So major unrest and its 18 containment was beyond the capacity of Lonmin security at 19 that time. 20 MR DA COSTA: Yes. 21 MR TIP SC: Now I'm going to just touch 22 again on the incident - the awful incident on 12 August 23 2012 in which Mr Fundi and Mr Mabelane lost their lives - 24 would that fall within the category of major unrest? 25 MR DA COSTA: The incident? The march</p>
<p style="text-align: right;">Page 30382</p> <p>1 commission of a number of active intimidation and that NUM 2 had embarked on a programme of assisting people to get to 3 work, that NUM had also, with effect from a meeting on the 4 8th of August, spoken against the strike because it was 5 unprotected and had urged employees to continue to work, 6 and to work through the structures. You recall all that? 7 MR DA COSTA: Ja a lot of that activity 8 was taking place around the Western Platinum area, but yes, 9 I'm aware of it. 10 MR TIP SC: Yes, and that as at the 11th 11 of August there was, as we know, a serious incident at the 12 NUM offices. I'm not going to go into any of the details 13 with you, but you are aware. You were, in fact, called up 14 to provide a co-ordinating role in your capacity as senior 15 management. 16 MR DA COSTA: Yes, that's right. 17 MR TIP SC: Yes. Now there is - again to 18 abbreviate matters - I want to take you to a paragraph in 19 the statement that we have from Mr Russo-Bello which is at 20 page 66 of the Lonmin bundle. Perhaps I could just - I beg 21 your pardon page 55. Rather than to call it up, let me 22 just read the portion. I think that you'll be familiar 23 with it. Mr Russo-Bello is dealing with the position on 24 the 11th August. He too was involved, he had been called 25 in, do you remember that?</p>	<p style="text-align: right;">Page 30384</p> <p>1 that was taking place? 2 MR TIP SC: Yes the march, the 3 confrontation, the attempt to stop the marches, the 4 unsuccessful attempt and the brutal murder of two of your 5 security officers. Is that major unrest? 6 MR DA COSTA: It's an unrest incident, 7 but yes, it was a significant incident. 8 MR TIP SC: Significant? 9 MR DA COSTA: Yes. 10 MR TIP SC: Well, Mr Da Costa, I'm not 11 sure, perhaps you can tell us if you think it wasn't a 12 major unrest incident, why it wasn't a major unrest 13 incident. 14 MR DA COSTA: No, but it was. 15 MR TIP SC: It was. 16 MR DA COSTA: It was a major incident, 17 yes. 18 MR TIP SC: Okay. So it would have been 19 an incident of a kind that Mr Russo-Bello had said we don't 20 have the capacity to deal with it. 21 MR DA COSTA: I don't know if he was 22 referring to that incident, or if he was referring to, you 23 know one of the problems with our security capacity was 24 that it was limited. It was limited in size and the people 25 who were able to deal with unrest in certain incidents were</p>

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1 limited in their number and when this unrest and when these
 2 events started popping up all over the property, it
 3 extended the capacity of our security people who had the
 4 ability or the knowledge to deal with those incidents, so I
 5 don't know if you meant capacity in that way.
 6 MR TIP SC: I'm going to put the question
 7 once more because I'm not sure what your answer is intended
 8 to mean. Mr Russo-Bello says in his statement, and he says
 9 it in respect of what he understood the position to be as
 10 at 11 August. He says that, "Lonmin security was limited
 11 and unable to contain major unrest at the mine." You agree
 12 with that. You have already agreed.
 13 MR DA COSTA: Yes.
 14 MR TIP SC: Yes, now I don't know why
 15 it's difficult is I'd say on the 12th of August, on the
 16 following day, there is a major march by aggressive and
 17 armed people, an attempt by a dozen or so security officers
 18 to stop them and the result of that is the march does not
 19 stop. Two of the security officers are murdered and I
 20 suggest to you that that is a major unrest incident.
 21 MR DA COSTA: Yes, it is.
 22 MR TIP SC: It is.
 23 MR DA COSTA: Yes.
 24 MR TIP SC: And we know that Lonmin
 25 security - at least in that deployment was unable to

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1 contain it because they were unsuccessful and two of them
 2 died, correct?
 3 MR DA COSTA: Yes.
 4 MR TIP SC: Yes. Now what I'm really
 5 wanting to know in consequence of that is what Lonmin's
 6 view was of the need to involve the forces of trained
 7 police officers. There are references in your statement
 8 and elsewhere to attempt to obtain assistance from the
 9 SAPS, correct?
 10 MR DA COSTA: Yes, it's correct.
 11 MR TIP SC: Are you able to give us any
 12 assistance on that, when such approaches were made, to
 13 whom, for what, with what result and so forth?
 14 MR DA COSTA: I can shed some light on
 15 it. From the - certainly from the morning of the 11th when
 16 we realised that the situation was escalating
 17 significantly, we started - well let me go back a bit. I
 18 mean from the Friday already we'd been in contact with the
 19 SAPS but through our normal contact channels, through the
 20 local Marikana Police Station, Bethanie, those areas and
 21 the Rustenburg Cluster. As things started escalating on
 22 Saturday morning and we saw that there weren't enough -
 23 well I say enough, but I mean, it didn't seem to us that
 24 there were enough public order police units being deployed
 25 to the operation, we started escalating our requests higher

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1 up. I personally did not contact anybody from the SAPS but
 2 I do know that Graham Sinclair had contacted people, Abe
 3 Kgotle had had discussions with people in the SAPS - I
 4 think the Provincial Commissioner and we had then also
 5 requested that - on executive level, that we engage with
 6 the SAPS at a higher level within the SAPS to increase the
 7 police - particularly public order policing presence on the
 8 property.
 9 MR TIP SC: Thank you. Then in
 10 conclusion, you refer to the visit to Lonmin on 12 August
 11 of the then president of NUM, Mr Zokwana, and he - as you
 12 already know - has given evidence here and he has described
 13 that he understood very clearly from the Lonmin management
 14 who were present that it was their view that they were not
 15 able to deal with the level of violence that was present at
 16 Lonmin at the time, correct?
 17 MR DA COSTA: Yes, that's correct.
 18 MR TIP SC: And Mr Zokwana's response was
 19 that it was essential to obtain SAPS intervention in order
 20 to restore law and order, correct?
 21 MR DA COSTA: Yes.
 22 MR TIP SC: And was it clear to you also
 23 that it was the restoration of law and order and the
 24 containing of violence that motivated him and that he was
 25 not in any sense seeking to have the SAPS intervene in the

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1 labour issues that were present at the mine.
 2 MR DA COSTA: Ja that - I mean that
 3 Sunday afternoon when we met with him, because he arrived
 4 at the mine. We didn't call him, and his main concern, as
 5 I recall, was the security of his - or the safety of his
 6 members and that's what he was concerned about, is that, as
 7 he said restore the law and order situation so that people
 8 who want to go to work can go to work eventually.
 9 MR TIP SC: Yes, right. Thank you Chair,
 10 thank you for the extra time.
 11 CHAIRPERSON: Yes thank you, Mr Tip. I
 12 think you're next Ms Barnes am I correct?
 13 MS BARNES: Yes, thank you Chair.
 14 CHAIRPERSON: How long are you going to
 15 be? Remind me?
 16 MS BARNES: An hour and a half, Chair.
 17 CHAIRPERSON: I see. Well we'll have a -
 18 sorry.
 19 MS BARNES: We may not quite manage that
 20 today with the tea break, Chair.
 21 CHAIRPERSON: No alright, we'll have to
 22 take the -
 23 MS BARNES: I do need an hour and a half.
 24 CHAIRPERSON: Yes, I understand. Okay
 25 well, you will have to then carry on with your remaining

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1 quarter of an hour, I imagine next time, but let's not
 2 waste any more time. Start, we take the tea break round
 3 about a quarter to 12 but I'll appoint you in charge of
 4 that. So when it's appropriate for us to take the
 5 adjournment, you let me know.
 6 MS BARNES: Thank you, Chair. Good
 7 morning Mr Da Costa.
 8 MR DA COSTA: Good morning.
 9 MS BARNES: I represent AMCU in this
 10 commission of inquiry.
 11 MR DA COSTA: Yes, I'm aware of that.
 12 MS BARNES: Mr Da Costa, if we could
 13 start by looking at your statement. That's 0017 - if we
 14 could have that on the screen please. Page 68, paragraph
 15 3.5. You're talking here about the RDOs approach to you on
 16 the 21st of June 2012 and you say the following, "I also
 17 recall that at the time, and having been aware of the
 18 events at the Impala Platinum mine earlier in the year, I
 19 was concerned that demands would be made after the meeting"
 20 and you're referring here, as I understand it, to the prior
 21 meeting that you understanding the RDOs had had. "I was
 22 concerned that demands would be made" –
 23 [11:33] CHAIRPERSON: Before you go on, I think
 24 you said page 65. It's in fact page 3 of exhibit OO17.
 25 MS BARNES: I was referring to the – I

