

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 297

11 NOVEMBER 2014

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64 10th Avenue, Highlands North, Johannesburg
P O Box 721, Highlands North, 2037
Tel: 011-440-3647 Fax: 011-440-9119 Cell: 083 273-5335
E-mail: realtime@mweb.co.za
Web Address: <http://www.realtimesa.co.za>



<p style="text-align: right;">Page 39072</p> <p>1 [PROCEEDINGS ON 11 NOVEMBER 2014] 2 [09:09] CHAIRPERSON: The Commission resumes. I 3 understand, well Mr Ramphele you're continuing, but I 4 received a request before we started, which is one of the 5 reasons why we're coming now, to give you an extension of 6 an extra 10 minutes because there's a point that you hadn't 7 begun to deal with earlier which you think you should, you 8 have to deal with, and I indicated that I'd give you those 9 10 minutes. Please, no more than that. 10 MR RAMPHELE: Thank you, Chair. Thank 11 you very much. Chair, we're still responding to the issue 12 of the duty of care of the employer and the proposition 13 that has been put forward by Lonmin that in these 14 circumstances the principal enunciated in this case should 15 not apply and we say that in relation to this case what the 16 court held, and that is you, Chair, you said what is 17 important – and you referred to an Afrikaans judgment, 18 Minister van Polisie v Ewels – what you considered 19 important "is die regsoortuiging van die gemeenskap, wat 20 die gemeenskap verlang dat die late as onregmatig beskou." 21 My trying to translate that would be that you're looking at 22 the legal conviction of the public and what they yearn for, 23 that the omission be regarded as unlawful. So in these 24 circumstances I think that if one takes that into account, 25 but not only that, after 1994 we operate in a</p>	<p style="text-align: right;">Page 39074</p> <p>1 looks at the damages that one has to pay in terms of loss 2 is 200 000. The proposition is that because we are going 3 to lose two billion we have a very reasonable consideration 4 that says we can forego 200 000 and we can forego actually 5 a number of 200 000s because otherwise we'll lose two 6 billion, and I'm saying it cannot be a consideration that 7 is justified to risk a right to life. So even with the 8 propositions that have been put forward, Lonmin would still 9 not be justified to risk the right to life and I mean most 10 recently we've had the most – as an example, the most, what 11 one can call a world calamity in the form of Ebola, and we 12 know how it's resolved; you quarantine it. If the 3000 13 strikers were as dangerous as that then there was a 14 possibility to actually just quarantine the problem and I 15 think the issue of taking the right to life as opposed to 16 isolating the problem was actually not considered. 17 CHAIRPERSON: I don't know that it's 18 right in approaching this matter to consider that there 19 would be 3000 strikers, that according to the evidence is 20 something that had never happened. You know 3000 strikers 21 armed, dangerous mood, according to the evidence that had 22 never happened before and they argue that it was not 23 reasonably foreseeable, but prima facie I think you're on 24 stronger ground when you say that if the Lonmin board was 25 faced with a business decision, do we accede to the request</p>
<p style="text-align: right;">Page 39073</p> <p>1 constitutional State where the right to life if has to be 2 limited consciously one has to say does the limitation of 3 the right actually pass the constitutional muster, that is 4 the limitation clause of the Constitution, and I don't 5 think that the risk, the conscious risk of lives of the 6 employees of Lonmin actually pass the constitutional 7 muster. 8 But Lonmin makes a very interesting proposition. 9 The proposition is that on financial grounds you can take a 10 conscious decision to limit the right to life, or because 11 of ventilation in a shaft you can actually risk the right 12 to life, or because there may be a methane explosion you 13 may limit the right to life. Now constitutional 14 interpretation has to be taken into account. Can a right 15 to life be consciously limited in a commercial setting 16 because there is possibility of an explosion, or there is a 17 problem with ventilation, or there is financial 18 consideration. 19 But what interests me is actually the financial 20 consideration because if we take this proposition further 21 then there is a limit to which this Commission has to make 22 some sort of determination. In a commercial setting, how 23 much is worthy of a risk to a right to life? Say for 24 argument sake the closing of a shaft was going to cost two 25 billion and the right to life of Langa or Mabebe, if one</p>	<p style="text-align: right;">Page 39075</p> <p>1 from our security people to provide them with an armoured 2 vehicle and equipment which will protect their lives in 3 circumstances where their lives may be threatened, it is a 4 very difficult proposition to justify, people say well 5 never mind, we'll take the chance that they'll be killed 6 but we'll save money in the process. If that's the way 7 that the matter was approached there may well be substance 8 in your contention that that wasn't a proper approach for 9 the Lonmin board to take. I don't think you can take 10 3000 – 11 MR RAMPHELE: Yes. 12 CHAIRPERSON: - armed strikers into 13 account because that is not something, to be fair, that 14 they could have foreseen, reasonably have foreseen at the 15 time they made that decision. Anyway, that's just a prima 16 facie response to what you say. If you disagree with the 17 prima facie point I put to you then obviously you must put 18 me right and show me why I'm on the wrong track at the 19 moment. 20 MR RAMPHELE: Well, let me actually make 21 a point in relation to that, that I was going to make, 22 Chair. There is a proposition that has been put before you 23 that actually the armoured vehicle would not have made any 24 difference, but we have evidence before the Commission of, 25 I think it's Mr Louw who was involved in the skirmish with</p>

<p style="text-align: right;">Page 39076</p> <p>1 the strikers, managed to get out with a soft-skin vehicle 2 and then tried to go back in to rescue Mabelane and Fundi, 3 now this time with an armoured vehicle, and there's 4 evidence before the Commission that he tried to leave the 5 armoured vehicle. The strikers attacked him and because he 6 managed to go back into the armoured vehicle his life was 7 saved. So that proposition I agree with that the decision 8 not to purchase armoured vehicle is a decision that was 9 actually putting a lot of vulnerability on the security 10 establishment, and armoured vehicle if purchased would have 11 made a difference, and in this particular case the company 12 did not take reasonable steps to heed the call for armoured 13 vehicle.</p> <p>14 CHAIRPERSON: In the light of the request 15 they'd received from their own security people, which was 16 motivated, they can't be heard to say that injuries to or 17 even death of their security people was not reasonably 18 foreseeable when they made the decision they made.</p> <p>19 MR RAMPHELE: Yes. Thank you, Chair. 20 Now there is another issue that Lonmin raises and that is 21 the issue of Mr Mabelane. Again this issue is an issue 22 that the family is very concerned about because it is an 23 issue where Lonmin is saying Mabelane was actually wrong 24 and that's why he died. Now firstly we have a situation 25 where Mabelane is not here to respond to that. The facts</p>	<p style="text-align: right;">Page 39078</p> <p>1 CHAIRPERSON: Is that not so? 2 MR RAMPHELE: Okay, thank you, Chair. 3 The first issue is, and that is it relates to the duty of 4 the employer. Does the employer send an employee that is 5 not trained to a situation that Mabelane was sent into? 6 And if one looks at this Media24 case, that if one 7 considers even international principles of law, like for 8 instance I think in my argument I may have mentioned some 9 of the practices where especially you have that UN will 10 send their own staff to very dangerous situations and 11 because of the dangerous situations there is an 12 international principle that is accepted that it is the 13 employer's duty to investigate the danger of the situation 14 in which they send their employee. It is not the 15 employee's obligation. It is the employer's obligation to 16 investigate the degree of danger into which they send their 17 employee, and –</p> <p>18 CHAIRPERSON: I'm sorry, wasn't the 19 evidence that Lonmin said to their security people don't 20 endanger your own lives. You must obviously do what you 21 have to do, but don't do so in a manner which endangers 22 your own life. Wasn't that the evidence? 23 MR RAMPHELE: They may have said that, 24 but we also have to consider exactly when that was said. 25 That was said a day or two before the 12th of August and</p>
<p style="text-align: right;">Page 39077</p> <p>1 that we have is that Mabelane received training of three 2 months of about 19 courses and in the 19 courses there was 3 crowd management. That is the formal training he received.</p> <p>4 CHAIRPERSON: Isn't there some evidence – 5 you can put me right if I'm wrong – isn't there some 6 evidence that his colleagues who were actually involved on 7 the scene that day didn't agree with what he was doing; 8 they considered it prudent to retreat and he didn't do so. 9 He was obviously very courageous in doing what he did, but 10 the impression we get from the evidence – whether it's the 11 correct impression is something you must deal with if you 12 have to, but that he was actually over-courageous, that he 13 was in fact overconfident that he could deal with the 14 situation when the other people thought that the situation 15 was so dangerous that he should have retreated as well.</p> <p>16 MR RAMPHELE: Yes. We'll get to that.</p> <p>17 CHAIRPERSON: I'm reminded the other 18 colleagues said they'd never seen him so firm about a 19 decision of that kind before. These are all factors we 20 have to bear in mind, but –</p> <p>21 MR RAMPHELE: Yes.</p> <p>22 CHAIRPERSON: - and those, that evidence 23 would tend to support the submission that Lonmin has put 24 up.</p> <p>25 MR RAMPHELE: Yes.</p>	<p style="text-align: right;">Page 39079</p> <p>1 this was said as some form of training, according to Mr 2 Sinclair, under cross-examination by Advocate Pillay. 3 Clearly if that has to be considered as training, and he 4 was talking in the context of how cars should be parked in 5 a situation like that. The question is now you have 3000 6 strikers that are angry, that have injured people. You 7 have had a 10-minute session informing the commander as a 8 form of training how they should conduct themselves in that 9 situation. Can that cause training? And my proposition to 10 you, Chair, is that it would not be adequate, especially 11 because the investigation that the employer has to do first 12 is what is the situation I'm sending this employee to. I'm 13 sending the employee to a situation where they are probably 14 carrying some guns with birdshots and the crowd has clearly 15 demonstrate that they have been bolstered by the non- 16 visibility of policing and they just move into any 17 situation and they have even attacked the – in this 18 particular case before Mabelane was attacked, Louw and 19 Vorster were attacked. The armoured vehicle had to vacate 20 from the area. Communication was sent that the ambulance 21 should not go into the area. So there was knowledge of the 22 danger that Mabelane and his team would have to face, 23 especially in view of the training that Mabelane had, and 24 we say that when we judge the duty of the employer we don't 25 judge it according to a reasonable man or reasonable</p>

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1 employer test, especially if the danger that is being
 2 posed, or the right that is at stake is the right to life.
 3 In this particular case –
 4 CHAIRPERSON: I'm sorry, I don't
 5 understand that submission. You say you don't judge it by
 6 the standards of a reasonable man because there's a danger
 7 of death.
 8 MR RAMPHELE: No, I'd –
 9 CHAIRPERSON: But surely the reasonable
 10 man would act appropriately if there was a danger of death,
 11 he would be more vigilant, take more trouble to ensure that
 12 the fatal consequences that might otherwise flow don't
 13 flow. The standard of the reasonable man is dependent upon
 14 the circumstances. Isn't that so?
 15 MR RAMPHELE: Well, the standard that
 16 we're talking about is not the standard of Mabelane. The
 17 case talks about the standard that one judges the employer
 18 and the standard that we judge the employer with is not
 19 confined to just the reasonable test. It is confined to
 20 the right at stake, and if the right at stake is the right
 21 to life and you knowingly put your employee in a situation
 22 of that nature, then we don't judge the employee. And I've
 23 mentioned the, actually it even, I think case laws in
 24 Europe and in other international jurisdictions have held
 25 that, that not the employee is judged. The duty rests with

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1 the employer. The employer must investigate the extent of
 2 the danger. When an employer sends an employee into a
 3 dangerous situation then it is the employer, not the
 4 employee that is judged, it is the employer that is judged.
 5 So the employer does not say to the employee take care of
 6 yourself and send them into a dangerous situation where
 7 their lives may be lost and then say in response well, he
 8 was supposed to act reasonably; he didn't. I said he said
 9 run away; he didn't. That is not the test. The test is
 10 when you send the employee out, did you take reasonable
 11 steps? And in this particular case with all the
 12 facilities, the equipment, the technology that Lonmin had,
 13 with all the intelligence, with realisation of the danger,
 14 did they actually take reasonable care to make sure that
 15 Mabelane's life was not in danger?
 16 Chair, I will move on to two last points –
 17 CHAIRPERSON: I'm afraid you won't be
 18 able to because your time is up. I gave you 10 minutes
 19 initially, I gave you an extra 10 –
 20 MR RAMPHELE: But you have been
 21 interrupting me, Chair.
 22 CHAIRPERSON: I'm sorry, but I didn't
 23 interrupt you, I put questions to you so that you could
 24 answer the difficulties that I had, prima facie
 25 difficulties –

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1 MR RAMPHELE: But Chair, I have to make
 2 the last point.
 3 CHAIRPERSON: Well, make it in one
 4 minute. You submitted written heads which we have read and
 5 will read again. Make the point, just state the point in
 6 one or two sentences and then I'm afraid you've got to
 7 stop.
 8 MR RAMPHELE: Then Chair, please don't
 9 interrupt my one minute.
 10 CHAIRPERSON: There are other people – I
 11 haven't started your one minute yet. There are other
 12 people waiting who also need time to present their case for
 13 their clients. Your minute starts now.
 14 [09:29] MR RAMPHELE: Chair, I was going to press
 15 you at the end, but I am not sure now.
 16 CHAIRPERSON: I will take this under
 17 punishment.
 18 MR RAMPHELE: Marikana is a test of
 19 constitutional values of the country. You're dealing with
 20 a situation where you have a community in mines that is
 21 confined to a very small area. We've heard that Lonmin
 22 says that you have about 28 000 employees confined in a
 23 very small space. This massacre has affected these many
 24 that are in the small space. Some of the illustrations
 25 thereof is what happened in the first inspection in loco.

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1 If you look at our submissions we propose a restoration
 2 fund because this is a Commission that has to also look at
 3 restoration and that restoration must be and this is
 4 practise in Lonmin, Mrs Langa's child may actually go back
 5 and work where the father used to work or one of the
 6 striker's child may also do the same. The question is if
 7 we leave the situation as is don't we perpetuate the gap
 8 that has been there between the families and the request
 9 for consideration and recommendation of a restoration fund
 10 is to have all the stakeholders trying to contribute to a
 11 situation where this unfortunate incident does not leave
 12 communities in Marikana having this between them, the
 13 divisions between them. So we believe that if say all the
 14 stakeholders including Lonmin and trade unions can
 15 contribute not only a fund, but a process of restoring
 16 relations between families because I am going to be – I've
 17 spoken to my clients on the issue of – because life has
 18 been lost and our constitutional values say that we must
 19 try and have communities that live together including with
 20 the employer, including the unions because that is what
 21 plural – that difficult English word, but that is what
 22 different views how they should co-exist in a
 23 constitutional democracy together. And we believe that if
 24 that fund is created then we will be able to go beyond this
 25 Commission with some sort of confidence that we will not

<p style="text-align: right;">Page 39084</p> <p>1 have another Marikana. And my families in the spirit of 2 ubuntu would also - because we've not done that and I think 3 Mr Mpofu has actually done that and Mr Mathunjwa has done 4 that, we pass our condolences to those families that have 5 lost their loved ones. We know that the strikers some of 6 them were involved in the killing our own families, but 7 we're saying that the law should take its course, we all 8 agree to that, the police must investigate, but beyond that 9 these families have to live together. And the Commission 10 is an opportunity to make sure that that happens. So that 11 is where we then believe that maybe if the Chair doesn't 12 want to give us one more minute we'll leave it.</p> <p>13 CHAIRPERSON: I've given you 14 substantially more than one more minute, but the point you 15 made was a point of substance, I'm glad you made it. Thank 16 you very much. Ms Barnes.</p> <p>17 MS BARNES: Yes thank you. Chair, 18 Commissioners, my learned friend, Mr Gotz and I will be 19 sharing the arguments on behalf of AMCU. I will be 20 addressing issues relating to AMCU and Lonmin and Mr Gotz 21 will address you on issues related to NUM and the police. 22 We will each address you for about an hour and then we will 23 hand over to Mr Ntsebeza who will present the argument on 24 behalf of the families. Chair and Commissioners, we have 25 prepared a document which records some of our key oral</p>	<p style="text-align: right;">Page 39086</p> <p>1 on the basis of accomplice liability. Commencing then, 2 Chair, Commissioners, with AMCU.</p> <p>3 CHAIRPERSON: Before you carry on, I'm 4 afraid the problem we had yesterday has recurred. There 5 are some headphones that are on too loud and we can hear 6 the voice all the time and it's very disturbing. Please 7 they must be turned off because alternatively the person 8 concerned who's got them must ensure that they're not 9 audible generally in the chamber because it's very 10 difficult to follow what Ms Barnes has to say if there's 11 another voice going on in the background. I can still hear 12 it. Is there anyone who hasn't got his or her earphones on 13 which is what we can hear? Or is it just a question of the 14 volume being turned up too loudly? I think we'll adjourn 15 for a couple of minutes so the problem can be sorted out.</p> <p>16 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>17 [09:43] MS BARNES: Yes, thank you very much. 18 Chair, Commissioners, when this Commission commenced a 19 little over two years ago now, AMCU was the villain in this 20 story. We heard that AMCU was the militant new union that 21 was engaged in a violent turf war with NUM at AMCU. We 22 heard that while it refused to admit it, AMCU was in fact 23 behind the protected strike. We were told that the strike 24 reeks of AMCU's involvement by Mr Russo-Bello of Lonmin. 25 Mr Mokwena told General Mbombo, the Provincial Commissioner</p>
<p style="text-align: right;">Page 39085</p> <p>1 submissions which we would like to hand up after our 2 argument.</p> <p>3 CHAIRPERSON: Thank you that will be very 4 helpful.</p> <p>5 MS BARNES: If I might then give you a 6 road map of what I intend to have in my oral address. I 7 will begin with AMCU and I will begin by making some 8 introductory remarks about AMCU's conduct generally in the 9 week of the 9th to the 16th of August 2012. Thereafter I 10 will deal with what appears to be the only remaining 11 allegation of any materiality against AMCU and that is the 12 allegation that AMCU was seeking to exploit the situation 13 at Marikana in order to get bargaining rights at Lonmin. 14 Finally then in relation to AMCU I will deal with a new 15 submission which has emerged in the heads of argument of 16 our learned friend, Mr Gumbi to the effect that AMCU is 17 liable in law for damages caused by its members during the 18 strike. That then deals with AMCU I will then move on to 19 make some submissions in relation to Lonmin, there I will 20 make submissions on Lonmin's claim that the striker's 21 demand for R12 500 was not negotiable and then finally I 22 will address you on the basis for our submission that 23 there's a prima facie case or prima facie grounds for 24 finding that Lonmin is criminally responsible for the 25 deaths and injuries committed by SAPS on the 16th of August</p>	<p style="text-align: right;">Page 39087</p> <p>1 of the North West Province that Lonmin could prove that 2 AMCU was in fact behind the strike. All of this has been 3 shown to be false.</p> <p>4 CHAIRPERSON: We never got that tape 5 recording that was to be the proof. That's never been 6 explained to us either.</p> <p>7 MS BARNES: Indeed. It never 8 materialised.</p> <p>9 CHAIRPERSON: In fact you were entitled 10 to remind us.</p> <p>11 MS BARNES: Indeed, it's never 12 materialised and of course Mr Mokwena readily admitted that 13 he'd never in fact heard it himself. We haven't heard 14 evidence from anybody who actually did hear it. We submit 15 that whether it was ever in fact in existence is 16 questionable. The evidence that has been led in this 17 Commission has established, we submit, that there's no 18 basis for any suggestion that AMCU was behind either the 19 demand for R12 500 or the unprotected strike or the 20 violence that followed it, and we note Chair and 21 Commissioners –</p> <p>22 CHAIRPERSON: I don't want to interrupt 23 you unduly, but am I correct in saying it was never put to 24 Mr Mathunjwa when he gave evidence, by anybody that AMCU 25 was responsible for what had happened?</p>

