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 296 10 NOVEMBER 2014

PAGES 38905 TO 39071



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1 [F	Page 38905 PROCEEDINGS ON 10 NOVEMBER 2014]	1	Page 38907 those research we presented before this Commission. They
_	09:12] MR GUMBI: Yes, thank you very much,	2	are well articulated in my heads of argument.
-	Chairperson and the Commissioners. Chairperson, with the	3	Furthermore the issue of suicide in the SAPS is
	ttle time I have I wanted to just make a brief submission	4	one of the issues that we are making a recommendation
	in the evidence. I'm not going to go into details on the	5	before this Commission that it's one of the issues that
	vidence that was tendered before this Commission, but I	6	this Commission must look at when making its recommendation
	vould like to make submission. Then I will deal with my	7	to the President. The issues of occupational stress in the
	ecommendation.	8	SAPS is one of the issues that we are making a
9	On the evidence of Captain Thupe, our submission,	9	recommendation that this Commission must look at and the
	Chairperson and the Commissioners, is that the Commission	10	issue of high rate of police killings in South Africa, we
	nust accept his evidence without any doubt. During his	11	submit to this Commission that it's one of the issues that
	ross-examination, we cross-examined Captain Thupe with	12	was also canvassed by the Goldstone Commission of Inquiry
	egard to some of the [inaudible] after the Roots meeting	13	long time ago that in South Africa there is high rate of
	nd we submit, Chairperson, that it is he that [inaudible]	14	police killing and it's one of the issues this Commission
	lid not interfere [inaudible] the narrative that led to the	15	must take into consideration, based on the fact that we are
	roduction of exhibit L and he never instructed anyone to	16	representing a police officer who was killed on that day.
	lele his name, and in that regard we submit, Chairperson,	17	With regard to the evidence of Mr X we submit to
	hat the Commission must also accept the evidence of	18	you, Chairperson and the Commissioners, that the Commission
	Captain Thupe about what happened on the 13th of August 2012	19	must accept the evidence of Mr X, especially around the
	when Warrant Officer Lepaaku was killed, and his evidence –	20	killing and the attack of police. Mr X, he implicated
21	CHAIRPERSON: Sorry, what weight do we	21	himself –
22 at	ttach to the differences between his first statement and	22	CHAIRPERSON: Can we be satisfied that Mr
23 h	is later statement, the fact that he didn't mention some	23	X was on the scene on the 13th in the light of a number of
24 ve	ery important facts in his first statement, only mentioned	24	the facts relied, in particular the fact that the person
25 th	hem in his second statement? Is that something that's	25	whom he identified on the photograph as being himself
	Page 38906		Page 38908
	relevant?	1	patently isn't, and further the fact that his description
2	MR GUMBI: Chairperson, our submission is		
2 +		2	of what happened is in variance with the objective facts?
	hat the evidence of Captain Thupe when you analyse it,	3	He claimed that the shooting started while General Mpembe
4 es	hat the evidence of Captain Thupe when you analyse it, specially when, during his cross-examination when we put	3 4	He claimed that the shooting started while General Mpembe was still counting. Now how can someone who was there have
4 e: 5 so	hat the evidence of Captain Thupe when you analyse it, specially when, during his cross-examination when we put ome of the narratives, it gives a clear indication that	3 4 5	He claimed that the shooting started while General Mpembe was still counting. Now how can someone who was there have made a mistake as serious as that?
4 es 5 so 6 so	hat the evidence of Captain Thupe when you analyse it, specially when, during his cross-examination when we put ome of the narratives, it gives a clear indication that ome of the narrative that were retrieved from the hard	3 4 5 6	He claimed that the shooting started while General Mpembe was still counting. Now how can someone who was there have made a mistake as serious as that? MR GUMBI: Our submission, Chairperson,
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1	Page 38909 correct in the light of in particular the two points that	1	Page 38911 MR GUMBI: Around the issues of police
2	I've put to you? If he was there, why does he point out	2	killing, when we questioned him around these crucial
3	someone on the photograph who manifestly is not he? Why	3	aspects, the facts surrounding the killing of Warrant
4	does he give that description of the shooting starting	4	Officer Lepaaku he couldn't provide any answers. We also
4 5		4 5	
	while General Mpembe was counting? We know from the video		cross-examined him on his role, why they went and fetch
6	that that's not what happened. So if he'd been there he	6	inyanga, what was the role of inyanga during this incident,
7	would, could he have possibly made that mistake? MR GUMBI: We submit, Chairperson, that	7	and he couldn't explain, provide the reason why the inyanga
8		8	was called to come, and furthermore even after the police
9	in various instances we may have many witnesses witnessing	9	killing we also cross-examined him, you know, with regard
10	one incident, and witnesses they can give different	10	to his role, what he said to the protesters at the koppie.
11	accounts of what happened on that particular day, but as	11	He couldn't provide explanation. He was very evasive. He
12	far as the killing of the police officers, those facts	12	couldn't provide answers to simple questions. So we submit
13	around there, the Commission must accept that he was there	13	in fact that the Commission and the Commissioners must
14	because he even went beyond and implicated himself that he	14	apply cautionary rule when assessing his evidence that was
15	participated during the police attack and killing. So we	15	presented before this Commission.
16	submit that this Commission cannot just reject his evidence	16	COMMISSIONER HEMRAJ: Isn't your main
17	entirely.	17	criticism of him in your submission in paragraph 18.4?
18	COMMISSIONER HEMRAJ: How do you get past	18	MR GUMBI: Is it on page?
19	the evidence that's on the video of the group that was at	19	COMMISSIONER HEMRAJ: It appears on page
20	the railway line where he can't be seen in that group?	20	47.
21	MR GUMBI: I do accept that,	21	MR GUMBI: Page 47, Commissioner. Yes,
22	Commissioner, that Mr X cannot be seen in that video, but	22	it's on page 84. Are you saying on page 84, Chairperson?
23	if he implicates himself in saying that I was there, we	23	Commissioner?
24	submit that there is no way that this Commission can reject	24	COMMISSIONER HEMRAJ: Isn't that your
25	his evidence in totality. Somewhere along the line this	25	main criticism of Mr Nzuza's evidence?
1	Page 38910	1	Page 38912
1	Commission, we submit must accept his evidence on the 13th	1	MR GUMBI: Yes, those are my main
2	Commission, we submit must accept his evidence on the 13th of August 2012.	2	MR GUMBI: Yes, those are my main criticisms.
2 3	Commission, we submit must accept his evidence on the 13th of August 2012. The evidence of Mr Nzuza, because I've been	2 3	MR GUMBI: Yes, those are my main criticisms. COMMISSIONER HEMRAJ: Yes.
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10th November 2014

Marikana Commission of Inquiry

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

1			
1	Page 38917 two main submissions. One is exploring whether Lonmin	1	Page 38919 having dealt with onus I don't intend to explore that
2	should have talked to the strikers, and secondly I'll	2	further, it seems to me that the parties are reasonably ad
3	consider the housing obligations under phase 2.	3	idem on onus. But what about the measure to hold
4	You would have seen, Chair, Commissioners, in our	4	accountable? For example, the LRC says "Mr Ramaphosa
5	reply in particular we deal with capita selecta. My	5	should be held accountable for using his political clout.
6	learned friend Mr Bham will address those capita selecta	6	He acted improperly." I'm not sure what this standard is,
7	and he'll pay particular attention to the demand for	7	is that a ethical standard or a moral standard because we
8	R12 500, and having appeared in other tribunals I know that	8	never heard the answer to the Kalahari farm example.
9	a scheme and a structure lasts as long as the first	9	CHAIRPERSON: Is there a difference
10	question comes and then it's gone. So I'm painfully aware	10	between a moral testimony and ethical testimony?
11	of the fact that this is but a wish list and no more.	11	MR BURGER SC: Well no, Chair, there's a
12	May I then start off with the first observation;	12	huge debate on the difference between morals and ethics.
13	how does the Commission hold a party –	13	My submission is that is not an issue to be explored by the
14	CHAIRPERSON: Let's see how long your	14	Commission. The structure for the Commission as a measure
15	scheme can remain intact.	15	to decide whether a party is accountable has to be looked
16	MR BURGER SC: How long does the	16	at from a different perspective. Firstly, there will be a
17	Commission, or how does a commission hold a party	17	criminal standard axiomatically, you will have a look at
18	accountable, applying which standard. There is a debate on	18	whether, in your view, there's a possibility of a crime
19	onus in this Commission and the standard of proof, but that	19	having been committed and we know how to deal with that,
20	seems to me to be largely uncontentious. The Human Rights	20	after all we are lawyers. Secondly, there's a delictual
21	Commission addresses that in their submissions and they do	21	standard and there we have a look at wrongfulness and
22	so at paragraph 32, and I refer to that because it seems to	22	legality and again we're in -
23	me that that is a good starting point and that's why I say	23	CHAIRPERSON: Wrongfulness and
24	I think it's reasonably uncontentious. They make the	24	culpability, wrongfulness and legality are the same thing.
25	following submission in paragraph 2.3.3, they say, "The	25	MR BURGER SC: Yes.
1	Page 38918		Page 38920
1	Commission has indicated, without making an explicit	1	CHAIRPERSON: Wrongfulness and
2	Commission has indicated, without making an explicit ruling, that the standard of proof it will apply in	2	CHAIRPERSON: Wrongfulness and culpability.
2 3	Commission has indicated, without making an explicit ruling, that the standard of proof it will apply in relation to findings of fact is the balance of		CHAIRPERSON: Wrongfulness and culpability. MR BURGER SC: Correct, well culpability,
2 3 4	Commission has indicated, without making an explicit ruling, that the standard of proof it will apply in relation to findings of fact is the balance of probabilities," and then they quote a reference to	2 3 4	CHAIRPERSON: Wrongfulness and culpability. MR BURGER SC: Correct, well culpability, I mean are you going to hold the party liable? And again
2 3 4 5	Commission has indicated, without making an explicit ruling, that the standard of proof it will apply in relation to findings of fact is the balance of probabilities," and then they quote a reference to something you said, Chairperson. They say "The HRC submits	2 3 4 5	CHAIRPERSON: Wrongfulness and culpability. MR BURGER SC: Correct, well culpability, I mean are you going to hold the party liable? And again we're in known territory for that. But if you have a look
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		I	
1	Page 38921 would be a mistake because accountability is not only	1	Page 38923 the politically well connected farmer wasn't permitted to
2	criminal liability or even civil liability. It's also	2	contact anyone in the police or anyone high up in the
3	holding people accountable for what they did wrong, not all	3	police because of his political connections. If that's the
4	wrongdoing in that sense is unlawful." I'm not sure I	4	answer then of course Mr Ramaphosa I suppose can be
5	understand that. How do you hold somebody accountable for	5	criticised, but if the answer is we can't say that, we
6	what he has done wrong if you don't define the standard by	6	don't know, there's no basis for suggesting that the non
7	which you measure it? But my learned friend goes on and he	7	well connected farmer is entitled to do everything he can
8	gives us an example. He says "The Provincial Commissioner	8	to get the police there, but the other one can't.
9	made a decision on the 15th of August to remove the strikers	9	MR BURGER SC: Chair, with respect, I'm
10	from the koppie the following day if they didn't lay down	10	not so confident on the answer to the first question. In
11	their weapons and leave. The SAPS in their submission lay	11	the old dispensation I was living in a constituency and in
12	much emphasis on the proposition that the Provincial	12	the constituency I had a member of parliament whether I
13	Commissioner, that the Provincial Commissioner's decision	13	voted for him or not he was my member of parliament. If I
14	was lawful, but even assuming that it is so that it is not	14	had a marauding crowd attacking my farm and I need the
15	the end of her accountability for that decision and its	15	assistance of the police and the local police station is
16	consequences. We contend" now this is the Commission by	16	dysfunctional, my submission is there is nothing wrong to
17	the evidence leaders as the Commissioners will have seen	17	phone my MP and say to him will you please help me. Can't
18	from our heads of argument that the decision was reckless,"	18	you speak to the Minister of Police and ask him to speak to
19	well that's easy, if it's reckless, it was by definition,	19	the National Commissioner and get something done, I'm being
20	under the Lex Aquilia, the Romans knew about that. "We	20	threatened in my life? What's wrong with that, is that
20	contend, as the Commission would have seen from our heads	20	morally wrong, is that ethically wrong?
22	that the decision was reckless and it was driven by an	22	CHAIRPERSON: Mr Burger, I think you
23	improper political motive. If that is so then she should	23	misunderstand me. What I'm saying is if the answer to that
24	be held accountable for that decision whether or not it is	23	question is there's nothing wrong with it then of course if
25	lawful." But how can that be lawful if it was reckless?	25	the analogy is applicable to the case of Mr Ramaphosa that
20		20	the unalogy is applicable to the case of wir Kanaphosa that
	Page 38922		Page 38924
1	Page 38922 How can it be lawful I ask rhetorically if it was motivated	1	Page 38924 answer can then be applied to his case as well.
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		1	
1	Page 38925 lives. The strikers will say to you we weren't embarked on	1	Page 38927 Commission's mandate was not to enquire into individual
2	an unprotected strike. We see the results, we'll never do	2	culpability. The Commission's mandate was particularly
3	it again. NUM and AMCU will say to you we would have	3	stated to be addressed at the SAPS, at Lonmin, at NUM and
4	smoked a peace pipe, we would have co-operated here as old	4	at AMCU and on the earlier days at the Departments. But
5	friends in order to avoid – but that's unhelpful. We can't	5	that was the brief given to them.
	do it that – we must test best endeavours with the	6	Chair, Commissioners, there is what may be a
6			5
7	knowledge available at the time. That's why we make the	7	helpful reference which was drawn to my attention by my
8	following submissions in our reply and can I go now to the	8	attorney recently and may I ask copies of that to be handed
9	reply in order to pick up from there? In paragraph 6 of	9	out? It's a Canadian commission of inquiry, a judicial
10	our reply we address this very issue and in 6.1 we make	10	one, His Lordship, Mr Justice Wright. I call it the Neil
11	what we consider to be a fundamental proposition. We say	11	Stonechild inquiry and what happened there apparently in
12	"In keeping with South African constitutional democracy the	12	the Saskatoon area of Canada there was an atrocious habit
13	LRA was promulgated and continues to operate in order to	13	by the police, so it was suggested, that they will pick up
14	regulate the relationship between capital and labour in all	14	youngsters who caused problems, go into the night at minus
15	its many facets including in the sphere of collective	15	28°C and drop them. And then pick them up the next
16	bargaining. And we've quoted the introduction to the LRA	16	morning, but I'm wrong to say they pick them up, they pick
17	which is really defined labour relations in this country	17	up the body because they die of hyperthermia. And that led
18	since the age of democracy. It was constitutionally	18	to the inquiry into the death of Neil Stonechild. And in
19	mandated, it's now the test to apply and we ask, with great	19	that process there was a consideration of the scope of a
20	respect, whether we have paid enough attention to that in	20	commission, a judicial commission of inquiry and it's a
21	the past two years and three months in considering what	21	helpful judgment to read, finding to read in toto, but in
22	happened here? We say in 6.2 that framework exists in	22	the time available I can't do that. May I ask you to have
23	order to promote stability in industrial relations and to	23	a look at the paginated pages at the bottom right-hand
24	guide parties on how they can be expected and are entitled	24	corner and 18 is not numbered, but it's 17 an 19. Right-
25	to act. And we refer to section 1 of the LRA which	25	hand bottom or right-hand foot, I believe –
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1	Page 38926	1	Page 38928
1	provides that its purpose is to advance economic	1	CHAIRPERSON: Even is bottom left, odd is
2	provides that its purpose is to advance economic development, labour peace, we underline labour peace. The	2	CHAIRPERSON: Even is bottom left, odd is bottom right. So we know where the page numbers are, just
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1	Page 38929 meant to be singled out as blameworthy, but were called for	1	Page 38931 Canada, I'm not sure how Justice Arbour dealt with that,
2	the sake of expediency as the ones who had the most to	2	but anyway presumably the report is on the Internet –
3	contribute to the unfolding of the narrative, many	3	MR BURGER SC: No let me address that
4	individuals, who by their own conduct, made errors or whose	4	because it's an important nuance. I do not for a moment
5	actions I found did not meet a legal or policy standard or	5	suggest if a police general X gave evidence for ten days,
6	expectation are otherwise persons greatly committed to	6	you will find it was unreliable, he was negligent and in
7	correctional ideals for women prisoners." This doesn't	7	fact he lied. But you are entitled to say, we are not
8	apply here. "They were part of a prison culture which did	, 8	going to convict him.
9	not value individual rights. Attribution of a personal	9	[09:52] But IPID or somebody should investigate here,
10	blame would suggest personal rather than systemic	7 10	there's an investigation going. He'd had an opportunity.
11	shortcomings and justifiably demoralise the staff while	11	He spoke, he had his chance to say, but it's very
12	offering neither redress nor hope for a better system."	12	different, and I'm only talking for the two people involved
13	And a passage I don't have the time to read, but which	13	from Lonmin's side. Take Mr Kellerman; for Mr Kellerman
14	you'll find at page 15 is extremely helpful, at the foot of	14	now to read in a report that IPID or the SAP(!) should
14	page 15 and over at 16. "The danger of fingering or	15	investigate what he had done on the 10th of August, I say
16	pointing a finger to people who are then not prosecuting	16	that's unfair because if, as is likely to happen, there's
17	and who has got no ability to clean the slur placed upon	17	no prosecution, there's no way that he ever had an
18	them by an adverse finding."	18	opportunity. He didn't see the ball coming. He was shot
19	CHAIRPERSON: I'm not sure if I've said	19	from behind. He didn't know he will stand to be accused.
20	it in the Commission, I think I have but over and over	20	He gave a statement, he gave a follow-up statement. Nobody
21	again I have stresses that this is not a commission that's	20	bothered to call him. To now say make a recommendation
22	going to hold mini criminal trials and "convict" people.	22	that he be criminally investigated would incorrect, and
23	That would be grossly unfair to the individuals concerned	23	that's what, as I read Judge Arbour saying, that's exactly
24	because we wouldn't really be convicting them, we'd simply	24	what she says and that's only, that's the caveat that I
25	be making findings that they're guilty without the	25	raise in this context.
20		20	
	Dogo 20020		
	Page 38930		Page 38932
1	jurisdiction to do so. If the Director of Public	1	But let me then deal with the second introductory
1 2	jurisdiction to do so. If the Director of Public Prosecutions then who caused the matter to be investigated	2	But let me then deal with the second introductory observation –
	jurisdiction to do so. If the Director of Public Prosecutions then who caused the matter to be investigated was satisfied that there was no case against them and they		But let me then deal with the second introductory observation – CHAIRPERSON: Sorry, just to take that
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1	shooters and say they should be investigated, but if there	1	On the contrary, the NUM recognition agreement prohibited
2	was a shooter called Van der Merwe and he was implicated by	2	Lonmin from doing so." And that takes me to the second
3	evidence to say Van der Merwe shot and he shot party so and	3	possible source of a duty to negotiate, that's contractual,
4	so, who's deceased today, and Van der Merwe is then called	4	that's that collective bargaining agreement and we address
5	here but he doesn't come, he's not feeling well, or he's	5	that in our main heads at page 17, paragraph 32. It was
6	just evading, he doesn't want to give evidence, no reason,	6	suggested from time to time that we should simply have
7	he may be mentioned then for further investigation. So	7	amended the agreement, gone to NUM, amend the agreement and
8	it's not a Mead and Persians debate. All I say in looking	8	negotiated with the strikers. We say in paragraph 32 of
9	at individuals from Lonmin's side it would be	9	the main heads, "In any event Lonmin could not simply
10	inappropriate, with respect, to hold individuals liable.	10	cancel the NUM recognition agreement and commence wage
11	We'll have a debate on the security system and that's a	11	negotiations directly with the RDOs or an ad hoc forum,"
12	debate which comes later –	12	and we refer to the clauses and the time period for
13	CHAIRPERSON: Mr Burger, it wouldn't be	13	amendment and we say that was not practical.
14	appropriate surely to adopt a more favourable approach, if	14	What we should consider though is what was the
15	one can use that phrase, in the case of Lonmin people, but	15	attitude of NUM and AMCU at that time. Did Mr Mathunjwa
16	not to apply the same approach to others.	16	and Mr Zokwana say to me why don't we amend this agreement?
17	MR BURGER SC: Yes, indeed. Indeed.	17	Why don't we have an ad hoc tribunal and solve this problem
18	CHAIRPERSON: That would lead to serious	18	with the striking workers? Of course that's not the
19	well merited criticism if we were to do that. Isn't that	19	evidence and let's remind ourselves of what the evidence
20	correct?	20	was. What was the evidence of NUM during the strike? We
21	MR BURGER SC: Well, you will see that we	21	deal with that in our main heads, page 84 and 85. May I
22	don't cross swords with my learned friend Mr Semenya,	22	read that to you and remind ourselves of that? Paragraph
23	although we have no reciprocity from him, but it's	23	211 we say, "Had the strikers genuinely wanted to engage
24	counterproductive to fight with the police. I mean it's	24	with Lonmin management on their wage demands they would
25	like clubbing seals; I don't want to do that. We'll	25	have chosen any number of representatives to go and
1	Page 38934 address Lonmin and hold that brief down.	1	Page 38936 negotiate with Lonmin other than on the koppie. Nothing
2	I secondly want to consider the source of the	2	prevented them from doing so. Zokwana's testimony was
3	duty on Lonmin to talk. You will again see – and I keep	3	emphatically to the similar effect. He said, 'Allow me now
4	going back to your mandate, to the terms of reference, in	4	to put how I would have seen it being easier. Suppose as
5	paragraph 1.1.2 of the terms of reference you're asked to	5	they did to Mr Da Costa, suppose as they did to Mr
6	consider the conduct of Lonmin, in particular whether it	6	Sinclair, that they elected a delegation not on the koppie
7	responded appropriately to the threat and the outbreak of	7	to say employer, we are here at the gates of LPD, we are
8	violence which occurred at its premises.	8	five or 10 unarmed. We are your employees, we would like
9		Ũ	
	Now looking for a source we identify in our main	9	to engage you, and if Lonmin could, if it could be shown
10	Now looking for a source we identify in our main heads in paragraph 27 what the obvious starting point is in		to engage you, and if Lonmin could, if it could be shown anywhere that Lonmin would have declined that situation I
	heads in paragraph 27 what the obvious starting point is in	10	anywhere that Lonmin would have declined that situation I
10	heads in paragraph 27 what the obvious starting point is in our submission, and we say the Labour Relations Act is the		anywhere that Lonmin would have declined that situation I would agree with you. My view is that a possibility could
10 11 12	heads in paragraph 27 what the obvious starting point is in our submission, and we say the Labour Relations Act is the legal framework and we spend some time in considering that	10 11	anywhere that Lonmin would have declined that situation I would agree with you. My view is that a possibility could have arisen if those workers could have agreed to march to
10 11	heads in paragraph 27 what the obvious starting point is in our submission, and we say the Labour Relations Act is the legal framework and we spend some time in considering that again in the replying affidavit, and we say in paragraph –	10 11 12	anywhere that Lonmin would have declined that situation I would agree with you. My view is that a possibility could
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		I	
1	Page 38937	1	Page 38939
1	bringing parity with wages paid to RDOs at Impala and	1	Mathunjwa is cross-examined and he says they must be
2	Anglo. The RDOs would also have received a further	2	addressed through union structures, really the same point
3	increase of 10% in October 2012, which might have put them	3	that was made in the heads, so I don't have to repeat that.
4	even in a better relative position.	4	There was a passage I wanted to read though, if I
5	Fourthly, had Lonmin engaged with the striking	5	may just find that, on NUM. Chair, can I come back to
6	mineworkers on the 10th of August we would have immediately	6	that. It's a – no, here it is. Here it is, 86. Let me
7	blurred the two types of strike and that would have had	7	just find that. No, it's not this. It's the passage,
8	far-reaching implications not only for Lonmin, but also for	8	you'll remember it in the heads, where Mr Zokwana says
9	the industry and the country.	9	"I've been in this game for a long time. I've never heard
10	Then most importantly the fifth reason, and I	10	of wage negotiations with armed workers at a koppie." That
11	want to pause a bit there, he says, "Both Mathunjwa and	11	was his evidence and we've quoted that.
12	Frans Baleni had discouraged me to engage." Now we don't	12	So I say, and I think I speak correctly as to
13	hear about that in the criticisms that we should have	13	NUM, NUM's attitude was the same as AMCU; don't speak to
14	spoken to the strikers. Both the two union leaders said to	14	the striking workers. I'm told it's paragraph 83 – page 83
15	us don't touch them.	15	of our main heads, yes, this is in fact it, paragraph 209.
16	Can I refer you to a letter Mr Mathunjwa wrote on	16	Sorry, 209, this is now the NUM view, "No productive wage
17	the 10th of August. You'll find that in the bundle we have	17	negotiations could in any event have taken place at the
18	annexed to our heads at page 652. We see this letter for	18	koppie," we submit, as Mr Zokwana testified as a trade
19	the first time in the AMCU bundle, but they only give us	19	unionist he had never come across a situation where wage
20	page 1 of it. Somehow page 2 didn't feature. We then file	20	negotiations were conducted, as he put it, in a mountain.
21	the complete letter. It is precursed by an earlier	21	He said, "and I'm saying this, Chairperson, because there
22	telephonic debate between Mr Mokwena and Mr Mathunjwa on	22	may be strikes in any situation. Always there will be
23	that morning and at page 652, the letter is dated 10th of	23	centres where such processes are handled because if
24	August 2012, Mr Mathunjwa wrote and he says, "Our	24	there's, I've never seen in my life of a trade union
25	telephonic conversation today 10 August 2012 refers." He	25	conducting negotiations in a forest, in a river, or in a
	Page 38938		Page 38940
1	Page 38938 says, "As AMCU we propose," and I don't read the whole	1	Page 38940 mountain." Now it's colourful language, but the message is
1 2		1 2	0
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2	says, "As AMCU we propose," and I don't read the whole letter, I read two points, he says, "that whoever will be	2	mountain." Now it's colourful language, but the message is clear and we say if you criticise Lonmin for not going to
2 3	says, "As AMCU we propose," and I don't read the whole letter, I read two points, he says, "that whoever will be receiving the memorandum must inform the marchers that by	2 3	mountain." Now it's colourful language, but the message is clear and we say if you criticise Lonmin for not going to the koppie and do some talking, some wage negotiation, you
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	says, "As AMCU we propose," and I don't read the whole letter, I read two points, he says, "that whoever will be receiving the memorandum must inform the marchers that by receiving such a memorandum does not set any precedents." He is under the impression that a memorandum will be handed over and he says if it's handed over just tell them this is not a precedent. A bullet down, "This memorandum will be communicated by management to respective recognised unions and a meeting will be coordinated to discuss the contents of the memorandum." Don't talk to them; take the memorandum and go to the unions. Then he says, concluding the letter, "We urge management not to take extreme measures in addressing this predicament by not giving undue recognition to the sinister forces which are not known to ourselves." It sounds like Mr Ramaphosa. That's on the 10th of August. Don't negotiate with these people. That's the AMCU formal view, and I'm told I should read the next paragraph, "As AMCU we suspect that there are forces behind this which as leaders we must address amicable." The syntax isn't great, but there it is. So that's the AMCU view. What's the NUM view? The NUM view we have spelt out in our heads at page 102, Mr Zokwana speaking,	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	mountain." Now it's colourful language, but the message is clear and we say if you criticise Lonmin for not going to the koppie and do some talking, some wage negotiation, you should address that and in fact say why that is wrong. So I'm exploring the sources of my duty to talk, of Lonmin's duty to talk – CHAIRPERSON: I'm sorry, Mr Burger, just for the sake of clarity, the criticism as I understand it of Lonmin for not negotiating isn't confined to the suggestion that Lonmin should have gone to the koppie. I understand that's part of the criticism. That's the part you're dealing with now. But there are others who say that what Lonmin should have done, not go to the mountain but negotiate at a safe venue with representatives of the strikers, who after all – this is the point made – after all were deliberately, so it is said, acting outside the union context. They say they don't want the unions to be involved. They were in the same position actually, as you know some of them where actually union members, as non- unionised workers, and the criticism is here you were faced with a strike involving non-unionised, or shall we say perhaps temporarily non-unionised workers, and the contention is that you should have been prepared to

