

# RealTime Transcriptions

TRANSCRIPTION OF THE

## COMMISSION OF INQUIRY

### MARIKANA

#### BEFORE TRIBUNAL

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

#### HELD ON

DAY 3      22 OCTOBER 2012      PAGES 112 TO 202

#### HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 22 OCTOBER 2012]  
 2 [09:37] CHAIRPERSON: I want to begin by  
 3 apologising for the late start this morning but one of our  
 4 Commissioners was held up in the traffic quite some time  
 5 which is the reason we couldn't start on time. This is a  
 6 resumption of the proceedings of the commission of inquiry  
 7 into the tragic incidents at or near the area commonly  
 8 known as the Marikana Mine in the North Western Province.  
 9 I understand that last week there were two meetings between  
 10 a member of the commission and representatives of firstly  
 11 the Bapo Ba Mogale Royal Family, also some people from the  
 12 Bapo Ba Mogale community. I understand that their  
 13 representatives are present today, is that correct? Who is  
 14 here from those parties? I think someone must take you a  
 15 microphone so we can get your, or you can come up to the  
 16 microphone and put yourself on record. Give us your name,  
 17 spell it, please, for the benefit of the transcribers and  
 18 then tell us for whom you appear.  
 19 MS KGOROEDIRA: I am Advocate Karabo  
 20 Kgoroedira. We appear together with Advocate Masilo. We  
 21 appear on behalf of Kosi Bob, Edward Mogale as well as his  
 22 Royal Family.  
 23 CHAIRPERSON: Thank you. Is there any  
 24 other representative from the Bapo Ba Mogale family or  
 25 community or are you the only representative?

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1 MS KGOROEDIRA: As far as I know, yes Mr  
 2 Chair.  
 3 CHAIRPERSON: Thank you. I ask the  
 4 representatives of the parties, please to please put  
 5 themselves on record. It's pleasant to see you all again.  
 6 Welcome back. I hope that the fortnight that's elapsed  
 7 since we were last together has been profitably spent. I  
 8 understand members of the family are now able to be  
 9 present. I want to thank the Department of Social  
 10 Development and all those who were involved in making it  
 11 possible for them to be here and to say they're very  
 12 welcome, we're very pleased to see them. Yes?  
 13 MR GUMBI: My name is Louis Gumbi, I'm  
 14 representing police and present civil rights union, POPCRU.  
 15 CHAIRPERSON: Thank you. Yes, you  
 16 haven't yet applied, as I understand it, to take part in  
 17 the proceedings but if you wish to, so to apply, I suggest  
 18 you make a written application to the secretary and we will  
 19 consider it. But of course you have the full right to be  
 20 here, to having a watching brief and I understand there may  
 21 be a desire on your part to have access to the  
 22 documentation, and in that regard I would suggest you  
 23 contact the evidence leaders who'll be able to assist you.  
 24 But if you wish to actually participate in proceedings by  
 25 making oral submissions and leading witnesses and cross-

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1 examining witnesses, you have to apply in writing for  
 2 permission to do so, which will be considered in due  
 3 course.  
 4 MR GUMBI: I will do that.  
 5 CHAIRPERSON: Thank you. I'll ask the  
 6 parties please to put themselves on record. I think we  
 7 proceed in order of seniority. I think Mr Bizos, you are  
 8 the senior practitioner present, is that correct?  
 9 MR BIZOS SC: I think so. I together  
 10 with my colleagues whose names I've put on record  
 11 previously appear for the Legal Resources Centre. I don't  
 12 know whether you will merely want our presence to be  
 13 announced or whether you want me to deal –  
 14 CHAIRPERSON: No, I just want you to put  
 15 yourself on record which you've now done.  
 16 MR BIZOS SC: Yes.  
 17 CHAIRPERSON: Yes. Mr Burger, I see  
 18 you're here again for Lonmin?  
 19 MR BURGER SC: Chairperson,  
 20 Commissioners, we appear for Lonmin. I'm Schalk  
 21 Burger, I'm assisted by my learned friends, Terry Motau and  
 22 Horace Shozi from the Johannesburg Bar.  
 23 CHAIRPERSON: Thank you. Who is here  
 24 from the police?  
 25 MR SEMENYA SC: Mr Chairman, I appear

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1 together with Mathibedi Ngalwana Sello and Baloyi on behalf  
 2 of the police. My name is Ishmael Semanya.  
 3 CHAIRPERSON: Thank you, Mr Semanya. Who  
 4 is here on behalf of AMCU?  
 5 MR BRUINDERS SC: Members of the  
 6 Commission, Ms Barnes and I appear for AMCU. My name is  
 7 Tim Bruinders.  
 8 CHAIRPERSON: Thank you, Mr Bruinders.  
 9 Who is here for NUM?  
 10 MR TIPP SC: Mr Chair, Commissioners, I  
 11 am Karel Tipp, I appear for NUM together with my  
 12 colleagues, Hamilton Maenetje and Thando Ntsonkota.  
 13 CHAIRPERSON: Thank you. Now on behalf  
 14 of the dependents of the deceased and the family of the  
 15 deceased, we have two groups of counsel, as I understand  
 16 it, is that fair? The one group is led by Mr Ntsebeza. Mr  
 17 Ntsebeza, I see you're here this morning.  
 18 MR NTSEBEZA SC: Yes, I am here and I  
 19 appear with Mr Stuart Wilson, Ms Louise and Ms Motwenya on  
 20 behalf of the deceased families.  
 21 CHAIRPERSON: Thank you. And Mr Mpofo?  
 22 MR MPOFU: Thank you Chair, yes, I'm also  
 23 here together with my learned friend, Mr Lesego Musi. We  
 24 appear for the same three parties that were mentioned  
 25 previously, namely the arrested and injured persons on the

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1 one hand, the Lonmin community committee which represents  
 2 them and the Masutle family still under the provisional  
 3 situation, Chair, because our request to the President, or  
 4 attempts have not yet been finalised but we will keep you  
 5 abreast as to that tender representation.

6 CHAIRPERSON: Anyone else who wishes to  
 7 place him or herself on record as representing one or other  
 8 of the parties or some party?

9 MS CHABEDI: Chairperson, I'm Dikeledi  
 10 Chabedi for the Department of Mineral Resources. I'm led  
 11 in this matter by Advocate Cassie Badenhorst SC and also  
 12 assisted by Mr Louis de Bruin from the Johannesburg Bar,  
 13 both of whom are not present today.

14 CHAIRPERSON: Thank you. Is there anyone  
 15 else?

16 MR LE ROUX: Mr Chairman, I'm Willem Le  
 17 Roux. I appear for the Chamber of Mines.

18 CHAIRPERSON: Thank you, Mr Le Roux. If  
 19 there's no one else who wishes to put him or herself on  
 20 record, we now proceed with the opening statements. We  
 21 requested the parties who were able to do so to make  
 22 opening statements and to put on record their version of  
 23 the events which form the subject matter of the first part  
 24 of the inquiry. I think it's appropriate to begin with Mr  
 25 Semenya. But before Mr Semenya starts, I think the

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1 interpreter must get an opportunity to interpret what's  
 2 happened so far.

3 INTERPRETER: Thank you Chairperson.

4 CHAIRPERSON: Thank you, Mr Interpreter.  
 5 Mr Semenya, would you like to begin with your opening  
 6 statements on behalf of your clients, the South African  
 7 Police Service.

8 MR SEMENYA SC: Thank you, Chair and  
 9 Members of the Commission. By way of introduction we're  
 10 making an opening statement on behalf of the South African  
 11 Police Service and the statement has six parts to it. We  
 12 start by making general remarks which we consider important  
 13 for setting the tone for our presentation. Then we  
 14 identify the applicable standing orders, policy  
 15 considerations, legislation and other instructions. We  
 16 then foreshadowed to the best of our ability the evidence  
 17 that will account for the tragic loss of lives on Monday,  
 18 13 August 2012, the 13 August event we call it, and  
 19 Thursday the 16th August 2012 around the kraal, which we  
 20 describe as scene 1. Thereafter we turn to the events at  
 21 what has now become known as koppie 3. This we term scene  
 22 2. In the fifth instance we draw from the Commission's  
 23 terms of reference to identify the roles that each of the  
 24 parties represented here played in this tragic event. And  
 25 lastly, we propose some recommendations around these

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1 matters.

2 CHAIRPERSON: Thank you, Mr Semenya. I  
 3 understand the interpreter has a copy of the document from  
 4 which you're reading, and so perhaps at the end of each  
 5 paragraph, each appropriate division, you can stop to give  
 6 him an opportunity to interpret.

7 MR SEMENYA SC: I'll do so, Chair. By  
 8 way of general remarks, we state that it is with a deep  
 9 sense of obligation to our nation that the South African  
 10 Police Service appears before this Commission to account  
 11 for the tragic events that culminated in the loss of human  
 12 lives at Marikana between Thursday, 9 August 2012 and  
 13 Thursday, 16 August 2012. It is indeed right that the  
 14 police service and the National Commissioner in particular  
 15 should come before this nation and account for the events  
 16 of the period in question. The National Commissioner and  
 17 entire police service welcome this opportunity.

18 It is also with a deep sense of regret that the  
 19 police service approaches this Commission, regret because  
 20 of a series of unfortunate events in the North Western  
 21 Province in August of 2012 that visited the tragedy, loss  
 22 and injury upon us as a nation and the police service.

23 The police service are duty-bound to use this  
 24 opportunity and the forum today to express its deep regret  
 25 at the loss of life that gave rise to what government has

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1 officially termed the Marikana tragedy. Lives were lost  
 2 among the rank of mineworkers, ex-mineworkers, mine  
 3 supervisors, mine security and the members of the police  
 4 service itself. But before any of these persons or those  
 5 injured were mineworkers, supervisors or police officers,  
 6 they were in the first instance citizens and residents of  
 7 this great nation.

8 They were members of families, communities and  
 9 organisations who are poorer today as a result of various  
 10 events at Marikana. Therefore as we set out to assist this  
 11 Commission with establishing the facts around the Marikana  
 12 tragedy we wish to underscore our regret at the loss of  
 13 life and the injuries that affected various families,  
 14 communities and sectoral groups at that time. Our thoughts  
 15 are with the families on all sides of this equation who  
 16 have lost loved ones and our best wishes go out to those  
 17 who are recovering both physically and psychologically from  
 18 this tragedy. The police service lost two members in one  
 19 of the early incidents of the week commencing, Warrant  
 20 Officer Monene, Warrant Officer Lepaaku and Lieutenant  
 21 Baloyi who was severely injured, as we shall report in  
 22 detail later in our evidence.

23 These members, as we stated earlier, were members  
 24 of families and communities.  
 25 [09:57] The sentiment applies no less to the eight

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1 civilians who had lost their lives since Thursday, 9 August  
 2 2012. It is necessary for us to stress this perspective  
 3 because public commentators setting out to make sense of  
 4 complex issues in our society often revert to a narrative  
 5 that suggests a stand-off of sorts between the police on  
 6 the one hand and the people on the other. This creates in  
 7 the minds of many people the perception of the police as an  
 8 alien and possibly hostile force removed from the people  
 9 the police are meant to serve in terms of our  
 10 constitutional mandate. In reality nothing can be further  
 11 from the truth of the outlook and commitment of the South  
 12 African police service. The Constitution of the Republic  
 13 of South Africa, in particular chapter 11 directs that  
 14 national security must reflect the resource of South  
 15 Africans as individuals and as a nation to live as equals,  
 16 to live in peace and harmony, to be free from fear and want  
 17 and to seek a better life.

18 Furthermore, the Constitution imposes on the  
 19 South African Police Service a responsibility to prevent,  
 20 combat and investigate crime. To maintain public order,  
 21 protect and secure the inhabitants of the Republic and  
 22 their property and to uphold and enforce the law. To  
 23 ensure that the police service leads up to the  
 24 constitutional imperatives, all members are subjected to  
 25 the Code of Conduct of the South African public police

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1 service published on 10 June 2005. The Code of Conduct is  
 2 a written undertaking which each member of the South  
 3 African Police Service is obliged to uphold in order to  
 4 bring about a safe and secure environment for all people of  
 5 South Africa. Members are called upon to make the Code of  
 6 Conduct part of their code of life, principles and values.  
 7 In addition, police services worldwide and in this country  
 8 have standard operating procedures, formulated national  
 9 instructions and guidelines. Police rely on them for their  
 10 operational guidance. These FOPs, instructions and  
 11 guidelines are there to ensure that everyone will act in a  
 12 common way. This within the environment where police need  
 13 to be self-disciplined while receiving their controlled and  
 14 limited supervision. The following are some of the key  
 15 benefits of using such an approach in policing. All  
 16 concerned have the ability to anticipate each other's  
 17 actions. Set a standard for all to monitor their  
 18 colleagues. Help assure proper vigilance. Provide police  
 19 with tested safe methods of handling normal and abnormal  
 20 conditions or tasks. Facilitate communication where there  
 21 is a task saturation and complexity. Keep officers  
 22 operating, being proactive and planning ahead.

23 In terms of government outcomes based approach to  
 24 the programme of action which demands measurable  
 25 performance and accountable delivery, the police service

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1 works alongside a range of departments in the justice,  
 2 crime-prevention and security cluster of government. In  
 3 this structure the work of the police service is part of an  
 4 integrated system with the overall formal objective or  
 5 outcome commonly known as outcome 3 of ensuring that all  
 6 South Africans are and feel safe.

7 An important part of this backdrop is the  
 8 extensive and at times uncompromising oversight to which  
 9 the police service is subjected by our parliament and  
 10 various institutions with mandates and powers to report  
 11 publicly on the performance and ethics of the police  
 12 service. In a rights based democracy, such oversight is  
 13 welcomed as a means to ensure that we perform, that is the  
 14 police service, its duties in accordance with the  
 15 Constitution in a challenging and complex social and  
 16 economic milieu. This milieu is addressed very directly in  
 17 the terms of reference of this commission with clear  
 18 injunctions for the Commission to examine the roles played  
 19 by Lonmin PLC, the South African Police Service, the  
 20 Association of Mineworkers and Construction Union, AMCU,  
 21 their members and officials, the National Union of  
 22 Mineworkers, its members and officials, the Department of  
 23 Mineral Resource or any other government agency including  
 24 the Department of Labour and individuals and loose  
 25 groupings in fermenting and/or promoting a situation of

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1 conflict and confrontation which may have given rise to the  
 2 tragic incidents, whether directly or indirectly.

