IN THE MARIKANA COMMISSION OF INQUIRY

(HELD AT CENTURION)

HEADS OF ARGUMENT FOR THE FAMILIES OF MABELANE, MABEBE AND LANGA

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INTRODUCTION

The Commission is established to investigate matters of public, national and international concern arising out of the events surrounding the incidences in Marikana from 09 to 18 August 2012 leading to the injury of more than 250 and deaths of 44 people in the area.

It is thus implied that both national and international standards of concern around the stakeholders are to be considered in order to address concerns on whether as a country; we measure appropriately in our affairs to what is internationally expected.

Our submission therefore shall endeavour to evaluate the standard of responses against international principles of law or treatise, our constitution and domestic law.

CLAUSE 1.1.1 - CONDUCT OF LONMIN IN RESOLVING DISPUTE

1. The evidence available shows that on 09 August 2012 the RDOs marched on Lonmin Management offices.[1]

2. The march which was observed by the SAPS and after Mr Mokoena had called intervention from the Provincial Commissioner General Mbombo went without any incident.

3. The relevant part to Mabelane' case is that the Lonmin Security is able to drive into the crowd and keep watchful eye on the strikers with clear mutual respect between the two parties (i.e. the strikers and security).[2]

4. The decision by Lonmin not to address the strikers when the crowd showed overwhelming support of the cause of the strikers can be regarded as provocative.

[1] Day 17 page 1775 lines 15-21, Day 38 page 4185 lines 6-23
[2] Lonmin hard drive/video recordings/pwbotha/quadruple 9MTS and 0010.MTS

5. The policy by Lonmin to refuse to speak to the strikers, but only their small delegation, created loss of confidence on the part of the employer to engage.

6. The evidence by Mr Martin Vorster, as contained on his statement, is that the strikers showed a lot of discipline. Though they carried 'pangas and kieries, they were not wielding same in any manner that showed hostility. This presented a chance to nip a potentially volatile situation at the bud, before it was out of control.

7. There was a process that was outside of the 'collective bargaining' process undertaken by Mr Da Costa which had the effect of building confidence between the strikers and Lonmin, though the interaction was limited in effect because it was only Karee 4 Shaft that had the benefit of access to Mr Da Costa.[3]

[3] Day 239 page 30022 -30037

8. In view of the known problem the employer was under an obligation to ensure that the communication with strikers is kept open

9. This failure to engage with blatantly unhappy group of about ‘1000’ workers was not the best manner the situation could have been handled.

10 Lonmin did not have legal duty to communicate with strikers outside of the ‘collective bargaining processes. This however did not mean there was no expectation from public mores that such an engagement should take place.

11. It is our submission that the conduct of Lonmin did not exercise its best endeavours to resolve the dispute between management and the RDOs, and the manner in which the rival trade union was lobbied to support management was also very divisive and dangerous.

BACKGROUND TO THE WAGE DISPUTE

12. The issue of the 'wage dispute' was common knowledge and this necessitated a number of communiques by the Human Capital Division under the leadership of Mr Mokwena.[4]

13. A position taken that 'central bargaining process' or 'collective bargaining' is the only form of engagement management was prepared to entertain.[5]

14. The method of communication which included internal TV broadcast and written communication were primary methods that were used.

15. The message delivered made it clear that 'no work- no pay' and those not reporting for would do so to their own peril.

[4] Day 290 page 37897 lines 12-15
[5] Day 291 page 37969-37970 and Exhibit LL page 27

16. A position to then approach court for an Interdict did not receive any movement from striking workers. At this point there was need to engage as workers were clearly prepared to use their ‘labour as a weapon’ but there also signs of intimidation of ‘non striking workers.

LEGAL DUTY OF LONMIN

17. It is without doubt that Lonmin took available legal remedies to try and put pressure on the striking workers, but when it was clear that this strategy would not bear results, there was a need to reconsider and create communication channels to workers.

18. The right to strike or protest is a constitutionally protected right though the regulation of any such gathering is by law enforcement.

19. Mr Mokwena and Sinclair correctly characterised the responsibility of control of gathering as police responsibilities and correctly called for police intervention.

19 This however did not take away the responsibility for dialogue with their workers as law enforcement could not resolve the labour dispute.

EU RECOMMENDED BEST PRACTICE

20. Some jurisdictions like the EU have encouraged corporations or companies to ensure continuous dialogue with the communities where they operate.[6]

21. The best practices as practised in the EU should be applied in South Africa. There should be dialogue with the communities within which mines are located. The community of Bapo Ba Mogale seem to be losing their land and cannot control same as a result of failure of dialogue between the mine and the community.