	Page 38941		Page 38943
1	because then Lonmin would have to be armed as well and that	1	CHAIRPERSON: We have it, don't we?
2	wouldn't have been a recipe for successful negotiation.	2	Isn't what is now on the screen part of that document?
3	MR BURGER SC: Yes.	3	MR BURGER SC: Is it there? I'm indebted
4	CHAIRPERSON: But that's the criticism	4	to – can we go to page 11, please? That's the – 11, top
5	you've got to deal with. It's not enough just to say we	5	right-hand corner.
6	didn't have to go to the mountain. I know some people say	6	CHAIRPERSON: I think 11 is earlier than
7	you should have, but others say you didn't have to go that	7	what we have at the moment.
8	far, but you should nevertheless have negotiated. That's	8	MR BURGER SC: Yes. Yes, thank you very
9	the point you've got to deal with, isn't it?	9	much, 11. Yes, thank you. So a few observations here.
10	MR BURGER SC: No, we will deal with	10	This is not, this is a security protocol, it's not a Lonmin
11	that. I'm just developing this argument and my learned	11	protocol. E&DM stands for "Emergency and Disaster
12	friend Mr Bham will address that. To that argument I will	12	Management," and you'll see it is a mining security
13	place, put some rhetorical questions because we must put it	13	document, Lonmin Mining Security procedures. It is
14	in context. The first question is when should I negotiate;	14	approved by the Manager: Mining Security. It was written
15	on the 10th, the 12th, the 14th or the 16th. Secondly, what	15	by Mr Kellerman. That we see from page 4 of this document,
16	should I negotiate about. I've told them, they know I'm	16	page 14 at the top, Gean Kellerman wrote this document, and
17	not going to pay R12 500. Up to today I don't pay that.	17	I think the evidence was Mr Blou approved it.
18	So that's a dead issue. What do I negotiate with? The	18	[10:12] On page 13 on the purpose, you'll see this has
19	third question I'm asking is the 12 and a half thousand	19	got nothing to do with wage negotiations. This is crowd
20	net, how is that computated? I still don't have any	20	control. The purpose of this document is "Set out a
21	question up to now – I may get it in reply, I don't know	21	uniform procedure for mining security to which all security
22	what any answer to that is. Then I want to say do I now	22	members must operate in order to effectively manage and
23	assume that having a court order that you must disband and	23	normalise any form of unrest situation." And 1.1.2, "The
24	disarm, they will ignore that and I must accept that with	24	procedure will be utilised as a guideline when managing an
25	equanimity?	25	unrest situation in order to minimise the loss of life."
	Page 38942		Page 38944
1	Then I say the last question I want to put	1	Page 15, the document has to be reviewed. We see
2	Then I say the last question I want to put rhetorically, I now negotiate with them, and I'm going to	2	Page 15, the document has to be reviewed. We see in paragraph 3.2, "Responsibilities and authorities," and
2 3	Then I say the last question I want to put rhetorically, I now negotiate with them, and I'm going to read you the evidence of Mr Da Costa, we negotiate and we	2	Page 15, the document has to be reviewed. We see in paragraph 3.2, "Responsibilities and authorities," and at 3.2.3, "Annual maintenance reviews of all mining
2 3 4	Then I say the last question I want to put rhetorically, I now negotiate with them, and I'm going to read you the evidence of Mr Da Costa, we negotiate and we can't come to an agreement. We couldn't thereafter come to	2 3 4	Page 15, the document has to be reviewed. We see in paragraph 3.2, "Responsibilities and authorities," and at 3.2.3, "Annual maintenance reviews of all mining security procedures and standards and associated security
2 3 4 5	Then I say the last question I want to put rhetorically, I now negotiate with them, and I'm going to read you the evidence of Mr Da Costa, we negotiate and we can't come to an agreement. We couldn't thereafter come to an agreement. What now? Do they now go home, put down	2 3 4 5	Page 15, the document has to be reviewed. We see in paragraph 3.2, "Responsibilities and authorities," and at 3.2.3, "Annual maintenance reviews of all mining security procedures and standards and associated security procedures and standard documentation will be conducted and
2 3 4 5 6	Then I say the last question I want to put rhetorically, I now negotiate with them, and I'm going to read you the evidence of Mr Da Costa, we negotiate and we can't come to an agreement. We couldn't thereafter come to an agreement. What now? Do they now go home, put down their weapons, go to their homes and start working again?	2 3 4 5 6	Page 15, the document has to be reviewed. We see in paragraph 3.2, "Responsibilities and authorities," and at 3.2.3, "Annual maintenance reviews of all mining security procedures and standards and associated security procedures and standard documentation will be conducted and updated where necessary." No wonder that the Lonmin EXCO
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		1	
	Page 38945		Page 38947
1	wage negotiation here. He didn't get near this because he	1	12 and a half thousand. Management at LPD knows they want
2	couldn't. This envisages that at the intersection on the	2	12 and a half thousand. Everybody on Lonmin's side know -
3	10th when security goes and say to the strikers will you	3	there's no debate about that. That debate has been had,
4	just stop here, I want to talk to you, they listen to him.	4	that concluded on the 31st of July. To now quote a protocol
5	They just walked past him. They walked to LPD. So this	5	accepted by the security division as a measure against
6	thing simply does not unfold. You'll see in 8.3.5 "The	6	which to measure my client as to whether he had his best
7	parties involved in the industrial action must be confined	7	endeavours is with respect a misplaced reliance on the
8	to a central location." Now there's no chance that he	8	document.
9	could confine them to a central location. "A management	9	Can I read that debate, and I don't know what
10	committee" – this is wrongly typed also, I should read it	10	time you want to have the tea. This is a convenient time
11	in its correct order, 8.3.6 should read, "A grievance	11	for me.
12	committee will be identified that will engage with the	12	CHAIRPERSON: If it's convenient for us
13	management committee that will include the manager." They	13	to take tea now I'll –
14	never got there, and then of course 8.3.11 rather quaintly,	14	MR BURGER SC: Indeed.
15	"Upon unsuccessful concluding of the talks all members	15	CHAIRPERSON: - accept your suggestion.
16	partaking in the industrial action will be removed from the	16	MR BURGER SC: Indeed, Chair.
17	security area and will not be allowed to return until such	17	CHAIRPERSON: We'll adjourn for 15
18	time as the dispute has been resolved." It's got nothing	18	
19	to do with what happened on the 10th of August. It wasn't,	19	[COMMISSION ADJOURNS COMMISSION RESUMES]
20	it couldn't have been applied and if it had been applied it	20	[10:45] CHAIRPERSON: The Commission resumes.
21	wouldn't have led to any talks about R12 500.	21 22	Yes, Mr Burger? MR BURGER SC: Thank you, Chair. We're
22 23	That's why we say in our reply on page 23 the following on this suggestion that somehow the protocol	22	MR BURGER SC: Thank you, Chair. We're busy dealing with the possible source of an obligation
23	agreement was not complied with. Page 23 of our reply we	24	resting on Lonmin to talk and we will submit to you that
25	say in paragraph 55, "There are a number of facts which	25	the three areas to look at are the Constitution, the LRA
	Page 38946		Page 38948
1	need to be considered in this regard. Firstly, the	1	and the collective bargaining agreement and I was just
2	securities procedure document had not been considered, let	2	concluding on what I referred to as the protocol agreement.
3	alone approved by EXCO." In fact I think the evidence was	3	May I refer to a debate between you, Chair, and my learned
4	they didn't know of it. 2, "The Da Costa discussions took	4	friend Ms Pillay on the first day of the argument? It is
5	place with Karee RDOs. Through those discussions Lonmin's	5	in the record at page 38534 and it debates XXX8 and what
6	response to the demand of R12 500 was communicated.	6	one should make of it and my learned friend Ms Pillay is
7	Notwithstanding that, the strike took place." Chair, you	7	making submissions and she says, "Ultimately the question
8	will remember that the evidence of Mr Da Costa was that	8	was, in terms of what document was Lonmin security
9	when he conveyed the 750 allowance to the RDOs on the 31st	9	arranging the operations and on the evidence of both Mr
10	of July, they're not very happy about it but he thought	10	Sinclair and Mr Blou it was exhibit XXX8. So we would
11	that's the and of the debate. They want every and for a		submit" and she says it was drafted by Play. It was
11	that's the end of the debate. They went away and for a	11	submit" – and she says it was drafted by Blou, it was
12	week nothing happened. So certainly as far as Da Costa is	12	drafted by Kellerman, approved by Blou. That's not really
12 13	week nothing happened. So certainly as far as Da Costa is concerned, his perception is the 12 and a half thousand	12 13	drafted by Kellerman, approved by Blou. That's not really the important point. Then she says lower down, "That is
12 13 14	week nothing happened. So certainly as far as Da Costa is concerned, his perception is the 12 and a half thousand debate has been had. He couldn't negotiate with them. It	12 13 14	drafted by Kellerman, approved by Blou. That's not really the important point. Then she says lower down, "That is our submission, Chair, and in fact the document does
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12 13 14 15 16	week nothing happened. So certainly as far as Da Costa is concerned, his perception is the 12 and a half thousand debate has been had. He couldn't negotiate with them. It was 150% more than the 5 400 they were earning. They've got the allowance. They're now on par with Impala and the	12 13 14 15 16	drafted by Kellerman, approved by Blou. That's not really the important point. Then she says lower down, "That is our submission, Chair, and in fact the document does reflect in a footer to the document that there is a signed version of it available" – "So we would submit that within
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		1	
	Page 38949		Page 38951
1	don't propose wasting time on but if they regarded it as	1	Nyalas. Can you imagine Mr Sinclair leading a bunch of
2	the appropriate to follow, why didn't they follow it?"	2	Nyalas onto the crowd armed with his rubber bullets and – I
3	Now, may I just engage with that debate? That document, if	3	mean it's really, it's something which, if that's the
4	it binds anybody it binds the security department at	4	counterfactual, it can't be seriously advised.
5	Lonmin. They could make no contribution to the wage	5	So all I'm saying is, XXX8 was never envisaged or
6	demands of the strikers. They could but be a nuntius	6	designed even by security to give standards to test what
7	between an unruly crowd and management. That role they	7	happened between the 9th and the 16th of August in this
8	were denied because the strikers wouldn't give them a	8	tragedy, the scale was just not –
9	memorandum, so they had nothing to call, to take to	9	CHAIRPERSON: I understand that argument.
10	management and secondly, the strikers wouldn't go, as per	10	Now let me put my other question to you. You were talking
11	XXX8, to that safe area, nominate a party to talk and if	11	about possible sources of the obligation, that's the way
12	the talks break down, put down their weapons and go home.	12	you phrased the question.
13	That process, the counterfactual is in fact destructive of	13	MR BURGER SC: Yes.
14	any suggestion of an obligation arising from the protocol.	14	CHAIRPERSON: Now I take it, it may well
15	CHAIRPERSON: May I ask you two questions	15	be argued by the SAPS that when the police are called in to
16	flowing from what you've said, unless you are still busy	16	deal with a disturbance, a breakdown of law and order and
17 18	with this topic – MR BURGER SC: No.	17 18	so forth on premises, if they then say, they go to the person who is in charge of the premises in fact who
19	CHAIRPERSON: - in which case I'll –	19	summoned them to put down the outbreak of disorder and they
20	there are two points. The first is, you talk about them	20	say to them, look here, we've got a very tricky situation,
21	laying down their arms and going home. Now by going home	21	the only way we see it being solved is if you're making,
22	are you suggesting that they had to bring the unprotected	22	doing something that we're asking you to do. We must tell
23	strike to an end because as I understand it an unprotected	23	you that without bloodshed and so forth we see it's very
24	strike is not illegal. There are certain consequences that	24	difficult to solve the problem. Would you please, in these
25	flow from unprotected strikes which, in this respect, they	25	special circumstances, agree to speak to the strikers? Now
	Page 38950		Page 38952
1	different forsen er en eta eta de staller an la esta erregen erregen eta erregen e	1	0
	differ from protected strikes but are you saying they	1	that's perhaps a not entirely accurate summary of what
2	should have laid – I understand about them laying down	2	that's perhaps a not entirely accurate summary of what happened but I think the gist of it is incorporated in what
2 3	should have laid – I understand about them laying down their arms, I haven't got a problem with that but are you	2 3	that's perhaps a not entirely accurate summary of what happened but I think the gist of it is incorporated in what I've said. Now, what may well be argued is that the
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1	Page 38953	1	Page 38955
1	weapons, they're bound to it under the law, under the	1 2	Then there's a criticism in the heads by the evidence leaders of Mr Kellerman and Mr Botha. They
2	Constitution of this country. I cannot talk to them now, I have exhausted that debate. They know I can't pay them	2	overreacted, they shot birdshot in order to protect workers
3	R12 500. They know I can't talk to them in the face of a		but there's another criticism that we didn't protect the
4	-	4	
5	sword. They know I can't talk to them while they are	5	workers – CHAIRPERSON: Is that someone with a cell
6	ignoring a court order. It will be inappropriate because	6	phone that's misbehaving? Would you please turn it off?
7	I'll set an example which would not only make my mine		
8	ungovernable but the platinum belt. Those are the facts.	8	Or the earphones are too loud perhaps but we can't carry on
9	Now you can ask me on those facts, do you	9	with this heckling going on from the right side by, either
10	criticise? The question is probably, criticise whom? You	10	from a cell phone or from headphones that are not on. Yes,
11	criticise the strikers. There was a question by the	11	please carry on, Mr Burger.
12	Commissioner and a very valid question at some stage to	12	MR BURGER SC: Thank you, sir.
13	say, didn't SAPS do anything right then? I want to pose	13	CHAIRPERSON: Carry on.
14	that question as to the striking workers. Their cause may	14	MR BURGER SC: There's the criticism that
15	be a very good cause but their actions, what did they do	15	we either over-protected our workers or we under-protected
16	right? They ignored a court order, they carried weapons,	16	them. And we point out these, the duality in the criticism
17	they killed people, they burned property, they run amok on	17	finally in para –
18	the mine. Now Lonmin has said but you must protect, over a	18	CHAIRPERSON: Sorry, Mr Burger, I can't
19	38 kilometre stretch you must protect your equipment and	19	concentrate. What is the problem? Where is that noise
20	your people. How do I do this with a marauding crowd	20	coming from? We can't – I think the answer is someone's
21	running around? So with great respect, sir, to put the	21	headphone is probably turned on too loud. We've now got
22	facts to me on what the police had said without considering	22	the headphones back, so that's why we're back where we were
23	Mr Mokwena's answer and that answer wasn't an answer only	23	previously. Please turn the headphones down and if the
24	for the police, he had said that to the nation on the 15th,	24	person concerned hasn't got the headphones on his or her
25	he had explained on SAfm why we couldn't talk and that's	25	head, then please turn them off completely because it's
	Page 38954		
			Page 38956
1	very much the line we adopted. You can't talk to these	1	Page 38956 very difficult to concentrate on the argument when there's
1 2	very much the line we adopted. You can't talk to these	1 2	=
	6		very difficult to concentrate on the argument when there's
2	very much the line we adopted. You can't talk to these people, you've got nothing to talk to and my learned friend	2	very difficult to concentrate on the argument when there's heckling going on at the side. Mr Burger –
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10th November 2014

