

IN THE MARIKANA COMMISSION OF INQUIRY

**CONCLUDING SUBMISSIONS ON BEHALF OF
THE NATIONAL UNION OF MINeworkERS
AND MRS FUNDI**

CONTENTS

Introduction.....	4
Background: Brief History of NUM.....	6
Collective Bargaining: Some General Perspectives and the Role of a Mandate.....	8
Collective Bargaining: Extension of Agreements.....	11
Aspects of NUM's Service to its Members.....	16
NUM and Strike Action.....	21
Collective Bargaining: NUM's Practice in Negotiations.....	25
Collective Bargaining: Impala and NUM's Policy regarding Differentiation.....	26
The 2011 Negotiations at Impala.....	30
Events at Impala.....	35
2011 Collective Agreement: Lonmin.....	39
Events at the Karee Mine.....	40
The Situation of RDOs.....	42
RDO Demand for R12,500 and the Exclusion of NUM.....	44
Consequences of Lonmin's Engagement with RDOs.....	49
The Role of NUM Meetings.....	54
Capacity of Lonmin Security.....	59
Events of 10 August 2012.....	70
Attack on NUM Office on 11 August 2012.....	72
Allegations Concerning the Shooting of Two Strikers.....	84
Events of 12 August 2012: Wonderkop.....	87
Events of 12 August 2012: K4 Shaft.....	99
Killing of Twala.....	102
NUM and SAPS Intervention.....	103

Alleged ‘Unholy Alliance’	105
Composition of the Strikers.....	106
Events of 15 August 2012.....	107
Events of 16 August 2012.....	109
The Peace Accord and Settlement of the Strike.....	113
Conclusions.....	113

IN THE MARIKANA COMMISSION OF INQUIRY

CONCLUDING SUBMISSIONS ON BEHALF OF THE NATIONAL UNION OF MINeworkERS AND MRS FUNDI

Introduction

1. The Commission was appointed with its mandate to investigate matters of public, national and international concern arising out of the tragic events at Marikana from 11 August to 16 August 2012 which led to the deaths of approximately 44 people, injury to more than 70 people, many arrests as well as damage and destruction to property.
2. Paragraph 1 of the Terms of Reference provides as follows: "*The Commission shall inquire into, make findings, report on and make recommendations concerning the following, taking into consideration the Constitution and other relevant legislation, policies and guidelines.*" The subparagraphs that follow identify particular entities whose conduct is to be enquired into, being Lonmin, SAPS, AMCU and NUM. Subparagraph 1.5 concerned the Department of Mineral Resources or any other government department or agency. This was subsequently deleted from the Terms of Reference. Finally, subparagraph 1.6 covered "individuals and loose groupings".
3. These submissions are directed in the main towards the conduct of NUM as described in paragraph 1.4 of the Terms of Reference, namely:
 - "1.4 *The conduct of the National Union of Mineworkers (NUM) its members and officials and in particular:*
 - 1.4.1 *whether it had exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between itself and Lonmin and/or AMCU or any other parties;*
 - 1.4.2 *the extent to which it exercised effective control over its membership and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives and property of other persons; and*

1.4.3 whether by act or omission it directly or indirectly caused loss of life or damage to persons or property."

4. Aspects of the interaction between NUM and other parties will be traversed in these submissions. Having regard also to the fact that they are to a substantial extent advanced also on behalf of Mrs Fundi, the circumstances of the death of Mr Hassan Fundi will be examined as closely as the evidence permits. These considerations make it appropriate for us to here recite also the content of paragraph 1.1 of the Terms of Reference:

"1.1 The conduct of Lonmin plc (Lonmin), in particular:

1.1.1 whether it exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between Lonmin and its labour force on the one hand and generally among its labour force on the other;

1.1.2 whether it responded appropriately to the threat and outbreak of violence which occurred at its premises;

1.1.3 whether it by act or omission created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct;

1.1.4 whether it employed sufficient safeguards and measures to ensure the safety of its employees, property and the prevention of the outbreak of violence between any parties;

1.1.5 to examine generally its policy, procedure, practices and conduct relating to its employees and organised labour; and

1.1.6 whether by act or omission it directly or indirectly caused loss of life or damage to persons or property."

5. Pertinent provisions of the Terms of Reference will be identified and evaluated in relation to the various topics that follow which, for ease of reference, have been listed in a covering contents page.
6. We will on occasion refer to material presented during the three phase 2 seminars that were conducted under the Commission's auspices. Although this material does not formally constitute evidence, appropriately weighted regard may helpfully be had to it as part of the information before the Commission, particularly where such material is

not otherwise disputed or where it is consistent with other evidential material. The seminar program as a whole was intended to deal with topics that were causally related to the events of August 2012 and it was at that time contemplated that the process would extend to submissions by parties and, in respect of certain matters, to oral evidence with cross-examination. The advent of the Commission's final deadline for the receipt of evidence by 30 September 2014 has inevitably curtailed that process. Where we deal with such content we will indicate whether we endorse it and, if we differ from it we will indicate why.

7. As we turn to an examination of the topics that most directly concern NUM, we record afresh the ongoing sorrow of NUM and Mrs Fundi at the loss of life and the injuries that occurred during the events that have been examined by this Commission and the dislocating impact on an uncountable number of people as a result. Although many others lost their lives after that period, NUM gives particular recognition to the following NUM officials and members and believes that their deaths flowed from the events leading up to and during the unprotected strike: (i) Mr Dumisani Mthinti, shop steward, killed 11 September 2012; (ii) Mr Daluvuyo Bongo, branch secretary, killed 5 October 2012; (iii) Mr Mbulelo Nqetho, shaft secretary, killed 3 June 2013; (iv) Ms Nobongile Nora Madolo, shop steward, killed on 12 August 2013; (v) Mr 'Brown' William Setelele, branch chairperson, killed on 17 October 2013; and (vi) Mr Percy Richard Letanang, shaft steward, killed on 2 November 2013. NUM pays tribute also to Mr Saziso Albert Gegeleza, shaft secretary, who stood up for the rights of his union on 11 August 2012, died after a long illness on 2 May 2013.

Background: Brief History of NUM

8. There is a vast amount of literature and information available on all aspects of the South African mining industry, including the working and related conditions of employment of miners. It seems to have been accepted by all parties that an appreciation thereof is necessary for a proper understanding of the nature of the conflict in August 2012.
9. For the purpose of these submissions we will set out a brief digest of the first-hand account given by Mr Zokwana in his evidence. He was first employed in 1979 as an

underground mining hand in 1979 and he has since then gained a great deal of experience and insight into the industry, including the difficulties faced by workers and the role of trade unions in that environment.¹

10. Since its formation in 1982 NUM has sought to improve the lives of mineworkers through collective bargaining.² It has addressed low wages and achieved leave pay and pensions.³ Over the previous three years NUM had obtained wage increases of between 9 and 10%; it has established a provident fund and a share ownership scheme.⁴
11. NUM has extensively and successfully tackled issues of health, safety and compensation, including the conduct of accident investigations.⁵ It has likewise taken up occupational hazards and diseases such as silicosis. It has developed structures to follow up the claims of afflicted mineworkers who return to their homes.⁶
12. NUM took on the fight against issues of tribalism, racism, hostel living, faction fighting including their impact on the dignity of workers.⁷ A concrete area of progress has been the steady conversion of single hostel living to decent housing units where a basic standard like privacy could be reclaimed.⁸
13. There is also a Mineworkers' Investment Trust that provides study bursaries to the dependents of mineworkers, as well as mineworkers themselves. Some 800 graduates have already been produced at a cost of R76m. In similar vein, NUM has established a Mineworkers' Development Agency, a body that seeks to uplift communities throughout Southern Africa.⁹
14. Notwithstanding NUM's endeavours and achievements as outlined above, it recognizes that there are still enormous shortcomings in the wages and working

¹ Zokwana: Day 41: 4401: 1 – 25.

² “BBB 1” paras 3 and 4.

³ Zokwana: Day 41: 4402: 18 – 4403: 14.

⁴ Zokwana: Day 41: 4404: 8 – 4405: 6.

⁵ Zokwana: Day 41: 4405: 7 – 4407: 4.

⁶ Zokwana: Day 41: 4407: 5 – 4408: 16.

⁷ Zokwana: Day 41: 4408: 17 – 4413: 8.

⁸ Zokwana: Day 41: 4413: 9 – 4414: 2.

⁹ Zokwana: Day 41: 4414: 3 – 4415: 13.

conditions of mineworkers. So, too, it recognizes that a central fact of life for mineworkers essentially remains in place, namely the migrant labour system and its attendant degradations.

15. In this regard we agree with the key structural argument presented by Prof Francis Wilson at the seminar of **9 April 2014**, namely that in the short term migrant labour brings about mutual benefits; in the long term, however, the mining centre develops whilst the labour sending area steadily declines to a state of poverty.¹⁰ Translated into the Marikana situation, there can be no doubt that when a migrant worker's home circumstances are becoming impoverished this will become a major stressor. When that is coupled with the *de facto* burden of meeting the expenses of a second home in the work environment, frequently compounded by micro-lending arrangements, the pressures will intensify the impact of workplace grievances.

Collective Bargaining: Some General Perspectives and the Role of a Mandate

16. Mr Zokwana testified to NUM's long standing engagement in and commitment to the processes of collective bargaining. The essence of these processes are now embedded in the Constitution of the Republic of South Africa and further detailed in a sophisticated set of enactments, central to which is the Labour Relations Act 66 of 1995 ("the LRA"). These legislative developments have brought about several major improvements in the position of workers. To a large extent they are the outcome of years of trade union struggle, in which NUM has played a prominent part. It is important to note that the particular mechanism that was put in place for the settling of the content of the LRA and other key labour legislation was Nedlac, a carefully fashioned institution for the generation of the tripartite cooperation of labour, business and government.
17. The resultant LRA dispensation has at its core an arrangement of lawfully organised union and employer entities functioning within a bargaining environment that not only regulates their interaction but also provides for the possibility of resort to lawful strike

¹⁰ See generally: Transcript: pages 23: 23 – 26: 17.

or lockout measures. Properly observed and applied, this would provide certainty and stability to the entire economy.¹¹

18. However, neither at Impala nor at Lonmin was this arrangement followed, with tragic and destructive consequences. At both, the employer unilaterally departed from a properly concluded collective agreement. In each instance this triggered substantial demands by a section of the workforce, made outside collective bargaining structures. In turn this led to unprotected strike action accompanied by high levels of violence. The impact of conduct of this kind on labour relations and economic activity has been profoundly negative, being precisely what collective bargaining legislation intended to prevent. This does not mean that the system of collective bargaining is defective or dysfunctional, but that conduct in breach of it is.
19. In the context of matters such as wage negotiations, collective bargaining on behalf of workers must be done through representatives. Implicit in that is the crucial role of a mandate. Mr Zokwana testified as a trade unionist with vast experience. He described its importance. In the context of this Inquiry, his evidence on this is of sufficient moment for it to be reproduced here:

“Before a union can engage any employer in any form of negotiations, you need a proper mandate from those on whose behalf you are negotiating. You must have the right to get their views. When we have gone through engaging with the employers in the course of give and take, you are able to go back and report and get a new mandate. Whenever you have to make a concession on one point or another, it must be through that mandating process. Without a mandate I don’t foresee you claiming to represent anybody, for you rely upon them giving you the way forward. So mandating is part and key to any process of bargaining ... You can only get a mandate from people who have the trust in you. You can only get a mandate from people who believe that you are still their agent. With the case of Marikana, the RDOs took a decision that NUM was not going to be such an agent and the violent nature of the process would have meant that interaction between NUM and those strikers was impossible, as a lot of our local shop stewards had to go into hiding. There was no way then for NUM to get that mandate from people where [there was]

¹¹ “BBB1” para 5; Zokwana: Day 41: 4415: 14 – 4416: 11.

violence towards the union, as shown by the incident of the 11th at the branch office.”¹²

20. As this passage makes clear, the existence of a mandate is a fundamental element, particularly where wage negotiations are to be conducted. Questions of efficacy come to the fore. For an outcome to be respected and observed, the process leading to it must have enjoyed the trust of and effective participation in it by the workers. We should point out that a mandate does not imply unanimity. Our system of labour relations incorporates the principle of majoritarianism. But, no matter what the numbers are, a union cannot fashion its own mandate and if the relevant constituency does not wish to give it one, then it is impermissible for the union nonetheless to approach another party as though it is properly authorised to do so.
21. The qualificatory need for a mandate is a vital consideration in relation to what NUM could have done during the days leading up to the especially tragic events of 16 August. Throughout that period it was not possible for NUM to have initiated interaction of a bargaining nature with Lonmin on behalf of the RDOs. There was no mandate and NUM could simply not have done this. One need only picture the reaction if Mr Zokwana and other NUM leaders had gone to the koppie to announce that they had begun talks with Lonmin on their behalf or to request a mandate to do so. The strikers had consistently and from the very beginning made it plain that they did not want NUM. They had attacked its office. They had threatened its shop stewards, who had had to leave the mine for their own safety. One shop steward had been killed at the koppie. The NUM President had been threatened and jeered when he attempted to address them on the 15th. To negotiate in that scenario was impossible. Moreover, as Mr Zokwana pertinently observed, the situation became one where the immediate need was for the restoration of law and order; ordinary negotiation was at that time not feasible.¹³
22. By way of illustration, questions were put on behalf of SAPS in the terms that NUM knew what the RDOs’ demand was and that it could therefore have opened discussions with management. With respect, that is fallacious. Knowledge of a

¹² Zokwana: Day 41: 4416: 16 – 4417: 22.

¹³ Zokwana: Day 41: 4442: 3 – 4443: 1; Day 42: 4546: 1 – 4547: 8.

demand does not constitute a mandate to act.¹⁴ By the same token, the proposition that was put by SAPS that it was always within the capacity of NUM and Lonmin (between the two of them) to reach an agreement without the loss of life is unrealistic.¹⁵ The strikers had made it abundantly clear that it was the employer whom they wanted to hear from, not NUM.

Collective Bargaining: Extension of Agreements

23. The evaluation of the conduct and disposition of the strikers should have regard to the applicable legal framework. A key feature of this is that the collective agreement of 2 December 2011 was binding not only on members of NUM, which had entered into the agreement, but equally so on members of AMCU and non-unionized employees.¹⁶ This follows as a matter of law and is so irrespective of whether or not they agreed with the terms of the agreement.
24. The legal structure is straightforward. Section 23 of the LRA deals with the legal effect of collective agreements. Subsections (1) and (2) state that:
- “(1) A collective agreement binds -*
- (a) the parties to the collective agreement;*
 - (b) ... ;*
 - (c) the members of a registered trade union ... that are party to the collective agreement if the collective agreement regulates –*
 - (i) terms and conditions of employment;*
 - (ii) ... ;*
 - (d) employees who are not members of the registered trade union or trade unions party to the agreement if –*
 - (i) the employees are identified in the agreement;*
 - (ii) the agreement expressly binds the employees; and*
 - (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.*

¹⁴ Setelele: Day 38: 4139: 7 – 4140: 8; 4147: 3 – 22.

¹⁵ Setelele: Day 38: 4156: 5 – 17.

¹⁶ Agreement: “XX2” at pages 13 to 20.

- (2) *A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1)(c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union ... for the duration of the collective agreement.*”
25. These provisions represent important policy imperatives concerning the integrity and stability of collective bargaining outcomes. They were directly applicable at Lonmin.
26. In the first place, the agreement recorded in clause 2.1: *“This agreement shall apply to and bind the following employees, at Marikana Operations: 2.1.1 All permanent employees who are members of the union [NUM] employed in the bargaining unit at the company. 2.1.2 All permanent employees who are not members of the union but who are employed within the bargaining unit at the company.”* Accordingly, the three requirements of section 23(1)(d) were satisfied, having regard to the fact that NUM was at the time the majority union at Lonmin.
27. In the second place, subsection (2) makes it clear that all employees who were members of NUM at that stage remained bound for the duration of the agreement regardless of whether they continued to be NUM members, resigned and/or changed to AMCU.
28. A further and related entrenchment of the policy objectives underlying the LRA is to be found in the prohibition provisions of section 65(3):
- “Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out_*
- (a) *if that person is bound by-*
- (i) *any arbitration award or collective agreement that regulates the issue in dispute; or ... “*
29. Plainly, in this case, the issue of RDO wages was regulated by the agreement, in clause 3 thereof.
30. These provisions entail a limitation of the right to strike. In the recent Labour Court decision of Van Niekerk J in the case of *Chamber of Mines of South Africa acting in its own name and obo Harmony Gold Mining Company Ltd and others v AMCU and*

others [2014] 8 BLLR 895 (LC) it was *inter alia* held that entry into a collective agreement entails contracting out of the right to strike, also in the case of section 65(3)(a)(i) “*in the sense that it prohibits strikes in circumstances where a binding collective agreement regulates the issue in dispute.*”

31. In respect of section 23(1)(d) the limitation flows from the “*legislative policy choice of majoritarianism*”. It was observed further that: “*The promotion of orderly collective bargaining is one of the explicitly recognized purposes of the LRA. Once a collective agreement is reached it is crucial that these follow – this is the quid pro quo to the employer for its consent to a collective agreement conferring improved benefits on employees...*” The Court also dismissed a challenge against the constitutionality of section 23(1)(d), holding that its limitation on the right to strike was justified.¹⁷
32. Section 23 of the Constitution is of course the source of the right to strike. When it comes to the interpretation of it, the Constitutional Court has specifically affirmed the value of relevant Conventions and Recommendations adopted by the International Labour Organisation (“ILO”): *SA National Defence Union v Minister of Defence and another* (1999) 20 ILJ 2265 (CC).
33. The ILO’s jurisprudence in this regard has been developed by its Committee of Experts on the Application of Conventions and Recommendations, as well as by the Freedom of Association Committee of the Governing Body. Van Niekerk J traversed key Conventions and Recommendations, together with a summary consideration of the position in other jurisdictions. His conclusion, with which we respectfully agree, was that the relevant provisions of the LRA were consistent with the policy and approach of those bodies.¹⁸
34. An important consideration flows from the above. Clause 12.4 of the 2011 agreement makes it possible for the parties to revisit its terms and to add, vary, cancel or novate any of them although, not surprisingly, that can only be done on a consensual basis, reduced to writing and signed.¹⁹ But, that clause cannot be decoupled from the relevant statutory stipulations. In particular, the prohibition on a strike contained in

¹⁷ Paras [54] to [57] and [73]. The decision was handed down on 23 June 2014 and is on appeal.

¹⁸ Paras [60] to [66].

¹⁹ “XX2” at page 19.

section 65(3) remains applicable. Hence, if the parties enter into a mid-stream engagement but no consensus results, there can be no lawful resort to strike action, for the remaining duration of the agreement.

35. The question presents itself: Would the RDOs of Lonmin have seen that route as more attractive than the one adopted by their colleagues at Impala? In our submission the answer is evident. They had no wish to pursue their R12,500 demand through collective bargaining processes that made no provision for the exercise of power, namely strike action. By the same token, they did not at any time contemplate approaching NUM to approach Lonmin on their behalf. Nor did they.
36. Under this heading, we stress that NUM's commitment to the structures that have been established to facilitate and regulate orderly and lawful collective bargaining is unqualified. These structures embody key values of the Constitution. Those values have in turn been given detailed and measured content in the LRA. The course that NUM has set itself upon seeks not only to fully address the interests of its members, but also to do so in accordance with the terms of those structures and the spirit that underlies them. Hence its practice in relation to negotiations (with which we deal below) deliberately brings to bear a philosophy of care, research, and reasonableness coupled with full interaction with its membership. Through this, it endeavours to contribute to the objective of peaceful labour relations and, through it, the promotion of sound economic development. This it does in the belief that overall economic stability and growth will bring advancement also for its own membership.
37. Among the relevant provisions in the constitution is section 23(5): "*Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining....*" As with all its provisions, that one directs itself in part towards the Founding Provisions which explicitly record and entrench the value of "*the rule of law*" (section 1(c)).
38. The LRA for its part then gives effect to this through *inter alia* section 1 which describes the purpose of the Act as being: "*to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the*

primary objects of this Act...” Among those primary objects is the following: *"to provide a framework within which employees and their trade unions, employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest"*. This is done in order to promote *inter alia* *"orderly collective bargaining"* as well as *"the effective resolution of labour disputes"*.

39. At the stage that NUM concluded a collective agreement with Impala on 7 October 2011, these values and purposes had been given effect to. The same was true as at 2 December 2011 when the agreement with Lonmin was signed. At Impala, the initial crack came when the company stepped outside this lawfully concluded arrangement in order to give an 18% increase to Miners. At Lonmin a similar crack arose upon the decision of the company to grant so-called "allowances" to RDOs in July 2012.
40. Those cracks became calamitous fractures once the RDOs at each company took the decision to launch unprotected strike action outside any collective-bargaining structures, with clear contemplation of massive pressure being exerted upon the company through widespread instances of unlawful conduct, especially violence.
41. This country's Constitution and its concurrent national labour legislation, the LRA, cannot accommodate fissures of this nature and extent. The legislation embodies multi-level and dedicated dispute resolution facilities. Where disagreements or grievances of any nature arise, there are avenues for those to be dealt with in a way that will not be destructive of labour peace or the rights of others. That is so in respect of the decisions of Impala and Lonmin. It is also so in respect of the decisions of the RDOs to embark on unprotected strike action, especially when that is coupled with violence.
42. It is with respect of great importance that this Commission should not in its findings inadvertently suggest any endorsement of the pursuit of wages or any other conditions of employment in ways that deliberately breach or evade lawful processes and structures and/or are coupled with strike violence. In particular, great care must be taken in relation to suggestions that levels of violence should themselves be treated as acceptable cause for accommodation outside the legal framework. If that were to be

seen to be legitimate, then the pursuit of industrial objectives through violence will to a disastrous extent subvert the processes entrenched by the Constitution and cultivated through the LRA.

Aspects of NUM's Service to its Members

43. From time to time there have been suggestions that NUM failed to render a proper service to its members. The tenor of these needs to be addressed and it will be convenient to do so with reference to contentions made at certain of the Commission's seminars.
44. Some examples of this arose during the presentation by Prof Buhlungu at the seminar of **31 March 2014**, by way of observations in the nature of being conclusions without any substantial – and tested – factual basis:
- 44.1. Although acknowledging that vast improvement to wages and conditions for, among others, mineworkers had been achieved,²⁰ Prof Buhlungu stated that NUM did not function optimally and that this became a problem for workers because they have nowhere to go.²¹ Against this is the clear and undisputed description given by Mr Gcilitshana in his evidence before the Commission of the inclusive, participatory and mandated processes undertaken by NUM leading up to the 2011 collective agreement. This evidence is described below.
- 44.2. Likewise, there is no evidence that any NUM member with a grievance or requiring any other assistance was not properly attended to by the NUM structures at Lonmin.
- 44.3. Prof Buhlungu's statement is also not compatible with the evidence of Mr Setelele that the demand for R12,500 was not at any time brought to the attention of NUM.²² So, too, it is clear from the evidence of Mr Da Costa

²⁰ Seminar Transcript: 28:20 – 25.

²¹ Seminar Transcript: 29:19 – 30:9.

²² Setelele: Day 38: 4128: 1- 12.

that it was already a pre-determined position of the RDOs as at 21 June 2012 that they wanted no unions to be involved.

- 44.4. It is a further important fact (to which Prof Buhlungu appears to have had no regard) that the demand for R12,500 was initiated by the RDOs at Karee. By then, AMCU had replaced NUM as the majority union at Karee.
- 44.5. On a related topic, Prof Buhlungu further stated that there was a problem “*that you find collusion sometimes across these three, union officials, the employer and the State or State officials*”.²³ That is a non-specific and ungrounded but prejudicial contention. It should, with respect, be entirely disregarded.
- 44.6. Prof Buhlungu states that the processes of NUM having worker meetings “*have fallen apart completely*”.²⁴ That is not a well-informed statement. We refer for instance to the account given by Mr Gcilitshana of the process of meetings including mass meetings relating to mandate matters, leading up to the conclusion of the December 2011 collective agreement.²⁵
45. Two aspects of the presentation drawn up by Mr John Brand for the **31 March 2014** seminar also require a response:-
- 45.1. It is again said that NUM failed to properly service members’ interests.²⁶ That is a statement of unqualified breadth, with no evidential or tested base and we contest it.
- 45.2. It is also said that NUM agreed to wages that were unacceptable to RDOs.²⁷ This assertion does not have regard to the detailed and inclusive nature of NUM’s processes relating to wage negotiations, including those of 2011 at Lonmin. These have been referred to above, including the evidence of Mr Gcilitshana that the final mandate before the conclusion of

²³ Seminar Transcript: 33: 20 – 22.

²⁴ Seminar Transcript: 35: 19 – 36: 10.

²⁵ Gcilitshana: Day 35: 3797:24 – 3806:23; 3811:1 – 3812:11.

²⁶ Seminar Transcript: 47: 14 – 15.

²⁷ Seminar Transcript: 47: 20 – 22.

the collective agreement was obtained at a mass meeting of employees, including RDOs. It must be borne in mind further that the demands for R12,500 did not arise at the time of the 2011 collective agreement, but after the later events at Impala.

46. At the seminar of **9 April 2014**, Mr Hartford presented a number of useful demographic perspectives on the relationship between migrant labour and workforce composition, which may well have played a role in a change in attitude to NUM and the ethos of orderly collective bargaining, including the following:
- 46.1. About 80% of migrant workers come from the Eastern Cape, of whom those from Pondoland have historically occupied the category of rock drill operating.²⁸
- 46.2. Of these workers, about two-thirds are made up of a relatively older generation, who joined NUM and were part of building it up in the days of apartheid. Relatively recently, the other one-third now consists of younger workers, described by Mr Hartford as being much more militant and with a high rate of turnover.²⁹
47. In the post-1994 period NUM took up accommodation issues as a central collective bargaining issue, resulting in the introduction of (i) a homeownership allowance and (ii) a living-out allowance.³⁰ We concur with Mr Harford's view that, as it unfolded, the latter allowance became a major socioeconomic driver in recent industrial action. Instead of renting accommodation, many workers built their own shacks and took on a second wife with all the additional expenses of running a second home.³¹

²⁸ Seminar Transcript: 10: 22 – 11: 15.

²⁹ Seminar Transcript: 11: 16 – 12: 6.

³⁰ Seminar Transcript: 13: 6 – 14: 4.

³¹ Seminar Transcript: 14: 4 – 15: 1.