[6] Promotion of social Dialogue between Management and Labour – DIRECTIVE 2002/14/EC OF EU PARLIAMENT AND COUNCIL OF 11 MARCH 2002.

CLAUSE 1.1.2 – OF THE T.O.R

WHETHER LONMIN RESPONDED ADEQUATELY TO THREATS AND OUTBREAK OF VIOLENCE

21. From evidence presented, the signs of discontent arose as early as April 2012 and already this resulted in loss of life.

22. On 09 August 2012, the complaints by RDOs was common knowledge and there had been interaction with Mr Da Costa.

23. The persistence by workers to pursuing Mr Da Costa and after some concessions were made and explanation was given did not augur well for an adequate response to the situation.

24. The response by Lonmin was positive in the beginning and there are steps taken to ensure that proper information is collected with Security

Officers observing the conduct of the work force from early shifts into the night and giving constant reports.

FIRING BY LONMIN SECURITY ON 10 AUGUST 2012

25. There is evidence that on 10 August 2012 two people were shot and wounded by Lonmin Security Officers.

26. The dockets were opened under Cas 69/08/2012. According to the docket presented as Exhibit …. , the incident took place at Wonderkop Four-Way Stop on Rowland Shaft.

27. A gentleman by the name of **Kluvet Dlomo** was shot and wounded by officials of Lonmin that he could identify by them as Lonmin Security Officers.

28. On the same day at about 18h00 another person by the name of **Thando Elias Mutengwane** presents under oath in his statement that he was on

his way home when he was shot by Lonmin Police driving in a Lonmin Security Twin Cab.

29. From these reported incidents, it is clear that Lonmin did not respond appropriately to the threat and that the Lonmin Security Officers who shot at the above two innocent individuals and not presenting them to any authority for wrong-doing should have been charged criminally and disciplinary steps were supposed to be taken at the workplace to establish circumstances leading to firing shots and injuring the victims.

30. The response by Lonmin in this regard indicates that the management condoned 'violence' by its own Security Officers, and there seems to be no mention by Lonmin Security Officers of these important events in circumstances that one could regard as relative calm as there exist no evidence of violence by strikers at this stage. In fact this information was deleted on the entries of Lonmin's Occurrence Book. [7]

[7] Day 265 page 33436/7

INCIDENTS OF 11 AUGUST 2012

31. From **ICAM File 2 TAB 5** a record of the events of 11 August and confirmed by evidence of Mr Blou, Mokoena and Sinclair was presented as evidence before the Commission.

32. It can be stated that from the manner in which the attack on NUM offices was treated was dangerous, unlawful and it is inexplicable how such an incident occurring close to Satellite Police Station could not have resulted in pressure on the SAPS to control the situation.

33. There is evidence that by this time a Joint Operations Centre should have been established and that Lonmin Management was a part of the JOC team.[8]

34. The events as they unfolded meant that Lonmin was aware of the danger and intention by NUM members to try and defend their offices. It

[8] Exhibit U, pages 2-4

is unclear how this could have happened without creating strong hatred and probable killings between striking RDOs and NUM members.

35. By omission to impress on the police their legal duty to control the crowds, and protect NUM offices in their premises, Lonmin was actually fanning fires and creating a rift between striking workers and NUM.

36. It is inescapable to conclude that Lonmin encouraged violence or war between the two groups and the Lonmin Security Officers were clearly taking sides.

37. This response was irresponsible, and as employer Lonmin failed in its duty.

WAS THERE A LEGAL DUTY TO ENSURE ENVIRONMENT OF PEACE?

38. Under international principles there is 'duty of care' placed on the employer and the state to ensure that its staff are not exposed to dangerous situations[i]. Though this authority is premised on UN staff on

international missions, the article clearly demonstrates that this duty of care is extended to employers and governments, especially where Right to Life is in issue.

39. The following quote from this article illustrate the positive duty that rests with states and employers in case of safe conditions of work:

Referring to the case of Osman v The United Kingdom, the EU Court reiterated its interpretation that: " …where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above mentioned duty to prevent and suppress offences against the person, it must be established that the authorities knew or ought to have known at the time the existence of a real and immediate risk to the life of an identified individual… it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge…".