Marikana Commission of Inquiry

Pretoria

Page 3897 MR BURGER SC: Thank you, M 2 Commissioner. We really, I duri Thave to read it but we 2 discussions with the Karve RDOs. So where does this 3 conclude on this observation in our main heads in paragraph discussions with the Karve RDOs. So where does this 4 24.2 and 24.3 where we day the headboulders. discussions with the Karve RDOs. So where does this 5 oradie on this observation in sort main heads in paragraph commend what we will have 6 to explore and what we will have to explore and what we will have 7 counterfactual. What is not explored and what we will have to explore and what we will have 10 first have been about? What would have happunct management differed us an increase of R250. This small 11 personned and over which personned in the weak ender the mint in the weak enders. If have shows about the weak ender the mint 12 oradie and enderweichig personned it counters weak in the RDOs. 'I and weak in the personned it weak ender the proceed ings?' The anoment i 13 chAllPERSON. Sorry, M Burger, the 14 breadbox weak in the intro or main weak in the is to grow as upplementary statement. Whether the was using the intro the is to explored and weak interweak in the is to grow as upplementary s				1 5
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ARCHIVE FOR JUSTICE	25	individual strikers who gave evidence and my learned friend	25	
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		1	
1	Page 38961	1	Page 38963 I would have had no problems. If he asks us to go to work,
1	put about perception of witnesses, a question is being put	1	I would have done so." And Chair, you say "You're not
2	about perception of witnesses. We have had a number of	2 3	
3	parties, of individuals who were involved in the strike who	4	answering the question. I think it, to be fair, because you didn't understand, the proposition being put to you by
4 5	gave evidence, they led none of this evidence about that	5	counsel for Lonmin is that if Lonmin had said if the
6	being their perception and I'm going to again object to the question. There isn't a factual foundation for this. The	6	strikers on the koppie go back to work, then Lonmin will be
7	evidence is backed up" – "In fact the evidence to back up	7	prepared to discuss with them whether they would give them
8	this perception hasn't been forthcoming." And the	8	extra money and give them the 12 500 they were asking for.
9	objection is then disallowed but over the page you revisit	9	In other words, the words are used, Lonmin would engage
10	that disallowance and you say at page 37930, "I must say I	10	with them on the demand, not would accede to the demand and
11	think, to be	11	pay the 12 500. So what you're being asked is, if you had
12	fair to him, he's correct. You've got, Mr	12	been told on the 16th that Lonmin's attitude is, leave the
13	Budlender got a concession that the workers may have seen	13	koppie, go back to work and we would then start talking to
14	it that way but higher than that one can't take it and he	14	you about whether we would give you the 12 500 that, what
15	is quite correct in saying that there was no direct	15	would your attitude have been? That's the question." He
16	evidence to that effect." That's really the only point we	16	says "That I would not have entertained."
17	make, there was direct evidence to the effect that it was	17	So we don't know how the amount is calculated and
18	explained to the strikers that these were not negotiations	18	we know they're not going to talk on the amount. Now one
19	and that they had a perception to the contrary is not borne	19	asks oneself, what do you talk about? You're now outside
20	out by the evidence.	20	structures, you're dealing with people armed and ignoring a
21	Another problem with the talking, and I'm now	21	court order and they say to you, this is what we want, we
22	dealing with whether we should have talked to the strikers,	22	can't tell you how it's calculated, tell us when you pay it
23	is that no-one could explain how the R12 500 was made up.	23	into my Capitec account and I'll be happy. Well, we say
24	Now I would have thought the first starting point, if one	24	it's just an unrealistic request.
25	sits around a table and you debate a wage claim, is for the	25	And I explored that with Mr Da Costa in re-
1	Page 38962 demander to say, I want 12 500 net and this is how I make	1	Page 38964 examination and I don't have to go there but you'll find it
2	it up. We haven't heard that to this day. We don't know	2	in the record at page 32953. You will remember, sir, I
3	whether there's a housing allowance in there. What we	3	said to Mr Da Costa, let us assume we have a duty to talk,
4	know, it is net. So it, probably cost to company is about	4	let us assume, come to the crystal ball and let us do the
5	20 000 a month but we just don't know that.	5	talking, how does it go? And I take him through the whole
6	What we do know is it was not negotiable. That's	6	scenario and he says, it's going nowhere. It's going
7	quite important. That you know from our heads where we	7	absolutely nowhere. Now if that's the evidence, sir,
8	refer to that at page 43. The evidence is that claim was	8	that's unchallenged. If that's the evidence what, with
9	not negotiable.	9	great respect I ask, is the point on criticising Lonmin for
10	In paragraph 80 at page 43 it's cross-examination	10	not talking to the strikers? What is the counterfactual?
11	by my learned friend \ensuremath{Mr} Motau and he is cross-examining \ensuremath{Mr}	11	If there had been talks here it would have caused ripplings
12	Magidiwana. We say in paragraph 80, "It was again clear	12	into the mining industry which we would have today
13	that there was no desire for talks with Lonmin. The demand	13	struggled to unravel and it would not have led to the
14	was for capitulation by Lonmin" and Mr Motau says, "So	14	avoiding of the tragedy on, in particular, the 16th.
15	according to what you're saying, if Lonmin had sent a	15	I must deal with a submission by the evidence
16	representative to the koppie to say to you, let us engage	16	leaders here at page 652 of their heads, an important
17	but not at the koppie, let us set up a process by which	17	submission they make in paragraph 1212. They make a
18	your demand will be assessed and evaluated, you would not	18	submission in paragraph 1212, it reads thus, "We submit
19	have agreed because you say that the employer in the same	19	that, given the dichotomy in approach by Lonmin to the
20	vein ought to have told you whether they are putting the	20	issue of engaging with workers on work-related issues" –
21	money or when are they going to deposit the money.	21	what they mean by a dichotomy I suspect is, Da Costa spoke
22	Correct." Remember the evidence, Chair, is they say all we	22	to the RDOs at Kareedouw, at Karee, why wouldn't you speak
23 24	want to know is when do you deposit the R12 500. Mr Magidiwana says, "I'm saying, sir, if they said look	23 24	to the striking workers on the 10th? Point 2, "Given that Lonmin had entertained the RDOs' demand in the way that it
		14	TOTAL TAC ELLEVALED THE KLUS DEDADO ID THE WAY IDAL I
24	gentlemen, the money will be put in on such and such a day,	25	did, given that Lonmin was well aware that the RDOs had