3 Chairperson and members of the Commission, we  
 4 believe the scope of this inquiry reflects the President's  
 5 appreciation that Marikana represents a complex microcosm  
 6 of many issues and situations in our broader society. Our  
 7 police service of around 160 000 members, excluding  
 8 civilians operate daily in this complex milieu where we are  
 9 often called upon when other players or partners in our  
 10 society have failed to resolve issues in their immediate  
 11 domain. We shall in the course of our presentation here,  
 12 demonstrate how the South African Police Service stepped  
 13 into various breaches around Marikana. You will hear  
 14 evidence that at various stages the police service tried to  
 15 encourage mine management and labour representatives to  
 16 engage in peaceful negotiations without involving itself in  
 17 labour disputes. Specifically the police service tried to  
 18 persuade AMCU and NUM to address differences and tensions  
 19 between the two unions. Senior officers also made efforts  
 20 to get the Lonmin management to address workers but  
 21 management's constant refrain was that it was not prepared  
 22 to negotiate outside collective bargaining structures.  
 23 Lonmin management also described the protestors as  
 24 "faceless". That notwithstanding, you will learn that by  
 25 that time Lonmin management had in fact already reached

<p style="text-align: right;">Page 124</p> <p>1 agreement with workers outside collective bargaining  2 structures and much to the chagrin of the recognised trade  3 union. Chair, members of the Commission, we will also hear  4 evidence that the police service tried to create an  5 environment in which labour leaders could communicate with  6 members even when some members were dismissive of some of  7 the leadership formations. Subtle diplomacy by the police  8 service was often more intense and persistent than the  9 efforts that should have been made by the parties  10 themselves. You will hear that all of this was undertaken  11 while the police service also managed daily an escalation  12 intentions, violence and death with ten deaths accumulating  13 the days preceding the critical incident in which the  14 police service used lethal force against a section of the  15 crowd of protestors. You will hear that the use of lethal  16 force was the last possible resort.  17 [10:17] You will hear of the fluidity of the situation at  18 Marikana on Thursday, 16 August 2012, a situation that got  19 out of control and tragic, but unintended consequences  20 resulted. This happened despite meticulous scenario  21 planning by experienced generals and other senior officers  22 at the joint operation centre. It was an effort to achieve  23 the object of dispersing and disarming over 3 000  24 protesters and remove the more militant and obdurate ones  25 by way of arrest. You will also hear that as the labour</p>	<p style="text-align: right;">Page 126</p> <p>1 evidence, it will be difficult to get to the bottom of  2 these events, without a proper interrogation of the inter-  3 union rivalry at Marikana/Lonmin which agreement in July  4 2012 directly with workers outside the collective  5 bargaining structures and the role that the Department of  6 Mineral Resources and other departments could have played  7 in monitoring the fulfilment of mining charter obligations  8 by Lonmin. Those obligations of the charter include mine  9 community development and housing and living conditions of  10 miners. We are also here with the understanding that  11 without engaging in unseemly muckraking or blame, this is  12 an opportunity for us to outline the forces that are at  13 play in the situation at Marikana and how the Police  14 Service set out to perform to the best of its ability in  15 very difficult and dangerous circumstances. But,  16 Chairperson, and members of the Commission, the Police  17 Service is also here with the understanding that we are a  18 developing society that often learns invaluable unforeseen  19 lessons under challenging conditions. In this spirit, the  20 Police Service remains open to learning from this process  21 and to do so as part of improving its practices, policies  22 and service to the community. The Police Service will do  23 so because it is in an imitable compact with all sectors of  24 South African society. There is no one, or no institution  25 on whom the Police Service can turn its back. There is no</p>
<p style="text-align: right;">Page 125</p> <p>1 relations and security dimensions of the situation around  2 Marikana deteriorated, in the course of the week, the South  3 African Police Service remained focused on one key outcome,  4 a peaceful resolution in which lives and property would be  5 preserved. You will hear at no stage during this situation  6 did the South African Police Service premeditate loss of  7 life and injury as an unstoppable end game.  8 We pause here to point out that we have noted the  9 speed with which commentators have characterised and  10 labelled as a massacre the actions that circumstances  11 imposed on the individual police officers, faced with  12 imminent danger to their lives and those who fired many  13 shots in the reasonable belief that this was an answer to  14 the imminent danger they were in. This characterisation  15 brought with it the connotations, completed unfounded as we  16 shall seek to demonstrate of the events at Marikana as a  17 wilful, brutal campaign on the part of the South African  18 Police Service. We shall show that there was no murderous  19 intent on the part of the Police Service. The evidence  20 will regrettably show that some of the protesters intended  21 a blood bath. We are mindful of the President's injunction  22 in the immediate aftermath of these tragic events at  23 Marikana, that all of avoid finger-pointing and  24 recriminations. However, having considered the roles  25 played by various parties represented here as documented in</p>	<p style="text-align: right;">Page 127</p> <p>1 situation from which the Police Service can walk away  2 literally or figuratively given its constitutional  3 imperatives to protect life and property, secure the safety  4 and security of everyone and to uphold the law and order.  5 When death, injury or damage is suffered by any  6 member of our society, the South African Police Service is  7 called on to serve and to ensure that law and order is  8 maintained. When death, injury or damage results from  9 conflict among any constituencies the Police Service steps  10 in and conducts itself impartially. When police officers  11 are targeted the Police Service steps in, suppressing the  12 human response of the moment in order to render a  13 professional service. Some members who may have been  14 affected by the death of their colleagues in the events of  15 Monday, 13th August 2012, were removed from Marikana and  16 posted elsewhere. This is never easy. This was not easy  17 at Marikana, not when the Police Service tried to save the  18 injured or when it collected the dead, regardless of  19 whether they were police members or fellow citizens against  20 whom the police acted. In fact, this will never be easy,  21 but we hope that our presentation alongside all others that  22 will be made in the course of this Commission will help us  23 build a better society and a better Police Service, that  24 has learnt valuable lessons from this unprecedented course  25 of events.</p>

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1 The South African Police Service is committed to  
 2 humane policing in a human society while retaining the  
 3 capacity to deal with forces or individuals who actively  
 4 threaten peace, order, stability and a better life to which  
 5 we all aspire. As we touch on humane policing, it is  
 6 appropriate at this point to indicate that the police  
 7 submission to the Commission contains various graphic  
 8 records of the violence that results from events around  
 9 Marikana. With our respect to the families of those who  
 10 have their lives, and still out of deep concern for the  
 11 survivors of those incidents, these graphics will be  
 12 detailed in the on screen presentations later. We do so  
 13 without intending to extend any trauma and hurt to those  
 14 affected.

15 Mr Chairman, members of the Commission, we also  
 16 deal with applicable standing orders, policy  
 17 considerations, legislation or other instructions that  
 18 appertain to these matters. Under those headings, we  
 19 propose to give a presentation regarding the training of  
 20 the various units of the Police Service, the policy  
 21 considerations which apply in crowd control and management,  
 22 the constitutional mandate of the Police Service, and the  
 23 various provisions of various statutes dealing with police  
 24 conduct. These however, and the evidence will be, were not  
 25 adequate instruments to deal with a treacherous situation

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1 of more than 3 000 belligerent protesters who were armed  
 2 and resisting any effort to disarm.

3 Around the events that happened at the kraal, and  
 4 also on 13 August, the evidence will show the following.  
 5 By the time shooting occurred around the kraal on the  
 6 afternoon of Thursday, 16 August 2012, numerous attempts by  
 7 senior officers including General Mpembe and Lieutenant-  
 8 Colonel MacIntosh had already been made since Monday, 13  
 9 August 2012 to persuade protesters to disarm.  
 10 [10:37] They had refused and proceeded to a koppie,  
 11 killing two police officers and severely injuring another  
 12 on their way there. They also robbed the police officers  
 13 that they had killed and injured of two pistols, an R5  
 14 rifle, a shotgun, a police two-way radio and ammunition.  
 15 Teargas, stun grenades and rubber bullets were used to  
 16 disperse them and stop them going into a residential  
 17 informal settlement. None of these measures deterred the  
 18 protesters. That was Monday, 13 August 2012. On Tuesday,  
 19 14 August 2012, and Wednesday, 15 August 2012, the police  
 20 service continued trying to negotiate with the protesters  
 21 to disarm peacefully. The protesters demanded to speak  
 22 with Lonmin management. Attempts were made by senior  
 23 police officers to persuade the Lonmin management to  
 24 address these protesters.  
 25 Lonmin management refused, saying it was not

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1 prepared to engage protestors outside collective bargaining  
 2 structures. They also labelled the protestors as, in  
 3 quotes, "faceless," connoting they may not be their  
 4 employees. Lonmin, however, later acknowledged that some  
 5 of these were indeed their employees, when photographs of  
 6 these were shown to them.

7 On Wednesday, 15 August 2012, the police service  
 8 facilitated a meeting between AMCU, NUM and Lonmin  
 9 management. At the end of that meeting, the police service  
 10 facilitated that both unions separately address the  
 11 protestors at the koppie and to persuade them to disarm.  
 12 The protestors adhered at the NUM delegation and did not  
 13 give them the opportunity to address them. The AMCU  
 14 delegation was received well, but the protestors still did  
 15 not disarm.

16 Chair, the evidence will show that the leader of  
 17 AMCU, Mr Mathunjwa, is seen pleading on his knees, begging  
 18 the protestors to disarm. They never did. Later that day,  
 19 Mr Mathunjwa indicated to General Mpembe that by 9 o'clock  
 20 in the morning, the following day, that is now Thursday, 16  
 21 August 2012, the people will put down their weapons and  
 22 that everyone will walk away happy. By 9:30 on Thursday,  
 23 16 August 2012, the people had not laid down their weapons.  
 24 It was reported later that the protestors will not disarm.  
 25 The joint operation centre then took a decision at 13:30 to

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1 disperse the protestors, disarm them, and where necessary,  
 2 effect arrests at 15h30. The implementation of this  
 3 measure was preceded by the deployment of barbed wire, to  
 4 send a message that the armed protestors may not cross the  
 5 police line. The protestors defied this and attempted on  
 6 three occasions to breach the police barbed wire. Teargas,  
 7 stun grenades, water canons and rubber bullets were used to  
 8 try and stop them from breaching the police line. This did  
 9 not deter them. They had protected themselves from rubber  
 10 bullets by wearing numerous layers of clothing and covering  
 11 themselves with a blanket.

12 Chair, members of the Commission, you will hear  
 13 evidence about the ineffectiveness of police-issue rubber  
 14 bullets in such circumstances. You will also hear evidence  
 15 that one of the leaders of the armed group of protestors,  
 16 in a green blanket, who we later now know to be Mr Noki,  
 17 confronted Lieutenant Colonel McIntosh who inside Nyala and  
 18 said, we quote, "We are going to kill one another today."  
 19 On the 3rd attempt, within a space of five minutes since the  
 20 first attempt to breach the police line, the protestors  
 21 managed to breach the police line around the kraal and came  
 22 charging at police officers with dangerous sharp weapons  
 23 and firearms.

24 Officers from the technical response team, which  
 25 had been deployed as a support service and show of force,

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1 at virtually less than a heartbeat of charging protestors  
 2 open fire on the advancing protestors with live ammunition,  
 3 without instruction from anyone in the circumstances, where  
 4 they reasonably believed their lives and that of their  
 5 fellow members to be in imminent danger. Most regrettably,  
 6 16 protestors died on that occasion.

7 You will hear evidence that two pistols were  
 8 recovered at the scene from among the protestors, one of  
 9 which had been robbed off the police officers killed on  
 10 Monday, 13 August 2012.

11 CHAIRPERSON: Mr Semenya, I see you're  
 12 now moving on to scene 2. Perhaps this is a convenient  
 13 stage to take the tea adjournment. Before we take the  
 14 adjournment, it's been brought to my attention that the  
 15 families have arrived and I think it's appropriate that we  
 16 should acknowledge their presence. We understand you've  
 17 come a long distance from the Eastern Cape. We understand  
 18 this whole matter is an occasion for great sadness to you,  
 19 but we think it appropriate that you should be here so you  
 20 can hear the evidence of what happened.

21 The process of bringing family members from  
 22 Lesotho and Swaziland is in progress, and officials of the  
 23 Commission are in the process of liaising with the Lesotho  
 24 Embassy and the Swazi Embassy in this regard. And the  
 25 attendance of family members from Lesotho and Swaziland

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1 will accordingly be secured for subsequent sittings of the  
 2 Commission.

3 The Commission will now adjourn for 15 minutes.  
 4 [INQUIRY ADJOURNS INQUIRY RESUMES]  
 5 [11:16] CHAIRPERSON: Mr Semenya, you were going  
 6 to move onto scene 2, the koppie, paragraph 45 of your  
 7 statement.

8 MR SEMENYA SC: Chair, perhaps, before I  
 9 commence that, there is a party, I am told requires to put  
 10 themselves on record.

11 CHAIRPERSON: Yes, who wishes to put,  
 12 which party wishes to put itself on record?

13 MS MEYERFELD: Good morning,  
 14 Commissioners. My name is Bonita Meyersfeld from the  
 15 Centre – oh, do you want me to come up?

16 CHAIRPERSON: May I suggest that you move  
 17 to the microphone -

18 MS MEYERFELD: Certainly.

19 CHAIRPERSON: - so that what you say will  
 20 be heard, and come properly on record. We don't want when  
 21 we read the transcript to see inaudible at this point.

22 MS MEYERFELD: Good morning,  
 23 Commissioners. My name is Bonita Meyersfeld, I am the  
 24 director of the Centre for Applied Legal Studies. I am  
 25 here in my capacity as a representative of the South

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1 African Human Rights Commission, and we apologise and beg  
 2 your indulgence for our late participation in these  
 3 proceedings. Our – the approach of the South African Human  
 4 Rights Commission has been very considered. It is clear  
 5 that it does not wish to duplicate or replicate any of the  
 6 investigations underway by this Commission of Inquiry. The  
 7 Human Rights Commission would, however, be very grateful  
 8 for an opportunity to participate in these proceedings, in  
 9 the form of a watching brief, and, if appropriate, on  
 10 occasion, the members of the South African Human Rights  
 11 Commission would be grateful for an opportunity to present  
 12 submissions in the public interest and that would be  
 13 communicated to you in due course.

14 CHAIRPERSON: Yes, thank you very much.  
 15 Of course, you don't permission to have a watching brief.  
 16 As far as participation is concerned in a more direct way,  
 17 you would require permission but we will deal with that as  
 18 and when it arises. Thank you.

19 MS MEYERFELD: Thank you very much.

20 CHAIRPERSON: Mr Semenya, perhaps you can  
 21 now proceed with paragraph 45.

22 MR SEMENYA SC: I see that the  
 23 interpreters are not here yet, Chair.

24 CHAIRPERSON: Yes, the Interpreter is in  
 25 many ways, the most important person in proceedings of this

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1 kind. You are quite correct, we must wait for him to come  
 2 before we commence.

3 MR NTSEBEZA: Chair, may I just also  
 4 bring to your attention, the fact that during the tea  
 5 adjournment, the families were taken a venue where  
 6 apparently they are having tea, and it does not seem to  
 7 have been a synchronisation of how that will be factored  
 8 in.