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1 MS BARNES: That is quite correct, Chair.
 2 CHAIRPERSON: That's obviously quite an
 3 important fact in itself, is it not?
 4 MS BARNES: It is indeed. And the
 5 allegations in fact, in fact there were rumours and there
 6 was a lot of reportage in the media to the effect that AMCU
 7 was in fact behind the strike, but that the allegations
 8 came from Lonmin rather belatedly. We dealt with that in
 9 our heads of argument. The direct allegations, as you
 10 correctly point out Chair, were not put to Mr Mathunjwa but
 11 appeared in detail for the first time in Mr Mokwena's
 12 supplementary statement and it appears that he was – that
 13 arose as a result of the transcript of the conversation
 14 between him and General Mbombo in which those allegations
 15 have been made and so because the transcript surfaced it
 16 appeared that it was not necessary to repeat – to deal with
 17 the matter and make the allegations in any supplementary
 18 statement. But he of course retracted all allegations that
 19 AMCU had been behind the strike. And we note, Chair and
 20 Commissioners, that the evidence leaders come to the same
 21 conclusion in their heads of argument and to the effect
 22 that AMCU is not behind the strike. They say in paragraph
 23 1.2.5.4 on page 668 of their heads of argument.
 24 Now we submit that the evidence that has been led
 25 in the Commission has established that far from being the

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1 villain in this story, the response of AMCU's leadership to
 2 the crisis that unfolded in Marikana during that week was
 3 responsible and constructive, and I need to address you
 4 briefly on that submission. As soon as the unprotected
 5 strike commenced Mr Mathunjwa proposed a meeting between
 6 the recognised unions at Lonmin and Lonmin management in
 7 order to discuss the problem. Now Lonmin say in its heads
 8 of argument that AMCU was not entitled to do this because
 9 AMCU was not entitled to bargain wages at Lonmin and
 10 therefore by proposing this meeting, Lonmin was in fact
 11 trying to exploit the situation –
 12 CHAIRPERSON: You mean AMCU.
 13 MS BARNES: - AMCU was trying to exploit
 14 the situation, thank you, Chair. Now with the greatest of
 15 respect there's no merit in this submission. We must
 16 remember that although AMCU didn't have the right to
 17 bargain wages at Lonmin it had a majority of members at one
 18 of Lonmin's mines and it had a whole host of rights at
 19 those mines. It had offices there. It had shop stewards.
 20 It had the right to hold mass meetings. It had the right
 21 to raise grievances and it had permanent representatives on
 22 a whole host of Lonmin forums and committees. And so we
 23 now had a situation where AMCU members were involved in
 24 this unprotected strike. It was an unprotected strike
 25 which was itself a problem. It was also a strike outside

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1 the structures, which was an additional problem, and we can
 2 submit – we submit that there can be no doubt that AMCU was
 3 in those circumstances entitled to propose a meeting to
 4 discuss the problem which involved its members. That's
 5 what it then did on the very first day that the strike
 6 commenced. That proposal of course fell on deaf ears.
 7 AMCU then made the same proposal for a meeting of all
 8 relevant stakeholders to discuss the matter five times
 9 during the week of the 9th to the 16th of August. We submit
 10 that those calls should have been responded to with greater
 11 and greater urgency as people started dying. Instead, they
 12 fell on deaf ears.
 13 If we can look at other steps taken by AMCU
 14 during that week. On Monday the 13th of August Lonmin asked
 15 for AMCU's intervention and here we make the point and it's
 16 really the flipside of Lonmin's submission that a number of
 17 actions taken by AMCU were inappropriate or unacceptable
 18 because they didn't have the right to bargain wages at
 19 Lonmin. AMCU didn't say well, no we know our members are
 20 involved in the strike, hear that there's been violence and
 21 deaths, but no, the strikes over wages. We don't have the
 22 right to bargain wages and so no, we won't. We won't come
 23 and intervene. And in fact we submit that had they done so
 24 it would have been cynical position to have adopted. It
 25 would have reflected poor leadership and they may well have

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1 been open to criticism that they hadn't used their best
 2 endeavours in relation to the matter. But of course they
 3 didn't do that. They readily agreed to intervene and Mr
 4 Mathunjwa immediately sent his general secretary and the
 5 national organiser to Lonmin on that Monday morning. We
 6 know that they met with the strikers, they met with Lonmin
 7 management, and we know that in the meeting with Lonmin
 8 management AMCU denounced the violence that was happening
 9 at the mine.
 10 The following day on the Tuesday the 14th of
 11 August AMCU publicly denounced the violence that was
 12 happening at Marikana. And then the following day on
 13 Wednesday, the 15th of August, Mr Mathunjwa responded
 14 positively to Mr Gwala's invitation to participate in the
 15 debate, SAFM debate, in which Mr Gwala quite correctly and
 16 commendably was concerned that a solution, some sort of
 17 solution be found for what was now clearly a crisis, and
 18 during that debate Mr Mathunjwa proposed that all the
 19 stakeholders meet and then go to the koppie and address the
 20 strikers. And we stress that it was Mr Mathunjwa, if one
 21 reads the transcript, it was Mr Mathunjwa that made that
 22 proposal for the first time. It was not in fact Mr Gwala.
 23 We deal with this matter in some detail on page 41 and 42
 24 of our heads of argument. Now the proposal that the
 25 stakeholders all meet to discuss the problem was – this was

<p style="text-align: right;">Page 39092</p> <p>1 in fact the fourth time that Mr Mathunjwa had made that 2 proposal in this week.</p> <p>3 Mr Mathunjwa then made good on his promise to 4 address the strikers on the koppie on the 15th of August 5 2012 and then of course he did so again twice on the 6 following day, the 16th of August. And there it's important 7 to emphasise that he did so in exceedingly difficult 8 circumstances for three reasons. When he went to address 9 the strikers on the koppie for the first time on the 16th of 10 August he did so despite the fact that the undertaking he 11 had sought from Lonmin earlier that morning had not been 12 given, and I am going to get into that in some detail in a 13 moment. So that was the first thing. The second was that 14 he went to address the strikers despite the fact that he 15 had to tell them that Lonmin's commitment that he'd 16 received the day before that they would engage with the 17 strikers' grievance if they return to work was now no 18 longer. They'd effectively reneged on that commitment. 19 And he also went to the koppie on that occasion, on the 16th 20 of August without any police escort. So despite all of 21 that he went to the koppie. It's clear from the transcript 22 that he attempted to persuade the strikers to put down 23 their weapons, end the strike and go back to work. We know 24 then that he attempted to communicate with Lonmin and there 25 was important feedback that he needed to give Lonmin at</p>	<p style="text-align: right;">Page 39094</p> <p>1 establishment of a forum outside of the collective 2 bargaining structures on which the workers were themselves 3 represented at which AMCU had a seat. The Chair put this 4 to my learned friend, Mr Burger, yesterday and his response 5 to that was, "well that was established in the context of 6 an entirely new ball game. 34 people had now died." Why, 7 we ask, and this is the critical question to which Lonmin 8 has provided no answer, why did the death of 10 people not 9 constitute a new ball game? So we submit that quite simply 10 had Mr Mathunjwa's proposal for the establishment of a 11 central forum been accepted by Lonmin as it should have 12 been, the massacre would have been averted. In summary 13 then, Chair and Commissioners, on this point we submit that 14 the response of AMCU's leadership to the crisis at Marikana 15 during that week was responsible and constructive, and that 16 AMCU ought to be acknowledged for this.</p> <p>17 Now many of the allegations that were initially 18 made against AMCU have been retracted or have been shown to 19 be false. We note in this regard that the police do not 20 appear to persist with their allegation that Mr Mathunjwa 21 gave an undertaking on the 15th of August to the police that 22 the strikers would lay down their arms and return to work 23 at 9 o'clock the next morning. They certainly do not 24 persist with this in their heads of argument. We note that 25 the evidence leaders find, correctly in our submission, and</p>
<p style="text-align: right;">Page 39093</p> <p>1 that stage, and I am going to get to that aspect in a 2 little detail later on. Lonmin refused to receive the 3 feedback and indeed refused to speak to him. The police 4 would no longer engage with him. He then went back on the 5 second occasion and he went down on his knees and he begged 6 the strikers to leave the koppie so that they would not be 7 killed by the police.</p> <p>8 Now finally and crucially, Chair and 9 Commissioners, in this vein on the 16th of August at the 10 meeting with Lonmin in the morning, Mr Mathunjwa proposed 11 that a forum be set up outside the established bargaining 12 structures on which AMCU would have a place and at which 13 the RDO issue could be discussed. Now yesterday my learned 14 friend Mr Burger said that Mr Mathunjwa and Mr Zokwana were 15 opposed to Lonmin engaging directly with the strikers, and 16 then he said to quote him, "they didn't say 'let's have an 17 ad hoc tribunal to solve this problem.'" Well we submit 18 that while it's true that AMCU was initially of the view 19 and initially took the position that the matter should be 20 dealt with through the structures, this is precisely what 21 Mr Mathunjwa was proposing on the 16th of August, an ad hoc 22 tribunal to solve the problem. That's precisely what the 23 central forum was. And as the Chair noted yesterday an 24 important counter factual to consider is how the strike was 25 ultimately resolved. It was of course resolved through the</p>	<p style="text-align: right;">Page 39095</p> <p>1 I quote "there are no facts to support the assertion by 2 SAPS that Mr Mathunjwa gave an undertaking that the 3 strikers would voluntarily disarm and disperse by nine 4 o'clock the next day." This is on page 670 of their heads 5 of argument as paragraph 1.2.6.1. We submit that that's 6 correct. It's not supported by the evidence and it appears 7 that the SAPS in any event no longer persisted with it.</p> <p>8 CHAIRPERSON: Well even during the course 9 of the evidence, General Annandale conceded that there 10 wasn't an undertaking. Mr Mathunjwa may well have been 11 optimistic. He certainly was. He may have been over 12 optimistic, appears to have been but General Annandale made 13 it clear that he could say an undertaking was given. So 14 even from the very beginning there wasn't a firm line 15 adopted by every police witness that an undertaking had 16 been given.</p> <p>17 MS BARNES: Yes, yes, that's quite 18 correct, Chair. So we submit that the only remaining 19 allegation of any materiality against AMCU is the 20 allegation that it was attempting to exploit the situation 21 at Marikana in order to obtain bargaining rights, to which 22 it was not entitled. We note that the evidence leaders 23 find that there is evidence to this effect. They appear to 24 accept that AMCU was in fact attempting to exploit the 25 situation. They do find though that despite this, there is</p>

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1 no basis to hold AMCU morally or legally responsible and
 2 they note that the evidence clearly suggests that
 3 irrespective of the reasons for doing so, Mr Mathunjwa did
 4 everything in his power to convince the workers to disarm
 5 and return to work. But we submit, with respect, that the
 6 evidence leaders' conclusion that AMCU was attempting to
 7 exploit the situation is wrong, and I will attempt to
 8 demonstrate that now.

9 CHAIRPERSON: There's another point you
 10 must deal with as well, and that was whether Mr Mathunjwa's
 11 evidence initially as to why he only went to the koppie at
 12 12 o'clock. What happened, what was the reason for the
 13 delay was, whether that evidence was truthful. Because you
 14 remember, the evidence was that for some reason that's not
 15 very clear to me, despite the fact that the transcript has
 16 been made available, the transcript of the discussion was
 17 made available, he hadn't read it beforehand before he gave
 18 evidence and it was only when he was confronted in cross-
 19 examination with the transcript that other facts came to
 20 light. That's an aspect you have to deal with as well.
 21 But of course the main point you make is that – twofold,
 22 one is he wasn't – your argument is he wasn't asking for
 23 bargaining rights, merely a presence, a right to
 24 participate in the ad hoc forum. I think that's the first
 25 point you make, is it? And the other one is, whatever else

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1 there is, is to his undying credit what he did at half past
 2 three when he went on his bended knees and pleaded with
 3 them to leave the koppie. No one else did that.

4 MS BARNES: Indeed Chair. We submit that
 5 that's significant in the sense as well that that does
 6 demonstrate his true intention. Lonmin makes the
 7 allegation in their heads of argument that once he couldn't
 8 get the undertaking once he couldn't get the undertaking,
 9 he thought he was no longer prepared to assist to resolve
 10 the impasse. I mean that's clearly not correct. He still
 11 went back to the koppie and did his best to persuade the
 12 strikers to leave. Chair, we submit that the two key
 13 reasons for the evidence leaders, here are two key reasons
 14 for evidence leaders' conclusion on this point, and the one
 15 is precisely what the Chair has just alerted me to now.
 16 Their contention that Mr Mathunjwa initially gave a false
 17 account of the meeting and then the second critical aspect
 18 that they rely on to come to their conclusion relates to Mr
 19 Seedat's evidence. So it's on the one hand their
 20 allegation that he gave false evidence initially and
 21 secondly the conversation with Mr Scott. And I am going to
 22 deal with both of those aspects in turn, if I may.

23 So if we consider first the first aspect, the
 24 evidence leaders find or make the allegation in their heads
 25 that Mr Mathunjwa initially gave a false account of the

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1 meeting held at Lonmin's LPD offices on the morning of the
 2 16th of August. Now we have two answers to that. The first
 3 is that while it's true that Mr Mathunjwa's statement does
 4 not deal with this in any detail, what must be remembered
 5 that this wasn't in fact a formal meeting. This was in
 6 fact a – this all happened in the foyer of the LPD offices
 7 where, and it was recorded by Mr Kwadi but it was people
 8 sitting around in a foyer and having this discussion in
 9 that context. Chair and Commissioners will recall that
 10 when I cross-examined Mr Seedat on this, he was adamant
 11 that he hadn't walked into a meeting but in fact he had. I
 12 was clear from the transcript. So this was not a formal
 13 meeting. It was a discussion between the parties. We
 14 point out that Mr Mathunjwa's statement does not, nor could
 15 it be expected to record the full detail of every informal
 16 discussion that happened between the relevant parties
 17 during that week. So that's the first point.

18 The second point and the more fundamental point
 19 is that we submit that Mr Mathunjwa does not, if one looks
 20 at the evidence holistically he does not contradict himself
 21 in this regard. So what he is adamant about is that he was
 22 not seeing bargaining rights for AMCU at Lonmin in the
 23 formal sense and we've pointed out in our heads of argument
 24 that as a matter of law those could not be simply conferred
 25 on him by Lonmin. And yet he gave clear evidence in that

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1 regard. He said, "I know how that works. I know that they
 2 couldn't just give me bargaining rights. That's not what I
 3 was asking for." On the other hand, what he has never
 4 denied in his evidence is that he wanted to be part of the
 5 solution to the problem and that that involved a forum and
 6 AMCU having a place on the forum in some way. So his
 7 evidence is clear, if one looks at it all about what he
 8 said he was not doing and what he says he was doing. The
 9 only passage that the evidence leaders rely on in his
 10 evidence to suggest that there is a contradiction is we
 11 submit incredibly unclear, so they refer to that in their
 12 heads of argument. It's day 24, page 2550 and 2551. And I
 13 am not sure that it's necessary to go to it but that's the
 14 only alleged contradiction in his evidence that they refer
 15 to. And if one looks at it, it's Mr Burger's cross-
 16 examining Mr Mathunjwa and it's not clear during the cross-
 17 examination whether Mr Mathunjwa is being asked what he was
 18 going to tell the strikers at the koppie or what he was
 19 going to tell management at Lonmin on the morning of the
 20 16th. So it's an unclear passage.

21 [10:03] And we submit it is now to support a conclusion
 22 in the context of all the evidence that Mr Mathunjwa
 23 contradicted himself on this aspect at all.