1	Page 38965 lost confidence in NUM, it was not inappropriate for Lonmin	1	Page 38967 Now he's talking about SAPS, I'm talking about the evidence
2	to adopt" – I suppose it must be, "it was inappropriate,"	1	leaders and I find that an unpalatable premise working
2	there's a double negative there – "it was inappropriate for	3	from, to suggest that we should have spoken in order to
	Lonmin to adopt an intransigent approach after the 9th by	4	avoid further violence –
4			
5	refusing to talk to the workers outside established	5	CHAIRPERSON: Well, can I put it to you
6	bargaining structures." Now comes the submission, "A	6	this way, it applies both to the NUM contention in relation
7	predictable result of Lonmin's intransigent refusal to	7	to SAPS, the intention it raised as far as your client - by
8	engage with the workers outside established collective	8	the evidence leaders against Lonmin. What seems to
9	bargaining structures was that workers resorted to	9	underlie this and I'm not being facetious when I put it
10	increasing desperate and violent measures in order to force	10	this way but it seems to be an accurate way of stating the
11	Lonmin to once again engage." So what do you do as a	11	proposition, we've heard the evidence from General Mpembe
12	worker? You go on an unprotected strike. You arm yourself	12	and we've seen the documents that support it, that in
13	and you start injuring people. If the employer does not	13	public disorder situations the doctrine of appropriate,
14	talk to you then, he gets criticised by the evidence	14	situational appropriateness applies. In certain, that
15	leaders. "Lonmin should have avoided further violence from	15	means in certain circumstances to bring the disorder to an
16	the strikers." Well it is, with respect, a startling	16	end you've got to not enforce the strict letter of the law
17	submission and perhaps nobody deals with it better than my	17	in every respect. That appears to be a well-accepted
18	learned friend Mr Tip where he addresses the very same	18	principle of situational appropriateness. Now this
19	debate in his reply and may I borrow from him, he won't	19	argument is an application of that doctrine, in effect, to
20	mind if I do it because no doubt -	20	Lonmin.
21	CHAIRPERSON: As long as you pay it back,	21	[11:24] And what had been said, this is something
22	I'm sure he won't mind.	22	obviously you say is inappropriate, but what's being argued
23	MR BURGER SC: Yes, yes, that's the one	23	is that just as the police were faced with a situation
24	party I haven't been accused of having an unholy alliance	24	where they had to apply the doctrine of situation of
25	with, so I'm still a free agent there. In the reply by NUM	25	appropriateness in order to avoid further bloodshed or
	Page 38966		Page 38968
1	Page 38966 – I hear objections, perhaps I am accused of that but it is	1	Page 38968 unnecessary bloodshed, a similar obligation would have
1 2	•	1 2	5
	- I hear objections, perhaps I am accused of that but it is		unnecessary bloodshed, a similar obligation would have
2	 I hear objections, perhaps I am accused of that but it is a moving target, sir, but in his reply in paragraph 18 my 	2	unnecessary bloodshed, a similar obligation would have rested upon Lonmin, temporarily in a flexible way in order
2 3	 I hear objections, perhaps I am accused of that but it is a moving target, sir, but in his reply in paragraph 18 my learned friend Mr Tip makes the following submission – 850, 	2 3	unnecessary bloodshed, a similar obligation would have rested upon Lonmin, temporarily in a flexible way in order also to stop bloodshed to enable the police to bring the
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	Page 38969		Page 38971
1	respect say is incorrect, is not only to postulate a duty	1	out on the evidence the implicit criticisms I should have
2	to talk where none exists, but then to say if you don't go	2	spoken to them, I should have had talks with them, but
3	there you're the instigator of the violence. You are the	3	I've addressed that, talks about what, when to pay them
4	perpetuator of the violence, that can't be wrong because	4 5	12 500, that would be a match to the dynamite. To call
5	what does that invite now?		them and say I'm not going to pay it to you and don't ask
6	CHAIRPERSON: No, Mr Burger, I'm not sure	6	me when, it's off. Well then we've got real trouble, but
7	that that's the argument that you have to deal with. I	7	that point is a different point I've made now.
8	don't think that the evidence leaders or SAPS contend for a	8	MR TOKOTA SC: Sorry, Mr Burger, do you
9	moment that the strikers are not subject to very, very	9	think if the strikers were to say, for example to Lonmin,
10	serious criticism. I don't think they would contend for a	10	if you refuse to talk to us, telling us about the
11	moment that the instigators of the violence – some of the	11	bargaining structures and so on we will continue killing
12	instigators of violence not all the instigators of violence	12	people, we will destroy property, we will do anything
13	are to be found in the ranks of the strikers. But they	13	unless you come, until such time that you come to us? Do
14	say, if I understand the argument, if I'm wrong I'd be	14	you think that Lonmin would still be justified and say no
15	corrected, that in order to deal with that violence it was	15	you can do what you want, I'm not going to go outside these
16	necessary for the police to be flexible, to apply the	16	parameters, Constitution, LRA and the agreement?
17 18	doctrine of situation of appropriateness and they seem to	17 18	MR BURGER SC: Yes indeed that is my submission, that's my submission. If what you put to me
	be saying that a similar obligation where they had		yields a different answer. If the answer is I must then
19 20	addressed a request to Lonmin, a similar obligation rested	19 20	talk, let's go into tomorrow and we have a strike and it's
20	on Lonmin. Whether I understand the argument correctly we'll discover in due course, but the question is that if	20	an unprotected strike and the workers kill people and they
22	that is the argument whether that argument is one that we	22	want quite an unrealistic wage. What do they do? It's
23	can uphold. That's really the point you're busy with at	23	quite simple, they say to the employer if you don't come
24	the moment.	24	and talk to me outside of structures, outside of the LRA
25	MR BURGER SC: Yes our submission is	25	I'll just go on killing. Can you imagine what that – but
20		20	The just go of kinnig. But you magnio what that but
	Page 38970		Page 38972
1	Page 38970 you're right. Let me not be unfair to my learned friends.	1	Page 38972 that's just, there's no rule of law then. There's no
1 2		1 2	
	you're right. Let me not be unfair to my learned friends.		that's just, there's no rule of law then. There's no
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2 3	you're right. Let me not be unfair to my learned friends. This is their argument, a predictable of Lonmin's intransigent refusal to engage the workers outside of	2 3	that's just, there's no rule of law then. There's no constitutional right to strike. That's not a right to strike being exercised, that's running wild. So that
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1	Page 38973 heads, but let's repeat the following. "1. There is no	1	Page 38975 best endeavours. They do not suggest that he didn't
2	engagement with the question what the outcome might have	2	exercise, now we say then, with great respect, to now argue
3	been if the demands of the strikers were not met." The	3	that Lonmin should be criticised for not having spoken to
4	President, Mr Ramaphosa does not say to us had you spoken	4	his strikers is a bridge too far.
5	what would have been the outcome of the talks? He doesn't	5	MR TOKOTA SC: Can I ask you this? If
6	go there. There is no suggestion by him as to where such	6	Lonmin were to go to the koppie and say I'm not prepared to
7	negotiations should have taken place, with whom	7	negotiate the wage on the koppie and in the atmosphere in
8	representing the strikers, with RDOs or with the whole	8	which you are, but all I've come here for is to negotiate
9	workforce. What preconditions would have been in place?	9	that you lay down your arms then we can arrange a suitable
10	You'll pay me the 12 500 in time, I don't negotiate or what	10	venue where we can talk without the arms. Would that have
11	is being spoken about and when should it have taken place?	11	a been an negotiation outside the three spheres which
12	On the 9th or on the 15th? He doesn't go there. If we want	12 13	you've mentioned?
13	a beneficial bystander here we want to call a seasoned		MR BURGER SC: No, no that would have
14	negotiator on how to act in these circumstances. One	14	been fun, it would have led nowhere. I'm not sure they
15	couldn't do better than Mr Ramaphosa, his credentials	15	would have got out of the Nyala on that because it would be
16 17	impeccable as a negotiator in wage negotiations. So what	16 17	dangerous with that message to get out. But they speak out of the Nyala with a loudhailer, they'll be laughed at, but
17	we say, if you accept, Chair, that you test my best endeavours on the facts available at the time and you say	17	it wouldn't have been in breach of anything. It would be
19	to the theoretical negotiator what does one do in these	19	in breach if they go back and they start negotiating, but
20	circumstances? We know what he did. He phoned the	20	of course you don't reach that stage. What the strikers
20	Minister, he says to the Minister get the Minister of	20	might well have said to them, remember there's a fight
22	Police and get these criminals under control, that's what	22	between AMCU and NUM at that stage. Mr Mathunjwa is there
22	he did. But we have a now 20/20 vision, let's test that	22	and he is saying to the strikers you've got a good case and
23	one. We say without the benefit of hindsight his motive	24	it's the enemy who holds you here. So they would probably
25	then, namely, to stabilise the situation and to bring the	25	have said to Lonmin what do you want to talk about. I
20	then, namely, to stabilise the situation and to bring the	20	
	Page 38974		Page 38976
1	acts of violence to an end cannot be faulted and I say this	1	don't know what Lonmin on your example says, presumably we
2	with all the responsibility I can muster, I cannot	2	want to tell you we can't pay you 12 500, end of the
3	criticise Mr Ramaphosa for doing what he did. He did what	3	debate. Or they say to you, you must first tell us what
4	I submit a responsible businessman would have done in those	4	the 12 500, how it's made up and then we'll consider, end
5	circumstances, try to stabilise a situation, get the police	5	of the debate. Or you must first tell me is this the
6	in.	6	12 500 by the RDOs or everybody, end of the debate.
7	After the events of the 13th of August, the	7	Because the strikers don't know, half of them think it's
8	killing of the five people it would have been unprecedented	8	RDOs, the other half thinks it's a free for all. So that
9	to expect wage negotiations between Lonmin and the strikers	0	
	to opport wago nogotiations between Eeninin and the strikers	9	scenario is just going nowhere. That's why the counter
10	outside of established collective bargaining. But now he	10	factual is so important here.
11	outside of established collective bargaining. But now he makes the following submission or it's made on his behalf.		factual is so important here. CHAIRPERSON: In looking at the counter
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1	Page 38977 which did all those things which actually brought about a	1	Page 38979 reminded before we go to tea that in hour heads at page 44,
2	settlement. So I'm not so sure that your counter factual	2	Commissioner, that question was asked of Mr Magidiwana what
3	as you put it is as compelling as you suggest. But I	3	would you have done if you didn't get an undertaking for
4	understand you may well wish to say to me there are	4	12 500 and he said that was unacceptable. So perhaps I'm
5	differences between what happened in September, those	5	even wrong to suggest that there could have been a debate
6	things differ from what the counter factual would have been	6	at the koppie. If it was anything less than the loudhailer
7	if we hadn't had the shootings on the 16th. I understand	7	saying end of the month R12 500 and no doubt they would
8	that and I'd be interested to hear your argument on that.	8	have left the koppie by then. That was just not an option
9	MR BURGER SC: I'd say you've anticipated	9	available. It's a perhaps a convenient time, Sir.
10	my argument. These things are incomparable. We have 34	10	CHAIRPERSON: 15 minutes.
11	bodies after the 16th, everybody shifts their position now.	11	[COMMISSION ADJOURNS COMMISSION RESUMES]
12	The strikers now talk below 12 500, Lonmin now talk for	12	[12:06] CHAIRPERSON: The Commission resumes. Mr
13	whatever you want to talk to them about. NUM and AMCU is a	13	Burger.
14	bit more tricky, but NUM is very happy to go in there. In	14	MR BURGER SC: Thank you, Chair. Just in
15	the end even AMCU arrives rather belatedly and they now say	15	concluding the debate on the, the submissions on the first
16	- but this is a different situation, it was suggested at	16	issue; my learned friends point me out that the question
17	some stage that I have overplayed the impact of that	17	posed by Commissioner Tokota was in fact the question you
18	tragedy. Can one ever overplay the 16th of December in this	18	posed to Mr Magidiwana which we've quoted on page 44 of the
19	country? It is a new –	19	heads where you put that very carefully on how talks could
20	CHAIRPERSON: The 16th of December –	20	have happened at the koppie, what might have been
21	MR BURGER SC: 16th of August.	21	suggested, and the answer came back, that wouldn't have
22	CHAIRPERSON: There were other killings	22	been entertained. So we don't have to -
23	on the 16th of December earlier, but we're busy with the	23	CHAIRPERSON: The other point that flows
24	16th of August.	24	from that is how typical were the views of Messrs
25	MR BURGER SC: Well I've made mistakes	25	Magidiwana and Nzuza? You quoted both of them and no doubt
	Page 38978		Page 38980
1	before, let me confess to that one. But it's quite a	1	the passages you cite support your submissions. But the
2	before, let me confess to that one. But it's quite a serious point. It is a new ball game after the 16th, the	2	the passages you cite support your submissions. But the point that interests me is that – obviously one forms prima
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1	Page 38981 give them the views of the people. We can but deal with	1	Page 38983 I think I speak for all our colleagues that we're confident
2	that. Mr Nzuza says he was the second-in-command. Mr	2	that you've leant over backwards, I think sometimes too
3	Magidiwana is on that score a pivotal witness. There may	3	far, to give fairness to everybody. So I don't criticise
4	be other people with other views. I have no doubt there	4	that, but we said that watch out in phase 2, don't deal
5	will be others, but at the end of the day we have to deal	5	with component parts of a case which cannot be considered
6	with the facts before us and my learned friend Mr Bham will	6	in isolation in unfairness to us, and we say that because
7	take some time in considering each of the witnesses called	7	there were practicalities at the time. We had spent two
8	from the strikers, and whether there are others, well, we	8	years on phase 1. Lonmin was given – I don't remember, I
9	don't know.	9	think 11 days or so to produce all our evidence on phase 1
10	CHAIRPERSON: I understand the argument.	10	and 2. So we had a list of witnesses, we had to cull from
11	MR BURGER SC: Yes, thank you.	11	that. In cooperation with the evidence leaders we – and
12	CHAIRPERSON: But look forward to hearing	12	then we had to make place for phase 2 and initially we
13	what Mr Bham has to say.	13	thought it would be the two Human Rights people. But then
14	MR BURGER SC: Then phase 2 the housing	14	it turned out but we just don't have time for that, and Mr
15	debate, can we again start by just considering briefly the	15	Seedat was a bit of a latecomer and we said, we agreed with
16	terms of reference. The terms of reference in paragraph	16	our learned colleagues, we should use Seedat on that, but
17	1.1.3 and 1.1.6 find particular application. In 1.1.3 in	17	it was a very limited inquiry. In the end we had the space
18	the context of Lonmin you're asked to consider, "Whether it	18	to call one witness on phase 2, that was Mr Seedat. He was
19	by act or omission created an environment which was conduce	19	in the box I think for something like three days, if I'm,
20	to the creation of tension, labour unrest, disunity amongst	20	on the outside. That was what we could produce and we say,
21	its employees, or other harmful conduct," and in 1.1.6,	21	we remind you of by the time you make a ruling on that
22	"Whether by act or omission it directly or indirectly	22	phase 2 you said, "Fairness can't be considered now; we can
23	caused loss of life or damage to persons or property."	23	only consider fairness at the end." And this is now the
24	Chair, in November 2012 you ruled phase 1 to be	24	time to come and this is the time in which I would like to
25	inquired into and that was directly linked to the events of	25	revisit that debate.
1	Page 38982 the 9th and the 16th of August, and Liremember in the early	1	Page 38984 We raise fairness in our beads and because it's
1	the 9th and the 16th of August, and I remember in the early	1	We raise fairness in our heads and because it's
2	the 9th and the 16th of August, and I remember in the early stages of the Commission when we were all still finding our	2	We raise fairness in our heads and because it's such an important subject may I just remind you it is in
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	Page 38985		Page 38987
1	of cross-examination. I thought until this morning it was	1	researcher will file her comprehensive phase 2 report with
2	a lady. I'm told it's not a lady, it's a man, but Dr	2	the Commission together with the evidence leaders' written
3	Forrest –	3	argument. The Commissioners will not be asked to make any
4	CHAIRPERSON: Dr Forrest – I don't know	4	findings on the basis of this comprehensive report, but
5	where you get that from. Dr Forrest is a lady and she in	5	they will be requested to forward it to the President
6	fact –	6	together with their report so that the government
7	MR BURGER SC: Then it is a lady, then	7	departments and the agencies that are ultimately tasked to
8	sorry, then let's stay with the female side of Dr Forrest –	8	investigate all the issues that were to be traversed in
9	CHAIRPERSON: She always dresses as a	9	phase 2 can have the benefit of the research." And again,
10	lady, was looking like a lady. I don't know what one –	10	with respect, we agree, and that's why you would have seen
11	MR BURGER SC: No, you know, and I was	11	in our reply we associate ourselves with the HRC's
12	then incorrectly informed, but it shows you that I haven't	12	suggestion as to how that subject should go forward.
13	had any access to probe anything that was said and that's	13	I've made the submission that the opportunity
14	quite a disadvantage for a cross-examiner certainly. So we	14	given to Lonmin to deal with the case against them both by
15	say the unfairness to Lonmin should the Commission make a	15	way of cross-examination, the absence of a final report by
16	recommendation on Lonmin's housing in isolation, we will	16	Dr Forrest, no engagement with the answers to our response
17	address under different headings. Firstly the 1.5 which	17	to the preliminary report – there may be an answer to it,
18	was culled out, and may I remind you, Chair, of what Dr	18	but I haven't seen it and we haven't had an opportunity to
19	Forrest had said in her report, which is very helpful on	19	address that in argument – to the three days given to Mr
20	this aspect. She had said the following in the Forrest	20	Seedat to traverse things which sometimes fell outside of
			-
21	report, my pagination is 1366. I think it comes from a	21	his period of employment at Seedat, that would be
22	previous time, but she is here addressing housing, section	22 23	unfortunate.
23	5, and at page 56 of her report she says, "Lonmin cannot be		In any event - I've made the submission also -
24	held solely responsible for the deplorable state of their	24	thirdly, that migrant labour and collective bargaining
25	housing in which its migrant workforce resides. The	25	should be all part of that inquiry.
	Dago 20096		Dago 2000
1	Page 38986 provisions of decent housing in the Marikana area is	1	Page 38988 There's another risk. Chair, that if there were
1	provisions of decent housing in the Marikana area is	-	There's another risk, Chair, that if there were
2	provisions of decent housing in the Marikana area is primarily a government responsibility and in view of the	2	There's another risk, Chair, that if there were to be recommendations or observations or holding of
2 3	provisions of decent housing in the Marikana area is primarily a government responsibility and in view of the removal of paragraph 1.5 of the original terms of reference	2	There's another risk, Chair, that if there were to be recommendations or observations or holding of accountable Lonmin in the context of housing that may