SOUTH AFRICAN CASE LAW

40. The duty to protect an employee in the workplace in South Africa on the BREACH OF DUTY to protect the employee can be found in the judgment of the current chairperson of the Commission in **Media 24Ltd and Another v Grobler [2005] 3 ALL SA 297 (SCA)** where the full court in a judgment delivered by FARLAM JA (as he then was) said:

[65] It is well settled that an employer owes a common law duty to its employees to take reasonable care for their safety (see, eg, *Van Deventer v Workman's Compensation Commissioner* **1962 (4) SA 28** (T) at 31B-C and *Vigario v Afrox Ltd* **1996 (3) SA 450** (W) at 463F-I). This duty cannot in my view be confined to an obligation to take reasonable steps to protect them from *physical* harm caused by what may be called *physical* hazards. It must also in appropriate circumstances include a duty to protect them from psychological harm caused, for example, by sexual harassment by co-employees.

[66] The test to be applied in this regard was laid down by this court in *Minister van Polisie v Ewels* **1975 (3) SA 590** (A) at 597A-B, where Rumpff CJ said:

'Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree. Om te bepaal of daar onregmatigheid is, gaan dit, in 'n gegewe geval van late, dus nie oor die gebruiklike "nalatigheid" van die *bonus paterfamilias* nie, maar oor die vraag of, na aanleiding van al die feite, daar 'n regsplig was om redelik op te tree.'

41. It is reasonable to conclude from the facts relating to the environment that was created between LONMIN SECURITY, Striking RDOs and NUM that the manner of handling this incident, no other reasonable conclusion is possible, other than to state Lonmin permitted NUM to take law into their own hands.

42. From the ICM referred to above, it came to the attention of Lonmin Management on 10 that there would be an attack on NUM offices. Lonmin is aware of the danger or threat that is made.

43. From the ICAM, it is recorded that: '…Intimidations continued. A mob of 300 threatened to burn down/take over the NUM offices…'

44. The NUM officials are permitted to 'protect' their offices and this situation of an imminent danger of someone being killed because of the threat is not impressed on authorities.

45. It is also known that the Lonmin Security actually was spectators of this 'para-military confrontation' and again this is not reported to the police to call for the intervention.

46. There is stark contrast to the call for police intervention from the march which was peaceful to the LPD.

WHETHER LONMIN BREACHED DUTY OF CARE TO PROVIDE SAFE ENVIRONMENT?

47. The standard used was established in both the afore-mentioned case and the case of Langley v Fox, where the court decided that 'In every case the answer to the question whether or not a duty arises must depend on the facts'

48. If one considers that part of the agreement with shop stewards is to take custody of affairs of the union, then such responsibility which is as a result of signed 'collective agreement' with the employer falls within the purview of work.

49. If the offices are situating in the work /employer premises, then the employer must create an environment where access to such facility is without any danger to such an employee. This is similar to the case in point. It is therefore our respectful submission that Lonmin failed to protect or to provide safe environment for NUM officials who had to protect their office, similarly Lonmin failed to take measures to the same extent it did at LPD on 10 August 2012, to ensure that the strikers are controlled by police.

CLAUSE 1.1.3 OF T.O.R

WHETHER LONMIN BY ACT OF OMISSION CREATED DISUNITY, TENSION RESULTING IN LABOUR UNREST

50. The issues relating to recruitment and accommodation of workers in hostels by especially mining houses in South Africa has always been a source of factions, and militarise young workers into tribal affiliations, and always turn to violent clashes.

51. There is no overt evidence of tribal tensions, but it is inescapable to conclude that the majority of workers who were militarised followed certain tribal rituals, buttressing a view that the conditions they lived in as hostel dwellers made the organisation of resuscitation of group identity forward.

52. The treatment of workers in inhuman conditions and with very low wages causes frustration and this has proven over years to be bedrock for conflicts in communities.

53. The evidence of Mr Mokwena on how the recruitment process was structured, bussing people from far places without providing accommodation bears testimony to this submission.[9]

54. We therefore submit that Lonmin by their policy of recruiting large sums of workers, going into thousands without providing accommodation has created conducive conditions for militarised work force which

[9] Day 292 page 38211

formulated itself into a force that if left to be frustrated in the manner it happened, would be difficult to control.

55. The creation of scarce accommodation is a creation of Lonmin as taking into account the distances from whence workers were recruited; Lonmin had a responsibility to only bus those workers for which accommodation has already been arranged. The current policies result in unavoidable tensions as a result of available accommodation and the strongest groups solidifying to protect whomever they identify with.

56. Failure by Lonmin to admit or even discuss the issue of conduct of the security on 11 August 2012 and deal with cases reported to the police of shootings by their own staff remains a problem. SHE ICAM INVESTIGATION TEMPLATE refers to incidents lessons learnt and recommendations. This however fails to touch this critical issue meaning no lessons were learnt from this unlawful conduct of security officers of Lonmin.

57. It is clear that the built up of anger was as a result of the manner in which the employer responded by using force, giving an indication to strikers that the only manner of resolution is force.