48. Mr Hartford advanced a thesis that the key driver for unilateral industrial action was the “*collapse of constituency-based representation*” on the part of NUM, involving also the place of full-time shop stewards and the stratification of the bargaining unit.³²
49. In the course of his presentation on **16 April 2014**, Prof Webster also touched on this issue. He cited the statistic that 24% of NUM’s shop stewards are full time. He added the observation that: “*You get frustration because there’s no response to your demands ...*”. This was described as the "social distance" between NUM stewards and NUM members.
50. In the view of NUM, commentary of this kind is inaccurate and does not reflect a sufficiently detailed appreciation of the functions of shop stewards and their relationship to union membership.
51. In the first place, it is necessary to bear in mind that mines are highly complex workplaces, involving three daily shifts/24 hour working cycles involving a large number of workers and a wide range of occupations. Many of those entail demanding and hazardous underground work, with widely dispersed working areas and residential arrangements. Because of this the appointment of full-time shop stewards became an important objective and their presence is regarded as being a positive product of significant collective bargaining gains by NUM over the years. Full-time shop stewards offer an important degree of continuity, coupled with incrementing knowledge and experience, which devolve into more sophisticated and more effective protection and advancement of the interests of union members.
52. Given the complex working and residential environment, demands on shop stewards are correspondingly extensive. As this Commission has heard, mineworkers have a wide range of concerns including working and living conditions, wages and benefits, issues around training, health and safety, compensation, disciplinary matters, financial and family matters. Having full-time shop stewards enables NUM to provide skilled and available persons to engage with members on this range of issues. It is simply not

³² Seminar Transcript: 15: 21 – 18: 10.

practicable for an equivalent service to be offered by part-time stewards, who very often are available only after working hours.

53. The question of full-time shop stewards is also related to the important issue of union offices. This, too, is a matter about which evidence has been presented to the Commission. These offices are indispensable in terms of accessibility to members and the provision of personnel to address their concerns. Offices exist at both branch and shaft levels. Shaft offices in particular provide points of contact with union members as they begin or conclude their shifts. These offices are staffed by both full-time and part-time shop stewards. Likewise, where escalation is required, shaft committees and then branch committees are the key union structures for taking grievances and other concerns forward.
54. In short, we submit, there is no good reason to simply equate ‘full-time’ with ‘social distance’. That conclusion finds no empirical echo in the material before the Commission.
55. As to the statement that members received no response from the union, we point out firstly that the RDOs did not at any time put their R12,500 demand to NUM for attention. More broadly, there is also no evidence of any instance of a worker who submitted a grievance or other demand to NUM and received no response. In this regard, Mr Gcilitshana gave specific testimony about how workers interact with NUM, being a process that may start *at the workplace* through a section steward, may proceed to the shaft committee, if needs be to the branch committee and, if required, to the regional level and, even, beyond that.³³
56. Mr Gcilitshana was not challenged in respect of this aspect of his evidence. In particular, it was not put to him or any other NUM witness that having full time shop stewards was a problem. Even more pertinently, it was not suggested to him that this was a cause of the resort by strikers to the violence that this Commission is investigating.

³³ Gcilitshana: Day 35: 3792: 11 – 24.

NUM and Strike Action

57. The view of Mr Zokwana and other senior persons in the leadership of NUM is that unprotected strikes in general have very grave consequences for all parties, including employees who participate in them. They lose the protection from dismissal afforded by the constitutional right to strike and employers often dismiss strikers and re-employ them on a selective basis, sometimes with reduced terms and conditions of employment. Additionally, such strikes are often accompanied by violence, intimidation and destruction of property.³⁴ These characteristics are of course not unique to unprotected action but, where the starting block is already outside the law, the likelihood for further unlawful activity increases.
58. For this reason NUM consistently urged its members at Lonmin not to take part in the unprotected strike called by the RDOs and to continue reporting for duty. NUM actively assisted those who wished to report to do so. It likewise called for strikers to return to work and for their demands to be channelled through established bargaining processes.³⁵
59. With the benefit of his experience as a unionist, Mr Zokwana confirmed that violence and intimidation are often directed against non-strikers. He stated the position concisely: *“Conduct of that sort is typically resorted to by strikers in order to bring about a further reduction in the number of workers reporting for duty and thus to decrease or stop production. This increases the pressure on the employer. He further observed: “You can only manage a strike that is peaceful ... if such a strike has been taken with the full mandate of those who participate in it.”* The corollary is that where strikers are not operating under the guidance of a trade union, the ensuing potential for violence is linked with the fact that the events have been taken out of the regulatory environment established by the LRA.³⁶

³⁴ Zokwana: “BBB1” para 7.

³⁵ Zokwana: “BBB1” para 8.

³⁶ Zokwana: Day 41: 4430: 10 – 24.

60. Useful insights were provided by Mr Chinguno at a phase 2 seminar on **16 April 2014** on the subject of “*worker-on-worker violence*” and the intimidation of non-strikers. He presented two broad analytic categories:
61. The first is that violence simply forms part of the strike “*repertoire*”, namely that “*violence works*” and that it helps to attain some of the strike goals.³⁷
62. The second and related category is that violence is also “*a means of forging collective solidarity*”. Mr Chinguno cited some illustrative interviews he had conducted with workers, most pithily captured in this statement: “*A strike has its own rules and rule number 1 is that no-one must report for work when a strike is called.*”³⁸
63. NUM agrees with this analysis, notwithstanding its firm opposition to the existence of workplace violence of any kind. So, too, it recognizes the applicability of the following formulation by Mr Chinguno: workers who are seen to be strike breakers become the enemy; the killing of a co-worker, who is now viewed as a “*scab*”, is perceived to be a legitimate punishment inflicted upon a collaborator.³⁹
64. Although he was drawing on his experience of the events at Impala earlier in 2012, NUM considers the following observations by Mr Chinguno to be apposite in respect of the later violence at Lonmin also, namely: (i) there are incidents of attacks upon union officials; (ii) it almost becomes dangerous to be associated with certain unions; (iii) a worker may be attacked as a ‘sell-out’ for wearing a T-shirt of “*a wrong union*”.⁴⁰
65. At the same seminar, Prof Webster also provided a range of valuable insights into the issue of strikes and violence. Although these related to both protected and unprotected strikes, his analysis is plainly of assistance in an evaluation of the events at Lonmin (and, earlier, at Impala also). As his departure point, he articulated a standard that NUM also subscribes to, being one that should be observed particularly in the current

³⁷ Seminar transcript: pages 15: 22 – 16: 5.

³⁸ Seminar transcript: pages 17: 21 – 18: 2.

³⁹ Seminar transcript: pages 18: 12 – 19: 5.

⁴⁰ Seminar transcript: page 19: 6 – 22.

constitutional dispensation, namely: “... *fundamentally, I think a strike should be a non-violent withdrawal of labour ...*”.⁴¹

66. Prof Webster made an important general point, being that unions will attempt to establish collective solidarity amongst its members, which may either be through coercion or through democratic means. Within that paradigm, he said, union democracy alone will not produce a satisfactory outcome; also required is an employer willing to negotiate and a police force trained in public order policing. NUM likewise agrees in general terms with those propositions, although it should be noted that there was at the time what may be considered to be a distinguishing factor at Lonmin, being that the unprotected strike was not declared through any union and that there was hence no ordinary nodal point for union-based negotiations.
67. In the next section of his presentation, Prof Webster set out to “*pick up a pattern in strikes*”.⁴² Although an exercise of that kind may provide some insights, we are of the respectful view that an examination of causes must be incident-specific and not pattern-based. Some comments follow:
- 67.1. In the first place, it is of course so that Prof Webster had very limited time for his presentation. As a result he could give attention to, mainly, only the 2012 strikes at Impala and Lonmin. Similarly, he could deal only with a very limited range of facts.
- 67.2. On that basis, the “*pattern*” at Impala was described as being one of “*violence by the State, violence by workers*”. From his brief outline of events at Lonmin, it appears that Prof Webster viewed the same pattern to apply there too.⁴³
- 67.3. At a certain level, events at that both strikes did unfold in that way. It is noteworthy, though, that violent conduct on the part of strikers preceded the action taken by the police. It would appear that this was taken into account by Prof Webster as he set about seeking to explain “*this*

⁴¹ Seminar transcript: page 26: 19 – 23.

⁴² Seminar transcript: 31: 1 – 3.

⁴³ Seminar transcript: 31: 11 – 32: 9.

*phenomenon of violence in strikes*⁴⁴, which we hence understand to be the resort by strikers to violence as part of a strike dynamic.

- 67.4. In respect of Impala, Prof Webster notes merely that there was a strike over allowances for RDOs and that management responded with dismissals.⁴⁵ That gives no recognition to some key trigger factors which have been extensively traversed before this Commission in respect of their value in explaining why violence ensued, such as: (i) Impala's unilateral grant of additional remuneration to Miners, hot on the heels of the conclusion by NUM of a comprehensive collective agreement; (ii) the coincidental circumstance that the chairpersons of both NUM branches at Impala were Miners; and (iii) the anger against NUM that arose from this and the view of workers that the union had not represented them well during the wage negotiations and had accepted Impala's assurance that the company could not afford better rates.⁴⁶
- 67.5. In respect of Lonmin, Prof Webster reflects the beginning of the violence in these terms: workers are told by management that their demands will be addressed only through NUM, that workers are not happy and march to the NUM office, where they are met with "*a hail of bullets*".⁴⁷ Important elements are missing from this account of a "*pattern*", in respect of the initial phases of the events, such as: (i) the 2011 disbanding by NUM of the Karee branch together with the strike and dismissals that followed; (ii) the displacement of NUM and the establishment of AMCU as the majority union at Karee; (iii) the exclusion of NUM from the RDOs' demand for R12,500; (iv) the acts of intimidation and assaults by strikers over 10/11 August 2012; (v) the opposition by NUM to the unprotected strike and the escorts provided by it to workers to get to their workplaces; and (vi) the information that the strikers who marched to the NUM office on 11 August 2012 were intending to burn it down.

⁴⁴ Cf. Seminar transcript: 32: 22 – 23.

⁴⁵ Seminar transcript: 31: 3 – 5.

⁴⁶ Gcilitshana: Day 35: 3774: 5 – 3778: 18.

⁴⁷ Seminar transcript: 31: 15 – 19.

68. On a different aspect, Prof Webster pointed to the responsibility of a union in a strike situation to control it and the conduct of its members who are on strike. We concur with this view. In the context of the events at Marikana it is however so that NUM had been side-lined by RDOs and other workers from the very start of the demand and strike process. Not only had it not called the strike, it had expressly opposed it. As was underlined by the strikers' rejection of Mr Zokwana when he tried to address them at the koppie on 15 August 2012, there was no scope whatsoever for NUM to exert the kind of regulatory influence contemplated by Prof Webster.

Collective Bargaining: NUM's Practice in Negotiations

69. Mr Gcilitshana outlined NUM's practice generally in its conduct of wage and related negotiations, with particular details in respect of the 2011 process at Lonmin.⁴⁸ We will highlight aspects of it:
- 69.1. The priority is to make it an inclusive process, with mandates forming a central part thereof. They are in the first place obtained from members before negotiations begin. As appropriate, report-back meetings are conducted and a mass meeting of workers is held in order to obtain final mandates before any conclusion of the negotiations is reached.
- 69.2. In 2011 this began with each branch convening a shop stewards' council at which workers' demands were directly received. This did not happen at Karee because NUM did not then have a branch there.
- 69.3. Thereafter each branch convened separate mass meetings at which the demands are presented, debated and perhaps amended.⁴⁹ The executive leadership of each branch then further discusses the demands, which are then placed before a central stewards' council for consideration. At 16h00 on the same day a consolidated list of demands was placed before a central mass meeting of workers at the Wonderkop Stadium for finalisation before

⁴⁸ See generally Gcilitshana statement "XX1" at paras 21 – 32.

⁴⁹ Gcilitshana: Day 35: 3800: 1 – 13.

submission of the demands to Lonmin. That meeting was attended by several thousand workers, including employees from Karee.

69.4. The demands are then forwarded to a dedicated market research section within NUM's head office, where they are assessed for consistency with the union's policies and evaluated against industry and market norms and practices. This step is informed also by the proceedings at NUM's annual bargaining conference at which experts give inputs on matters such as the economy, cross-sectoral issues, inflation and the like. It is attended by all regional structures as well as a large number of branch committees. Consideration is given to how collective agreements have performed over the previous year and ways of improving negotiations and demands are examined, as are the latest annual reports of relevant employers.⁵⁰

69.5. The purpose of all of this is to ensure that NUM does not make unreasonable demands of the employers and, in turn, that it does not create unreasonable expectations on the part of workers which may backfire on the union and negatively affect the credibility of NUM's negotiations. Only after this process of scrutiny will a set of demands be cleared for submission to the employer.⁵¹

70. Overall, this is a carefully designed process that objectively seeks to harmonize the participation of workers with a rational and justifiable set of opening demands. It is the approach, we submit, of a well-resourced and mature union operating in accordance with the Constitutional values of peaceful and constructive labour relations.

Collective Bargaining: Impala and NUM's Policy regarding Differentiation

71. A question that has come up a number of times in the course of these proceedings is whether the Lonmin RDOs had decided to exclude NUM as at the stage that they marched to Mr Da Costa with their R12,500 demand on 21 June 2012 because they

⁵⁰ Gcilitshana: Day 35: 3802: 2 – 3804: 4.

⁵¹ Gcilitshana: Day 35: 3804: 5 – 3805: 24.

were unhappy with NUM's approach to negotiations at Impala. Aspects of this were traversed by the Chairperson with Mr Zokwana and they present a useful focus for consideration of that question.⁵²

72. Referring *inter alia* to the article by Ms Carol Paton published in *Inside Mining* ("XX8"), the Chairperson formulated the question in these terms:

*"... It may be that the attitude of the RDOs was that they'd heard that NUM hadn't been supportive of the rock drill operators at Impala being given a differential increase and they'd heard that NUM's policy was – negotiating strategy, to use the words of the article – had been to raise the wages of lowest paid workers at the expense of differentiation between skill categories. They were effectively asking for a differentiation between skill categories. They understood, or they may well have understood that that wasn't NUM's negotiating strategy. NUM had been opposed to that at Impala, therefore they had to go on their own."*⁵³

73. Importantly, the Chairperson observed immediately after posing this question that it was at that stage "*speculation based upon the material which we have before us ...*" Since that date some additional material has been placed before the Commission, which we will address. Fundamentally, though, it is a question that remains speculative and various factors point to this.
74. In the first place, it is of course material that there is no evidence whatsoever that Ms Paton's articles and their account of what Mr Dunne had said to her was noted by any RDOs or that the conduct of the RDOs as a group were affected thereby. In particular, no Lonmin RDO has given evidence at this Commission to the effect that they had gone "*on their own*" because of NUM's bargaining at Impala.
75. In this context, it is to be noted that Ms Paton's report on Impala and Mr Dunne found its way into print twice, in more or less identical terms. "XX8" was published in an *IM* edition datelined 26 September to 30 October 2012. That publication could hence have played no role in the events of August 2012. The earlier publication was in the *Business Day* of 14 June 2012. It could clearly not have influenced the views of Impala RDOs during their strike and, we reiterate, no Lonmin RDO has said anything

⁵² See generally Transcript: Day 42: 4527: 11 – 4539: 3.

⁵³ Transcript: Day 42: 4530: 10 – 21.

about it. By the same token, there is no suggestion anywhere in the evidence that Mr Dunne's views as expressed to Ms Paton had been conveyed to RDOs, whether at Impala or at Lonmin. In short, the demonstration of any causal connection between Ms Paton's articles and the events is absent.

76. In any event, we submit, the minutes of the Impala negotiations do not support this aspect of the articles, which we address under the next topic. Before we turn to that, we point out that there is a second equally fundamental fact that must go into the scales in respect of this question. The Impala collective agreement was entered into on 7 October 2011.⁵⁴ Collective bargaining at Lonmin began only on 18 October 2011. In between these Lonmin negotiation meetings, reports were made to branch committees and where necessary general meetings were held. A final mandate mass meeting was held at the end of November 2011, shortly before the collective agreement was entered into on 2 December 2011.⁵⁵ There was hence ample opportunity for aggrieved RDOs to raise concerns about Impala or, for that matter, complaints about the negotiations by NUM at Lonmin. Plainly, that did not happen. Mr Gcilitshana dealt with these matters in his evidence and nothing of the sort was suggested to him.
77. It is also most material to take into account that the Impala RDOs did not go on strike because of the 7 October 2011 collective agreement which was concluded between NUM and Impala. They went on strike because of the unilateral decision taken by Impala management on 18 December 2011 to increase the wages of Miners by 18%. It was that decision that triggered their demand in January 2012 for a basic wage of R9,000, which in turn led to the unprotected strike.⁵⁶
78. It is likewise notable that there is no suggestion that Impala had wanted to grant an additional increase in the wages of Miners and that NUM had frustrated that. Moreover, if it had indeed been seen by Lonmin as pressing that its RDOs receive an extra increase then, once it resorted to unilateral action, one might fairly have expected that RDOs would at the same time have been the beneficiaries of the extra

⁵⁴ Gcilitshana: "XX1" para 6.

⁵⁵ Gcilitshana: "XX1" paras 28, 29, 31 and 32.

⁵⁶ Gcilitshana: "XX1" paras 6, 7 and 8.

money that Impala claims it had wanted to give them. Impala was evidently not too troubled about the fact that NUM had concluded an agreement with it that covered the wages of Miners. There is no reason to think that it would have felt constrained about the terms of the agreement regarding RDOs.

79. We return now to the question put by the Chairperson to Mr Zokwana, who dealt with both parts of the two-fold content of that question. The first is a quite narrow factual matter, namely whether or not Impala had wanted to give RDOs a differential increase but NUM had refused. This is dealt with more fully below. Mr Zokwana was however in a position to testify that he had consulted on this with NUM's senior negotiator who had informed him that this was not correct. Impala made no such offer. If it had, it would have been in writing, so that NUM could have looked at it properly and responded in like manner. If, though, an offer like that had been made it would not have been in accordance with NUM's policy to reject it, said Mr Zokwana. As set out more fully below (in the section dealing with the situation of RDOs), NUM has in fact previously bargained for and accepted differential increases for RDOs, through the Chamber.⁵⁷
80. The second component of the question put by the Chairperson to Mr Zokwana related to the more general issue of differentiation and NUM's policy. As reported by Ms Paton in the later *IM* article (but not in the earlier *Business Day* article), Mr Baleni (the NUM General Secretary) had said: "*NUM's negotiating strategy has been to raise the wages of lowest paid workers at the expense of differentiation between skills categories.*"⁵⁸ The elements of this are complex and Mr Zokwana identified the key features. He did so in general terms but it is appropriate to note that Mr Baleni's comment was directed particularly to negotiations within the Chamber concerning gold mines where somewhat different considerations are at play than in the platinum sector.
81. Broadly, NUM has approached the issue of differentiation by seeking to move the industry from the Paterson grading system, which is geared to the level of authority

⁵⁷ Zokwana: Day 42: 4535: 12 – 4536: 7.

⁵⁸ Transcript: Day 42: 4529: 24 – 4530: 6.

attached to a job ('who reports in to that person'), towards a system where the categories are based on a recognition and assessment of what the performance of the job actually entails.⁵⁹

82. Grading around performance necessarily brings to bear a second level of complexity, regarding which NUM uses the expression "*harmonisation of work*". Mr Zokwana illustrated the difficulties with an example: "*... we have seen that if you are going to upgrade operators and you leave winch drivers, they will say you may drill the hole, blast, but who cleans it without me? Then we said let's be scientific, such that when you say to machine drillers you will be on group 8, we were able to give reasons why it is group 8, because that work [by task teams that evaluate jobs] has been done and we have changed the system.*"⁶⁰
83. In relation to Mr Baleni's statement, Mr Zokwana said: "*NUM adopted a strategy of dealing with the wage gap ... there were about nine categories for black mineworkers and our campaign has been ... for rolling up the lower categories, so that you can increase their earnings, by cutting the lower categories out ... So this statement [by Baleni] would not have an impact in NUM refusing to accept an offer [for] RDOs – but what NUM wanted was the scientific approach in dealing with grading, so we don't upgrade the category of loco drivers and tomorrow you end up with other operators like loader who will say ... we are doing a better job.*"⁶¹
84. These difficulties were echoed in the evidence of Mr Gcilitshana in that, generally in relation to collective bargaining, the pursuit of differential increases for one specific group is problematic, in that it raises the expectations of other categories.⁶²

The 2011 Negotiations at Impala

85. On the question of whether Impala made an offer regarding RDOs that was refused by NUM, it is necessary to examine some of the detail of the negotiations with Impala in 2011. This was set out in the affidavit of Mr Tantsi who, as at 2011, was the

⁵⁹ Zokwana: Day 42: 4531: 7 – 23.

⁶⁰ Zokwana: Day 42: 4531: 24 – 4532: 21.

⁶¹ Zokwana: Day 42: 4536: 18 – 4537: 15.

⁶² Gcilitshana: Day 37: 4036: 15 – 4037: 3.

chairperson of the NUM North branch at Impala and closely involved in the negotiations on wages and working conditions in that year. His affidavit is “XXX7”. It was deposed to on 11 October 2013 and, thereafter, Mr Patel and Mr Dunne provided responses. These are “XXX5” and “XXX6” respectively, dated 13 December 2013.

86. Mr Tantsi’s affidavit puts up a full set of the minutes of the eight negotiation sessions. He points out that these are formal and minuted, in accordance with a long-standing and important practice: *“It is there to ensure that, as a matter of record, there is certainty about what the parties are offering or demanding, as the case may be, together with the essence of what the motivation for their position is. ... Accordingly, the course of the negotiations in 2011 is reliably documented in the minutes.”*⁶³ Mr Patel confirms that the minutes are correct.⁶⁴
87. A summary of the key features of each session is provided and Mr Tantsi states: *“As is apparent from this summary, there was at no stage an offer by Impala of an additional increase for RDOs that was refused by NUM ... If Impala had tabled an additional increase, that would have been recorded in the minutes. There is no such entry. I can confirm also that no extra increase was raised by Impala outside the negotiation sessions.”*⁶⁵ Mr Patel does not dispute this.
88. Before we turn to the minutes, it will be convenient to reproduce the relevant portion of “XX8”:

“Impala management, says executive director Paul Dunne, had suggested to NUM that rock drill operators, who have the hardest job of all underground machine operators, be given a differential increase, but the union had refused. ‘We recognised that we were out of step with the rest of the industry both in job grading and in pay. We wanted to give the rock drill operators a higher increment. But that suggestion never found its way into the final agreement’, says Dunne.”

⁶³ “XXX7” paras 8 and 9.

⁶⁴ “XXX5” para 10.

⁶⁵ “XXX7” paras 11 and 12.

89. A vital question flows from the Dunne statement: *What was the amount of the higher increment that Impala wanted to give the RDOs? How much money did NUM's alleged refusal deny them?*
90. Mr Patel's affidavit is principally devoted to the interaction between NUM and Impala on the issue of harmonization and correctly asserts that NUM had a demand for harmonization over all A4 categories. However, he incorrectly contends that this resulted in prejudice to RDOs and that NUM did not accept a wage differential between RDOs and other A4 employees. It is also incorrect that Impala complied with NUM's harmonization demand.⁶⁶
91. It is likewise significant that Mr Patel does not at all deal with the actual wage levels that were debated and contested during the negotiations. In order to appreciate the true course of those negotiations it is essential to adopt a more complete view of what took place. Such is readily apparent from the minutes as a whole, which show very clearly that NUM's demands in respect of RDO wages were at all times higher than the offers made by Impala. Equally, they also show that there was at no time an offer of an increment for RDOs that was refused by NUM. To this end, it will suffice for us to refer to a limited set of points in the minutes:-
- 91.1. Before the 2011 negotiations began, the position was that there were differentials and that RDOs received more than other A4 employees. The basic wages were as follows: A3 surface: R3704; A4 surface: R3902; A3 u/g: R4050; A4 u/g: R4202; A4 RDO: R4486.⁶⁷ As was noted in the minute for 24 May 2011, those differentials were the result of previous wage agreements (thus, as agreed to by NUM).⁶⁸
- 91.2. NUM's opening demands were for a 14% across the board increase or for minimum basic wages, whichever was the greater. The minimum wages that were demanded were R5000 for surface and R5700 for underground

⁶⁶ "XXX5" paras 26, 29, 30 and 31.

⁶⁷ See for instance Appendix Two of "JLT8" annexed to "XXX7".

⁶⁸ Cited by Patel: "XXX5" para 18.

employees. A3 positions were to be upgraded to A4 and there was to be harmonization across A4.⁶⁹

- 91.3. It may be helpful for us to underline that a percentage across the board increase does not in any way amount to a ‘harmonization’ demand. By its very nature, such an increase would not only have preserved any pre-existing differentials, but would in quantum terms have increased the gap between upper and lower wage levels. It was at all times open to Impala to make any percentage proposals that it saw fit, whether on an across the board basis or on a category-specific basis.
- 91.4. NUM’s second set of demands were different, being an upgrading from A3 to A4 and, distinctly, a harmonization demand properly so called entailing wage equalization. On the basis of the opening wage demands, it would have brought about substantial wage increases for all employees, including RDOs. It would have closed the wage gap and, hence, the lowest paid employees would have received the largest increase.
- 91.5. It is to be noted that these demands were made on the basis that there would be a one-year agreement.⁷⁰
- 91.6. NUM’s approach with this formulation of its demands has been elucidated by Mr Tantsi: *“Realistically, NUM did not anticipate that the second of these demands [for harmonization] would be realized during that round of negotiations. Hence, it at the same time continued to engage with Impala on differential increases for, amongst others, the RDOs. ... Had it thought that normalization might be achieved, it would then have pushed for RDOs to be moved to Grade B1.”*⁷¹

⁶⁹ Minute for 11 May 2011: Annexure “JLT1” p3 paras 1 and 2.

⁷⁰ Minute for 11 May 2011: Annexure “JLT1” p5.

⁷¹ Tantsi: “XXX7” paras 16 and 17.

- 91.7. Impala responded in the second session, proposing a three-year agreement with a set of percentage increases beginning at 5% of year one for bands A, B and C.⁷² In session three it increased that percentage to 5.5%.⁷³
- 91.8. At the fourth session it provided a schedule showing that the relevant percentage offer was now 6%. It included a table with the minimum basic wages it was offering. In respect of A4 u/g it offered, over three years, increases for RDOs to R4800, R5100 and R5400 respectively; for other A4 u/g the offers were R4500, R4800 and R5100.⁷⁴
- 91.9. It is to be noted that the minimum wage now offered for RDOs in year one (R4800) was greater than the 6% increase it was offering (which would have been R4755). What this signifies is that Impala was well aware that it was entirely at liberty to pitch its offers at any level, as it saw fit. It was not in any way restricted by NUM's 'harmonization' demand.
- 91.10. In the course of the fifth session Impala adjusted its percentage base to 6.5% and its three-year minimum wages offer for RDOs to: R4800, R5300 and R5600; for other A4 u/g: R4500, R5000 and R5300.⁷⁵
- 91.11. At the sixth session it was recorded that NUM had taken Impala's offer back to its members and that it had been rejected. The members had instructed NUM to declare a dispute, which had been done, and CCMA intervention was being pursued.⁷⁶
- 91.12. Impala's percentage offer went up to 8% and the minimum wages for RDOs to: R4850, 5300 and R5600; for other A4 u/g: R4550, R5000 and R5300. NUM persisted with a one-year agreement proposal but reduced its minimum wage demand in respect of RDOs to R5400 and other A4 u/g to R5100. It thereby formally accepted that a differential in respect of RDOs

⁷² Minute for 24 May 2011: "JLT2" p6.