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1 believe I was referring to the paginated –
 2 CHAIRPERSON: No – no, I know you were
 3 but you know when we read the record or others read the
 4 record after us, when you refer to an exhibit they'll look
 5 at the exhibit, it's page 3 of the exhibit. Anyway let's
 6 not waste any more time, I've corrected it.
 7 MS BARNES: Alright, so to finish the
 8 paragraph you said, "I was concerned that demands would be
 9 made after the meeting which Lonmin could not possibly
 10 meet." Do you see that?
 11 MR DA COSTA: Yes, I did.
 12 MS BARNES: Now I take it that by the
 13 events at the Impala Platinum mine you're referring there
 14 to the unprotected strike that took place in the first
 15 quarter of 2012, is that right?
 16 MR DA COSTA: That's correct, yes.
 17 MS BARNES: And you have given quite a
 18 lot of evidence about your knowledge of what happened
 19 during that strike and so hopefully my questions in this
 20 section can go quite quickly, but you were obviously – this
 21 was, it was a fairly protracted strike. I think you've
 22 indicated that it was about six weeks. It was also violent
 23 is that correct?
 24 MR DA COSTA: Yes, that's right.
 25 MS BARNES: And it was in fact largely

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1 responsible for quite a significant drop in the country's
 2 platinum output in the first quarter of 2012, correct?
 3 MR DA COSTA: Yes, that's correct.
 4 MS BARNES: So you would have been
 5 following these events with some interest and presumably
 6 with some concern at the time, correct?
 7 MR DA COSTA: Yes, that's correct.
 8 MS BARNES: You've already indicated that
 9 you were aware at the time of the unilateral adjustment
 10 that was made by Impala management to the salaries of
 11 miners, correct?
 12 MR DA COSTA: Yes. In December, yes.
 13 MS BARNES: Yes, after the –
 14 CHAIRPERSON: Certificated miners.
 15 MS BARNES: That's right, Miners with a
 16 capital M. After the conclusion of the collective
 17 agreement in 2011 the adjustment was made.
 18 MR DA COSTA: Yes, I was aware of that.
 19 MS BARNES: Different figures are bandied
 20 about. The adjustment is reported by some as 16% and
 21 others at 18%. Do you happen to know what the figure was?
 22 MR DA COSTA: No, I don't know exactly.
 23 I thought it was 18% but that's fine.
 24 MS BARNES: And you said yesterday in
 25 response to questions from Mr Budlender that you were aware

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1 of some of the details of the wage agreements at Impala in
 2 2011, correct?
 3 MR DA COSTA: Some of the details of the
 4 wage agreement?
 5 MS BARNES: At Impala and the demands
 6 that were made at Impala in 2011.
 7 MR DA COSTA: No, I don't think I was
 8 referring to 2011. I was aware of the, I was aware of the
 9 increases that were given following the unprotected strike
 10 in 2012. I believe that's what I was saying.
 11 MS BARNES: Well, you were referred to
 12 the affidavit of Mr Patel which indicated that there was an
 13 issue at Impala in 2011 where Impala management wanted to
 14 retain a differential for RDOs but NUM preferred
 15 harmonisation against the wage band. Do you recall that
 16 evidence yesterday or that being put to you yesterday and –
 17 MR DA COSTA: Yes. I recall that being
 18 put to me yesterday, yes.
 19 MS BARNES: Were you not aware of that at
 20 the time?
 21 MR DA COSTA: During mid-2012?
 22 MS BARNES: No, when it happened.
 23 MR DA COSTA: When it happened, no.
 24 MS BARNES: Either in late 2011 or early
 25 2012.

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1 MR DA COSTA: No, I wasn't particularly
 2 aware of it then, no.
 3 MS BARNES: Because the view of many
 4 analysts, and it's a view that is shared by AMCU, is that
 5 there were essentially twin triggers of the Impala strike,
 6 the unprotected strike in 2012 and those twin triggers
 7 were, firstly, the unilateral adjustment to the wages of
 8 miners that was given by Impala management and then that as
 9 combined with the failure to achieve any significant
 10 increase for RDOs at Impala in 2011. Do you want to
 11 comment on that?
 12 MR DA COSTA: That may well be so.
 13 MS BARNES: And what we know is that when
 14 the 2012 strike commenced the RDOs at Impala had two
 15 demands. Their first demand was that their basic salary be
 16 increased to R9 000 a month which was the equivalent of the
 17 increase of 18%, well, assuming that it was 18% that the
 18 miners had received and the second demand was that there
 19 were to be no negotiations with NUM. Were you aware of
 20 that?
 21 MR DA COSTA: Ja, basically yes. I
 22 didn't have in-depth knowledge of what was going on there
 23 but yes.
 24 MS BARNES: You would have been aware
 25 though that that strike was characterised by quite extreme

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1 anti-NUM sentiment. The NUM offices were forcibly closed,
 2 large numbers of NUM workers, I think in the region of
 3 30 000 resigned from NUM during the strike. You were aware
 4 of that?
 5 MR DA COSTA: Yes, I was aware of that.
 6 MS BARNES: And you would have been aware
 7 as well that Impala management dismissed large numbers of
 8 workers, rehired them and then eventually in April 2012
 9 granted very significant increases, particularly to RDOs,
 10 in the region of 25%, correct?
 11 MR DA COSTA: Yes, I'm aware of that.
 12 It's specifically those increases that I was referring to
 13 that I was aware of.
 14 MS BARNES: And so you would have been
 15 aware that the effect of that then was – well, you would
 16 have been aware that the strike was started by RDOs
 17 themselves and that they had rejected NUM at the outset.
 18 You would have been aware of that.
 19 MR DA COSTA: It certainly appeared that
 20 way.
 21 MS BARNES: And so the end result in
 22 April 2012 was that those RDOs had secured very significant
 23 increases for themselves, acting on their own and without
 24 any representation from NUM, correct?
 25 MR DA COSTA: Correct, for themselves and

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1 the rest of the work force.
 2 MS BARNES: Now surely you – and I say
 3 you yourself personally and Lonmin would have been
 4 concerned in April 2012 that the events that had happened
 5 at Impala could spread to Lonmin.
 6 MR DA COSTA: That was a possibility.
 7 MS BARNES: Was it a concern?
 8 CHAIRPERSON: Sorry, the question is
 9 whether you were concerned that that might well happen?
 10 MR DA COSTA: Yes, I think we were.
 11 MS BARNES: In April 2012. We know that
 12 the increases at Impala were signed on the 20th of April
 13 2012 and it would have been shortly after that presumably
 14 that these very significant increases would have come to
 15 your attention, correct?
 16 MR DA COSTA: Ja, it's probably early May
 17 or so, yes.
 18 MS BARNES: Not only you yourself were
 19 concerned but Lonmin generally speaking was concerned that
 20 this might spread to yourselves, that's correct
 21 MR DA COSTA: Yes.
 22 MS BARNES: Now presumably, Mr Da Costa,
 23 the risk of the events that happened at Impala spreading to
 24 Lonmin would be heightened if the RDOs at Lonmin were
 25 underpaid or at least regarded themselves as underpaid.

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1 Would that be correct?
 2 MR DA COSTA: It would be correct, yes.
 3 MS BARNES: Now I understand that you
 4 don't have a very specific recollection of the wage
 5 negotiations at Impala - sorry, at Lonmin – at the end of
 6 2011 but it seems, the evidence before this Commission is
 7 that a demand for an increase was made on behalf of the
 8 RDOs. It's not necessary to go into the details but you
 9 accept that a demand for some sort of increase was tabled
 10 by NUM at those negotiations?
 11 MR DA COSTA: Well, yes. As I said, I
 12 haven't checked the minutes but yes, I accept that it was.
 13 MS BARNES: And according to the evidence
 14 of Lonmin's chief negotiator, that demand was first tabled
 15 in the 2009 negotiations.
 16 MS BARNES: I don't know about that.
 17 That's a long time ago.
 18 MS BARNES: His evidence is that there
 19 was an inability, a failure to achieve that demand in the
 20 2009 negotiations and then again a failure to achieve the
 21 demand in the 2011 negotiations.
 22 CHAIRPERSON: You spoke about Lonmin's
 23 chief negotiator, I take it you mean NUM's chief
 24 negotiator.
 25 MS BARNES: Apologies yes, Lonmin - NUM's

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1 chief negotiator.

2 CHAIRPERSON: Yes.

3 MS BARNES: Sorry did you get the

4 question, Mr Da Costa?

5 MR DA COSTA: I got the question but I

6 don't know if – if the evidence is before the Commission

7 then it is. I don't –

8 CHAIRPERSON: [Microphone off, inaudible]

9 – the evidence, it wasn't challenged in cross-examination.

10 You've got no basis for challenging it now, correct?

11 MR DA COSTA: No. As I say, 2009 is a

12 long time ago. I certainly involved in anything at that

13 time.