2 3 4	provisions of decent housing in the Marikana area is primarily a government responsibility and in view of the removal of paragraph 1.5 of the original terms of reference the failures of national, provincial and local government	2 3 4	There's another risk, Chair, that if there were to be recommendations or observations or holding of accountable Lonmin in the context of housing that may bedevil a future inquire because do they then take that as
2 3 4 5	provisions of decent housing in the Marikana area is primarily a government responsibility and in view of the removal of paragraph 1.5 of the original terms of reference the failures of national, provincial and local government in this regard are no longer a matter which the Commission	2 3 4 5	There's another risk, Chair, that if there were to be recommendations or observations or holding of accountable Lonmin in the context of housing that may bedevil a future inquire because do they then take that as part of their recommendations? Do they revisit the whole
2 3 4 5 6	provisions of decent housing in the Marikana area is primarily a government responsibility and in view of the removal of paragraph 1.5 of the original terms of reference the failures of national, provincial and local government in this regard are no longer a matter which the Commission is empowered to investigate. To the extent that this	2 3 4 5 6	There's another risk, Chair, that if there were to be recommendations or observations or holding of accountable Lonmin in the context of housing that may bedevil a future inquire because do they then take that as part of their recommendations? Do they revisit the whole debate and see whether this partial conclusion fits into
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	Page 38989		Page 38991
1	we would have no control. But there are two points I think	1	to a commission to explore housing in the larger context,
2	that have to be made in response to what you've said. The	2	then with request, one asks oneself what is the purpose of
3	first is if we were to engage in investigation into	3	this Commission making some prima facie views known?
4	Lonmin's compliance or non-compliance with its housing	4	Making prima facie views known without the benefit of for
5	obligations, if we were to do that – I don't say we will –	5	one moment exploring migrant labour. Just consider that
6	we would have to make it clear that this is a very small	6	for the moment. You criticise housing of Lonmin
7	part of a very big question and it's not to be assumed for	7	theoretically, but you do not look at what is really at the
8	a moment that that's accepted that problem has now been	8	source of the problem, comes from – I don't know, 1886,
9	dealt with, that the relevant box can be ticked and people	9	when did we discover diamonds? Migrant labour, that's the
10	can move on. The rest of the housing problem, I think is	10	problem.
11	alluded to in the passage from Dr Forrest's report you	11	You have a problem here which is a problem
12	read, remain to be investigated. That's the first point.	12	inextricably interwoven with your local, provincial and
13	In regard to the possibility of a second	13	national Department of Housing and their performance in the
14	commission or other tribunal or body or task team or	14	North West province. You can't look at Lonmin without
15	whatever expression might be used, of course you know a	15	taking that into account, but you can't take that into
16	commission report has got no binding force. A commission's	16	account.
17	report is simply the answer of the commission to the	17	Now again we would submit that it's really of
18	questions posed by the President in respect of which he	18	very limited benefit for you to embark on that, on the SLP
19	would like advice and no future commission if there were	19	inquiry into whether Lonmin complied with SLP. With
20	one, or task team or whatever body it was that was called	20	respect, you can hardly have that debate if you don't have
21	upon to look into the matter would be bound in any way by	21	a debate with the regulator of the SLP, the DMR, because
22	anything we say. They'll say well, we note with interest	22	they're pivotal, they do it on a quarterly basis they look
23	what the Commission has said, we venture to disagree, we -	23	at that. There is a constant debate between Lonmin and the
24	give their reasons to why they disagree or they say we	24	DMR on those issues.
25	agree with some parts, disagree with others, but the point	25	[12:26] At some stage there comes a section 93 charge, Mr
1	Page 38990	1	Page 38992 Seedat says it's a very sinister document that: it involves
1	I'm making to you is that anything we say, if we say	1	Seedat says it's a very sinister document that; it involves
2	I'm making to you is that anything we say, if we say something - it's not to be regarded as a given at this	2	Seedat says it's a very sinister document that; it involves a director who had to be paid some money to get out of the
2 3	I'm making to you is that anything we say, if we say something - it's not to be regarded as a given at this stage we will – anything we say would only be of an	2 3	Seedat says it's a very sinister document that; it involves a director who had to be paid some money to get out of the way, never challenged, but in that answer we say to the DMR
2 3 4	I'm making to you is that anything we say, if we say something - it's not to be regarded as a given at this stage we will – anything we say would only be of an advisory nature. The advice would bind nobody, it would	2 3 4	Seedat says it's a very sinister document that; it involves a director who had to be paid some money to get out of the way, never challenged, but in that answer we say to the DMR we cannot build 5500 houses, it's not on, it cannot be
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	Page 38993		Page 38995
1	the real issues. We think that is an unwise process to	1	please.
2	follow, with great respect.	2	MR BHAM SC: I'm going to do that. The
3	Can I then conclude on this issue by the	3	first of the topics is the demand for the amount of
4	counterfactual; assume for the moment that there is going	4	R12 500. I'm going to go into aspects of that demand. The
5	to be a finding, assume for the moment that we are going to	5	second topic is intended to be the perception of strikers.
6	be criticised in a vacuum, what is the counterfactual here?	6	I'm going to say a lot less on it than I had intended to
7	Because then the Commission will have to address the	7	say because in part it was dealt with by Mr Burger. The
8	reality; what if 5500 houses had been built, what effect	8	third topic is the 10 August shooting and the criticism of
9	would that have had on the tragedy? Remember we employ	9	Mr Botes –
10	28000 employees and we've got 10000 contract workers.	10	CHAIRPERSON: Sorry, the?
11	Let's forget about the contract workers and think away that	11	MR BHAM SC: The 10 August shooting –
12	the government should provide housing to them. But of the	12	CHAIRPERSON: 10th of August?
13	28000 we employed we've now built houses for five and a	13	MR BHAM SC: Ja, and the criticism of Mr
14	half thousand. What about the other 20 and a half	14	Botes in that regard. This was a discharge of rubber
15	thousand? Is that going to take away their complaints? Is	15	bullets and teargas. The fourth aspect is the
16	that going to create trust between the employer and the	16	characterisation of the strike. The fifth topic is the
17	employee? I wouldn't have thought so. That's never	17	capacity of Lonmin Security and the sixth – sorry, I said
18	addressed.	18	seven topics, it's six topics, and the sixth topic is the
19	Another question; we know on the facts available	19	suggestion that Lonmin ought to have shut down its
20	from Dr Forrest that the schools in the Rustenburg area are	20	operations and the nuance criticism under that topic that
21	insufficient. Health is insufficient. Social services are	21	Lonmin ought not to have actively encouraged its workers to
22	insufficient. What would have been the effect of bringing	22	go to work.
23	in five and a half thousand, not individuals, households	23	If I might start with the very first topic, and
24	into that area on electricity, on water, on education, on	24	that's the demand for R12 500 -
25	hospitals? We don't know. We know that with three houses	25	CHAIRPERSON: So in fact you've only got
	Page 38994		Page 38996
1	it was a disaster. How it would be with 5500, one just	1	six topics?
2	it was a disaster. How it would be with 5500, one just doesn't know. And again I don't give that as an absolution	2	six topics? MR BHAM SC: It's six topics and under
2 3	it was a disaster. How it would be with 5500, one just doesn't know. And again I don't give that as an absolution of the problem. What I say is, and we've been overruled on	2 3	six topics? MR BHAM SC: It's six topics and under the first point, or rather the first topic, the demand for
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		1	
1	Page 38997	1	Page 38999
1	there would have been no continuation of the strike, or not	1	that would kind of reward them for the work they were doing
2	a strike in the first instance. So how the amount went	2	so it was, they just felt it was a good number. I asked
3	when one looks at the context of Impala from 9 000 to	3	them," and now he quotes his discussion with them, "'How
4	12 and a half thousand, a rather dramatic jump, we're not	4	did you calculate it? Did you base it on anything?' They
5	left any the wiser and those who could have told us that	5	said," and this is the high water mark of the evidence,
6	had not come before the Commission to address you on that.	6	"'No, we don't do calculations. It's just a, it's a good
7	The second point is to look at the various	7	number." So the central issue which drove the events all
8	discussions between RDO representatives and Mr Da Costa.	8	that you know is that what was said to Mr Da Costa is that
9	Now we know he was first approached on the 21st of June. He	9	the number, the amount we're seeking is a good number.
10	then reported back together with Mr Nkisi to RDO	10	There was absolutely no attempt to explain that, to go into
11	representatives from Karee on the 2nd of July. On the 23rd	11	it in order to assess its reasonableness, its affordability
12	of July he indicated to them in the further meeting in	12	and the like.
13	principle Lonmin's willingness to pay an RDO allowance. On	13	The third aspect of their demand, and this is
14	the 30th of July 2012 on his evidence, and there's no	14	significant because of how the composition of the strike
15	counterevidence in this regard, he stated to them that	15	force had changed, the third aspect is that the RDOs wish
16	Lonmin would not negotiate the 12 and a half thousand, it	16	to negotiate the increase only for themselves. So when
17	was inappropriate and Lonmin would not accede to it, but he	17	Karee RDOs had first approached Mr Da Costa it was just an
18	made it clear that that issue was not open for negotiation	18	increase for RDOs, and in fact when Mr Mabuyakhulu, who is
19	and he's given the reasons for that, and on the 31st of July	19	an RDO, had testified he had given three reasons for not
20	the RDO allowance was communicated. In between that we now	20	involving unions and one of those reasons is that the
21	from the evidence that on the 19th of July there was an AMCU	21	demand for R12 500 was limited to RDOs. That of course
22	meeting at Karee where the demand, and this was the only	22	changed, as I'm going to demonstrate to you.
23	demand on the table at that point in time, was meant to	23	The fourth aspect in relation to the demand for
24	have been discussed. We don't know much more about that	24	R12 500 and the Da Costa discussions is that the content of
25	meeting because we were not party to it and those who could	25	those discussions does not appear to have been reported
	Page 38998		Page 39000
1	Page 38998 have testified on it did not come and testify.	1	Page 39000 back to the striking mineworkers when they went on strike
1 2		1 2	9
	have testified on it did not come and testify.		back to the striking mineworkers when they went on strike
2	have testified on it did not come and testify. But throughout the hearing of this Commission we	2	back to the striking mineworkers when they went on strike and thereafter. In other words when you heard the
2 3	have testified on it did not come and testify. But throughout the hearing of this Commission we have been given no explanation at all of how the amount of	2 3	back to the striking mineworkers when they went on strike and thereafter. In other words when you heard the testimony of a number of mineworkers who went on strike
2 3 4	have testified on it did not come and testify. But throughout the hearing of this Commission we have been given no explanation at all of how the amount of R12 500 was arrived at, when it was decided to be an	2 3 4	back to the striking mineworkers when they went on strike and thereafter. In other words when you heard the testimony of a number of mineworkers who went on strike which came before you and you're now told that they were
2 3 4 5	have testified on it did not come and testify. But throughout the hearing of this Commission we have been given no explanation at all of how the amount of R12 500 was arrived at, when it was decided to be an appropriate figure to put up, and by whom. That failure to	2 3 4 5	back to the striking mineworkers when they went on strike and thereafter. In other words when you heard the testimony of a number of mineworkers who went on strike which came before you and you're now told that they were carefully selected so as to be a representative sample of
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	have testified on it did not come and testify. But throughout the hearing of this Commission we have been given no explanation at all of how the amount of R12 500 was arrived at, when it was decided to be an appropriate figure to put up, and by whom. That failure to furnish this Commission with that explanation is most significant because the amount demanded was significantly higher than what was put up at Impala and in fact it was an increase sought in the basic wage by approximately 150%. All that you have before you, Commissioners, is what Mr Da Costa said was communicated to him about the amount of R12 500 and in the bundle that we've given to you of our heads of argument and the attachments, if you go to page 247, it's a passage I'd like to read to you because this is the high water mark of the explanation of R12 500, it's Mr Da Costa's rendition of what was said to him and this has never been contradicted. At page 30027 on the 3rd of June you, Mr Chairman, had asked Mr Da Costa, "Did you ask them how they reached the figure of 12,5?" He says, "I did." You say to him, "What was their response?" He says, "I did, Chair, I did. I said that's a very high figure and in fact if you went to that sort of basic wage you'd be earning significantly more than some of the supervisors.	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	back to the striking mineworkers when they went on strike and thereafter. In other words when you heard the testimony of a number of mineworkers who went on strike which came before you and you're now told that they were carefully selected so as to be a representative sample of the mineworkers, what stood out in relation to each of them is at worst they did not know of the Da Costa talks at all. At best, even if they knew of the fact of those talks, they did not know of the content of those talks. Each of the workers was asked, each of the witnesses was asked about this. At page 287 in the bundle before you Mr Mabuyakhulu had stated when he was asked about the Da Costa discussions, he said at the hearing when he was asked about it that that was the first time he heard about it. Mr Phatsha in his testimony had stated that he was unaware of the Lonmin position as adopted by Mr Da Costa. In other words there was o report back on that. Mr Magidiwana, who was not an RDO, could point to nothing which suggested that he had any knowledge of those discussions, nor could he point to any report back of those discussions, nor could he point to any report back of those discussions, or where the figure had actually come from. Mr Nzuza, who had joined the strike not when it
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	have testified on it did not come and testify. But throughout the hearing of this Commission we have been given no explanation at all of how the amount of R12 500 was arrived at, when it was decided to be an appropriate figure to put up, and by whom. That failure to furnish this Commission with that explanation is most significant because the amount demanded was significantly higher than what was put up at Impala and in fact it was an increase sought in the basic wage by approximately 150%. All that you have before you, Commissioners, is what Mr Da Costa said was communicated to him about the amount of R12 500 and in the bundle that we've given to you of our heads of argument and the attachments, if you go to page 247, it's a passage I'd like to read to you because this is the high water mark of the explanation of R12 500, it's Mr Da Costa's rendition of what was said to him and this has never been contradicted. At page 30027 on the 3rd of June you, Mr Chairman, had asked Mr Da Costa, "Did you ask them how they reached the figure of 12,5?" He says, "I did." You say to him, "What was their response?" He says, "I did, Chair, I did. I said that's a very high figure and in fact if you went to that sort of basic wage you'd be earning significantly more than some of the supervisors. The reply to me was 'Well, that's, you know this is just,	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	back to the striking mineworkers when they went on strike and thereafter. In other words when you heard the testimony of a number of mineworkers who went on strike which came before you and you're now told that they were carefully selected so as to be a representative sample of the mineworkers, what stood out in relation to each of them is at worst they did not know of the Da Costa talks at all. At best, even if they knew of the fact of those talks, they did not know of the content of those talks. Each of the workers was asked, each of the witnesses was asked about this. At page 287 in the bundle before you Mr Mabuyakhulu had stated when he was asked about the Da Costa discussions, he said at the hearing when he was asked about it that that was the first time he heard about it. Mr Phatsha in his testimony had stated that he was unaware of the Lonmin position as adopted by Mr Da Costa. In other words there was o report back on that. Mr Magidiwana, who was not an RDO, could point to nothing which suggested that he had any knowledge of those discussions. None of them could tell you where the discussions, or where the figure had actually come from. Mr Nzuza, who had joined the strike not when it commenced, in fact on the day it had commenced he was going
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	have testified on it did not come and testify. But throughout the hearing of this Commission we have been given no explanation at all of how the amount of R12 500 was arrived at, when it was decided to be an appropriate figure to put up, and by whom. That failure to furnish this Commission with that explanation is most significant because the amount demanded was significantly higher than what was put up at Impala and in fact it was an increase sought in the basic wage by approximately 150%. All that you have before you, Commissioners, is what Mr Da Costa said was communicated to him about the amount of R12 500 and in the bundle that we've given to you of our heads of argument and the attachments, if you go to page 247, it's a passage I'd like to read to you because this is the high water mark of the explanation of R12 500, it's Mr Da Costa's rendition of what was said to him and this has never been contradicted. At page 30027 on the 3rd of June you, Mr Chairman, had asked Mr Da Costa, "Did you ask them how they reached the figure of 12,5?" He says, "I did." You say to him, "What was their response?" He says, "I did, Chair, I did. I said that's a very high figure and in fact if you went to that sort of basic wage you'd be earning significantly more than some of the supervisors.	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	back to the striking mineworkers when they went on strike and thereafter. In other words when you heard the testimony of a number of mineworkers who went on strike which came before you and you're now told that they were carefully selected so as to be a representative sample of the mineworkers, what stood out in relation to each of them is at worst they did not know of the Da Costa talks at all. At best, even if they knew of the fact of those talks, they did not know of the content of those talks. Each of the workers was asked, each of the witnesses was asked about this. At page 287 in the bundle before you Mr Mabuyakhulu had stated when he was asked about the Da Costa discussions, he said at the hearing when he was asked about it that that was the first time he heard about it. Mr Phatsha in his testimony had stated that he was unaware of the Lonmin position as adopted by Mr Da Costa. In other words there was o report back on that. Mr Magidiwana, who was not an RDO, could point to nothing which suggested that he had any knowledge of those discussions, nor could he point to any report back of those discussions, nor could he point to any report back of those discussions, or where the figure had actually come from. Mr Nzuza, who had joined the strike not when it