58. The same applies to how Lonmin acceded to use of force by NUM officials to 'protect' their offices.

FACTS SURROUNDING THE KILING OF MABEBE AND WHETHER LONMIN MUST BE FOUND LIABLE FOR HIS DEATH?

59. We submit that Lonmin by omission caused the death of Eric Thapelo Mabebe who was murdered by strikers on 12 August 2012 and at K 4 – Shaft. [Postmortem Report

60. Mabebe was a member of NUM and Lonmin together with the said union encouraged workers to go to work on 12 august 2012

61. After the incidence of 10 and 11 August 2012 it was apparent to both the parties that it would be dangerous for any person to go to work and not be attacked by the strikers.[10]

62. The information available to Lonmin on 10 August 2012 indicates that the strikers were in huge numbers and there was need for Lonmin to call support of the SAPS in order to control the situation.

63. It was highly probable that the strikers had lost patience with Lonmin management as they were snubbed by management after they indicated that they were unhappy with being addressed by Security Officer and not a person relevant to their demand for R 12 500- 00.

WARNING ABOUT ATTACK ON K4 - SHAFT

[10] Day 39 page4228, lines 16-23, Day 292 page 38212, lines 1-12

64. According to ICAM …. Lonmin received information on 11 August 2012 that the strikers intended to attack K4- Shaft where Mabebe was going to be reporting.

65 Lonmin did not take steps to either warn the workers about the threat or ensure their safety.

66. There is no explanation from Lonmin why the police were not asked to patrol the K4-Shaft and the explanation by Security Officer Sinclair is that the K4 Shaft is a huge area.

67. There is no evidence that the SAPS were alerted to the danger of any of the huge area nor that steps were taken at all.

68. The possibility of the threat of attack being realised was high after the NUM and strikers clashed on the road leading towards NUM offices.

69. The situation was clearly volatile as Lonmin security had already shot and injured some persons and these obviously enraged strikers and placed them in a frame of mind that sought to either defend themselves or attack.

TREATMENT OF THE INJURED

70. There is evidence from Mr Sinclair that in the evening of 12 August 2012 there was increased police presence. He however cannot explain how it happened that the warning of 11 August of 2012 regarding attack on K4 Shaft was not heeded to.

71. The atrocious hacking to death of the Security Officers of Lonmin was important indication of what the strikers were capable of doing.

72. Lonmin armed with this knowledge chose not to inform the police about the threat of attack on K4 Shaft, even if they were to inform them of the

size of the shaft and probable challenges relating to covering all of the area.

73. According to ICAM Report [Lonmin Report **- ICAM file 1 Tab 30**] of 12th August 2012, the emergency response was the first to attend to Shaft K4 when there was intelligence of an attack at the same shaft. This was 'reckless conduct' by Lonmin by any standard one may consider.

74. The evidence by Mr Janse Van Vuuren paints a worrying picture of the treatment of the injured. Van Vuuren indicates that though the deceased Mabebe was the worst of the patients that were transported to Saffy Hospital and yet he was the last to be treated. The other patients who were injured were white miners.[11]

75. It is one of them that actually raise the seriousness of Mabebe to the Lonmin Medical Staff noticing that Mabebe required urgent attention and is in a more serious condition than him.

[11] Statement Janse Van Vuuren GGGG1

76. On being asked why the preferential treatment, Mr Mokoena of Human Capital said such policy does not exist. Though individual miners understand the concept of fair treatment across colour line, it appears from the systemic preferential treatment of persons according to their race needs attention.

77. At least we do not have any knowledge of white employees sharing 'hostel accommodation' with black miners and therefore what seem abnormal has gained normalcy under the circumstances.

78. Mr Mabebe as the cross examination of Mr Blou by NUM Counsel Mr Tip SC, illustrated the weaknesses in the emergency response. This is most important in a situation where an employer has put the employees in such a situation having prior warning of the impending attack.

79 Lonmin knowingly encouraged Mabebe to attend work at K4-Shaft and knew at that time that the Shaft was targeted for an attack. Yet Lonmin

ignored the warning of an attack, experienced the attack of the security guards, and continued to risk the lives of Mabebe.

80. The conduct by Lonmin meets the requirements of '**negligently causing the death of a person, whilst knowing the extent of the danger of such person, whilst in a position to take reasonable steps to avert the death, deliberately ignored its legal obligation to do so.'**

FACTS SURROUNDING THE DEATH OF FRANS MABELANE

81. Frans was a senior staff in the security department and on 12 August 2012 he was posted to be in charge of the operation security at Wonderkop area for Day Shift whilst MR Botha was responsible for night shift.