9 CHAIRPERSON: We I did say when we  
 10 adjourned that we were adjourning for 15 minutes.

11 MR NTSEBEZA SC: Yes.

12 CHAIRPERSON: And we came back after 12  
 13 minutes, so everyone who was present when we adjourned,  
 14 would have known that we were likely to commence, or  
 15 recommence 15 minutes, or slightly longer than that, after  
 16 that. But I hear what you say and in future, perhaps that  
 17 point can be made more clearly to those who go away to this  
 18 other venue that you have referred to.

19 MR NTSEBEZA SC: Thank you.

20 CHAIRPERSON: I understand that the  
 21 Interpreter was away arranging for other interpretation to  
 22 take place in a room close to the auditorium where we are  
 23 which is received a television feed, and the – what is  
 24 happening, is being interpreted into Setswana as I  
 25 understand it.

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1 INTERPRETER: Yes, they are being  
 2 interpreting into Setswana, Venda and Shangaan.  
 3 CHAIRPERSON: Yes, that was the reason  
 4 for the interruption and the hold up. I also have been  
 5 informed that Ms Fundi, I don't know if – is Ms Fundi here?  
 6 She must be in the other room, I imagine. So she will be  
 7 watching it on the closed circuit television. Ms Fundi  
 8 from Malawi has come, all the way from Malawi, to attend,  
 9 and she's obviously, a very long and I am sure in many ways  
 10 painful journey for her, and I just want to convey to her  
 11 our appreciation that she's been able to arrive safely and  
 12 to be in attendance when the evidence is led regarding the  
 13 death of her family member. Yes, thank you, Mr Semenya, I  
 14 think you can now move on to paragraph 45.  
 15 MR SEMENYA SC: Thank you, Chair. We now  
 16 address scene 2, which is at koppie 3. In this regard, the  
 17 evidence will show the following, that protesters from  
 18 scene 1 retreated to koppie 2, and were joined by other  
 19 protesters who were not at scene 1. They then ran to  
 20 koppie 3. The various Police Unit still with the  
 21 objectors, dispersing the protesters into manageable  
 22 smaller groups so as to disarm and arrest them for  
 23 contravening numerous laws, surged through kopie 2. Their  
 24 arming included the contravention of regulation of  
 25 Gatherings Act and the provisions o the Dangerous Weapons

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1 Act. At koppie 3 water canons were used to disperse the  
 2 protesters. Some dispersed westwards, and through the TRT  
 3 line led by Captain Kitt without incident.  
 4 CHAIRPERSON: TRT being the Tactical  
 5 Response Team.  
 6 MR SEMENYA SC: Indeed, Chair. Others  
 7 remained obdurate and police officers heard shots being  
 8 fired from inside the koppie crevices and bushes.  
 9 Believing this to be fire from the protesters, some of the  
 10 police officers returned fire with sharp ammunition. Other  
 11 police officers returned fire against specific protesters  
 12 they had seen firing at them. The evidence will be that  
 13 some of the 13 protesters who were shot and killed at  
 14 Koppie 3, had charged police officers with dangerous sharp  
 15 weapons and had been shot in self-defence. We account for  
 16 this below. Others could have been killed when police  
 17 officers returned sharp fire believing shots to have been  
 18 fired from the bushes and crevices in the koppie by  
 19 protesters. The police officers are prepared to accept  
 20 that they may have been responding to "friendly fire"  
 21 believing it to be fire from the protesters. Without  
 22 forensic evidence, we are unable to give an unqualified  
 23 account explaining the death of some of the persons inside  
 24 koppie 3.  
 25 Three firearms were found on the scene, and 13

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1 bodies were discovered. Using the lettering of the local  
 2 criminal record centre, to identify each body found at  
 3 koppie 3, an account of each of the bodies found at scene  
 4 2, koppie 3, will be described below. We must point out  
 5 however that too many members of the Police Service dispute  
 6 the correctness of the Google map that we were given by the  
 7 evidence leaders at the beginning of the Commission's  
 8 sitting. The disputed aspects of that Google map will  
 9 become apparent during evidence, if the evidence leaders  
 10 should decide to submit it into evidence. The dispute  
 11 relates to the number and location of sharp ammunition  
 12 cartridges found in the koppie, among other things. So we  
 13 propose to use the Google map for a very limited purpose of  
 14 identifying the location of bodies found at koppie 3.  
 15 Chair, and members of the Commission, the two  
 16 bodies marked A and B, were part of the group that took  
 17 position inside koppie 3. The group was armed with pangas,  
 18 spears and knobkieries and charged out of the koppie  
 19 towards the police line. The police shouted out to the  
 20 charging group to stop and fired warning shots into the  
 21 ground. The group retreated into the bushes and charged  
 22 once again. The evidence will be that the police shot at  
 23 the group when it did not stop in response to the warning  
 24 shots and killed the two. The body marked C was inside the  
 25 koppie and came out running towards the line of the police

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1 who were moving towards the koppie to effect arrests. The  
 2 shooting from the koppie had stopped at this point. The  
 3 person was armed with a spear and a knobkierie. The  
 4 members of the Police Service shouted at the person to  
 5 stop. The person broke his run, and walked towards the  
 6 police. The police instructed the person to lie flat on  
 7 the ground on his stomach. He knelt down and placed his  
 8 hands on the ground without letting go of his weapons. A  
 9 police officer approached the person to effect an arrest,  
 10 the person jumped up with a spear in his hand and lunged at  
 11 the police officer, missing the neck of the police officer.  
 12 The police officer fired at the person, and the person  
 13 continue to lunge and attempted a further assault on the  
 14 police officer. The police officer continued to shoot at  
 15 the person and another police officer also shot at that  
 16 person. While continuing to shoot at the person the police  
 17 officer under attach, tripped and fell on his back and the  
 18 person fell on his back, next to the police officer.  
 19 The bodies marked D, E, G, H, J, K, L and M,  
 20 where among the large group of armed protesters who were  
 21 inside the koppie. Gunshots were fired at the police from  
 22 inside the koppie. The police fired shots in the direction  
 23 of the firing group, killing these eight persons.  
 24 [11:36] The police service does not yet have ballistic  
 25 reports relating to these deaths, and is, at this stage,



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1 unable speak more specifically to each of the deaths. The  
 2 evidence may reveal that the response of some of the police  
 3 officers may have been disproportionate to the danger they  
 4 faced from the group of more than 200 armed protestors.  
 5 The body marked M was part of a group that came  
 6 from inside the koppie to the edge of the copy chanting and  
 7 armed with pangas, spears and knopkieries. Two members of  
 8 the group armed with spears charged out from the group  
 9 towards the police line. Despite repeated warnings the two  
 10 continued to charge and were shot and 1N was killed.  
 11 The body marked as O was among the persons who  
 12 were inside the koppie. The group was armed with pangas,  
 13 spears and knopkieries. The person was in the vicinity  
 14 from where gunshots were fired at police officers who were  
 15 walking into the koppie. The police returned fire in the  
 16 direction from which the gunfire came. A person charged at  
 17 the police who were in the koppie in the vicinity of O, and  
 18 the police shot at that person. In the absence of  
 19 ballistic reports, it is not possible at this stage to say  
 20 with certainty who is responsible for the shooting of this  
 21 person.  
 22 Chair, members of the Commission, we now address  
 23 the role of the other parties. At the outset we state that  
 24 failure of other role-players to play their part can never  
 25 on it's own be justification for the loss of life at

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1 Marikana, but this failure cannot be ignored if we are to  
 2 learn from these events and seek to ensure that they do not  
 3 recur. In our submission, there is a real possibility that  
 4 this tragedy could have been averted if the parties  
 5 involved here had played their proper roles.  
 6 The evidence will show that on 23 July 2012  
 7 Lonmin struck a wage deal directly with workers outside the  
 8 collective bargaining process and only informed the unions  
 9 about the deal after it had been struck. The National  
 10 Union of Mineworkers, the recognised trade union at  
 11 Marikana, was not pleased. Yet when it really mattered,  
 12 tensions having risen to boiling point by August 2012,  
 13 Lonmin steadfastly refused even to address the protestors  
 14 on their wage increase demand, contending that the protest  
 15 was illegal and that it was not prepared to negotiate  
 16 outside the collective bargaining process. This  
 17 inconsistent approach, we will argue at the end of the  
 18 hearing, must have sent mixed messages to the protestors.  
 19 The argument will be that the workers must have believed  
 20 that if they could secure wage allowances from Lonmin, just  
 21 to base after their first demand for increases, and without  
 22 embarking on any industrial action, much more could be  
 23 achieved by upping the ante to violent, unprotected strike.  
 24 The argument will be ultimately that Lonmin created this  
 25 beast that it later found impossible to tame, and this is

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1 with reference to the violent strikes.  
 2 Lonmin also has obligations under the Mining  
 3 Charter to improve the housing and living conditions of its  
 4 workers and to develop the community of which they are  
 5 part. Reliance will also be placed from what this  
 6 Commission has observed during the inspection in loco, very  
 7 little, if anything, has been achieved in this regard by  
 8 Lonmin. At the end we will argue that when living  
 9 conditions remain stagnant, while cost of living is on an  
 10 upward trend, it is inevitable that wages will leave behind  
 11 the affordability curve. Wage increase demands then become  
 12 inevitable as workers seek to do with their wages that  
 13 which the mining company has failed to do under the Mining  
 14 Charter. This also raises the question of enforcement.  
 15 The Department of Mineral Resources is charged with that  
 16 responsibility. The housing and living conditions standard  
 17 was developed by the Department of Mineral Resources in  
 18 conjunction with the Department of Housing in April 2009.  
 19 The argument will be that the apparent failure to monitor  
 20 progress in this regard, could very well have contributed  
 21 to the events culminating in this tragedy.  
 22 There is evidence also of violent rivalry between  
 23 NUM and AMCU. The evidence will be that in the days  
 24 leading up to Thursday, 16 August 2012, there were violent  
 25 clashes between members of NUM and AMCU, during which

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1 deaths were reported. Subsequent to the events of 16  
 2 August 2012, we have heard in the public media about union  
 3 office bearers being assassinated at Marikana. The sharp  
 4 question that arises is what role leaders of the rival  
 5 trade unions played to calm down the rising tensions.  
 6 Chair, members of the Commission, we shall argue  
 7 at the end of the hearing that little, if anything, was  
 8 done by these leaders, when it is their duty to avert what  
 9 inevitably proved to be a tragedy. The argument will  
 10 further be that the blame on the two unions is not  
 11 mitigated by Lonmin's conduct fanning the flames of inter-  
 12 union rivalry, when on 23 July 2012, it negotiated a wage  
 13 deal directly with workers, thereby upsetting collective  
 14 bargaining structures to the chagrin of NUM.  
 15 Although it is a sensitive issue, particularly at  
 16 this time, we have to ask whether the protesters,  
 17 themselves, could have played a more constructive role that  
 18 could have averted this tragedy. It will be argued at the  
 19 end of the hearing that whereas everyone, including the  
 20 workers, has a right of assembly under the Constitution,  
 21 the right to protest being a legitimate right of the  
 22 workers, this right could not be asserted outside the  
 23 parameters of the law.  
 24 The bearing of arms, the charging at the police,  
 25 the destruction of property, the killing of police

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1 officers, security personnel and the members of the public,  
 2 cannot be justified in a constitutional democracy. It will  
 3 be argued therefore that the unions have a duty to  
 4 inculcate discipline amongst its members.  
 5 Chair, members of the Commission, you will also  
 6 hear evidence about the dogged refusal by the protestors to  
 7 disarm. You will also hear evidence of an anthropologist  
 8 who's an expert in the area, about the ritual that some of  
 9 them underwent in the belief that they would be invincible  
 10 and invulnerable. This vaguely attempts to explain the  
 11 inexplicable conduct of charging at the police with spears,  
 12 despite the force displayed by the police.  
 13 You will hear evidence about Mr Mathunjwa, the  
 14 president of AMCU, begging them to disarm to no avail. You  
 15 will hear about the protestors charging at the police,  
 16 killing two officers, and attempting to kill scores more.  
 17 You will hear about the leader of the protestors demanding  
 18 to sign a pact of death with the police negotiators. You  
 19 will see video footage of a protestor shooting at the  
 20 police. You will see evidence of bullet marks on at least  
 21 one of the police Nyalas.  
 22 [11:56] You will see evidence of vehicles torched by the  
 23 protestors. You will hear evidence of the protestors  
 24 threatened to kill two police officers who were recording  
 25 video footage of the developments shortly before the tragic

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1 shooting at scene 1. Those police officers had to be  
 2 removed and that explains in part the insufficient footage  
 3 of the events of Thursday, 16 August 2012, both at scene 1  
 4 and at scene 2.  
 5 Chairperson, and members of the Commission, we  
 6 will at the end call for various recommendations. The  
 7 first point we make is that the Marikana tragedy was a very  
 8 first for the country. There was no history of protestors  
 9 with such large number, bearing arms, posing immediate  
 10 threat to the life and property, armed with dangerous  
 11 weapons, sabre-rattling, with an intent to engage the  
 12 Police in a mortal duel. The policies of crowd control and  
 13 management have proved inadequate to contain this type of  
 14 situation. The Police Service will then have to reconsider  
 15 its practices, policies, training, equipment and additional  
 16 resources to better help it address future events of this  
 17 kind. A recommendation along this would therefore be  
 18 apposite.  
 19 Whereas, Chair, and members of the Commission,  
 20 Lonmin could have been within its rights to refuse  
 21 engagement in salary negotiations with the armed  
 22 protestors, it was evident from the Police requests that an  
 23 engagement, albeit not culminating in the revision of the  
 24 wage agreement concluded, could have assuaged the  
 25 protestors and averted the armed conflict. We shall call

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1 for a recommendation that employers in such circumstances  
 2 have a duty beyond accepting a contractual right. The duty  
 3 must include taking action appropriate in the circumstances  
 4 to save lives.  
 5 The tragedy in Marikana also shows that the duty  
 6 of unions goes well beyond the narrow confines of  
 7 industrial bargaining. They must also hold a moral duty to  
 8 educate their members, particularly in relation to "floor  
 9 crossing," where membership of the one is exchanged to the  
 10 other. We shall call for a recommendation for unions to  
 11 agree a protocol regulating the peaceful movement or change  
 12 of union membership or the creation of competing unions.  
 13 The Department of Mineral Resources has bound  
 14 itself to ensuring that the objectives of the Mining  
 15 Charter have been observed, including consultations with  
 16 communities on projects and conduct and assessment of their  
 17 needs, as well as ensuring housing and living conditions  
 18 are improved so as to facilitate ownership by family units.  
 19 We shall call for a recommendation that the department must  
 20 monitor the realisation of the Mining Charter objectives  
 21 with greater vigilance and vigour.  
 22 Concluding the opening remarks on behalf of the  
 23 South African Police Service, the National Commissioner of  
 24 Police reiterates the Service's regret at the loss of  
 25 lives, expresses her regret at the destruction of property