14 MS BARNES: And this is the reason that

15 NUM's chief negotiator described the situation as a time

16 bomb. He said the demands had been made essentially for

17 four, well, on two occasions during a period of four years,

18 had not been achieved and the failure to achieve a

19 significant increase for the RDOs was a time bomb. Were

20 you aware of that, of that sentiment at least?

21 MR DA COSTA: Look, I can't say that

22 there was, you know, that I was aware that this was a time

23 bomb that was going to explode at any stage because as I've

24 said before, that I was aware of the fact and still am that

25 rock drill operators are a fairly volatile group of people

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1 but I – you know I wasn't, you know, let's say you know I

2 wasn't aware that there was huge dissatisfaction amongst

3 the rock drill operators but them being volatile as they

4 are, they were always a risky occupation to deal with.

5 MS BARNES: Well, I put it to you, Mr Da

6 Costa, that on the facts Lonmin should have been extremely

7 concerned in April 2012. You have a situation where NUM at

8 Lonmin is saying that this is a time bomb, RDOs are

9 underpaid and you have RDOs at Impala taking matters into

10 their own hands and securing a massive increase for

11 themselves. I put it to you that those facts should have

12 caused Lonmin to be extremely concerned in April 2012.

13 Would you like to comment on that?

14 MR DA COSTA: Well, as I said, I think we

15 were concerned and that, that concern was obviously

16 amplified as we went further on.

17 MS BARNES: Presumably then if Lonmin was

18 concerned as you say, Lonmin would have been taking steps

19 to put contingency plans in place in the event that the

20 events at Impala spread to Lonmin, correct?

21 MR DA COSTA: I'm not sure that we were

22 putting any contingency plans in place at that point in

23 time.

24 MS BARNES: So no steps were being taken?

25 MR DA COSTA: You know, I can't remember

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1 specifically but I remember that we had been having

2 discussions around rock drill operator bonuses and so on

3 and to see what we could do to maybe improve those but you

4 know that was the sort of discussions that we were having.

5 CHAIRPERSON: It doesn't if it was being

6 sort of systematically and intentionally looked at because

7 after you made your proposal, you remember, there was some

8 delay before EXCO eventually came back with an answer which

9 I think was based upon investigations that were done then.

10 So it wasn't as if – I think the point being made to you,

11 it wasn't as if Lonmin said in April, look here, this is a

12 problem here, we must be concerned about it, we'd better be

13 ready to deal with it when it arises, so that intensive

14 work was done to create a position from which you would be

15 able to operate when the demand surfaced. That doesn't

16 appear to have happened, does it?

17 MR DA COSTA: No.

18 MS BARNES: Chair, this would be a

19 convenient time for tea.

20 CHAIRPERSON: We'll adjourn for 15

21 minutes.

22 [COMMISSION ADJOURNS COMMISSION RESUMES]

23 [12:06] CHAIRPERSON: The Commission resumes. Mr

24 Da Costa, you're still under oath. Ms Barnes?

25 MR DA COSTA: Chair, sorry, can I maybe

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1 just, can I clarify a point that I finished off just before

2 the break?

3 CHAIRPERSON: Yes, of course you can.

4 MR DA COSTA: Having reflected on it

5 during the break.

6 CHAIRPERSON: Of course you can.

7 MR DA COSTA: I've said that we weren't

8 doing anything about, - well, not doing a lot about the

9 fact that we were concerned, during the break it occurred

10 to me that the executive was busy with a scenario planning

11 exercise where they were constructing various scenarios

12 around what potentially could result with, you know if the

13 Industrial Relations Developments had it in particular ways

14 and I think there were four scenarios to show that they had

15 constructed it at that time and we're busy putting some

16 actions together to deal with the various scenarios, and

17 then we ended up in the strike situation, I almost think

18 before all the actions had been sorted out. So I just

19 wanted to put that on record.

20 MS BARNES: So presumably the scenario

21 planning exercise that you refer to would have been done in

22 writing, correct?

23 MR DA COSTA: I'm sure it would have

24 been, yes.

25 MS BARNES: Well, we will then make a

Page 30401

1 request to Lonmin to get the documents that you –

2 CHAIRPERSON: I take it you have the

3 senior counsel present and the junior counsel and attorney,

4 so you make it orally now?

5 MS BARNES: Yes, yes, indeed, we do. If

6 we could go to your statement again, Mr Da Costa, OO17, it

7 is page 15 of the actual statement, paragraph 4.10. You

8 talk here about the meeting that you had with AMCU

9 representatives on the 29th of July 2012 and this is the

10 meeting in which you informed the AMCU representatives of

11 the RDO allowance that was going to be implemented,

12 correct?

13 MR DA COSTA: That's correct.

14 MS BARNES: Now if during this meeting

15 the AMCU representatives had said to you, no, no, we're not

16 happy with that, we think the amount is too low, we think

17 it should be higher, or if they had said to you, no, in

18 fact we don't think an allowance is a good idea, we think

19 we should rather increase the drilling bonus. Presumably

20 you would have said to them, look, I can't entertain your

21 demands, this is not a negotiation, I'm just here to tell

22 you what Exco has decided and this allowance is going to be

23 implemented, would that be correct?

24 MR DA COSTA: Yes, if they had said that

25 to me that would probably have been my response. They

Page 30402

1 didn't say that to me.

2 MS BARNES: You've indicated in your

3 statement that the decision was made on the 27th of July by

4 Exco?

5 MR DA COSTA: That's correct.

6 MS BARNES: And this meeting was then

7 subsequent to that on the 29th of July?

8 MR DA COSTA: Yes, that's correct.

9 MS BARNES: Okay.

10 CHAIRPERSON: Can I ask you a question of

11 how this thing works? I take it the allowance wouldn't

12 have been pensionable?

13 MR DA COSTA: No, no, it wouldn't have

14 been.

15 CHAIRPERSON: And the drilling bonus

16 wouldn't have either?

17 MR DA COSTA: No.

18 CHAIRPERSON: So if they had got an

19 increase, never mind whether they got 2,500 or whatever,

20 but if they had an increase which was pensionable, that

21 would have been compared with what they were offered and

22 that would have been substantially more adventitious to

23 them because it would have affected their pensions when

24 they finally retired, which would have affected the whole

25 of their lives effectively, is that right?

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1 MR DA COSTA: Yes, that's right.

2 MS BARNES: Mr Da Costa, let's look now

3 at the proposals you made once you received the RDO demand

4 and that document appears at page 3 and 4 of XXX3. Now

5 firstly it's clear from this note that you took these

6 demands very seriously, correct?

7 MR DA COSTA: Yes, I think I've said

8 that.

9 MS BARNES: You start off in your note by

10 saying it should be indicated to the workers that there are

11 structures in place, there are the two year agreements in

12 place and so on, but then you follow that up by saying that

13 will be unlikely to resolve the matter and more will need

14 to be done, correct?

15 MR DA COSTA: Yes, so that paragraph

16 where I'm dealing with the feedback was basically getting a

17 mandate from the executive as to what feedback I'll be

18 giving to the rock drill operators, yes.

19 MS BARNES: But you make four proposals

20 which we've, it is clear from the evidence that you've

21 already given what they are, I mean essentially it is

22 engagement with NUM and AMCU at a national level

23 engagements, specifically with the view to reaching

24 agreements at the local level and then an increase in the

25 drilling bonus and an RDO allowance. Can I just

Page 30404

1 understand, was the increase in the drilling bonus proposed

2 in addition to an RDO allowance or as an alternative to

3 that?

4 MR DA COSTA: No, I think I spoke to that

5 on Tuesday as well, it was, my intention was that it was an

6 either or, that it was either the bonus or the allowance.

7 MS BARNES: And ultimately we know that

8 the only one of those proposals that was ever adopted was

9 the RDO allowance and then only in the amount of R750,

10 correct?

11 MR DA COSTA: In terms of what was paid,

12 in terms of the remuneration, yes. I mean as far as

13 consulting the NUM and AMCU representatives at Marikana, I

14 think I did that.

15 MS BARNES: Well, I put it to you, Sir,

16 that that's not correct. We've just established that you

17 told the AMCU representatives about the RDO allowance after

18 the decision had already been taken and it was to be

19 implemented, correct?

20 MR DA COSTA: Yes.

21 MS BARNES: You were simply informing

22 them of the allowance, correct?