82. Though there was briefing at 07h00 the briefing did not indicate how the shootings by Lonmin of the previous night would affect the operation. It appears that reports on these shootings were not made. This does not

help the person in charge to execute with full knowledge of the probable mood of the strikers. It is an obvious fact that the shooting by Lonmin on the workers would only aggravate the situation.

83. The evidence shows that our client Mr Mabelane was unaware of the shootings by his colleagues.

84. He therefore considered the relationship between security of Lonmin and the strikers to be the same as on 10 August 2012 when the security could drive their vehicles almost a few metres from the strikers without any consequence.

85. There is also evidence before the commission that before Mabelane, Fundi and their team arrived at a point where the strikers were, already Mr Martin Vorster and Louw had been attacked by the strikers.

86. We learn from the evidence of Rantho that he was asked to arrange an ambulance as one of the security officers was injured.

87. The account of Mr Vorster of incident demonstrated that the 'rubber bullets' would not stop the strikers, pump gun was not enough to stop the strikers, and that there was a steadfast determination by strikers to attack the security irrespective of the threats of shooting.

88. This piece of information in security filed should be enough to revise all plans and ensure that something is done.

89. From the evidence of Mr. Rantho the local police were reluctant to come and after calling Capt. Govender and then Col. Merafe it was clear that there was a level of reluctance as Lonmin was blamed for contacting provincial office directly and without first talking to local police station.

90. The delay in response by the police seems to have been caused by the attitude the Marikana Local Police Station who according to statement by MR Rantho were displeased by communication by Lonmin with province and not recognising them as being responsible for the area, or

resulting in local being instructed from the province on matters they were supposed to know about.

91. A further issue is the lack of communication with Mabelane when he took the decision to approach the strikers and after Louw and Vorster were attacked.

92. The distance between the point where Louw and Vorster were attacked and point where Mabelane and Fundi were hacked to death is about 300 to 350 metres.

93. A large crowd would take no less than 15 minutes to cover this distance, and despite the time lag between the two points, and with Lonmin fully aware of the danger posed by the strikers, the Lonmin Security failed to physically go and rescue the Mabelane team who were without a doubt going to be attacked by the strikers.

94. Lonmin made two lapses that showed ‘knowledge of the danger and appreciation that this danger could cause death’ and despite the full appreciation of the high probability, or to point where it could be described as certainty, Lonmin failed to warn the security officers Mabelane and Fundi to avoid approaching the strikers.

95. By their conduct Lonmin is complicit in the death of Mabelane and must take full liability as ‘employer’ with legal duty to ensure that the environment to which it sends employees are safe. This submission is premised on the fact that two of Lonmin’s employees Louw and Vorster were the first to encounter the wrath and anger of the strikers. They state that they contacted their line managers as well as the control room so that their colleagues should be warned of the impending danger of the strikers. The control room does not discharge that obligation. Further the lack of adequate training of the security officials in dealing with situations of that nature as well as the lack of proper policy and planning by Lonmin contributed to the death of Mabelane. Further Lonmin’s directive that security officers should withdraw when danger is imminent created confusion to their employees (Security officers), as we

submit again that due to lack of proper training they were not able to act in unison and contrary thereto the strikers who were at the koppie for two to three days were able to act in unison. Further Lonmin's decision not to acquire hard skin vehicle put its employees in a very vulnerable position and that also contributed to the death of Mabelane.

96. It must also be mentioned that Mabelane is a member of the community of Bapo ba Mogale. He family is aggrieved further by the fact that as a member of this community he died when his community was not given a proper chance to protect its members against strikes same as the one that happened in August 2012.

97. I shall when I deal with issues of Housing come back to this issue and the disrespect for territorial integrity of Bapo Ba Mogale by the minig activities of Lonmin.

DEATH OF LATE JULIUS LANGA

98. Mr Langa was killed in the early hours of 13 August 2012 and on his way to work from a nearby village called Segwaelane, a village under Bapo Ba Mogale community.

99. The shootings of 10 August, shootings of 11 August and killings of 12 August 2012 sent a clear and strong message that 'safety of workers' was an issue.

100. The management of Lonmin in the words of Mr Mokwena after he heard of the killing of Mr Twala on the 'koppie' leaves one with full knowledge that Lonmin knew that to avert the killing, either the workers were to be stopped from going to work, in the same way Mokwena said he could not go or send any of his staff to the 'koppie' after Mr Twala killing.

101. The decision by Mokwena not to even consider the issue of sending staff to the koppie was not to be changed even with police escort.