24 If we turn then to the issue relating to Mr
 25 Seedat, now here again we submit with respect that the

<p style="text-align: right;">Page 39100</p> <p>1 evidence leaders failed to appreciate significantly, or 2 sufficiently the difference between seeking bargaining 3 rights and seeking to be part of a negotiated solution at 4 Lonmin, and the evidence leaders make the following 5 submission in their heads of argument, they say that – and 6 it's important that I read it – they say, "We submit that 7 in view of the fact that AMCU did not challenge Mr Seedat's 8 evidence that one of the issues touched on during the brief 9 discussion between him and Mr Mathunjwa was bargaining, the 10 Commission ought to make a finding that bargaining was 11 discussed that day." 12 Now we submit with respect that that's not 13 correct in the sense that Mr Seedat was indeed challenged 14 on that in cross-examination. So the reference there is 15 day 293, page 38379, line 25 to 38380, line 14, and I'm 16 cross-examining Mr Seedat and I put it to him in terms 17 that, I refer to the words that Mr Seedat uses, which were 18 "Give me a place at the bargaining table and I will get the 19 workers off the koppie," and then I say, "Mr Mathunjwa has 20 testified in the Commission that he did not use those words 21 to you. Do you understand that?" and Mr Seedat says, "I 22 wasn't there but if he said it, yes okay." So that Mr 23 Mathunjwa said that to Mr Seedat was clearly challenged in 24 cross-examination. 25 It was put to Mr Seedat in his cross-examination</p>	<p style="text-align: right;">Page 39102</p> <p>1 contended that there's any merit in this argument, and we 2 submit that once they fall away there is no basis for the 3 allegation. 4 If I might then deal briefly with the new 5 submission that appears in the heads of argument on behalf 6 of our learned friend Mr Gumbi on behalf of Mr Lepaaku and 7 Mr Baloyi. They make the submissions in paragraphs 106.13 8 to 106.14 of their heads and they basically say that AMCU 9 and NUM are liable at law for the damage caused by their 10 members during the strike, and we simply make the point 11 here that first – they refer to quite a lot of case law in 12 support of that and they start with the Constitutional 13 Court case of SATAWU versus Jarvis, which I think Mr Gumbi 14 referred to in his oral argument the other day. Now that 15 of course is not applicable. That was a case in which 16 SATAWU had in fact arranged the gathering, and in fact all 17 the further cases that, the same difficulty arises in 18 respect of all the further cases that they rely on. 19 They're all cases in which the union has in fact arranged 20 the gathering, or has called the strike. That was not the 21 case here and so those cases cannot apply. So they don't 22 lay any basis in the body of their heads for their 23 submissions in this regard, but in any event, the case law 24 that they rely on is inapplicable. So we submit that 25 there's no merit in that.</p>
<p style="text-align: right;">Page 39101</p> <p>1 that in the informal discussion that he'd walked into, 2 which he hadn't realised at the time, but two minutes 3 earlier, as appears from the transcript, Mr Mathunjwa had 4 confirmed in his conversation with Mr Kwadi that what he 5 wanted was a central forum to be established and for AMCU 6 to have a place on the central forum, and it was put to Mr 7 Seedat that in the circumstances he could not have been 8 sure whether Mr Mathunjwa was asking for a place at the 9 bargaining table in the sense of bargaining rights for AMCU 10 at Lonmin, or for a place at the central forum. While Mr 11 Seedat did not concede this, he did concede that he was not 12 sure of the precise words that had been used by Mr 13 Mathunjwa. At times he said it was bargaining rights. At 14 other times he said negotiating table. Those were two 15 different terms used by him, and it was also clear even 16 while giving his evidence that he didn't appreciate that 17 there was an important difference between the two concepts, 18 at the very least in the context of the discussions that 19 were taking place. 20 So we submit that in those circumstances Mr 21 Seedat's testimony cannot constitute evidence for the 22 conclusion that Mr Mathunjwa was seeking bargaining rights 23 for AMCU at Lonmin. That's really, we submit the basis on 24 which, the only possible basis on which – those two bases, 25 the only possible bases on which it could seriously be</p>	<p style="text-align: right;">Page 39103</p> <p>1 COMMISSIONER TOKOTA: In fact in this 2 particular case the unions have distanced themselves from 3 the strike. So they were in no way involved. Instead they 4 were trying what they could do in order to avert the 5 strike. So the basis for the liability is actually not 6 there, as was in those cases that were referred to by Mr 7 Gumbi. That's your – 8 MS BARNES: Indeed. Indeed, Commissioner 9 Tokota. With respect, that's exactly correct. This was a 10 case in which the evidence shows that the union members in 11 respect of both unions had explicitly rejected their 12 involvement, had acted on their own, and that there's 13 absolutely no evidence to the contrary. 14 COMMISSIONER TOKOTA: And also the 15 strikers themselves said that we don't want unions to be 16 involved at all. 17 MS BARNES: Indeed. Indeed. 18 CHAIRPERSON: I thought, if I may say so, 19 that you summarised your submission very neatly in one 20 sentence when you said they weren't acting qua AMCU 21 members, which says it all really even in less than the 22 minute that I gave your learned friend earlier today. 23 MS BARNES: Yes, I believe we said so in 24 our heads of argument. Thank you, Chair. 25 Chair and Commissioners, if I might then move on</p>

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1 to make some submissions briefly in relation to Lonmin.
 2 Lonmin spent a great deal of its argument yesterday seeking
 3 to justify its decision not to engage with the strikers.
 4 Now we submit that it had a duty to engage by virtue of the
 5 protocol, as Mr Burger termed it, and we've set out our
 6 reasons for this, for our submission in this regard in
 7 detail in our heads of argument. I'm not going to repeat
 8 them here, but we submit that even if that is wrong, that
 9 it acquired a duty to engage at the very latest by the 15th
 10 of August when SAPS implored it to engage because 10 people
 11 had died and it was necessary in order to avert further
 12 bloodshed, and that is essentially what General Mpembe says
 13 in the meeting of the afternoon of the 15th of August. At
 14 the very latest by that stage Lonmin had a duty to engage
 15 in our submission.
 16 CHAIRPERSON: Remember Mr Burger posed
 17 the question, what was the source of the obligation to
 18 negotiate, and I asked him for his submission, the question
 19 whether the source was not a request from the police when
 20 they were invited there to restore law and order. The
 21 police say in order to do our job you must help us by
 22 negotiating, at least talking – perhaps negotiating is the
 23 wrong word, we'll fight about what that word means, but at
 24 least talking to the strikers, and of course he didn't
 25 accept that proposition, but you say that it's a correct

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1 proposition?
 2 MS BARNES: Indeed, Chair. I mean one
 3 sees from what General Mpembe says in the meeting of the
 4 afternoon of the 15th that he says to Lonmin and to the two
 5 unions, there needs to be engagement in order to avert
 6 further bloodshed. This engagement is the last hope,
 7 otherwise there will be further bloodshed. I mean it's
 8 absolutely clear at that stage there can be no doubt that
 9 there was a duty on Lonmin to engage.
 10 CHAIRPERSON: What do you say about the
 11 argument that – I don't want to take you out of the
 12 argument that you've prepared. What do you say about the
 13 argument that that would be a very unwise course to adopt
 14 because - there was a bit of hyperbole but the suggestion
 15 was that there may be substance behind the hyperbole, and
 16 that is that it makes nonsense of the Labour Relations Act,
 17 it makes nonsense of the collective agreement, and once you
 18 agree to talk to violent armed unprotected strikers in the
 19 face of a collective agreement, in the face of all the
 20 other things they had, that that would be, in the long term
 21 would have very deleterious effects and as he put it, it
 22 would cause chaos – I'm not sure if he used the word chaos,
 23 but he used a similar word, paralysis possibly – in the
 24 whole platinum area. Now that's a very strong submission
 25 made by counsel with all the emphasis at his command. I

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1 take it you're going to deal with that?
 2 MS BARNES: Yes, Chair, we would submit
 3 that, you know, it wasn't a normal situation. It was a
 4 crisis. It required, it was an extraordinary situation
 5 that required extraordinary action and that had to be
 6 engagement in the circumstances. That's the one answer is
 7 because it wasn't a normal situation, the normal rules and
 8 procedures were no longer applicable. Something different
 9 had to be done and the obvious thing was for everybody to
 10 sit down and talk. The second answer is that that's what
 11 ultimately was done. Ultimately there was a structured
 12 engagement and that's how the problem was ultimately
 13 resolved, and I think, Chair, you pointed out yesterday
 14 that that didn't result in the collapse of collective
 15 bargaining systems or –
 16 CHAIRPERSON: To be fair, Mr Burger
 17 replied, saying that was done under the shadow of, I'm not
 18 sure whether he said 34 or 44, but under the shadow of a
 19 great tragedy which shocked the world, not just South
 20 Africa, and you can understand people's attitude being
 21 changed. I think that was his answer. I don't know how
 22 you deal with that.
 23 MS BARNES: Yes, of course our answer to
 24 that, Chair, is that 10 people had already died by the 15th
 25 and that was sufficient reason to engage in an

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1 extraordinary process of engagement.
 2 Chair and Commissioners, we submit thought that
 3 Lonmin needs to be judged on what it didn't do, but also on
 4 what it did do, and when one takes these things together a
 5 rather disturbing picture emerges, we submit, because
 6 Lonmin did not engage with the strikers but what it did do
 7 is it spread misinformation about the strikers. It claimed
 8 not to know who the strikers were, calling them faceless.
 9 It claimed that AMCU was behind the strike. It claimed
 10 that the strike was caused by rivalry between AMCU and NUM.
 11 All these claims were false and Lonmin made these claims
 12 while knowing them to be false.
 13 CHAIRPERSON: Is that correct? I could
 14 understand your point about the facelessness of the
 15 strikers, which is obvious nonsense and that was not
 16 seriously persisted in, I don't think. But I must confess
 17 that I get the impression that Lonmin believed that AMCU
 18 were behind the strike and I think they believed – again,
 19 you know, this is a prima facie perception, one of the
 20 reasons why we're having oral hearings is so that prima
 21 facie points can be put on the table and dealt with. I
 22 also get the impression, prima facie you see, that Lonmin
 23 believed that there was rivalry between the two unions. I
 24 get that from those other documents that were put in, I
 25 think your side actually put them in, the scenario and that

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1 sort of thing. So I'm not sure it's fair to say that
 2 Lonmin deliberately spread misinformation – I say
 3 deliberately spread misinformation that AMCU were behind
 4 the strike and that it was because of the rivalry between
 5 AMCU and NUM. I think, I mean it may be that I'm
 6 overlooking important factors which you'll obviously put to
 7 me, but –
 8 MS BARNES: Chair, if I –
 9 CHAIRPERSON: I wasn't aware of any
 10 evidence which indicated that Lonmin didn't believe it at
 11 the time. There is of course that bit about the recording
 12 that they claimed to have which we never saw. I'm not sure
 13 there's anything else, but anyway, but if there are other
 14 factors that you've got that are relevant in that then
 15 obviously you must give us.
 16 MS BARNES: Chair, two responses to that.
 17 The one is that, I mean during our cross-examination of the
 18 Lonmin witnesses we went through the reasons why the strike
 19 happened. I mean we went through the facts relating to
 20 Impala, the facts relating to RDOs at Lonmin being
 21 underpaid, and I mean it's clear a story is told about how
 22 the strike at Lonmin happened. Those facts were all
 23 readily conceded to by in particular Mr Da Costa and Mr
 24 Mokwena. They understood those facts and they were aware
 25 of them at the time and they conceded that they were very

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1 concerned that because of what had happened at Impala the
 2 same thing could happen at Lonmin. There was never any
 3 suggestion by either of them that the true cause of the
 4 strike was somehow as a result of rivalry between the two
 5 unions. So there's never been any evidence to that effect
 6 from Lonmin, and ja, I mean in relation to the allegation
 7 that AMCU was behind the strike, I mean that we've dealt
 8 with earlier this morning. Again there's no evidence.
 9 CHAIRPERSON: I'm sorry, there was also
 10 some evidence as far as I can recall from Mr Da Costa to
 11 say that though the people at Karee said they were acting
 12 outside the confines of union activity, and though the
 13 people involved at Karee were both members of AMCU and
 14 members of NUM, there was a suggestion that the
 15 representatives who came to see him, I think I'm correct in
 16 saying were AMCU members and there was at least two of
 17 them. So there was a sort of insinuation perhaps, or a
 18 suspicion. You see I can understand your point that Lonmin
 19 didn't have evidence, but if they had a suspicion, albeit
 20 an unfounded one, which they believed then you're not
 21 entitled to say that they deliberately spread
 22 misinformation. That they spread misinformation appears to
 23 be correct but whether we can be satisfied that they
 24 deliberately did that is something which I'd like further
 25 argument on if you have it for us, because as I say prima

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1 facie I have a difficulty and you understand it's my duty
 2 to put my difficulties to you.
 3 MS BARNES: Of course. Chair, the second
 4 answer is, we deal with this in our heads of argument in
 5 some detail. We deal with what we call a campaign of
 6 misinformation by Lonmin in detail in our heads of argument
 7 and we draw the inference that because there's absolutely
 8 no evidence and none has ever been suggested of either
 9 AMCU's involvement or of the cause of the strike being
 10 rivalry between the two unions, that the misinformation was
 11 deliberate. There's been no answer to those allegations in
 12 our heads either in replying heads from Lonmin or in oral
 13 argument. So the allegations we've made in that regard are
 14 unanswered by Lonmin. We simply make that point.
 15 Then Chair and Commissioners, Lonmin also spent a
 16 great deal of its argument contending that the –
 17 CHAIRPERSON: I'm sorry, can I just put a
 18 further point to you which flows from a point made to me by
 19 my colleague. The evidence as far as I recall seems to
 20 indicate that the trouble, if one can call it that, started
 21 at Impala and there certainly was rivalry between NUM and
 22 AMCU. NUM was seen to be ineffective and distracted
 23 perhaps by other concerns, not pushing the interests of the
 24 workers as fully as they should have done. Whether that
 25 perception is correct isn't relevant for our purposes. And

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1 AMCU was certainly gaining ground there, and then now that
 2 was known to the people at Lonmin. Now if you then get a
 3 demand for a dramatically increased remuneration and the
 4 suspicion is that AMCU have got something to do with it,
 5 (a), because of what happened at Impala, and (b), because
 6 of the identity of some at least of the people who went to
 7 see Mr Da Costa, it's not difficult to understand how
 8 Lonmin could have come to suspect that what had played out
 9 at Impala was being repeated at Lonmin. It was quite clear
 10 I think that Lonmin was faced with a situation where AMCU
 11 was gaining ground. They gained ground dramatically at
 12 Karee. There was no suggestion that that was going to stop
 13 at Karee. If AMCU were gaining ground, NUM were on the
 14 retreat, there was obviously a campaign by AMCU, nothing
 15 wrong with that, to get a situation where they have
 16 majority support and all the benefits that would flow from
 17 that. Now regard being had to those factors can one say
 18 that Lonmin didn't even suspect that there was rivalry
 19 between the two unions, didn't even suspect that the fact
 20 that some AMCU people, and they would think based on what
 21 happened elsewhere that AMCU was actually supporting the
 22 demand and possibly even behind it in some way, and that
 23 was part of their campaign to show the workers that they
 24 were better equipped to represent them. The question I'm
 25 asking you is whether one can say that Lonmin didn't

<p style="text-align: right;">Page 39112</p> <p>1 honestly believe that. Whether it was reasonable, whether 2 they had evidence to support the suspicion, those are 3 different questions, but you see you've made quite a 4 serious allegation against Lonmin that they came up with 5 these incorrect statements knowing them to be false. 6 That's the point that I'm putting to you. 7 MS BARNES: Chair, I mean clearly 8 there's – 9 COMMISSIONER HEMRAJ: I'm sorry, before 10 you answer the question, can I just add to that, isn't 11 there evidence that the inter-union rivalry was very marked 12 after the dismissal and re-employment of thousands of 13 employees? Isn't that where – 14 CHAIRPERSON: [Microphone off, inaudible] 15 COMMISSIONER HEMRAJ: Yes, at Karee. 16 MS BARNES: Yes, of course there was 17 union rivalry. We accept that. What we don't accept is 18 that there's any evidence that that was the cause of the 19 strike and if Lonmin believed that that – 20 CHAIRPERSON: I'm sorry, the question 21 doesn't relate to that. You know, with respect, you must 22 answer – 23 MS BARNES: But I think I'm getting to 24 the answer – 25 CHAIRPERSON: You must answer the</p>	<p style="text-align: right;">Page 39114</p> <p>1 CHAIRPERSON: That wasn't a very good 2 answer. 3 MS BARNES: That's the extent of the 4 explanation for their suspicion. We submit that there is 5 none. What one also sees, Chair and Commissioners, is that 6 Lonmin in fact – they in fact attributed much of the 7 violence and even deaths to union rivalry. I mean we see 8 that in media statements that they issued. That 9 information was then obviously handed over to the police. 10 We see the same thing in exhibit L. We've referred to that 11 in some detail in our heads of argument. One also sees in 12 a speech given by Mr Farmer, he in fact attributes the 34 13 deaths on the 16th of August 2012 to union rivalry in a 14 speech that he gave just before his resignation. We submit 15 that there's no basis for that. Can I move onto to my next 16 point? 17 CHAIRPERSON: [Microphone off, 18 inaudible]. 19 MS BARNES: So the next point we want to 20 make deals with the contention by Lonmin that the demand 21 was non-negotiable and there we just want to make the point 22 that Lonmin haven't dealt at all with Mr Mathunjwa's 23 uncontested evidence that when he spoke to the strikers on 24 the 16th of August they in fact said to him and if I can 25 quote "They were aware that management might not have</p>
<p style="text-align: right;">Page 39113</p> <p>1 question that was put, not the question – I'm not being 2 unkind. I mean I understand I'm being difficult really. 3 It's the way, it's mores mea, but the point is not whether 4 there was evidence, the question is whether one can find 5 that they, (a), suspected it or didn't even suspect it; and 6 (b), if we find that they did suspect it can one say the 7 suspicion was one that they didn't truly hold because there 8 wasn't evidence to back it up, because suspicion and 9 evidence aren't always the same thing. Very often they are 10 not, as you know. 11 [10:22] MS BARNES: Well, Chair, they simply 12 haven't explained it, so in the absence of concrete 13 evidence and the absence of any explanation or 14 substantiation by Lonmin of their suspicion, we submit that 15 it's highly questionable. 16 CHAIRPERSON: Did you ever put it to them 17 that you didn't believe that, you didn't suspect it, were 18 they ever called upon to answer that question directly? 19 MS BARNES: Well I did put it to Mr 20 Mokwena that there was no evidence and there could be no 21 suggestion that the strike was caused by union rivalry and 22 his answer, we refer to it in our heads of argument, was 23 rather lamely to say well the two union presidents during 24 that week didn't seem particularly fond of each other. So 25 that's the extent of the evidence of why –</p>	<p style="text-align: right;">Page 39115</p> <p>1 R12 500 from the start, but that perhaps such a position 2 could be achieved through a process and over some time." 3 So that's in Mr Mathunjwa's statement, he repeats that in 4 his evidence here. And of course that's the feedback, it 5 was part of the feedback, a crucial part of the feedback we 6 would submit that he wanted to give to Lonmin on the 16th, 7 but they refused to speak to him. 8 CHAIRPERSON: I'm sorry, I didn't want to 9 give the impression of heckling you, I mean you've raised 10 points and when I think of possible answers it is my duty 11 to put them to you. There are two aspects of this matter 12 we've got to look at. The one is using hindsight can we 13 say that it would have made a difference or were they 14 resolutely determined to get 12 500 and not a cent less. 15 If that's a contention put up, you've got the answer from 16 what Mr Mathunjwa said, but the other aspect we have to 17 look at is whether Lonmin thought at the time there's no 18 point in negotiating because they've drawn a line in the 19 sand and that's it. Now admittedly the evidence they rely 20 on isn't also terribly helpful as direct evidence of that 21 because they all sat there with people like Mr Nzuzza and Mr 22 Magidiwana what they've said which of course they didn't 23 know at the time what they were going to say before this 24 Commission. But if you're criticising them for not 25 negotiating and part of your criticism is that they should</p>

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1 have realised that they wouldn't have to come up with
 2 12 500 immediately, there was chance that the strikers
 3 would settle for less then we have to look at – but on the
 4 other hand they say what was the point of negotiating, it
 5 would have been an exercise in futility because they were
 6 resolute 12 500 or nothing and they couldn't come up with
 7 12 500. That's part of their answer so one has to look at
 8 it from that point of view as well if one wants to evaluate
 9 the answer they put up. Isn't that correct? The answer –
 10 the correct one is yes it has to look at it what the answer
 11 is to further questions is something you'll deal with I
 12 take it.

13 MS BARNES: Yes, yes, Chair. We simply
 14 want to make the point that whatever the strikers' position
 15 may have been before the 16th, it's not entirely clear in
 16 our submission from the evidence, but even if it was for
 17 the sake of argument resolute before then, then at the very
 18 least it had softened by the 16th and that was an
 19 opportunity for – further opportunity for engagement.