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1 and to those injured, extends her condolences to the  
 2 families of the deceased, wishes speedy recovery for those  
 3 injured, encourages better and responsible industrial  
 4 relations between the mining employers and their workers,  
 5 wishes the mining sector and their workers to make the  
 6 rightful contribution in the country's economy, accepts the  
 7 right of everyone to lawful protest, with corresponding  
 8 obligation to do so within the limits of the law. She also  
 9 expresses her gratitude to, and confidence in, the members  
 10 of the Police Service who discharged their responsibilities  
 11 in what was obviously a trying and unprecedented occasion.  
 12 Finally the Police Service remains committed to  
 13 discharging its constitutional mandate to prevent, combat  
 14 and investigate crime, maintain public order, protect and  
 15 secure the inhabitants of the Republic and their property,  
 16 and to uphold the law and to enforce it without fear or  
 17 favour. Thank you, Mr Chairman, and members of the  
 18 Commission.  
 19 CHAIRPERSON: Thank you, Mr Semanya. I  
 20 now call upon Mr Burger, on behalf of Lonmin to present the  
 21 opening statement on behalf of his client.  
 22 MR BURGER SC: Thank you, Chairperson and  
 23 Commissioners. Lonmin takes part at this stage of the  
 24 inquiry to assist the Commission in exploring Theme 1,  
 25 namely the events as they unfolded during the period 9 to

<p style="text-align: right;">Page 148</p> <p>1 16 August 2012, first to facilitate and assist those  2 families who've lost loved ones, and provide us to find  3 closure. Second, to explore and understand the build-up to  4 the events as they unfolded, because viewed in isolation,  5 so we submit, no proper evaluation is possible. Third, to  6 testify to the demands leading to the strike, the strike  7 itself and the march on Friday, 10 August 2012, the  8 confrontation between the striking workers and NUM  9 officials on Saturday, the 11th of August 2012, the killings  10 perpetrated on Sunday, the 12th of August 2012, the unrest  11 and killings on Monday, the 13th of August 2012. In this  12 process, we will address the interaction between the  13 striking workers on the one hand, and Lonmin Security,  14 South African Police Services and trade union  15 representatives during the period in question. We will  16 lead evidence as to the atypical violence, aggression, and  17 criminal behaviour which accompanied the actions of the  18 striking workers and which led to the death of members of  19 the South African Police Service and Lonmin security  20 officers and workers themselves.</p> <p>21 Chair, we will co-operate by making available  22 witness statements by senior management and security  23 personnel of Lonmin, who were involved in interacting with  24 the striking workers, the South African Police Service,  25 NUM, AMCU and the DME and who witnessed certain of the</p>	<p style="text-align: right;">Page 150</p> <p>1 transpired on that day. From the documentation and  2 statements filed, you will also get an understanding of the  3 interaction between the South African Police Service and  4 the department on the one hand, and Lonmin security and  5 management on the other, during the period in question.  6 [12:16] Now the approach adopted by management to the  7 RDO's salary demand as expressed by the striking employees,  8 how that interaction unfolded of the violence which  9 accompanied the strike, of the arrival of the South African  10 Police Service at the mine in large numbers from Tuesday,  11 the 14th of August 2012. Intimidation of Lonmin witnesses  12 hampers our ability to assist the Commission, I hope only  13 at this early stage, to consult with witnesses and to make  14 statements available to the Commission. Offers of witness  15 protection are being perceived by some of our witnesses as  16 providing scant protection. We may well have to seek  17 further guidance and assistance from the Commission if our  18 efforts to obtain evidence is further compromised.</p> <p>19 We as the legal team representing Lonmin intend  20 to give you as Commission, Chair, and our colleagues  21 leading the evidence, our full assistance to execute your  22 mandate and to formulate recommendations which would, so we  23 hope, assist in identifying and addressing those factors  24 which have given rise to these tragic events in order to  25 avoid a recurrence and to normalise relationships between</p>
<p style="text-align: right;">Page 149</p> <p>1 events during the period in question. As part of this  2 process, we have already made available documents, emails,  3 maps of the area, video recordings, and the log kept of the  4 events as they unfolded.</p> <p>5 According to the evidence we've been able to  6 obtain thus far, the demand for a basic salary of R12 500  7 by the rock drill operators surfaced in the second half of  8 June 2012 at Lonmin's Karee shaft. In the statements to be  9 filed, we briefly address the events as they unfolded from  10 that time, but will seek to paint a more detailed picture  11 from Thursday, the 9th of August 2012. You will however  12 hear, Chair, that by Thursday, the 16th of August 2012, the  13 area around the by now well known koppies near the informal  14 settlement where a large crowd of striking workers had  15 congregated, was under the control of the South African  16 Police Service. Of the events as they unfolded on that  17 fateful day, Lonmin and its security personnel have limited  18 firsthand knowledge.</p> <p>19 The events of the preceding day, Wednesday the  20 15th of August, and the interaction between the main  21 protagonists, being the striking workers, and the South  22 African Police Service, as well as the representatives of  23 NUM and AMCU, Lonmin employees acting as liaison and  24 providers of interpreting services, will be addressed and  25 should assist the Commission in forming a picture of what</p>	<p style="text-align: right;">Page 151</p> <p>1 all role players involved.</p> <p>2 In conclusion, Chair, if submissions are to be  3 made about the causes of the tragedy, we will do so at the  4 end of the evidence on Theme 1. We refrain from doing so  5 in opening and refrain from engaging with those fingers  6 already pointed, and I suspect still to be pointed, at this  7 early stage.</p> <p>8 CHAIRPERSON: Thank you, Mr Burger. I  9 now ask Mr Tipp to make the opening – it's described as an  10 opening submission, but it's opening statement, I take it,  11 on behalf of the National Union of Mine Workers.</p> <p>12 MR TIPP SC: Thank you, Chair. Chair, we  13 have prepared a written opening submission which has been  14 lodged with all parties. There are certain subparagraph  15 headings. I'll indicate those as I work through the  16 document.</p> <p>17 Firstly, introduction. The Commission is  18 appointed with its primary focus to investigate matters of  19 public, national and international concern arising out of  20 the tragic events at Marikana from 11 August to 16 August  21 2012, which led to the death of more than 44 people, injury  22 to more than 70 people, many arrests, as well as damage and  23 destruction to property.</p> <p>24 The National Union of Mine Workers - which we  25 abbreviate as NUM - has welcomed the appointment of the</p>

<p style="text-align: right;">Page 152</p> <p>1 Commission and has committed itself to contribute wherever 2 possible to the conducting by the Commission of a thorough 3 inquiry into the causes of these events and the making by 4 it of appropriate recommendations.</p> <p>5 Paragraph 1.4 of the Terms of Reference of the 6 Commission stipulates that the conduct of NUM, its members 7 and its officials is to be investigated and reported on. 8 Certain particular aspects thereof are identified in 9 subparagraphs 1.4.1, 1.4.2 and 1.4.3. NUM will give its 10 full cooperation to the Commission in relation not only to 11 these paragraphs, but on any matter where it may be in a 12 position to advance the work of the Commission. Should it 13 be shown that any NUM members conducted themselves in an 14 unlawful manner, NUM will institute the appropriate 15 disciplinary steps in terms of its constitution and will 16 expect the law to take its course.</p> <p>17 The second topic is the ongoing violence and 18 intimidation at Marikana. As the Commission is aware its 19 proceedings take place in the context of ongoing volatility 20 and tension. The climate of violence and intimidation that 21 characterised the period leading up to 16 August 2012 has 22 not abated at Marikana and had since spread to other mines 23 in the Rustenburg area, leading to more deaths, injury and 24 destruction. This has a profound impact on the 25 Commission's proceedings. This is most clearly illustrated</p>	<p style="text-align: right;">Page 154</p> <p>1 represented NUM at the pointing out. This inference has 2 been bolstered by a range of subsequent attacks on NUM 3 members in the Wonderkop Hostel complex and nearby 4 settlements, resulting in further deaths, injuries and 5 destruction of property. As a result many NUM branch 6 leaders and shop stewards have had to leave their 7 residences.</p> <p>8 These events have sharply exacerbated the 9 reluctance of NUM members and others to assume the role of 10 being witnesses before the Commission. That reluctance was 11 present from the beginning of our preparatory work on the 12 pertinent incidents. It was at no time indicative of any 13 unwillingness to assist the Commission, but had its source 14 solely in concerns about personal safety. This has had a 15 material impact on NUM's preparations for the inquiry and 16 we have communicated with the Commission regarding the 17 submission of the names of witnesses and their statements 18 and the need to give earnest attention to ways in which the 19 safety of potential witnesses can be effectively secured.</p> <p>20 NUM is anxious to have this matter addressed in 21 such a manner that the work of the Commission will not be 22 delayed or otherwise hampered. It has an unqualified 23 commitment to contribute to that work, which it views as 24 being of vital importance, but it also has an unqualified 25 commitment to the safety of its officials and members.</p>
<p style="text-align: right;">Page 153</p> <p>1 by the killing on Friday, 5 October 2012 of Mr Daluvuyo 2 Bongo. Mr Bongo was the Secretary of the Lonmin Western 3 Platinum Branch of NUM and was consulted on a number of 4 occasions on matters relevant to the issues requiring 5 investigation by the Commission. It was envisaged that he 6 would be a material witness and that his testimony would in 7 due course not only have been of assistance to the 8 Commission, but would also have advanced NUM's capacity to 9 present evidence as to its role in the events under 10 examination.</p> <p>11 It was as a result of these consultations that Mr 12 Bongo attended the Commission's inspections in loco on 1 13 and 2 October 2012. In particular on the latter date, it 14 was Mr Bongo who pointed out to the Commission various 15 matters at and near the NUM office within the Western Mine 16 Platinum precinct. Mr Bongo was shot and killed at his 17 place of residence in the Wonderkop Hostel complex, a 18 location visited by the Commission on 2 October 2012. The 19 shooting occurred between 5:30 and 6PM. He was hit by six 20 bullets. NUM does not at this stage have a conclusive 21 understanding of the event, but it would appear to be at 22 least a plausible inference that this was a deliberate and 23 targeted killing. That is how it is presently being 24 interpreted by officials and members of NUM. It is also 25 perceived as being connected to the fact that Mr Bongo</p>	<p style="text-align: right;">Page 155</p> <p>1 Notwithstanding this, NUM offers the following submissions 2 at this stage of the Commission, each of which will be 3 briefly expanded upon below.</p> <p>4 Firstly, the unprotected strike had begun on 9 5 August 2012; secondly, the background to the unprotected 6 strike and developments in the area and the circumstances 7 that lead up to the events of 11 to 16 August 2012; 8 thirdly, collective bargaining issues that arise; fourthly, 9 the level of preparation and planning on the part of SAPS 10 during the days before 16 August 2012 and the conduct of 11 police officers at the time of the shooting on that day; 12 fifthly, the inquiry into the events subsequent to 16 13 August 2012.</p> <p>14 We then address the unprotected strike commencing 15 on 9 August 2012. The unprotected strike by the rock drill 16 operators - which we will abbreviate as RDO's - which 17 commenced on 9 August 2012 was from inception characterised 18 by high levels of intimidation and violence. The strike 19 soon descended into a complete disregard for the rights and 20 lives of non-strikers, resulting in the death of 10 people 21 between 9 and 15 August 2102. NUM believes that 22 unprotected strikes in general have catastrophic 23 consequences for all parties, but none more so than the 24 employees who participate in them. Not only do they lose 25 the dismissal protection of the constitutionally entrenched</p>

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1 right to strike, but these strikes are often plagued by  
 2 significant levels of violence, intimidation and  
 3 destruction of property.  
 4 [12:36] It is for these reasons that NUM consistently  
 5 urged its members not to associate with the unprotected  
 6 strike, to continue reporting for duty, called for the  
 7 strikers to return to work and for their demands to be  
 8 channelled through established collective bargaining  
 9 processes and procedures. NUM also consistently urged  
 10 Lonmin and the SAPS to take steps to prevent the unlawful  
 11 conduct of the strikers and the intimidation and violence  
 12 directed at non-strikers. NUM is of the view that the  
 13 position it adopted in this regard gave rise to anti-NUM  
 14 sentiment amongst the strikers and violence towards its  
 15 members, officials and the union itself. Since the  
 16 commencement of the strike numerous mass meetings were  
 17 called by NUM encouraging its members to distance  
 18 themselves from the unprotected strike action and  
 19 associated violence and intimidation. NUM also actively  
 20 assisted its members as well as other employees who wanted  
 21 to report for work but who for one or other reason were  
 22 finding it difficult to get to work. On the morning of 11  
 23 August 2012, several hundred of the unprotected strikers  
 24 who appeared to include non-Lonmin employees gathered near  
 25 the Nhlondokop Stadium and marched towards the Western

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1 Platinum branch offices of NUM. It is believed that the  
 2 marchers had malicious intent and upon their arrival in the  
 3 vicinity of the NUM offices a confrontation ensued between  
 4 the marchers and a number of NUM members during which  
 5 firearms were discharged. Although there already appeared  
 6 to be differing versions regarding this incident, NUM will  
 7 in due course lead evidence that in the circumstances the  
 8 use of firearms by NUM members was justified.  
 9 We now deal further with the background to the  
 10 unprotected strike. NUM is of the view that the tragic  
 11 events at Marikana have their roots in recent labour  
 12 disputes in the area, in particular at Lonmin's Karee mine  
 13 and the nearby Impala Platinum mine. These disputes were  
 14 also characterised by violence, intimidation and loss of  
 15 life and in the case of Impala Platinum mine the  
 16 undermining of agreed collective bargaining processes. As  
 17 at Lonmin, NUM and Impala had entered into a two-year  
 18 collective agreement dealing with wages and other  
 19 substantive terms and conditions of employment. During the  
 20 course of that agreement, Impala took a unilateral decision  
 21 to grant an additional wage increase to one category of  
 22 employees being miners. Another category of employees, the  
 23 RDOs, were aggrieved by this decision and embarked on an  
 24 unprotected strike in support of their demand that they too  
 25 should be granted an increase in addition to the increase

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1 already provided for in the collective agreement. After a  
 2 protracted unprotected strike Impala acceded to that  
 3 demand. Many employees and former employees of Impala  
 4 Platinum mine and Lonmin reside in the same or nearby  
 5 townships, informal settlements and villages within the  
 6 vicinity of these mines. Events and conduct at a  
 7 particular mine or in a particular community permeates  
 8 through nearby mines and surrounding communities. In this  
 9 regard NUM understands that persons who were not Lonmin  
 10 employees, including former Lonmin and Impala Platinum  
 11 employees and residents from nearby communities were  
 12 involved in the Lonmin industrial unrest and also gathered  
 13 on the koppie near Marikana Mine. NUM submits that without  
 14 direct reference to recent labour disputes at other mines  
 15 in the Rustenburg area and to the circumstances of the  
 16 surrounding communities, the Commission would be deprived  
 17 of critical background and factual information required to  
 18 adequately probe the incidents at the Marikana Mine.  
 19 Without this information being properly placed before the  
 20 Commission the Lonmin incidents will not be placed in the  
 21 sufficiently complete context so as to enable the  
 22 Commission to make a fully informed evaluation of the  
 23 events and the conduct of the various parties. The  
 24 consideration of this background by the Commission will  
 25 materially contribute to a proper appreciation of the