23 MR DA COSTA: That's fine.

24 MS BARNES: And you've accepted that if

25 they had disagreed and put demands to you in conflict with

Page 30405

1 that allowance, that your response would probably have
 2 been, no, I can't negotiate with you, I'm just telling you
 3 what Exco has done.
 4 MR DA COSTA: Yes, it would have been.
 5 MS BARNES: Sir, I put it to you that
 6 there was no attempt then, it can't possibly be said that
 7 there was an attempt to reach agreement with AMCU on the
 8 allowance. You were simply informing them of what had been
 9 decided, isn't that correct?
 10 MR DA COSTA: That's correct.
 11 MS BARNES: Now at the national level Mr
 12 Tip has put the position as far as NUM is concerned on
 13 record and I must similarly put the position as far as AMCU
 14 is concerned on record. There was never any approach to
 15 AMCU at national level to discuss the approach that had
 16 been made by the rock drill operators and what should be
 17 done in relation thereto and presumably you don't have any
 18 knowledge to the contrary?
 19 MR DA COSTA: No, I don't.
 20 MS BARNES: If we can look again at your
 21 statement, let me just find the correct page number.
 22 CHAIRPERSON: Could I ask you a question
 23 that's puzzling me? Remember I said I got the impression
 24 that the drilling bonus and the allowance were cumulative
 25 and not alternative?

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1 MR DA COSTA: Ja.
 2 CHAIRPERSON: Now I'm not sure it is
 3 correct but let me just ask you about one thing while Ms
 4 Barnes is looking at what she is looking for. You say that
 5 in relation to the drilling bonus, you suggested an
 6 increase by 20%, you can go on to say how this would
 7 increase the bonus earnings potentially for rock drill
 8 operators and you end up by saying, "Based on the average
 9 drilling bonus earned by rock drill operators for the year
 10 to date it would mean an additional cost of a R100 per
 11 person per month." Okay, then the other allowance you
 12 proposed was a thousand per month for singlehanded
 13 drillers, 800 for assisted drillers and 500 for assistants
 14 and then you go on to say on the next page, "There are
 15 approximately 4,200 rock drill operators employed in the
 16 mining division."
 17 Assuming you make assumptions as to how many is
 18 singlehanded, how many assisted and how many are
 19 assistants, and then you say, "The allowance and bonus
 20 increases proposed above will increase costs by 3,6 million
 21 per month." Now I'm not quite sure how the arithmetic
 22 works, but perhaps you can do it and tell me the answer
 23 when you come back.
 24 MR DA COSTA: Good.
 25 CHAIRPERSON: That figure, you get of 3,6

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1 million per month, does that reflect, I mean presumably it
 2 doesn't reflect only the drilling bonus, does it? So in
 3 other words if you take the drilling bonus as a figure and
 4 you take the allowance as a figure, do you get a total of
 5 3,6 or, because if it is not that way, then the figures,
 6 you wouldn't have the same figure for the drilling bonus
 7 and for the allowance.
 8 MR DA COSTA: Ja.
 9 CHAIRPERSON: So it looks to me without
 10 having done the sums, as if that 3,6 you refer to, 3,6
 11 million is probably a culmination but let's not worry about
 12 it now. Perhaps you can work it out and by next time when
 13 you come back you can give me an answer.
 14 MR DA COSTA: Okay.
 15 CHAIRPERSON: Unless you can do it off
 16 the top of your head in which case you're clever than I am
 17 but that's not surprising.
 18 MR DA COSTA: No, that's fine, I'll work
 19 it out.
 20 MS BARNES: If we can –
 21 CHAIRPERSON: Did you find what you're
 22 looking for, Mr Barnes?
 23 MS BARNES: Yes, thank you, Chair. If we
 24 could have Mr Da Costa's statement on the screen again
 25 please, OO17, page 8 of the statement, paragraph 3.25 and

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1 here you say the following, "I did prepare a note which I
 2 understand was tabled at the next Exco meeting held on
 3 Monday, the 28th of June 2012. I'm not a member of Exco and
 4 was not present at the meeting. Munro subsequently advised
 5 me that he presented my note to Exco and that after
 6 deliberating on the issue Exco decided that it needed
 7 further information on RDO salaries, including a
 8 comparator, rather a salary pay to RDOs at other mines. My
 9 understanding was that Exco tasked Barnard Mokwena to deal
 10 with this issue."
 11 So your understanding then, well, you were in
 12 fact informed by Munro specifically that your note, the
 13 note that we've just looked at, was tabled and discussed at
 14 the Exco meeting on the 28th of June 2012, correct?
 15 MR DA COSTA: Yes, that's correct.
 16 MS BARNES: Now we have been provided
 17 with the minutes of that meeting, a very heavily redacted
 18 version of the minutes of that meeting. I must just place
 19 on record that we were given to understand, my colleague,
 20 Mr Gotz and I were given to understand by Lonmin's counsel,
 21 Mr Burger in particular, that the two of us could have
 22 sight of the original minutes, but unfortunately we were
 23 then subsequently informed that Lonmin was not prepared to
 24 allow us to do that.
 25 MR DA COSTA: Yes.

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1 MS BARNES: So we haven't had sight of
 2 the un-redacted minute, we will have to make do with what
 3 we have. If we can look at the minute –
 4 CHAIRPERSON: Mr Bham, is that the
 5 attitude of Lonmin?
 6 MR BHAM SC: [Inaudible].
 7 CHAIRPERSON: Don't you trust counsel or
 8 officers of the High Court, if they are shown something on
 9 a basis that the redacted bits are confidential unless it
 10 appears they are relevant to what we're busy with and they
 11 won't mention it to anybody else? I take it that
 12 undertaking they would give?
 13 MR BHAM SC: I –
 14 CHAIRPERSON: Or don't you trust them –
 15 MR BHAM SC: I'm not aware of the
 16 undertaking that had been given of the discussions.
 17 CHAIRPERSON: Particularly if Mr Burger
 18 didn't have a problem with it?
 19 MR BHAM SC: I am not aware of those
 20 discussions, it didn't come to my attention.
 21 CHAIRPERSON: Perhaps you can investigate
 22 the matter?
 23 MR BHAM SC: I will.
 24 CHAIRPERSON: Thank you.
 25 MR BHAM SC: I will.

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1 MS BARNES: If we could go to XXX3, it is
 2 page 6 and that is where the minutes of the meeting of the
 3 28th of June begin. If we go to page 8 of that minute
 4 you'll see paragraph 7 says, "BM cautioned that no
 5 adjustment should be made to the salaries of unionised
 6 employees as Lonmin has agreements in place that must be
 7 adhered to," and then on the next page, page 9 we see the
 8 following. This appears to be an action item, if one looks
 9 at the previous page. This says, "To consider the
 10 implications of, one, NUM claiming representation at this
 11 point in time, two, dealing with two unions that will not
 12 meet or speak to each other, and then three, a possible
 13 request for the reopening of wage negotiations in October.
 14 The probabilities of the risk occurring and mitigation
 15 strategies are to be put in place for each scenario," and
 16 then there is a reference to BM which is presumably Barnard
 17 Mokwena. Did you know anything about the risk assessment
 18 that's been referred to here?
 19 MR DA COSTA: I think that that is the
 20 scenario planning that I was –
 21 MS BARNES: Is that what you were
 22 referring to?
 23 MR DA COSTA: That I was referring to. I
 24 think that's what it is.
 25 MS BARNES: Did you have sight of any

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1 written documents in relation to that?
 2 MR DA COSTA: No, I didn't.
 3 MS BARNES: And have you up until this
 4 point?
 5 MR DA COSTA: No.
 6 MS BARNES: Now you'll see, Mr Da Costa,
 7 that what we don't see anywhere in this minute, heavily
 8 redacted as it is, we don't see any discussion by Exco of
 9 the proposals in your note, that's the one thing we don't
 10 see. We also don't see any discussion or any decision in
 11 relation to the feedback that you should be giving the
 12 RDOs. I'm correct in saying that that was the purpose of
 13 your note and the request you made was for Exco to give you
 14 guidance as to how to give feedback to the RDOs, correct?
 15 MR DA COSTA: Yes, that was the purpose
 16 of my note.
 17 MS BARNES: And you agree with me that we
 18 don't see any discussion on those points in this minute?
 19 MR DA COSTA: Yes, I don't see anything
 20 in there.
 21 MS BARNES: And then if we go to the
 22 next, the minutes of the next Exco meeting which was held
 23 on the 19th of July 2012, that is at page 14 of XXX3. Here
 24 again you can have a quick look, but there is not much to
 25 read. Again there is no discussion in this minute of any

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1 of your proposals, there is no discussion or decision in
 2 relation to the feedback that Exco thinks that you should
 3 be giving to the RDOs.
 4 CHAIRPERSON: I take it you have seen un-
 5 redacted minutes. How were they normally, you trusted to
 6 see them, even if other people aren't, how are the minutes
 7 normally kept? You know sometimes minutes just record
 8 decisions, sometimes minutes reflect discussions, points of
 9 view that had been expressed, queries raised and that kind
 10 of thing. Now what is the style, if one can use, if that's
 11 the right word to use, for the Exco minutes of Lonmin?
 12 MR DA COSTA: You know I've seen some of
 13 the minutes from Exco meetings, they're generally
 14 structured in the way that they sort of capture the main
 15 points discussed and then have a section for action items –
 16 CHAIRPERSON: Discussions are minuted,
 17 not just decisions?
 18 MR DA COSTA: No, the main points that
 19 are discussed are normally minuted.
 20 CHAIRPERSON: Yes, so what we've seen,
 21 the bits that have been left for us to look at on these
 22 minutes only appear to reflect decisions more or less, is
 23 that correct, or perhaps consensus, or am I wrong?
 24 MR DA COSTA: I think, you can see the
 25 minutes are structured in such a way, so it is issues for