⁷³ Minute for 9 June 2011: "JLT3" p4.

⁷⁴ Appendix One to Minute for 21 June 2011 "JLT4".

⁷⁵ Appendix Three to Minute for 28/29 June 2011: "JLT5".

⁷⁶ Minute for 1 August 2011: "JLT6" p1.

should continue to apply and that ‘harmonization’ across A4 was no longer being insisted upon.⁷⁷

91.13. Impala tabled a further adjustment of its offer at session seven. It was willing to accept a two-year agreement and went to 9% for year one. In respect of minimum wages for A4 employees it now offered: A4 surface R4253 and R4500; A4 u/g R4600 and R5100; A4 RDO R4900 and R5400.⁷⁸

91.14. Impala’s offer at session eight was, after dispute and mandate processes, subsequently adopted in the collective agreement signed on 7 October 2011. For all A4 employees the increase for year one was 10%, with the minimum wages calculated accordingly. There was hence a corresponding differential *vis-à-vis* RDOs: The minimum wage for RDOs went to R4935 for year one and R5428 for year two. Other underground A4 employees were to receive R4622 and R5100 respectively.⁷⁹

92. In sum, we submit that the recorded – and objective – detail of the negotiations makes it clear that Impala offered what it chose to offer, that it was at all times entirely at liberty to table higher offers than it did in respect of RDOs, and that it patently did not happen that a higher increment for RDOs was tabled by Impala and which NUM refused. The statement by Mr Dunne as reported in the articles written by Ms Paton, as well the contentions contained in Mr Patel’s affidavit are accordingly materially incorrect.

Events at Impala

93. NUM presented evidence on events at Impala because there were some parallels between those events and the subsequent developments at Lonmin. In addition to indicating some explanatory roots in respect of the tragic events at Marikana, these parallels pose questions as to the extent to which the Impala events were or were not taken into account by, particularly, Lonmin. There is no dispute of any consequence

⁷⁷ Minute for 1 August 2011: “JLT6” Appendix Two and p4.

⁷⁸ Minute for 3 August 2011: “JLT7” Appendix One.

⁷⁹ Minute for 13 August 2011: “JLT8” Appendix Two.

in relation to the basic narrative of what took place. It was described by Mr Gcilitshana.⁸⁰ The topic of NUM's approach to bargaining at Impala will be dealt with separately.

94. Similar to the position at Lonmin, NUM and Impala had entered into a two-year collective agreement dealing with wages and other substantive terms and conditions of employment. It was entered into on 7 October 2011 and was due to expire on 30 June 2013. However, not long after the conclusion of that agreement, on 18 December 2011, Impala took a unilateral decision to grant an additional wage increase effective from January 2012 to one category of employees, being Miners, whose wages were governed by the agreement. Miners play a vital role in the production process; they are the competent officials as statutorily defined and certificated. Experienced and able Miners are a valuable resource and poaching takes place amongst the different mining companies and, it is apparent, Impala was concerned not to run the risk of losing its Miners. This unilateral increase amounted to 18%, over and above the 8.5% increase provided for in the agreement.⁸¹
95. No increase was afforded to any other category of workers. NUM was very concerned about this increase. It was done outside the collective agreement. It undermined that agreement. It undermined NUM, which had concluded the agreement on the basis of Impala having stated during the negotiations that it couldn't afford more. Yet, barely two months later, a substantial further increase for Miners was announced and implemented.⁸² This generated anger on the part of employees (other than Miners) not only with the company, but also with NUM. Workers felt that NUM hadn't represented them well and that it hadn't reported honestly in its feedback to members when it conveyed that the company couldn't afford higher increases.⁸³ This was aggravated by the coincidental fact that the then chairpersons of the two NUM branches at Impala were Miners; employees felt that certain individuals within NUM

⁸⁰ See paras 5 – 11 of his statement: Exhibit "XX1".

⁸¹ Gcilitshana: Day 35: 3771: 12 – 3774: 4.

⁸² Gcilitshana: Day 35: 3774: 5 – 3775: 25.

⁸³ Gcilitshana: Day 35: 3776:3 – 3777:14.

had benefited through this unilateral increase, which gave rise to discontent with NUM structures and these chairmen.⁸⁴

96. A particular category of aggrieved employees became the focal point for this discontent. These were the RDOs. They embarked on an unprotected strike in support of a demand for an increase in their basic wage to R9,000. Neither this demand nor the decision by RDOs to embark on unprotected strike action was in any way processed through NUM structures.⁸⁵
97. The strike was characterised by high levels of violence and intimidation, much of which was directed at NUM and its members. In the course of this, the NUM offices at Impala were forcibly closed and the branch leadership had to be removed from the mine for fear of their safety. In all, over 60 people sustained injuries and four lost their lives.
98. There were successive dismissals, totalling about 17,200 by 2 February 2012, most of whom were however later reinstated. That number was reached because the entire workforce went out in support of the RDOs. Even the Miners were dismissed because they were unable to report for work and hence fell foul of a company ultimatum.⁸⁶
99. By way of a Management Brief dated 20 April 2012, Impala announced a number of salary adjustments. Again, these were unilateral. The detail of them is important. Even allowing for the fact that some of the adjustments involved only the bringing forward of the effective dates of increases already provided for in the collective agreement, the position of RDOs in particular entailed also a promotion from A4 to B1 grades, resulting in an illustrative and immediate increase of overall 'guaranteed pay' from R7,643 to R9,991, being an increase of 30.72%.⁸⁷ That, it should be noted, was an increase over and above the increase provided for in respect of year one of the

⁸⁴ Gcilitshana: Day 35: 3778: 2 – 18.

⁸⁵ Gcilitshana: Day 35: 3779: 2 – 13.

⁸⁶ Gcilitshana: Day 35: 3781: 17 – 3783: 15.

⁸⁷ Bundle "XX2" at pages 5 and 6. See also Gcilitshana: Day 35: 3785: 14 – 3787: 1.

collective agreement, although it already absorbed the increase in respect of the second year.⁸⁸

100. In addition to the substantial quantum of this increase, a vital aspect of it is that it had been determined by management in response to a protracted, violent and unprotected strike. That step entailed *inter alia* a major and unilateral change to a lawfully concluded and current collective agreement. NUM, the recognised bargaining union, was not involved in the calling of the strike. It was similarly not called in to participate in any negotiations concerning its settlement.⁸⁹
101. The consequences of Impala’s conduct for the status and credibility of NUM as well as the integrity of and respect for an orderly collective bargaining are quite profound – both in relation to the initial unilateral increase of the wages of Miners and the subsequent unilateral increase of pay provisions, pursuant to the unprotected strike. Mr Gcilitshana described the impact of the second lot of wage adjustments in terms similar to the first, namely that NUM was cast in a bad light, with the loss of trust in the leaders because workers felt that those leaders had not been honest in their feedback to workers. Specifically, this failure of trust arose because the company was now showing that it could in truth find a good deal of extra money for wages – which it had told NUM during negotiations that it did not have.⁹⁰
102. This very concern is substantiated in the following statement in Impala’s Management Brief of 20 April 2012: “*These adjustments are made in good faith based on what the Company can afford at this stage. It is imperative that we return to full production level to ensure sustainability of the organisation.*” What Impala was in effect conveying here was that (despite several months of strike-reduced production) it had now found more money in order to pay substantial increases, so as to get its production back on track.⁹¹ From the perspective of NUM and a proper collective bargaining process, we submit, this statement revealed a regrettably cynical approach.

⁸⁸ As per ‘XX2.6’ the date for the next salary review remained 1 July 2013.

⁸⁹ Gcilitshana: Day 35: 3787: 2 – 3788: 3.

⁹⁰ Gcilitshana: Day 35: 3788: 4 – 19.

⁹¹ Bundle “XX2.6”; Gcilitshana: Day 35: 3788: 20 – 3789: 23.

103. Many employees and former employees of Impala Platinum Mine and Lonmin reside in the same or nearby townships, informal settlements and villages within the vicinity of these mines. Events and conduct at a particular mine or in a particular community permeate through nearby mines and surrounding communities.

2011 Collective Agreement: Lonmin

104. Mr Gcilitshana is the NUM chief negotiator for Lonmin.⁹² His evidence concerning NUM's approach to negotiations flows into the specific process of the tabling of a set of demands to Lonmin on 17 October 2011. The evidence also incorporated a summary of the key features of each of the six negotiation meetings held with the Lonmin negotiation team. None of that evidence is in dispute and will not be reproduced in these submissions.⁹³
105. In respect of category 4 employees, which included RDOs, there was a demand that they be moved up a category and receive the remuneration of a category 7 employee. That in itself would have brought about significant remuneration improvements. The difference would be in the region of R2,000.⁹⁴ In addition, there was a demand for a 15% wage increase across the board. It was confirmed by Mr Da Costa that if NUM's demand during these negotiations for the RDOs to be rolled up from category 4 to category 7 had been met, it would have been very significant for them; they would have earned a substantial amount more.⁹⁵
106. It should be noted that the demand in relation to RDOs accorded with what they had asked for, as per the mandate from the final pre-negotiations mass meeting.⁹⁶ The demand that RDOs be rolled up from category 4 to 7 (and its R2,000 wage improvement) had also been approved through NUM's internal pre-negotiation checking. Put differently, the demand was viewed by NUM as a reasonable one and reflected its view that RDOs were being drastically underpaid for the work they did.⁹⁷

⁹² Gcilitshana: Day 35: 3768: 3 – 15.

⁹³ Gcilitshana: "XX1" paras 30 – 32.

⁹⁴ Gcilitshana: Day 36: 3918: 8 – 12.

⁹⁵ Da Costa: Day 241: 30366: 8 – 30367: 2.

⁹⁶ Gcilitshana: Day 35: 3806: 4 – 23.

⁹⁷ Gcilitshana: Day 36: 3957: 9 – 3958: 17.

In the course of the ensuing negotiation meetings, Lonmin remained opposed to such promotion of RDOs. It referred *inter alia* to a programme it said that it was busy with to develop youth from the surrounding communities to take on the job of the RDOs.⁹⁸

107. As the negotiations proceeded, NUM maintained its demand that RDOs be rolled up to category 7. At the sixth session, on 22 November 2011, NUM warned Lonmin that if the position of the RDOs was not addressed, they would become ‘a time-bomb’.⁹⁹ The company remained unmoved and soon thereafter a mandate meeting was held at Wonderkop with some 5,000 workers in attendance including many RDOs. Settlement was approved by those workers on the basis, generally, of a 10% rise after the first year and a further 9% after the second.¹⁰⁰
108. Although an agreement may have a two year period, Mr Gcilitshana confirmed that it was nevertheless possible for the parties to amend by agreement if necessary. In fact, this had previously happened at Lonmin.¹⁰¹

Events at the Karee Mine

109. In many ways the events of 9 to 16 August 2012 have their origin at the Karee Mine and, especially, with its complement of RDOs. An appreciation of relevant background events at Karee is therefore necessary. Mr Gcilitshana provided an outline thereof in his evidence.¹⁰²
110. On 12 May 2011 NUM suspended its branch chairperson (Steve Kululekile) and secretary (Daniel Mongwaketsi) at the Karee Mine arising out of their non-compliance with the NUM Constitution relating to branch elections. The conduct of proper elections within NUM is a matter of great importance to it.¹⁰³ The Karee branch committee was also dissolved. There was however a great deal of unhappiness about this step and thousands of Karee employees went on an unprotected strike demanding the reinstatement of the branch committee. The strikers included many RDOs.

⁹⁸ Gcilitshana: Day 35: 3807: 22 – 3808: 23.

⁹⁹ Gcilitshana: Day 35: 3809: 6 – 24.

¹⁰⁰ Gcilitshana: Day 35: 3811: 1 – 3812: 11; See also Setelele: Day 38: 4124: 11 - 16.

¹⁰¹ Gcilitshana: Day 36: 3951: 13 – 3952: 18.

¹⁰² See generally his statement “XX1” at paras 12 – 20.

¹⁰³ Gcilitshana: Day 35: 3792: 3 – 10.

111. In response, Lonmin dismissed approximately 11,000 of the striking employees. Pursuant to negotiations between NUM and Lonmin management, the majority of these employees were re-employed, but about 2,000 employees were not. These included the former NUM branch leadership.
112. Management at the time insisted that it was their prerogative who to re-employ and also required that those whom it re-employed were to sign new terms and conditions of employment. In addition, upon their re-employment, employees were required to re-join a trade union if they desired, which meant that trade union recruitment of these employees began afresh. There were numerous reports of intimidatory conduct directed at NUM.
113. Both NUM and AMCU set about recruitment efforts. By December 2011, AMCU had recruited a substantial number of employees at Karee Mine and on 15 December 2011 Lonmin entered into a limited organisational rights agreement with AMCU at its Karee Mine for access and stop order facilities. By February 2012 NUM had recruited sufficient members for it to launch a new branch, which it did on 7 February 2012. In May 2012 Lonmin signed an extended organisational rights agreement with AMCU in terms of which they were afforded offices and facilities and the election of representatives at the Karee Mine. AMCU had also by this time established a branch at Karee Mine. While AMCU had achieved majority membership at Karee Mine, NUM remained the majority union at Lonmin's Marikana operations as a whole and it continued to be the sole collective bargaining agent on behalf of all employees in the relevant bargaining unit.
114. Incidents of violence at Karee Mine continued over this period. Among other such incidents, on or about 22 April 2012 several employees were assaulted at different shafts at Karee Mine one of whom later died in hospital as a result of severe head injuries.¹⁰⁴ In May 2012 the keys to a NUM offices at Karee Mine (at Four Belt) were

¹⁰⁴ This was Mr Dolane. See inter alia email from Bongani Nene and Lonmin media release dated 23 April 2012. Bundle "XX 2.10 – 12."

forcibly confiscated from the possession of one of NUM's branch leaders by a large group of workers, but NUM's occupation was later restored.¹⁰⁵

The Situation of RDOs

115. Mr Zokwana has a full appreciation of the position of RDOs. All underground work is difficult, but none can match what an RDO must do on a daily basis. The work is done on the rock face. Oil dribbles on his body, which shivers with the constant vibration of the drill. There is always the risk of there having been a misfire, which will fatally detonate if the RDO drills there. He works under what is called a 'hanging wall', being an as yet unsupported roof. Its strength will be subject to the impact of the previous day's blasts and any geological issues. This poses a real risk and many RDOs have died in that process.¹⁰⁶ Mr Phatsha's description of his work as an RDO made a useful contribution to an appreciation of the nature and risks of that job.¹⁰⁷ Mr Da Costa also confirmed that the work done by an RDO entails a number of hazards and that they face those hazards for longer periods during a shift than do other employees.¹⁰⁸
116. Having regard to the nature of this work and its importance in the production process, it appears now to be generally accepted that RDOs have historically been underpaid. Certainly, that has been the view of NUM for some time. An underlying factor for this has been, as Mr Zokwana put it: "*NUM has fought and still believes that the rate at which RDOs are paid is very low as the current form of job grading done by the industry does not take into account the conditions, the kind of work a person performs.*" Instead, it was the practice to a worker's position in the chain of authority.¹⁰⁹
117. This approach to remuneration generally is not unique to RDOs or to the platinum sector. NUM took up the position of RDOs across the mining industry with the Chamber of Mines in a concerted way in 1998 when it put a demand to the Chamber

¹⁰⁵ Gcilitshana: Day 36: 3905: 18 – 3906: 17.

¹⁰⁶ Zokwana: Day 41: 4418: 23 – 4419: 7; 4420: 13 – 24.

¹⁰⁷ Phatsha: Day 50: 5427: 2 – 5428: 11.

¹⁰⁸ Da Costa: Day 241: 30371: 5 – 30372: 20.

¹⁰⁹ Zokwana: Day 41: 4421: 3 – 7; 4423: 11 – 17.

to change the grading system. It also sent a delegation to Canada in order to receive advice on structural matters and how job arrangements could be done in the industry, which improved NUM's capacity to engage the Chamber in respect of RDOs.¹¹⁰

118. In 2005, within the Chamber, there was a roll up of RDOs from group 4 to group 5, which meant some improvement in their basic wage. In 2010 the NUM general secretary met the senior negotiators of the Chamber in relation to RDOs. Pursuant to that, a task team was formed during the 2011 negotiations which reported in 2012 and resulted in an additional R500 on their basic pay, over and above the 10% increase that was agreed.¹¹¹
119. The position in the platinum sector has been more problematic because there is no central bargaining structure equivalent to that within the Chamber environment. NUM had to engage individual employers at different times, with workers scattered at different mines, whereas the Chamber has a single forum. This made it difficult for NUM to co-ordinate its efforts; it was an inhibiting factor in respect of the agreements that were being reached.¹¹² In this regard, Mr Zokwana endorsed the article by Ms Carol Paton and her observation that the absence of centralised bargaining had in part led to the unstable competition around wage levels; he pertinently added that it was this that had given rise to the 18% increase for Miners unilaterally introduced by Impala.¹¹³
120. Although, as set out above, there are particular features of the work of RDOs that support the view that they are underpaid, sight must not be lost of the fact that there are several categories of mineworkers, many of whom also face great dangers on every underground shift for wages that NUM has for long sought to improve. As a union, NUM has responsibilities to the full range of such employees.

¹¹⁰ Zokwana: 4423: 4 – 8; 4423: 18 – 4424: 4.

¹¹¹ Zokwana: 4422: 13 – 23.

¹¹² Zokwana: 4424: 16 – 4425: 14

¹¹³ “XX8”; Zokwana: 4425: 15 – 4427: 5.

RDO Demand for R12,500 and the Exclusion of NUM

121. The Rustenburg platinum belt comprises a number of mining operations, principally those of Lonmin, Impala and Amplats. These operations are situated in relatively close proximity to each other and there is considerable interaction between the various local communities that service these companies and that accommodate many of their workers. News of developments in respect of matters such as wage levels travels rapidly through these communities. As was confirmed by Mr Gcilitshana, the unilateral wage increases at Impala (outlined above) impacted on Lonmin workers in two ways: firstly, that some workers might cross over to Impala; and secondly, that those workers would form an expectation of achieving substantial increases through the same route, namely unprotected strike action.¹¹⁴
122. That expectation was indeed formed and the same route was pursued, deliberately so in our submission. The first clear manifestation of it was the presentation to Mr Da Costa of a demand for RDO basic wages to be increased to R12,500. He was at the time the VP Mining Operations at Karee and has given detailed evidence of the manner in which this happened. Several aspects of it are of critical importance to a proper appreciation of both the initial and the ongoing attitude of the RDOs to collective bargaining structures and, as part thereof, to the place of NUM.
123. Mr Da Costa's account is primarily to be found in exhibit "OO17" which he confirmed in his evidence. There is no significant dispute in respect of the essential sequence and content of what he described, which may be summarised as follows: –
- 123.1. Mr Da Costa became aware that RDOs had started having meetings amongst each other. This was during the period before 21 June 2012. He then learned of a handwritten poster calling on RDOs to attend a meeting on 21 June 2012. This poster did not identify the issue to be discussed nor did it indicate by whom the meeting was being convened. In particular, there was no indication on this poster of any trade union involvement. At the time, he was mindful of the events at Impala and was also aware that

¹¹⁴ Gcilitshana: Day 35: 3814: 18 – 3816: 18.

Anglo Platinum was in talks with its RDOs. He was concerned that Lonmin RDOs might make a demand that the company “*possibly could not meet*”.¹¹⁵ We interpose the observation that it is apparent from this that Lonmin’s apprehension was not so much the prospect of a demand, but its possible quantum.

- 123.2. Indeed, it is clear that the RDOs’ demand was the topic for discussion at the meeting and, as reported by Lonmin security, a decision was then taken to march on the Karee administration offices. Shortly thereafter, at about 17h00, approximately 300 people marched to the area outside his office. Two people from amongst the crowd were nominated to come and speak to Mr Da Costa. They were both RDOs at Karee and members of AMCU.¹¹⁶
- 123.3. Mr Da Costa told them that raising any grievance by marching to his office was an incorrect way of doing things. He indicated also that their concerns should have been raised with their line management and their respective unions. Their response was that he, Mr Da Costa, was the appropriate person to deal with and that the matter concerned only RDOs at Karee. Hence, they said, it was not appropriate for them to raise it with their trade unions or with line management.¹¹⁷
- 123.4. They outlined their view that the RDOs were not adequately remunerated for the kind of work that they did. They then made a demand for their basic wages to be increased to R12,500. Mr Costa made it clear that wage issues should be dealt with through the established central bargaining structures. The two RDOs objected to their demand being dealt with in that way because, they said, “*they did not want any union involvement in the matter.*” They went on to express the view that trade union involvement would only be appropriate if the issue raised was one which affected the entire workforce. They repeated that their demand affected

¹¹⁵ “OO17” para 3.5.

¹¹⁶ “OO17” para 3.11.

¹¹⁷ “OO17” paras 3.15 and 3.16.

only RDOs at Karee and, for that reason, the unions should not be involved.¹¹⁸

- 123.5. The discussion went on for approximately one hour. Mr Da Costa kept referring back to the structures in place which dealt with wage negotiations whereas they kept stating that they wished to deal with the matter outside of those structures. They also said that they were not making a demand but were simply requesting an increase in the basic salary. Mr Da Costa informed them that he would take the matter up to Lonmin's Exco and that he would give them feedback by 2 July 2012.
- 123.6. Mr Da Costa prepared a note for Exco which was tabled at its meeting on 28 June 2012. It decided that it required further information including a comparison of salaries paid to RDOs at other mines. Again, we interpose that Exco, like Mr Da Costa, was quite content with the notion that Lonmin would engage the RDOs, its true concern being the quantum and not the process.
- 123.7. On 2 July 2012 five RDOs came to see Mr Da Costa. They were all members of AMCU.¹¹⁹ Mr Da Costa conveyed to them his view that their demand was too high and that Exco would not agree to it. At the same time (somewhat contradictorily) he again said to them that this was a matter that "*should take place through the proper wage negotiation process*". He also pointed out to them "*that there was a two-year wage deal which was still in place and that the next wage negotiations would be held towards the end of 2013*". Mr Costa also told them that if Lonmin were to start separate negotiations with RDOs, then other groupings would want that as well. Their response was that if other groupings had similar issues, they could also deal with him directly.
- 123.8. When Mr Da Costa told them that Exco was still dealing with their demand, they expressed their dissatisfaction that the matter had not by then

¹¹⁸ "OO17" para 3.19.

¹¹⁹ "OO17" para 3.26 (the fifth RDO being Mr Booi).

been taken further. According to Mr Da Costa the representatives were becoming increasingly more assertive and they were no longer as cordial as had been the case at the first meeting. At about 17h00 Mr Da Costa was informed that the RDOs as a group had decided to once again march on his office. However, although disgruntled, they were persuaded that Lonmin should have a further period of three weeks in order to revert with a response.

- 123.9. During that period Mr Munroe told Mr Da Costa that Exco had indicated a willingness to structure an allowance for RDOs and that, if the situation threatened to result in a strike, he could advise the RDOs that they would receive an allowance. Here again, we submit, it is clear from Mr Da Costa's own account that Lonmin's approach was one of outright commercial expediency and that it was not truly concerned with the dictates of orderly collective bargaining.
- 123.10. As arranged, the five RDO representatives returned to Mr Da Costa on 23 July 2012. Their mood was "*more aggressive*" and he could sense the potential for strike action. About 500 RDOs had marched to his office on this occasion and Mr Da Costa addressed them. He told them that the manner in which they had approached the whole issue was wrong, because it had to be dealt with through established bargaining structures. He further told them that Lonmin would not and could not agree to an increase of R12,500, but that Exco had decided to pay them an allowance. Although some of those present seemed to have an interest in the allowance, others were persistent in their demands for a basic increase to R12,500.¹²⁰
- 123.11. On 30 July 2012 Mr Da Costa met with the two representatives who had first approached him and informed them that Lonmin would give allowances as follows: R750 for unassisted RDOs; R500 for assisted; and R250 for assistants. The RDOs held a meeting that afternoon and Mr Da

¹²⁰ "OO17" paras 4.1 and 4.2.

Costa understood that they had accepted the allowances, although they remained unhappy.

124. Mr Mabuyakhulu confirmed that the position of the RDOs was from the very start, at the latest from 21 June 2012, that they did not wish any unions to be involved in their advancement of their demand for R12,500. This corresponded with his own experience of the attitude of the RDOs throughout the period under discussion.¹²¹
125. On 19 July 2012 there was an AMCU meeting at Karee regarding the role of shop stewards. A Lonmin report notes that Steve (Khululekile) also advised the members present that “*the matter of the increase will be addressed at the coming meeting with Region*”. Mr Mabuyakhulu says that he was not at this meeting but, after some prevarication, he agreed that there was only one increase being talked about at Karee among the RDOs in July 2012, and that was the R12,500. The report also notes that members were told to take any problems to the AMCU office before going to HR. In short, there was by that time a viable and accessible AMCU office at Karee and it was playing a role in relation to RDOs and the R12,500 demand.¹²² Plainly, we submit, there was no prospect that these RDOs would contemplate submitting their demand through NUM channels. That had been determined by no later than 21 June 2012 and it remained the position throughout the subsequent events.
126. Mr Gcilitshana established that the decision of RDOs to march to Mr Da Costa at Karee in order to convey their demand for a basic wage of R12,500 was taken independently of NUM, which was neither informed thereof nor involved in it.¹²³ He confirmed a proposition to that effect put on behalf of the injured and arrested persons (“IAP”).¹²⁴

¹²¹ Mabuyakhulu: Day 48: 5322: 17 – 5323: 6.

¹²² Exhibit “CCC3”; Mabuyakhulu: Day 48: 5325: 13 – 5328: 24.

¹²³ Gcilitshana: Day 35: 3820: 23 – 3821: 2.

¹²⁴ Gcilitshana: Day 37: 4020: 8 – 4021: 1.