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1 events and incidents leading up to 16 August 2012. NUM is  
 2 also of the view that the social and economic circumstances  
 3 of the communities in the vicinity of the Marikana Mine  
 4 where many mine workers employed by Lonmin and other mines  
 5 reside, and associated community grievances and protests  
 6 contributed to the general situation leading to the Lonmin  
 7 incidents. We now deal with further submissions concerning  
 8 collective bargaining. NUM will give evidence of its  
 9 longstanding engagement in and commitment to the processes  
 10 of collective bargaining. These are rooted in the  
 11 Constitution of the Republic of South Africa and further  
 12 provided for in the Labour Relations Act, 66 of 1995. They  
 13 entail lawfully organised union and employer entities  
 14 functioning within the bargaining environment that not only  
 15 regulates their interaction but also provides for the  
 16 possibility of resort to lawful strike or lock-out  
 17 measures. They provide certainty and stability to the core  
 18 of South Africa's economy, the events at Marikana were  
 19 destructive of this regime. Notwithstanding the  
 20 significant gains made to wage levels in the mining  
 21 industry through collective bargaining processes over the  
 22 years, the overall level of mining wages remains low. The  
 23 work is hard and dangerous, living in social conditions are  
 24 for the most part deplorable. But the enforcement of wage  
 25 demands that are pursued not through a collective agreement

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1 reached after regulated negotiation in accordance with the  
 2 law or through regulated collective bargaining processes,  
 3 but through manifestly unprotected strike action, through  
 4 intimidation and through the wielding of weapons and acts  
 5 of violence to the extent of some killings during the days  
 6 before 16 August 2012 is both unacceptable and  
 7 unsustainable. The impact of an approach of this kind on  
 8 labour relations and economic activity is profoundly  
 9 negative.

10 In response to the Marikana tragedy a range of  
 11 commentators have raised broad questions around the  
 12 functionality of the current collective bargaining system  
 13 within South Africa's industrial relations environment. It  
 14 is NUM's respectful submission that it is not the role of  
 15 this Commission to undertake an in-depth or general  
 16 examination of the country's collective bargaining system.  
 17 Such an exercise would be undesirable not only because of  
 18 its magnitude but because also an examination of this  
 19 nature impacts on all sectors of the economy and is best  
 20 undertaken by all affected parties in forums designed for  
 21 that purpose. Specific collective bargaining issues do  
 22 however arise in the Lonmin context which this Commission  
 23 should consider in probing the conduct of Lonmin, NUM and  
 24 AMCU as mandated by the terms of reference. For present  
 25 purposes, it is the conduct of the parties within the

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1 current collective bargaining framework that must be  
 2 examined. Two broad collective bargaining and industrial  
 3 relations issues accordingly arise. First, the commitment  
 4 of the parties to honour existing collective bargaining  
 5 structures and agreements, and second, the approach of the  
 6 parties to the management of the unprotected industrial  
 7 action in this context and their endeavours to avoid the  
 8 catastrophic events that unfolded during the period in  
 9 question. Like Impala Lonmin's actions demonstrated a  
 10 fundamental undermining of agreed collective bargaining  
 11 processes and collective agreements.

12 [12:56] The RDOs at Lonmin's Karee mine approached  
 13 Lonmin's management in the wake of the events at Impala,  
 14 with a demand that they should be granted an increase, in  
 15 addition to the increase provided for in the collective  
 16 agreement that was binding on them. In response to this  
 17 demand, Lonmin made a decision to award additional  
 18 allowances to RDOs and their assistants. Lonmin did not  
 19 negotiate with NUM, as the recognised collective bargaining  
 20 agent. NUM was simply informed of the company's decision  
 21 to grant the additional allowances. Not satisfied with  
 22 these additional allowances, and emboldened by the  
 23 company's willingness to deal directly with them and to  
 24 increase their pay during the currency of a collective  
 25 agreement, the RDOs embarked on an unprotected strike in

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1 support of their original demand.

2 As stated earlier, NUM not only distanced itself  
 3 from the unprotected strike and associated violence and  
 4 intimidation, but it took proactive steps to facilitate the  
 5 return to work of those employees who did not want to  
 6 participate in the strike, and encouraged the strikers to  
 7 channel their demands through the existing collective  
 8 bargaining structures and processes.

9 CHAIRPERSON: I think perhaps this is an  
 10 appropriate stage for us to take the lunch adjournment, as  
 11 you're moving onto a new topic, the role of the South  
 12 African Police Services.

13 MR TIPP SC: Yes.

14 CHAIRPERSON: Very well, we will adjourn  
 15 now for an hour until 2 o'clock.

16 [INQUIRY ADJOURNS INQUIRY RESUMES]

17 [14:01] CHAIRPERSON: Good afternoon. The  
 18 Commission resumes. I have been informed that the day  
 19 passes which people have today are only valid for today.  
 20 From tomorrow no-one will be allowed into this auditorium,  
 21 except the commissioners, unless they are in possession of  
 22 accreditation documents which contain their photographs.  
 23 So, apparently photographs have to be taken at the City  
 24 Hall. So we have decided that we will sit this afternoon  
 25 until 4 o'clock, we won't take a tea adjournment, we will

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1 sit straight through to 4 o'clock to enable those who  
 2 require, I take it, it is not the members of the public but  
 3 it is officials and counsel and representatives, an  
 4 opportunity to go to the town hall to arrange, or city  
 5 hall, to arrange for their photographs to be taken and  
 6 these accreditation documents to be issued. So, I am  
 7 telling you that now, so we are sitting straight through  
 8 till 4 o'clock without an adjournment and then, we will  
 9 then take the adjournment until tomorrow morning. I  
 10 understand the officials will be there until 6 o'clock  
 11 processing the application for accreditation documents. I  
 12 have also been informed that the air-conditioning is not  
 13 working properly and it is rather hot here in Rustenburg  
 14 and so in the circumstances I have, and my colleagues have  
 15 agreed to allow those who wish to do so to take off their  
 16 jackets. This indulgence only lasts for as long as the  
 17 air-conditioning doesn't work. But as far as this  
 18 afternoon is concerned, certainly the air-conditioning  
 19 apparently is not working, and for those who wish to take  
 20 off their jackets may do so. The indulgence only applies  
 21 to persons other than the commissioners who will have to  
 22 keep their jackets on. Mr Tipp, you were making your  
 23 opening statement, would you like to proceed?

24 MR TIPP SC: Thank you Chair,  
 25 Commissioners. I had got to the point in the written

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1 document that we submitted which is the heading of, role of  
 2 the South African Police Services. It's paragraph 30 and  
 3 I'll proceed from there. Grave questions present  
 4 themselves in relation to the level of preparation and  
 5 planning on the part of SAPS during the days before 16  
 6 August 2012 and the conduct of police officers at the time  
 7 of the shooting on that day. NUM is aware that there are  
 8 other parties and representatives who will be giving  
 9 special attention to this aspect of the inquiry. In order  
 10 to avoid the duplication of material that is placed before  
 11 the Commission, NUM will wherever appropriate make  
 12 available to those representatives such information as it  
 13 has gathered in this regard. Of particular concern for NUM  
 14 was the inability of Lonmin security personnel to manage  
 15 the increasing levels of violence since the commencement of  
 16 the strike. NUM made repeated – of particular concern for  
 17 NUM was the inability of Lonmin security personnel to  
 18 manage the increasing levels of violence since the  
 19 commencement of the strike. NUM made repeated requests for  
 20 a significant increase in the presence of law enforcement  
 21 agencies to manage the security situation and avoid further  
 22 acts of violence and the loss of life and also repeatedly  
 23 engaged the SAPS during the daily Lonmin security briefings  
 24 on its efforts to disarm the strikers who were heavily  
 25 equipped with dangerous weapons.

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1 Mr Chair, we deal next briefly with the question  
 2 of the inquiry into subsequent events. NUM is also of the  
 3 view that the examination by the Commission of a number of  
 4 events, incidents and statements that occurred or were made  
 5 after 16 August 2012 involving or bearing upon various  
 6 parties already identified in the terms of reference will  
 7 materially contribute to a proper appreciation of the  
 8 events, incidents and/or their conduct during the period on  
 9 and before that date. Subsequent events and incidents that  
 10 NUM believes require examination for this purpose include  
 11 (1) the peace accord signed on 6 September 2012 and the  
 12 associated negotiations. (2) the addendum to the wage  
 13 agreement signed on 18 September 2012 which ended the  
 14 unprotected strike. (3) the killing of NUM shop steward,  
 15 Mr Dumisani Ntinti on 11 September 2012 in the immediate  
 16 vicinity of the koppie and in similar circumstances to the  
 17 killing of Isaiah Twala on 14 August 2012. Fourthly, the  
 18 killing of NUM branch secretary, Mr Daluvuyo Bongo on 5  
 19 October 2012 and subsequent attacks on the members and  
 20 officials at the Wonderkop Hostel complex and surrounding  
 21 settlements.  
 22 We next turn briefly and lastly to the terms of  
 23 reference of the Commission. In NUM's view there should be  
 24 no uncertainty that the Commission's present terms of  
 25 reference adequately encompass the enquiries that should be

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1 directed towards the background to the unprotected strike  
 2 and to incidents and events subsequent to 16 August 2012  
 3 even on the basis that they will not become principle  
 4 concerns of the Commission. NUM hence believed it  
 5 advisable to secure an appropriate amendment to clarify the  
 6 Commission's powers in this regard. In contemplation of  
 7 this on 9 October 2012 NUM submitted a motivation to the  
 8 President proposing an amendment to the terms of reference  
 9 of the Commission as published in Government Gazette of 12  
 10 September 2012. A copy of NUM's submission was provided to  
 11 the Commission and to the parties. And that, Chair and  
 12 Commission, completes the opening statement for NUM.  
 13 CHAIRPERSON: Thank you, Mr Tipp. I just  
 14 want to make it clear in relation to what I said earlier  
 15 about the day passes. Members of the public don't require  
 16 day passes or any accreditation to come to the auditorium.  
 17 So, what I said earlier doesn't apply to them. Those who  
 18 are here using, having access to special facilities who  
 19 have day passes will find delaying further, that the day  
 20 pass won't let them in tomorrow and from tomorrow special  
 21 accreditation documents will be required which have  
 22 photographs of the holders thereof. I was talking about  
 23 that, that is the reason why we will adjourn at 4 o'clock  
 24 this afternoon. Members of the public don't have to worry  
 25 about it because they don't need day passes or

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1 accreditation documents to get in. So, I hope that is  
 2 clear. Mr Bruinders, we didn't receive documents from you,  
 3 I don't know whether you propose making an opening  
 4 statement on behalf of AMCU?  
 5 MR BRUINDERS SC: I do.  
 6 CHAIRPERSON: Would you please proceed?  
 7 MR BRUINDERS SC: I will. Members of the  
 8 Commission, an opening address is meant to tell a story.  
 9 Here it is meant to tell the story about the events of 9 to  
 10 16 August 2012 and how that story will unfold in the  
 11 evidence that will be led before you. It is a hard story  
 12 to tell not least because it is a story of so many deaths  
 13 that could have been avoided had rational, reasonable and  
 14 ultimately simple measures been taken. It is also hard  
 15 because AMCU has not had enough time to master the  
 16 thousands of pages of documentary evidence, nor has it  
 17 finalised the many witness statements that it has taken.  
 18 Members of the commission, AMCU will furnish the evidence  
 19 leaders with a number of statements. Commission, among  
 20 them is the statement of Mr Mathunjwa its President. His  
 21 statement tells a major part of the story we recount  
 22 briefly today.  
 23 So how to tell that story. AMCU thought it best  
 24 to tell it chronologically. It does so in a written  
 25 opening statement, that statement is being finalised and

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1 will be served on the Commission tomorrow. In the  
 2 meanwhile we give a summary of the chronology of that story  
 3 and it is the following. AMCU first became aware that the  
 4 rock drill operators wanted to communicate their demand of  
 5 a wage increase of R12 500 a month at Lonmin on 21 June and  
 6 then 21 July 2012. On 21 July particularly these rock  
 7 drill operators consisted of members of the NUM and AMCU  
 8 mainly but it appears that the majority of these rock drill  
 9 operators were members of the NUM. At first Lonmin  
 10 management engaged directly with the rock drill operators,  
 11 that is they engaged with them outside of the existing  
 12 collective bargaining structures. And what also means is  
 13 that they did not engage with the NUM or AMCU about the  
 14 demand of the rock drill operators. Lonmin responded to  
 15 this demand by unilaterally approving an allowance of R750  
 16 a month for rock drill operators. Approval was unilateral  
 17 because it was not done after bargaining collectively or  
 18 even consulting with the NUM for AMCU. Having negotiated  
 19 directly with the rock drill operators about their demand  
 20 for a wage increase it appears that after the operators  
 21 rejected the counter offer Lonmin refused to negotiate with  
 22 them directly again until after 16 August 2012. That  
 23 engagement too was unsuccessful. But Lonmin never engaged  
 24 with AMCU over the demand by the rock drill operators.  
 25 AMCU is unaware that Lonmin engaged with NUM over the

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1 demand. Lonmin first engaged with AMCU and the other  
 2 unions and representatives of unaffiliated rock drill  
 3 operators about their demand for a wage increase after 16  
 4 August 2012 during the CCMA negotiations. In July 2012  
 5 when Mr Mathunjwa was first informed by Lonmin about  
 6 employees wanting to serve a memorandum on management, he  
 7 asked Mr Mokwena of Lonmin to call a meeting of the trade  
 8 unions who organised at Lonmin to discuss how to deal with  
 9 that demand. By 10 August 2012 Lonmin had not called a  
 10 meeting.  
 11 [14:21] On that day, Lonmin again contacted Mr Mathunjwa  
 12 to inform him about a march taking place on that day. Mr  
 13 Mathunjwa repeated his request for a meeting, in writing  
 14 this time, and in that letter to Lonmin, he called upon Mr  
 15 Mokoena to call a meeting of all Unions to attempt to  
 16 resolve the dispute between rock drill operators and  
 17 Lonmin. Lonmin did not call a meeting in response to this  
 18 request. Between July and 10 August 2012, AMCU is aware  
 19 that rock drill operators from the NUM and AMCU, had met on  
 20 a few occasions. They met without any participation by any  
 21 union and they met to debate their demand and to decide  
 22 what to do about it. On 10 August 2012, the rock drill  
 23 operators marched to Lonmin offices. They wanted to  
 24 communicate to Lonmin management their demand for an  
 25 increase of R12 500 a month, and they wanted management to