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1 noting, so I mean that's basically just noting the
 2 essential issues, the main issues that were discussed and
 3 then there is another section that says, action items for
 4 each one of the major headings.
 5 CHAIRPERSON: So it does look like a sort
 6 of conclusory paragraph, as it were, giving a conclusion.
 7 These are, you know after the discussion.
 8 MR DA COSTA: Yes.
 9 CHAIRPERSON: And these are the points
 10 that go forward, these issues we've looked at it, but there
 11 is no recordal of the particular issues that were discussed
 12 -
 13 MR DA COSTA: No -
 14 CHAIRPERSON: - or the points of view
 15 raised and that kind of thing.
 16 MR DA COSTA: No, and they're normally
 17 structured in this way, as it is here.
 18 CHAIRPERSON: I see.
 19 MS BARNES: Are they recorded, is there
 20 an audio recording of the meetings?
 21 MR DA COSTA: I'm not sure actually to be
 22 honest, I don't know.
 23 MR MPOFU: Chairperson, thanks, I'm just
 24 taking advantage since we are talking about the minutes,
 25 seeing that my cross-examination is obviously going to be

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1 deferred to a later date, this was one if the issues that I
 2 was going to raise.
 3 [12:25] So our position would be that for the purposes of
 4 cross-examination we'd like to be given a set of those
 5 minutes either by the arrangement suggested by the
 6 Chairperson, failing which we will make an application that
 7 before the cross-examination those minutes must be produced
 8 in full. Thanks, Chairperson.
 9 CHAIRPERSON: Did you also receive an
 10 undertaking from Mr Burger that you could see them?
 11 MR MPOFU: No, I didn't, but maybe it's
 12 because I never raised it before with him. So I'm not
 13 raising that issue. I'm simply saying -
 14 CHAIRPERSON: I see. You're just putting
 15 something on record -
 16 MR MPOFU: Yes, that whatever
 17 arrangement -
 18 CHAIRPERSON: - telling the Lonmin
 19 representatives what you're going to do.
 20 MR MPOFU: Thank you, Chairperson.
 21 Whatever arrangement -
 22 CHAIRPERSON: I'm sure they have noted
 23 what you said.
 24 MR MPOFU: Thank you, Chairperson.
 25 CHAIRPERSON: Please carry on, Ms Barnes.

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1 MR GOTZ: Chair, I should just indicate
 2 that I'm not, I was the one who was speaking to my learned
 3 friend Mr Burger. I'll be hesitant to suggest that he made
 4 an undertaking to me. He certainly indicated his attitude
 5 to the disclosure of the minutes and indicated to me that
 6 he had no concern, that he could see no concern with
 7 counsel for AMCU having sight of the full unredacted
 8 version, but I will -
 9 CHAIRPERSON: Yes, it's important that
 10 you mention that so that the facts as you've reflected
 11 them, or stated them to us are before us, but in any event,
 12 it's a matter which will obviously enjoy some attention
 13 later on, unless some arrangement can be made obviously on
 14 the basis of a strict undertaking as to confidentiality of
 15 matters not directly relevant on the parts of those legal
 16 representatives who are to be given access to the minutes,
 17 if in fact such access is to be given. But that's a matter
 18 we don't have to discuss now. Mr Ntsebeza raises his hand.
 19 He wants to put a point on record too.
 20 MR NTSEBEZA SC: Yes, Chair. Chair, the
 21 families didn't make any application for the cross-
 22 examination of this witness, but I am particularly
 23 concerned and I've been mulling it in my mind as to whether
 24 this is the kind of thing that this Commission should be
 25 confronted with where there is information which it ought

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1 to consider in the totality of what it should be arriving
 2 at by way of truth and its mission, that even to counsel,
 3 let alone to the Commissioners, there is information of
 4 this nature that has not been discovered in its fullness.
 5 CHAIRPERSON: Well, one is - okay, I hear
 6 you. One way of dealing with the problem in the past
 7 relating to other confidential material has been for an
 8 arrangement to be concluded in terms where the evidence
 9 leaders get access even to cabinet minutes and you know,
 10 other things of that kind, and the basis they're officers
 11 of the Commission and so on, and if the evidence leaders
 12 come back and say no, no, it isn't a problem, then one
 13 accepts it. I mean it may be that that's a compromised
 14 approach which could be adopted which would solve the
 15 problem. In any event, we don't have to discuss it further
 16 now. Your concerns are being noted.
 17 MR NTSEBEZA SC: No, it is of course more
 18 than just a concern, Chair. What I'm simply wanting to
 19 note is that we would like to reserve our right for the
 20 families, subject to what gets revealed from the contents
 21 of the -
 22 CHAIRPERSON: Yes, yes, yes, when I said
 23 to you everything is noted, including your reservation, but
 24 you're eating into Ms Barnes's time and I don't think she'd
 25 like that. So carry on with your cross-examination, Ms

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1 Barnes.

2 MR BHAM SC: Sorry, Mr Chairman, I don't

3 want to eat further into Ms Barnes's time, but just to

4 resolve the issue; I will propose, I understand a proposal

5 had been made from our side to make it available to the

6 evidence leaders. This is a logistical matter. I'll be

7 able to deal with it with my colleagues.

8 MR BUDLENDER SC: With great respect, it

9 doesn't help for it to be made to us because we don't know

10 what Ms Barnes's interest is in it.

11 CHAIRPERSON: No well Ms Barnes can tell

12 you what she's looking for. At any rate, we don't have to

13 discuss it further now. This is a matter that can be

14 discussed later on outside the chamber, but Ms Hemraj asked

15 me to ask Mr Bham, do you know whether there's a tape

16 recording kept of the proceedings at the EXCO?

17 MR BHAM SC: I'll take an instruction on

18 that. I'll find out, and what I will do is once I've

19 established that and seen the unredacted minutes, which I

20 haven't seen myself, we'll communicate with the parties who

21 have spoken now and find a practical solution to this. We

22 should take much more time on this.

23 CHAIRPERSON: Yes. Alright, thank you,

24 Mr Bham. I'm grateful to you for your assurance.

25 MS BARNES: Mr Da Costa, if you could

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1 look, please, at page 17 of the minute of the 19th of July

2 meeting, you will see item 5 reads as follows, again this

3 is an action item under Human Capital, it says, "To prepare

4 an opinion covering the operational, political and legal

5 implication in the event of various identified inter-union

6 rivalry scenarios emerging, this is to include the

7 implications of addressing the demands of the RDOs at this

8 point in time and the implications in terms of potentially

9 reopening wage negotiations." Now were you aware of the

10 opinion that's being referred to in this paragraph?

11 MR DA COSTA: No, I wasn't. You know

12 again I'm assuming that this was related to the scenarios

13 that they were working on.

14 MS BARNES: Chair, if I might just have a

15 moment. Alright, now Mr Da Costa, this EXCO meeting was

16 held on the 19th of July 2012, as we know, and what we know

17 is that the RDOs came and spoke to you again a few days

18 later on the 23rd of July 2012, correct?

19 MR DA COSTA: Yes, that's correct.

20 MS BARNES: And at this stage EXCO was,

21 as you put it in your statement, or EXCO had by this date,

22 the 23rd of July, not yet concluded its deliberations on the

23 issue. So in other words they were still discussing it.

24 They hadn't made any firm decision or any definite, adopted

25 any definite position. They had simply told you that in

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1 the event that the workers got aggressive and it looked as

2 though there might be a strike, you should tell them that

3 EXCO was considering an allowance and you'd work out the

4 amounts later, correct?

5 MR DA COSTA: That's correct.

6 MS BARNES: And that is in fact what

7 happened, correct?

8 MR DA COSTA: Yes, that's correct.

9 MS BARNES: So even though Lonmin had

10 been aware and concerned since April 2012 that the events

11 that had happened at Impala might spread to Lonmin, as at

12 the 23rd of July 2012 you were still essentially fobbing the

13 RDOs off and saying well, look, EXCO might consider an

14 allowance, I can't give you an amount yet, but I'll let you

15 know, correct?

16 MR DA COSTA: I wouldn't put it that I

17 was fobbing them off. I was giving them the feedback that

18 had, that I had received from the executive and at that

19 time I took it that the executive were taking their time to

20 consider this issue properly.

21 MS BARNES: You had at least fobbed them

22 off though in a sense that you hadn't been able to give

23 them any feedback at all from the 21st of June to the 23rd

24 of July, correct?

25 MR DA COSTA: It's correct that I wasn't

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1 in a position to give them any feedback specifically on

2 their demand, yes.