127. Likewise, Mr Mathunjwa testified that the demand came from the RDOs and not any union. According to him, AMCU had played no role whatsoever in it and, he said, he had first heard about it only on 13 August 2012.¹²⁵
128. Mr Setelele was the chairperson of the NUM branch at WPL. He heard that the Karee RDOs had put a demand to Lonmin for a wage of R12,500. This demand was not processed through any NUM structures. It was thereafter taken up by RDOs at other Lonmin operations. Mr Setelele was aware also that Lonmin had decided to give certain allowances to RDOs but that these had been rejected and that the RDOs would embark on an unprotected strike.¹²⁶

Consequences of Lonmin's Engagement with RDOs

129. Almost predictably, the fact that Lonmin was engaging directly with the RDOs did not go unnoticed. An indicative consequence was another march to Mr Da Costa by a relatively small group of between 15 to 20 team leaders on 5 or 6 August 2012. They presented a memorandum raising two issues. Mr Da Costa advised them that these were salary negotiation issues and that it was inappropriate for them to have approached him directly. They went away. Mr Da Costa's sense of it at the time was doubtless correct, namely *"that the team leaders had seen the RDOs achieve something through their approach and the team leaders were willing to take a chance on achieving something through a similar approach."*
130. It was clear to Mr Da Costa that if the RDOs remained unhappy and embarked on some activity, this would take the form of a work stoppage.¹²⁷ Notwithstanding such prospect it was at that stage clear that *"the company's position was that we were not prepared to reopen the wage agreement. We did not want to get into a wage negotiation process and we were not going to negotiate this position... backwards and forwards."*¹²⁸

¹²⁵ Mathunjwa: Day 21: 2241: 25 – 2243: 14.

¹²⁶ Setelele: Day 37: 4074: 19 – 4076: 4.

¹²⁷ Da Costa: Day 239: 30057: 18 – 30058: 10.

¹²⁸ Da Costa: Day 239: 30059: 9 – 15.

131. Once more, it is clear from this that Lonmin was seeking to avert strike action through offering an allowance, whilst at the same time seeking to maintain the impression that it was not negotiating.¹²⁹ In reality, the grant of an allowance in the circumstances of this matter would have been interpreted by employees in general to be an increase of the remuneration package of RDOs. Equally, it would have been understood that it had resulted from a direct approach, with normal bargaining processes having been entirely bypassed.
132. A number of aspects of the difficulties inherent in Lonmin's manner of dealing with the RDOs were traversed and underlined during the cross examination of Mr Da Costa by various parties. We will deal here in the main with matters raised on behalf of NUM.
133. There was a history at Lonmin of incidents of violence concerning disputes about union representation and disputes about issues such as the schoonteer shifts, which had given rise to numerous incidents of intimidation, violence, and even one death. Mr Da Costa confirmed that those and similar incidents must have conveyed to Lonmin that when demands were placed before it that weren't met, then there was the likelihood of intense dissatisfaction which could again produce a level of violence.¹³⁰
134. When Mr Da Costa gave the instruction on 24 July 2012 that Lonmin security was to be placed on "high alert", that required extra vigilance. In particular, that would have required that extra care be taken to ensure that all of the surveillance cameras were functioning properly, especially so once the strike had been embarked upon.¹³¹
135. Mr Da Costa agreed with a short set of fundamental labour relations principles. These were:-
- 135.1. The policy and legislative framework of this country's industrial relations has an express and deliberate objective of promoting peace in the workplace and in the conduct of labour disputes.

¹²⁹ Da Costa: Day 239: 30061: 2 – 9.

¹³⁰ Da Costa: Day 240: 30193: 5 – 19.

¹³¹ Da Costa: Day 240: 30194: 16 – 30195: 30196: 5.

- 135.2. It seeks to achieve this through a comprehensive set of negotiating and dispute resolution structures.
- 135.3. At the heart of these is the recognition of the necessity for collective bargaining arrangements and in this it respects the position of both the employers and the employees.
- 135.4. By the same token, our system of labour relations seeks to promote and protect the functioning of trade unions and the effective operation of collective agreements.
- 135.5. Conversely there are two modes of conduct that are fundamentally destructive of these principles. The first is that unilateral departures from the content of collective agreements, be it by a union or by an employer, have a destructive effect. The second mode of conduct that poses problems for our system is that acts of intimidation, destruction of property, assaults and murder cannot be sanctioned as a means of enforcing demands.¹³²
136. Dealing with some matters in chronology that should have alerted Lonmin to the possibility of violence in July/August 2012, there was notably the killing of Mr Dolane on 21 April 2012, whilst he was on his way to work an overtime shift. The context of this was that Lonmin had experienced ongoing problems from approximately January 2012 in relation to the working of schoonteer and working-in shifts. These problems were connected with dissatisfaction about AMCU not having received office accommodation, pursuant to which boycotts and acts of intimidation had occurred.¹³³ Because of the indications of AMCU involvement, Lonmin approached the AMCU head office, which denied any such involvement. Lonmin did not at that time pursue these issues.¹³⁴
137. In respect of the decision by Mr Da Costa to engage directly with the RDOs he put forward various factors that he considered had justified such a decision.

¹³² Da Costa: Day 241: 30312: 20 – 303013: 10.

¹³³ Da Costa: Day 241: 30321: 14 – 30324: 2; 30324: 20 - 30326: 15.

¹³⁴ Da Costa: Day 241: 30329: 18 - 30331: 19

138. One of these was that the request for a higher wage appeared to be confined to RDOs at Karee. However, he acknowledged that the recommendation made by him to Exco concerned RDOs at all divisions of Lonmin. Plainly, it was not a demand that could have been dealt with in relation to Karee alone.¹³⁵ The unsatisfactory aspect of this is that Mr Da Costa continued to engage with the Karee RDOs while the Exco was considering the issue, but without any interaction with the RDOs at the other Lonmin divisions.¹³⁶ Similarly, the decision by Exco to grant the allowances was taken without any communication or interaction with the full set of RDOs.¹³⁷
139. In his memorandum to Exco Mr Da Costa had pointedly advised that there should be interaction with the unions, both nationally and locally. Clearly, from an industrial relations point of view, this was sound advice. Regrettably, it was not followed and unilateral decisions were made. In our submission, that seriously exacerbated what was already a situation charged with potential for major unrest and violence.¹³⁸ There was no communication with the national offices of any union and the communications with local and regional office bearers followed upon the decision taken by Exco. These were no more than information steps and Mr Da Costa confirmed that he would not have entered into negotiations with them.¹³⁹
140. Mr Da Costa further confirmed that one should not make unilateral changes in the context of a collective-bargaining arrangement. The interaction with RDOs had an immediate knock-on effect in the approach of the team leaders. Because they did not have wide support, they were sent away, whereas the RDOs had been treated differently.¹⁴⁰ In respect of the RDOs, the possibility that they might leave Lonmin and move to competitors where the wages were higher had been a major consideration underlying the decision to grant unilateral allowances to them.¹⁴¹ Similarly, it was a commercial and management factor that RDOs have scarce skills.¹⁴² Mr Da Costa

¹³⁵ Da Costa: Day 241: 30333: 20 – 30334.

¹³⁶ Da Costa: Day 241: 30337: 16 - 30340: 6.

¹³⁷ Da Costa: Day 241: 30341: 12 - 30342: 17.

¹³⁸ Da Costa: Day 241: 30344:8 - 30346:15.

¹³⁹ Da Costa: Day 241: 30348:6 - 30349: 5; 30404: 15 – 30405: 19.

¹⁴⁰ Da Costa: Day 241: 30349:21 - 30350:18.

¹⁴¹ Da Costa: Day 241: 30351:7 – 30352:14.

¹⁴² Da Costa: Day 241: 30353:17 - 25.

conceded that factors such as these were precisely the sorts of considerations that ought to have gone into a proper collective bargaining forum, notwithstanding the fact that RDOs had expressly said that they did not want unions involved.¹⁴³

141. Mr Da Costa understood that the difficulties at Impala had arisen because an extra increase had unilaterally been given to Miners.¹⁴⁴ He likewise acknowledged the parallel between the situation at Impala and the one at Lonmin (although he observed – rather inconsequentially – that, at the latter, the unprotected strike had been triggered by the very group to whom the extra allowances had been offered).¹⁴⁵
142. Mr Gcilitshana accepts that Mr Da Costa had no option but to talk to the workers.¹⁴⁶ However, that did not address or cure the real problem, being that a unilateral grant of additional allowances followed.
143. The decision of the Lonmin Exco to give additional allowances to RDOs (ranging from R750 to R250) was taken unilaterally, without any negotiation with NUM, and during the currency of a binding two-year agreement. NUM was not happy about this, given that it was at the time the union with bargaining rights – although it was not *per se* opposed to RDOs receiving extra remuneration; the issue was one of process.¹⁴⁷ The norm at Lonmin is that even with matters such as the award of bonuses, a task team composed of trade union and management will look into allowances and how they should be implemented and communicated. That did not happen in this case.¹⁴⁸
144. Given that Lonmin had not engaged NUM from the start, it became very problematic for NUM to intervene at a later stage. If it had done so, and the RDOs had not obtained what they were demanding, they would have blamed NUM.¹⁴⁹ Moreover, the RDOs had throughout made it utterly clear that they did not want NUM involved. For NUM to have stepped in, without a mandate to do so, would inevitably have seriously exacerbated what was already a very volatile situation.

¹⁴³ Da Costa: Day 241: 30354: 1 – 30357:18.

¹⁴⁴ Da Costa: Day 241: 30360: 4 – 10.

¹⁴⁵ Da Costa: Day 241: 30362: 11 – 30363: 22.

¹⁴⁶ Gcilitshana: Day 36: 3913: 20 – 25.

¹⁴⁷ Gcilitshana: Day 35: 3821: 14 – 3822: 7.

¹⁴⁸ Gcilitshana: Day 36: 3908: 6 – 24; Day 37: 3978: 10 – 13.

¹⁴⁹ Gcilitshana: Day 37: 3982: 4 – 15.

145. From the perspective of a NUM branch chairperson, Mr Setelele made it clear that the union could only approach Lonmin if it had a mandate to do so from the RDOs, both before and after the inception of the strike.¹⁵⁰
146. Overall, there is a disquieting sense that Lonmin did not have the corporate skill or managerial strength to act in an informed and decisive fashion. At one level, it was concerned that the events at Impala could spread to its own mining operations.¹⁵¹ However, it seems nevertheless not to have done anything systematic or purposeful to prevent that. Even after the RDOs had made their demands to Mr Da Costa, Exco evidently did not treat the issue as being one of any urgency.¹⁵² More essentially, Exco did not appear to identify – and then avoid – the structural parallels between what had led to the violent industrial action at Impala and what it was itself now putting in place at Lonmin.

The Role of NUM Meetings

147. The witness statement of Mr Setelele contains this passage:

*“I had become aware also that following this demand being presented to management, Lonmin had approved the payment of an additional allowance for the RDOs but that these were rejected by the RDOs, who then resolved to go on an unprotected strike in support of a demand for the full R12,500. The issue of this demand by the RDOs was discussed at various meetings by the NUM branches in Lonmin. NUM’s position was consistently put forward at these meetings, namely that the wages of RDOs was covered in the two-year collective agreement that had been concluded in December 2011, that it was a breach of this agreement for RDOs to raise fresh demands during the term of that agreement, and that NUM was opposed to unprotected and hence illegal strike action.”*¹⁵³

148. From time to time during the hearing, the portion concerning NUM putting forward that it was a ‘breach’ of the collective agreement to raise fresh demands during its term has been paraphrased to have the quite weighty effect that ‘NUM told the RDOs

¹⁵⁰ Setelele: Day 38: 4134: 12 – 4135: 13; 4138: 7 – 15.

¹⁵¹ Da Costa: Day 241: 30395: 2 – 21.

¹⁵² Da Costa: Day 241: 30398: 5 – 30399: 17.

¹⁵³ “YY1” paras 3 and 4.

that they couldn't then raise a wage increase demand and that the RDOs had therefore decided to act on their own and hence to embark on an unprotected strike'.

149. In our submission, an interpretation along that line is not warranted on a proper analysis of the evidence. This submission has three broad components: (i) it is clear that the RDOs had decided to raise their demand without any union involvement well before the NUM meetings here in the picture; (ii) there is no evidence that the decision-making of RDOs was in any way influenced by those meetings; and (iii) the content of the meetings must be viewed as a whole.
150. As has already been outlined above, the RDOs had decided to go on their own by, at the latest, 21 June 2012. That was well before the first relevant NUM meeting, which was held on 8 August 2012. To put that in context, Mr Gcilitshana testified that it was by then clear that RDOs were intent on embarking upon unprotected strike action in support of their demand for a basic wage of R12,500, pursuant to which NUM held a report back meeting at which it took the opportunity to speak out against the strike and to caution workers against participating in it.¹⁵⁴
151. Mr Setelele dealt with this meeting in the course of his evidence-in-chief. NUM made it clear that it did not support any resort to unprotected strike action and cautioned RDOs about the risks of doing so. There were some RDOs at this meeting who indicated that they would take their demand up on their own and that they did not want to talk to NUM about it, notwithstanding that they were at that very meeting advised to bring their concerns or demands directly to the branch committee. This is advice that NUM always gives at its meetings.¹⁵⁵
152. In addition to NUM's general policy of opposition to unprotected strike action, Mr Setelele also outlined its view that RDO wages were (like those of other employees) covered in the then current two-year agreement and that workers should go back to work and bring their demands directly to the branch committee where they and NUM could sit and discuss them.¹⁵⁶ Under cross-examination Mr Setelele further clarified

¹⁵⁴ Gcilitshana: Day 35: 3823: 1 – 3824: 7.

¹⁵⁵ Setelele: "YY1" para 6; Day 37: 4077: 16 – 4079: 14.

¹⁵⁶ Setelele statement "YY1" at paras 4 and 6; Day 37: 4076: 1 – 4077: 3.

NUM's position, as conveyed at the meetings it held. There were two elements that ran together: the one was that NUM was opposed to unprotected strikes and that people should go to work; the second was that issues should be brought forward so that they could look at how those issues could be solved.¹⁵⁷

153. In his testimony, Mr Setelele referred to the fact, which is a clearly established one, that the RDOs had taken their decision to approach management themselves before NUM made a statement at any mass meeting about the effect of there being a two-year agreement.¹⁵⁸ In this context, he confirmed that the statement by Mr Da Costa that the RDOs had as at 21 June 2012 informed him that they wanted no union involvement accorded with his knowledge of the attitude of the RDOs. Before the meeting of 8 August 2012, there had been no NUM meetings at which the demand for R12,500 had been addressed.¹⁵⁹
154. Mr Setelele accepted that paragraph 4 of his statement "YY1" did not correctly reflect the import of clause 12.3 (read with 12.4) of the collective agreement, being that there could be discussions on terms and conditions during the currency of an agreement, but no strike action. His acceptance of that must however be treated in tandem with his further testimony, which is also contained in his statement, that it had also been clearly conveyed to workers at the NUM meetings that wage demands could be raised, but through the correct channels. At any time, it was possible to meet with management and obtain a solution over any matter existing at that time.¹⁶⁰
155. Mr Zokwana testified to the same effect.¹⁶¹ He pointed out also that there is no indication that RDOs went to NUM and were then told by NUM that they could do nothing about their demand because of the two-year agreement.¹⁶² This is a point of some importance. In our submission there is no basis upon which an inference can be drawn that the decision of RDOs to run their own demand had anything to do with the few NUM meetings which took place over the period of 8 to 14 August 2012.

¹⁵⁷ Setelele: Day 38: 4114: 5 – 19; Day 38: 4175: 17 – 23.

¹⁵⁸ Setelele: Day 38: 4178: 5 – 12.

¹⁵⁹ Setelele: Day 38: 4200: 17 – 4203: 3.

¹⁶⁰ Setelele: Day 38: 4198: 11 – 4200: 10.

¹⁶¹ Zokwana: Day 41: 4483: 15 – 20.

¹⁶² Zokwana: Day 41: 4487: 13 – 4488: 1.

156. When evaluating what was conveyed at, particularly, the feedback meeting of 8 August 2012 it is necessary to apply a reasonable test of what the possible causal role thereof might have been. This was not a mass meeting of RDOs and, plainly, NUM was by then in no position to call such a meeting. There was no broadcast to RDOs and they did not form a single entity for communication. In any event, it is instructive to have regard to a significant factual aspect of that meeting. As already described, there were some RDOs there. What they had to say was: “*We don’t want to talk to NUM.*” It was not: “*We note that NUM says it can do nothing for us.*”
157. It should also be borne in mind that meetings do not take place in a vacuum. As Mr Zokwana pointed out: “*mineworkers are seasoned members*” and many would be aware that changes were made to a multi-year agreement in 2005 after the NUM head office had been informed of the need.¹⁶³
158. Mr Gegeleza provides an illustration of this understanding that many RDOs would have. He became an RDO in August 2001. He was a member of NUM and the Vice Secretary of the Rowland Shaft Committee. Before the strike began he had heard that RDOs were demanding R12,500. He was aware that the two-year agreement covered the wages of RDOs. About this he says: “*it was my belief that any new wage demands should be raised and addressed only during the course of the next round of wage negotiations or on the basis that the circumstances justified a negotiated amendment of the two-year agreement.*”¹⁶⁴
159. Mr Zokwana’s attention was drawn to the sequence of meetings between RDOs and Mr Da Costa (which have been outlined above). He confirmed that it was his understanding of the events that the RDOs had from the beginning, as at 21 June 2012, been against any processes of negotiations on their issue and that they wanted it to be done as a separate matter. When RDOs said at the NUM meeting of 8 August 2012 that they did not want to talk to NUM about their demand, this conformed to their attitude from as early as June.¹⁶⁵

¹⁶³ Zokwana: Day 46: 5027: 10 – 23.

¹⁶⁴ Gegeleza statement: “ZZ2” para 4.

¹⁶⁵ Zokwana: Day 48: 5240: 6 – 5249: 12.

160. Mr Mabuyakhulu was at the time an RDO at Karee and became an AMCU member during July/August 2011. He attended a general meeting of RDOs on 9 August 2012, at which it was confirmed that no trade union should be engaged in respect of the RDOs' demand for R12,500. He said that there were three reasons for this: firstly, RDOs belonged to different unions and they should therefore be excluded; secondly, NUM had already indicated that it would not be able to discuss wages for RDOs only; and thirdly, a request for an increase had been made to NUM in 2006/2007 but no report back had been made since then. It was also said that NUM was the only union representing workers from category 3 to 8.¹⁶⁶ Although this account includes NUM indicating a limitation on what it could do for RDOs, it does not meaningfully tally with the contentious part of Mr Setelele's paragraph 4. That aside, it is apparent that the RDOs had various reasons for their decision to go to management directly.
161. Mr Mabuyakhulu's further evidence on this subject is illuminating. He was critical of NUM because, he said, shop stewards had previously not given them feedback. Regarding AMCU he testified that: "*The decision that was made during the discussions, was that AMCU was not yet involved in negotiations pertaining to wages. That it will only be able to do so after two years at the expiry of the existing agreement.*" From the side of the RDOs, he went on, they had decided to go to the employer directly, also because there were RDOs who belonged to AMCU, others to NUM, and others who were non-unionised.¹⁶⁷ In our submission, it is clear from this that the tempo-setting Karee RDOs would not go to NUM whilst their union of choice, AMCU, was not yet in a position to negotiate wages on their behalf. Hence, as at Impala, the route would be a direct one to the company and the resort to the exercise of power would be an unprotected strike, with its inherent prospect of violence.
162. The other meetings held over these days do not change the picture. The next one was on the late afternoon of 10 August 2012, at the Wonderkop Hostel. NUM again conveyed the message that it did not support the unprotected strike, that workers should report for duty and that they could go to the WPL NUM office if they needed assistance to get to work. NUM put out the same message also to people in the nearby

¹⁶⁶ Mabuyakhulu: Day 48: 5261: 1 – 5262: 13.

¹⁶⁷ Mabuyakhulu: Day 48: 5306: 13 – 5311: 14.

village and in the hostels.¹⁶⁸ In fact, NUM members did escort employees to work, as was noted in the Lonmin security log.¹⁶⁹

163. In the afternoon of 11 August 2012 Mr Setelele addressed a meeting of about 1,000 workers near the Wonderkop Stadium, in which he again outlined NUM's opposition to an unprotected strike. He further emphasised that a wage agreement was in place and that any wage demands had to be addressed through the proper channels.¹⁷⁰
164. On 14 August 2012 NUM held a mass meeting at Eastern Platinum. It was attended by many workers. Mr Gcilitshana was among those who spoke at it. Employees were again cautioned against taking part in the unprotected strike. NUM speakers also spoke out against violence and intimidation. An update was given about the Lonmin ultimatum that strikers would be dismissed; workers were informed also that the ultimatum had been extended.¹⁷¹

Capacity of Lonmin Security

165. An important part of the Marikana environment concerns the capacity of Lonmin security to deal with the situation that arose at the mine during the period beginning 10 August 2012. In the course of the evidence before this Commission it became clear that Lonmin's own security resources were woefully inadequate in respect of the safety and security issues presented by the unprotected strike action of its RDOs. We submit that the following general propositions can be identified: (i) the inability to provide proper security for employees and facilities, as well as the inability to control mass action, created the space within which unlawful conduct, acts of intimidation and violence including murder could take hold and escalate; (ii) this contributed substantially to a sense of instability and vulnerability; (iii) equally, it led to an environment in which non-striking employees lost confidence in their own ability to assert their rights and to resist intimidation; and (iv) it placed members of its security complement in situations of peril which could not be contained.

¹⁶⁸ Gcilitshana: Day 35: 3838: 3 – 21.

¹⁶⁹ Gcilitshana: Day 35: 3839: 2 – 3840: 7. Setelele: "YY1" at paras 8 – 11; Day 37

¹⁷⁰ Setelele: "YY1" para 23.

¹⁷¹ Gcilitshana: Day 35: 3851: 8 – 3852: 10.

166. Questions around Lonmin's security resources, training and general capacity were addressed at a stage of the Commission's proceedings when limited time was available. Nonetheless, it was possible to identify a number of very grave shortcomings to which Lonmin was evidently not in a position to provide satisfactory explanations. To a large extent, such shortcomings were apparent through an examination of Lonmin's documentation, supplemented in several respects through the oral testimony of its own witnesses. For the purpose of these submissions, only certain of the more important of those shortcomings will be traversed.
167. The key person who gave evidence on these matters was Mr Henry Blou, who was at all material times employed by the Western Platinum division of Lonmin as its Manager of Mining Security. By and large, he testified in a forthright and candid manner and acknowledged that there were indeed many areas of deficit in the security establishment during the period in question. Mr Blou has considerable experience in the security industry, particularly within the mining sector.
168. By way of important background, Mr Blou confirmed the applicability of a number of provisions in a document described as "The Counter Industrial Action Response Procedure Document for Lonmin".¹⁷² This document had been signed off, meaning that it had been approved and put into motion. It contains a number of important regulatory provisions about how security matters are to be managed, many of which would reflect ordinary good practice.¹⁷³ These provisions include the following: –
- 168.1. In terms of paragraph 3.2.2 Mr Blou himself bore the custodial responsibility in respect of all generic security risk management procedures, documents and associated information within Lonmin.
- 168.2. Paragraph 4.1.3 reads: "*This procedure will serve as a guideline for managing industrial action as each individual type of incident will warrant the manager, mining security to apply his or her discretion on how to effectively manage the relevant situation.*" Mr Blou confirmed that he was the person who had to apply his discretion in such instances. Effective

¹⁷² Exhibit "XXX8".

¹⁷³ Blou: Day 281: 36126: 10 – 21.

communication systems had to be in place in order to ensure that relevant information was conveyed to him for this purpose.¹⁷⁴

- 168.3. In terms of paragraph 4.4.1: "*The manager, mining security, or such appointed person will be responsible to conduct an effective and detailed planning and briefing session.*"¹⁷⁵
- 168.4. Paragraphs 4.4.2 and 4.4.3 require that attendance lists and minutes of briefing sessions must be recorded and stored safely. This relates to matters such as the evaluation of information, plans and action.¹⁷⁶
- 168.5. Paragraph 4.4.4: "*Deployed members must be briefed on the latest situation when reporting on duty, and debriefed when reporting off duty.*" Mr Blou confirmed that this was a critically important requirement.¹⁷⁷
- 168.6. Equally so, paragraph 4.5.3: "*Planning must be done precisely in order not to confuse the deployed teams of what functions are expected of them.*"¹⁷⁸
- 168.7. The important role of debriefing sessions is dealt with in paragraphs 4.6.1, 4.6.2 and 4.6.3 where particulars are set out, including the need for such sessions to be recorded. According to Mr Blou, if there had been a debriefing, it would be reflected in the log.¹⁷⁹
- 168.8. A further and vitally important provision is set out in paragraph 8.1.3: "*All situations must be closely monitored in order to determine the mood of the people taking part in the industrial action in order to predict possible influences, consequences which may lead to business interruption or disruptions, intimidation, injury to people, damage to property via sabotage, or disruption of external services.*"¹⁸⁰

¹⁷⁴ Blou: Day 281: 36128: 12 – 36129: 14.

¹⁷⁵ Blou: Day 281: 36130: 11 – 18.

¹⁷⁶ Blou: Day 281: 36130: 19 – 36131: 20.

¹⁷⁷ Blou: Day 281: 36134: 3 – 25.

¹⁷⁸ Blou: Day 281: 36135: 20 – 36136: 1.

¹⁷⁹ Blou: Day 281: 36137: 1 – 36142: 8.

¹⁸⁰ Blou: Day 281: 36147: 2 – 13.

169. As was confirmed by Mr Blou, the function of predicting what a crowd might do is critical. For that purpose there must be an accurate assessment of their "mood". That is a relative concept requiring among others an appreciation of previous experience and perspectives.¹⁸¹ Among these are a number of factors of which Mr Blou was well aware: (i) the fact that industrial action in South Africa over the past 10 years or so has very often been accompanied by quite high levels of violence; (ii) a good deal of such violence has been directed towards those who do not participate in the strike; (iii) the events of earlier in 2012 at Impala; (iv) the killing of Mr Dolane at Lonmin on 21 April 2012 when he was on his way to work; (v) a mass meeting of some 3000 employees at Karee on 12 June 2012 to discuss AMCU shop stewards and pending dismissal disputes, concerning which Mr Blou was aware of concomitant anti-NUM sentiment; (vi) the approach by RDOs to Mr Da Costa on 21 June 2012 with the demand for R12,500; (vii) the fact that they became very unhappy when they did not get the outcome they had sought, with Mr Blou being aware of the heightened security requirements; (viii) the NUM mass meeting of 8 August 2012, where it had spoken against participation in the imminent strike action and had urged employees to continue to go to work, with Mr Blou appreciating that this might promote anti-NUM feeling among those who intended to strike.¹⁸²
170. Against that background, we submit, it was of great importance for the senior management of Lonmin security to concern itself closely with an assessment of the mood of the strikers who had marched to the Lonmin offices on 10 August 2012. Once the strikers were informed that their demands would not be entertained, at least not in that way, there was great dissatisfaction on their part. Mr Blou was very concerned about this. He detected a new tone, a new level of aggression that he had not seen before. In his view, this new tone was "*the game changer*".¹⁸³ Importantly, Mr Sinclair experienced the situation in a similar way. After the crowd had been told that management would not entertain the demand, they dispersed and "*intimated that management would have to take the consequences and would be responsible for what*

¹⁸¹ Blou: Day 281: 36150: 3 – 36151: 5.