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1 engage with them over their demand. Lonmin refused to  
 2 speak to the rock drill operators about their demand. The  
 3 Lonmin management advised the rock drill operators to  
 4 approach the NUM about their demand.  
 5 On 11 August 2012 rock drill operators marched to  
 6 the NUM offices. As on 10 August 2012, they were unarmed.  
 7 As on 10 August 2012 the march proceeded peacefully. That  
 8 is until marchers got to about 500 metres from the NUM  
 9 offices and that is when official of the NUM shot and  
 10 killed two rock drill operators who participated in the  
 11 March. As a result of the conduct of the NUM officials the  
 12 rock drill operators decided to arm themselves in self-  
 13 defence and to gather at the big koppie at Wonderkop where  
 14 they thought they felt safe. That is where they gathered  
 15 daily between 11 and 16 August 2012. They gathered in the  
 16 morning, and left for their homes at night. On 12 August  
 17 2012 the strikers at the koppie decided to march to the  
 18 offices of the NUM to put their demand to the NUM and to  
 19 complain about the shooting of their colleagues on the  
 20 previous day.  
 21 Again, roughly about 500 metres from the NUM  
 22 offices they were prevented by Lonmin Security from  
 23 proceeding any further. The marchers resisted the attempt  
 24 by Lonmin Security to prevent them from marching to the NUM  
 25 offices. Lonmin Security shot and killed two of the rock

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1 drill operators who participated in that march. There was  
 2 a scuffle between marchers and Lonmin Security. As a  
 3 result, two Security officers were killed.  
 4 On 13 August 2012, an AMCU delegation met with  
 5 strikers at the koppie. The delegation was asked by the  
 6 strikers to ask Lonmin management to come to the koppie to  
 7 engage with them about their demand for a wage increase.  
 8 The delegation met with Lonmin management later, and  
 9 conveyed the demand of the strikers to management.  
 10 Management's response was that they would only speak to the  
 11 strikers after they returned to work. The delegation  
 12 returned to the koppie, where they communicated the  
 13 response of the Lonmin management to the strikers. The  
 14 strikers responded by informing the Lonmin – by informing  
 15 the delegation, that is the AMCU delegation, that they  
 16 would stay at the koppie until management came to the  
 17 koppie to talk to them and engage with them there about  
 18 their demand. During the course of 13 August 2012, a  
 19 contingent of strikers marched from the koppie to Lonmin.  
 20 When they got to the Lonmin offices, they were asked by  
 21 management to take a back route on their way back to the  
 22 koppie. On their way along that route, the contingent was  
 23 stopped by South African Police Service officers. The SAPS  
 24 shot and killed two participates in that contingent.  
 25 During that encounter two police officers were killed.



<p style="text-align: right;">Page 172</p> <p>1 On 14 August 2012 the strikers at the koppie, 2 asked the SAPS to ask Lonmin management to come to the 3 koppie to address them and talk to them there about their 4 demand. 5 On 15 August Mr Mathunjwa met with Lonmin 6 management, the SAPS and the NUM. At that meeting, Lonmin 7 agreed to engage with the strikers, if they renounced 8 violence and returned to work. Mr Mathunjwa went to the 9 koppie where he addressed the strikers and conveyed 10 management's offer to them. The strikers received Mr 11 Mathunjwa, but said to him that it was late, in other 12 words, it was late in the day. They wanted to continue 13 discussing this matter with Mr Mathunjwa at 9 on the 14 following morning. Mr Mathunjwa then contacted Lonmin 15 management and the SAPS. He reported that the strikers 16 were receptive to the offer by Lonmin. 17 A Mr Kgotla of Lonmin undertook to meet with Mr 18 Mathunjwa at 8 o'clock on the follow morning to talk about 19 how to induct returning strikers. The overwhelming 20 majority of the strikers left the koppie for their homes on 21 the night of 15 August 2012. On the morning of 16 August 22 2012, Mr Mathunjwa met with Mr Kwadi. Mr Kwadi is from 23 Lonmin. Mr Mathunjwa informed him about the undertaking 24 given by Mr Kgotla on the previous evening. Mr Kwadi did 25 not seem to know about this. He undertook to consult with</p>	<p style="text-align: right;">Page 174</p> <p>1 and to ask to come to the koppie to listen to their demand 2 for a wage increase, and to talk to them about their 3 demand. Mr Mathunjwa left the koppie and tried to contact 4 Lonmin management and the SAPS. He asked to see a General 5 Mpenbe whom he believed to be in charged of the operation 6 at the koppie. General Mpenbe refused to talk to him 7 because he said that the Provincial Commissioner was now in 8 charge of that operation. Mr Mathunjwa asked to speak to 9 the Provincial Commissioner. He was informed that she was 10 unavailable. She was apparently at an ANC torch bearing 11 ceremony. Mr Mathunjwa tried to get hold of Mr Kwadi of 12 Lonmin. Mr Kwadi said that Lonmin management was not 13 prepared to meet with him, and that he should inform the 14 SAPS of the demand of the strikers to address them at the 15 koppie i.e. Mr Kwadi told Mr Mathunjwa to tell the SAPS of 16 the strikers' demand that Lonmin management talk to them at 17 the koppie. 18 Mr Mathunjwa was then got hold by telephone by a 19 Mr Seedat whom he believed to be a director of Lonmin to 20 ask him to assist to get management to talk to him or to 21 address the strikers. Mr Seedat undertook to see what he 22 could do. He never got back to Mr Mathunjwa. Mr Mathunjwa 23 tried again to contact the SAPS, to get their co-operation 24 in resolving the conflict between Lonmin and the strikers. 25 That attempt was unsuccessful.</p>
<p style="text-align: right;">Page 173</p> <p>1 his principals and to get back to Mr Mathunjwa. Later that 2 morning, Mr Kwadi informed Mr Mathunjwa that Lonmin refused 3 to engage with the strikers after they returned to work. 4 Mr Mathunjwa understood that to mean that Lonmin was 5 withdrawing its offer that it had made on the previous day. 6 That was the offer to talk to or engage with strikers if 7 they renounced violence and returned to work. Still later 8 that morning, Mr Mathunjwa spoke to the Provincial 9 Commissioner of Police over a mobile phone. The Provincial 10 Commissioner used the opportunity to scold Mr Mathunjwa 11 about why he was not a koppie. Mr Mathunjwa returned to 12 the koppie. This was the first time that he went to the 13 koppie on 16 August. Before doing so, he met with three 14 generals of the SAPS at its base outside the koppie. They 15 included the Provincial Commissioner. Mr Mathunjwa 16 informed them of what he was about to do, and then told 17 them about the withdrawal of the offer by Lonmin. The 18 Provincial Commissioner said, that was not her problem. 19 Mr Mathunjwa then went to the koppie. The SAPS 20 refused to supply a vehicle or any assistance to Mr 21 Mathunjwa to get there. He went to the koppie on his own 22 steam. He informed strikers at the koppie of the fact that 23 Lonmin had withdrawn its offer made on the previous day. 24 He asked them to leave the koppie and to return to work. 25 The strikers again asked Mr Mathunjwa to go back to Lonmin</p>	<p style="text-align: right;">Page 175</p> <p>1 Having been deserted by Lonmin and the SAPS, Mr 2 Mathunjwa returned to the koppie for a second time on that 3 fateful day, on Thursday, 16 August 2012. He informed the 4 strikers that no one from Lonmin was prepared to talk to 5 him about the strikers' request or to accede to the request 6 to come to the koppie to engage with them about their 7 demand. He pleaded with the strikers to leave the koppie. 8 They informed him that they would stay and that they were 9 happy for him to leave. He left. 10 Not long after he had left the koppie, the SAPS 11 shot and killed strikers at the big koppie and later at the 12 small Koppie. Mr Mathunjwa and his team did not witness 13 the shooting. 14 [14:41] By 16 August 2012 neither Lonmin nor the SAPS had 15 communicated to the strikers on the koppie or indeed AMCU 16 or the NUM a written or oral time-based ultimatum to leave 17 the koppie on the pain of clearly defined consequences. 18 The strike did not end on 16 August. It continued until it 19 was finally settled when the rock drill operators and their 20 unions agreed to an increase. But not before Lonmin again 21 unsuccessfully negotiated with the strikers directly, 22 unilaterally and outside of the collective bargaining 23 structures. AMCU does not deal in great detail in this 24 opening address for the conduct of the SAPS on 16 August 25 2012. That is left for others this afternoon. But</p>

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1 according to AMCU's members, on that day, the SAPS  
 2 surrounded them after they gathered on the koppie during  
 3 the morning of 16 August. Many tried to leave when they  
 4 saw the barbed wire being spanned to cage them in at the  
 5 koppie. One group of strikers tried to get out at a gap in  
 6 the barbed wire so that they could flee to the nearby  
 7 informal settlement. When the SAPS closed the gap with  
 8 barbed wire that group ran around a clump of shrubs to get  
 9 around the barbed wire. When they emerged around the clump  
 10 that group was mowed down by automatic gunfire by the TRT.  
 11 At this stage it would be premature for AMCU to make  
 12 recommendations about who was responsible for the events  
 13 between 9 to 16 August 2012. That will be done after  
 14 evidence has been led and witnesses have been subjected to  
 15 cross-examination.

16 CHAIRPERSON: Thank you, Mr Bruinders.  
 17 The next party I'll call on is the Legal Resources Centre,  
 18 Mr Bizos.

19 MR BIZOS SC: We have submitted a report.  
 20 I'm not going to read out the whole of it. I would refer  
 21 to page 1 which is really a matter of a formal nature and  
 22 doesn't have any bearing. In paragraph 2 on page 2 we say  
 23 that the LCR is a human rights organisation which promotes  
 24 constitutionalism and the rule of law and in particular the  
 25 interests of poor and marginalised communities. I want to

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1 pause here for a moment –

2 CHAIRPERSON: Mr Bizos, I think you  
 3 should give the interpreter –

4 MR BIZOS SC: I want to, not to read out  
 5 but to make a submission, that we in the Legal Resources  
 6 Centre consider all the rights in the Constitution and in  
 7 the Bill of Rights as sacrosanct. None is more sacrosanct  
 8 than the right to life. I make this submission because I  
 9 think that the Commission must not be drawn in, in the pre-  
 10 , rather the 17th August where unfortunately ten people, or  
 11 it may be 12 I'm not sure, have lost their lives. I would  
 12 submit that listening to that evidence, the violence by  
 13 supporters of one trade union or another, the intervention  
 14 of the police with two casualties, appeared in my  
 15 submission, as acts of revenge. Our constitution, our  
 16 legislation, our common law does not sanction murder as an  
 17 act of revenge. We are concerned that in one of the  
 18 statements made by a police officer, he comes very near to  
 19 saying that he shot to kill because two of his colleagues  
 20 had been killed before by the striking miners. That is an  
 21 excuse for the use of lethal force and acts of revenge. We  
 22 wish to place on record that acts of revenge do not solve  
 23 problems of workers, employers, the police, the people of  
 24 the country as a whole.

25 We have carefully listened to the submissions

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1 made by our learned friend, Mr Semenya. He has said that  
 2 it was planned and it made a sort of half a concession that  
 3 it may have been unlawful violence in respect of the  
 4 koppie. But in general terms we again, having read the  
 5 documents that have been made available to us up to now,  
 6 that the force used, the lethal force is not sanctioned by  
 7 any of our laws, by the Constitution, by our legislation.  
 8 It is significant, Mr Chairman and Members of the  
 9 Commission, we have read a lot of paper. I think that  
 10 we've got something like 14 files from all the documents  
 11 that have been submitted. Maybe we missed it, but we have  
 12 not seen any evidence of a single policeman being  
 13 scratched, never mind shot at on the 17th, or 16th, I beg  
 14 your pardon. The police are entitled to use lethal force  
 15 in order to defend their lives. On the evidence that we  
 16 have so far read, this great life-threatening danger didn't  
 17 lead to the harm, physical harm of any police officer. By  
 18 way of contrast 34 lives were lost on the 16th. Where is  
 19 the proportionality that the Constitution, the legislation  
 20 and the standing orders provide for? Was it thrown  
 21 overboard by the police that turn machine guns, R4s, R5s  
 22 and R6s are machine guns, Mr Chairman. In asking, you  
 23 recall that we asked for a lot of documents, and I want to  
 24 thank my learned friends acting for the police, they have  
 25 been very generous, they have given us a lot of documents.

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1 But we wanted to know their plan. We got a plan. What  
 2 does it say? That they used as a model a plan which was  
 3 put together as to how you deal with a hostage – yes. Now  
 4 I ask rhetorically, who is this Mr Scott that put this plan  
 5 together to use a method of dealing with hostage takers in  
 6 a situation where there were 3000 people, some of whom were  
 7 armed? But there is no suggestion that they shot only at  
 8 the armed people. We don't know and we may not find out  
 9 precisely how many of the people that were actually shot by  
 10 this in terms of the Scott plan.