3 MS BARNES: The first time you were able

4 to give them, to tell them anything in concrete terms was

5 on the 23rd of July when you said EXCO is considering an

6 allowance but I can't tell you in what amount, correct?

7 MR DA COSTA: That's correct.

8 MS BARNES: So Mr Da Costa, you then

9 engaged, overall you engaged with the RDOs from the 21st of

10 June 2012 until the 30th of July 2012, which was the date on

11 which you communicated the amount of the allowance to them,

12 correct?

13 MR DA COSTA: Yes, that's correct.

14 MS BARNES: And then on the 10th of August

15 2012 they went on strike, unprotected, but it was

16 essentially over the same demand, correct?

17 MR DA COSTA: That's correct.

18 MS BARNES: If we could go to your

19 statement OO17, page 19 of the statement, paragraph 7.3,

20 here you say the following, "Management inside LPD

21 discussed the matter and thereafter decided that we would

22 not engage with the group as the group was engaged in an

23 illegal strike. In addition we viewed the matter as

24 finalised because EXCO had pursuant to the benchmarking

25 exercise determined an RDO allowance which brought the

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1 remuneration received by the RDOs at Lonmin in line with
 2 that received by RDOs at Implats and Anglo Plats.”
 3 So essentially what you do there, if I understand
 4 it correctly, is you give two reasons for Lonmin’s decision
 5 not to engage with the strikers. The first is that you
 6 have given them an allowance which brings them into line
 7 with what their counterparts at Impala and Anglo are
 8 earning, and the second is that it’s an illegal strike,
 9 correct?
 10 MR DA COSTA: Yes, that’s correct.
 11 MS BARNES: Now the first reason that I
 12 mentioned, bringing them into line with their counterparts,
 13 that’s in fact not correct and we established on Tuesday in
 14 the evidence that the allowances did not in fact bring the
 15 wages of the RDOs at Lonmin into line with their
 16 counterparts at Impala, correct?
 17 MR DA COSTA: It was broadly in line. It
 18 was still a little bit short, yes.
 19 MS BARNES: The wages at Lonmin were
 20 still below those of Impala for RDOs, correct?
 21 MR DA COSTA: As I said, the wages were
 22 broadly in line. They were still slightly below Impala and
 23 Anglo Platinum.
 24 MS BARNES: Now I’d like us to focus on
 25 the other reason that you give, the fact that this was an

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1 illegal strike. I take it you’re aware of Lonmin’s mining
 2 security procedures. There’s a set of documentation, it’s
 3 called “Lonmin mining security procedures.” It’s
 4 documentation that was discovered by Lonmin in this
 5 Commission.
 6 CHAIRPERSON: It’s not an exhibit. Do
 7 you want to make it an exhibit?
 8 MS BARNES: I’m going to make it an
 9 exhibit, Chair. Perhaps if we could –
 10 CHAIRPERSON: Am I correct in thinking
 11 that the next exhibit is XXX8?
 12 MS PILLAY: That’s correct, Chair.
 13 CHAIRPERSON: I just call it Lonmin
 14 mining security procedures. It is so marked.
 15 MS BARNES: Mr Da Costa, you should have
 16 a copy of the document in front of you.
 17 MR DA COSTA: I do have.
 18 MS BARNES: Okay, are you familiar with –
 19 CHAIRPERSON: [Microphone off, inaudible]
 20 MS BARNES: Sorry Chair, it’s XXX8.
 21 CHAIRPERSON: [Microphone off, inaudible]
 22 MS BARNES: Are you familiar with this
 23 document, Mr Da Costa?
 24 MR DA COSTA: I must say I wasn’t
 25 familiar with it at the time, but I did read it, so I

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1 wasn’t familiar with the detail of it at the time but I did
 2 read it in preparation for my cross-examination.
 3 MS BARNES: So you’ll see that the
 4 document is dated, at its heading it’s dated the 9th of May
 5 2012. You see that?
 6 MR DA COSTA: Yes.
 7 MS BARNES: Yes, it’s at the top of the
 8 document –
 9 MR DA COSTA: Yes, I see it. I see it.
 10 MS BARNES: It’s also on the table, in
 11 the table in the middle, and then at the bottom of the page
 12 it says “last printed,” the 10th of August 2012. You see
 13 that?
 14 MR DA COSTA: Yes, I do see that.
 15 MS BARNES: That was the date on which
 16 the unprotected strike at Lonmin commenced, correct?
 17 MR DA COSTA: That’s correct.
 18 MS BARNES: If you go to page 24 of the
 19 document at paragraph 8.3 –
 20 CHAIRPERSON: Well, it’s 24 of this
 21 overall Lonmin discovery. The page that you’re referring
 22 to is page 4, sorry, page 14 of this exhibit.
 23 MS BARNES: That’s quite right, thank
 24 you, Chair. Page 14, clause 8.3 is entitled “Unprotected
 25 industrial actions” and this sets out what Lonmin is

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1 required to do in the event of an unprotected strike,
 2 correct?
 3 MR DA COSTA: Yes, that’s correct. I see
 4 that.
 5 MS BARNES: 8.3.2 says, “Clear ultimatum
 6 to return to work must be given to the workforce.” That
 7 was done, we know. 8.3.4 says, “An application for a court
 8 interdict must be made if the ultimatum to return to work
 9 was not honoured.” Again we know that that was done,
 10 correct?
 11 MR DA COSTA: That’s correct.
 12 MS BARNES: And then 8.3.6 says, “A
 13 management committee will be identified that will engage in
 14 talks with the grievance committee that will include the
 15 manager, mining security, or such an appointed person and
 16 the ER liaison officer.” That as I understand it describes
 17 the establishment of a management committee that must be
 18 set up in the event of an unprotected strike, correct?
 19 MR DA COSTA: That’s correct.
 20 MS BARNES: Then the next paragraph,
 21 8.3.7 says, “A committee that will talk to management will
 22 be identified and only those people will be allowed to
 23 engage in talks with management.” That’s a reference to
 24 the need to set up a committee from amongst the striking
 25 workers to engage with management, correct?

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1 MR DA COSTA: That's correct.
 2 MS BARNES: 8.3.8, "The committee as
 3 mentioned above must preferably not exceed four people,"
 4 and then 8.3.9, "A central location within the security
 5 controlled area will be set up in order to facilitate the
 6 talks." So what's clearly required, or perhaps for the
 7 sake of completeness I can read 8.3.10, "Only identified
 8 management and the committee will be allowed to enter the
 9 location facilitating the talks, and nobody else."
 10 So what's clearly required in the case of an
 11 illegal strike is that a management committee is set up, a
 12 committee from amongst the strikers, preferably not to
 13 exceed four people is to be set up, and a location at which
 14 talks are to be held is to be identified and talks are then
 15 to be held, correct?
 16 MR DA COSTA: That's correct.
 17 MS BARNES: And we know that in this case
 18 that committee was essentially in existence. You'd been
 19 negotiating with five people who purported to, who stated
 20 that they represented the RDOs, and so that would have
 21 sensibly and conveniently constituted a committee which
 22 could have been formed in terms of paragraph 8, and
 23 management could then have engaged in talks with them,
 24 correct?
 25 MR DA COSTA: That's not entirely true.

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1 I mean the committee, the group of people I was engaging
 2 with represented the RDOs at Karee. On the morning of the
 3 10th of August the group comprised many more RDOs. So it's
 4 not entirely true.
 5 MS BARNES: It certainly would have been
 6 a starting point though. You already engaged in
 7 negotiations, or if you want to, if you prefer the talks,
 8 with five individuals on the subject matter of the RDO
 9 wages.
 10 MR DA COSTA: Ja, you see the view, as I
 11 put it in my statement that in our view that issue had been
 12 concluded. It was, it had been concluded. We'd given our
 13 solution to that issue and it was closed.
 14 MS BARNES: But whether you viewed it as
 15 concluded or not, Mr Da Costa, there was an unprotected
 16 industrial action and therefore clause 8.3 came into
 17 effect, correct?
 18 MR DA COSTA: Yes, so I mean normally
 19 when there's unprotected industrial action or a wildcat
 20 type strike, in many cases the issue, or the grievance is
 21 not known and the objective of getting that little
 22 committee together, or getting representatives from the
 23 employee body that is now protesting is to in the first
 24 place understand what the concerns are, and then to see if
 25 it is possible to do anything about it. In this case we