¹⁸² Blou: Day 281: 36151: 6 – 36152: 14; 36156: 3 – 36159: 4; 36159: 5 – 36162: 20; 36163:13 – 36165:3; 36166:12 – 36168:13.

¹⁸³ Blou: Day 281: 36172: 23 – 36173: 20.

was to happen". He added: "*The levels of aggression and number of workers involved were unusual and very disturbing. I realised that people were joining the crowd from Karee and other mines*".¹⁸⁴

171. Mr Blou acknowledged that this was a very important moment in the history of what was to develop, with both he and Mr Sinclair having made an alarming assessment of the mood of the strikers. Their response was to bring in a variety of extra resources to manage the unfolding events. They also established an operations centre, the idea being to centralise all calls and log them in a joint central facility in order to "monitor the developments and coordinate any responses".¹⁸⁵
172. However, what is absent from the steps that were thus described was any account of interaction and discussion between himself, Mr Sinclair and others in the leadership of the security establishment – "*along the lines of doing the predicting that the procedures memorandum requires that you assess in order to predict the consequences*". In our submission, the need "to predict" stands at the heart of what Lonmin security was required to do at that stage, but failed to. Put differently, there was no effective "*scenario planning*". The need for 'prediction' and 'planning' is by very nature an ongoing one so that developments are taken into account in a continual way, producing planning updates. In this case, that planning should have had full regard to the further factor that NUM had during the evening of 10 August undertaken the escorting of employees who wished to get to work. Mr Blou confirmed that it was foreseeable that the strikers would not like that and, had he and his team done scenario planning, that this would have been seen as increasing the risk of an attack by the strikers on the NUM office on the Saturday morning.¹⁸⁶
173. Somewhat circuitously, Mr Blou testified that a 'brainstorming session' as mandated had indeed been conducted during the afternoon of 10 August. However, there is no minute of it. It also appears that the possibility of an attack on the NUM offices was not considered because such an attack had not been previously experienced.¹⁸⁷ The

¹⁸⁴ Blou: Day 281: 36172: 23 – 36174:23.

¹⁸⁵ Blou: Day 281: 36175: 22 – 36177: 5.

¹⁸⁶ Blou: Day 281: 36178: 3 – 36181: 2.

¹⁸⁷ Blou: Day 281: 36181: 3 – 36184: 21.

evidence of Mr Blou on this aspect is far from satisfactory. The log (“EEEE19.1”) shows that the strikers dispersed from Wonderkop at 13:55. Three minutes later there was a debriefing session chaired by Mr Sinclair and Mr Blou is not recorded as being present. Notwithstanding the obvious importance of a session of that kind at that point, Mr Blou apparently did not consider it to be important for him to be there.¹⁸⁸ A further unsatisfactory feature of this is that there is not only no minute and there is also no entry in the log recording any discussion concerning *scenario planning* or anything of the sort. On balance, we submit that an exercise of that nature did not in fact take place. There is no indication of an appropriate appreciation of the seriousness of the situation or of any consideration as to whether bringing in one hard skin vehicle would be sufficient. There is also no explanation concerning the absence of a minute or log entry.¹⁸⁹

174. In relation to the critical topic of planning, a specific question was put to Mr Blou as to when it became clear to Lonmin security for the first time that their arrangements, as put in place on 10 August 2012, might not have been sufficient. His answer was revealing, being that it was on Sunday the 12th. Implicit in that answer is that Mr Blou and his team did not consider the attack on the NUM offices and the shooting that took place there on the 11th as being of sufficient moment to revisit, as a matter of urgency, the adequacy or otherwise of the arrangements that had made for security over the ensuing few days.¹⁹⁰
175. The log shows that there was a second briefing at 15:10 on the afternoon of the 10th. There were three comments and they related to buses. There was no indication of any discussion concerning security arrangements. At 16:30 there is an important record of an instance of intimidation in the vicinity of the NUM offices. Other entries in the log note clearly that NUM members were conducting escort functions. There were other reports of incidents of intimidation of employees going to work. These were reported

¹⁸⁸ Blou: Day 281: 36185: 15 – 36189: 5.

¹⁸⁹ Blou: Day 281: 36193: 8 – 36194: 25.

¹⁹⁰ Blou: Day 281: 36195: 12 – 22.

to Mr Blou but he seemed not to have been troubled by them because, he said, those sorts of incidents were not unusual.¹⁹¹

176. His view seems to have been that Lonmin security could deal with disruptive conduct by small groups of strikers but that any large scale unrest such as an attack on property would be a matter for SAPS.¹⁹² Pursuant to that view, Mr Blou was specifically asked whether he and his colleagues had as that Friday afternoon and into the evening identified the possibility that there might be another large gathering and march the following morning. His answer was essentially to the effect that in such event the sole role of Lonmin security would be to inform SAPS. When asked to deal with the delay that might be involved before the arrival of a police deployment, Mr Blou's answer was: "*The plan was that Lonmin would protect its property and its people to the best of its capacity with the available resources it had*". For the rest, it could only wait for SAPS to come.¹⁹³ To be evenly modestly effective, we submit, proper security planning can never take so non-specific a form.

177. In real terms, what this translated into on 11 August 2012 was an entire inability on the part of Lonmin security to provide any effective protection of the NUM office, NUM personnel, and the Lonmin vehicle used by NUM. As he put it: "*The strategy was to tell them that people are intent on coming and burn these offices, so please vacate these offices.*"¹⁹⁴

178. Mr Blou accepted that the NUM office contained all its records, all its membership records, all its records of grievances that it was handling and generally everything that sustained the life of the union was in that office. He accepted also that NUM should never have been placed in a situation where the members present on the 11th had to make a decision as to whether they would abandon the office and all its contents or try to defend it.¹⁹⁵ The two security officers (Dibakoane and Motlogeloa) had been instructed that if there were a large march their duties were solely to go to wherever

¹⁹¹ Blou: Day 281: 36196: 19 – 36199: 8.

¹⁹² Blou: Day 281: 36201: 22 – 36204: 10.

¹⁹³ Blou: Day 281: 36208: 9 – 36211: 16; 36212: 7 – 36213: 19.

¹⁹⁴ Blou: Day 281: 36213: 20 – 36215: 20.

¹⁹⁵ Blou: Day 281: 36216: 12 – 36217: 2.

that march was heading and to inform the people in that facility to flee.¹⁹⁶ That is a standing instruction.¹⁹⁷

179. Mr Blou was not informed by JOC or anyone else on 11 August 2012 when it became apparent that there was a gathering and that the strikers intended to march to the NUM office and burn it down. This was plainly a very serious development and the practice/instruction was that he should have been informed immediately so that he could carry out his role of making a decision as to how it should be dealt with.¹⁹⁸
180. A significant factor underlying Lonmin's inadequate security capacity is the decision by management in about 2005/2006 to 'demilitarize' its security resources. Senior security managers gave input at the time. Mr Blou was one of those and he was *inter alia* in favour of retaining armoured vehicles. Lonmin had four at the time and they were disposed of. A high-tech surveillance system was installed and this was coupled with a reduction in the number of security personnel. The result of this was to limit Lonmin Security's ability to contain and control labour unrest and public violence.¹⁹⁹
181. This made it imperative to have sufficient lines of communication with SAPS and "*being able to detect possible violence and damage to property as early as possible so as to be able to summon SAPS so as to where possible pre-empt such violence and damage to property.*"²⁰⁰ Lonmin had now shed its previous capacity to deal with unrest and violence and placed this in the hands of SAPS. For this it was essential that SAPS should be timeously informed and ready to act. However, despite numerous discussions, Mr Blou was not aware of specifics regarding SAPS response times.²⁰¹
182. This leads to a position that we submit is a very unsatisfactory one, namely that while Lonmin may be waiting for SAPS to mobilise, its own security officers are expected to do their best to contain the situation. That may require them to put themselves at risk. At the same time, said Mr Blou, these officers are entitled to withdraw if the

¹⁹⁶ Blou: Day 281: 36217: 3 – 18.

¹⁹⁷ Blou: Day 281: 36220: 21 – 36221: 15.

¹⁹⁸ Blou: Day 281: 36226: 3 – 36227: 2.

¹⁹⁹ Blou: Day 282: 36233: 18 – 36240: 8.

²⁰⁰ Blou: Day 282: 36240: 9 – 18;

²⁰¹ Blou: Day 282: 36248: 15 – 24.

situation is dangerous.²⁰² That leads to security officers being posted into very invidious situations and potentially, at least, without certainty as to what they must do. It also means that non-striking employees who face attack from strikers may be left without any protection because Lonmin security officers may consider that they themselves are at risk. That is what happened at the NUM office on 11 August; there was no protection, only advice to evacuate.²⁰³

183. Although extra security people were brought in from external service providers, it is clear that they were concerned with matters such as access control and nothing more substantive. They would not be deployed to deal with a large crowd of armed and aggressive people. Their presence didn't affect the necessity to bring SAPS in to contain situations of that kind.²⁰⁴
184. It is clear from the evidence of Mr Blou that he and other managers in Security did no scenario planning of any consequence. As an example, Mr Kwadi is recorded as having been at the briefing meeting at 08:00 on 11 August where he raised the fact that NUM was assisting its members and his concern that it might take the law into its own hands resulting in faction fights. Mr Blou agreed that this was a very serious possibility and that it should have been part of a scenario planning session – but couldn't recall that there had been one.²⁰⁵
185. Closely related to this kind of deficit was the fact that there had been no debriefing session with the two security officers who had been present during the march to and attack on the NUM office. Plainly, this was vital (and required) in order to get a first-hand understanding of what the crowd was like (*inter alia* its 'mood'), what the implications were for their future conduct, what NUM might do, what security planning should be put in place, and so on. Scenario planning as a quintessential security planning tool was simply not done.²⁰⁶

²⁰² Blou: Day 282: 36249: 8 – 36250:

²⁰³ Blou: Day 282: 36250: 11 – 36252: 1.

²⁰⁴ Blou: Day 282: 36261: 2 – 36262: 5.

²⁰⁵ Blou: Day 282: 36271: 12 – 36273: 21.

²⁰⁶ Blou: Day 282: 36278: 23 – 36280: 19.

186. The attack on the NUM office was discussed at a security meeting at 14:00 on the 11th. Remarkably, the view was that because there hadn't previously been a sustained attack on a NUM office and because this one had been repelled, the strikers would not return to there. They did not consider the possible scenario that the anti-NUM feelings of the strikers would have been inflamed by what had happened and because two of them had been injured. The security team did not anticipate any retaliation.²⁰⁷ Their conclusion, we submit, should have been precisely the opposite.²⁰⁸
187. According to Mr Blou, not only did Lonmin not during their discussion on the 11th anticipate a repeat attack on the 12th, that remained the case until after the march and killing of Messrs Fundi and Mabelane.²⁰⁹ However, this evidence of his does not have much support. Firstly, the log notes that there might be a fight between NUM and AMCU. Secondly, Mr Dewald Louw has given evidence that this very possibility was discussed at a briefing attended by him on the afternoon of the 11th - although no specific planning had been put in place to deal with it.²¹⁰
188. Moreover, a briefing note issued by Mr Sinclair, the Group Mining Security and Emergency Manager, at 07:30 on the 12th expressly identifies that the strikers had undergone traditional rituals in preparation for a revenge attack on the NUM representatives who had confronted them on Saturday morning. The security status had been stepped up to 'double red' on Saturday afternoon "*because of the potential mass revenge conflict*". Mr Blou knew of the rituals. He also knew of the 'double red' status but his thoughts about this had gone no further than that Lonmin property near Wonderkop needed to be protected.²¹¹
189. It is difficult to imagine a more stark demonstration of the fact that there was not even a semblance of scenario planning at this critical stage of the events. Here one has the two most senior managers in the Mining Security section of Lonmin without a common view of what may happen and, therefore, of what planning needs to be done. Not only is there not a common view, it is clear that there has not even been a proper

²⁰⁷ Blou: Day 282: 36285: 17 – 36286: 17.

²⁰⁸ Blou: Day 282: 36291: 4 – 25.

²⁰⁹ Blou: Day 282: 36295: 21 – 36296:11.

²¹⁰ Blou: Day 282: 36296: 12 – 36299: 16.

²¹¹ "FFFF6" Brief 4; Blou: Day 282: 36301: 8 – 36303: 22.

exchange of views, with Mr Blou not even being aware of Mr Sinclair's understanding of what happen on the 12th. Why is this so grave? First, because no planning at all is put in place. Second, more broadly, we reiterate what we have submitted above, namely that when there is no effective planning there will be no effective security; when there is no effective security, space is created for the eruption of violence and the deepening of conflict; when there is that kind of eruption, it gathers momentum whereafter subsequent attempts to regain a secure environment will have become all the more problematic.

190. In this instance, there was already a fundamental security shortfall in that Lonmin (to its knowledge) could not contain an eruption. That should have been clear by the 10th. It was unmistakably evident after the attack on the NUM office on the morning of the 11th. The prospect of a further attack must have been apparent to any security manager and it is inconceivable that it would not have been seriously tabled and discussed if a meaningful scenario planning had been held. Clearly, there was no purposeful examination at that level of the relationship between three cardinal elements: (i) realistic threats; (ii) Lonmin capacity; and (iii) the logistics of securing, timeously, the requisite SAPS presence.
191. There is evidence concerning telephone calls to SAPS. In context, we submit that those calls lacked the necessary vigour. That is hardly surprising when the two top managers were neither *ad idem* nor engaged in continual discussion about what they were facing. Mr Sinclair anticipated a revenge attack. Mr Blou did not. There was such attack and Mr Fundi and Mr Mabelane died. When those two managers were not on the same page, what prospect was there of getting a sufficient SAPS contingent to the mine, quickly enough?
192. Ultimately, Mr Blou did not dissent from the highlighted conclusion in the ICAM report ("RRRR 2.2") reading: "*Comprehensive scenario planning not conducted and embedded across the operations, which is risk-based and details tactical actions*".²¹² That is an important ICAM finding and an important acknowledgement by the Manager of Mining Security.

²¹² Blou: Day 282: 36366: 21 – 36368:1 2.

Events of 10 August 2012

193. On 10 August 2012 the RDOs met near the stadium and marched to the LPD. When they were stopped not far from there and asked what they wanted, they elected five RDOs who would represent them in talking to the employer. After some time they proceeded further to the LPD, where the representatives went in to talk to management. On their return they reported that management had said to them that NUM had told the employer not to talk to the RDOs. The representatives again went in to ask management what should be done next. They came back and reported that the employer had said that the RDOs could do what they want. Thereafter they went back to the stadium, where it was agreed that they would meet there the next day and wait for the employer there.²¹³ Mr Mabuyakhulu was on the march to LPD on 10 August. He confirms that the march went to LPD and back to Wonderkop without incident. It did not go anywhere near the NUM office and no shots were fired.²¹⁴
194. At Mr Mathunjwa's instance, Mr Nkalitshana (AMCU's national organiser) established from the AMCU branch chairman at Karee that the march of 10 August 2012 had been organised by the RDOs themselves who said that "*it had nothing to do with the unions and that they did not want the unions involved.*"²¹⁵
195. Mr Magidiwana was not an RDO and earned less than them. However, he joined the strike after hearing from other workers that they had been stopped from going to work. All workers had to support the RDO strike. In his view, he was also striking for R12,500 although, plainly, such demand had never been put to Lonmin on his behalf.²¹⁶
196. By way of reference to various Lonmin security entries and management emails, Mr Gcilitshana noted that there were a number of reports of acts of intimidation during the night of 10 August 2012. These reports had reached management and also NUM. NUM was opposed to the unprotected strike and also to acts of violence in and around

²¹³ Mabuyakhulu: Day 48: 5264: 13 – 5266: 16.

²¹⁴ Mabuyakhulu: Day 48: 5332: 5 – 12.

²¹⁵ Mathunjwa statement "NN": para 20a.

²¹⁶ Magidiwana: Day 61: 6508: 6 – 16; 6511: 3 – 6512: 8.

the workplace as well as acts of intimidation.²¹⁷ The Lonmin log reflects a variety of reports across a number of areas and we note them below. Although these entries are highly unlikely to have captured all incidents of intimidation, it is clear that these were widespread:

197. Two incidents were raised with Mr Louw, drawn from a police docket (CAM69/2012), concerning complaints that certain people had been injured apparently by shots fired from Lonmin security vehicles. These were at 18:16 and 19:40. Mr Louw did not know directly about them, although he said he had heard about the incident.²¹⁸
198. Mr Setelele confirmed that there was no shooting incident in the vicinity of the NUM office at any time on 10 August.²¹⁹ Two employees were assaulted on their way to work that evening and he arranged for them to be taken to the Andrew Saffy hospital.²²⁰ Mr Setelele also accompanied the Quantum used by NUM on several trips to escort employees to work. During those trips he did not witness incidents of intimidation, but on one occasion a group shouted at them that they would be killed for transporting people to work whilst they were out on strike.²²¹
199. It may be taken as established that the strikers were angered by NUM's opposition to the strike and by its efforts to assist people to get to work. Indeed, this was the premise for a proposition put to Mr Zokwana by counsel for the IAP, being that NUM had known that the strikers would view NUM's actions as provocation.²²² Even more directly, it was further put that "*... it was also provocative to do something which you knowingly knew was calculated to break the strike.*"²²³ Mr Phatsha unambiguously confirmed that the strikers did not like the fact that NUM had declared that it did not support the strike and that it had been making a concerted attempt to assist people who

²¹⁷ Gcilitshana: Day 35: 3834: 1 – 3835: 5.

²¹⁸ Louw: day 262:33142:24 – 33143:13.

²¹⁹ Setelele: "YY1" para 13.

²²⁰ Setelele: "YY1" para 12.

²²¹ Setelele: "YY1" paras 14 – 16.

²²² Zokwana: Day 45: 4893: 5 – 4894: 17.

²²³ Zokwana: Day 45: 4895: 10 – 13.

wanted to work to get there. Strikers viewed this conduct by NUM as being aimed at weakening the strike and ensuring that it did not succeed.²²⁴

Attack on NUM Office on 11 August 2012

200. We review here the evidence concerning this event. There is no dispute that a large group of strikers (some 2,000 to 3,000) marched from the Wonderkop Stadium area to the NUM offices at about 08:30 on Saturday the 11th. They were met there by a small group of NUM stewards and members. In the ensuing clash a few shots were fired from the NUM side and the marchers turned and fled. Two of them were injured, quite seriously.
201. There are essentially two disputes. The one has to do with the detail of precisely what took place during the clash, such as the throwing of stones and who charged whom first. We submit that the NUM version is to be preferred, but that this is not the truly germane issue. The second dispute has far more importance for a proper and contextual evaluation of the event and this concerns why the strikers went to the NUM office in the first place.
202. Its importance lies *inter alia* in the allegation that was widely disseminated amongst the strikers that they had been innocently going to or passing by the NUM office when they were attacked and shot at by NUM members, for no reason at all. That version is rejected by NUM as false. NUM asserts that the strikers came to its office because they had decided to attack it, reportedly with the intention of burning it as well as the kombi that was used by NUM and which, particularly, had been during the previous night to transport non-strikers to work. We submit that the facts and probabilities regarding this area of dispute are overwhelmingly in favour of NUM.
203. We turn now to a narrative of the events and the related considerations. At about 05h30 Mr Gegeleza left home for his work as an RDO at the Rowland Shaft. On the way he came across a group of about 20 NUM shop stewards in the vicinity of the Wonderkop Hostel. They had been escorting employees to work and Mr Gegeleza decided to join them. Mr Louw describes a group of this nature, possibly this very

²²⁴ Phatsha: Day 51: 5476: 2 – 21.

one. When he came on duty at approximately 05:00 he went to Wonderkop where he saw a group of people armed with knobkerries and pangas escorting employees from the hostel towards Rowland shaft. He was informed that this was a group of NUM members acting like security officers, escorting people to work. They closely monitored the movement of the people but there were no security incidents to be reported.²²⁵ From the information which he had received, Mr Louw was of the view that the NUM people were basically making sure that the others arrived at work safely. They were protecting rather than forcing the others to go to work against their will. From what he saw himself, the NUM people were not aggressive.²²⁶

204. The group Mr Gegeleza had joined then proceeded to the NUM office. On their way they addressed people at various places, encouraging them to report for work and advising them that the NUM office would provide any assistance that they required.²²⁷ In all, there were about 30 people there. A little while before 09h00 one of them received a call from a friend who was with the strikers, warning him that they had decided to march to the NUM office to deal with the NUM leadership and the NUM office. Moments later Mr Setelele was informed by Lonmin security personnel that the RDOs were marching along the main road in the direction of the office and that they were threatening to burn it. It was decided that Mr Setelele should take the NUM Quantum to safety. Mr Bongo handed out some weapons to those in the office, explaining that these had been obtained during the previous evening from strikers. Mr Gegeleza was given a knobkerrie and a spear. Ordinarily, there were no weapons at the office.²²⁸
205. Mr Setelele gives a consistent description of these events. He was at the office when two Lonmin security officers arrived there at about 08h30 and informed him that a group of strikers had started marching from the veld near the Wonderkop Stadium and that they were heading to the NUM office, armed with an assortment of weapons such as knobkerries and spears. These officers also told him that the marchers intended to

²²⁵ Louw: "AAAA36" p1.

²²⁶ Louw: Day 262: 33049:19 – 33051: 2.

²²⁷ Gegeleza "ZZ2" paras 6 – 10.

²²⁸ Gegeleza "ZZ2" paras 11 – 14.

burn down the NUM office as well as the Quantum which had been used to take employees to work.²²⁹

206. Mr Setelele decided to move the Quantum to safety and he and the NUM driver did so. As a result he was not at the office at the time of the confrontation there. He was however aware that there were some weapons at the office that morning, such as knobkerries, sticks and spears. Ordinarily, there would be none. Some of these had been taken away from strikers during the previous night and others had been fetched from their homes by members who had experienced threats and intimidatory conduct from strikers. He was informed later that Mr Bongo distributed these to those members who decided to stay and defend the NUM office.²³⁰
207. After Mr Setelele had left the group at the office moved onto the road because they were afraid they might otherwise be trapped. They intended to defend themselves and the NUM office. Mr Gegeleza testified that they were extremely afraid about the possibility of this attack. Some of the group decided to leave, others stayed.²³¹
208. While the group was standing in the road, two Lonmin security officers came there in a van and spoke to Mr Bongo. Mr Gegeleza was nearby and heard the officers tell Mr Bongo that the strikers were on the way and were going to attack the NUM people. The officers said that they should close the NUM office and leave. Mr Bongo asked them who would protect the office, to which the officers responded that they, the security, were not in a position to do so. This increased Mr Gegeleza's level of fear and it was at that stage that some of the NUM group left. The two security officers drove away.²³²
209. This sequence of events is confirmed in the statements of Mr Motlogeloa and Mr Dibakoane, the two security officers in question. Of them, the former testified in these proceedings. Their statements are respectively "ZZ4" and "ZZ3". The statement of Mr Dibakoane places the events in helpful context. He describes the escort functions performed by NUM stewards during the evening of 10 August 2012, so that the

²²⁹ Setelele: "YY1" para 17.

²³⁰ Setelele: "YY1" paras 18 -19.

²³¹ Gegeleza: Day 39: 4230: 19 – 4231: 23.

²³² Gegeleza: Day 39: 4231: 24 – 4233: 19.

members could report for duty. He received information from certain informants that there was much unhappiness about NUM's intervention in this regard and a mass meeting of the strikers had been called for the following morning. He was informed that the purpose of this meeting was to confront and challenge NUM at their offices as NUM was not adhering to the "no work embargo".²³³

210. On the morning of the 11 August, a large crowd gathered and the two security officers were informed that it was now the intention of the crowd to march to the NUM offices and to burn them down. It was again conveyed to them that the motivation for this was that NUM had been assisting its members to attend work on the previous day.²³⁴ The two security officers then decided that they would drive ahead of the crowd to the NUM office in order to warn them of the crowd's intention and to request that they should vacate the office. Mr Motlogeloa spoke to Mr Setelele, who responded that they would not leave their office. Mr Dibakoane spoke to Mr Bongo with the same result. Mr Bongo asked whether the two security officers would remain behind to protect the office but Mr Dibakoane did not respond to this as the NUM officials had already clearly decided that they were not going to leave.²³⁵ The two security officers then decided to move away because it was unsafe for them to remain there. They drove up the road some distance.²³⁶
211. Very soon after the security officers had departed, the sound of the approaching strikers was heard. Mr Gegeleza led a small group to the outside of the corner of the fence around the NUM office, from where there was a full view of the taxi-rank street (street B as depicted on "YY2.2"). He saw the marchers turn the corner from street A into street B, coming in the direction of the satellite police station and the NUM office. They were singing songs and moving fast, running; their mood was aggressive. He saw sticks, knobkerries, pangas and spears amongst them.²³⁷
212. At that point, Mr Gegeleza called out to the others. The NUM group was at that stage not even 20 in number. Some of the NUM group came to him and they then moved

²³³ Dibakoane: "ZZ3" paras 2.4, 2.5 and 2.6.

²³⁴ Dibakoane: "ZZ3" para 2.10; Motlogeloa: Day: 263: 33193:2 – 20.

²³⁵ Motlogeloa: Day 263: 33194: 16 – 22; Dibakoane: "ZZ3" paras 2.16 – 2.19.

²³⁶ Dibakoane: "ZZ3" para 2.21; Motlogeloa: Day 263: 33196: 18 – 33197: 8.

²³⁷ Gegeleza: Day 39: 4233: 20 – 4237: 21.

towards the strikers and confronted them. The strikers were then at the corner of street C and some had turned into it. Mr Gegeleza and his small group (of four or five) were in the ‘sidewalk’ area alongside street B, outside the NUM office fence.²³⁸ Although they were massively outnumbered, Mr Gegeleza was adamant that this would not be a good reason to run away. To do so was not part of his Pondo upbringing.²³⁹

213. The strikers then saw Mr Gegeleza and his group and some strikers called out: “*Here are these dogs.*” In the words of Mr Gegeleza: “*By then we were – they were approaching us and on the other side we were also approaching them.*”²⁴⁰
214. None of the marchers gave any indication or said anything to the effect that they had come there because they wanted to speak to NUM because they wanted NUM to assist them to take demands to Lonmin.²⁴¹ This evidence was not challenged.
215. According to Mr Gegeleza, some stones were thrown by the strikers at the NUM group. The events were “*unfolding very fast*”. Mr Gegeleza was afraid, but wanted to protect his life as well as the office of NUM.²⁴² As the strikers and the NUM group were about to meet, Mr Gegeleza heard “*more than three*” gunshots, whereupon the strikers retreated. Mr Gegeleza saw that they were running away. Some of the strikers went through a gap in a concrete fence on the other side of street B. The NUM group then chased them to the hostels.²⁴³
216. During this encounter with the strikers, Mr Gegeleza did not get an impression that they thought that the bullets would not injure or affect them. To the contrary, he agreed with the proposition put to him on behalf of the IAP that as soon as the strikers heard the gunshots they ran for their lives.²⁴⁴ Mr Gegeleza was very startled by the shots and it seemed to him that the strikers were also. It was the shots that turned the

²³⁸ Gegeleza: Day 39: 4238: 2 – 22; 4240: 11 – 4241: 20.