20 CHAIRPERSON: Somebody, I think it may
 21 have been Mr Ramaphosa, but somebody certainly said that
 22 experience shows that in industrial negotiations, strikes
 23 and things of that sort strikers always draw a line or
 24 pretend to draw a line in the sand. But the problem is
 25 normally solved somewhere east or west of the line and not

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1 on the line.

2 MS BARNES: It's certainly not –

3 CHAIRPERSON: Was it Mr Ramaphosa who
 4 said that? Someone said that.

5 MS BARNES: It may have been. It's
 6 certainly not a reason not to negotiate in our submission.

7 CHAIRPERSON: Ms Barnes, it's now half
 8 past ten, when it's convenient for you would you let me
 9 know and we'll take the adjournment?

10 MS BARNES: This is a convenient time,
 11 Chair.

12 CHAIRPERSON: 15 minutes.

13 [COMMISSION ADJOURNES COMMISSION RESUMES]

14 [10:47] CHAIRPERSON: The Commission resumes. Ms
 15 Barnes.

16 MS BARNES: Yes, thank you, Chair. If I
 17 might then make my final point and this relates to, I'd
 18 just like to elaborate on the basis on which we say that
 19 Lonmin, there may be criminal liability for Lonmin on an
 20 accomplice basis. We say in our heads of argument that
 21 Lonmin colluded with the police to break the strike and we
 22 don't use that term lightly. We don't use the term
 23 "colluded" lightly. It is considered. It means to come to
 24 a secret understanding for a harmful purpose.

25 We submit that if one looks at the transcript of

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1 the meeting between General Mbombo and Mr Mokwena, what you
 2 see there are three things. First of all you see an
 3 agreement that a hard line is going to be taken in relation
 4 to the strikers, and Mr Mokwena conceded this in answer to
 5 questions from Mr Chaskalson. So it was agreed between the
 6 two that a hard line would be taken, in other words there
 7 would be no negotiation with the strikers.

8 The second thing one sees is that a police
 9 operation will be launched. It's a question of when. At
 10 that stage it was due to be launched on the Wednesday, and
 11 the third thing one sees is that despite, those two things
 12 are agreed upon essentially despite the fact that it is
 13 foreseen that there may be bloodshed. It's clear, General
 14 Mbombo says so in terms.

15 So we submit then even if the term "collusion" is
 16 perhaps overstating the position, we submit it's not if one
 17 looks at the transcript and one looks at those three key
 18 issues upon which agreement was reached. Then in any event
 19 we submit that if one were to use the term "cooperation"
 20 instead of collusion one would still have a basis for
 21 accomplice liability. It's clear that SAPS and Lonmin
 22 cooperated with a view to launching the police operation
 23 and it's clear that they did so despite foreseeing that
 24 harm may result, and this is critical. So we know that
 25 both General Mbombo and General Mpenbe foresaw harm and

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1 indeed bloodshed and communicated this in the meetings to
 2 Mr Mokwena and the other Lonmin persons who were present.

3 But what's also important to stress is that Mr
 4 Jamieson himself foresaw injury and possibly death arising
 5 as a result of the police operation, and we refer to the
 6 evidence in that regard at page 183 of our heads of
 7 argument where it of course arises out of Mr Jamieson's
 8 email, and this is as early as Tuesday the 14th of August
 9 2012 where he says, "Although we are glad about the police
 10 operation there's always the worry that it goes wrong."
 11 And then he's cross-examined on that and it's put to him
 12 that based on that he foresaw the possibility that
 13 something could go wrong and that there might be injuries
 14 and possibly even deaths as a consequence of the police
 15 operation, and he says – I'm just reading –

16 CHAIRPERSON: The passage is quoted at
 17 page 183 of your heads.

18 MS BARNES: Yes.

19 CHAIRPERSON: Where Mr Jamieson says, Mr
 20 Gotz puts to him the quotation, "Although we were glad
 21 about the police operation there is always the worry that
 22 it goes wrong." He asked him about that, and then he
 23 suggested they foresaw something going wrong and injuries
 24 and possibly deaths. Jamieson says, "Yes, well what Mark
 25 had said on the phone was, you know, we have to be worried

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1 here that this is, you know, maybe 2 or 3000 people who
 2 were armed. We've got a lot of police on site who are also
 3 armed, and whilst there's a plan in place that the police
 4 have, which is the police's call, it's not ours, that
 5 sounds like a situation where things might go wrong where
 6 you've got an angry group of people who are armed and one
 7 or other group of people who are intent on taking the arms
 8 off them." It's clearly a situation that has the potential
 9 to go wrong, but you would think that the police had
 10 covered those eventualities. Now the plan that's been
 11 talked about is the encirclement plan because that's clear
 12 from what the Provincial Commissioner said to discuss the
 13 plan, remember there was, they used the wrong word in the
 14 original transcript, it's encirclement is agreed now to be
 15 the correct term. But there was also the letter that Mr
 16 Ramaphosa got from the representative of his company on the
 17 executive where she spoke about the police having a, I
 18 think she used the word "corral" if I remember correctly,
 19 but certainly she was clearly talking about the same plan.
 20 So what the Lonmin people knew about was a plan, which was
 21 the so-called encirclement plan which was designed by the
 22 police to be as – I think I'm accurately summarising it –
 23 to be as risk-free as it was possible in the circumstances.
 24 They certainly don't appear to have had any inkling that
 25 that plan would be abandoned because it couldn't be

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1 implemented because of the decision made on the Wednesday
 2 night and that another plan has to be knocked together in a
 3 hurry on the Thursday to replace it, with all the problems
 4 that Scott had because he sat there the morning – he was
 5 according to the minutes of the 6:30 meeting, which
 6 admittedly were edited at Roots, but there's no reason I
 7 would think to disbelieve this entry, that he was called
 8 upon to draw a contingency plan if they didn't lay down
 9 their arms, which of course indicates that the plan they
 10 already had couldn't be used and they knew that, and he was
 11 able to attend to the matter after 20 past 8 because that's
 12 when he finished helping with the cordon and search
 13 application, and he sat there from 20 past 8 through until
 14 about 1 o'clock and we know how he works; he prepares
 15 documents and he works, sets out things on his computer and
 16 has them printed and hardcopies for everybody, but he
 17 didn't do that, and when he's asked to explain why he
 18 didn't do it he said he couldn't remember what happened
 19 that morning. Well, it doesn't require too much insight to
 20 understand what inference one draws from that. So he was,
 21 and he conceded that in his evidence later that he had a
 22 very difficult task to do, a very difficult plan to draw
 23 up, and created by this deadline that had come from above,
 24 so he couldn't do anything about it. But the point, the
 25 reason I put all of that to you is there was no reason for

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1 the Lonmin people to realise that that would happen and
 2 could it ever have been – let me put it this way; you
 3 understand this is a prima facie point I'm putting to you
 4 to get your assistance, but was it reasonably foreseeable
 5 on the part of the Lonmin people that the police would
 6 impose a deadline the night before without even knowing
 7 what the details of the plan were, whether the plan that
 8 was, really could be implemented on the Thursday in
 9 circumstances which they knew about, that in the result the
 10 police would have to knock together a plan with all the
 11 defects to which the evidence leaders have referred on the
 12 Thursday? Was it something which one can say that the
 13 Lonmin people should have reasonable have foreseen that
 14 sort of thing might happen?

15 MS BARNES: Chair, no, not that they
 16 would have reasonably have foreseen what happened with
 17 regard to the NMF meeting, certainly not, but can I give
 18 two answers; the first is that it's –

19 CHAIRPERSON: I'm sorry, before you
 20 answer, just let me finish. Remember what I put to you was
 21 it appears from the evidence that Lonmin knew about the
 22 first plan. They knew not necessarily the details, but
 23 they knew there was a plan that had been worked out, this
 24 "corralling plan" I think is the way how it was described
 25 in the email that Mr Ramaphosa got. It's the encirclement

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1 plan. So they knew the details of that. If that was a
 2 relatively risk-free plan then Lonmin would have known that
 3 as well, I take it. It's a fair inference. The question
 4 is whether they would, could reasonably have foreseen that
 5 relatively risk-free plan would be abandoned and be
 6 replaced by something cobbled together at the last minute
 7 with – it certainly would be the argument, with a very
 8 risky plan.

9 MS BARNES: Chair, the difficulty is if
 10 one looks at Mr Jamieson's answer here it certainly doesn't
 11 appear as though he's aware of some sort of risk-free
 12 encirclement plan because he refers specifically to 2 to
 13 3000 people who are armed. I mean his answer here seems to
 14 suggest that he envisaged something in the nature of what
 15 did actually happen. So the first answer is it can't be
 16 said from his answer here that he – we don't know exactly
 17 what Lonmin knew about the plan and what detail they knew,
 18 but it can't be said from this that he was aware that a
 19 safe plan was, safe encirclement plan – some sort of
 20 rational plan that was safe was envisaged. But –

21 CHAIRPERSON: Yes, you're correct, but he
 22 does in fact appears not to have known the detail because
 23 he ends up by saying you would think that the police had
 24 covered those eventualities.

25 MS BARNES: But Chair, the fundamental

<p style="text-align: right;">Page 39124</p> <p>1 point we submit is that both General Mpembe and General 2 Mbombo said there may well be blood. You need to talk. 3 That's what Mpembe said on Wednesday afternoon. You need 4 to talk, otherwise there may be blood, and Mbombo said the 5 same thing to Mr Mokwena on Tuesday, and Lonmin still 6 refused to talk. So they must have been aware, with 7 respect, that the police operation, the details of which 8 they couldn't have been certain of, carried a risk of 9 bloodshed. The two generals told them that.</p> <p>10 CHAIRPERSON: Well, Mpembe's statement – 11 sorry, yes, Mpembe's statement you rely on made to Zokwana 12 was made in the context of not implementing the 13 encirclement plan, but talking about disarming a man on the 14 koppie who is armed with an axe and you've got a rifle. 15 But certainly the passage in the transcript of the 16 conversation between General Mbombo and Mr Mokwena does 17 appear to support you.</p> <p>18 MS BARNES: I'm really referring to the 19 transcript of the meeting that was held on Wednesday 20 afternoon that General Mpembe chaired and there's in fact, 21 I think there is, I think the appropriate, or the 22 applicable passage is in fact in our heads - I'll find it 23 in a moment – where he specifically, he calls upon the 24 parties to talk in order to avoid further bloodshed. So it 25 must have been clear that if the matter couldn't be</p>	<p style="text-align: right;">Page 39126</p> <p>1 presence we still have Mr Twala being killed. Now it's 2 probably a fair inference even without having regard to 3 what Mr X said, that Mr Twala was killed because he was 4 suspected of being a police informant and there may well 5 have been – again we've got no basis for saying this is 6 correct or incorrect, but it's probably a fair assumption 7 that there might have been a few more informers on the 8 koppie, people from whom the police handlers were getting 9 their information. So there was still an ongoing 10 possibility that even if the strikers weren't killing other 11 people, there might have been further Twala type deaths 12 after the Tuesday. Isn't that true?</p> <p>13 MS BARNES: Chair, yes, but it's 14 difficult to understand what acting in a more pointed way 15 could have referred to, given that there was now a big 16 police presence, that the situation had been brought under 17 control as far as it could, so we submit that the use of 18 that term in that context is highly questionable. That's 19 as far as we take it, but for that reason we say that Mr 20 Ramaphosa should be included in the list of people that are 21 investigated in relation to this issue.</p> <p>22 We'd like to say in conclusion that we support 23 what the Legal Resources Centre has said on this issue, we 24 align ourselves with their submissions, and we refer 25 specifically to page 174 and 175 of their heads where they</p>
<p style="text-align: right;">Page 39125</p> <p>1 resolved through negotiations and if the police operation 2 had to be resorted to, there was a risk of bloodshed. I'll 3 find that passage in a moment, Chair.</p> <p>4 But if I might then just make a point about Mr 5 Ramaphosa's involvement and indicate what our position is 6 on this. Chair, what we say here is that it's not really 7 the fact of communicating that is objectionable, but it's 8 what was said in the communications, and what we'd like to 9 highlight is two things. First of all Lonmin witnesses 10 conceded that by Tuesday the 14th of August the big police 11 presence at Lonmin that they had sought had been achieved, 12 and we know that that's objectively true. So that had been 13 achieved by Tuesday. The situation had effectively been 14 brought under control by Tuesday, and then on Wednesday you 15 have Mr Ramaphosa saying in an email that it's important, 16 and he's going to get Minister Mthethwa, the Minister of 17 Police at the time, to act in a more pointed way, and 18 Chair, that's what we submit is disturbing and questionable 19 because you had a situation where you had, I mean Mr 20 Ramaphosa's explanation for his request was that he wanted 21 the, that he sought, you know, for the criminal elements to 22 be arrested and dealt with, and for the police to take 23 control of the situation. But that had happened.</p> <p>24 CHAIRPERSON: Well, it's not entirely 25 accurate because when, in the face of that big police</p>	<p style="text-align: right;">Page 39127</p> <p>1 list the Lonmin executives that they say should be 2 investigated in this regard. We would add Mr Ramaphosa to 3 that list for the reasons I've given, and then of course 4 they also indicate that Lonmin itself as a company could be 5 investigated on the same basis at page 175, and we align 6 ourselves with that recommendation as well.</p> <p>7 COMMISSIONER TOKOTA: But taking your 8 argument just from this answer from Mr Jamieson, Lonmin 9 being aware of all the risks involved, but wouldn't you 10 think that in view of what he says here that you would 11 think that the police had covered those eventualities. On 12 what basis can you say now they foresaw death when they say 13 much as we know about that, but then the police had a plan. 14 So in that plan we assume that they are going to cater and 15 make sure that those eventualities of death do not occur. 16 What else could Lonmin do then?</p> <p>17 MS BARNES: Commissioner Tokota, I think 18 the answer is then one would have expected Mr Jamieson to 19 have answered no, not at all, we did not think in our 20 wildest dreams that the police plan could go wrong, we 21 thought that they'd have it perfectly under control and we 22 didn't think that there'd be any injuries, let alone 23 deaths, but he doesn't say that though –</p> <p>24 COMMISSIONER TOKOTA: Isn't that what 25 he's saying here?</p>

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1 MS BARNES: With respect, no. He says
 2 there is this kind of plan where 3000 armed people on a
 3 koppie who don't want to be disarmed and the police trying
 4 to disarm them has the potential to go wrong. So he does
 5 foresee the risk of something going wrong in our
 6 submission.
 7 COMMISSIONER TOKOTA: Mr Ramaphosa was
 8 questioned quite a lot about the more pointed way. You
 9 think we should reject his explanation to that?
 10 MS BARNES: Commissioner Tokota, we
 11 submit that his explanation is difficult to understand in
 12 relation to the timing of the more pointed way and for that
 13 reason we say it's questionable, and his explanation is
 14 unsatisfactory because of when he said it. If he'd used
 15 the same words a few days earlier the situation might be
 16 different, but he was asking for additional more pointed
 17 action at a time when the situation had been brought under
 18 control. That we submit is worrying.
 19 COMMISSIONER TOKOTA: Ja, but the
 20 incidents of death occurred on Thursday. Would you say he
 21 had foreseen that in the light of the fact that he was
 22 arranging a meeting for a Friday?
 23 MS BARNES: Chair, we simply say that he
 24 should be investigated together with the other Lonmin
 25 executives on this issue because he did of course act in

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1 his capacity as a Lonmin director.
 2 If I might just refer finally, Chair and
 3 Commissioner, to – it's on page 46 of our heads and this is
 4 the meeting with General Mpembe that I was referring to and
 5 he says inter alia the following, "We are now faced with a
 6 situation where we don't want to be seen as the police that
 7 is brutally killing people," and then it goes on, "We are
 8 policing in a democracy where negotiation is a weapon, not
 9 the bloodshed. My request is, (1), we need both your
 10 intervention. The operation has reached to a sensitive
 11 stage and we might be, we might go and lose more lives."
 12 So in other words he is saying there's a risk of lives
 13 being lost, there's a risk of further bloodshed if you
 14 don't intervene and try and achieve a negotiated solution.
 15 Thank you, Chair and Commissioners, those are my
 16 submissions.
 17 CHAIRPERSON: Thank you, Ms Barnes. Mr
 18 Gotz.
 19 MR GOTZ: Chair, thank you, and good
 20 morning to you and the Commissioners. Chair and
 21 Commissioners, it's fallen to me to deal with two
 22 outstanding issues which we address at some length in our
 23 heads of argument and those issues are, as my learned
 24 friend Ms Barnes indicated, the issue of the NUM and our
 25 submissions in relation to that, and in addition the issues

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1 relating to the police action, particularly at scene 1 on
 2 the 16th of August 2012.
 3 [11:07] And I would like to present my submissions under
 4 four themes. The first theme is what we refer to as NUM's
 5 responsibility during the week of the 9th to the 16th of
 6 August and what I'd like to address there is the allegation
 7 that - I beg your pardon 9 to 16 August 2012 and what I'd
 8 like to address there is the question of whether or not NUM
 9 can be considered to be blameless as it were because of the
 10 fact that there was no mandate that it had as a union to
 11 take up the RDOs issue. The second theme that I'd like to
 12 address are particular issues relating to the 11th of
 13 August. Very little airtime has been given to those events
 14 during the proceedings thus far and I fear, with respect,
 15 there are certain issues that need to be or facts that need
 16 to be corrected in relation to the events of the 11th of
 17 August. And what I'm referring to there in particular is
 18 what happens when the crowd of strikers reaches the NUM
 19 office and there's the shooting by the NUM officials. My
 20 third theme, as I've indicated, is turning to SAPS and its
 21 conduct particularly in relation to the 16th of August and
 22 my fourth theme is really to sweep up a couple of
 23 additional residual issues and I'd like to deal with two
 24 matters there. One is a submission by NUM in relation to
 25 the policy of centralised bargaining and the final issue is

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1 again a submission by NUM in relation to how one must view
 2 the composition of the strikers on the 16th of August at the
 3 koppie. Can I preface my remarks and my address by making
 4 this point? A lot of what I'm going to say may be regarded
 5 as being quite critical of NUM and I want to emphasise that
 6 in doing so it shouldn't be regarded in any way as some
 7 form of inter-union rivalry between AMCU and NUM. The
 8 submissions are being made simply because of the fact that
 9 we believe that NUM's responsibility particularly in
 10 relation to issues just prior to when the strike started
 11 and also its conduct on the 11th of August were major
 12 factors which influenced the developments subsequently
 13 during that week. And we believe, not through any sort of
 14 contestation between AMCU and NUM the function of
 15 contestation between AMCU and NUM, there are issues that
 16 need to be ventilated and simply that we've chosen to do so
 17 in our heads of argument and our address. There's a large
 18 section of NUM's heads of argument, so let me turn to the
 19 first theme that I'm going to address. There's a large
 20 section of NUM's heads of argument which are devoted to an
 21 attempt to say that it should bear no responsibility
 22 because of the fact that it had no mandate from its
 23 members, from any RDO to take up the issue that the RDOs
 24 were raising, being a demand R12 500. And the logic of the
 25 argument and one sees this both in NUM's heads of argument