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1	Page 39001	1	Page 39003
1	evidence that he was stoned on his way and he then joined	1	dealing with a demand for R12 500, the expectation of which
2	the strike on the next day; he could point to nothing which	2	was in the minds of workers beyond RDOs.
3	suggested that he knew of the engagement between the RDO	3	If you look at the evidence, Mr Magidiwana speaks
4	representatives and Mr Da Costa at the time, or of the	4	to this and this is at page 313 of the bundle in front of
5	content of that, and then you come to the last of those	5	you, there's the portion of his evidence, if I might just
6	witnesses, Mr Mtshamba, who was an RDO. Now Mr Mtshamba	6	go to that. At page 6511 of the transcript, 11 March 2013,
7	had gone on leave at the end of July. There was no report	7	where he speaks about the fact that he too expected R12 500
8	back to him on those talks. He had simply heard from a	8	and he said when it was first said that this is not now no
9	colleague that there had been an allowance. When he came	9	longer an RDO issue but it includes every employee at
10	back on the 13th he on the next day went to the koppie,	10	Lonmin. So his evidence before you is by the time they had
11	again without knowing what the issues were at all. So he	11	gone on strike it included more than just RDOs, every
12	didn't know about the content of the talks, and his	12	employee at Lonmin, and Mr Nzuza who also testified on this
13	testimony was significant in two regards; in the first	13	at paginated page 327 of your bundle stated the following,
14	instance he believed that the issue was that Lonmin RDOs	14	he was asked about why he anticipated as a winch operator
15	were getting paid less than their counterparts at the other	15	R12 500 out of an RDO strike and he said, his testimony
16	mines. So he wasn't told that the allowance was meant to	16	was, "I know the workers who wanted that money." He was
17	bring parity and that his complaint and concern was	17	asked, "Which workers?" He says, "I was told the workers,"
18	addressed as a result of the allowance. When he, and in	18	and then he was asked, "Which category of workers?" and he
19	fact he said that with that outcome he was very happy, and	19	simply referred them to the workers. So in other words
20	those were his words. When that issue had passed him by he	20	this demand which started off by one category of workers at
21	then stated that he believed that the strike had continued	21	a single shaft had developed into a demand by all workers
22	by the time he had returned from leave on the 13th because	22	in that category, but when the strike had started it
23	the RDO allowance was limited to Karee RDOs – well, nobody	23	included workers outside of that category and it created an
24 25	had told him that the allowance was across the board. Now to the extent that it can be said that there	24 25	anticipation of such an increase for all workers across the board, and that is when one considers what Lonmin would
25	Now to the extent that it can be said that there	25	board, and that is when one considers what commit would
	Page 39002		Page 39004
1	Page 39002 was a grievance on the part of the striking mineworkers	1	Page 39004 have been confronted with at that point in time. First of
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	was a grievance on the part of the striking mineworkers		have been confronted with at that point in time. First of
2	was a grievance on the part of the striking mineworkers because Lonmin had not spoken to them at all, or had chosen	2	have been confronted with at that point in time. First of all it was confronted by a demand for an amount which was
2 3	was a grievance on the part of the striking mineworkers because Lonmin had not spoken to them at all, or had chosen not to speak to them, leaving aside the content, in other	2 3	have been confronted with at that point in time. First of all it was confronted by a demand for an amount which was not explained. Secondly it was confronted by a demand for
2 3 4	was a grievance on the part of the striking mineworkers because Lonmin had not spoken to them at all, or had chosen not to speak to them, leaving aside the content, in other words if you can divorce that grievance from what they were	2 3 4	have been confronted with at that point in time. First of all it was confronted by a demand for an amount which was not explained. Secondly it was confronted by a demand for an amount which started with one category of workers at one
2 3 4 5	was a grievance on the part of the striking mineworkers because Lonmin had not spoken to them at all, or had chosen not to speak to them, leaving aside the content, in other words if you can divorce that grievance from what they were going to talk about, then the fault of that would appear to	2 3 4 5	have been confronted with at that point in time. First of all it was confronted by a demand for an amount which was not explained. Secondly it was confronted by a demand for an amount which started with one category of workers at one shaft. It was then met, having given its response to that,
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1	Page 39005	1	Page 39007
1	three passages because it cropped up three times in his	1	the first instance he said he wanted parity with workers at
2	evidence. The first appears at page 328 of the paginated	2	other mines and when he was asked whether he would have
3	bundle put before you. In the transcript it's the 28th of	3	been happy with that he said very happy. Well, that's what
4	August 2014 at page 35991 when I asked him, "So if I	4	the RDO allowance had given to him. In the second instance
5	understand you correct, what the workers were waiting for a	5	he said when he did come back from leave and join the
6	response to when they would get the money they were	6	strike he knew nothing about the discussions, he didn't
7	demanding?" He says, "Yes, that's what I'm saying." I	7	know why they were on strike. He went there because they
8	then said to him, "And that is what they wanted, a report	8	were on strike and he thought, because he was told, that
9	back on when they would get the money?" and he says, "Yes,	9	the strike was because the other RDOs, in other words those
10	that's what they wanted." The issue then cropped up again	10	who were not at Karee, were not given the RDO allowance.
11	at paginated page 329, transcript 28 August 2014, page	11	Now he was wrong in every respect. So for him to come and
12	35997, starts at line 22, and what's significant about this	12	say that he could say that the workers would happily have
13	is this cross-examination came after we were shown the	13	engaged on different terms with Lonmin management, they
14	video footage of various members from amongst the strikers	14	didn't want the 12 and a half thousand at that stage, you
15	addressing the group of strikers at the koppie. So a whole	15	can't take that evidence anywhere because he didn't know
16	number of them spoke and I then said to him, I put the	16	the issues of the strike. He came in quite late in the day
17	following to him, I said, "Is it fair to conclude from what	17	and he didn't even know about the Da Costa discussions.
18	we were shown, from all those video clips that there were	18	That then leaves you in relation to the amount of
19	two non-negotiables for those of you who were on the koppie	19	R12 500 with three fundamental issues. The first is it's a
20	at the time, the strikers? The first was that you wanted	20	figure which was not only fundamentally higher than the
21	Lonmin management to come to the koppie and the second was	21	Impala demand, but it was also unexplained. You don't know
22	that you wanted your demand for payment of R12 500 to be	22	where it came from, how it came, and on what basis it was
23	met?" He says, "Yes, that's what we wanted," and I then	23	presented.
24	put to him, "And if you didn't get what you wanted the	24	The second is that having initially started as an
25	strike would have continued?" and he says, "Yes, I've	25	RDO demand by Karee RDOs it had by the time the strike had
1	Page 39006	1	Page 39008
1	already said so." In other words from their perspective	1	commenced on the 9th of August and throughout the period
2	already said so." In other words from their perspective there was absolutely no evidence to suggest from those who	2	commenced on the 9th of August and throughout the period under investigation by this Commission spread to workers
2 3	already said so." In other words from their perspective there was absolutely no evidence to suggest from those who had spoken that they were negotiable on that. In fact on	2 3	commenced on the 9th of August and throughout the period under investigation by this Commission spread to workers other than RDOs. In other words it was now not only an RDO
2 3 4	already said so." In other words from their perspective there was absolutely no evidence to suggest from those who had spoken that they were negotiable on that. In fact on the contrary they stated in direct terms that they were	2 3 4	commenced on the 9th of August and throughout the period under investigation by this Commission spread to workers other than RDOs. In other words it was now not only an RDO issue, it has gone well beyond that, and the third and most
2 3 4 5	already said so." In other words from their perspective there was absolutely no evidence to suggest from those who had spoken that they were negotiable on that. In fact on the contrary they stated in direct terms that they were non-negotiable. He emphasises this again at page 36075 on	2 3 4 5	commenced on the 9th of August and throughout the period under investigation by this Commission spread to workers other than RDOs. In other words it was now not only an RDO issue, it has gone well beyond that, and the third and most important is that the strikers from their perspective, and
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1	Page 39009 MR BHAM SC: And he was talking of the	1	Page 39011 adjournment, and then we –
	5	2	-
2 3	rule of law. He's dealt with the topic fully where there	2	MR BHAM SC: Yes. CHAIRPERSON: Sorry, I'll get it right
	was a suggestion of what strikers might, or workers might have perceived Lonmin to be doing during the Da Costa		the second time. We'll take the lunch adjournment and
4 5	discussion. So he's dealt with it fully –	4 5	we'll resume at quarter to 2.
	-	_	-
6		6 7	MR BHAM SC: Thank you very much. [COMMISSION ADJOURNS COMMISSION RESUMES]
7	6		-
8	CHAIRPERSON: Would they have thought,	8 9	[13:51] CHAIRPERSON: The Commission resumes, Mr Bham.
9	perceived –	-	
10	MR BHAM SC: Ja.	10	MR BHAM SC: Thank you, Commissioners.
11	CHAIRPERSON: - Lonmin has negotiated	11	The next topic that I want to go onto is dealt with in our
12	with them. That is the point he dealt with very fully.	12	replying heads at page 856 and that's the shooting of 10
13	MR BHAM SC: I can just make one further	13	August 2012, page 856. The topic commences at paragraph 33
14	observation to what has already been stated in that regard	14	and is dealt with until paragraph 36. The reason we deal
15	and that is this; from the workers who had come to testify	15	with the topic is because what is said by the evidence
16	they had all said without fail that they had received no	16	leaders in relation to that incident. Now you'll recall
17	report back on the Da Costa talks. They either were	17	the incident very briefly. It's an incident Mr Botes had
18	unaware of the fact of those talks or at the very least	18	spoken to when on the evening of the 10th of August they
19	were unaware of the content of those talks. They didn't	19	discharged their firearms with rubber bullets and teargas
20	know what Lonmin had communicated, how those talks went,	20	in order to disperse a group of people who they said were
21	and the like. Now you simply cannot have a perception if	21	intimidating people who were on their way to work. The
22	you are amongst that group of strikers of what Lonmin was	22	evidence leaders say the following at paragraph 1217 of
23	doing or what Lonmin objectively was communicating if you	23	their heads of argument. They say "The shootings that
24	didn't know of the existence of that communication or the	24	occurred on the evening of the 10th by Lonmin security
25	content of that communication.	25	personnel which are addressed elsewhere in these
	Page 39010		D 20010
	1 age 37010		Page 39012
1	We're now no longer talking in the early days	1	submissions were not adequately explained by Lonmin. We
1 2		1 2	
	We're now no longer talking in the early days		submissions were not adequately explained by Lonmin. We
2	We're now no longer talking in the early days when you could put probabilities in anticipation of	2	submissions were not adequately explained by Lonmin. We submit that Lonmin had failed to place any facts before
2 3	We're now no longer talking in the early days when you could put probabilities in anticipation of something being said. We're talking at the conclusion of	2 3	submissions were not adequately explained by Lonmin. We submit that Lonmin had failed to place any facts before this Commission except for the bland allegations that the
2 3 4	We're now no longer talking in the early days when you could put probabilities in anticipation of something being said. We're talking at the conclusion of these hearings. We're talking at a stage when all of the	2 3 4	submissions were not adequately explained by Lonmin. We submit that Lonmin had failed to place any facts before this Commission except for the bland allegations that the strikers were intimidating workers to show that the
2 3 4 5	We're now no longer talking in the early days when you could put probabilities in anticipation of something being said. We're talking at the conclusion of these hearings. We're talking at a stage when all of the evidence has been led and when I had raised the objections	2 3 4 5	submissions were not adequately explained by Lonmin. We submit that Lonmin had failed to place any facts before this Commission except for the bland allegations that the strikers were intimidating workers to show that the shooting incidents on the evening of 10th August were
2 3 4 5 6	We're now no longer talking in the early days when you could put probabilities in anticipation of something being said. We're talking at the conclusion of these hearings. We're talking at a stage when all of the evidence has been led and when I had raised the objections which my learned friend Mr Burger had referred you to about	2 3 4 5 6	submissions were not adequately explained by Lonmin. We submit that Lonmin had failed to place any facts before this Commission except for the bland allegations that the strikers were intimidating workers to show that the shooting incidents on the evening of 10th August were justified." They then say "On this basis and in light of
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10th November 2014