102. It is therefore unthinkable that workers were expected to board a Lonmin bus at the hostel, go to work through the marauding strikers, and those living in nearby villages to scrape through open fields where the strikers could attack on the way to to work.

103. Even in these deathly circumstances, Mr Mokwena and Lonmin did not find it proper to warn the workers by radio station, in the same manner they had used the radio to encourage them to come to work, to be careful of strikers and when in danger to stay at home.

104. It is the evidence of Mr Mokwena that Lonmin did not know what to do under the circumstances as stopping production would have been costly.[12] So the value of profit was directly balanced against the 'Right to Life' and Lonmin took a view that the Right to Life could be sacrificed rather than profit, until the unknown happened.

DUTY OF LONMIN TO WARN WORKERS OF LIFE DANGERS

105. Lonmin had a legal duty to ensure that the work environment is safe.

[12] Day 292 Pages 3822/3

106. There is also a duty when the environment has to be investigated that the employer (Lonmin) investigates any dangers relating to the environment and the employee is expected to rely on the information that he receives from the employer about the safety of the workplace.

107. Therefore in this case it was Lonmin that had all the information about the dangers to life of the workers and Lonmin encouraged workers to rent rooms from nearby villages also knew that there would be workers walking from Segwaelane to the workplace.

108. Lonmin therefore had a positive duty to warn Mr Langa on whether it was safe to travel to work or not.

109. There is admission by Lonmin in the Media Release on 12 August 2012 that the situation is out of control. This gave Lonmin adequate opportunity to warn the workers of these dangers.

110. The possibility of being killed was not only a distant guess, but a reality in view of the manner of the killings, the persons who were targeted, and how the possibility of escaping from such dangers were minimal.

111. Mr Langa fell under the targeted group as he was a non-striking worker who was informed to go to work by previous announcements, and he would like many others be alone against a large group of angry strikers, there would not be any negotiation persuasion and the killing would be brutal and not easy to identify the killers.

112 Lonmin knew about these dangers, and despite full knowledge acted in a manner that risked the lives of workers like Langa whilst not ready to face the same dangers as management.

113. Lonmin's responsibility in this regard is grave and this has deprived families of bread winners whose lives will never be the same because of the role of rearing children that these workers who died had.

114. We find that the damages must not discount efforts taken by Lonmin thus far, but should take into account the effect of damage caused on the families.

THE STATE FAILED IN ITS DUTY OF SECURITY AND PROTECTION OF OUR CLIENTS' RIGHT TO FREEDOM OF ASSOCIATION

115. The Right to Freedom of Association is a right protected by the constitution under Section 23 and also by international law. South African law, in industrial places, provides under Section 5 of the Labour Relations Act, 2005 (as amended) the 'Right to Join a Trade Union' and collective bargaining.

116. The events of Marikana posed a vexed question of protection of the 'right to form union and industrial action' and protection of these rights vis-vis the protection of the employee that does not wish to join such

union, or even to associate with industrial action. There exists therefore a debate whether the conduct of the strikers properly considered is 'industrial action' or 'criminal conduct'?

117. Our submission is for the commission to evaluate protection that was granted to non-striking workers like Thapelo Mabebe, Frans Mabelane and Julius Langa. The debate around the Rights under of Freedom of Association as purported to protect 'unionised workers' tends to drown out protection of rights of 'non-striking' workers' in position of Mabebe, Mabelane and Langa.

118. This submission seeks to contend that the Right Not To Strike or Not to Join a Trade Union is a Right to Freedom of Association too, and deserves both protection and recognition.

119. International law encourages states under ILO to protect the right to association and much has been written about this protection. It is therefore a plausible argument to state that indeed the strikers were exercising a Right to Freedom of Association. The question is whether the state had an obligation to ensure that their right to protest happens in a situation where the rights of others remain protected.

120. In our interpretation of rights of our constitution, our courts normally take cognisance of trends, and or decisions of international jurisdictions, and to this effect, I wish to refer to decisions of the European Court of Justice indicating that the right not to strike must be granted same protection as right to freedom of association.

STATE LIABILITY ON DEATH OF MABEBE

121. On 12 August 2012 Mabebe took a conscious decision to go to work and in conformity with the 'call' by Lonmin and NUM that the workers must not held to the strike of the RDOs (Rock Drill Operators). It is our

submission in relation to the State and SAPS that the latter had an obligation to ensure that Mabebe was protected in his choice.

122. Though the LRA and UN Convention on Human Rights protect Freedom of Association, and therefore the objective of this right is to protect workers within the realm of joining a trade union, it is our submission that there is positive duty on the state to give protection to those who '**do not wish to join'** the association, in this case the strike as was called by RDOs and to some extent supported by AMCU. Further that failure by the State to protect the rights of 'non-striking' workers in the position of Mabebe is failure to protect 'The right to his freedom of association'.