11 We are going to call expert evidence that what  
 12 the police planned and what they did on the 16th is unheard  
 13 of in practically the whole world, that where you have 3000  
 14 people, some of whom are armed, and you turn R4s, R5s and  
 15 R6s against them. We are going to ask for permission to  
 16 cross-examine those that formulated this plan to explain  
 17 themselves. We will refer the Commission, contrary to what  
 18 our learned friend has said that there are no precedents in  
 19 South Africa and this is unique. Unhappily that is not  
 20 historically correct. There were similar situations where  
 21 commissions such as yours pronounced upon the conduct of  
 22 the police in the particular cases. They have invariably  
 23 suggested restrain and a strict liability against those who  
 24 are too readily using violent means to put the end of  
 25 lives. We will refer you to those findings, precedent and

<p style="text-align: right;">Page 180</p> <p>1 cases to the Constitutional Court, the Supreme Court of  2 Appeal, the Provincial Divisions of how police are expected  3 to behave. There is even a standing order that we will  4 refer you to in the police documents that says that what  5 the judges say must be strictly adhered to. Unhappily what  6 the judges have said – and we will refer you to the  7 passages don't square up with the conduct of the police on  8 the 16th.</p> <p>9 On the contrary, it's not what the judges have  10 tried to prevent that they pay regard to. It may well be  11 that they may have been influenced by irrational statements  12 made by some persons in high authority, shoot to kill.  13 That's not part of our jurisprudence, that is not the way  14 in which a police force is to behave. We hope to have an  15 opportunity to present that case to you. I'm very bad at  16 reading documents, Mr Chairman. You've got the document, I  17 don't want to read it out, but I wanted to make what our  18 main submissions are going to be. And this is why we are  19 here. The moment we heard this, Mr Chairman, we actually  20 engaged forensic and other experts in order to show, how  21 are they going to explain that the vast majority of their  22 wounds were in the back? [Inaudible] back to be shot. I'm  23 sorry, I think one of the Commissioners wanted to ask a  24 question perhaps.</p> <p>25 CHAIRPERSON: She wanted you to do what I</p>	<p style="text-align: right;">Page 182</p> <p>1 where the original danger was, they were wounded, they have  2 told their story. Were they chased and were they were shot  3 at whilst they were running away, did the police have  4 regard to the decided cases that even if you intend  5 arresting a person, you don't shoot in order to kill them  6 or to inflict grievous bodily harm. Who took the decision  7 that this wild chase in the veld in hundreds of metres,  8 could take place? These are the questions, Mr Chairman,  9 that, how is the fact that, how is it, was it good luck or  10 the divine will that in this war situation, which one of  11 the witnesses for the police describes, there managed to be  12 34 deaths and not a single even minor injury? We haven't  13 seen any. I don't know whether our learned friends have  14 seen any and we believe that the conduct of the South  15 African Police set out in 1.1 and 1.24 which the commission  16 has adopted as the first theme of its proceedings. We  17 will, we are ready, we are ready to call the senior  18 officers that have taken these decisions and I may say at,  19 even at this early stage that they claim that both the  20 Commissioner of Police and the Minister actually authorised  21 this plan. If that is so, it may with respect be necessary  22 for all the persons that were responsible for this to be  23 interrogated by our learned friends even across and –  24 [inaudible]. Thank you for the opportunity, Mr Chairman.</p> <p>25 CHAIRPERSON: Thank you, Mr Bizos. Mr</p>
<p style="text-align: right;">Page 181</p> <p>1 wanted you to do earlier and that is give the interpreter a  2 chance to interpret, because you see what you say is  3 important that the people here who don't understand English  4 should –</p> <p>5 MR BIZOS SC: Oh, I beg your pardon. I  6 know him to have a very good memory for many years.</p> <p>7 INTERPRETER: Thank you for the  8 compliment, Mr Bizos.</p> <p>9 [15:01] MR BIZOS SC: My attention has been drawn  10 by my learned friend to paragraph 9 in particular that I  11 should possibly read out on page 4. We pose the question,  12 who took the decision to adopt the plan that led to the  13 deployment of armed police and the policies followed on the  14 16th of August. We don't know who is going to take  15 responsibility and we invite the evidence leaders to have  16 the necessary consultations as to who we have to listen to,  17 to say that I take responsibility for what happened. Who  18 took the decision to use live ammunition? Were the  19 preparatory steps and decision making of SAPS and other  20 policing units which led to the shooting and deaths of the  21 16th of August, consistent with the applicable legal and  22 policy requirements?</p> <p>23 At the inspection in loco, Mr Chairman, you were  24 shown places far away from the original shooting where  25 people who were injured, were hundreds of metres away from</p>	<p style="text-align: right;">Page 183</p> <p>1 Ntsebeza, you are appearing on behalf of the families of 21  2 of the striking miners killed on the 16th of August. Would  3 you care you make your opening, do you wish to make your  4 opening statement now?</p> <p>5 MR NTSEBEZA SC: Thank you, Mr  6 Commissioner and members of the commission. It's been a  7 long day, Mr Commissioner and I don't intend to make it any  8 longer than it has been. Mr Commissioner, opening  9 addresses have been marked with civility which they should  10 be, given the nature of the occasion and where everybody  11 have expressed feelings of regret, that everything has  12 happened and that there is a need for a reconciliation. I  13 wouldn't like to be the one to spoil the party and I  14 promise you, Mr Chairman and members of the commission, I  15 will not. There is a job however to be done and my job is  16 to tell you, hopefully not in the length of time that I am  17 told in my research it took Christopher Clark QC who was  18 counsel for the bloody Sunday inquiry that I talked about  19 on the last occasion, in Northern Ireland who took three  20 months to deliver his 1.25 million word opening address. I  21 certainly will not go that far. And may I add, indeed we  22 were told that each opening address will be delivered in 15  23 minutes by each representative and I intend to do my best  24 to keep within that timeslot.</p> <p>25 CHAIRPERSON: 15 minutes or less.</p>

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1 MR NTSEBEZA SC: Indeed, Mr Chairman, if  
 2 I will I will try and be within that mark. Mr Chairman, it  
 3 is fair to say that as we see in our opening statement  
 4 which was sent to you, that the central task of the  
 5 commission as we see it at this stage is to determine the  
 6 facts and the circumstances that surround the killing of 34  
 7 people by the South African Police Service on the 16th of  
 8 August 2012. There doesn't seem to be much doubt or  
 9 contestation about the fact that those 34 on the 16th of  
 10 August 2012 were killed by the police. We represent, as  
 11 you said Mr Chairman, families of 21 of those who were  
 12 killed on the day, the names and further particulars of  
 13 whom have been provided to you, Sir. We have organised to  
 14 find out how best we can say this, but at the end of the  
 15 day we will invite the commission to make the finding that  
 16 those who were killed and whom we represent, the families  
 17 of whom we represent were unlawfully killed by the SAPS.  
 18 It is our understanding that the SAPS will  
 19 contend, and that much seemed to emanate from the long  
 20 address that we were given at the beginning of the SAPS  
 21 presentation, that it opened fire on our clients next of  
 22 kin out of necessity.  
 23 More particularly our understanding is that 1,  
 24 their contention is that certain strikers were shot while  
 25 they ran, armed with pangas and machetes in closed

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1 formation towards SAPS at crime scene 1 with the apparent  
 2 intent to attack the officers who were stationed there. It  
 3 seems also to be the contention by the SAPS that other  
 4 miners were shot whilst they resisted arrest, allegedly  
 5 with firearms, at a small koppie at crime scene number 2.  
 6 More cynically, and this would not appear in my written  
 7 statement, it would appear that the claim is that the SAPS  
 8 killed the miners because the miners charged at them  
 9 despite the SAPS manifest superiority of firepower, because  
 10 the miners believed that they were invincible because of a  
 11 muti that they had taken. This seems to be the  
 12 justification for the killing of those whom we were told  
 13 charged at the SAPS in this belief.  
 14 For us, Mr Chairman and the commissioners, the  
 15 subtext of this profound justification for the SAPS killing  
 16 the miners is that the miners, according to them, acted  
 17 like possessed vermin, that they had to be destroyed like  
 18 vermin and that they were destroyed like vermin and this we  
 19 will submit cannot be the attitude of a police service in a  
 20 post-apartheid democratic South Africa.  
 21 Moreover, Mr Chairman, we will submit the police  
 22 version in our contention is contradicted by much of the  
 23 independent documentary evidence so far disclosed to the  
 24 commission, particularly post-mortem reports which is going  
 25 to be an area of contestation as to exactly what those

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1 reports mean. A typical post mortem report at our, in our  
 2 possession has the following conclusions, a total of eight  
 3 shotgun pellets entered the body 16 to the right lower  
 4 back, 2, one to the left lower back, 3, one to the back of  
 5 the head. In summary all the fatal projectile wounds were  
 6 sustained from the back. It seems to us therefore, that if  
 7 this evidence is sustained which we show on our reading of  
 8 the documents and we are the first who will concede that we  
 9 probably are wrong in some ways, but if it is shown to be  
 10 so that no less than 14 of the striking miners were shot  
 11 from behind, mainly in the back or in the back of the head,  
 12 that kind of evidence which we would submit is unlikely to  
 13 be contradicted, would then be wholly inconsistent with the  
 14 claims of necessity that the SAPS will seek to advance.  
 15 In the event we submit, this commission must  
 16 consider whether in those kind of circumstances, it would  
 17 be competent for anyone, let alone a policeman to shoot  
 18 someone in the back and then plead rationally that it was  
 19 an act of self defence. We will submit that it is not so.  
 20 Now whatever the truth of that tragic day, Chairman and  
 21 Commissioners, it cannot be that the SAPS could not have  
 22 acted differently. It could and should have brought the  
 23 day and indeed the gathering to an end peacefully and  
 24 without loss of life. That will be our contention. Indeed  
 25 we will contend that every step in our reading of the

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1 evidence, that the SAPS took leading up to and including  
 2 the 16th of August not only made the workers' deaths  
 3 foreseeable, in the end it made those deaths the most  
 4 likely result.  
 5 [15:21] We are the first to accept that in an orderly  
 6 society it is the duty of law enforcement agencies, as my  
 7 learned friend submitted, to disarm people who are armed,  
 8 dangerous in a decent society, that it is the task of the  
 9 South African Police Service to disperse people who are  
 10 gathered unlawfully in circumstances which bring discomfort  
 11 to others who have the right to that same area and space to  
 12 go on with their legitimates lives. But this, we will show  
 13 that whilst disarming and dispersing the miners may not  
 14 have been an illegitimate objective, something which we  
 15 accept. However, the manner and the timing of the SAPS  
 16 attempts to do so, inevitably invited injury and as it  
 17 sadly happened, death as well.  
 18 It appears that an attempt was made to negotiate  
 19 directly reasonably and meaningfully with the workers  
 20 gathered on the large koppie, known colloquially as the  
 21 mountain. Instead the commanders on the scene, which seems  
 22 to be admitted sent in National Union of Mineworkers and  
 23 Association of Mine Workers and Construction Union  
 24 officials to discuss their labour demands with the striking  
 25 workers. SAPS officers on the scene must have known by

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1 that time that the workers were not under the immediate  
 2 control of either NUM or AMCU and therefore to rely  
 3 exclusively on NUM or AMCU to negotiate with the miners was  
 4 wholly inappropriate. At that stage, we will submit the  
 5 situation was a public order issue and not a labour issue,  
 6 at that stage, and should have been treated in a manner  
 7 consistent with recognised best practice in public order  
 8 situations. Sadly, it was not treated in that way.

9 It appears, Chairman and Commissioner members,  
 10 that immediately prior to the killings, and this account  
 11 appears very clearly from the account given by Tim  
 12 Bruinders SC, it does appear that no direct order to  
 13 disperse was issued by SAPS to the striking miners, failing  
 14 which the Police would move in, disarm them and arrest  
 15 them, nor was there any ultimatum issued which required the  
 16 miners to lay down their weapons nor were the miners given  
 17 any opportunity to comply with any such order. In fact,  
 18 after what it describes as a show of force, which could  
 19 only have heightened tensions at the scene, the SAPS sought  
 20 to encircle and then kept the workers, a barbed wire fence  
 21 was placed around the mountain, blocking the miners' most  
 22 likely dispersal route, too the Inkameng Informal  
 23 Settlement, and it was this event, and this event alone, we  
 24 will submit, which precipitated the movement of the  
 25 strikers off the mountain. They had no choice but to move

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1 in numbers towards the police space and they were given  
 2 nowhere else to go.

3 In these circumstances, we submit death and  
 4 injury were depressingly predictable but less predictable  
 5 was the fact that many of these miners would be shot, as we  
 6 have claimed in the back and in the back of the head  
 7 apparently while trying to escape. We will contend that  
 8 the use of automatic weapons was in itself astonishing,  
 9 especially in the absence of any indication that the miners  
 10 possessed more than three firearms and in the absence of  
 11 any suggestion that they had threatened to use them.

12 Honourable Commission, it will be your unenviable  
 13 task to take into account the chilling allegations that are  
 14 made in documents and statements made to the independent  
 15 police investigative directorate, which contain accounts of  
 16 injured miners being shot dead by the Police whilst they  
 17 lay prostrate on the ground, in the immediate aftermath of  
 18 the first volley of Police fire. It is a matter for  
 19 comment that these harrowing accounts of what can only be  
 20 described as extrajudicial execution are more consistent  
 21 with the injuries disclosed in the post-mortem reports than  
 22 the explanations so far advanced by the Police. They  
 23 certainly do call for an answer, which we hope you will be  
 24 able to find. We will, with your leave, Mr Chairman, and  
 25 your Commissioners, seek to introduce and rely upon

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1 national and international instruments dealing with public  
 2 order, police and crowd control and we shall invite the  
 3 Commission to find that the SAPS conduct on 16 August fell  
 4 far short of these standards and in many ways blatantly  
 5 violated those standards. We will also ask you for leave  
 6 to introduce expert evidence relating to the miners' fatal  
 7 injuries and to the inappropriateness of the SAPS's  
 8 approach to the gathering on the mountain, because in the  
 9 end, our submission will be that the timing, the manner of  
 10 SAPS's response to the gathering on the mountain was or  
 11 were 1, aggressive, 2, misguided, 3, disproportionate, 4,  
 12 unreasonable, and 5, unlawful.

13 Mr Chairman, and honourable members of the  
 14 Commission, I heard my learned friend and my most respected  
 15 leader of Lonmin saying that this is not a time to  
 16 apportion blame or point fingers, I think that's how he put  
 17 it. But please allow me to say that it is our contention  
 18 that whilst the primary responsibility lies with SAPS  
 19 insofar as it is agreed that they are the ones who were  
 20 responsible for the deaths on that day, we believe Lonmin  
 21 must also share the blame for the following reasons,  
 22 firstly, if response to the rock drill operators called  
 23 RDOs at the centre of the strike, ranged from feckless to  
 24 the imperious, finally Lonmin abrogated all responsibility  
 25 to the National Government.

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1 Prior to June 2012, Lonmin's response to the  
 2 RDO's apparently well-founded complaints of  
 3 disproportionately low pay was to hold them to a collective  
 4 agreement negotiated with the NUM. Lonmin insisted on  
 5 engaging with the RDOs within the existing collective  
 6 bargaining structures, which is laudable. In June and July  
 7 2012 however, Lonmin changed tack and openly engaged with  
 8 the RDOs outside Union structures, as we all know now on 3rd  
 9 of August it offered the RDOs a modest increase in some of  
 10 their allowances. When the RDOs rejected this offer,  
 11 Lonmin accused them of acting outside Union structures and  
 12 refused to engage with them, remarkably self serving,  
 13 inasmuch as Lonmin had negotiated with the RDOs outside  
 14 existing Union structures and then had dumped them when  
 15 they did not accept this offer.

16 It seems fairly established, as some commentators  
 17 before me have indicated, that the evidence would show  
 18 fairly overwhelmingly that all the striking RDOs said they  
 19 wanted as a precondition to dispersal from the mountain was  
 20 a meeting with Lonmin's management to discuss their  
 21 grievances, and we shall, if necessary, lead evidence that  
 22 the miners repeatedly assured their families that all they  
 23 were waiting for was for Lonmin to arrange a meeting with  
 24 the strike committee. Lonmin consistently refused such a  
 25 meeting as Adv Bruinders said very clearly step by step,

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1 even when it became obviously that substantial violence  
 2 might ensue if that meeting didn't take place. We submit  
 3 and we will show in evidence, that instead it instigated  
 4 and escalated an excessive security response. It's letters  
 5 to the Minister of Minerals and Energy are appalling. In  
 6 one of them for example, dated the 13th of August 2010, when  
 7 Chief Commercial Officer, called for the State, and I  
 8 quote, "to bring its might to bear using resources at its  
 9 disposal to resolutely bring the situation under control."  
 10 Subsequent events give that letter an inflection that is as  
 11 sinister as it is tragic.