Marikana Commission of Inquiry

Pretoria

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1	comes and says that which occurred at Impala also	1	what Mr Botes had to say about acts of intimidation? The
2	characterised the events of the 10th of August. They say to	2	answer to that is no. We know there was a background of
3	you it's a bland statement. Now you can't have it both	3	Impala, we know what happened there and you're being urged,
4	ways, it's one way or the other.	4	in relation to that background, to have regard to the
5	CHAIRPERSON: But why were the entries	5	nature of violence which occurred at that strike. Now if
6	about that incident removed from the occurrence book? And	6	that had happened at Impala and you're being asked to take
7	why did Mr Botes, in his evidence, transfer them to the	7	into account that background why is it improbable that
8	11th?	8	there was a similar occurrence of intimidation on the
9	MR BHAM SC: Sorry I missed the second	9	night. The third aspect is yes Mr Botes did say he heard,
10	part of the question.	10	but what you do know is that on the day there were
11	CHAIRPERSON: I think it was Mr Botes in	11	incidents of unrest and intimidation. How do you know
12	his statement described those events, but put them on the	12	that? Quite independently of what Mr Botes has said you've
13	11th and there was a fair amount of circumstantial evidence	13	got to look at the cross-examination of Major Govender, an
14	in the statement which made it appear that it was indeed	14	aspect which has been left out in the manner in which the
15	the 11th when these things happened. In a later, a very	15	evidence leaders have assessed Major Govender. Let's do
16	late stage the - in the affidavit say oh dear he's made a	16	that because you'll find that three critical aspects comes
17	mistake, these things happened on the 10th. No explanation	17	from his evidence. The first is that he stated and he
18	really as to how he made that mistake. When you read that	18	spoke to –
19	together with two other, the one I've mentioned, namely,	19	CHAIRPERSON: This is paragraph 35 of
20	the omission from the occurrence book and secondly the fact	20	your –
21	that Mr Sinclair who was also to some extent on the 10th	21	MR BHAM SC: Yes but if you look at the
22	doesn't mention it at all in his statement. Now why do we	22	transcript, on the 14th of August, page 35090, there are
23	have those factors?	23	three points I'm going to make about this. The first is he
24 25	MR BHAM SC: You're absolutely right in	24 25	spoke to an email he received on that evening from the
25	relation to raising the questions on the deletion in the	25	police reporting on events which occurred on that evening.
	Page 39014		Dama 2001/
			Page 39016
1	occurrence book and Mr Sinclair has said. Let me state it	1	Now this quite independent of anything which Sinclair did
1 2	6	1 2	Now this quite independent of anything which Sinclair did and which Botes spoke to. So it's an outside source
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2	occurrence book and Mr Sinclair has said. Let me state it clearly now because there is criticism about that, Mr Sinclair was responsible for deleting items from the occurrence book wrongly, incorrectly and I'm not going to	2	Now this quite independent of anything which Sinclair did and which Botes spoke to. So it's an outside source talking about what occurred on the day. And that email which came from within police sources said to Mr Govender
2 3	occurrence book and Mr Sinclair has said. Let me state it clearly now because there is criticism about that, Mr Sinclair was responsible for deleting items from the occurrence book wrongly, incorrectly and I'm not going to defend that. He was just wrong in doing that. We found	2 3	Now this quite independent of anything which Sinclair did and which Botes spoke to. So it's an outside source talking about what occurred on the day. And that email which came from within police sources said to Mr Govender who said he had no reason to doubt it, the following.
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1 1	Page 39017	1	Page 39019 Burger, had referred to the schizenbranic criticism of
1	happens on a path where people who wish to go to work would have to page. That's the second aspect. The third aspect	1	Burger, had referred to the schizophrenic criticism of
2	have to pass. That's the second aspect. The third aspect relating to why he did not agree with Botes on taking	2	Lonmin is we're damned if we do and we're damned if we don't. If they had done nothing and that very group of
3		3	
4	action to disperse of them. He admitted eventually that he	4	people had assaulted people going to work we would have
5	did not have any training to manage a crowd control. In	5	been criticised for not having prevented that. Because we
6	other words assessing the situation was beyond the ambit of	6	urge a measure to prevent the assault of other people,
7	his training. So what do you have from that, you have from	7	having assessed the situation which by all accounts
8	that yes the completely unsatisfactory and unjustifiable	8	objectively would appear to be an unusual situation where a
9	conduct on the part of Sinclair regarding the deletion from	9	group of people are standing for a purpose they couldn't
10	the occurrence book. There's no question about that, but	10	explain. And you acted in order to prevent people who wish
11	does that mean the incident didn't occur and does that mean	11	to go to work or who were coming away from work from being
12	the discharge of the firearm was unjustified? It cannot	12	assaulted, you're criticise for that.
13	mean that because you've got independent evidence of a	13	CHAIRPERSON: What inference do you draw
14	report of unrest on the day where workers who were coming	14	from the deletion of the entries and the fact that Botes
15	away from work were assaulted. You've got the confirmation	15	transfers this to the following night? If you apply the
16	by Major Govender of a group of people who were standing in	16	balance of probabilities standard would it be – I'm not
17	a very strange place you might say on a Friday evening	17	asking this as a rhetorical question, I'm just asking for
18	armed with knobkerries. One might ask why and giving an	18	information, would it be appropriate to draw an inference
19	explanation which didn't make sense. And you've got Major	19	that what Sinclair was trying to hide was that there had
20	Govender's final concession that his training did not	20	been an excessive reaction, over vigorous reaction by
21	permit him to assess the situation at that point in time.	21	Lonmin in dealing with the situation?
22	So we would submit to you, Commissioners, that you simply	22	MR BHAM SC: It was made the first point
23	cannot disregard what Botes says about the fact of the	23	what Sinclair – it wasn't the only entry he deleted. On
24	occurrence and why the firearm was discharged. And that	24	every occasion when firearms were discharged he deleted
25	what he says is supported by what Major Govender had	25	that. Now his motivation behind that appeared to be to
1	Page 39018 conceded during his cross-examination, cross-examination	1	Page 39020 delete all those references. So not to justify whether it
2	which is entirely omitted in reference in the assessment by	2	was an over reaction or under reaction, the mere fact that
3	the evidence leaders of the situation.	3	there was a reaction he sought to delete. And as I said
4	COMMISSIONER HEMRAJ: Mr Bham, what do	4	-
5			You simply cannot condone him tor doind that. We have not
	You make of the fact that Major Govender didn't see the	5	you simply cannot condone him for doing that. We have not sought to do so and we say you can't do that. But against
	you make of the fact that Major Govender didn't see the crowd or the group of people in possession of any sharp	5 6	sought to do so and we say you can't do that. But against
6	crowd or the group of people in possession of any sharp	6	sought to do so and we say you can't do that. But against that before you draw any inferences, when you draw
6 7	crowd or the group of people in possession of any sharp weapons?		sought to do so and we say you can't do that. But against that before you draw any inferences, when you draw inferences you draw inferences on the totality of the
6	crowd or the group of people in possession of any sharp weapons? MR BHAM SC: No you're absolutely right,	6 7	sought to do so and we say you can't do that. But against that before you draw any inferences, when you draw inferences you draw inferences on the totality of the facts. Amongst the totality of the facts is that there
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1	Page 39021 deletion and whose activity in deleting items was not	1	Page 39023 CHAIRPERSON: These aren't people who
2	restricted to that particular issue –	2	alleged that they were attacked by intimidating strikers.
3	CHAIRPERSON: I'm not seeking to draw any	3	MR BHAM SC: No, no we may be at cross
	inferences, I'm just asking what inferences can be drawn	4	purposes, those would have been in relation to people who
4			
5	and it may be that there are two inferences you can draw.	5	were shot at on the day. Now there are a couple of things.
6	The first inference is the strikers were behaving	6	First of all they don't draw the nexus between that
7	inappropriately, intimidating people who wanted to go to	7	incident as you say and secondly there was not evidence led
8	work and the second inference you may draw is that the	8	at this Commission about the nature of their injuries and
9	response of Lonmin to that situation was excessive which is	9	the extent of the shooting which would suggest that you can
10	why Botes moved it to the Saturday night and Sinclair	10	draw an inference of the excessive use of force. In other
11	removed that entry together with others. But I'm not	11	words we're sitting now with the Commission which has sat
12	saying one must draw an inference, I'm not seeking to draw	12	for just on two years with extensive evidence having been
13	any inference, I'm just asking you for assistance on what	13	lead, with time having been given for evidence to be led in
14	inferences, if any, can be drawn.	14	order to allow us to draw inferences from facts put before
15	MR BHAM SC: I'll try to do that. In	15	the Commission. To draw inferences from facts which are
16	relation to the inference you mentioned, the second of the	16	not before the Commission is to draw inferences from
17	two inferences which is whether it was excessive conduct or	17	speculation when you've got the facts, when you've got the
18	not then I move points to make. First of all you've heard	18	facts. And so consequently in relation to that incident I
19	not testimony from anybody who's come to say that the	19	would submit to you that only is there insufficient
20	extent of the shooting was excessive in relation to what we	20	evidence to draw an adverse inference against the incident
21	had done. The second is you've not heard any evidence of	21	of shooting on the day, of course you can comment and you
22	people who had sustained any injuries of a nature as a	22	should about the deletion from the occurrence book because
23	result of that conduct which would suggest excessive	23	it is just unacceptable. But what you can't do is
24	injuries or rather excessive conduct on the part of Lonmin.	24	translate that into an inference to be drawn against the
25	And the third thing and we go back to that is all of the	25	incident having occurred and the justification for the
	Page 39022		Page 39024
1	Page 39022 objective evidence points to the fact that there were a	1	Page 39024 incident. Nor is there sufficient for you to draw an
1 2		1 2	
	objective evidence points to the fact that there were a		incident. Nor is there sufficient for you to draw an
2	objective evidence points to the fact that there were a group of people with intent at that point in time. And	2	incident. Nor is there sufficient for you to draw an inference about any excessive force. May I then go onto
2 3	objective evidence points to the fact that there were a group of people with intent at that point in time. And that intent was not a pleasant intent towards people who	2 3 4	incident. Nor is there sufficient for you to draw an inference about any excessive force. May I then go onto the next topic and this is dealt with in our replying heads
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	Page 39025		Page 39027
1	away from the strike, a very simple, trite proposition of	1	President, Mr Ramaphosa, to characterise that conduct as
2	human nature I'll put to you, that if I ask you for	2	criminal is just amazing, frankly. The manner in which
3	something legitimate, but I come and punch you on the nose	3	certain people had conducted themselves, the hard evidence
4	in order to try to get it. You may examine the legitimacy	4	of what had happened from the 10th onwards, you simply
5	of my request on the one hand, but you're going to take	5	cannot, you cannot characterise that conduct and its
6	very unkindly to that bleeding nose on the other hand. Now	6	outcome in any other manner. At the very least it's a fair
7	I put a simple example and I don't put it facetiously, the	7	characterisation and doesn't justify the criticism of that
8	simple point is that when the events were characterised as	8	characterisation.
9	criminal they were characterised as criminal because of	9	The next issue that I would like to deal with is
10	unfolding events and the conduct in the process. By that	10	at page 859 of our heads of argument and that goes to the
11	stage Mr Fundi and Mr Mabelane were killed.	11	capacity of Lonmin Security. Now in this regard there were
12	[14:11] We have seen photographic evidence of their	12	a number of matters which were dealt with in respect of
13	bodies, it was gruesome, it was brutal. By that stage Mr	13	which Lonmin Security was criticised and the essence of the
14	Mabebe and Mr Langa were killed. Questions still remain	14	criticism was that you were inadequately equipped to deal
15	about precisely who had killed them, but it seems to be	15	with the events which unfolded and consequently
16	generally accepted that they were killed from people who	16	inadequately equipped to deal with injuries to persons who
17	were amongst the group of strikers. In other words there	17	were injured in that period. When I say persons who were
18	was conduct from people amongst the group of strikers which	18	injured I'm talking of between the 9th and the 13th when Mr
19	had moved from legitimate, a legitimate manner to advance a	19	Mabelane, Mr Fundi, Mr Langa and the like, and Mr Mabebe
20	demand to an unlawful and criminal manner in advancing the	20	were killed, and all of that is because you failed in a
21	demand. That doesn't make the demand criminal, it makes	21	broader duty you might have had. That entire debate in the
22	the manner in which it is being done criminal.	22	first instance overlooked evidence given by Mr Blou which
23	CHAIRPERSON: The flipside of course the	23	wasn't challenged, and that evidence was that in 2005 a
24	possession by a significant number of strikers of dangerous	24	process had commenced for Lonmin to demilitarise its
25	weapons which in itself –	25	operations. In other words to move from dealing with
	Page 39026		Page 39028
1	MR BHAM SC: Well, there's more than	1	events on this scale to dealing with crime and the like on
2	that –	2	a lower level. So if the question is asked was Lonmin
3	CHAIRPERSON: - in itself is an offence		
4		3	equipped to deal with the events as they unfolded, the
	and they were engaging in public gatherings, armed with	4	answer is obviously not. They weren't.
5	these dangerous weapons. That in itself is an offence,		answer is obviously not. They weren't. But the question cannot stop there. Lonmin, and
5 6	these dangerous weapons. That in itself is an offence, wasn't it? So it's not correct to say that this	4	answer is obviously not. They weren't. But the question cannot stop there. Lonmin, and the question that should be asked is ought Lonmin to have
5	these dangerous weapons. That in itself is an offence, wasn't it? So it's not correct to say that this unprotected strike was not accompanied by criminality.	4 5	answer is obviously not. They weren't. But the question cannot stop there. Lonmin, and the question that should be asked is ought Lonmin to have been in a position from a security perspective to deal with
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1	Page 39029	1	Page 39031 MR BHAM SC: Can I deal with both of
1	thought well motivated requests – by their own security staff to give them extra equipment which would enable them	2	those aspects? In relation to the first one the principle
2	to protect the workers, and in particular to protect the	2	that it's a duty of the employer to protect a safe working
4	security guards. I don't know that the argument goes so	4	environment, one would hope that every employer does so,
5	far as to suggest that Lonmin should have turned their	5	whether it's in a small household context or it's a larger
	mining premises into an armed camp. The main thrust of the		factory context. But you've got to ask yourself what the
6		6	
7	criticism is their own security people foresaw the need to have armoured vehicles and certain other equipment to	7 8	limits of that protection are. Let's take it at its lowest. I'm an employer in a household context. I've got
8			
9	protect the security staff who would be performing the	9	staff working for me. The best I can do is to employ armed
10	functions of protecting the ordinary staff, and that was	10	reaction, perhaps a security guard in the street and the
11	turned down and the impression gained is that the board	11	like. Am I expected to do more than that? If my home is
12	preferred to expose their security people to the risk of	12	then invaded by five or six armed people and in that
13	being killed or seriously injured rather than to depart	13	context there's inadequate security, have I failed in my
14	from, even to the extent request depart from the policy of	14	duty? Am I meant – how far am I meant to go in the
15	demilitarisation which had been adopted I think in a	15	provision of that? On the fact of this case it is one
16	slightly different security environment in 2005. I'm not	16	thing to state a bland statement of an employer's
17	saying that's a good argument, but I'm just putting to you	17	obligation. It is quite another thing to apply that
18	my understanding of the case that you have to answer on	18	statement to what occurred in this instance because then
19	this point.	19	you would have to say that in this instance there was an
20	MR BHAM SC: I'm quite fortunate that the	20	obligation on Lonmin to have sufficient security to have
21	part that one of the persons involved in that SCA case is	21	protected everybody in its premises, some 38 square metres,
22	sitting next to me and he's just told me that the SCA case	22	against the type of incidents and in the circumstances
23	was directed towards protection of workers against acts of	23	which prevailed at this point in time.
24	sexual harassment. But let's assume it goes slightly	24	CHAIRPERSON: No, no, Mr Bham, that's not
25	wider –	25	the point that you have to answer. The point you have to
	Baga 20020		Dago 20022
1	Page 39030 CHAIRPERSON: No, but the principle –	1	Page 39032 answer deals with the failure to provide adequate equipment
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1	Page 39033	1	Page 39035
1	for repeatedly, and you heard Mr Blou and a number of other	1	they did nothing other than going to alert NUM, and in fact
2	people say, which included hard-skin vehicles, as it was	2	during the cross-examination of one of our witnesses the
3	referred to here.	3	question was raised well why didn't you try to do anything
4	There are a number of aspects to that. The first	4	more to stop these marchers from going to the NUM offices
5	aspect to that is in relation to what occurred here,	5	where all the records and the like were kept. The
6	because you've got to ask yourself firstly the criticism	6	difficult truth, and it is the difficult truth because two
7	arises from the deaths of Messrs Fundi and Mabelane, tragic	7	Lonmin employees were tragically killed on that day, is
8	circumstances, so that criticism and that issue can't go to	8	that there are instances in which members of security
9	the deaths of Mr Mabebe and Mr Langa. It goes to Mr – and	9	forces in situations of this sort are at risk precisely
10	now you've got to ask yourself what the evidence was before	10	because of what they're confronting. They're the first
11	you in that regard. Let's start off with your question,	11	line of their defence. Yes, it would have been very good
12	but I want to go beyond that to look at the evidence as	12	for the security staff and they still want it, they've been
13	well because we can't ignore the evidence in this regard.	13	asking for it time and again, to have had better equipment
14	In the first instance, yes, it is true that the	14	and hard-skin vehicles. Would that on the facts of this
15	Lonmin Security personnel had asked for better equipment,	15	case at that point in time have yielded a different result?
16	more sophisticated equipment, and even hard-skin vehicles.	16	You can't come to that conclusion.
17	It is also true that Lonmin made a business decision and	17	So in other words you can criticise Lonmin for
18	did not provide them. But in relation to the deaths of	18	not having had hard-skin vehicles. You've got to ask
19	Messrs Fundi and Mabelane you've got to ask yourself the	19	yourself how many hard-skin vehicles, used by whom. Do you
20	question because that question only arises as a result of	20	need it in addition to what you've contracted for with Coin
21	their deaths, their tragic deaths, and in the attempt to	21	Security? All of those questions remain unanswered in the
22	suggest that if Lonmin had done something differently in	22	bland statement that if they had Nyalas and if they had
23	that regard a different result might have eventuated.	23	different type of clothing there would have been a
24	Now there are a couple of aspects to that. You	24	different result. Regrettably in this instance that
25	can't ignore the evidence of the very security people who	25	criticism serves only to do one thing and that is to shift
	Page 39034		Page 39036
1	spoke to the need for more security equipment, who said	1	focus from the true cause of the deaths of Mr Mabelane and
2	spoke to the need for more security equipment, who said that they had never previously experienced a situation	2	focus from the true cause of the deaths of Mr Mabelane and Mr Fundi, and that is the violent conduct on the part of
	spoke to the need for more security equipment, who said that they had never previously experienced a situation where if they stood in front of oncoming workers who were		focus from the true cause of the deaths of Mr Mabelane and Mr Fundi, and that is the violent conduct on the part of certain people who they tried to stop, who they called out
2 3 4	spoke to the need for more security equipment, who said that they had never previously experienced a situation where if they stood in front of oncoming workers who were on strike and asked them to disperse they were met with a	2 3 4	focus from the true cause of the deaths of Mr Mabelane and Mr Fundi, and that is the violent conduct on the part of certain people who they tried to stop, who they called out to stop, and who attacked them and left them in the state
2 3	spoke to the need for more security equipment, who said that they had never previously experienced a situation where if they stood in front of oncoming workers who were on strike and asked them to disperse they were met with a violent reaction.	2 3	focus from the true cause of the deaths of Mr Mabelane and Mr Fundi, and that is the violent conduct on the part of certain people who they tried to stop, who they called out to stop, and who attacked them and left them in the state we saw, we were subjected to those photographs. That was
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1	events had occurred. It is true, and in fact we saw from	1	when you knew it might happen at other areas, but what was
2	Mr Nzuza's evidence when he tried to downplay the reason	2	the extent of your resources to protect each of those
3	for them marching towards the shaft on that day, it is true	3	areas.
4	that there was the possibility of elements from amongst the	4	The final aspect I want to deal with is dealt
5	strikers heading towards other shafts. The question that	5	with by reference to an extensive quote in our replying
6	you've got to ask yourself is given that the Lonmin	6	submissions –
7	Security staff was in total 60 people, and given where the	7	COMMISSIONER HEMRAJ: Just before you
8	focal point of the problem was at that point, which had	8	move on, the ICAM report identifies other areas that Lonmin
9	already completely stretched that limited resource, what	9	itself admits they felt short, not related to capacity.
10	more could have been done at that point in time? Now you	10	What do you say about that?
11	could ex post facto say they should have employed more	11	MR BHAM SC: No, there are two aspects.
12	security guards, they should have had more contractors and	12	Remember when they talk of having fallen short, not
13	the like, but the reality of the matter is, Commissioner	13	relating to capacity, they're talking of having fallen
14	Hemraj, they were not equipped to deal with an outbreak of	14	short in a number of respects which have not been raised as
15	violence and attacks at that level over the whole mine,	15	being related to the cause of any of the deaths. In others
16	which is extensive. In other words you ask the question	16	words what I'm dealing with is where the death did occur,
17	about K3 Shaft – K4, my apologies, about K4 Shaft. At that	17	because those are the facts and that's the ambit of the
18	point in time you probably have found a similar limited	18	investigation, in this instance the death at K4, and the
19	security presence at a number of other operational areas	19	issue in relation to K4 was the limited security personnel.
20	which were away from where the koppie was and the central	20	In other words those aspects you refer to, Commissioner
21	focal point. If you were to suggest that they ought to	21	Hemraj, which the ICAM report referred to as having been
22	have beefed up security at K4 Shaft, first question is to	22	inadequate are not aspects which in any way arise in the
23	what extent, what would have prevented it, and it could not	23	debate about the number of people who were at K4 at the
24	have been limited to K4 Shaft. It would have been across	24	time.
25	the operational areas, and now you begin to get again into	25	COMMISSIONER HEMRAJ: Yes, but moving
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			1 age 37040
1	the debate of how extensive a security ought they to have	1	away from K4, the other criticisms that arise in the ICAM
1 2	provided at that point in time. Is the obligation on them	1 2	away from K4, the other criticisms that arise in the ICAM report, what do you say about those? I'd be obliged if
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	Page 39041		Page 39043
1	deaths of persons and injuries to persons I'm not aware of	1	services were maintained, then the prospect of closing the
2	any aspect of that ICAM report which becomes relevant in	2	mine down at that point in time was not only impractical,
3	respect of the deaths that we're looking at, and that's why	3	but impossible in that time period, impossible without
4	I don't make the submission. And if I'm wrong on that,	4	creating substantial environmental concerns in relation to
5	Commissioner Hemraj, perhaps I'll be pointed to a specific	5	water pumping, concerns such as explosions because of the
6	instance, but I'm not aware, and that's why we've focussed,	6	methane build-up. So it simply was not possible.
7	we've tried to focus - a lot has been said in this	7	He spoke in addition to the financial
8	Commission, there's been a lot of evidence, there's been a	8	implications of closure and again that aspect was not
9	lot of references in many exhibits that have been put up.	9	challenged. So the first part of closure of the mine and
10	We've tried to focus on what the terms of reference of this	10	the fact that some people would have had to work was dealt
11	Commission are in order to assist the Commission in what	11	with by him in a manner which was not challenged.
12	it's got to deal with and that's why, I'm not aware, and if	12	The second part is if you were in those
13	there's something specific perhaps it will be drawn to my	13	circumstances in response to the growing conduct on the
14	attention, but I'm not aware of the causal link between any	14	part of those who were on strike to close the mine, you're
15	of those other shortcomings and the matters being	15	simply sending out a message for the future that the more
16	investigated by the Commission.	16	unruly the behaviour becomes, the greater the onus is
17	Sorry, may I go to the last issue that I'm going	17	placed on the employer in order to close down its
18	to deal with, and that's dealt with at page 861 of our	18	operations.
19	replying heads of argument, paragraph 49 onwards, and this	19	The final aspect was the criticism for Lonmin
20	deals with the failure to close the mine. There's a subtle	20	having put out the message encouraging people to go to
21	nuance, the additional issue, and that was a criticism	21	work. Now there are two aspects that I want to, or two
22	about having positively called on people to go to work.	22	submissions I want to make in that regard. The first is
23	Let's deal with the first issue and that's the	23	that it has to be implied in that criticism that Lonmin
24	failure to close the mine. Now we've quoted extensively in	24	ought to have kept quiet and therefore by its silence
25	paragraph 50 of our heads of argument the passage from Mr	25	discouraged people from going to work. Of course that's
	Page 39042		Page 39044
1	Page 39042 Seedat's evidence, which was not challenged, and that was	1	Page 39044 the same as closure. That's the same as saying you ought
1 2	6	1 2	
	Seedat's evidence, which was not challenged, and that was		the same as closure. That's the same as saying you ought
2	Seedat's evidence, which was not challenged, and that was first of all the time period within which the mine could	2	the same as closure. That's the same as saying you ought to have closed.
2 3	Seedat's evidence, which was not challenged, and that was first of all the time period within which the mine could have been closed, it would have taken us out of the 9th to	2 3	the same as closure. That's the same as saying you ought to have closed. The second aspect to that in relation to the
2 3 4	Seedat's evidence, which was not challenged, and that was first of all the time period within which the mine could have been closed, it would have taken us out of the 9th to the 16th in any event. Secondly the practicalities of	2 3 4	the same as closure. That's the same as saying you ought to have closed. The second aspect to that in relation to the items that the Commission is investigating is that there is
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Marikana Commission of Inquiry