<p style="text-align: right;">Page 39132</p> <p>1 as well as the evidence leaders' argument is that because 2 of the fact that the workers at an early stage had rejected 3 NUM's involvement in the raising of the demand and in those 4 circumstances NUM had no mandate to take the demand up. 5 This meant that NUM was effectively entitled to remain 6 completely uninvolved and must be found by this Commission, 7 as it were, blameless for the subsequent events. Chair, 8 with respect to the evidence leaders and my learned friends 9 for the NUM, we do not agree that NUM cannot be faulted 10 because it had no mandate from the RDOs. And we 11 respectfully submit that in fact a large portion of the 12 responsibility for what happened must be attributed to the 13 fact that NUM took an incorrect and largely indefensible 14 position in key meetings just prior to the commencement of 15 the strike. And may I refer the Commissioners in that 16 regard to page 112 of our heads of argument where we cite a 17 witness statement, a paragraph in the witness statement of 18 Mr Setelele which is exhibit YY1, paragraph 4. What Mr 19 Setelele says and I'd like to emphasise certain portions of 20 this paragraph is that the issue of this demand by the RDOs 21 was discussed at various meetings by the NUM branches in 22 Lonmin and NUM's position was consistently put forward in 23 these meetings, namely, that the wages of the RDOs was 24 covered in the two year collective agreement that had been 25 concluded. But it was a breach of this agreement for the</p>	<p style="text-align: right;">Page 39134</p> <p>1 agreement was a fundamentally incorrect one. And the 2 reason for that of course was that the two year wage 3 agreement could be varied by agreement – 4 CHAIRPERSON: I don't see you quoting the 5 relevant passage in your heads at this point and maybe it 6 will be elsewhere, but the passage in the heads said that 7 every demand that was raised that's not dealt with in the 8 agreement is regarded as having been settled. And it then 9 went on to say that accordingly it's not possible for the 10 employees to engage in strike action in support of such 11 demands. But it was made quite clear by Mr Zokwana, not 12 that we suspect that we needed his assistance, but in fact 13 it was welcome all the same, that that didn't prevent the 14 union from going back to the employer and saying look here 15 we know we can't strike, but we have got the right to 16 engage you on the matter. The agreement can even be 17 amended, there have been precedents in the past where 18 points of that kind arose, there was a dramatic increase on 19 one occasion in the inflation rate and the inflationary 20 increase was way out of line with the actual inflation. 21 Newman went back to the employer and the employer accepted 22 the point as a sound one and amended the agreement. So 23 there was no reason why NUM couldn't have gone to Lonmin 24 and said look here we know you wouldn't accept the RDOs 25 demand at the time, but things have changed. Look what</p>
<p style="text-align: right;">Page 39133</p> <p>1 RDOs to raise fresh demands during the term of that 2 agreement and NUM was opposed to an unprotected strike. 3 Now, Commissioners, during the course of Mr Setelele's 4 cross-examination the Chairperson established, through his 5 own cross-examination, very effectively, two fundamental 6 points. 7 CHAIRPERSON: Mr Gotz, I was going to get 8 some praise from Mr Ramphela, but I didn't get it because I 9 pulled him up, but I didn't expect you to criticise me the 10 way you're doing. I suppose it looks like cross- 11 examination, I suppose I – I'm not supposed to cross- 12 examine the witnesses am I? 13 MR GOTZ: I beg your pardon, my choice of 14 words – 15 CHAIRPERSON: The - 16 MR GOTZ: I do beg your pardon, Chair. 17 Through your questions, Chair, two facts were established. 18 The first is that Mr Setelele had consistently articulated 19 this position at key meetings, inter alia at the meeting of 20 NUM members on the afternoon of the 8th of August 2012, the 21 day before or two days before the strike commenced and the 22 other fact that emerged during the course of the Chair's 23 questioning was that Mr Setelele accepted that this 24 position. In other words it was a breach of the agreement 25 for RDOs to raise fresh wage demands during the term of the</p>	<p style="text-align: right;">Page 39135</p> <p>1 happened at Impala, look at what happened at Amplats. 2 MR GOTZ: Yes indeed, Chair. 3 CHAIRPERSON: And the fact – again this 4 is something I shall have to put to Mr Tip, but it's not 5 entirely realistic to say they didn't raise it because they 6 didn't have a mandate. If they'd realised that it wouldn't 7 be a breach of the agreement, if they also realised that 8 they had the monopoly of bargaining rights in respect of 9 negotiating rights and so forth in respect of the 10 emoluments of the employees, they could well have gone back 11 to the employers and said look here we can't strike because 12 of this, but what we can do is we can engage Lonmin. 13 Please give us a mandate to do that and we will raise the 14 matter on your behalf. They didn't do that and the 15 impression I get, Mr Tip will tell me why I'm wrong if I am 16 wrong in due course, but the impression I get is the reason 17 they didn't seek a mandate was because they didn't think 18 that it was open to them to approach Lonmin because they'd 19 misinterpreted or forgotten the relevant clause of the 20 agreement. 21 MR GOTZ: Yes, indeed, Chair, that is 22 essentially our submission and you've summarised it 23 extremely effectively and I won't pursue the argument in 24 the sense that I won't – I don't need to persuade you, 25 you've appreciated the argument. The relevant references,</p>

<p style="text-align: right;">Page 39136</p> <p>1 Chair, for Mr Zokwana's statements are that miners were 2 aware that changes could be made to the agreement. That 3 can be found on day 46, at page 5027 of the transcript and 4 it's lines 10 to 23 and an easy reference for this is also 5 NUM's heads of argument at paragraph 157. 6 CHAIRPERSON: What page are you reading? 7 MR GOTZ: Sorry, Chair, I'm giving you 8 the references for the point that my made about Zokwana, 9 I'm not sure that they are in our heads – 10 CHAIRPERSON: Mr Tip gets [inaudible] 11 NUM. I want to say that your heads I must say I find very 12 helpful. They address most of the pertinent passages in 13 the record for us. With regard being had to the fact that 14 there can be something like 40 000 pages at the end, any 15 help in the labyrinth that we get from counsel is 16 gratefully received. And certainly you've given us a lot 17 of help for which it's appropriate for me to thank you. 18 MR GOTZ: Thank you, Chair. Chair, just 19 to emphasise the point that NUM, of course, was at the time 20 fully aware of the fact that the RDOs were underpaid and 21 indeed at the conclusion of the 2011 wage negotiations was 22 so concerned about the failure to achieve a differential 23 increase for the Lonmin RDOs that it warned that the 24 situation was a ticking time bomb. That factor, coupled 25 with the fact that the wage could in these sorts of</p>	<p style="text-align: right;">Page 39138</p> <p>1 the RDOs would be taken up by the NUM. And with this 2 concept – 3 CHAIRPERSON: - go further than that, by 4 the only union which had negotiating rights in respect of 5 increases in the mining. Because of the structure of the 6 agreement between or the content rather of the agreement 7 between NUM and Lonmin NUM had a monopoly from the 8 employees of negotiating rights and if they didn't choose 9 to exercise them there was no-one who had the power under 10 the various collective agreements to do that. Isn't that 11 right? I'm sorry that takes the submission further than 12 you want to take it, but prima facie it seems to be 13 correct. 14 MR GOTZ: Indeed, Chair, what we say is 15 that indeed created a responsibility not only to its own 16 members, but of course to all of the RDOs at Lonmin because 17 it alone had the right to bargain on their behalf and of 18 course AMCU did not have the bargaining rights. And Chair, 19 in addition – 20 CHAIRPERSON: It's not only that, even 21 the non-unionised workers didn't have those rights either, 22 isn't that so? 23 MR GOTZ: Indeed, Chair and we would say 24 finally that this constituted a failure to properly 25 represent the interests of the RDOs in circumstances where</p>
<p style="text-align: right;">Page 39137</p> <p>1 circumstances be varied by agreement, we submit those are 2 two undisputed facts which must be seen in or must form the 3 backdrop of evaluating the impact of NUM's position that 4 the agreement could not in fact be varied and in fact it 5 would be a breach of the agreement in order to do so. And 6 we submit in those circumstances that the attempt to 7 suggest that it bears no responsibility for the subsequent 8 events because it did not bear a mandate or did not have a 9 mandate from the RDOs should not be accepted and we submit 10 that the – 11 CHAIRPERSON: I understand that, I 12 understand that submission. We'll get comment from a 13 slightly different angle from Mr Tip on it in due course, 14 but what kind of responsibility are you talking about? I 15 understand the submission they must bear some 16 responsibility for what happened because of what they did 17 and particularly what they didn't do, but how would you 18 describe that responsibility and how would we, if we accept 19 your submission, how should we describe the responsibility 20 in our report? 21 MR GOTZ: Chair, may I make this 22 submission? We would say that a finding that the NUM 23 officials who articulated that position improperly and 24 possibly negligently articulated that position which had 25 the effect of foreclosing any prospect that the demand of</p>	<p style="text-align: right;">Page 39139</p> <p>1 they knew that the situation was a ticking time bomb. Now, 2 Chair, that finding – 3 CHAIRPERSON: So all you're asking us 4 effectively to do is to make that finding. That would be a 5 - 6 MR GOTZ: That was a preface to my next 7 submission. 8 CHAIRPERSON: I'm sorry, forgive me. 9 MR GOTZ: Chair, under the terms of 10 reference you're required, the Commission is required to 11 consider inter alia whether NUM used its best endeavours to 12 resolve the situation. And we would submit that this does, 13 on our submission, fall under the rubric of that term of 14 reference and you can make a finding in terms of the terms 15 of reference that by virtue of this fact alone NUM did not 16 use its best endeavours. My learned friend, Mr Burger, 17 yesterday used the example of the counter factual which he 18 indicates it was a term common to the competition regime 19 and essentially the inquiry is but for a particular fact 20 would the situation have developed differently. And we 21 submit under this counter factual, a counter factual in 22 which NUM had recognised what its responsibilities were to 23 the workers and indeed adopted a position which was not the 24 one as articulated by Mr Setelele. Things may well have 25 developed differently and you can find that on a balance of</p>

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1 probabilities. Chair, we do not make the submission that
 2 that leads to any form of delictual or criminal
 3 responsibility on the part of NUM. It's a simply a
 4 submission that under the terms of reference it must bear
 5 the responsibility for its failure to properly represent
 6 the RDOs under those circumstances. Chair, may then I turn
 7 to –
 8 MR TOKOTA SC: Sorry, Mr Gotz, do I
 9 understand, I just want to clear up my mind, do I
 10 understand you to be saying that NUM should have taken it
 11 upon itself to do the negotiations on behalf of the RDOs
 12 for this 12 500?
 13 MR GOTZ: Mr Tokota, I put it no,
 14 Commissioner Tokota, I put it no higher than this, if NUM
 15 had not articulated this position at a meeting and instead
 16 adopted the position which we submit it ought to, that
 17 these were extraordinary circumstances, prior to the strike
 18 having started in which RDOs were underpaid. And then in
 19 which circumstances where they had been told expressly that
 20 the RDOs were heading for an unprotected strike what it
 21 ought to have done under those circumstances was said to
 22 the RDOs but we can in fact take your cause up and have a
 23 variation, possibly a negotiation with Lonmin with a view
 24 to varying the two year wage agreement. And it's failure
 25 to do that, it's principled –

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1 CHAIRPERSON: It's not as simple as that.
 2 NUM have said and I think it's quite clear from evidence,
 3 they only act on mandates from their members. So you'd
 4 have to further with the submission, I'm not saying it
 5 would necessarily be a wrong submission if you went that
 6 far, but anyway we're just testing the argument at the
 7 moment. But surely if there's any merit in that submission
 8 you'd have to go so far as to say that NUM should then have
 9 approached the RDOs and said look we've got the monopoly of
 10 bargaining rights, we are prepared to take this up if you
 11 give us a mandate to do so. And if the RDOs said no it's
 12 got nothing to do with you we're not prepared to give you
 13 any mandate to do anything then of course the situation
 14 might be different. But I don't think it would be valid
 15 criticism of NUM, as I said this is all prima facie, I
 16 haven't made up my mind on anything, it wouldn't be valid
 17 criticism of NUM to say that even without a mandate,
 18 without even seeking a mandate they should have gone off to
 19 Lonmin to raise the situation of the RDOs.
 20 MR GOTZ: Indeed, Chair, I think that's
 21 absolutely correct. It had the opportunity to facilitate
 22 that. There were various meetings by Mr Setelele's own
 23 admission that the demand by the RDOs in that paragraph on
 24 screen was discussed at various meetings by the NUM
 25 Branches.

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1 [11:26] So it was topic for discussion yet it did nothing
 2 to facilitate the obtaining of a – did nothing to
 3 facilitate obtaining a mandate from the RDOs.
 4 CHAIRPERSON: To be fair the problem
 5 appears to be that they misunderstood or misinterpreted the
 6 terms of the agreement. So they thought the door was
 7 closed. They thought there was nothing they could do.
 8 That's why they said, there's nothing we can do, we must
 9 wait until the agreement expires and take it up again then.
 10 So their mistake or failure or omission or whatever the
 11 appropriate word is, was apparently brought about by a
 12 failure to interpret their agreement correctly, and that
 13 would be corrected.
 14 MR GOTZ: Yes Chair, with this gloss, I
 15 would with respect submit that misunderstanding was a
 16 negligent one, in circumstance where even Mr Zokwana says
 17 that the NUM officials and indeed the NUM membership is
 18 aware that these agreements can be varied and indeed have
 19 been varied in the past. The position Mr Setelele says was
 20 articulated and taken by the NUM officials at Lonmin,
 21 mistaken as it may be, was nevertheless a one that was
 22 borne of negligence, if not gross negligence, with respect
 23 Chair.
 24 Chair, may I then turn to my second theme which
 25 is a range of submissions in relation to the 11th of August

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1 and there are really four topics under that theme. The
 2 first topic that I want to address briefly is the issue of
 3 the time of the incident. The Chairperson, during a debate
 4 with my learned friend Ms Pillay on the first day of
 5 argument, asked Ms Pillay, "are we certain of the time in
 6 which the attack at the NUM offices occurred," and Ms
 7 Pillay said that she would revert after the break, and then
 8 did revert with the information that Mr Motlogelwa had
 9 indicated in his witness statement that the march had
 10 occurred to, or the march had started towards the NUM
 11 offices at 11 o'clock in – on Saturday morning. Chair,
 12 there is in fact a considerable amount of objective
 13 evidence which I'd like you to – to refer the Commissioners
 14 to which in fact indicates that the mark occurred much
 15 earlier and indeed before 9am and I'd like to refer the
 16 Commission to that – to those pieces of evidence. There
 17 are really five pieces of evidence, but before I refer you,
 18 I think it is important for me to indicate that we are on
 19 this score at least ad idem with NUM because in NUM's heads
 20 of argument in paragraphs 234 and 235 of their main
 21 submissions referring to an entry for 09:03 in the Lonmin
 22 log book which is EEEE19A, exhibit EEEE19A, Lonmin's
 23 counsel say that entry for 09:03 plainly relates to a
 24 situation after the attack had been dispersed at a time
 25 when the two injured strikers were being removed to

<p style="text-align: right;">Page 39144</p> <p>1 hospital. Let me indicate again that that is in relation 2 to an entry for 09:03 on the morning of the 11th of August. 3 The first piece of evidence is indeed the Lonmin log book 4 which has a variety of entries which indicate that the 5 attack or the incident occurred prior to 9am. On the 11th 6 of August on exhibit EEEE19A there's an entry for 9am which 7 says that Frans Mabalini reports a person shot at Wonderkop 8 Hostel. There's an entry for 09:08 which says that Frans 9 reports a person being shot inside the hostel next to the 10 Shagan offices. And then there's an entry for 09:36 which 11 talks about medics transporting one patient to the Andrew 12 Saffy Hospital with one gunshot wound in the lower back. 13 Those entries, Chair, undoubtedly relate to the times when 14 Lonmin Security personnel found the two victims of the NUM 15 shooting, and as I have indicated those bodies or those 16 people were found at 9 a.m. and 09:08 respectively. 17 CHAIRPERSON: The entries in the 18 occurrence book? 19 MR GOTZ: In the Lonmin logbook, yes. 20 CHAIRPERSON: It's Lonmin occurrence 21 book. 22 MR GOTZ: Although – 23 CHAIRPERSON: Sorry, it occurred to me, I 24 just put something to you – 25 MR GOTZ: Yes?</p>	<p style="text-align: right;">Page 39146</p> <p>1 information will be entirely in accordance with your 2 submissions. 3 MR GOTZ: Indeed Chair. Might I mention 4 that what I am dealing with is the objective evidence which 5 supports the proposition that it happened before 9 a.m. 6 And this is the first of five pieces of evidence that I 7 will refer to. 8 CHAIRPERSON: Yes, but it's all subject 9 to the possible problem that there were entries made in the 10 Lonmin occurrence book after the event, that the time was 11 incorrectly recorded. It may be correctly recorded but 12 there's a problem. But the AVL records will indicate one 13 hopes with great accuracy. You see one of our problems is, 14 Mr Mabuyakhulu in a passage to the evidence which you 15 quoted at the top of page 123, says "on the 11th at 9 16 o'clock we met at Wonderkop and we exchanged views. It was 17 then decided that we should approach" – so there is 18 evidence the other way apart from the evidence – there's 19 evidence the other way that he approached the office was 20 followed on a meeting at Wonderkop, I think reading the 21 statement where the matter was discussed, so there's 22 evidence on either side of the line, but hopefully the AVL 23 material which Mr Bham is going to give us, get us, will 24 put the matter beyond dispute. 25 MR GOTZ: Indeed Chair. May I mention</p>
<p style="text-align: right;">Page 39145</p> <p>1 CHAIRPERSON: - it occurs to me there is 2 a point put by one of the evidence leaders after we 3 adjourned when I raised the point, to say that if we get 4 the vehicle, I forget the abbreviation, but you know 5 there's AVL, if we get the AVLS of the document of the 6 vehicle that the Lonmin security people were travelling in 7 on the morning of the 11th, we will get where one hopes 8 accurate evidence of when this incident, or when they went 9 to the NUM office. And we won't then be dependent upon the 10 accuracy or otherwise of someone who is making entries in 11 the Lonmin occurrence book. If the point is important, and 12 I think it probably is, I am sure if we ask Lonmin to give 13 us those records they will do so without any inappropriate 14 deletions. So perhaps we can ask them now. Mr Bham, you 15 are following the point? It shouldn't be too difficult for 16 your clients to give us the AVL records relating to the 17 vehicle driven by Lonmin security officials who went to the 18 NUM office on the morning of the 11th of August, apparently 19 to warn the NUM people of information they had received to 20 the effect there was going to be an attack. Mr Bham is 21 making notes, nodding his head, so I am not going to stop 22 you arguing, but it seemed to me that that might be a 23 satisfactory way of resolving the problem. 24 MR GOTZ: Yes, Chair. 25 CHAIRPERSON: It may well be this</p>	<p style="text-align: right;">Page 39147</p> <p>1 the evidence, it is evidence which is outside of the Lonmin 2 log book which I think is in addition we would get the AVL 3 which would con – records which would confirm the 4 submissions that we are making. The other evidence is 5 briefly Chair, because I am running out of time, it's the 6 dockets in relation to the finding of the body of 7 Mabuyakhulu and Mr Ngema, both of whom were shot, contains 8 statements by the police officers that they received the 9 relevant call to come to the scene at 9am and in both of 10 those dockets that record statements of the bodies of Mr 11 Mabuyakhulu and Mr Ngema who of course were still alive at 12 the time having been found at 09:15 and 09:20 respectively. 13 That is a piece of evidence that is quite independent of 14 the Lonmin log book because those police officers 15 responding to the call, would not have any influence or not 16 be influenced by the Lonmin logbook. Mr Setelele's witness 17 statements, you will recall he testified that when the two 18 Lonmin security personnel, Mr Tobiokana and Motlogelwa 19 arrived on the scene he then left to take the Quantum 20 vehicle away to a point of safety. He says in his witness 21 statement that those two security guards arrived at the NUM 22 office at 08:30am Chair, then in addition there is 23 indications that senior SAPS members were told probably by 24 Lonmin or perhaps by the officers involved that the 25 incident had in fact occurred at 08:30. You will recall</p>