²³⁹ Gegeleza: Day 40: 4354: 7 – 4355: 9.

²⁴⁰ Gegeleza: Day 39: 4242: 5 – 19.

²⁴¹ Gegeleza: Day 39: 4242: 20 – 25.

²⁴² Gegeleza: Day 39: 4243: 1 – 14.

²⁴³ Gegeleza: Day 39: 4245: 8 – 4246: 17.

²⁴⁴ Gegeleza: Day 40: 4353: 9 – 19.

- strikers and, he believed, saved him and the others from serious injury or even death.²⁴⁵
217. The strikers who had turned down street C also ran away after the gunshots, together with those who were in street B.²⁴⁶ The reason for chasing the strikers after they had turned and started to run away was to prevent them from planning a second attack.²⁴⁷
218. In the course of this chase, Mr Gegeleza saw an injured person next to the Schagen Workshop.²⁴⁸ The chase came to an end at the top of street A in the vicinity of the entrance to the hostel area (at the long white building to be seen on “YY2.1”).²⁴⁹ The NUM group then returned to the NUM office. There is a short video clip showing them in street B and about to turn into street C. The group shown on the video is larger than the NUM group that had repelled the strikers; some other people had joined them from the hostel area.²⁵⁰
219. It was at that stage that Mr Setelele got back to the NUM office. The incident was over and he met up with the NUM members who were returning from the direction of the hostel to the office after they had managed to disperse the attacking strikers. Mr Setelele was then informed that some shots had been fired by NUM members and that two of the strikers had been injured. He did not see anybody who had been killed.²⁵¹
220. There was then a meeting at the NUM office at which it was decided that the office should remain open and that all the shop stewards would remain in attendance to deal with any emergencies and to assist members and any other workers who needed assistance that NUM could provide.²⁵²
221. At about 13h00 a group of NUM shop stewards marched from the NUM office to the Wonderkop Stadium. The purpose of this was to see what the strikers were doing, because there remained a real fear among the NUM members that the strikers could be

²⁴⁵ Gegeleza: “ZZ2” paras 21 and 23.

²⁴⁶ Gegeleza: Day 40: 4318: 9 – 11.

²⁴⁷ Gegeleza: Day 39: 4248: 9 – 15.

²⁴⁸ Gegeleza: Day 39: 4249: 14 – 25.

²⁴⁹ Gegeleza: Day 39: 4251: 7 – 18.

²⁵⁰ Video clip is “X1”; Gegeleza: Day 39: 4252: 20 – 4255: 3.

²⁵¹ Setelele: Day 38: 4095: 9 – 4096: 24; Gegeleza: Day 39: 4260:20 – 4261: 3.

²⁵² Gegeleza: Day 39: 4255: 20 – 4256: 4.

planning another attack, that they might not be able to resist. There is a short video of this group.²⁵³

222. Mr Gegeleza conceded that it was physically possible for him to have left the NUM office before the strikers arrived. He maintained however that there was no way that he would have done so. As he put it: *“It never crossed my mind to leave or to lock the office of the NUM and let it be attacked, whereas I was there.”*²⁵⁴ In this context, it was suggested that there was a satellite police station right there; Mr Gegeleza pointed out that the police don’t stay there and that it was just a building.²⁵⁵
223. In response to the proposition put by SAPS that this incident had been the turning point in the whole (Marikana) episode, with NUM being the aggressors and responsible for attacking the strikers, Mr Gegeleza differed. He said that it was possible that the problem had started because it never worked well with the RDOs, who would have been angered that people were being escorted to work, possibly aggravated by the shots that had been fired.²⁵⁶
224. It was also put to Mr Gegeleza that the NUM meeting at about 16h00 near the Wonderkop Stadium had amounted to an eviction of the strikers from their usual meeting place and that they had hence started meeting at the koppie. He disagreed, pointing out that there had been no confrontation and that the only workers there were those who had come to listen to Mr Setelele.²⁵⁷
225. When evaluating this incident as a whole and the decision of a small number of shop stewards to defend the NUM office, it is with respect important to have full regard to the consequences for the union if that office had indeed been burnt down. Mr Zokwana identified some of them and we quote what he had to say on this vital topic:

“Psychologically it would have made NUM members to be afraid of ever being seen as part of NUM. Two, it would have denied NUM to interact with its own members who were employees of Lonmin. I base this from the events that happened in Impala,

²⁵³ Video clip “X3”; Gegeleza: Day 39: 4256: 9 – 4257: 9.

²⁵⁴ Gegeleza: Day 40: 4377:9 – 4379: 11.

²⁵⁵ Gegeleza: Day 40: 4390: 15 – 21.

²⁵⁶ Gegeleza: Day 40: 4382: 25 – 4383: 17.

²⁵⁷ Gegeleza: Day 40: 4386:22 – 4388: 11.

*where our offices were shut down by the same situation like the one intended in Lonmin, our shop stewards being denied the right to be in the office and interact with members and service them as they have been doing. But if the office was burnt, not only would it have been the structure destroyed but the very crucial NUM documents and information could have been destroyed as well ... But what was supposed to happen was for those who were employed who are trained to deal with such situations, were supposed to be there to protect people, property and the rest ... In defending the NUM office [those who made the decision to defend it] defended the image of the organisation. We stand by them because we believe that nobody in this country has a right to threaten anybody's life or to threaten the destruction of property.*²⁵⁸

226. Counsel for the IAP put to Mr Zokwana that the shooting and injuring of two of the strikers at the NUM office was itself provocation. He disagreed, maintaining that the true provocation lay in the strikers' decision to march with arms to the NUM office with the threat to burn it.²⁵⁹ It was also put that Mr Bongo in his email at 'XX2.78' had suggested that Lonmin security and NUM work as a team. Mr Zokwana did not dispute this, but noted that the purpose of this related only to people being able to get to work without hindrance, not to do any other thing.²⁶⁰
227. It was also put that the protestors on the 11th had made no decision to go and burn the NUM office. Mr Zokwana queried what then would have been the intention. If the purpose was to go and consult NUM, he said, then the marchers should have been only NUM members, they should have done so peacefully and none of them should have been carrying weapons.²⁶¹ It was further put that they decided to march to NUM because they believed that NUM had stopped Lonmin from talking to them and because they had been told that they could only put their demands through NUM. Mr Zokwana responded that NUM would not have blocked negotiations by the employer, despite the fact that it did not have a mandate to do so itself. He referred also to the fact that Lonmin had actually offered an amount after the RDOs had been to Mr Da Costa.²⁶²

²⁵⁸ Zokwana: Day 41: 4443: 10 – 4445: 25.

²⁵⁹ Zokwana: Day 45: 4898: 22 – 4899: 25.

²⁶⁰ Zokwana: Day 45: 4915: 2 – 4917: 7.

²⁶¹ Zokwana: Day 46: 5020: 11 – 5021: 11.

²⁶² Zokwana: Day 46: 5021: 22 – 5023: 7.

228. According to Mr Mabuyakhulu, the strikers met at Wonderkop at about 09h00. As indicated above, they were going to wait there for the employer – although, of course, there was no indication whatsoever that the employer would be coming there. Then someone suggested going to NUM to ask why they didn't want the employer to talk to them. A report was received from others that some people had been shot by members of NUM driving in a Quantum. There were also reports that some of the strikers had gone to the buses to "*find out what is happening*" but guns were pointed at them and they were told to go to work, forcefully so. The decision was then made to go to NUM and enquire why they didn't want the employer to talk to them. They had no violent intentions.²⁶³ according to Mr Mabuyakhulu, there was not much reaction to the report that NUM people had been firing shots from the quantum and that one person had been injured. He himself, he said, was not angry and he did not notice any anger from the people in this vicinity. They were only some people who said that this was "*just not right*".²⁶⁴ In our submission, this description is not plausible and is not contained in his statement "XX6" is this.
229. The march proceeded to the street with a taxi-rank, turned left and as they were approaching the satellite police station they came across a group of NUM members who were singing. Then they said "*AMCU Karee*" and fired a gunshot. After that they said "*Eastern Bop*" and there was another gunshot. The strikers then turned and ran away. As he was running he realised that he'd been shot and he then collapsed. Some NUM members found him and he was further assaulted with the handle of a spear and a butcher's knife. He lost consciousness and was later assisted and taken to hospital. He sustained various injuries including, unfortunately, a serious abdominal one.²⁶⁵
230. Mr Mabuyakhulu conceded that, if the true intention had been to request NUM to allow the employer to talk to the RDOs, that could have been done by the group of five leaders. When they did elect five leaders (on 10 August) they did so because the

²⁶³ Mabuyakhulu: Day 48: 5266: 19 – 5268: 8.

²⁶⁴ Mabuyakhulu: Day 49: 5350:4 – 5354: 7.

²⁶⁵ Mabuyakhulu: Day 48: 5268: 22 – 5270: 10.

RDOs couldn't all talk at the same time.²⁶⁶ He went on to positively confirm that it would have been better to go to the NUM office with five and not 3,000. The five could have done it without any display of arms.²⁶⁷

231. Although Mr Mabuyakhulu sought to confine the reason for going to the NUM office to the notion of asking NUM why it was blocking the employer from talking to the strikers, he confirmed that it had been reported during the discussion on the 11th that NUM members had shot AMCU on the previous day. We submit that, on that version, it is highly improbable that the strikers would not have wanted to take that issue up with NUM.²⁶⁸
232. There is a further signal fact. The uncontested evidence of Mr Gegeleza is that, at the moment of confrontation, there were shouts from the strikers like: “*There are the dogs!*” If indeed the strikers had indeed come there to seek NUM’s assistance *vis-à-vis* Lonmin, there would not have been such shouts. Rather, there would have been announcements of their wish to have NUM take up their cause.
233. Mr Blou testified that the instructions to the Lonmin security officers in this situation would have been to get the people out of the building if it was clear to them that they could not halt the march. He understood that the officers had spoken to the NUM people there not just once, but twice.²⁶⁹ Mr Blou confirmed also that the attack on the NUM office had been discussed by himself and his security management team at 14:00 on the 11th. His understanding of the events was as follows: there had been an attack by a large group of strikers who had wanted to burn the office and the Lonmin Kombi; some NUM members were present and took the decision not to leave the office; they repelled the attack and some shots were fired by a couple of the NUM people, injuring two of the strikers; the strikers ran away and NUM members chased after them to keep them on the move.²⁷⁰

²⁶⁶ Mabuyakhulu: Day 48: 5309: 2 – 9; 5311: 15 – 5312: 32.

²⁶⁷ Mabuyakhulu: Day 48: 5313: 1 – 12.

²⁶⁸ Mabuyakhulu: Day 49: 5345: 9 – 5348: 8.

²⁶⁹ Blou: Day 282: 36255: 2 – 36256: 8.

²⁷⁰ Blou: Day 282: 36284: 12 – 36285: 16.

234. In the course of questions regarding the 12th yet another indication of poor coordination and action by Lonmin security emerged. The log records at 09:03 on the 11th that: "*8 rubber rounds shot to disperse a mob opposite the NUM offices. 2 SAPS constables available to assist.*" That entry plainly relates to the situation after the attack had been dispersed, at a time when the two injured strikers were being removed to hospital and first investigations were getting underway. In our submission, the fact that rubber rounds had been fired at that stage is an important one in the context of a proper assessment of what had taken place and what the mood was of the strikers. A manager in the position of Mr Blou, with the decision-making responsibilities that had been assigned to him, should have been informed immediately of that shooting. At the very least, he should have noted the entry in the log soon thereafter. However, he testified that he had not known of it at the time and only became aware of it long after these events, at a time when a spreadsheet was being prepared.²⁷¹
235. The two constables who were present at that stage were from the Marikana police station (Vispol). Mr Blou was taken through an analysis of telephone calls and related records, from which it is clear in summary that POP assistance had been requested only at 09:02 and such assistance was, at best, between 30 and 60 min away.²⁷²
236. The facts as a whole establish, in our submission, that the NUM members acted within the parameters of private defence of property. Once they had taken the decision not to abandon their office by fleeing, they likewise acted within the requirements of self defence. The decision not to flee was a legitimate one. The office contained all the records of NUM at that branch and, as the evidence establishes, for a union to lose all its records as well as its office is utterly destructive of its viability as a union. That is doubtless precisely what the strikers who attacked it intended to achieve. The NUM members were entitled to resist that.
237. It is clear that the firing of a few shots was the critical factor in that resistance. Those shots induced the strikers to turn and run away. Without them, both the office and the

²⁷¹ Blou: Day 282:36319:20 – 36323:6.

²⁷² Blou: day 282:36396:5 – 36398:6

NUM members would have been overrun, with grievous consequences. The attackers comprised some two or three thousand aggressive and armed men with a single destructive intent. Lonmin security afforded no protection whatsoever and were patently in no position to even attempt to halt the oncoming strikers. There was no opportunity to seek the intervention of SAPS. The NUM members were on their own.

238. In the result, the defence of the office, including the firing of a few shots, was necessary to avert the threatened harm, it was a reasonable response to the attack and it was directed solely against the attackers. That accords with the law as set out in *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A). It accords also with the proportionality test as formulated in *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (2) SACR 105 (CC) 134, which requires that the interest being protected must be weighed against the interest of the wrongdoer, with the interests being weighed in the light of the Constitution.
239. It is contended by, principally, the IAP that the shots fired by the NUM members outside the office amounted to a "game changer", constituting one of three substantive facts that led to the escalation of violence at Lonmin and, eventually, to the shootings on 16 August 2012. We strongly dispute that characterisation and assert as we have above that the NUM officials concerned were acting legitimately in the defence of their office and/or of themselves. At its most fundamental, however, we point out that the strikers had marched to the office with unlawful intent. If the shots were a "game changer" then the "game" itself was an instance of violent purpose through armed and aggressive mass action. Such a "game" is inherently indefensible. It cannot serve as a springboard for the perpetrators to seek to derive some legitimisation because an entitled party resists its unlawful conduct. In this context, we contend that the true "game changer" was the decision of the strikers to launch a mass-based move in the pursuit of an illegal objective. They implemented that as soon as the strikers left their meeting place on the morning of 11 August 2012 and set off towards the NUM office.

Allegations Concerning the Shooting of Two Strikers

240. This topic is closely connected to the previous one but raises distinct issues. It is appropriate to make two general submissions at this stage.
241. The first concerns the widespread view that two strikers had been shot while they were innocently passing the NUM office on their way back from the LPD offices. That view was, we submit, not merely wrong but was propagated, at least by many of the strikers, falsely and intentionally. We make that submission fundamentally because there were in the region of 2,000 to 3,000 strikers on the march to the LPD on 10 August 2012. Every one of them would have known with complete certainty that the march had been escorted back to Wonderkop by SAPS, that it had not gone anywhere near the NUM office, and that no shots had been fired at marchers on that day. There is every reason to consider that this initial group of strikers formed the core of the strikers from that day onwards, even accepting that the numbers grew somewhat over the next few days. Given that, why would a patently false allegation about shootings on the 10th have continued to flourish among the strikers, if not to serve the purpose of striker mobilisation and the demonization of NUM?
242. Lonmin ICAM report ("RRRR 2.4") at column 4 page 2 contains a very relevant entry dated 11 August 2012 setting out a report from an undercover security employee who attended the gathering of people in the open veld next to the Wonderkop stadium in order to get intelligence on what was happening. The entry goes on in column 5 where it is noted that a sangoma be brought in so that the people could do a ritual "to be fearless". This related to the belief "*that the bullets fired at them will turn into water and firearms will not be able to shoot bullets*". That, of course, marks an important turning point in respect of the conduct of at least some of the strikers: on 11 August at the NUM office they turned and ran away when shots were fired; on 12 August they appeared to be unconcerned about the presence of firearms.
243. Important in respect of the *bona fides* of the claims that NUM had shot at them whilst they were innocently at or passing by the office, this security report notes the following: "*The mass wanted to retaliate. The mass believed that 2 of their members were killed during an attempt earlier the day to torch the NUM offices. They were*

preparing for war. The mass of people moved to the koppie. It was more private for what they have planned." This entry is significant also in respect of claims that have been aired during the Commission that the strikers had gone to the koppie in order to find a place of refuge.

244. Our second general submission relates to the manner in which the shots fired at the NUM office were used on an ongoing basis to justify the carrying of more dangerous weapons. It can be accepted that those shots took the strikers by surprise. We again refer to Mr Gegeleza's evidence about the 11th: "*I was very startled by [the gunshots] and it seems that the strikers were also ...*"²⁷³ We submit that it can be accepted also that the fact that a relative handful of NUM members had successfully resisted their attack on the NUM office prompted the heightened carrying of weapons which, coupled with the administration of muti on the afternoon of the 11th, seemingly satisfied the strikers that they could now overrun any NUM defence on the morning of Sunday the 12th.
245. However, the adoption of the mantra that their weapons could not be laid down because they were necessary "*to defend ourselves against NUM*" should certainly not, we submit, be accepted at face value. Nor, by the same token, the frequently repeated claim that the strikers had retreated to the koppie as a place of refuge from NUM. After the events of 11 August, there was a NUM mass meeting at Eastern Platinum on 14 August. That aside, there was at no time any other gathering of NUM members and, in particular, no gathering of a group of armed NUM members. The local NUM leadership had left for places of safety on the 12th. In our submission, the strikers could not have been *bona fide* in their claims about a continuing threat from NUM.
246. More than that, the conduct of the strikers was simply not that of a group that was geared towards self-defence. If they had truly gone the koppie because they feared a NUM attack they would have done something basic like posting sentries to look out for one. They would have sought Lonmin or SAPS protection. They would not have moved singly or in two's or three's, as many evidently did, from their places of residence to and from the koppie.

²⁷³ Gegeleza: "ZZ2" para 21.

247. More pointedly, when they set out from the koppie on the morning of 12 August, they were clearly intending to deal decisively with whoever was at the NUM office. They were prepared to kill as it happened, and did. They were not then defending themselves against NUM. The same is true in respect of the strikers who went to K4 shaft that night. The same is true for the move to the K3 shaft on the morning of the 13th.
248. We proceed to set out some instances of how the reports of the shots fired at the NUM office on the 11th were disseminated. In its press statement of 14 August 2012, delivered by Mr Mathunjwa, AMCU had the following to say about the march of Friday 10 August to Lonmin: *“While passing at Wonderkop Mine, we were told that people who came out of NUM office wearing NUM T-shirts opened fire to marchers and one worker was killed on the spot while others were wounded and taken to hospital. Workers have seen the culprits and can identify them by names. That incident led to the eruption of the violence and more deaths at the mine.”*²⁷⁴
249. In the course of his 16 August address to the strikers at the koppie, Mr Mathunjwa once again dealt with this in strong terms, declaring that it was a “*lie*” that the events at Marikana had started on the Saturday. He very explicitly went on to inform the strikers that: *“The killing of people started on Friday where employees were marching to the stadium to talk about their views and rights, where we were told yesterday here, members from the NUM office came out holding guns and shot at you and two employees were killed.”*²⁷⁵
250. This was proclaimed before a large crowd, a few thousand of whom had been on the Friday march and knew that it was incorrect. But how was Mr Mathunjwa’s statement received? Through the affirmative chants of “*Power!*” and “*It is ours!*” Viewing the video of that address, it is apparent that no-one there was moved to correct the position. On the whole, we submit, one must infer that this formed a deliberate part of the strikers’ presentation of themselves as peaceful victims.

²⁷⁴ Mathunjwa: Day 21: 2268: 3 – 10. Exhibit “OO2”.

²⁷⁵ Exhibit “OO9” page 9.

251. It is not in dispute that Mr Mathunjwa's statement was wrong. Nonetheless, we refer to the basic geography of the area, with which probably all the strikers on the koppie would have been familiar in order to underline that those strikers would have known that to be so. As depicted on a Google photograph it is clear that the route between the Wonderkop Stadium and the LPD does not pass the NUM office and would have required a deliberate decision to go there.²⁷⁶
252. There are various indications that the version of a NUM attack and the killing of two strikers played a role in the subsequent events. Mr Phatsha says that he began carrying an "incula" and a bush knife because of what he heard; he did not himself see any NUM members attacking strikers throughout the period 11 to 16 August 2012.²⁷⁷ In cross-examination, he was more explicit and confirmed that it was not his evidence that during this period the strikers had received information that NUM was planning to attack them at the koppie. He had also never heard about any information to the effect that NUM was planning to attack strikers. In fact, no attacks occurred at the instigation of NUM against the strikers during the period.²⁷⁸ He himself was not chased by any NUM officials, even on the 11th when people were returning from the NUM office.²⁷⁹ Rather, it appeared that he was carrying weapons because of the police presence at the koppie; there was no prospect of any attack by NUM while the police were present. He did not hear that the police were going to leave.²⁸⁰

Events of 12 August 2012: Wonderkop

253. There were a few NUM members at the office that morning. Mr Gegeleza was one of them. Soon after 09h00 he received a call from a friend to tell him that the people who had gathered at the koppie were planning another march to the NUM office. Those who were at the office decided to immediately close the office.²⁸¹

²⁷⁶ Exhibit "PP1".

²⁷⁷ Phatsha: Day 51: 5462: 3 – 21; 5470: 20 – 22.

²⁷⁸ Phatsha: Day 51: 5493: 21 – 5494: 17.

²⁷⁹ Phatsha: Day 51: 5599: 13 – 21.

²⁸⁰ Phatsha: Day 51: 5505: 7 – 5506: 2; 5509: 7 – 17; 5518: 15 – 5519: 18.

²⁸¹ Gegeleza: Day 39: 4257: 22 – 4258: 23.

254. Mr Louw is a Superintendent with Lonmin Security. Soon after beginning his shift on 12 August 2012 he and Mr Vorster went to the EPL hostel to check on a gathering there. From there they were returning to the Wonderkop Hostel area when they received word from the Emergency OPS that the people at the koppie were moving towards the Wonderkop hostel. They drove to the T-junction at the lower end of the road through Wonderkop and parked on a traffic island facing the oncoming crowd. This was at approximately 09:35. The crowd stopped approximately 20m in front of them. Mr Louw saw that there were two distinct groups. The one in front consisted of about 50 to 70 people and the one behind had more than 1000 in it. There was about 30 to 40 metres between them. Mr Louw and Mr Vorster got out of the vehicle they were in and faced the crowd pointing their shotguns in their direction. The crowd had formed a crescent with the security offices in the concave part. When they stopped they assumed a crouching position. The smaller group appeared to have a leader instructing them what to do. During this period that group continued rhythmically slamming their traditional weapons together and humming or chanting just loud enough to be heard. They were all armed, ranging from spears, pangas, knobkerries to steel bars. During this period Mr Louw was on his radio calling for additional security.²⁸²
255. Mr Louw described the crowd as: militaristic, organised, disciplined and their body language was "definitely attacking" and hostile. The mood of this crowd was different from the one at the LPD on Friday. The amount of weapons they were carrying was very different. So was the way that they were chanting and the manner in which they were holding their spears. These were being brandished in the direction of the security officers and they would for instance see a striker take a spear and demonstrate a slitting of the throat. Facial expressions were also different and some of them were shouting. Mr Louw totally disagreed with any suggestion that crouching by the strikers was a way of showing respect to the officers. He interpreted this as the movement of an attack on them.²⁸³

²⁸² Louw: "AAAA36" p2; Day 261: 32987: 20 – 32991: 21.

²⁸³ Louw: Day 262 are: 33055:4 – 33057:14.

256. Then, one of the people stood up and hurled a rock at them. Mr Vorster opened fire with his shotgun and the crowd charged forward in an attack on them. Mr Louw also opened fire. He could get off two shots and then ordered Mr Vorster to get into the vehicle so that they could retreat. Before they could enter the vehicle, Mr Louw was hit on his left shoulder with a knobkerrie and struck on his left thigh by a large rock. Mr Vorster was cut by a panga on his right side.²⁸⁴
257. As Mr Vorster tried to pull off, the vehicle stalled. At that stage strikers had completely enveloped the vehicle and, while Mr Vorster was struggling to get the engine going again, they were attacking it with an assortment of weapons. Once Mr Vorster managed to get the engine restarted, they moved off and pushed through the crowd. Mr Louw fired some further shots through the passenger-side window which had by then been smashed. They managed to escape.²⁸⁵ The extensive damage to the vehicle is depicted in a set of photographs.²⁸⁶
258. When they had got away from the crowd they stopped to clear the broken glass out of the vehicle. Mr Louw again contacted the control room by radio to request assistance. He also requested that they should contact Mr Blou, Mr Botes and Mr Miles (his direct line manager) to inform them that he and Mr Vorster had been attacked and that they had suffered damage. He also contacted Mr Miles by phone.²⁸⁷
259. As is noted in the ICAM report ("DDDD 2" p9), during his radio call into the operations centre, Mr Louw had conveyed a warning that the crowd in the Wonderkop hostel area should not be engaged with as they were dangerous. Plainly, that was a very important communication. Mr Mabelane and Mr Fundi would not have been at the radio control room and the report was not given directly to them. A message could have been got to them either by radio or by cellphone.²⁸⁸ Mr Louw's concern at that

²⁸⁴ Louw: "AAA36" p3; Day 261: 32992: 21 – 32994: 22.

²⁸⁵ Louw: Day 261: 32994: 23 – 32996: 11.

²⁸⁶ "DDDD3"

²⁸⁷ Louw: Day 262: 33002: 3 – 23.