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1 felt that we knew what the concern was. We felt that we
 2 had dealt with the concern and that the matter was closed.
 3 MS BARNES: So no steps were taken by
 4 Lonmin in the context of this unprotected strike to
 5 implement clause 8.3, correct?
 6 MR DA COSTA: On the 9th of August, no.
 7 MS BARNES: Or at any stage thereafter up
 8 until the 16th of August.
 9 MR DA COSTA: Yes. No.
 10 MS BARNES: That of course amounts on
 11 Lonmin's part, Mr Da Costa, to a violation of its own
 12 procedures, correct?
 13 MR DA COSTA: Well, in this particular
 14 case we did not follow this procedure to the T.
 15 CHAIRPERSON: You say you didn't follow
 16 it to the T. How far did you follow it? How far down the
 17 alphabet did you follow it?
 18 MR DA COSTA: No, there were a number of
 19 things that we did do, ja. It's the issue around the
 20 committee that we didn't do, or the representatives from
 21 the employees.
 22 CHAIRPERSON: [Microphone off, inaudible]
 23 thrust of it is there are going to be talks. There are
 24 going to be talks between the management committee and the
 25 committee identified in terms of 8.3.7, which presumably is

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1 a committee containing representatives of those who are
 2 engaged in the unprotected strike. Isn't that right?
 3 MR DA COSTA: That's right.
 4 [12:45] CHAIRPERSON: So the heart of these
 5 procedures as far as the matters that we're looking at is
 6 concerned is there is a procedure set out in your own
 7 documents which provides for talks between your management
 8 committee as defined in 8.3.6 and a committee of the
 9 strikers as referred to in 8.3.7.
 10 MR DA COSTA: Ja. Yes, that's right.
 11 CHAIRPERSON: And that wasn't done.
 12 MR DA COSTA: No, it wasn't done for the
 13 reasons that I have –
 14 CHAIRPERSON: No, no, I understand that.
 15 So you didn't get very far down the alphabet as far as the
 16 heart of this is concerned, did you? Never mind not
 17 adhering to the T. Is that right?
 18 MR DA COSTA: That aspect of it –
 19 CHAIRPERSON: Ja.
 20 MR DA COSTA: No, we didn't.
 21 MS BARNES: If we can go again to your
 22 statement, Mr Da Costa, to page 21. In fact it's page 22
 23 and 23. In fact before I ask you about these paragraphs,
 24 perhaps I can, I need to introduce another document as a
 25 new exhibit. It's a minute, it purports to be a minute of

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1 a meeting held on the 13th of August 2012 between Lonmin and
 2 AMCU.
 3 CHAIRPERSON: That will be XXX9, minutes
 4 of meeting held on 13 August between Lonmin Mine management
 5 and the AMCU head office, and I've marked that XXX9.
 6 MS BARNES: Thank you, Chair. Now you
 7 deal with this meeting, Mr Da Costa, in paragraphs 10.3 and
 8 10.4 of your statement and you say in paragraph 10.3 that,
 9 you list Mr Mathunjwa as one of the people that was present
 10 at this meeting. You see that?
 11 MR DA COSTA: Yes, I do.
 12 MS BARNES: Now Mr Mathunjwa's evidence
 13 is that he wasn't at this meeting. His evidence was that
 14 he in fact sent an AMCU delegation, which included the
 15 general secretary and the national organiser, to Lonmin.
 16 They then met with the branch committee. They then spoke
 17 to the workers on the koppie and they then had a meeting
 18 with Lonmin management, and he then received a report back
 19 from them the next morning, which was Tuesday, the 14th of
 20 August, and AMCU then held a press conference, and the
 21 first time Mr Mathunjwa went to Lonmin in the context of
 22 this week was on the Wednesday when he went following the
 23 SAFM interview and he then had the meeting with General
 24 Mpembe and with NUM on the Wednesday afternoon. Now that
 25 was his evidence. Do you accept that you may have been

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1 mistaken in listing Mr Mathunjwa as one of the people
 2 present at that meeting?
 3 MR DA COSTA: It is possible that I may
 4 have been mistaken.
 5 CHAIRPERSON: Remind me, Ms Barnes, was
 6 this evidence that Mr Mathunjwa gave challenged at all in
 7 cross-examination by counsel appearing for Lonmin?
 8 MS BARNES: It wasn't challenged, Chair,
 9 and it was never put to Mr Mathunjwa that he was in fact at
 10 this meeting on the 13th of August.
 11 MR DA COSTA: Quite honestly I remember
 12 engaging with Jeff Mphahlele. So I may have been mistaken.
 13 MS BARNES: Now in paragraph 10.4 of your
 14 statement you say, you describe what was discussed and you
 15 say from halfway through the paragraph, "At the meeting the
 16 AMCU representatives distanced themselves from the strike.
 17 They told us that they condemn the violence and the
 18 killings." You see that?
 19 MR DA COSTA: Yes.
 20 MS BARNES: That's your recollection of
 21 what happened in the meeting?
 22 MR DA COSTA: Yes.
 23 MS BARNES: Is that –
 24 MR DA COSTA: Yes, and where –
 25 MS BARNES: The two sentences that I've

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1 just read.
 2 MR DA COSTA: That's partly the
 3 recollection, yes. There's more to it.
 4 MS BARNES: Absolutely, but that part is
 5 correct?
 6 MR DA COSTA: Yes.
 7 MS BARNES: If we look now at this
 8 minute, what purports to be the minute of this meeting,
 9 XXX9, do you know, first of all, Mr Da Costa, do you know
 10 who took this minute, or who's responsible for producing
 11 it?
 12 MR DA COSTA: I think it would have been
 13 Patrick Peega that took it, or Tumelo Nkisi. I'm not
 14 hundred percent sure.
 15 CHAIRPERSON: Just as a matter of
 16 interest, how did this mistake occur – if it was a mistake,
 17 as it appears to have been – that Mr Mathunjwa is reflected
 18 as someone who's there? How could that happen?
 19 MR DA COSTA: I'm not sure, Chair.
 20 CHAIRPERSON: I take it what can happen I
 21 suppose is the attendance part is written up before the
 22 meeting starts. It was perhaps anticipated that he'd come
 23 and whoever took the minutes didn't realise that he hadn't,
 24 you know, the name was in the attendance list, so it wasn't
 25 deleted. I mean that's an explanation that occurs to me,

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1 but if that isn't the explanation, I can't understand how
 2 it could have happened. Unless as Adv Hemraj says, it's a
 3 cut and paste from another meeting.
 4 MR DA COSTA: No –
 5 CHAIRPERSON: Have you had other meetings
 6 from which cutting and pasting could have been done?
 7 MR DA COSTA: No, I don't think so. I
 8 mean we didn't meet with the national representatives of
 9 AMCU much before this time.
 10 MS BARNES: So Mr Da Costa, if you look
 11 at the second page of the minute, the last bullet point
 12 under the first heading - if you could go up a bit, please
 13 – you'll see it says, "AMCU was asked to publicly denounce
 14 violence and illegal activities." Do you see that?
 15 MR DA COSTA: Yes, I do.
 16 MS BARNES: And then further down the
 17 page under management - if you could go down the page,
 18 please - it says, the first bullet point it says, "AMCU
 19 should denounce violence." You see that?
 20 MR DA COSTA: Yes, I see that.
 21 MS BARNES: Now according to your
 22 statement – and we've just confirmed it – AMCU did in fact
 23 denounce violence in the meeting, correct?
 24 MR DA COSTA: Yes, they did in the
 25 meeting, but I think the point was that they should do it

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1 publicly.

2 CHAIRPERSON: [Microphone off, inaudible]

3 if you have the minutes of the meeting and this is

4 something that was said, then surely it should have been

5 recorded. I mean you accept they did denounce it at the,

6 they did indicate at the meeting that they denounced it?

7 MR DA COSTA: Yes.

8 CHAIRPERSON: Right, and surely that was

9 a material point which should have been recorded. Isn't

10 that right?

11 MR DA COSTA: Yes, it should have been.

12 CHAIRPERSON: Ja, and so you have this

13 meeting with them. Did you send them a copy of the minutes

14 to say, you know, please, here's a copy for your records of

15 the minutes kept of the meeting we had with you? Wouldn't

16 that have been a sensible thing to do? Was that done?

17 MR DA COSTA: I don't know if - I really

18 don't know if it -

19 CHAIRPERSON: May I ask you, was a tape

20 recording made of this meeting? We've had evidence, a lot

21 of, it appears to be quite a common practice at Lonmin to

22 make all sorts of tape recordings, even if the people who

23 are being recorded don't know about it. Was this meeting

24 tape recorded, to your knowledge?

25 MR DA COSTA: Not to my knowledge, Chair,

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1 no.

2 CHAIRPERSON: I see.

3 MS BARNES: And in fact, Mr Da Costa,

4 AMCU had a press conference the next morning, the 14th of -

5 well, I think at about lunchtime, the 14th of August 2012,

6 during which they issued a press statement in which they

7 publicly denounced violence. You're aware of that?

8 MR DA COSTA: I'm not aware of it, but it

9 may well be, ja.

10 MS BARNES: We can provide you with the

11 press statements.

12 MR DA COSTA: No, I -

13 MS BARNES: I can assure you that it

14 states that AMCU publicly denounced violence.

15 MR DA COSTA: No, I'm not going to

16 contest that.