EU DECISIONS ON THE MATTER

123. Though there is no South African case law on the matter, we rely on the persuasive nature of international case law in interpreting our Constitution. This case is similar to the decision that was taken by the European Human Rights Court of Justice in **Gustafson v Sweden, 25 April [ECtHR] Case No. 15773/89.**

124. In this case the applicant lodged a complaint that the state of Sweden failed to protect his right to freedom of association and that failure to protect him constituted a violation of Article 11 of the EU Charter of Human Rights.

125. The Court held that in relation to compliance with Article 11 that**: 'although the essential object of Art 11 is to protect individual against arbitrary interference by public authority … there may in addition be a positive obligation to secure the effective enjoyment of these rights. Art 11 must be interpreted to encompass not only a positive right to form and to join an association, but also the negative aspect of that freedom, namely the right not to join or to withdraw from the association'.**

126. The Court found that national authority is obliged to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the negative right to freedom of association.

127. In the case of Mabebe and Langa the national authority in the position of SAPS had a positive obligation, in view of the facts known that those exercising the ‘right to work’ would be attacked, to ensure that they were able to exercise their right ‘not to join the strike and attend to work safely’ without harassment and or being killed.

128. It is important to mention that certain requirements were considered important, and they are all present in this situation.

They are that:

a. Whether the compulsion to interfere with the right to association significantly affected the enjoyment of the freedom of association;

b. Whether the terms of the compelled conduct have more favourable terms than those under the existing ‘collective bargaining’. That is

whether the Freedom of Association conduct being compelled is more favourable than 'collective bargaining arrangement'.

129. In the case of Marikana the compulsion was violent, riddled with particular rituals and there was so much anger resulting in persons losing lives. It cannot be gainsaid that the choice of 'not joining the strike' was more favourable and therefore the requirements mentioned in the case before EU court were satisfied.

130. The EU Court addressing the obligation of the State in situations where there are tensions as a result of the differing and where one has minorities. The Court said:

'…The emergence of tensions is one of the unavoidable consequences of pluralism, that is to say the free discussion of all political ideas. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing political groups tolerate each other (**see Serif v Greeece, No 38178/97 $ 53, ECHR 1999-IX).**

131. IT IS OUR SUBMISSION THAT SAPS FAILED TO POSITVELY TAKE STEPS TO SECURE THE RIGHT TO FREEDOM OF ASSOCIATION OF MABEBE, MABELANE AND LANGA and therefore must be found liable for any damages their respective families suffered as a result of their killings.

RECOMMENDATION

132. The language of the law relating to 'protection of the right to freedom of association' must expressly include the 'right not to associate' or 'the right not to join a trade union'.

133. Unless such a right is expressly provided, the accentuation of the positive aspect of this right shall always result in undermining the choice not to join or associate. In view of the world developing trend of workers loath to join trade unions, and as also expressed in the evidence of Mr Mokoena of Lonmin that the percentages of workers non-unionised are steadily growing, the law must protect these choices in clear terms.

RECOMMENDATION

134. The Right Not to join a strike or to be a member of a trade union is a constitutional right. Such right must be clearly protected by law.

In the decision of 'The Administrative Tribunal of the International Labour Organisation' IN RE GRASSHOFF, JUDGMENT NO. 402 (1980). The tribunal considered the evaluation of risk versus sending workers to an environment that is abnormally unsafe.

135. The tribunal stated that:

'it is a fundamental principle of every contract of employment that the employer will not require the employee to work to work in a place which he knows or ought to know to be unsafe..'

136. The Tribunal went to hold that: *'If there is doubt about the safety of a place of work, it is the duty of the employer to make the necessary enquiries and to arrive at a reasonable and careful judgment, and the employee is entitled to rely upon his judgment'*

137. South African Constitution

The provisions of South Africa Constitution Act provides for respect for International Law and adherence to international best practice. It is therefore incumbent on domestic laws to adhere to ILO Conventions as SA is a signatory of the convention.(Glenister decision)

138. The South African constitution also provides for 'fair labour practice' and the 'right to life'. This includes that the employer shall to ensure security of the employee.

DUTY BY THE STATE TO PROTECT LIFE

139 The Commission seeks to respond to international and national concerns. We submit that in order to respond adequately, it is expected

that we match the expectation to both international and domestic principles that are applicable.