²⁸⁸ Louw: Day 262:33061:5: – 33063:25.

stage was that the crowd should not be engaged. He wanted all the managers to be informed so that they could make the choice about deployments in the area.²⁸⁹

260. Mr Louw and Mr Vorster went back to base to reload with AAA rounds, having seen that rubber bullets had had no effect on the strikers.²⁹⁰ They had heard that Mr Mabelane and Mr Fundi had been trapped at Wonderkop and wanted to come to their aid. They first went up the western part of the Wonderkop Road where Mr Vorster got into a Protea Coin armoured vehicle. The road into the Wonderkop area was blocked by strikers so they drove around past the Andrew Saffy Hospital but the road beyond that was also blocked by the crowd.²⁹¹ The strikers were all in a crouched position.²⁹²
261. Because the strikers were blocking them the security officers regrouped at the Rowland Crossing, where others joined them, including Mr Botes and Mr Miles. All of them then went back to the scene. Members of the crowd were making their way back in the direction of the koppie. They were able to get through the remainder. Mr Louw fired another AAA cartridge at strikers who were preventing them from getting to where they could see Mr Fundi and Mr Mabelane and they then got through to them. An ambulance was with them.²⁹³ They had been hoping that the two officers might still be alive but they were not. The manner in which they had been put to death was something that Mr Louw had never seen in his whole life. He broke down and Mr Botes comforted him.²⁹⁴
262. Mr Masibi is a security officer who joined the group headed by Mr Mabelane near the bus terminal. Mr Mabelane informed them that the strikers intended to burn the NUM office. He wanted the security officers to form a line and to disperse them with rubber bullets. There was disagreement about this, with some officers pointing out that there was no adequate manpower, as well as the absence of an armoured vehicle which under these circumstances should have been present before attempting to stop these

²⁸⁹ Louw: Day 2623 3064: three – 33065:10

²⁹⁰ Louw: Day 262: 33007: 10 - 330

²⁹¹ Louw: Day 262: 33008: 1 – 13; 33009: 17 – 24; 33012: 16 – 33013: 8.

²⁹² Louw: Day 262: 33017: 6 – 17.

²⁹³ Louw: Day 262:33018:7-33021:14.

²⁹⁴ Louw: Day 262:33021:15 – 25.

marchers. They said that they would not be able to stop the strikers with rubber bullets. However, Mr Mabelane was insistent that they must stop them, even without those resources. He said that they must do so to prevent the strikers damaging Lonmin property.²⁹⁵

263. As the strikers approached, attempts were made by gesture and voice to bring them to a stop but they continued coming forward. Mr Masibi saw some of the strikers gesture that security men should get out of their way. Then shots were fired from the line. The rubber bullets had no effect on them. The security offices retreated and, as they did so, Mr Masibi saw that the strikers were proceeding fast towards them. He went to his car that realised that there would not be sufficient time to start it up and drive away so he ran past it. He saw that Mr Mabelane and Mr Fundi were in their car but had not got it started yet²⁹⁶.
264. Mr Masibi provides a valuable description of the movement of the strikers. They seemed different from other crowds that he had dealt with during his experience at Lonmin. Their ranks seemed closer and, when they were requested to stop, they went into a crouching position and were banging their weapons together. They seemed more organised and appear to be acting in unison, almost as if they had been trained as to what to do. Their movements were more precise and deliberate and he would certainly call them "militant".²⁹⁷
265. Mr Motlogeloa, together with Dibakoane, joined the deployment near the bus terminal. He gives a similar description in respect of some disagreements amongst the security officers concerning vehicle deployments and their capacity to stop this crowd. Although there had been attempts by the security officers to halt the crowd so that there could be discussions, it continued to press forward. Some rounds of rubber bullets were then fired by the security officers and the crowd surged forward. He and Mr Dibakoane were able to make their escape, but he could see that the Livina had been surrounded. The marchers were moving in a crouching position and then stood and pounced aggressively towards the security line. He could not describe this as

²⁹⁵ Masibi: "DDDD7"; Day 262: 33155: 11 – 33157: 20.

²⁹⁶ Masibi: Day 262: 33158: 8 – 33161: 21.

²⁹⁷ Masibi: "DDDD7": Q and A section.

showing respect and the strikers were not submissive to any of the instructions to stop.²⁹⁸

266. Mr Botes was called to the scene at approximately 10:00 with the information that two colleagues had been trapped at the hostel and that other security personnel had been attacked by a large group of marchers who were heading towards the NUM office. He went to the general office in the area where he met with Mr Vorster. They went together in the Protea Coin Mamba and headed to the hostel area. As they approached, Mr Botes could see smoke which, as it turned out, was coming from a VW Polo which had been set alight. He saw another security vehicle, being the Livina, and that two Lonmin officers who had been attacked were lying just outside the vehicle. These were Mr Fundi and Mr Mabelane; it was clear to Mr Botes that they had been severely wounded.
267. Mr Botes wanted to get out of the Mamba to determine if they were still alive. However, before he could do so, he saw a small group of armed people rushing towards them, followed by a much bigger group of armed people, and the Mamba was attacked. They tried to keep the group away from the vehicle. Mr Vorster fired rubber bullets and he, Mr Botes, fired birdshot at their legs. None of this seemed to have any effect. In turn they were fired upon with a handgun. The crowd kept advancing on them and they were forced to retreat.
268. When he had received further security reinforcements, Mr Botes went back to the scene. At this stage, the Livina had also been set alight. Mr Fundi and Mr Mabelane were now both clearly dead. The former had been badly hacked and the latter had been burnt beyond recognition.²⁹⁹
269. What emerges plainly from this account by Mr Botes is that there were two phases to the attack. It may well be that both Mr Fundi and Mr Mabelane had died during the first part of it but the fact that the same or different strikers returned to the scene to cause further mutilation does nothing to diminish the sense of brutality that must be associated with this event. The extreme nature of that brutality is graphically evident

²⁹⁸ Motlogeloa: Day 263: 33242: 10 – 33244: 21.

²⁹⁹ Botes: “EEEE2”: 18 – 24.

in the slides contained in the SAPS Presentation. No verbal description can match the impact of those images.³⁰⁰

270. Especially distressing are the mutilations that are apparent on the face of Mr Fundi. Both his upper lip and lower lip regions had been chopped off. Although not apparent from the photograph is the fact that his tongue had also been severed. In that regard, we refer to the affidavit of Mr Swaleh Fundi, his brother, who had prepared the body for burial. He confirms that, among the other injuries seen by him, Mr Fundi's tongue had been cut out.³⁰¹
271. What happened to these body parts? They are nowhere to be seen on the photographs. The only direct evidence in this regard has been provided by "Mr X". Although there are many criticisms that have been levelled against a variety of aspects of his evidence, we submit that that does not warrant the entirety of his evidence being ignored. The admissibility of any particular part of it depends upon the content of that evidence, its apparent probative value, its possible prejudicial implications, relevant circumstantial features and, having regard to those factors, an evaluation of whether that particular item of evidence should be disregarded or taken into account on an appropriately weighted basis. In this case, Mr X testified that the lips and the tongue together with some blood that was garnered from Mr Fundi were collected into a plastic bag and handed to the sangoma on the koppie for use in the preparation of an even stronger muti.³⁰² In support of the submission that this evidence should be admitted, we point out that the relevant post-mortem report describes only lacerations on the tongue. It does not state that the tongue was removed. The question to be posed then is where Mr X could have formed the view (now objectively verified) that the tongue had been cut out if he had not been at the scene and seen it for himself.
272. Returning now to Lonmin security issues, when Mr Louw and his team went on duty that morning they were given information that the strikers wanted to go to the NUM office in order to take revenge for the incident of the 11th when they were allegedly

³⁰⁰ Exhibit "L" slides 28 – 32.

³⁰¹ "AAAA40".

³⁰² Mr X: "AAAA1.2" paras 12 and 13.

shot at by NUM officials.³⁰³ However, that was not accompanied by any planning in respect of matters such as which security officers should attend and with what resources and in what numbers in order to deal with the situation. There was only a vague "instruction" that they should try to prevent the strikers from crossing the tarred road and getting into the Wonderkop area. In fact, the upshot of this lack of planning was that Mr Louw and Mr Vorster found themselves having to deal with over 1000 heavily armed and aggressive strikers.³⁰⁴ This lack of attention to communications, their proper transmission onwards, and the complete failure to record them in the log, particularly in respect of critical events like the events of 12 August was something that surprised Mr Louw. Plainly, serious shortcomings are evident here.³⁰⁵

273. A similar lack of proper planning is apparent from the evidence of Mr Masibi. When he went off duty early in the afternoon of 11 August, there was reference only to the possibility that there might be a meeting on the Lonmin premises on the following day, but nothing was said about the possibility of another march by strikers to the NUM office.³⁰⁶ The disagreement about the absence of an armoured vehicle is indicative of there not having been planning beforehand on how to deal with a march of the kind that they encountered. As Mr Masibi put it: *"Yes, it is true on that day we did not discuss about what was going to happen. We were just told to go and patrol to see if there was going to be a gathering."*³⁰⁷
274. Mr Motlogeloa also confirmed that when he went on duty that morning and as at the stage that he joined his colleagues in the vicinity of the bus terminal there had been no planning put in place regarding how to deal with the situation.³⁰⁸
275. As noted on the Lonmin log at 07:40 that morning, a SAPS Nyala had been posted outside Nkaneng. That would clearly have been a very significant vehicle to have had present at the scene in Wonderkop. It could well have averted the calamity that followed. However, it wasn't there and there is no indication that anybody took any

³⁰³ Louw: Day 262: 32999: 17 – 25.

³⁰⁴ Louw: Day 262: 33075: 23 – 33080: 19.

³⁰⁵ Louw: Day 262: 33081: 20 – 33083: 18.

³⁰⁶ Masibi: Day 263: 33170: 4 – 33171: 13.

³⁰⁷ Masibi: Day 263: 33173: 9 – 33174: 12.

³⁰⁸ Motlogeloa: Day 264: 33288: 19 – 33290: 2.

steps to mobilise it. Mr Blou was entirely unable to cast any light on this; he personally did nothing about it at the time.³⁰⁹

276. Another serious failure on the part of Lonmin's security establishment is to be seen in its failure to react to incoming reports, logged in the JOC, which should have alerted it to the prospect of another mass movement of strikers.

277. We refer here *inter alia* to the report from the undercover security operative with which we have dealt above ("RRRR 2.4"). Evidently, this information would have been received by the Lonmin JOC in the course of Saturday evening (given that the security operative had left the koppie when it became dark because of safety concerns). The relevant question presents itself as to what was done with this information. Mr Blou confirmed the receipt of it by JOC people, including himself. He agreed also that this was a serious report dealing, as it did, with talk about preparation for war. Asked what they had done about it, Mr Blou seemed unable to do better than to repeat that Lonmin deployed its resources as best as it could and ensured that SAPS was informed. His evidence on this was, with respect, unconvincing. It is at odds with his other evidence that no mass movement was anticipated for the 12th and, in particular, that it was never anticipated that the strikers might conduct a retaliatory attack on NUM offices. Given this, the reliability of his evidence that SAPS was informed in detail about the undercover security operative's information must be doubtful.³¹⁰

278. Still on the subject of Lonmin Security failures, at 08:07 that morning Mr Vorster reported that a group of at least 30 people had already gathered at the koppie. A few minutes later at 08:10 Mr Bongo of NUM called in to report that people were boarding taxis in masses. Although no destination could be given by him, the concern about the situation was apparent. At the same time another Lonmin operative reported that the mob at the koppie was increasing.³¹¹

³⁰⁹ Blou: Day 282: 36308: 13 – 36310: 21.

³¹⁰ Blou: Day 283: 36494:10 – 36498:23.

³¹¹ Blou: Day 282: 36311:17 – 36312:5.

279. Mr Blou acknowledged that this amounted to a triumvirate of very significant entries and that it was clear from them that a gathering mass of people was coming together. This was precisely the kind of situation that posed the potential of a serious incident, particularly having regard to what had already taken place on the morning of 11 August. Mr Blou confirmed that he had been in the JOC at the time and would have been aware of these reports. His reaction “would have been” to alert SAPS and to ensure that "*the people on the ground*" were aware of the gathering and that they could protect themselves and the areas and the proximity of where the gathering was taking place. According to him, the persons doing radio communications in the JOC communicated with the people on the ground.³¹²
280. In our submission, the dual nature of security officers being instructed to protect themselves and, at the same time to protect property (and/or persons) was not adequately clarified in the evidence of Mr Blou. It left a serious area of ambiguity in respect of what was expected of them. This is a factor that may well have played a key role in the circumstances that led to the deaths of Mr Fundi and Mr Mabelane. Mr Blou testified that an instruction of that sort had been part of the morning briefing. He was asked specifically what the understanding would have been at that briefing on the part of the security officers and whether they went on duty believing that they should or should not anticipate that they might have to deal with another march. Mr Blou's response did not deal with the thrust of that question. His answer was that Lonmin had never had "strike action" on a Sunday. If anything, he said, strikers would rest on Sundays and then start again on the Monday. Hence he thought that the security officers went away from the briefing believing that they should patrol the areas and detect any incident that might occur.³¹³
281. However, contrary to that somewhat sanguine view, strikers were in fact massing. Mr Blou agreed that the indications were that this was taking place rapidly and that it seemed that this would be a large gathering. It was put to him that, on that basis alone, it was required of him as the Manager of security to urgently revise his view that there was no potential of a retaliatory attack on the NUM offices. He resisted that

³¹² Blou: Day 282: 36313:3 – 36314:5.

³¹³ Blou: Day 282: 36314:6 – 36315:15.

proposition, testifying that his thinking was that the strikers would "*just have a dance of show of force and that they would disperse again*". Unpersuasively, we submit, he again invoked the contention that it had never happened before that strikers would gather on a Sunday and "have a second go" at a property.³¹⁴ Mr Blou's resort to past experience of this kind was again challenged. His explanations were not at all satisfactory, but ultimately he accepted that it was already clear to Lonmin by the morning of 12 August that it was dealing with an unprecedented and uncharted situation. He conceded that: "*I believe we should have taken a different view at the time and we did not.*"³¹⁵

282. In fact, so absent was any element of scenario planning or any comparable process of evaluating what the information might signify, that Mr Blou did not even remain at the JOC so that he could satisfy himself as to the purpose of this massing together of strikers. He said that it was not necessary for him to do so because there were many members of the security management team and they were giving each other turns to operate. Underlining how unsatisfactory this is, Mr Blou on the one hand agreed that these were "*exceptional circumstances*" but on the other hand he was prepared to testify that the situation was "*no different from previous situations that had unfolded.*"³¹⁶

283. Mr Blou confirmed that the radio report by Mr Louw at about 09:30 that security officers should not engage the strikers because they were dangerous should have been effectively communicated to the officers on the ground. He only later became aware that Mr Louw and Mr Vorster had been very lucky to escape with their lives and accepted that this dramatically altered the prospect of what might happen thereafter. What had by then become apparent was that the strikers were on the move, they were heavily armed, they were dangerous, they were prepared to attack Lonmin security officers and kill them. Mr Blou accepted that it was "*absolutely critical*" that this should have reached the officers on the ground, by radio and if necessary via cellphone. He was however unable to confirm whether it did or did not happen, but

³¹⁴ Blou: Day 282: 36315:16 – 36316:12.

³¹⁵ Blou: Day 282: 36316:13 – 36319:19.

³¹⁶ Blou: Day 282: 36328:14 – 36330:4.

accepted that if it had not happened in that way, this would have been a grave defect in the process that day.³¹⁷ As a matter of fact, of course, this critically important communication was not forwarded to those whose safety was immediately at risk.

284. A related and further grave shortcoming concerning the topic of management and communication is that Mr Blou did not receive a call to inform him of the very serious attack by the strikers on Mr Louw and Mr Vorster. If he had received such call, he would immediately have taken steps to ensure that the security officers on the ground withdrew and did not engage the strikers. At the same time he would have wanted confirmation that SAPS had been informed of the situation. All of that should in turn have been reconfirmed with him. None of that took place. If it had, the incident would not have unfolded as it did.³¹⁸
285. If there had been an armoured vehicle at the scene the security officers could have sought refuge in it once it became apparent that they could not contain the strikers. Most probably, this would have enabled them to get out of the situation safely.³¹⁹ Despite the appeals from Mr Blou and Mr Kent to management in August and December 2011 for the acquisition of armoured vehicles, those appeals were declined, on the basis that if Lonmin security at any time in a crisis required an armoured vehicle then that should be arranged with the external service providers.³²⁰ On the day, a Protea Coin Mamba was in the vicinity of Wonderkop. It had mechanical problems and it did not have a suitable two-way radio. Even when Mr Vorster attempted to commandeer it (which was after the killing of the security offices), there were delays because the driver first had to obtain permission from his manager. It is plain from this, we submit, that no effective steps had been taken in order to secure an adequate and available armoured vehicle resource. Clearly, that was an important step and the failure to take it contributed materially to the outcome prognosis.³²¹
286. Mr Setelele was informed about the killing of the two Lonmin security officers and that this had been done by strikers who were again on their way to the NUM office.

³¹⁷ Blou: Day 282: 36333:9 – 36338:25.

³¹⁸ Blou: Day 282: 36344: 11 – 36349:10.

³¹⁹ Blou: Day 282: 36349:11 – 36350:22.

³²⁰ Blou: Day 282: 36351:3 – 36352:15.

³²¹ Blou: Day 282: 36351:3 – 36357:20.

Shortly thereafter the branch leadership discussed the position. Given that there had been two attacks on the NUM office and having regard to the overall volatility of the situation at Marikana, it was decided that all branch committee members should for their own safety be moved to accommodation off the mine premises.³²²

287. As from 12 August 2012 NUM regularly attended Lonmin security briefings. NUM consistently sought increased law enforcement measures to prevent acts of intimidation and violence directed against non-strikers.³²³ These briefings took place every morning and were conducted by Lonmin security and HR personnel. They usually dealt with the strike situation, measures to protect workers and employee numbers reporting for work. Members of the police generally attended.³²⁴

Events of 12 August 2012: K4 Shaft

288. After the event at Wonderkop that morning, Lonmin security had a discussion, the conclusion of which was that it was not in a position to secure an outlying shaft such as K4 and that its available resources had to be devoted to essentially the Wonderkop area. The security presence at the shaft consisted of Protea Coin guards, none of whom was armed and they could not have stopped an attack by a large group of strikers.

289. As contained in a timeline prepared during the ICAM investigation ("RRRR 2.9") there had been important warnings before the attack that the strikers had discussed doing just that. One of these was communicated at 15:40 on Saturday the 11th. It was confirmed that security had been informed about the planned attack. Mr Blou was not aware of this. On the 12th at 20:30 the K3 shaft control room informed central operations of intimidation taking place there. Ten minutes later K3 shaft reported that a large group of people was moving towards K4 shaft. At 20:45 the K4 shaft control room operator phoned the mine overseer reporting this movement. Mr Blou accepted that these were very important indicators before the attack of its imminence and that it

³²² Setelele: "YY1" paras 24 – 25; Gegeleza: Day 39: 4258: 24 – 4259: 7.

³²³ Gcilitshana: Day 35: 3849: 7 – 3850: 1.

³²⁴ Gcilitshana: Day 36: 3861: 21 – 3863: 6.

should have sparked a very deliberate and immediate reaction from those in charge.³²⁵ Plainly, there had been no such reaction.

290. Mr Blou confirmed that, whether it be Protea Coin or Lonmin security independently or jointly, they were not in a position to provide effective protection for employees at K4 shaft on the night of 12 August 2012. In such circumstances, Mr Blou endorsed a portion of the evidence of Mr Sinclair, being that where there is a risk to workers of that nature, then they would not be permitted to come in and go to their workplaces. In this context Mr Blou further confirmed that, having regard to the events of the 11th and the morning of the 12th, Lonmin security was no longer saying that nothing would happen on a Sunday; it was indeed dealing with a situation where there was every prospect of other devastating attacks, with K4 shaft being a point that could not be protected.³²⁶ Mr Blou accepted that given the gravity of the situation, then indeed people should have been forewarned not to continue to work.³²⁷
291. Mr Zokwana had expressed the same view in his evidence, saying that Lonmin was supposed to ensure the safety of its employees and, if it couldn't, then it should have closed and not allowed its people to go to work.³²⁸ It did not occur to NUM at the time to request Lonmin to do so, but with hindsight it may well have been something that it should have done.³²⁹
292. One of the persons who reported for duty at the K4 shaft that evening and who had no knowledge of any of these specific warnings was Mr Janse Van Vuuren, who worked for an independent contractor. He has described that the security situation on his approach to the shaft and at the shaft itself was no different that evening from any other. He had received no warning before the shift that it might be risky to report for work. As usual, there was only one security guard in attendance at the shaft entrance.³³⁰

³²⁵ Blou: Day 282: 36361:15 – 36363:15.

³²⁶ Blou: Day 282: 36364:3 – 36365:24.

³²⁷ Blou: Day 282: 36365:25 – 36366:20.

³²⁸ Zokwana: Day 47: 5122: 9 – 25.

³²⁹ Zokwana: Day 47: 5135: 17 – 5136: 23.

³³⁰ Van Vuuren: Day 270: 34336: 8 – 17; 34337:25 – 34339:10; 34340:2 – 5.

293. When the strikers attacked at the shaft, Mr Janse Van Vuuren received a number of injuries of a physical nature as well as severe emotional trauma, for which he still receives medication. His bakkie was very extensively damaged. While he was in it, a striker struck the windscreen with a steel pipe. Fortunately for Mr Janse Van Vuuren the windscreen, although shattered, did not give way entirely otherwise the pipe would have struck his head, very likely mortally so.³³¹
294. In the course of this attack, five employees were injured and several vehicles were set alight. One employee later succumbed to his injuries, being Mr Eric Mabebe. Some circumstantial detail concerning the medical treatment received by him is outlined below.

The treatment of Mr Mabebe

295. Mr Mabebe was brutally assaulted in the course of the attack on K4 shaft. His skull was fractured so badly that there was brain extrusion. His jaw was fractured. There were a number of stab wounds. Mr Janse Van Vuuren went to him after the attack had come to an end. He found Mr Mabebe lying next to a burning vehicle. Given his serious injuries Mr Van Vuuren dragged him a little distance away for his safety. Sometime later an ambulance arrived. Whilst they were waiting, Mr Mabebe was still conscious and complaining about his pain.
296. Although there are some indications in the documentation of Mr Mabebe being noted as "dead on arrival" at the Andrew Saffy hospital, such indications are clearly inaccurate. The ICAM documentation ("RRRR 2.6") is an admission sheet completed by a medical practitioner. It makes notes on the condition of "the patient" and records that a Ringer's drip was inserted. That was at 22:29, being approximately one-and-a-half hours after the attack and when the injuries were sustained. On the face of it, that is an unacceptably long time from the point of view of Mr Mabebe's critical need for urgent and effective emergency treatment. Mr Blou was not in a position to comment on the medical aspects of the matter but agreed that *prima facie* this appeared to have been a long time. It would appear that inadequate reports may have been made from

³³¹ Van Vuuren: Day 270: 34326: 18 – 34328:6; 34335:20 – 34336:7.

the personnel at K4 shaft and that this may have played a role in there not having been a paramedic with Advanced Life Support training in attendance at the shaft when the ambulance arrived. It is in any event not clear though that such a paramedic was available at that time.

297. But other serious questions remain. Mr Van Vuuren's evidence clearly conveys that there were no substantial medical interventions at the hospital. There were no ICU or comparable facilities. At some point a mask had been placed over the face of Mr Mabebe, presumably for the administration of oxygen. Other than that, he saw no treatment. Moreover, it was Mr Van Vuuren who formed the view that Mr Mabebe had died. When he drew the attention of nursing staff to this situation, he was angrily informed that he was not a doctor. Sometime thereafter, a doctor came to the bed and confirmed that Mr Mabebe was indeed dead.
298. We are not in a position to make informed submissions on the treatment of Mr Mabebe. Nonetheless it would appear that they may well have been serious shortcomings in this regard. They were identified with sufficient clarity for Lonmin to tender an explanation of them, if it had chosen to do so. Nothing was forthcoming. We submit that this is a matter that warrants comment by this Commission.

Killing of Twala

299. Apart from the fact that the condition of Mr Twala's body is known, the only evidence dealing with his killing came from Mr X and that is to some extent circumstantial. Along the lines briefly indicated above, we submit that this subject is also one where some regard should be had to that evidence, at least in relation to the context and general description that has been provided.
300. Inherent in the situation of this killing, given the proximity of where Mr Twala fell and the area of the koppie where strikers had gathered, we submit that there is a good deal more than a possibility that Mr Twala was indeed executed because certain of the strikers had a suspicion that he was passing on information about the events on the koppie and that he was hence directly acting against the purpose of the strike.

301. In making that submission, we are mindful of the fact that Mr X does not place himself at the scene of the actual killing. Even on this limited basis, therefore, we are not in a position to make any submissions about precisely what took place in the moments before his death and who may have been directly involved at that stage.
302. Significantly, Mr Nzuzwa testified that he had seen Mr Twala in discussion with the leadership, this being material corroboration of what Mr X had to say.³³²
303. There does not appear to be any reasonable basis upon which it can be concluded that the death of Mr Twala was not directly connected with the events on the koppie and the conduct of some strikers. This position was reflected in what counsel for the IAP had to say in the course of the cross-examination of Mr X, namely: *"Our case will be that the deaths on the 13th, all five deaths on the 13th, even those that might have been perpetrated by the protesters should be laid at the door of SAPS, which triggered that event, and that then leaves out the deaths of Mr Fundi, Mr Mabelane, Mr Mabebe, Mr Langa and Mr Twala. In respect of those deaths, as I have already said, it would seem that those deaths can be placed at the door of the protesters...."*³³³

NUM and SAPS Intervention

304. On the morning of 12 August 2012 Mr Zokwana received a call from Mr Bongo who told him that a large group of armed strikers were heading for the Wonderkop hostel complex and that there was the potential for violence having regard to the events of the previous day. He decided to go to Lonmin, where he was informed of the killing of the two Lonmin security guards. He was shocked by these killings and the manner in which they had been carried out. In his view, this was not the industry "culture".³³⁴
305. He immediately requested a meeting with Lonmin management, which took place at Middelkraal later that afternoon. The management were very concerned and explained that they had contacted SAPS but had not had a quick response. They also made it clear that their own security personnel were not able to deal with this level of violence. As a result of this, Mr Zokwana called the office of the Provincial

³³² Nzuzwa: Day 277: 35513: 11 – 35514: 20.

³³³ Record: Day 260: 32774: 20 – 32775: 2.

³³⁴ Zokwana "BBB1" paras 12 and 13

Commissioner but was not satisfied with the response. He then left a message for the Minister to whom he later spoke and raised his concern that unless there were enough SAPS members at the mine to restore law and order, many lives would be lost. The Minister undertook to do everything possible to ensure an adequate deployment.³³⁵

306. Under cross-examination Mr Zokwana reconfirmed that the conduct of the strikers was such as to require SAPS to intervene. He had called for reinforcements to try and resolve the problem. What he expected was that the police should do everything within the law and their training to make sure that the continued carrying of weapons and threatening the lives of others should be stopped.³³⁶
307. Of particular concern for NUM during the period from 12 to 15 August 2012 was firstly the inability of Lonmin security personnel to manage the increasing levels of violence since the commencement of the strike and, secondly, the ensuing lack of an effective commitment by the SAPS to disarming the strikers. It was of fundamental importance to NUM that active steps had to be taken by the SAPS to disarm the strikers and in the daily security briefing sessions held during the strike, NUM had consistently requested the SAPS to do so. We underline that these were ‘requests’. It was made plain at the briefing sessions that police planning was a matter for the police; NUM was not involved in that.³³⁷ NUM attended those briefing sessions because it had been invited to do so; it would not have objected if AMCU had also been invited.³³⁸
308. Mr Zokwana’s discussions with the Minister of Police and with Mr Ramaphosa were directed solely to the nature of the violence and the need to make the mine safer and to prevent the further loss of lives; they were not about whether the strike was legal or not.³³⁹ He disagreed with the proposition that NUM was part of any arrangement to secure the government treating the strike in any particular way.³⁴⁰ He similarly disagreed with the proposition that there were collusive activities between NUM and

³³⁵ Zokwana: Day 41: 4432: 25 – 4434: 20; Mthethwa: Day 255: 32088: 12 – 32089: 6.