	Dogo 2004E		Dogo 20047
1	Page 39045 CHAIRPERSON: I notice you didn't ask	1	Page 39047 The preliminary report puts it clearly that the
2	your attorney, you only asked your leader. Yes, thank you,	2	Lonmin has failed in its social labour plans in the
3	Mr Burger and Mr Bham, for the arguments on behalf of	3	providing of housing since 2007. Lonmin has provided some
4	Lonmin. Thank you. Do we have – who is going to speak on	4	justification for not doing that, but our criticism is
5	behalf of the Mabebe, Mabelane and Langa families? Yes, Mr	5	basically, is directed at the government because in terms
6	Ramphele, and we've also got the Bapo Ba Mogale, do they	6	of section 26 of the Constitution there's a duty on
7	want to go first? Mr Ramphele, have you come to terms with	7	government to provide housing and to ensure that there's
8	your learned friends from Bapo Ba Mogale as to who's going	8	progressive realisation of the right to housing. The
9	to speak first?	9	report suggests that there's been an interview with the
10	-	10	local municipality, which in terms of the housing laws is
10	5		
	them to go first is because there are some of the issues	11	the responsible organ of State for development of housing
12	that have been raised by Lonmin and in which I have to	12	and development of townships. The Director of
13	confer with my brother –	13	Infrastructure at Madibeng Municipality suggests that
14	CHAIRPERSON: So you'd like the Bapo Ba	14	there's not sufficient funding, as well as the suggestions
15	Mogale Community –	15	also that the municipality in Rustenburg doesn't have
16	MR RAMPHELE: To go first, yes.	16	sufficient funding to provide housing. The report creates
17	CHAIRPERSON: - representatives to speak	17	a bleak scenario in the sense that there's no water,
18	first?	18	sufficient water, there's not sufficient roads, not
19	MR RAMPHELE: Thank you.	19	sufficient health care, and all of that is indicative of,
20	CHAIRPERSON: Yes, please put your name	20	or normally associated with poverty.
21	on record, Sir.	21	Now the report also suggests that associated with
22	MR DEWRANCE: Thank you, Commissioner.	22	the socioeconomic problems which are referred to also,
23	My name is Myron Dewrance, I'm from the Johannesburg Bar.	23	there's an increase in drug problems. There's an increase
24	I appear with my learned colleagues Naidoo and Boudle.	24	of abuse against women and children and the unemployment
25	CHAIRPERSON: Thank you.	25	levels are hovering at 74% in the communities. In fact in
	Page 39046		Page 39048
1	Page 39046 MR DEWRANCE: Mr Commissioner –	1	Page 39048 Segwaelane the migrants outnumber the local Bapo Ba Mogale
1 2		1 2	
	MR DEWRANCE: Mr Commissioner –		Segwaelane the migrants outnumber the local Bapo Ba Mogale
2	MR DEWRANCE: Mr Commissioner – CHAIRPERSON: I think it will be helpful	2	Segwaelane the migrants outnumber the local Bapo Ba Mogale by 20 to 1. So this is a recipe for disaster and it
2 3	MR DEWRANCE: Mr Commissioner – CHAIRPERSON: I think it will be helpful if you spelt your surname for the benefit of the	2	Segwaelane the migrants outnumber the local Bapo Ba Mogale by 20 to 1. So this is a recipe for disaster and it appears to us that the local government has done very
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2 3 4 5	MR DEWRANCE: Mr Commissioner – CHAIRPERSON: I think it will be helpful if you spelt your surname for the benefit of the transcribers. MR DEWRANCE: D for Daniel, E-W-R-A-N-C-	2 3 4 5	Segwaelane the migrants outnumber the local Bapo Ba Mogale by 20 to 1. So this is a recipe for disaster and it appears to us that the local government has done very little – I wouldn't say nothing, our written submission says nothing, but I would say very little because there is
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	Daga 20040		Dogo 20051
1	Page 39049 established to address the issues raised in the report and	1	Page 39051 raised. Mr Ramphele.
2	also the relevant replies made to this report, and that's	2	MR RAMPHELE: Thank you, Chair.
3	basically, Commissioners, our participation and our	3	CHAIRPERSON: I don't know what I called
4	submissions in this respect. If there's any questions	4	upon you as Mr Gumbi. Mr Gumbi of course has addressed us
5	we'll be glad to field them.	5	earlier this morning and last week and I don't know what
6	CHAIRPERSON: Thank you. No, thank you,	6	day it is with the Commission, but I'm sorry. I'm not sure
7	we have no questions. What you've said is very clear and	7	whether Mr Gumbi's cross or you're cross with the mistake,
8	easy to understand.	8	but anyway, Mr Ramphele the floor is yours until 4 o'clock.
9	MR DEWRANCE: As it pleases.	9	MR RAMPHELE: I think I would not have
10	CHAIRPERSON: Mr Ramphele, would you like	10	any problems with that, but I think Mr Gumbi would. Chair,
11	us to take the tea adjournment now, give you a chance to	11	thank you. I represent Mr Langa, Mr Mabebe and Mr
12	look at your notes and get instructions, and then we can	12	Mabelane.
13	come back at about just after 3 o'clock and you can have	13	CHAIRPERSON: I think you represent the
14	until 4 – we'll come back at quarter past 3 and then you	14	estates or families of those persons.
15	can have a clear run until 4 o'clock. Would that be	15	MR RAMPHELE: The families, that is
16	acceptable?	16	correct. The families of the deceased Mabebe and others.
17	MR RAMPHELE: Chair, that is quite good	17	Our representation, Chair, is going to basically start with
18	for me.	18	looking at whether the police by their conduct created
19	CHAIRPERSON: Quite?	19	tension that led to the deaths of our clients and whether
20	MR RAMPHELE: Very good decision for me.	20	because of that conduct the police we can say should be
21	CHAIRPERSON: Sorry, I didn't hear you.	21	found liable. The second will be in relation to Lonmin.
22 23	MR RAMPHELE: I say –	22	We will then shortly discuss the conduct by NUM and the
23 24	CHAIRPERSON: Very good decision? MR RAMPHELE: I appreciate that very	23 24	concessions that were made by AMCU. As you would know, Chair, much of our case was made out or at least that's
24 25	much.	24 25	what we think, in the cross-examination of the witnesses
23	much.	25	
	Page 39050		Page 39052
1	Page 39050 CHAIRPERSON: I see, yes. Thank you very	1	Page 39052 that were before the Commission and this representation is
1 2	CHAIRPERSON: I see, yes. Thank you very much. We will adopt that, adjourn till quarter past 3.	1 2	that were before the Commission and this representation is to address these concessions that were made. We start with
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2 3 4 5 6	CHAIRPERSON: I see, yes. Thank you very much. We will adopt that, adjourn till quarter past 3. [COMMISSION ADJOURNS COMMISSION RESUMES] [15:19] CHAIRPERSON: Yes, Mr Gumbi, the Commission resumes. MR CHASKALSON SC: Sorry, Chairperson, we	2 3 4 5 6	that were before the Commission and this representation is to address these concessions that were made. We start with the duty of the police in terms of the Constitution which says that the object of the police service is to prevent combat, investigate crime, maintain public order, protect and secure the inhabitants of the Republic and their
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		I	
1	Page 39053 POP will parade, JOC will be activated at 7 o'clock on 2012	1	Page 39055 third recommendation is that those that are found to have
2	08 10 and remain operational for the duration of the	2	been derelict of their duties to implement this plan must
3	strike." And then it also goes on to say "All incidents	3	be brought to book because as a result of this we're
4	must be reported to the JOC on an hourly basis." This plan	4	talking about 44 lives.
5	in clause 3.2.5 it says "No personnel may report off duty	5	The second submission that we make is there is a
6	without being given an instruction to withdraw." 3.2.4 "No	6	duty to secure non-striking workers. And this duty in
7	deviation from duty will be allowed without authority of	7	relation to the 12th of August actually was very clear
8	the JOC." We know that this beautiful plan that actually	8	because there were multiple reports of attacks of people
9	realised the danger, that danger that was clearly	9	going to work, we've just heard and this is uncontested of
10	foreseeable to people in that area which included Langa,	10	people that were being attacked and of some attacks that
11	Mabebe and Mabelane. And that this plan that was supposed	11	happened where people would ordinarily pass either to or
12	to be executed to protect them just - there's no evidence	12	from work. These people were not on strike. We have a
13	that this plan was implemented. There were no reports on	13	constitution that says freedom of association must be
14	hourly basis, there was not report to the JOC and the	14	promoted or must be protected and in my heads I have tried
15	Commission has not been furnished with any such report.	15	to show that the freedom of association that has protected
16	Now it is clear just from the plan that was appreciated by	16	includes the freedom of choice not to go on strike. And
17	the police, that they appreciated the danger, they knew	17	that is the right that the police have a duty to protect.
18	what to do and they did not do what they knew was supposed	18	So what we have is we heard that on the 12th of August, in
19	to be done according to their constitutional duty. Now the	19	the morning at 7:00 there was Nyala and a Kombi of
20	first recommendation hereto is that the Commission must	20	policemen that was around the area where the strikers were
21	find that the police in their omission to implement their	21	busy with their rituals. We do not know who was in this
22	own plan on the 10th or from the 10th of August 2012 created	22	Nyala. We do not know what instruction these people that
23	conditions that resulted in heightened tensions in	23	were in the Nyala were given. We do not know why they
24	Marikana. 2. The omission to implement the plan created	24	withdrew from that when we have evidence of Lieutenant-
25	lawlessness where strikers were aware that they were not	25	Colonel Visser clearly indicating that on the 12th, in the
	Page 20054		Dago 20056
1	Page 39054 monitored and this bolstered their courage and they almost	1	Page 39056 morning they had received reports of people having been
1 2	Page 39054 monitored and this bolstered their courage and they almost felt invincible. And this weakened a late intervention	1 2	Page 39056 morning they had received reports of people having been injured the previous day. Of shootings that were reported
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2 3	monitored and this bolstered their courage and they almost felt invincible. And this weakened a late intervention that was tried to be mastered. The fourth was that this	2 3	morning they had received reports of people having been injured the previous day. Of shootings that were reported to the police. Now here you have a police Kombi with
2 3 4	monitored and this bolstered their courage and they almost felt invincible. And this weakened a late intervention that was tried to be mastered. The fourth was that this omission encouraged the marauding by angry strikers, free	2 3 4	morning they had received reports of people having been injured the previous day. Of shootings that were reported to the police. Now here you have a police Kombi with persons inside and Nyala, they appreciate a situation
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1	Page 39057 SAPS is there evidence on which a finding can be based that	1	Page 39059 relation to the death of Mr Mabelane and Mr Fundi, that may
2	there was a causal connection between that breach and the	2	well have been a focal point which should perhaps have been
3	deaths of Messrs Mabebe, Mabelane and Langa and presumably	3	patrolled with a fair degree of regularity, but what about
4	each of those has got to be dealt with separately because	4	Mr Langa and what about Mr Mabebe? In any event, I'm
	the circumstances of their deaths were different. But what		
5		5	putting the question to you because I'd like to hear your
6	evidence – you don't address this in your heads, what	6	answer.
7	evidence is there of a causal connection between the breach	7	MR RAMPHELE: You see the plan, the plan
8	of which you complain by members of SAPS and the deaths of	8	clearly indicated the area that was supposed to be covered.
9	the three persons in respect of whose estates, on behalf of	9	Clause 1.2 of the plan says, "The area where the operation
10	whose estates and families you appear before us?	10	is to take place, namely Western Platinum Mine, Karee Mine,
11	MR RAMPHELE: Okay thanks, Chair.	11	and Eastern Platinum Mine, which falls within the policing
12	There's uncontested evidence that at 7 o'clock there was	12	precinct Marikana SAPS," and there is no evidence that
13	Nyala and a Kombi. By that time we don't have any evidence	13	these areas that you are referring to do not fall within
14	that the strikers had gathered the courage to actually	14	this venue. So in their plan they made a plan that covers
15	confront the police and stop them from doing their duty.	15	the eastern part, or the Eastern and the Western Platinum
16	CHAIRPERSON: How big is the property	16	Mine and therefore an argument that may come, which I think
17	that had to be patrolled? The area over which - which	17	will be a fair argument, that we could not be there, the
18	contains the mines, the Lonmin mines how big is that area?	18	question would then come but in your plan that is the area
19	What is the area that would have to be patrolled, the Kombi	19	that you cover. So you had to be there, or your plan was
20	that you are talking about, the Nyala they obviously can't	20	then supposed to say because of our capacity we can only
21	be all over the property all the time. So the mere fact	21	cover east and not west. So there is a causal connection
22	that they were withdrawn doesn't in itself lead ineluctably	22	between the omission to cover the area that is in the plan
23	to the conclusion on the balance of probabilities that if	23	when it comes to Mabebe.
24	they had still been there – this is what Mr Burger calls	24	When it comes to Langa it will be a slightly
25	the counter factual. If they had been there is there a	25	complex matter and there I would have difficulty because
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	Page 39058		Page 39060
1	Page 39058 basis for saying that the deaths wouldn't have occurred?	1	Page 39060 they were not in the venue that is put forward in the
1 2	5	1 2	
	basis for saying that the deaths wouldn't have occurred?		they were not in the venue that is put forward in the
2	basis for saying that the deaths wouldn't have occurred? In other words as I put it to you earlier, what evidence is	2	they were not in the venue that is put forward in the contingency plan. Thank you, Chair. May I then go
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1	Page 39061 implement the contingency plan you covered in cross-	1	Page 39063 Ranto. Now part of that statement has got very concerning
2	examination. In other words you gave them an opportunity	2	sort of actually facts and that is Mr Ranto realised that
3	to explain why, did you?	2	Lonmin Security would not be able to deal with the
4	MR RAMPHELE: Yes, yes I did.	4	strikers. He actually says "I then called Mr Govender and
5	COMMISSIONER TOKOTA: What was the	5	asked Mr Govender for support to say we will not be able to
6	explanation?	6	deal with this situation. You have more than a thousand
7	MR RAMPHELE: There was no explanation.	7	strikers," and in his statement he says Mr Govender was
8	There was no explanation given. I asked one of the police	7 8	disgruntled, he showed disgruntlement at this. There was
9	officers that are involved in the training of the police	9	no clear indication whether they would get the support they
10	whether in their training they're aware that a plan that is	9 10	needed. He called Lieutenant-Colonel Merafe and he says
11	properly developed can just be omitted and not be carried,	11	Lieutenant-Colonel Merafe was sarcastic. That is how he
12	and there was no clear explanation before the Commission on	12	describes the response that he got, and this sarcasm and
13	how -	13	disgruntlement, if one reads the statement, comes from the
14	CHAIRPERSON: Haven't you got a stronger	14	manner in which he perceived the local police station was
14	point than that? Captain, or I think he's a Major, Major	14	treated and he said well, why – I think something was said
16	Govender was listed in the plan as being someone who's	16	like why don't you go to the province so that, you know,
17	playing an important role and his evidence was he was never	17	because we always receive instructions from the province
18	even told about the plan, never told he was mentioned in	18	when it comes to you.
19	the plan, never told what he was supposed to do. So the	19	Now this statement clearly indicates that there
20	failure to implement the plan is illustrated not only by	20	was an issue with the local police station and maybe, and
21	the evidence that you've dealt with in cross-examination of	20	it is something that again it would be good if, and we
22	other witnesses, but Major Govender's own evidence is very	22	recommend that the police be permitted to make a full
23	strong in your favour as far as that's concerned.	23	account of why the absence on the 11th and the 12th,
24	MR RAMPHELE: Is it in agreement with me	24	because –
25	that there was an omission, how that omission took place	25	CHAIRPERSON: When Major Govender gave
	Page 39062		Page 39064
1	was not put before the Commission?	1	his evidence you didn't question him about it, did you?
2	CHAIRPERSON: [Microphone off, inaudible]	2	MR RAMPHELE: [Microphone off, inaudible]
3	MR RAMPHELE: Because that is –		
A		3	CHAIRPERSON: I say when Major Govender
4	CHAIRPERSON: All I'm saying to you is	3 4	CHAIRPERSON: I say when Major Govender came and gave evidence you didn't question him about this
4 5			
	CHAIRPERSON: All I'm saying to you is the evidence in relation to the plan and the non- implementation of the plan, an important item of that	4	came and gave evidence you didn't question him about this point, did you? MR RAMPHELE: Well, I do not think that,
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1	Page 39065 that the Commission must put to the SAPS because beyond	1	Page 39067 and how they would be protected in this instance, because
2	this Commission it is in our interest to know that the	2	it was clear that they were targets.
3	Constitution and its values are actually protected by the	3	Let me go to Lonmin, and – well, before I finish,
4	police.	4	one of the recommendations, Chair, is that, and I know that
5	CHAIRPERSON: I understand. I see you've	5	you don't make absolute decisions but the issue of damages
6	got 10 minutes left. You haven't touched the part of your	6	that it would be – maybe fair is not the right word, but
7	heads in relation to the liability of Lonmin. Are you just	7	you would understand what I mean – it would be useful if
8	going to take those as read? It's quite full written	8	the Commission were to make a finding on the liability of
9	argument on that, but –	9	the police in relation to this and further if there's an
10	MR RAMPHELE: Yes.	10	issue of say amount or quantum then it could be directed to
11	CHAIRPERSON: You haven't mentioned it at	11	a further body, because I believe that having to expect
12	all in your oral address. Anyway, you've got 10 minutes	12	that these poor families should go through another process
13	left.	13	of trying to prove what has, what we've been trying to
14	MR RAMPHELE: Well, I think we didn't	14	prove in the last two years in this Commission would be
15	start at quarter past, Chair. We took a bit of time, I	15	cumbersome on them.
16	think about five to six minutes waiting for my time by the	16	I'll go to Lonmin and in relation to Lonmin it's
17	break.	17	interesting because very interesting propositions were made
18	CHAIRPERSON: You were given three	18	by Lonmin. Maybe I should start with the first proposition
19	quarters of an hour –	19	that – and we have evidence of Da Costa who says "I was
20	MR RAMPHELE: 45 minutes.	20	speaking to the workers, the executive had taken a decision
21	CHAIRPERSON: - and you started at 20	21	not to speak to them," and you are being asked by the legal
22	past.	22	representatives of Lonmin to make a finding that the
23	MR RAMPHELE: Yes.	23	strikers did not want to speak to management, they wanted a
24	CHAIRPERSON: I'll give you another 10	24	deposit in a Capitec bank account, I think it's a bit not
25	minutes tomorrow morning. That means in other words you	25	too far but it's actually seriously denigrating. The
1	Page 39066		Page 39068
1	Page 39066 can carry on now till 4 –	1	Page 39068 strikers say that we would like to speak to the management
1 2		1 2	
	can carry on now till 4 –		strikers say that we would like to speak to the management
2	can carry on now till 4 – MR RAMPHELE: Okay, thank you, Chair.	2	strikers say that we would like to speak to the management of Lonmin, we don't want to speak to anyone else. That is
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1	Page 39069 villages to the shaft and secure the shaft until knock-off	1	Page 39071 says you have a duty to protect, and that fortunately is
2	time? It is a simple thing. You don't require much more.	2	the judgment that you, Chair, gave in MTN and it was argued
3	What stopped Lonmin from going to the radio and saying we	3	quite competently by Mr Burger. I see you want to say
4	are going to identify points at which we are going to	4	something, Chair?
5	collect workers, and we are going to make sure that those	5	CHAIRPERSON: No, I just want to say it's
6	workers are safe, and not putting them in a situation where	6	4 o'clock. Would you like to continue with this very
7	Langa at 3 o'clock in the morning has got to be alone going	7	interesting part of the argument at 10 o'clock tomorrow
8	through to the shaft because he heard that there was this	8	morning? Sorry, for 10 minutes from 9 o'clock tomorrow
9	call that this strike is not lawful?	9	morning.
10	[15:59] This strike is not lawful; if you follow it then	10	MR RAMPHELE: Correct, Chair. Thank you
11	you are actually probably dismissible as an employee, and	11	very much, Chair.
12	it doesn't make sense to say that no, we don't have	12	CHAIRPERSON: Alright, we'll adjourn till
13	evidence that they didn't hear. Mr Mokwena was here, he	13	9 o'clock tomorrow morning.
14	says there was a TV everywhere in Lonmin and that TV was	14	[COMMISSION ADJOURNED]
15	sending the same message. How do we then come and say no,	15	
16	maybe they were not influenced by radio? But again the	16	
17	issue is not whether they heard or whether we have	17	
18	evidence. It is not possible, they are not here to say	18	
19	that.	19	
20	The standard of proof that my learned brother	20	
21	Budlender SC spoke about is reasonable suspicion that this	21	
22	might have happened. Now can we reasonably say that we	22	
23	don't have suspicion that they heard that they were	23	
24	supposed to go to work, otherwise there was an unprotected	24	
25	strike, when we know by evidence that Lonmin and NUM held	25	
1	Page 39070 meetings in villages to say this strike is unprotected, go		
2	back to work, you must not heed the strike?		
3	So the duty of safety of workers by Lonmin is		
4	clear in the evidence that is before you. There is no		
5	logical conclusion that one can arrive at to say that there		
6	is no connection between the announcements that were made		
7	that you go to work and then the response of the deceased		
8	to actually heed to that announcement. There is absolutely		
9	no reasonable conclusion that one can bring about.		
10	In the OB of Lonmin there was an announcement		
11	made in the North West radio, in Radio Metsweding, we know		
12	that the TV screens of Lonmin were sending the same		
13	message. Now a worker would clearly be having a serious		
14	problem if this message that was so widely broadcasted did		
15	not come about. We're not saying that Lonmin, if the		
16	option was to close the mine then that is the only option.		
17	No, no, no, no, I don't think that the duty of care was		
18	does Lonmin have the resources to engage a bus company -		
19	they don't have buses but we know they do - to actually		
20	take out one of the buses, to hire extra security because		
21	they don't want to be militarised and they have 28000		
22	workers, and because they have 28000 workers they want to		
23	come to the Commission and say oh, we have too many		
24	workers, we can't protect them. The law says if you have a		
25	worker you must protect. So each one of the 28000 the law		
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