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1 Chair, that the – that Brigadier Calitz testified that in,
 2 when he arrived he received an email which he then
 3 forwarded onto the NATJOC which was described – which had
 4 described the situation at the time and in paragraph 27 of
 5 his witness statement he quotes that email which he
 6 forwarded on and he records that the incident occurred at
 7 08:30 a.m. in his witness statement. And then finally,
 8 Chair, there is the objective evidence of the video camera
 9 218 which is a taxi rank dome camera which is exhibit X1
 10 and the time on that camera Chair, records the time as the
 11 group of NUM members are seen returning to their offices
 12 after the incident. The time is recorded at 09:34 but it's
 13 important to note that Mr Dirk Botes gave evidence that he
 14 had checked the variances between the times of the various
 15 CCTV cameras and had found that the variance between camera
 16 218 and actual time was 26 minutes. In other words, that
 17 this camera was running 26 minutes ahead of time. So what
 18 we can conclude from that is that the time when the NUM
 19 officials returned to their offices after the incident was
 20 at 09:08 and Chair, that's what we would submit is five
 21 independent sources of evidence which would corroborate the
 22 indications in the Lonmin log book that the incident
 23 actually did take place before 9am notwithstanding what
 24 some of the witnesses that have testified may have put the
 25 time at. And Chair, we says that this is a matter of some

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1 importance largely because of the suspicion that the
 2 strikers armed themselves inter alia with pangas from Mr
 3 Cassim's shop which as you know, only opened at 9am prior
 4 to the march to the NUM offices. We submitted in our heads
 5 of argument that we submitted that in fact the arming of
 6 the strikers with inter alia dangerous weapons such as
 7 pangas was in fact a response to what they perceived as
 8 having been an attack on them as a consequence of the –
 9 following the march.
 10 Chair, let me deal briefly with some of the
 11 issues relating to the actual incident. We know from the
 12 evidence that approximately 2 to 3 000 people marked
 13 towards the offices. We know also that there was a rumour
 14 that was started and we've set out in our heads of argument
 15 the evidence that this was effectively a rumour, and we
 16 make the submission that being a rumour from which – where
 17 the source cannot be identified, this Commission will be
 18 very reluctant to find with certainty that the rumour was
 19 in fact true. A rumour was started that the – that they
 20 were on their way to the NUM offices with a violent intent,
 21 that being to burn the offices down. Chair, what's also
 22 clear from the evidence is that upon receiving this
 23 information from the Lonmin security guards, the 30 or so
 24 NUM officials in the offices armed themselves I would
 25 suggest to the teeth including with firearms, at least one

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1 firearm, and went outside to confront the strikers. The
 2 stated reason for that Chair, is – was in order to protect
 3 their property. Chair, let me emphasise that of course the
 4 offices themselves were not owned by the NUM. They were
 5 offices that were provided by Lonmin. We do accept though
 6 that it may have contained contents belonging to NUM inter
 7 alia files which would obviously be property –
 8 CHAIRPERSON: It contained the records of
 9 the branch.
 10 MR GOTZ: Yes indeed.
 11 CHAIRPERSON: And those records,
 12 presumably part of the ongoing operations of the Union
 13 would have been important.
 14 MR GOTZ: Chair, the essential question
 15 is given the fact that the stated intent was to go out to
 16 confront the strikers with a view to protecting the
 17 property, what are the legal principles that are at play in
 18 these sort of circumstances? And we've referred in our
 19 heads of argument as has my learned friends, our learned
 20 friends for NUM to the Van Wyk case where it is emphasised
 21 that taking action which could potentially lead to the
 22 deaths of other people in defence of property is only
 23 justified in very exceptional circumstances and we've set
 24 out the principles. In the Van Wyk case it was found that
 25 those were exceptional circumstances but inter alia because

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1 of the fact that a clear warning had been given that if the
 2 person who sought to invade the property committed to their
 3 intended course, there was a firearm on the other side of
 4 the door which could have lethal consequences if they
 5 pursued that action. And that establishes the principle
 6 Chair, that in these circumstances this sort of conduct is
 7 exceptional and at the very least, what one is expected of
 8 the person who is acting in defence of the property must
 9 take clear steps to indicate that essentially lethal
 10 consequences might result, and the Van Wyk case goes as far
 11 as to suggest that the invader must be told or informed in
 12 some way that there is a lethal weapon in the possession of
 13 the party.
 14 CHAIRPERSON: And of course, the facts of
 15 that case were very special. I am not sure that the
 16 principle you are relying on now is necessarily of general
 17 application for every situation. You remember the Van Wyk
 18 case was a case of spring gun. The shopkeeper was troubled
 19 with all sorts of, with burglaries and so forth. He had
 20 set up the spring gun in his shop so if anyone came in, the
 21 spring would be activated and the gun would go off. So he
 22 had ample time to give a warning, in fact the suggestion
 23 was he did but problems about the language of the warning
 24 and all that. But it may well be that in a situation where
 25 there is a sudden attack on someone with a view to destroy

<p style="text-align: right;">Page 39152</p> <p>1 his property, that he may be entitled to protect himself or 2 rather, protect his property without giving a warning if 3 there wasn't reasonable time to do so, if his right to 4 protect the property is one which is sufficiently important 5 to trump the rights of the assailant, potential thieves, 6 robbers. So the passage in Van Wyk's case which requires 7 an adequate warning may well be based on the facts of that 8 case with the spring gun set up long in advance. But of 9 course I am not sure we want to go down that avenue for the 10 purposes of this Commission because as far as I can recall 11 the evidence was that the relevant shots were fired when 12 the strikers were about 30 metres away from the offices, so 13 they would have had as I see it prima facie, what Mr Tip's 14 going to say, the NUM people had the opportunity to fire 15 warning shots perhaps one or two, and it may well be that 16 once the strikers had seen the NUM people weren't going to 17 abandon the office, they were going to stand there and 18 defend it, and they were armed with firearms waving 19 firearms, they might well have decided that discretion was 20 the better course of valour and to have departed. So I am 21 not sure we've got to go down that route but what I am 22 saying to you is the proposition you state here in 23 paragraph 26.8 may not a statement of general application, 24 but you more or less imply that in the way you phrase that 25 paragraph you red.</p>	<p style="text-align: right;">Page 39154</p> <p>1 themselves were all that could have been done by way of a 2 warning. There could have been a shouted warning as well. 3 MR GOTZ: Indeed. Indeed, Chair, and 4 this must of course, we have also referred in our heads of 5 argument to the evidence that in fact what the two Lonmin 6 security guards witnessed was in their words NUM officials 7 pouncing on the strikers, coupled with the evidence of Mr 8 Gegeleza which we submit is indicative of his state of mind 9 at the relevant time. But he was at that point not quite 10 certain whether a fight would in fact ensue and we've 11 referred to those passages in our heads of argument. 12 CHAIRPERSON: There's also an entry 13 somewhere which indicates that those Lonmin security 14 officers mightn't have been quite as candid about their own 15 involvement at that stage as one would have hoped, and 16 there's a suggestion, and maybe no more than that, that 17 they may also have been involved in something. So one has 18 to treat their evidence with a fair degree of caution also, 19 but anyway, it seems that the essential facts which you 20 require for your argument I would have thought capable of 21 being established without going into those other byways and 22 side alleys which might cause difficulty if more closely 23 calibrated factual findings were required. 24 MR GOTZ: Yes, indeed. Chair, may I make 25 two final points on this very quickly. It is notable,</p>
<p style="text-align: right;">Page 39153</p> <p>1 MR GOTZ: Yes indeed, Chair, and we would 2 submit that the principle that emerges from the Van Wyk 3 case, that taking action in defence of property which could 4 potentially lead to loss of life is only justified in 5 exceptional circumstances is of general application and 6 that my learned friends for the NUM have correctly referred 7 to the Walters case which is a Constitutional Court 8 judgment which also makes the point although - that the 9 Constitution has an impact here because what one is valuing 10 is two independent rights and the right to life or the 11 potential loss of life is obviously of far greater 12 significance in the balancing or proportionality inquiry, 13 then the person's right to property. 14 [11:46] Chair, you are with respect absolutely correct 15 that what the evidence indicates I'd understood from Mr 16 Motlogeloa's statement that the distance was in fact 50 17 metres, but even if it was 30 we would submit that given 18 the description that Mr Gegeleza gives to the incident 19 there was ample time to fire one or two shots into the air 20 and to see what the consequences might be. 21 Chair, may I emphasise this; that it – 22 CHAIRPERSON: [Microphone off, inaudible] 23 could also, I mean not only have fired shots but say look 24 here, if you people come closer and attack our offices we 25 will fire. So it wasn't just a situation where shots</p>	<p style="text-align: right;">Page 39155</p> <p>1 Chair, that we have to rely on the evidence of Mr Gegeleza 2 in this regard who neither pulled the trigger in the 3 circumstances, was in fact some distance away from the 4 person who pulled the trigger, and indeed who testified at 5 the relevant time that he was not certain that a fight 6 would ensue. What we do not have either in the form of a 7 witness statement and certainly not in the form of oral 8 evidence before the Commission is evidence from the shooter 9 himself, and that places, with respect, the Commission at a 10 distinct disadvantage. It would have been far more 11 desirable had the person who actually pulled the trigger 12 come to give evidence, or at the very least filed a witness 13 statement, but we do not even know to the best of my 14 knowledge who that person was. 15 CHAIRPERSON: No, we don't know who it 16 was, but there were, you will recall, at the time the 17 evidence was given apprehension, whether reasonable or not 18 we don't have to go into, apprehension that if the identity 19 of the shooter became apparent either because he gave 20 evidence or a statement was forthcoming, he might have 21 added to the list of those who died in consequence of the 22 Marikana troubles. 23 MR GOTZ: Chair, I wasn't involved at 24 that stage and weren't aware of that and I do appreciate 25 that that would potentially be an issue, but that, those</p>

<p style="text-align: right;">Page 39156</p> <p>1 were –</p> <p>2 CHAIRPERSON: Remember I wouldn't allow</p> <p>3 the witnesses to mention the person's name. They did know</p> <p>4 who it was, but I rightly or wrongly thought it a matter</p> <p>5 the police can investigate in due course. I didn't think</p> <p>6 it would be sensible in the circumstances to insist upon</p> <p>7 that answer being given. So that may well be a reason why</p> <p>8 we haven't got a statement, but the point you make of</p> <p>9 course is correct that whatever the reason was, the fact</p> <p>10 that the shooter didn't come forward and explain the</p> <p>11 circumstances of the shooting does hamper to some extent</p> <p>12 the work of the Commission. But I would have thought that</p> <p>13 in the light of the submissions you made we can probably</p> <p>14 make the findings that have to be made for the present</p> <p>15 purposes despite that, but that's a matter we have to look</p> <p>16 at later.</p> <p>17 MR GOTZ: Indeed, Chair. The final point</p> <p>18 is this, is that there is really no dispute that what</p> <p>19 happened subsequently is that the NUM officials then</p> <p>20 pursued the fleeing strikers through the gap known as "Stop</p> <p>21 Nonsense" and as Mr Mabuyakhulu says in his evidence in an</p> <p>22 uncontested piece of evidence, he was severely assaulted</p> <p>23 and lost consciousness, and we set out in our heads of</p> <p>24 argument the authorities which indicate that that sort of</p> <p>25 subsequent pursuit is not something that can fall under the</p>	<p style="text-align: right;">Page 39158</p> <p>1 [12:11] CHAIRPERSON: The Commission resumes. Mr</p> <p>2 Gotz.</p> <p>3 MR GOTZ: Thank you, Chair. Chair, just</p> <p>4 to indicate that I hope to be done in approximately 20</p> <p>5 minutes, just for the sake of those people who –</p> <p>6 CHAIRPERSON: While we're busy with that,</p> <p>7 Mr Ntsebeza came to see me, he's looking very worried about</p> <p>8 the fact that what we, the question of time, what we did</p> <p>9 was we allocated the whole day to you and the families to</p> <p>10 divide up among yourselves and the purpose of the hearing</p> <p>11 of course is for main points to be highlighted and really</p> <p>12 for questions to be put by the Commissioners to counsel so</p> <p>13 that they can deal with them. That's the purpose of it.</p> <p>14 The main argument is the written argument and that's, and</p> <p>15 you obviously appreciated that, that's why you and indeed</p> <p>16 the families have submitted very full and helpful</p> <p>17 arguments. But there is concern on the part of Mr Ntsebeza</p> <p>18 that his time is being eaten into and of course this</p> <p>19 Commission's capacity to sit comes to an end at the end of,</p> <p>20 on Friday. So the reason I raise this is that if necessary</p> <p>21 – perhaps you must tell me now, perhaps I must ask Mr</p> <p>22 Ntsebeza. You've got 20 minutes, you say, that you want.</p> <p>23 Mr Ntsebeza, do you want me to adjourn at lunchtime until</p> <p>24 half past 1, at least it will give you an extra quarter of</p> <p>25 an hour?</p>
<p style="text-align: right;">Page 39157</p> <p>1 rubric of self-defence and so at the very least that</p> <p>2 subsequent assault is not something which can be the</p> <p>3 subject of a claim of self-defence, and we've referred to</p> <p>4 the authorities in our heads of argument. Under those</p> <p>5 circumstances, Chair, we do submit that there is a prima</p> <p>6 facie case that the person or persons involved were not</p> <p>7 acting in self/private defence, putative or otherwise –</p> <p>8 CHAIRPERSON: Prima facie case of what</p> <p>9 then?</p> <p>10 MR GOTZ: Well, it would be attempted</p> <p>11 murder and certainly – attempted murder, certainly; those</p> <p>12 are the charges on the, indicative charges on the dockets</p> <p>13 already, and of course assault with intent to do grievous</p> <p>14 bodily harm against Mr Mabuyakhulu. So be it. But those</p> <p>15 are the, we would submit that it is open to the Commission</p> <p>16 to make the recommendation on the basis that there is a</p> <p>17 prima facie case of attempted murder and also –</p> <p>18 CHAIRPERSON: When it's convenient for</p> <p>19 you we'll take the tea adjournment. I'm in your hands.</p> <p>20 You indicate when it will be convenient.</p> <p>21 MR GOTZ: Chair, I'm at a point where I</p> <p>22 want to deal with some residual issues in relation to the</p> <p>23 11th, but I'm happy to deal with those after tea.</p> <p>24 CHAIRPERSON: 15 minutes.</p> <p>25 [COMMISSION ADJOURNS COMMISSION RESUMES]</p>	<p style="text-align: right;">Page 39159</p> <p>1 MR NTSEBEZA SC: Any time I can get</p> <p>2 anywhere now, Mr Chairman, I will be very glad to get.</p> <p>3 CHAIRPERSON: So we will take the lunch</p> <p>4 adjournment will be for half an hour. Mr Gotz, if you can</p> <p>5 use less than the 20 minutes, because your learned friend</p> <p>6 Mr Ntsebeza has got a time shortage problem, I'm sure he'll</p> <p>7 appreciate it and I would too.</p> <p>8 MR GOTZ: Chair, then I will try and</p> <p>9 short circuit this. I just emphasise the point made by my</p> <p>10 learned friend Ms Barnes at the outset, we have reduced the</p> <p>11 oral argument to effectively a speaking note which we will</p> <p>12 hand up to –</p> <p>13 CHAIRPERSON: Yes, no, I was very pleased</p> <p>14 when I heard that because that also helps us to use the</p> <p>15 time profitably.</p> <p>16 MR GOTZ: There is one aspect that I must</p> <p>17 just deal with very briefly in relation to the consequences</p> <p>18 of the NUM shooting on the 11th. We have made the</p> <p>19 submission in our heads of argument that it was the</p> <p>20 consequence of that shooting that the strikers began to</p> <p>21 carry the various weapons that they did, and if we are</p> <p>22 correct in the timing of when the incident occurred, and of</p> <p>23 course the timing of when Mr Cassim's shop opened, that</p> <p>24 would be a strong pointer to the fact that it was in</p> <p>25 response to the shooting that the strikers began to carry</p>

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1 more dangerous weapons. And Chair, that is significant
 2 because we submit that one aspect with respect that has
 3 been overlooked is that the law relating to the carrying of
 4 dangerous weapons has in fact recently undergone a slight
 5 evolution. The Gatherings Act, the Regulation of
 6 Gatherings Act now provides in section 8(4) that no
 7 participant of a gathering may have in his or her
 8 possession any dangerous weapon as defined in the Dangerous
 9 Weapons Act, and that is made a criminal offence.

10 But that amendment to section 8, or that
 11 provision of section 8(4) of the Regulation of Gatherings
 12 Act was not in fact in force at the time. At the relevant
 13 time the provision of the Regulation of Gatherings Act read
 14 somewhat differently and I'll read it to the Commissioners.
 15 It said, "Participants at a gathering shall abide by any
 16 law in respect of the carrying of dangerous weapons." So
 17 unlike the current position which makes it a prohibition,
 18 the provision merely said "shall abide by any law," and
 19 therefore what one needs to do is to look elsewhere, to
 20 effectively the Dangerous Weapons Act of 1968, in order to
 21 determine what the position is, and as we – well, we will
 22 provide this note for you afterwards, but as we indicate
 23 there in the 1968 act the relevant provision says that,
 24 "Any person who is in possession of any dangerous weapon
 25 commits an offence unless he is able to prove that he at no

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1 time had any intention of using such weapon or object for
 2 any unlawful purpose."