140 The binding and /or persuasive effect of international laws and instruments was discussed fully in the case of Glenister[ii] and therefore our submission shall make reference to such principles with full confidence that the Commission in its recommendation shall include where appropriate suggestions that our laws should be reviewed to align with best practice in order to avoid future incidences like Marikana.

141. Universal Declaration of Human Rights[iii], Article 3 provides for upholding of the Right to Life, Liberty and Security of Person. Art. 6 of the International Convention on Civil and Political Rights[iv] [herein 'ICCPR'] moves the obligation further by providing that: '**everybody has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.** Article 4 of the ICCPR buttresses the right to life by providing that: **'States are not able to derogate from Article 6 even in times of a public emergency'**. The same provisions are found in Article 4 of the African Charter.[v]

South African Case Law on Protection of Life

142. Section 12 of the Constitution of South Africa Act protects the Right to Life. The South African Courts in the case of **Carmichele v Minister of**

Safety and Security [vi] held that there is public duty of police to protect the Right to Life**.** The facts briefly of the case briefly are that the conduct of police and prosecutor had resulted in the release of a person charged of rape and that this person assaulted the complainant.

143. The CC found that the State could be found liable for damages arising out of the unlawful omissions of its officials. **'The Court went on further to state that the Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the rights such as the right to life.'**

144. South African legal writers like **CR Snyman** commenting on the Carmichele case argues that 'the court may one day open the way for holding an individual police officer liable for a crime such as culpable homicide flowing from her negligent omission to protect a person from the real possibility of danger'.

145. This view which stems from argument relating to development of the common law in line section 39 of the Constitution resonates with our submission that:

146. The omission by the South African Police to protect non-strikers like our clients give rise to liability on the part of the SAPS as an organ of state.

147. It further is strengthened by their obligations in terms of Section 205 of the Constitution read with South African Police Services Act.

Other Jurisdictions on the matter

148. We submit that the obligation by the state must be extended to include that there must be positive steps taken by the state where there is possibility of danger to lives of citizens.

149. The EU courts have found that 'there is an obligation of the state to conduct public investigation into potential violations of the right to life and prohibition against ill-treatment.

150. The case of AM and ORs, R (on the application) v Secretary of State for the Home Affairs Department & Others [vii] the court held the following in its interpretation of the right to life and State Duty

'it is a well-established obligation to instigate an official investigation where there is credible evidence of a breach of Article 2 of the EU Charter of HR.'

151. In this matter where the state was alleged to have been alerted too late the complainant appealed to the EU HR Court of Justice which found that: the state ought to have conducted an independent public enquiry when the appellant alerted them of the possibility that their rights may have been infringed.

152. In the case of Marikana the police were alerted as early as 09 August 2012 of the possibility of danger to lives of individuals. They actually were present won 10 August 2012 when the strikers were singing with kieries, pangas, and sticks, even though they were not aggressive. An obligation rested on the state to foresee the possibility of the weapons being brought to use. Therefore a surveillance from this point on was the least reasonable the public who were potential victims would have expected.

LEGAL FUNDING AND DUTY OF THE STATE TO ENSURE 'EQUALITY OF TREATMENT'

153. In our submissions on behalf of the families we respectfully note that the Chairperson and Commissioners have granted us indulgence and

have been ready to assist our presentation to the best possible measure. We readily appreciate these efforts.

153. The Commission of Enquiry of Marikana seeks to establish Truth, Restoration and Justice for all families of victims of these tragic events, a lauded effort by government. We express our concern that truth is product of resources, and therefore to the extent that government failed to present same resources to all parties, there was unequal presentation of cases of victims **much to skew the truth the commission was established to achieve**. This we respectfully submit discounts the excellent work of the commission.

154. It is unfortunate that even at this late stage, some of the family members have to ask Legal Aid Board an entity of state to fund them to fight the same body (Legal Aid Board) to assist the family members to present their cases.

155. Our final submission is therefore that:

The Truth in a Commission in the position of Marikana is appointed by the state. The state must not select the evidence she wants heard. All families of

victims must be heard and gain access to resources to do so. State assist all of families of victims to present their cases the best possible. This is the challenge directed to the Ministry of Justice in the Commission and we humbly request that our submission reach the ministry. Unless parties are assisted in the same manner, then the Commission turns into a political scheme to reflect only some truths.

We thank Commissioners for their indulgence.

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[i] Duty of Care towards Personnel Deployed in International Missions by Andre de Guttry

[ii] Glenister v …

[iii] UNDHR

[iv] ICCPR

[v] Article 4 of the African Charter states: '…

[vi] [2001] ZACC 22; 2001(4) SA 938 (CC)

[vii] [2009] EWSA CIV 219 (17 March 2009)