17 MS BARNES: If we look then at, also on

18 the second page of the minute, the last bullet point under

19 AMCU, it says, "The employees at the koppie demand that the

20 company increase the pay of all employees to 12 500. The

21 employees will return to work the following day if the

22 increase is given." You see that?

23 MR DA COSTA: I see that.

24 MS BARNES: Now if we look at your

25 statement at paragraph 10.4, much the same thing is stated.

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1 "They told us that they condemned the violence," okay, I've

2 read that. "However, they then said to us that the issue

3 could easily be resolved if Lonmin had agreed to pay a

4 basic salary of 12 500 to the RODs." It then says, "Munroe

5 asked the AMCU representatives if they were formally

6 tabling a demand on behalf of the striking workers. Their

7 response was that they were not doing so." Now that's not

8 captured at all in the minute, is it?

9 MR DA COSTA: No, it's not captured in

10 the minute, but it was said.

11 MS BARNES: So from the minute the

12 impression is created that AMCU is tabling a demand on

13 behalf of the strikers, correct?

14 MR DA COSTA: It may be.

15 MS BARNES: That's the -

16 CHAIRPERSON: It's quite a - I'm sorry to

17 interrupt, Ms Barnes, but remember you and I had a

18 discussion previously about whether the 12,5 was a demand

19 just for an allowance - or sorry, basic salary really for

20 the RDOs or for all employees. Certainly it started as a

21 demand for RDOs, but you said no, no, by the time as it

22 developed it ended up as a demand for everybody. Now your

23 statement says, that's where I got the idea from that it

24 was 12,5 for RDOs, that's what your statement says in 10.4,

25 but the minute says something different. Now which of the

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1 two is correct?

2 MR DA COSTA: Well, the way I remember

3 the comment, and I guess it's quite a long time ago, but it

4 was something to the effect of if you pay the people on the

5 koppie the R12 500 then they will come off the koppie and

6 this thing can be ended fairly quickly. So you know, when

7 I said, when I wrote my statement out I wrote the RDOs.

8 Obviously as the strike progressed more and more people

9 joined it. It was not just RDOs; it became a much wider

10 group of people.

11 CHAIRPERSON: Yes, I see. Thank you.

12 MS BARNES: Yes, so the clear impression

13 is created from this minute that AMCU is in fact tabling a

14 demand on behalf of the strikers, correct? That's how it

15 reads.

16 MR DA COSTA: Yes. Yes, I think so.

17 MS BARNES: When in fact AMCU had

18 specifically said in the meeting that they were not doing

19 so, correct?

20 MR DA COSTA: Yes, they did say that.

21 MS BARNES: Chair, I see it's almost 1

22 o'clock.

23 CHAIRPERSON: I see, yes.

24 MS BARNES: I'd like to move on to a new

25 section.

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1 CHAIRPERSON: Ja, but before you do that,
 2 can you explain this discrepancy that Ms Barnes has put to
 3 you, pointed out?
 4 MR DA COSTA: The discrepancy between
 5 what I'm saying and the minute?
 6 CHAIRPERSON: Ja.
 7 MR DA COSTA: I can't explain that.
 8 CHAIRPERSON: Who's right [microphone
 9 off, inaudible]?
 10 MR DA COSTA: I'm right.
 11 CHAIRPERSON: So you're right. Sorry, I
 12 had machine off. I asked you who's right and you said "I'm
 13 right." Alright, I being you. We'll adjourn now until
 14 Tuesday morning at 9 o'clock when Colonel Modiba is going
 15 to be giving evidence. In my ruling this morning I
 16 indicated that the parties must please indicate by Monday
 17 morning, fairly early Monday morning what topics they –
 18 those who wish to cross-examine and what topics they wish
 19 to cover, what time they consider appropriate and this
 20 material can be sent to me electronically on Monday and
 21 I'll endeavour to make a decision during the course of the
 22 day, so when we start on Tuesday it will be clear who's
 23 going to cross-examine and for how long and on what topics,
 24 and documents upon which the cross-examination will be
 25 based, or documents to which the parties will refer in

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1 cross-examination must of course be also listed and sent to
 2 the SAPS, or firstly I suppose to the evidence leaders and
 3 thereafter on to the SAPS, so the usual procedure that we
 4 have in respect of cross-examination can be followed. Mr
 5 Budlender, I see you want to say something.
 6 MR BUDLENDER SC: Chair, in that regard
 7 Ms Pillay has sent out an email to the parties this morning
 8 following on your ruling, asking that parties who wish to
 9 cross-examine or intend to submit the usual applications
 10 and documents by 10 o'clock on Monday morning. Would that
 11 be in order?
 12 CHAIRPERSON: Yes, thank you. Thank you
 13 very much. Mr Ntsebeza, you –
 14 MR BUDLENDER SC: If it can be sent to Ms
 15 Pillay as well as to you.
 16 CHAIRPERSON: Sorry?
 17 MR BUDLENDER SC: They should please be
 18 sent to Ms Pillay as well as to you.
 19 CHAIRPERSON: Sent to Ms Pillay, yes.
 20 Thank you. Yes, Mr Ntsebeza, you raised your hand and
 21 turned your light on.
 22 MR NTSEBEZA SC: Mr Chairman, in line
 23 with the spirit of your ruling, if there is time next week
 24 and in an endeavour for us to use the time that is
 25 available next week after Colonel Modiba has been called,

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1 the families would like to indicate that they would also
 2 like to hear, if it is possible, the evidence of Colonel
 3 Mere, M-E-R-E. I don't know whether the rank is what –
 4 CHAIRPERSON: That was communicated to me
 5 out of the chamber and I've conveyed it to Mr Budlender and
 6 my understanding is he's thinking about it. What we also
 7 have in mind, however – Mr Budlender can perhaps explain to
 8 you – we're not going to waste the rest of the week. Mr
 9 Budlender can tell you shortly what we have in mind, or Mr
 10 Chaskalson perhaps.
 11 MR CHASKALSON SC: Yes, Chairperson. We
 12 thought the best way of using the remaining time in the
 13 week would be to cross-examine the SAPS members responsible
 14 for recording and preserving the recording of the NMF
 15 meeting of the 15th of August.
 16 CHAIRPERSON: Yes, thank you. Yes, and I
 17 had indicated to you that I agree with that. The question
 18 as to whether Colonel Mere will come give oral evidence or
 19 we'll merely rely on his affidavits and possibly those who
 20 wish to ask questions may, if we don't have him giving oral
 21 evidence, can submit interrogatories to him from which we
 22 can get his replies. That's a matter that can be discussed
 23 with the evidence leaders.
 24 As I did indicate this morning to those who
 25 didn't know before, that every day counts and obviously

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1 we've got to be very careful to use up the time as
 2 profitably as we can. On the other hand it may well be
 3 that even if Colonel Mere doesn't give oral evidence,
 4 whether he will or not is a matter that I can't say
 5 anything about now, but it may well be that preparing
 6 interrogatories for him on points in terms of which his
 7 replies are requested may be in the circumstances a not
 8 entirely unsatisfactory alternative. That's something that
 9 the parties can think about.
 10 We'll now adjourn till Tuesday – we'll adjourn in
 11 a moment, but sorry, I'm reminded I'm being very
 12 discourteous to you, Mr Da Costa. I'm sorry. You're
 13 excused. You're going to come back I take it because your
 14 cross-examination is not finished, but the date upon which
 15 we'd like you back will be conveyed to the attorneys
 16 representing Lonmin, and obviously the matter will be
 17 discussed with them so that a date can be found which is
 18 acceptable.
 19 MR DA COSTA: Thank you, Chair.
 20 MR BHAM SC: Mr Chair, sorry, just in
 21 closing, it is going to be some time before Mr Da Costa
 22 comes. He's under cross-examination; ordinarily we
 23 shouldn't speak to him. I or somebody from our team would
 24 need to speak to him about logistical arrangements. That
 25 ought not to be a problem, but I just want to place that on

1 record now.
2 CHAIRPERSON: I'm glad you raised that.
3 Yes, because you're under cross-examination, Mr Da Costa,
4 the normal rule applies that I must request you not to
5 discuss matters which were dealt with in cross-examination
6 or relate to your evidence with anybody else. I know it
7 can be difficult when there's a long adjournment, but I'm
8 afraid I would expect you to comply with that. But that
9 doesn't mean that you can't talk to the legal
10 representatives of Lonmin about logistic arrangements about
11 when you'll come and what will be suitable and convenient
12 and so forth, but please don't talk to anybody – and I mean
13 anybody – about the matters that have been dealt with in
14 cross-examination, or matters generally relating to your
15 which or which you think might well arise in the course of
16 your future evidence. Please remember that.
17 MR DA COSTA: Okay, I understand. That's
18 fine, Chair.
19 CHAIRPERSON: We'll now adjourn until
20 Tuesday morning 9 o'clock.
21 [COMMISSION AJDOURNED]
22 .
23 .
24 .
25 .



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