3 So the effect of the provisions which were in
 4 operation at the time of 9 to 16 August 2012 was that a
 5 defence which is potentially of application is created, and
 6 the defence is this, that if the strikers believed that
 7 they were under attack and required the weapons for
 8 defensive purposes, it's at least arguable that they would
 9 be able to prove that they had no intention of using the
 10 weapons for any unlawful purpose. The relevance of this
 11 submission, Chair, is that the evidence leaders have
 12 recommended that there be a wholesale, or recommendation
 13 for a wholesale prosecution of all those people who can be
 14 identified in the videos as carrying a dangerous weapon and
 15 at least, with respect, as I read the arguments it's
 16 because of an apparent, a suggestion apparently that the
 17 mere carrying of the weapons might be unlawful, and so we
 18 refer the Commissioners to this perhaps simply as a
 19 clarification of a point of law. I might have misread our
 20 learned friends' heads of argument on behalf of the
 21 evidence leaders, but it is an important qualification and
 22 something which we submit if we're correct on the facts, is
 23 a defence which is potentially of application and which
 24 ought to be at least noted in the final report that is
 25 issued by the Commission.

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1 Chair, then may I turn to issues relating to
 2 SAPS, and here I intend to be relatively brief. We really
 3 seek to address one, or two contentions, contentious issues
 4 in relation to what occurred at scene 1 on the 16th of
 5 August 2012.

6 We do say that the facts in relation to scene 1,
 7 the factual, what actually happened is largely at this
 8 point well established, if not common cause, and we in our
 9 heads of argument have not sought to refer extensively to
 10 the evidence in relation to that issues, but we merely do
 11 point out that we align ourselves with the factual
 12 submissions that are made in relation to, in the heads of
 13 argument of the families, the South African Human Rights
 14 Commission, the injured and arrested persons, and of course
 15 the evidence leaders.

16 But there is one aspect where we do part company
 17 with the evidence leaders and that is the issue of whether
 18 the alignment of the Nyalas at scene 1 was a product of
 19 intention on the part of any person, or as we understand
 20 the evidence leaders to be submitting, it was the
 21 unfortunate consequence of disorder in the conduct of SAPS
 22 and not as a consequence of any intention, and we do with
 23 respect disagree with that submission on behalf of the
 24 evidence leaders.

25 Can I highlight this point, Chair; the evidence

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1 leaders have characterised the argument that is being made
 2 on behalf of the families, they don't mention AMCU, but
 3 also obviously AMCU, as well as the injured and arrested
 4 persons, that the case being put is that there was a
 5 deliberate intention on the part of SAPS to direct the
 6 strikers towards the TRT, to set up a situation where the
 7 TRT would appear to have reason to fire at the strikers.
 8 Now with respect, Chair, that's not the argument that is
 9 being ventilated, certainly on behalf of AMCU. We do not
 10 submit that the strikers were intentionally channelled
 11 towards the TRT so that the TRT could open fire and kill
 12 them. What we do submit though, Chair, is that this
 13 Commission can find that there was an intention to channel
 14 strikers towards the TRT. That is the first question; was
 15 the channelling of the strikers by the Nyalas intentional
 16 or merely an inadvertent effect of perhaps chaos and
 17 disorder.

18 Chair, my learned friend Mr Chaskalson was asked
 19 by Commissioner Hemraj the critical question of who was
 20 directing the Nyalas, who was giving the orders to the
 21 Nyalas at the relevant time. The answer to that question
 22 is it was Brigadier Calitz and there are two independent
 23 sources of evidence in support of that submission. The
 24 first is the evidence of Lieutenant-Colonel Scott who in
 25 his witness statement was unequivocal in saying that what

<p style="text-align: right;">Page 39164</p> <p>1 he heard on the radio was that Brigadier Calitz was giving 2 orders. Eventually he says that those orders were to 3 engage, but in the course of that he refers to the evidence 4 of – he refers to hearing on the radio Brigadier Calitz 5 giving an order for the Nyalas to come into some form of 6 formation and that evidence is then corroborated – perhaps 7 I can give you the reference for that – 8 CHAIRPERSON: You're quoting from 9 paragraph 41.11 of your heads – 10 MR GOTZ: Yes, indeed. 11 CHAIRPERSON: - at page 188. 12 MR GOTZ: Indeed, and then of course Mr 13 Botes when I cross-examined him gave confirmation of that. 14 I put it to him directly, "Did you hear Brigadier Calitz 15 giving orders for the Nyalas to come into formation?" and 16 he accepted that he had heard that. His only point of 17 disagreement with Brigadier Calitz was that he hadn't heard 18 Papa signs being used but had actually heard Brigadier 19 Calitz referring to drivers and commanders by name. So 20 both Lieutenant-Colonel Scott and Mr Botes testified that 21 they heard Brigadier Calitz giving the orders for the 22 Nyalas to come into some form of formation, and given the 23 timing of when those orders were given we submit that the 24 conclusion is inescapable that Brigadier Calitz was at the 25 relevant time directing the Nyalas to move forward and come</p>	<p style="text-align: right;">Page 39166</p> <p>1 MR GOTZ: Chair, what we say – 2 CHAIRPERSON: Can we make a finding on 3 that? 4 MR GOTZ: Chair, it must be borne in mind 5 that these sort of things are effectively what SAPS does on 6 a day-to-day basis, these sort of things are the product of 7 training exercises. Nyalas are placed in a particular 8 formation in order to direct protesters in a particular 9 direction and we illustrated that with reference to the POP 10 training manuals in relation to block. So what we submit 11 is that when Brigadier Calitz says block, when he gives 12 orders that they must move up into a particular formation 13 the end result, that crescent that one has seen in various 14 diagrams, the simple submission is that is a product of 15 Brigadier Calitz directing and ordering the Nyalas to move 16 into that position. 17 CHAIRPERSON: I must confess I read it 18 the other way and I have serious concerns about it. I 19 don't know what the answer is. I thought the order he gave 20 was block and I couldn't, and if that had been done and 21 there had been a block we wouldn't have had the problems we 22 had and I couldn't understand, and I still don't quite 23 understand why there wasn't a, the Nyalas weren't put in a 24 block formation which would have prevented the front group 25 of the strikers from advancing to their deaths.</p>
<p style="text-align: right;">Page 39165</p> <p>1 into a particular formation. 2 There one has the answer to the question of 3 whether or not the channelling was the product of any form 4 of intention on the part of Brigadier Calitz, and we submit 5 that the answer must be it was. That must be combined with 6 the evidence that Brigadier Calitz gave that this was what 7 he referred to as "n perfekte blok," or perfect block in 8 English, and it was put to him on various occasions why is 9 this a perfect block and he tried to explain that. But 10 ultimately we submit that his evidence that this was a 11 perfect block must stand as a clear indication that he'd 12 set out to accomplish something which he regarded as having 13 been perfectly achieved. And Chair, under those 14 circumstances the evidence of Brigadier Calitz coupled with 15 the evidence of Lieutenant-Colonel Scott and Botes must 16 lead you to the conclusion with respect that the 17 channelling of the strikers, or the setting up of the 18 strikers in the formation was the product of intention on 19 the part of Brigadier Calitz. The second – 20 CHAIRPERSON: What exactly is he alleged 21 to have said? He could never have said what Scott says in 22 the, you know, in the reported speech, they must move up 23 into some sort of formation. He would never have said 24 please move up into some sort of formation. What 25 formation, what form of a formation did he give orders for?</p>	<p style="text-align: right;">Page 39167</p> <p>1 MR GOTZ: Well, Chair, but it – 2 CHAIRPERSON: So I just put that to you 3 so you understand where I'm coming from. 4 MR GOTZ: Yes. 5 CHAIRPERSON: I don't know the answer, 6 but my impression was, despite some evidence to the 7 contrary, that the order was to form a block and for some 8 reason they didn't and I don't understand why they didn't. 9 Maybe there wasn't enough time or there was chaos and 10 confusion, but it is to me prima facie at this stage an 11 unsatisfactory feature of the case that there wasn't a 12 block. 13 MR GOTZ: Yes, Chair, you will recall 14 though that the POP training manuals indicate that there 15 can be blocks of different types and we illustrated that 16 with reference to exhibit KKK49, I think it is, which is 17 the POP training manual in relation to blocking, and what 18 that training manual reveals is that there can be two, 19 effectively two different types of blocks. The one is the 20 block that prevents a group of strikers moving down a 21 particular path. The diagrams indicating with reference to 22 a street that they are prevented from moving down a street, 23 but there are other forms of blocks and there are blocks 24 that create a channel, or canalise is the wording which is 25 used in the training manual, which canalise, or channelize</p>

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1 strikers in a particular direction and we submit that that
 2 was the type of block that was put in place. Essentially
 3 Brigadier Calitz recognising that his own POP members were
 4 probably ill equipped to deal with a group of armed
 5 striking workers decided that the best people to deal with
 6 the strikers to do the dangerous work of arresting them,
 7 disarming and arresting them, were the TRT, and so he
 8 engineered – quite cleverly we would submit – a block known
 9 as, well as he described it, a perfect block which had the
 10 effect of channelling the strikers down towards the TRT for
 11 them to be disarmed by the TRT, with the tragic
 12 consequences.

13 Chair, we do know that the TRT were the special
 14 units that would perform two roles. The one role was to
 15 protect the POP in circumstances where something went
 16 wrong, but the other role, which was equally important
 17 according to the evidence of Lieutenant-Colonel Scott, was
 18 the responsibility in his words to carry out the task of
 19 disarming and arresting of belligerent strikers, and he
 20 makes that point in his witness statement HHH20, paragraph
 21 8.29. So the role of disarming and arresting, as he put
 22 it, belligerent strikers was always to be done by the TRT
 23 and so it's not particularly difficult to understand what
 24 Brigadier Calitz was attempting to accomplish by setting up
 25 the Nyalas in a particular way which would first of all

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1 channel them towards the TRT and then ultimately for the
 2 TRT we would submit in his conception of the implementation
 3 of the plan would effectively then be responsible for the
 4 difficult task of, the high risk task of disarming and
 5 arresting the strikers.

6 So we do say that the channelling was deliberate,
 7 and we really part company with the evidence leaders only
 8 on this question. My learned friends have indicated that
 9 it was negligent on the part of Brigadier Calitz to not set
 10 up the Nyalas in a manner which would block the strikers in
 11 the sense of preventing them from moving through what has
 12 been referred to as channel A and channel B into the
 13 position where they would come into close quarters with the
 14 TRT.

15 [12:31] And of course we agree that at the very least
 16 this Commission should find that that was negligent on the
 17 part of an experienced police officer, POP officer in
 18 charge of those Nyalas we would absolutely agree. But we
 19 would say we would take it a step further and say that the
 20 channelling of the strikers in that direction was the
 21 product of intention on the part of Brigadier Calitz. And
 22 Chair, just one final point on this in relation to the
 23 evidence leaders and I do make this point with some
 24 respect, is that one of the oddities of the evidence
 25 leaders' approach in this case is that in relation to scene

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1 2 they, with respect, have not difficulty ascribing the
 2 injuries and the deaths that occurred at scene 2 to what
 3 they refer to as a paramilitary operation with the aim of
 4 annihilating those who were perceived as the enemy. And
 5 Chair, we do say if one is making those sort of comments in
 6 relation to scene 2 it is not particularly difficult to
 7 come to the same conclusion in relation to scene 1. What
 8 is it a paramilitary operation with the aim of annihilating
 9 those who were perceived as the enemy at scene 2, but one
 10 cannot ascribe the same characterisation, this being a
 11 paramilitary operation with a similar intention to scene 1.
 12 It doesn't become a paramilitary operation after scene 1.
 13 If it's a paramilitary operation, with respect, Chair, it's
 14 a paramilitary operation from the outset. It may not have
 15 been with the aim of annihilating those who were perceived
 16 as the enemy until scene 2, but at the very least if the
 17 evidence leaders are correct that this was such an
 18 operation at scene 2 you can ascribe some form of intention
 19 on the part of Brigadier Calitz who was ultimately in
 20 control of that paramilitary operation. So, Chair, we do
 21 make the submission that this was a product of intention
 22 and you should ultimately find under those circumstances
 23 that SAPS acted with at least dolus eventualis in relation
 24 to what happened at scene 1. Chair, there's one further
 25 aspect which I might just mention which I don't address

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1 because my learned friends for the injured and arrested are
 2 going to deal with is that we do differ somewhat from the
 3 approach that various parties have taken for the correct
 4 tests to be applied for whether the person acted or imputed
 5 - whether TRT members acted in putative self defence at
 6 scene 1. My learned friend, Mr Mpofo is going to be
 7 addressing that question and for the reasons that he will
 8 advance during his address. We say that the TRT members
 9 did not act in putative self defence at scene 1. Chair,
 10 may I then just turn briefly to two issues that I need to
 11 sweep up?

12 CHAIRPERSON: I haven't been keeping an
 13 eye on the time. You did say you'd be 20 minutes, it feels
 14 a bit longer than that, but it may have been that - in fact
 15 if this was caused by the intensity of the argument it made
 16 me think it was longer, but how much time –

17 MR GOTZ: I need minutes to make
 18 reference to the points. Chair, the one point is that in
 19 paragraphs 356 and 358 of NUM's heads of argument the
 20 submission is made that this Commission should recommend a
 21 centralised bargaining – to make recommendations to
 22 organised labour, business and the state that there's a
 23 need for centralised bargaining. And we do submit that
 24 that is not an issue which is free from contention, it was
 25 not the subject of detailed debate in the Commission. It

<p style="text-align: right;">Page 39172</p> <p>1 was supposed to be dealt with in the phase 2 proceedings 2 and we submit that it should not in fact be a 3 recommendation that is made. Ultimately it's a NUM policy, 4 one which –</p> <p>5 CHAIRPERSON: It's a NUM policy, it's not 6 an AMCU policy, AMCU was opposed to it, as I understand it 7 and there are arguments either way. The smaller mine 8 owners don't like it because they might be forced into 9 doing things which are all right for the bigger miners, but 10 not for smaller miners. On the other hand there are 11 arguments that it seems to work quite well in the coal and 12 gold sections, but your point is that we can't really, on 13 the material before us, give a definitive opinion and we 14 should refrain. Am I right?</p> <p>15 MR GOTZ: Indeed. Chair, there's one 16 final issue which I should just mention is that there are 17 submissions in NUM's heads of argument in relation to the 18 composition of the strikers on the day, on the 16th of 19 August. We in fact prepared heads of argument about a 20 month ago on this question and we will make that available 21 to you. The simple point is we don't agree with the 22 submissions that are made in relation to the composition of 23 the strikers either in NUM's heads of argument or in the 24 phase 2 preliminary report that the vast majority of 25 strikers on the koppie were AMCU members. And we made</p>	<p style="text-align: right;">Page 39174</p> <p>1 that information will certainly be given intensive 2 attention and consideration when our report is drafted. I 3 want to thank you and your colleagues for all the work that 4 was done which will help us, as I said, quite considerably.</p> <p>5 MR NTSEBEZA SC: Thank you, Mr Chairman. 6 May I also on behalf of my clients and those who instruct 7 me thank you, Mr Chairman and your Commissioners for the 8 undertaking that you are making. As you well realise there 9 are 37 families or families of 37 mineworkers who were 10 killed between the 13th and the 16th and family of each of 11 whom is keen to know whether there was any lawfulness in 12 the killing of their loved ones let alone justification for 13 those killings.</p> <p>14 CHAIRPERSON: The same points apply, of 15 course, to the families of the other seven.</p> <p>16 MR NTSEBEZA SC: Indeed.</p> <p>17 CHAIRPERSON: We'll also deal with them 18 as well.</p> <p>19 MR NTSEBEZA SC: Indeed, Mr Chair, I can 20 only speak for those that I'm acting, but I share the 21 sentiment. The families of the police, the families of 22 security people. Mr Chair, for housekeeping purposes I 23 will indicate the material that we want to rely on, but 24 just so that it is known where we stand with respect to the 25 submissions made by the evidence leaders relative to</p>
<p style="text-align: right;">Page 39173</p> <p>1 submissions in writing earlier, but those don't seem to 2 have been made available as yet to all the parties.</p> <p>3 CHAIRPERSON: I look forward to receiving 4 those, thank you.</p> <p>5 MR GOTZ: Thank you, Chair and apologies 6 for going over time. Those are our submissions.</p> <p>7 CHAIRPERSON: The apologies are really 8 due to Mr Ntsebeza and not to me, but thank you very much. 9 Mr Ntsebeza, we will accede to your request that we 10 shouldn't take more than half an hour for lunch and I did 11 indicate to you in chambers when you came to see me about 12 the application for more time, or the problems you were 13 having with time, but one aspect you don't have to deal 14 with very fully is the question of the details in respect 15 of each of the 37 deceased persons for whose families you 16 appear. We have undertaken to do our best in our report to 17 set out – if you have a section dealing with each of the 44 18 deceased persons with our findings in respect of 19 circumstances in which they died, whether they were 20 employed by Lonmin. If so in what capacity and so forth. 21 You've actually broken the back of that and we're very 22 grateful to you and those who've assisted you for compiling 23 that part of the heads which is going to lighten our task 24 considerably. You don't have to cover it in detail, but 25 you can be assured and your clients can be assured that</p>	<p style="text-align: right;">Page 39175</p> <p>1 whether it was a function of chaos at scene 1 that the 2 mineworkers were channelled to what the evidence leaders 3 themselves call a fuselage of TRT firing. We have dealt 4 with this topic very extensively and may I just refer you 5 to it, I'm not going to go there. In our replying heads in 6 paragraphs 31 to 33 we articulate why it is so that what 7 happened in the channelling, the perfected block was in 8 fact a function of intention and not a function of a 9 haphazard chaos that may have haphazard execution of the 10 plan. And therefore we align ourselves with what Mr Gotz 11 has said, it was the tail end of his submissions. Now we 12 will want for our main argument to rely on the following 13 material. There is a short video clip coming from exhibit 14 TTT4. I will give the references now and we would also 15 like to hand up and these are ready, Chair, the following 16 latest post-mortem reports specifically for Mr Jkanisi, Mr 17 Sokanyile, the latest post-mortem reports that have become 18 available. And you will have noticed that in our heads we 19 deal with those deaths insofar as there is equivocation as 20 to whether they were inflicted unlawfully or not. We also 21 have got documents which are submissions by Amnesty 22 International which we crave leave to hand up.</p> <p>23 CHAIRPERSON: I'm not sure - we have 24 receive a document from Amnesty International, in fact the 25 secretary is in the process of writing to Amnesty</p>