³³⁶ Zokwana: Day 42: 4550: 6 – 15.

³³⁷ Gcilitshana: Day 37: 4014: 10 – 16; Zokwana: “BBB1” para 9.

³³⁸ Gcilitshana: Day 37: 4049: 13 – 4050: 9.

³³⁹ Zokwana: Day 44: 4805: 14 – 4806: 5.

³⁴⁰ Zokwana: Day 44: 4811: 17 – 4813: 12.

Lonmin which were directly and causally connected to the events of 16 August 2012.³⁴¹

309. Mr Zokwana did not see a conflict of interest in his discussions with Mr Ramaphosa and other past and present leaders of NUM. The issue was the violence of the strike and the fact that people were being killed. An employer (or shareholder) must also ensure that the workers are safe, he testified.³⁴²
310. Mr Da Costa was present on 12 August 2012 when Mr Zokwana met with Lonmin management. It was clear to him that Mr Zokwana's view was that it was essential to obtain SAPS intervention in order to restore law and order and that he was not in any sense seeking to have police intervention in the labour issues that were present at the mine.³⁴³

Alleged 'Unholy Alliance'

311. Counsel for the IAP put to Mr Zokwana that there was a toxic collusion between the State (represented by SAPS) and capital (represented by Lonmin) which was the primary cause for the 'massacre' and that there was another collusion between NUM and Lonmin which was a secondary cause.³⁴⁴ It is noteworthy, though, that later in the cross-examination it was helpfully clarified that it was not being suggested that NUM was directly responsible for the 'massacre' or that NUM had wanted it to happen.³⁴⁵
312. Apparently in support of NUM/Lonmin collusion there was reference to the daily security briefings. Mr Zokwana pointed out that the principal purpose of these was to advise the parties of the state of security around the mine. It then appeared that this was not part of the alleged collusion.³⁴⁶ The alleged secondary collusion was later named the "*unholy alliance*".³⁴⁷

³⁴¹ Zokwana: Day 44: 4817: 24 – 4818: 23.

³⁴² Zokwana: Day 44: 4829: 19 – 25; 4834: 19 – 4835: 4.

³⁴³ Da Costa: Day 241: 30386: 14 – 30388: 8.

³⁴⁴ Transcript: Day 43: 4713: 5 -12.

³⁴⁵ Zokwana: Day 46: 5012: 9 – 21.

³⁴⁶ Zokwana: Day 43: 4714: 9 – 4715: 13.

³⁴⁷ Transcript: Day 44: 4739: 20 – 22.

313. NUM denies that it was party to any unlawful or irregular arrangement with Lonmin or any other party in respect of the events at Marikana. At this stage it remains unclear what the precise content is of the alleged 'unholy alliance'. To the extent necessary it will deal more fully with this topic in reply.

Composition of the Strikers

314. Information about the composition of the strikers on the koppie is of considerable importance in relation to various issues. From the point of view of NUM, the most important concerns the question whether NUM was in a position to exert greater influence over the conduct of those strikers than it did. In the course of the re-examination of Mr Mathunjwa a schedule of persons who were not at work during the period at issue was put in. This schedule was drawn from Lonmin records and was an extensive list of persons who were recorded in their system as having been absent. The schedule was submitted on the basis that this presented a comparable picture of the union membership of the people on the koppie. On that basis, the majority appeared to be members of NUM. This exhibit was entered as "OO19". At that time and on occasions thereafter NUM indicated that there were concerns about the utility of a schedule of that nature and undertook to try to provide the Commission with more directly relevant data.

315. After some time, Lonmin was able to produce two different sets of information, the one dealing with persons who had unfortunately lost their lives in the course of the events and the other dealing with those persons who had been arrested on 16 August 2012. A comprehensive analysis was done of *inter alia* the union affiliation of all those persons as at 16 August 2012, their occupation, their status as employees, and the like. This compilation and analysis was placed before the Commission on 3 June 2014 as exhibit "XXX1".

316. There is no dispute concerning the accuracy of this information. In our submission it provides a far more focused pocket of analysis than did "OO19", in that these are details of persons who were in fact on the koppie as at 16 August 2012 and whose union affiliations can be reflected as at that date in terms of the Lonmin records. They show that of the arrested persons, 144 were AMCU members and 60 were members of

NUM. 35 of those persons were not on the Lonmin records at all. Of those who lost their lives, 19 were AMCU members and 8 were members of NUM. As is apparent from these figures, it may confidently be inferred that AMCU members were in a large majority over NUM. To this must be added the important supplementary consideration that many persons who were still noted in the records of Lonmin as being NUM members as at 16 August 2012 were *de facto* in transition from NUM to AMCU or simply migrating out of NUM. Furthermore, as Mr Zokwana has pointed out, the conduct of these individuals was in any event such that even if a person was still recorded as a NUM member, such person had placed himself beyond the policy and disciplinary requirements of NUM membership and could not any longer be properly considered to be within the domain of NUM. For these reasons, we submit that this information strongly supports the inference that NUM was not in a position to require persons on the koppie to behave in ways different from those that they had as a matter of fact embarked upon.

Events of 15 August 2012

317. When the proposal arose at the SAfm Forum@Eight program that the two union leaders should go and address the strikers at the koppie, Mr Zokwana agreed to go to the mine. Upon his arrival at the mine, NUM shop stewards told him that a strong anti-NUM sentiment had taken root at the koppie and that it would be unsafe to address the crowd there. The shop stewards were particularly concerned about the singing of anti-NUM songs and the killing of Isaiah Twala near the koppie on the previous day.³⁴⁸
318. He then attended a meeting at LPD with General Mpembe, Mr Mathunjwa, Lonmin and other union members. The upshot of this was that Mr Zokwana agreed to go and address those on the koppie. It was arranged that he and Mr Mathunjwa would go in police Nyalas, separately, and that he would speak first.³⁴⁹ Mr Zokwana confirmed

³⁴⁸ Zokwana “BBB1” paras 16 and 17.

³⁴⁹ Zokwana “BBB1” paras 18 and 19.

that General Mpembe had said that there were both NUM and AMCU leaders at the koppie but did not recall anything having been said about numbers.³⁵⁰

319. Gen Mpembe had said that they would meet with a delegation of the strikers at the koppie. However, when they arrived, they were channelled to meet the mob of people with weapons.³⁵¹
320. As they approached the strikers, Mr Zokwana saw a group that may have been the leaders of the strikers crouching. They said that he should get out of the Nyala and come forward, with five policemen if he were afraid. The SAPS commander ordered him not to leave the Nyala. The strikers had been singing a song, which now grew louder. At the same time they were clashing their weapons together, like assegais and pangas. The song was: “*How can we kill NUM, we hate NUM? How can we kill Zokwana.*” Mr Zokwana was shocked. In all his years of dealing with mineworkers, including faction fight situations, he had never encountered workers who were so aggressive and threatening, or so armed.³⁵²
321. Despite this, Mr Zokwana attempted to address the strikers. He said that they should disarm, allow the police to play their role, that the strikers should go back to their hostels and that they allow processes for dealing with their grievances to take place after that. However, the noise from the strikers made it impossible for him to continue and after a few minutes the officer in charge instructed him to stop and they left the scene.³⁵³ Later, there was a debriefing session at which Mr Zokwana reported that he had done his best to address the strikers but that they had been unwilling to listen to him. At their request, a separate debriefing was held later with AMCU.³⁵⁴
322. His experience at the koppie was so unprecedented that when Mr Zokwana awoke the following day, his voice had gone. In addition to what he had seen and heard at the koppie, Mr Zokwana had also seen photographs in exhibit “L” of the persons who had been put to death between 12 and 14 August. The viciousness and cruelty there

³⁵⁰ Zokwana: Day 41: 4436: 6 – 22.

³⁵¹ Zokwana: Day 44: 4797: 10 – 20.

³⁵² Zokwana: Day 41: 4438: 5 – 4439: 23.

³⁵³ Zokwana: Day 41: 4440: 2 – 11.

³⁵⁴ Zokwana: “BBB1” para 24.

depicted were also of a kind that he had not encountered before. If any NUM member had participated in acts of violence of that kind, they would definitely not have acted in accordance with the principles and policies and beliefs of NUM as an organisation.³⁵⁵

Events of 16 August 2012

323. Under this topic we confine ourselves to some aspects of the addresses to those on the koppie.
324. Mr Mathunjwa agrees that the morning of 16 August 2012 was not an occasion to sweep up emotions, nor to do electioneering for AMCU, nor to pick a fight with NUM.³⁵⁶ Despite this, we submit that there were several points where precisely that was done, as is apparent from the transcript “OO9”.
325. In this context, Mr Mathunjwa’s statement from the Nyala on the previous evening is relevant, namely that the employer would talk to “*the union they select*” if employees went back to work. Plainly, we submit, this conveyed that AMCU would be granted the right to negotiate at least the specific issue of the R12,500 demand. This was traversed with him in evidence, but no satisfactory answer was given.³⁵⁷
326. In a markedly evasive portion of his evidence, Mr Mathunjwa was driven to dissociate himself from his official’s clear imputation that NUM had for 30 years oppressed the workers. He was then confronted with his own statement that NUM had been oppressing the black nation and could offer nothing better than that this had been “*in that point of time*”.³⁵⁸
327. Overall, it is submitted that the first address by Mr Mathunjwa did not convey what he had said in his evidence-in-chief was the essential message of this address, being that

³⁵⁵ Zokwana: Day 41: 4440: 12 – 4442: 2.

³⁵⁶ Mathunjwa: Day 24: 2518: 2 – 16.

³⁵⁷ Mathunjwa: Day 24: 2526: 20 – 2530: 10.

³⁵⁸ Mathunjwa: Day 24: 2530: 13 – 2537: 23.

workers should disperse, return to work and lay down their arms. Various aspects relating to this were examined during cross-examination to illustrate this.³⁵⁹

328. In respect of the “*kill the NUM*” song it was put to Mr Mathunjwa that the singing of that song by a large group of armed men clashing their weapons together is in general extremely menacing and that, for any person identified in the words of the song, it would be terrifying. Mr Mathunjwa accepted that it could bear that interpretation and that it might be thought to be objectively menacing, but sought to neutralize this by referring to “*the culture*” and the practice of clapping hands when singing. In our submission, the impact of that song and the clashing of weapons permits of no such dissipation. In relation to Mr Mathunjwa’s evidence that he reprimanded Mr Nkalitshana afterwards, it is to be noted that during the singing of the song Mr Mathunjwa is shown recording the event on his smartphone, displaying no sign of surprise or concern.³⁶⁰
329. Regarding this song, Mr Mathunjwa says that on 16 August 2012 he afterwards told Mr Nkalitshana to refrain from singing it, since it might be misinterpreted. He was however unable to offer any explanation why he hadn’t acted there and then to stop Mr Nkalitshana from singing this inflammatory song.³⁶¹
330. Mr Mathunjwa sought to avoid criticism by describing the song as a metaphor for ‘competition’. He accepted however that people who sang it or heard it might have thought that the words were literally intended.³⁶²
331. Zokwana did not agree that the song has the meaning of ‘to compete’.³⁶³ He opposed the clashing of weapons during the singing of songs; if people wanted to sing and clap, they should use their hands and not move around with weapons.³⁶⁴ As it happens, Mr

³⁵⁹ Mathunjwa: Day 25: 2648: 1 – 2649: 5 et seq.

³⁶⁰ Exhibit “CC7”; Mathunjwa: Day 25: 2649: 5 – 2651: 13.

³⁶¹ Mathunjwa: Day 24: 2523: 1 – 21.

³⁶² Mathunjwa: Day 22: 2358: 15 – 2360: 13; 2361: 2 - 14.

³⁶³ Zokwana: Day 41: 4453: 7 – 25.

³⁶⁴ Zokwana: Day 42: 4560: 15 – 4561: 5.

Mathunjwa condemned the clattering together of weapons and, generally, any kind of armed protest.³⁶⁵

332. Mr Mathunjwa was given ample opportunity to demonstrate that he had clearly said to the strikers that they should disperse, lay down their weapons and go back to work. He confirmed that he had not explicitly said so but maintained – unconvincingly so, we submit – that such message was clear from appeals by him to the strikers that, for instance, NUM and Lonmin should not be given the chance to say that AMCU had caused people to be killed in the mountain. So, too, his references to the CCMA could not in our submission be construed as a statement that the strikers should disarm and return to work.³⁶⁶
333. As part of his explanation for not making an explicit statement in those terms, Mr Mathunjwa described the problematic environment he confronted at the koppie, pointing out that he couldn't simply arrive there and lecture the strikers on what they had to do. He testified further that he hadn't gone to the koppie to promote AMCU but had had it in his mind to see the people dispersing.³⁶⁷
334. Whilst one can readily accept that he couldn't simply dictate and that he had to gain the strikers' trust,³⁶⁸ it is also so that the circumstances were such that Mr Mathunjwa was required to weigh his words with great care and to ensure that his fellow office bearers did the same. It was of great importance that they should not further inflame what was already a very tense situation. It is all very well for Mr Mathunjwa to confirm in his evidence, as he did, that this was not an occasion for the sweeping up of emotions; the real question concerns what he actually said to the strikers at the time. The evaluation of that and its probable impact on the mood of those strikers is an objective one.
335. In this regard, the entire transcript of what was said at the koppie is relevant. Illustrative aspects thereof were raised during cross-examination, but not exhaustively.

³⁶⁵ Mathunjwa: Day 23: 2397: 17 – 2398: 12; 2404: 11 – 18; 2418: 3 – 4.

³⁶⁶ Exhibit "OO9"; Mathunjwa: Day 25: 2654: 12 – 2660: 6.

³⁶⁷ Mathunjwa: Day 25: 2660: 7 – 2662: 15.

³⁶⁸ Mathunjwa: Day 27: 2858: 10 – 21.

336. One such topic dealt with pro-AMCU statements that were plainly geared to membership recruitment and which entailed the deliberate alignment of AMCU with the strikers' demands and its portrayal as the union that would fight for them.³⁶⁹
337. The closely allied and converse topic comprised numerous anti-NUM statements and its portrayal in a very bad light. Again, only illustrative examples were traversed during cross-examination, principally being the joint proposition that NUM has done nothing for workers, that it had been oppressing black workers for 30 years (that is, for its entire history), and that it has also killed workers.³⁷⁰
338. The last of these particularly highlights the contradictory and unsatisfactory nature of what Mr Mathunjwa was saying about the content and effect of his address to the strikers.
339. During his evidence Mr Mathunjwa coupled this with the assertion also made by him during his address at the koppie that NUM oppressed the black nation by stating that the strikers were saying that they had been paying subscriptions to NUM and "*at the end of the day they are shooting at them.*"³⁷¹
340. Importantly, Mr Mathunjwa at the same time also confirmed that the strikers on the koppie believed that NUM had, for no good reason, shot and killed two of their members. This, he further confirmed, played a significant role in their attitude to their circumstances and their mood.³⁷²
341. A crucial element in that attitude, whether professed or actual, was the oft-repeated proposition that the strikers had taken up more heavy arms as from the afternoon of 11 August 2012 in order to protect themselves from further attacks by NUM members.
342. Given that, a serious question mark presents itself as to the *bona fides* of Mr Mathunjwa's claim that he did his best to persuade the strikers to disarm and disperse

³⁶⁹ Mathunjwa: Day 25: 2663: 4 – 2667: 16.

³⁷⁰ Mathunjwa: Day 25: 2670: 8 – 2674: 15.

³⁷¹ Mathunjwa: Day 24: 2501: 1 – 2502: 5.

³⁷² Mathunjwa: Day 25: 2623: 8 – 20.

when he had during his address in stark terms ‘reminded’ them that NUM had for no reason shot and killed two strikers who were innocently passing by the NUM office.

The Peace Accord and Settlement of the Strike

343. During the negotiations to end the strike, after 16 August 2012, the strikers had their own delegation. They were not represented by either NUM or AMCU.³⁷³
344. As from 24 August 2012 there were facilitated attempts to bring about a resolution of the strike and ongoing violence. On 29 August Lonmin management presented a draft peace accord. Representatives of the South African Council of Churches played a leading role in this process. On 5 September 2012 all parties signed the peace accord, with the exception of AMCU and the delegation representing the striking workers.
345. During this process, NUM participated actively and *inter alia* engaged with the strikers’ delegation, providing whatever assistance was required by them. Ultimately, a wage agreement amending the two-year collective agreement was signed by all the parties.³⁷⁴
346. Even at the stage of the Peace Accord and the negotiations that led to it, it is clear that the strikers were independently represented, by an entity identified as the ‘delegation of the striking employees’. It was not in any way feasible for NUM to put itself forward as the representative of the striking employees for the purpose of negotiations with Lonmin and the conclusion of the addendum to the 2011 collective agreement.³⁷⁵

Conclusions

347. For the reasons set out above, it is submitted that the evidence presented during the course of the Commission demonstrates that NUM exercised its best endeavours to resolve the dispute which had arisen at the time and which manifested itself through violent and unlawful behaviour, and through unprotected industrial action. It did so

³⁷³ Mathunjwa: Day 22: 2383: 20 – 23.

³⁷⁴ Gcilitshana: Day 35: 3855: 11 – 3859: 10.

³⁷⁵ Setelele: Day 38: 4198: 3 – 10.

by demonstrating its commitment to lawful and peaceful demonstration and protected industrial action.

348. It is submitted further that NUM exercised effective control over its members who remained in good standing throughout the course of the strike and who themselves acted lawfully and in accordance with its policies and guidelines. NUM was in no position to exercise control over the strikers who were nominally NUM members but who had *de facto* set themselves against NUM and its policies. Its then President nonetheless sought to address those members and other workers on 15 August 2012, but was threatened and jeered at.
349. We submit with respect that there is no evidence to support a finding that NUM is responsible, either directly or indirectly, for the loss of life and damage to persons and property that occurred during the period 9 to 16 August 2012.
350. With regard to Lonmin we submit that it did not exercise its best endeavours to resolve the dispute about RDO wages in that it decided on unilateral grants for RDOs outside the collective agreement and outside the established bargaining structure.
351. We submit also that it did not respond appropriately to the threat and outbreak of violence, in consequence of inadequate preparation, planning and organisation.
352. We submit further that it did not employ sufficient safeguards and measures to protect its employees and property. In particular it did not prevent or contain the attack on the NUM office on 11 August 2012. It did not ensure the safe deployment of its security personnel on 12 August 2012, resulting in the death of Mr Fundi. It did not ensure the safety of workers at the K4 shaft on 12 August 2012, resulting in the death of Mr Mabebe.
353. In this manner it directly or indirectly caused loss of life or damage to persons or property.
354. With regard to the killing and mutilation of Mr Fundi, it is submitted in addition to the above that members of the strikers are directly responsible; the specific details of this and identification of the particular persons responsible should be a matter for priority

investigation and prosecution by the South African Police Service and the National Prosecuting Authority.

355. We further submit that the Commission should make recommendations on the following two issues:

Centralised bargaining in the platinum sector

356. The system of individualised plant level bargaining in the platinum industry contributed significantly to the industrial relations instability that characterised the sector in the period immediately before August 2012, which manifested itself in a series of unprotected strikes and violence that culminated in the strike in August 2012.

357. On one level, the unilateral wage increases given by both Impala and Lonmin to specific categories of its employees to the exclusion of others represented a significant undermining of a lawfully recognised system of collective bargaining at both these employers. At a deeper level however, those acts were symbolic of the much bigger problem of individualised bargaining in the sector – it created unnecessary competition between employers who operate these mines within a confined community and who were unyielding in their desire to attract and retain the best employees through the lure of higher wages.

358. It is for this reason that we respectfully submit that the Commission is well placed to recommend to organised labour, business and the State, that in order to maintain sustainable orderly collective bargaining, and to ensure the long term viability of the sector, centralised bargaining is fundamental. To the extent that it may be necessary to do so, we submit that it would not be misplaced for the Commission to also recommend that this issue be pursued by the relevant national government departments, including the Department of Labour.

Investigations and prosecutions

359. Finally, NUM and Mrs Fundi submit that the Commission has heard various accounts, both directly and indirectly, of unlawful and criminal behaviour and conduct on the part of various individuals and organisations. For this reason, it is submitted that the

Commission should recommend to the South African Police Service and the National Prosecuting Authority that where evidence exists of criminal behaviour on the part of any person, that the SAPS and NPA pursue those investigations as a matter of urgency, and where particular investigations and prosecutions were held in abeyance for the duration of the Commission, that those be pursued without further delay.

K S Tip SC

T Ntsonkota

Counsel for NUM and Mrs Fundi

Cheadle Thompson & Haysom Inc

Attorneys for NUM and Mrs Fundi

Sandton

27 October 2014

IN THE MARIKANA COMMISSION OF INQUIRY

REPLYING SUBMISSIONS ON BEHALF OF
THE NATIONAL UNION OF MINeworkERS
AND MRS FUNDI

Although there are various matters in dispute arising out of the submissions filed by some of the parties, we do not intend to traverse such disputes here and will in general deal with them on the basis of NUM's main submissions, filed on 27 October 2012. There are however two areas of criticism of NUM that we wish to briefly address by way of reply. They have been articulated by more than one of the parties and they concern what is akin to an issue of principle: (i) should NUM have provided escort functions during the night of 10/11 August 2012? (ii) should NUM have vacated its office on 11 August 2012? It will be convenient to address these questions with reference to the contentions of SAPS.

Ad SAPS Submissions [Section 'O']

1. *Ad paras 421.6, 422.5 and 422.10:* NUM is criticised for calling upon employees to report for work and for escorting those who needed assistance to do so. SAPS contends that this fuelled the conflict. We contest this view. Although it is correct that NUM was aware that strikers would be angered by activity that was directed towards the performance of work rather than compliance with the call to strike, NUM does not accept that the prospect of strikers being angered is a good ground for what amounts to the surrender of the rule of law and/or the *de facto* submission to unlawfulness.
2. NUM was opposed to unprotected strike action. More than that, it was opposed to the enforcement of such a strike through intimidation and violence. Conversely, NUM fully supported the right of those who wished to work to be able to do so. Hence, NUM was willing to provide escort assistance in circumstances where it was apparent that Lonmin itself was unable to do so, to a sufficient extent. It seems to NUM that there is an unarticulated premise underlying these contentions by SAPS (which we accept is confined to the Marikana context), namely that strikers who break the law

must not be resisted for fear that they become angered by such resistance. We respectfully consider that to be an unpalatable premise.

3. *Ad paras 421.7, 422.3, 422.6 and 423.1:* NUM is similarly criticised by SAPS for electing to defend its office against the strikers on 11 August 2012. It is plain from these paragraphs that SAPS has not accepted that the strikers were conducting an attack on the office. SAPS goes further and suggests that NUM mobilised its members and arranged weapons beforehand, in preparation for a confrontation with strikers.
4. The NUM office and its content were essential for the viability of the presence of the union. There is ample evidence in this regard. In these circumstances, we submit that the NUM members and officials were entitled to resist an attack that was manifestly hostile and reportedly intent on burning down the office. We reiterate the submissions made above that it is the position of NUM that unlawful conduct should be resisted where, as in this case, it is appropriate to do so.
5. We have dealt with the intention of the strikers in our main submissions. Nevertheless, it will be convenient to set out here an abbreviated account of the key evidence, which we submit establishes a clear case of hostile intent on the part of the strikers. Shortly put, this *was* an attack: (i) during the evening of 10 August 2012, Mr Dibakoane was informed by certain informants that there was much unhappiness about NUM's escorting of workers and that a mass meeting had been called for the next morning, the purpose of which was to confront and challenge NUM at its offices because it was not adhering to the "no work embargo";¹ (ii) as the strikers set off towards the NUM offices on 11 August 2012, the two security officers received information that it was now the intention of the crowd to burn down the NUM offices;² (iii) having regard *inter alia* to the songs that were being sung, the security officers decided to go ahead of the march and to warn those at the NUM office of the crowd's intention and to request that they should vacate the office; (iv) shortly before the security officers arrived a Mr Kolkati (who was present in the NUM office)

¹ Dibakoane "ZZ3" paras 2.5 at 2.6.

² Dibakoane "ZZ3" para 2.10.

independently received a warning from a friend of his who was amongst the strikers, being that the strikers had decided to march to the NUM office intending to deal with the branch leadership and to take over the office;³ (v) at the point of confrontation at the NUM office, strikers started shouting at NUM members, including threatening words like "*here are these dogs*"; it was clear that they were very hostile and that there was at no stage any indication from them that they had come there in order to speak to the NUM people;⁴ (vi) even the rather pro-striker witness, Mr Motlogeloa, confirmed that the NUM people at the office were in danger from the crowd and that is why they were advised to leave; the two security officers themselves also left the scene because the advancing strikers made it unsafe for them to stay;⁵ (vii) to complete this picture, there is an important *ex post facto* report by a Lonmin undercover operative who gave an account of what was said at the koppie in the course of the afternoon of 11 August 2012, which included the desire of the mass to retaliate after the shooting of two persons "*during an attempt earlier the day to torch the NUM offices*".⁶

6. Regarding the weapons at the NUM office, the evidence is clear that there are ordinarily no weapons present there but that there were some on the morning of 11 August 2012. These had been confiscated from strikers who were intimidating others, or had been brought from their homes by NUM members during the night because of their experience of dealing with acts of intimidation. There is no evidence whatsoever that weapons had been arranged in order to deal with a march. Clearly, the first information about such a march was received by those in the NUM office only when the march was already underway.⁷

K S Tip SC

T Ntsonkota

Counsel for NUM and Mrs Fundi

³ Gegeleza "ZZ2" para 11.

⁴ Gegeleza "ZZ2" para 19.

⁵ Motlogeloa: Day 264: 33270: 15 – 33271: 12; 33275: 9 – 33276: 17; 33278: 8 – 33280: 15.

⁶ "RRRR2.4"; NUM submissions paras 242 and 243.

⁷ See for instance: Setelele "YY1" para 19.

Cheadle Thompson & Haysom Inc
Attorneys for NUM and Mrs Fundi

Sandton
3 November 2014