12 Whether or not a meeting with Lonmin would have  
 13 averted the deaths of the 16th of August, we may never know,  
 14 but Lonmin's failure to consider meeting with the  
 15 representatives of the striking workers –

16 [15:41] CHAIRPERSON: The interpreter has asked  
 17 us to adjourn for a few minutes, they want to get – yes, he  
 18 said for a few minutes. No, we don't have to adjourn then,  
 19 just another interpreter who's going to take over for a few  
 20 minutes. Yes, please proceed, Mr Ntsebeza, we've now got a  
 21 new interpreter.

22 MR NTSEBEZA SC: Yes, thank you very  
 23 much, Mr Chair. I was in paragraph 27 of my written  
 24 submissions. Mr Chairman and honourable commissioners, we  
 25 submit that whether or not the meeting with Lonmin would

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1 have averted the deaths of the 16th of August, that's now a  
 2 matter of conjecture, but what we do say is that Lonmin's  
 3 failure to consider meeting with representatives of the  
 4 striking workers, was a tragically lost opportunity in the  
 5 days leading up to the massacre. We contend that Lonmin  
 6 was patently more interested in crushing the strike than in  
 7 understanding its causes. There's another changing of the  
 8 guard, I notice.

9 CHAIRPERSON: Thanks.

10 MR NTSEBEZA SC: Chairman and  
 11 commissioners, we are strongly making the submission we  
 12 have just made, because after the massacre, Lonmin did  
 13 agree to negotiate with the community of representatives  
 14 elected from among the striking workers on the mountain.  
 15 The representatives travelled to Rustenburg, where they  
 16 negotiated with Lonmin management and ultimately agreed the  
 17 wage increase that ended the strike.

18 What ultimately I'm going to show is that a  
 19 revolution was always possible provided that Lonmin was  
 20 willing to engage consistently and fairly with workers, and  
 21 it is tragically most unfortunate that it had to take the  
 22 terrible events of the 16th of August for that to be pressed  
 23 home to Lonmin.

24 We will respectfully seek your permission, Mr  
 25 Chairman and Commissioners, to introduce evidence from an

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1 expert on socio-economic circumstances underlying the  
 2 mining industry. His name is Mr Gavin Hartford, and this  
 3 we'll do in an attempt to show the root causes of the  
 4 strike as the expert sees it.

5 The expert will say, amongst others, that at the  
 6 heart of the Marikana strike lies a economic and social  
 7 crisis in the mining communities. That at the root of the  
 8 crisis is the migrant labour system, which can be traced to  
 9 the 1880's and which sustained the economic base of the  
 10 apartheid regime and has remained substantially unreformed  
 11 in the 18 years since the advent of a democratic South  
 12 Africa. On a lighter note, talking about the olden days,  
 13 somebody pointed to me the colour code of the flag behind  
 14 yourselves, which strongly reminds oneself of the Vier  
 15 kleur, which was the Republic of South Africa's flag, as it  
 16 then was. So I think this is the appropriate time to draw  
 17 contrast that it does appear that the more things change  
 18 however they still remain the same.

19 But on a more serious note, coming back to the  
 20 topic, I felt I could resist that one, because this year  
 21 that migrant labour system has remained substantially  
 22 unreformed in the 18 years since the advent of democracy,  
 23 and we point out that all our clients are sustained by  
 24 migrant labour, and that some of the other miners killed on  
 25 16 August, are migrant labourers from Lesotho and

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1 Swaziland, exactly as it was pre-1994.

2 It is therefore to say, if you allow us to call  
 3 him, Mr Chair and Commissioners, that the specific  
 4 migratory and housing conditions of migrants have led to a  
 5 double economic burden of sustaining households, both in  
 6 the rural family settings and homesteads, and immediately  
 7 adjacent to the mines. That collective bargaining  
 8 processes and institutions have failed dismally to address  
 9 the causes of discontent in mine labouring communities, and  
 10 that mine company management is complicit in this failure.

11 He will say that solving the underlying causes of  
 12 labour unrest at Marikana, require radical reaping of the  
 13 future of migrant labour of the collective bargaining  
 14 system and of manager-employee relations at the mine level.  
 15 And he will say that there is an urgent need to promote  
 16 greater freedom of association at the mines, like Lonmin,  
 17 as the first step towards restoring the legitimacy of the  
 18 collective bargaining system.

19 What he will say is that what happened on the 16th  
 20 of August was not the unfortunate result of a dispute  
 21 between two labour unions. Indeed attempts by some to  
 22 reduce the massacre to failings within the NUM or AMCU, are  
 23 either unfortunately misguided or mischievous or both,  
 24 because the evidence is that neither union had much control  
 25 over the striking workers or the committee that represented

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1 them. NUM and AMCU members were shot in more of less equal  
 2 measure.  
 3 Through that evidence, and afterwards, we would  
 4 hope to submit to you, Commissioners, that the massacre was  
 5 the grimly predictable result of the deeply entrenched  
 6 poverty in which migrant labourers are held. An  
 7 undemocratic workplace, the winner take all kind of  
 8 structure of our unions and our 50 plus one, absolutely  
 9 undemocratic, Broken collective bargaining procedures and  
 10 institutions, high-handed mine management and a militarised  
 11 - unfortunately, apparently from these events, trigger-  
 12 happy police force. It would be unfortunate indeed and  
 13 would tragically obscure the truth our clients seek, where  
 14 either the NUM or AMCU to be made to take responsibility  
 15 for far-reaching structural and policy failings which  
 16 throws South Africa's social and economic crisis into sharp  
 17 review.  
 18 Chairman, Commissioners, let me first say in  
 19 making my final remarks about what is in paragraph 35 of my  
 20 statement, that let me first thank the efforts that have  
 21 been made to get the families of the deceased to this  
 22 gathering. I have met them, Mr Chairman, and every single  
 23 one of them has indicated that they wanted to be here, they  
 24 want to be here, because they believe the Commission is  
 25 geared to establish, if not for them, but for everybody who

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1 cares to watch the proceedings of this Commission, an  
 2 indication, if not the entire truth, of what happened. For  
 3 them, even the fact that they are grieving does not  
 4 subtract from their desire to want to know, and for them,  
 5 if the facts are such that they are uncomfortable for them  
 6 to know, then they want an entitlement to be here to hear  
 7 it for themselves, as you try the difficult task of putting  
 8 before all of us and those who are here, the facts, and you  
 9 as Commission directing the manner in which we should  
 10 conduct ourselves in an endeavour to unlock the truth, and  
 11 hopefully to engender that spirit of reconciliation that  
 12 was talked about at the beginning of these proceedings.  
 13 However we must first get at the truth. The  
 14 efforts that has been made over the last 14 days, are  
 15 applauded, but they have not gone far enough, and it is my  
 16 opportunity to state, in the spirit of seeking to get it  
 17 done correctly all the time, what has not happened, which  
 18 should have happened.  
 19 By and large, members of the family are here.  
 20 Most of them coming from the Eastern Cape, but there are  
 21 two examples which I need to put before you, Sir, and  
 22 members of the Commission Zameka Mungu who is a relative of  
 23 the deceased, Jackson Lehura from Lang Fletcher, for a  
 24 reason which I suppose the Commission will investigate, has  
 25 had to pay her way to be here.

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1 [16:01] And it appears that it is because she either was  
 2 not contactable or she was not contacted. And to smoothen  
 3 this, we would request whoever is making these arrangements  
 4 to liaise with my attorneys all the time, because my  
 5 attorneys are in constant contact with the people whom we  
 6 represent. So that is where we are at. Secondly –  
 7 CHAIRPERSON: May I interrupt you Sir?  
 8 That's a fair request and we will see to it that it's  
 9 complied with.  
 10 MR NTSEBEZA SC: Thank you, Mr  
 11 Commissioner. Further, once again I would like the members  
 12 of the Commission responsible for making these arrangements  
 13 to liaise with my attorneys and establish what the glitches  
 14 were for Gumuza, on behalf Yona family, and Ngweyi, N-G-W-  
 15 E-Y-I, Gumuza, G-U-M-U-Z-A, Yona is Y-O-N-A. Ngweyi, on  
 16 behalf of Michael Ngweyi, why or what the glitches were  
 17 that nobody came to pick Mrs Ngweyi on behalf of Michael  
 18 Ngweyi, even though arrangements had been made that she  
 19 would be picked up.  
 20 I am told by my learned friend that there is  
 21 Qwelane, Q\_W\_E – oh Gwelani, G-W-E-L-A-N-I, from  
 22 Lusikisiki, who apparently also would want to be here  
 23 because one of the people close to him, is one of those who  
 24 died. It is work-in-progress. It's something that can be  
 25 dealt with, and I'm merely placing it on record.

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1 The one grievance that clearly is weighing  
 2 heavily with the families, is the fact that it is only one  
 3 family, or one person per family, who can be assisted to be  
 4 here. We had made a request that the state or the  
 5 Department of Social Development to take it out the  
 6 parameters of controversy, the Department of Social  
 7 Development should make available assistance for at least  
 8 two persons per family.  
 9 There are practical reasons for this, and may I  
 10 just indicate that the tradition is that widows do not  
 11 travel, or travel with the same kind of freedom that we, in  
 12 our nuclear families have, even if there's been a death  
 13 that has befallen the family. There usually is a  
 14 requirement, traditional or other, you may think about  
 15 that, and there'll be a debate about whether this is so,  
 16 but the fact of the matter is that there are circumstances  
 17 like those where, at least if the widow is going to be  
 18 travelling somebody must assist her.  
 19 Now, this requirement that one person per family  
 20 must travel, has led to an untenable situation where,  
 21 because of patriarchy, that decision being left with the  
 22 families, men has selected men and they have left grieving  
 23 widows at home, and yet it can't be otherwise. And without  
 24 being childish about it, Mr Chairman and honourable members  
 25 of the Commission, it does not sit well for a plea to be

<p style="text-align: right;">Page 200</p> <p>1 made that the resources are not limitless.</p> <p>2 I certainly appreciate that I'm a taxpayer and I</p> <p>3 would like to make sure that my tax money goes to</p> <p>4 appropriate causes, but there are horses for courses, and I</p> <p>5 want to say and make this submission as a plea, and make it</p> <p>6 as politely as I can, it does not sit well with us that</p> <p>7 families must be told that there are no funds, and there</p> <p>8 may well be no funds, when, as I say in the submission,</p> <p>9 there does not seem to be any the amount of – there does</p> <p>10 not seem to any amount of restraint in the employment of</p> <p>11 legal representatives on behalf of the state, and I can</p> <p>12 then imagine, from the volume of the work, that this is</p> <p>13 justified. I can understand that, and I'm not making this</p> <p>14 thing facetiously, the submission, but to be told that</p> <p>15 because we don't want to misuse your taxpayer's money by</p> <p>16 allowing a minimum of two per family to attend these</p> <p>17 proceedings, it is just disproportionate on a scale of</p> <p>18 things. This is an occasion where we, as a country, must</p> <p>19 redeem ourselves. It will be of no use, in our humble and</p> <p>20 respectful submission if the families get out of this</p> <p>21 entire exercise, which was set up for an objective, that</p> <p>22 they get away from it feeling that they did not get an</p> <p>23 equal opportunity to be part and parcel of it.</p> <p>24 I know the argument has been made that it is not</p> <p>25 even compulsory for the state or the government to make the</p>	<p style="text-align: right;">Page 202</p> <p>1 worker is killed, is for the job that has been left vacant</p> <p>2 to be offered to a family member. So she's now preparing</p> <p>3 to leave her five children. Tsepiso, 17 years. Nowili, 13</p> <p>4 years. Sizwe, 12 years. Xolile, 9 years. Noxolo, 3</p> <p>5 years. She will leave those children to come to work at</p> <p>6 Lonmin in terms of that tradition. Those children, in a</p> <p>7 way that they mean to sharp relief an intersection between</p> <p>8 the [inaudible] system and the rights-based society where</p> <p>9 socio-economic rights are an ideal that is striven for.</p> <p>10 Those children have lost their father to the police,</p> <p>11 insofar as it is un-refuted that his father was killed by</p> <p>12 the police, and they are now leaving their mother to the</p> <p>13 migrant labour system. They now require a searching</p> <p>14 examination from this commission and a full explanation of</p> <p>15 the circumstances which press on them. The sad prospect of</p> <p>16 a parentless childhood, things that you and I take for</p> <p>17 granted. This society must promise us a better society</p> <p>18 than the previous one. Your wisdom, the three of you, will</p> <p>19 be sought in the search for an answer to those conundrums.</p> <p>20 Thank you, Mr Chair, thank you, Commissioner.</p> <p>21 CHAIRPERSON: Thank you, Mr Ntsebeza,</p> <p>22 we'll carry on tomorrow with the opening addresses. We</p> <p>23 will adjourn now for the reasons I explained earlier until</p> <p>24 9 o'clock tomorrow morning.</p> <p>25 [INQUIRY ADJOURNED]</p>
<p style="text-align: right;">Page 201</p> <p>1 provisions that it has made, for which we are thankful.</p> <p>2 For instance, Mr Chairman, before I step down, it is none</p> <p>3 to clear what is really happening to the families today.</p> <p>4 After today, they will be here. They know that we are not</p> <p>5 sitting from Wednesday. The question is whether that they</p> <p>6 are going to be here between Wednesday and Monday when we</p> <p>7 resume, or whether they will go back and then be brought</p> <p>8 up. It is even none to clear what is meant by saying</p> <p>9 families will be here as and when they are needed.</p> <p>10 I just want to put this before you, Mr Chairman</p> <p>11 and members of the Commission, because it is your</p> <p>12 commission, and whenever you are advised of what is or is</p> <p>13 not happening, it is important that you have had the</p> <p>14 benefit of our submissions. We really would like this</p> <p>15 matter of the families to be looked at. We need some</p> <p>16 certainty. How long are they going to be here? Are there</p> <p>17 arrangements in place that are going to be made? And my</p> <p>18 attorneys, I offer, will always be there to liaise whoever</p> <p>19 is in the commission to facilitate the bringing of the</p> <p>20 families.</p> <p>21 As I end, Mr Chairman, I bring the attention,</p> <p>22 your attention, to a statement which tells the story of</p> <p>23 Zameka Mungu, Z-A-M-E-K-A, M-U-N-G-U. She lost her husband</p> <p>24 on the 16th of August. The events we will be focussing in</p> <p>25 the next while. She feels that the custom at Lonmin when a</p>	



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