<p style="text-align: right;">Page 39176</p> <p>1 International to thank them for this submissions which we 2 received. It's only one document that we got which is a 3 very helpful document and we also got a document from Mr 4 David Bruce. I requested that the material of this kind we 5 got should be communicated to all participants of the 6 Commission. So they'll know what we've got and deal with 7 it as they wish. But the Amnesty International document, I 8 think – unless you've got something else as well, but we've 9 got an Amnesty International report and as I've said the 10 letter has already been drafted, the secretary is in the 11 process of sending it to Amnesty International to thank 12 them and also to Mr Bruce for his contribution.</p> <p>13 MR NTSEBEZA SC: Mr Chair, if you have 14 them then it is in fact – it is indeed our pleasure that 15 you should have them because I think they will go a long 16 way to assisting the Commission in its work. Then we also 17 would like to hand up to yourselves a schedule of fresh, 18 this is traditional markings from exhibit KKK10 which is an 19 exhibit which was compiled by the South African Police 20 Service itself relevant to the post-mortem on the people 21 who had died. And we'll want to make an analysis of what 22 that says and what it means and what the Commission should 23 have regard thereto. Also like the [inaudible] of AMCU we 24 will hand up a copy of the oral notes that we prepared in 25 support of this evidence which we'll go –</p>	<p style="text-align: right;">Page 39178</p> <p>1 MR NTSEBEZA SC: Thank you, Mr Chair. 2 Chairman, Commissioners Hemraj and Tokota at the beginning 3 of this Commission we did mention by name and I think we 4 are going to do so today albeit fleetingly who it is whom 5 we represent. It is important because in the hustle and 6 bustle of argument sometimes it will become statistics. We 7 talk about 37 people whom you represent. There were three 8 who died on the 13th and those are Thembelakhe Mati, Sammy 9 Jokanisi, Pumzile Sokanyile. Their relatives are here, 10 whether they are brothers or sisters, fathers or mothers, 11 nephews, nieces or just members of their extended families. 12 And the difference between everybody else here is that our 13 people, those relatives, those families are keen to know 14 what, at the end of the day, it is that is going to be 15 found as to why their loved ones were killed. Because it 16 is not a contest that they were killed, the issues is 17 whether they were killed lawfully or unlawfully. And in 18 the two years that they have sitting here and listening to 19 the evidence that was read, that was led, analysed, they 20 are keen to know in what way it can be said that those who 21 were killed by the police and that is also not something 22 that is in issue except that at one stage the Commissioner 23 of Police was called in to question as to whether it was by 24 the police or not, but it's settled now that those families 25 whom we represent were killed by the police. Whether they</p>
<p style="text-align: right;">Page 39177</p> <p>1 CHAIRPERSON: Thank you, that will also 2 be very helpful.</p> <p>3 MR NTSEBEZA SC: For those areas that I 4 will not have reached because of time constraints I'm sure 5 the oral notes will assist Commission.</p> <p>6 CHAIRPERSON: I think I should say this 7 because your clients are possibly not quite as 8 knowledgeable about how things work in courts and 9 Commissions, I think I should say and I take it this will 10 be interpreted to them that what we have said from the 11 beginning of this part of our work is that the arguments 12 that we ask for are really the written arguments which are 13 very full. The purpose of this sitting is for highlighting 14 and for counsel to be able to answer questions and queries 15 that we've got to put. So the parties concerned mustn't 16 think that the mere fact that a matter hasn't been dealt 17 with in this oral hearing it means it's being ignored. On 18 the contrary, every single sentence in the written heads 19 will be carefully studied and considered and debated by my 20 colleagues and myself. I think that's important that 21 everybody should know that, but particularly I think your 22 clients and possibly the clients who were suffered as a 23 result of the death of the other seven people irrespective 24 of for whom you do not appear. But it's very important 25 they should understand that, that's why I put it on record.</p>	<p style="text-align: right;">Page 39179</p> <p>1 were killed with any lawfulness, justification and we'll 2 argue at the end of it all that each and every one, all the 3 three I've mentioned and each of every one of the 33 I will 4 mention were killed unlawfully. And we'll set out why we 5 say they were unlawfully killed. 33 of the people whom we 6 represent died on the 13th of August, on the 16th, Sitelega 7 Gadlela, Thembinkosi Gwelani, Patrick Akhona Jijase, 8 Jackson Lehupa, Raphael Janiveke Liau, Mafolisi Mabiya, 9 [inaudible] Majaja, Anele Mdzeni, Bongani Mdze, 10 Makhosandile Mkhonjwa, Teleng Mohai, Khawamare Elias 11 Monesa, Thabiso Johannes Mosebetsane, Thobile Mpumza, 12 Babalo Mtshazi, Michael Ngweyi, Mpunsene Ngxande, Ntandazo 13 Nokamba, Mguneni Noki, Bongani Ndongophele, Mongezeleli 14 Ntenetya, Andries Msenyeno, Molefi Ntsoele, Henry Mvuyisi 15 Pato, Modisaotsile van Wyk Sagalala, Fezile David Saphendu, 16 Mzukisi Sompeta, Thabiso Johannes Thelejane, Mpangeli 17 Tukusa, Nkosiyabo Xalabile, Cebisile Yawa, Mbongani Khosa 18 Yona, Tobisile Zibambebe. 19 [12:50] All of these people who were unlawfully killed in 20 our submission by the police on the 16th of August were 21 mineworkers. They had been drafted from mainly the 22 Transkei, but also from surrounding territories, Swaziland, 23 Lesotho. I don't think there was anyone from Botswana. 24 These had been drafted – and I use the word advisedly – by 25 means of a system, the migratory labour system, which dates</p>

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1 back to the discovery of gold in 1886 –

2 CHAIRPERSON: Diamonds, 1870.

3 MR NTSEBEZA SC: Well, diamonds, but our

4 submission, given where we are talking about, will be there

5 was an intensification of the use of migrant labour after

6 the discovery of gold in the Reef in 1886. In fact, as we

7 put it to Cyril Ramaphosa when he was testifying, it was

8 the Glen Grey Act passed by the Cape Parliament in 1894

9 that created what was euphemistically called reserves which

10 Deputy President Ramaphosa was, aimed to agree with me was

11 indeed a euphemism for these places being in fact

12 reservoirs for cheap labour. That’s what they were.

13 The Glen Grey Act wanted to end the independence

14 of the peasant small scale farmer. He was going to have to

15 be forced to come to the mining areas, to the Reef as a

16 labourer. The conditions when they came here, and this is

17 now something that would have featured, Mr Chairman, in

18 phase 2 of your work, but we never got to that, but you

19 have evidence particularly from the Deputy President who

20 agreed that this was a system which was abhorrent. Those

21 who came here and became mineworkers were kept in compounds

22 which were a little better, if at all, than prisons. They

23 were not permitted to live with their families. They lived

24 in the most dehumanising circumstances, and we can

25 understand that this was at the beginning of, or at the end

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1 of the 19th century, but as you saw in your inspection in

2 loco, Mr Chairman, those conditions have barely changed.

3 The places in which the mineworkers are kept, save for

4 those that have been cosmetically altered into so-called

5 family units, but the majority of the places that you

6 visited and saw are still compounds. People who are

7 mineworkers stay there without any family. They are still

8 dehumanised, and the question you must ask yourself is why

9 does this happen in a democracy; why are we still having a

10 perpetuation of this kind of conditions of service and

11 living for mineworkers?

12 Mr Burger yesterday was man enough, Mr Chair, to

13 admit that the appalling conditions under which mineworkers

14 still live in the mines are inexcusable. I think that’s

15 the word he used, and we say so, we agree with him fully

16 there. We’re saying these are not the conditions that you

17 would expect ordinary human beings to have lived in, and

18 again we say it is important to contextualise who these

19 people are, who are these mineworkers. We are talking

20 about people who by reason of the low wages that they were

21 getting could never earn enough other than just to sustain

22 them and to have a little bit to support their families

23 with whom they were not staying, but that condition would

24 be perpetuated.

25 In fact in one of the clips that we will show

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1 Magidiwana captures this that if you are a migrant worker

2 you are going to pass that legacy forever. Your own

3 children and your children’s children will continue to work

4 in the conditions under which – and why is this so in a

5 democracy?

6 Mr Chairman, Commissioners, it may well be that

7 it is not different from what the author of a book entitled

8 “Learning to trust democracy” which was published in 1999,

9 the author is Michael Rueben. He says what we now have in

10 the new South Africa, and that he said 10 years ago in

11 1999, that inexorably the new South Africa has been heading

12 towards an escalation of socioeconomic stratification. He

13 says that the new socioeconomic stratification will not be

14 along the traditional lines of the white ruling class

15 versus the African underclass. He predicted that it will

16 assume the new profile of an African white upper class

17 dominating the bloated State apparatus and the business

18 sector versus a largely African underclass consisting of

19 those who are not rewarded with a government job for their

20 participation in the struggle and those who are

21 unemployable because they lack qualifications. Mr Chair,

22 in the profiles of those who died and the families whom we

23 represent it may well be that what Michael Rueben says

24 about them being the African underclass, that this is who

25 they are.

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1 But even so, Mr Chairman, even so the question

2 remains; in a democracy founded on the values of equality,

3 freedom, human dignity, a democracy informed by the values

4 of Ubuntu, how does it happen that a labour dispute

5 escalates to a point where in that very week 44 human lives

6 are taken, 34 in one day? What is the function of a police

7 service in a democracy founded on those values? How does

8 it deal with what it perceives to be unlawfulness or

9 lawlessness? These are the answers that these families are

10 expecting the Commission to assist them with because they

11 were devastated by the events that form part of your

12 inquiry.

13 CHAIRPERSON: Mr Ntsebeza, is this an

14 appropriate stage for us to take the lunch adjournment

15 until half past 1?

16 MR NTSEBEZA SC: Thank you, Mr Chairman.

17 CHAIRPERSON: Until half past 1, then you

18 can continue with your arguments. Half an hour.

19 MR NTSEBEZA SC: Thanks, Mr Chairman.

20 [COMMISSION ADJOURNS COMMISSION RESUMES]

21 [13:33] CHAIRPERSON: The Commission resumes. Mr

22 Ntsebeza?

23 MR NTSEBEZA SC: Thank you, Mr Chairman.

24 Mr Chairman, what we want to say is this, it’s all very

25 well for all the parties to say we are dealing with a

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1 violent crowd of people and a group of people who had a
 2 propensity for violence which is what at the beginning of
 3 these proceedings the mine workers and the strikers were
 4 referred to as. Even if we assumed just for question of
 5 argument, Mr Chairman, that this is so, what the families
 6 are interested to know is whether it is the expectation of
 7 a democracy that law enforcement agencies might also use
 8 savage if not worse methods to deal with those whom they
 9 regard as savage and we are making the submission that
 10 there has to be a difference. It's not only that they are
 11 law enforcement agents, they are law enforcement agents in
 12 a democracy. That is when, when it was put to Mr Mthethwa
 13 and the Deputy Minister whether they can imagine anything –
 14 CHAIRPERSON: You mean –
 15 MR NTSEBEZA SC: Deputy President I'm
 16 sorry, Deputy President Ramaphosa, whether they can recall
 17 in living memory anything of this scale of what happened on
 18 the 16th. All of them agreed. It is the kind of happening
 19 that reminded them of Sharpeville, of Langa of Boipatong
 20 and all those events in our dark history in the past that
 21 were referred to as massacres and almost 20 years into our
 22 democracy we had a massacre on that scale and therefore
 23 there lies the question and at the end of these
 24 proceedings, Mr Chairman, I'll try and demonstrate that it
 25 cannot be done in the name of democracy. That there needed

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1 to be more equivocation either for Minister Mthethwa or
 2 Deputy President Ramaphosa. The fact that what happened
 3 certainly on the 16th, I'm not saying anything about what
 4 happened on the 13th because I'm going to get into that
 5 detail, the extra judicial killings in our submissions.
 6 What happened just ought not to have happened. When we
 7 submit, Mr Chair, that in both scene 1 and scene 2
 8 especially on the 16th, the killings on the 16th these are
 9 killings that take place after a plan was conceived but
 10 more importantly the day before 4 000 rounds of ammunition,
 11 sharp ammunition are ordered.
 12 CHAIRPERSON: That's correct, they were
 13 ordered on the day.
 14 MR NTSEBEZA SC: On the day.
 15 CHAIRPERSON: That's the evidence and
 16 when they arrived, and there's a dispute as you know as to
 17 whether –
 18 MR NTSEBEZA SC: Yes.
 19 CHAIRPERSON: Brigadier Calitz ordered
 20 them or whether it was Colonel Merafe doing it himself
 21 without instruction from –
 22 MR NTSEBEZA SC: Yes.
 23 CHAIRPERSON: And the evidence is when
 24 they arrived at the JOC Brigadier Pretorius sent them back.
 25 But the significance of the fact that they were ordered

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1 indicates that some senior official, senior officer foresaw
 2 the possibility at least of serious fire battle involving –
 3 MR NTSEBEZA SC: Yes.
 4 CHAIRPERSON: Substantial amount of
 5 bullets and so on.
 6 MR NTSEBEZA SC: Yes, thank you, Mr
 7 Chairman, and of course four mortuary vans are ordered.
 8 Now the evidence that we'll draw your attention to shows
 9 that most if not all of the people were killed, were killed
 10 by high velocity R5 rifle gunfire. Now in our heads of
 11 argument, I think in paragraphs, if I could get there Mr
 12 Chairman. In paragraph 334, in fact from 335 Warrant
 13 Officer Wessels testifies as to what effect an R5 rifle
 14 has. He's been asked my intention is just to get an
 15 unequivocal statement from you, if is possible, he agrees
 16 with me that when once you bring R1 rifles and R5 rifles to
 17 a scene you are likely to incur fatalities because those
 18 are lethal weapons intended to kill. Warrant Officer
 19 Wessels says "I will agree with you later and you yourself,
 20 Mr Chairman take it up and you say sorry to interrupt you
 21 isn't the expression assault rifles, have you ever come
 22 across that expression assault rifle, Warrant Officer
 23 Wessel assault rifle is the correct. Now are R4 and R5s
 24 assault rifles, Wessels they confirm, they conform to the
 25 description of an assault rifle. Chairperson, you are then

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1 on the battle field, you use them on the battlefield to
 2 kill the enemy don't you, that is correct". We'll be
 3 making further submissions about the use of those kinds of
 4 weapons. Now De Rover who came as the expert by the South
 5 African Police Services has this to say and we record it in
 6 the heads. In 335.2, Mr Chairman. "But at least in
 7 understanding the risks these weapons pose and I'll be more
 8 specific that a 556 round fired at close range is virtually
 9 in fair definition a kill shot. It doesn't even matter
 10 where on the body you hit because if you strike, the
 11 problem is that with the fact that the bullet on impact
 12 disintegrates because of the high kinetic energy it
 13 carries" and then lower down, virtually the last paragraph
 14 where it starts with but "but at close range that bullet
 15 shatters on impact and it produces horrific wounds. If you
 16 get hit on the arm, you're likely losing that arm. If you
 17 get hit centre body mass you get a wound cavity, from what
 18 I understand to be 20 centimetres across. So your chance
 19 of survival are minimal". So when we say these people were
 20 killed, Mr Chairman, we can talk about technical terms,
 21 because I'm a lawyer I'm supposed also to lay the test and
 22 what have you. But these families have heard what Warrant
 23 Officer Wessels was saying was the effect of what an R5
 24 rifle does and these families have heard what expert
 25 witness De Rover says is the devastating effect of R5

<p style="text-align: right;">Page 39188</p> <p>1 rifles. Especially at close range and then they will ask 2 was there no other way. I'm assuming at this stage that it 3 is accepted that the police had reason to believe that they 4 were being attacked, that they were protecting themselves. 5 The question the people would want to know was this the way 6 and Mr Chair, as you then proceed [inaudible] things. 7 First of all there will be argument which I think my 8 learned friend Mr Mpofu will be making with respect to the 9 principles of putative self defence which is product of a 10 joint effort made by our legal team, the legal teams of 11 LRC, SHRC, on AMCU, I'm not properly advised, Mr Chair, 12 but, so there is that, I believe that it was handed up and 13 if it wasn't at least there was an – 14 CHAIRPERSON: But I take it we're going 15 to be getting it in due course. 16 MR NTSEBEZA SC: Indeed. 17 CHAIRPERSON: Looking forward to hearing 18 it and it seems quite a powerful combination of people 19 involved in preparing it. So all the more reason to read 20 it with eager anticipation. 21 MR NTSEBEZA SC: But if I may just say 22 this, Mr Chair, we want to address you on a couple of 23 things. The first one is what is the standard of proof 24 that you should adopt in determining the lawfulness or 25 otherwise of the killings. Insofar as you have heard</p>	<p style="text-align: right;">Page 39190</p> <p>1 settlements, that much is even testified to by Colonel 2 Vermaak and our submission is that the subsequent discharge 3 of teargas and stun grenades by the SAPS was thus without 4 reason, unprovoked and unnecessary and it is in our 5 submission this unprovoked attack by means of tear gas and 6 stun grenades which caused the confrontation between the 7 SAPS and the strikers and the deaths that ensued and we 8 make the submission that on that basis the SAPS must be 9 held liable for all the deaths that occurred on that day. 10 Where one can spend a little more detail is with the aid of 11 this new post mortem report which I referred to. Mr 12 Chairman you'll know that Mr Jokanisi's the striker who was 13 shot and killed on the same field when the main 14 confrontation took place, all be it from a distance from 15 it. We have made the submission that he was unlawfully 16 killed by the SAPS. They have not provided any 17 justification or any explanation regarding the 18 circumstances in which Mr Jokanisi was killed, in fact they 19 simply argue based on the alleged proximity of Mr 20 Jokanisi's body to that of Warrant Officer Lepaaku that is 21 fair to infer that his death must have been the result of 22 police response to an attack on the police by him or his 23 fellow strikers. 24 CHAIRPERSON: Mr Ntsebeza, I take it we'd 25 better mark these exhibits that you're handing in?</p>
<p style="text-align: right;">Page 39189</p> <p>1 extensive argument from the SHRC on this point which we're 2 endorsing namely that the onus is on the police service to 3 justify each shot, to justify each killing and where they 4 are not able to do so the killing must then be found to be 5 unlawful. Because any other approach would in any event as 6 I understood their submissions inconsistent with the 7 fundamental right to life and with the domestic civil 8 standard of proving relation to alleged unlawful killings. 9 Then I'd like to spend a little more time, Mr Chair, on the 10 killings that took place on the 13th of August 2012. But in 11 relation to that I have to say there has been a lot of 12 submissions that were made both by the evidence leaders and 13 everybody else and it seems to us that rather than 14 saturating that area with further argument we can make the 15 following summary of what we understand the essential 16 issues are relevant to that. Except that we'll now give 17 you more detail with respect to the killing of Mr Jokanisi 18 and the killing of Mr Mati and to the extent that there is 19 still any equivocation the killing of Mrs Sokanyile. But 20 relevant to the 13th we summarise our submissions as 21 follows. 1, it is clear to us that the strikers were 22 walking peacefully in the direction of the koppie when 23 there was this unprovoked attack on them by means of 24 teargas and stun grenades and it is so even though they 25 had not changed the direction towards the informal</p>	<p style="text-align: right;">Page 39191</p> <p>1 MR NTSEBEZA SC: Yes, Mr Chair. 2 CHAIRPERSON: We did have a document 3 earlier in respect of Mr Jokanisi, that we marked according 4 to my notes ZZZZ33. That's already before us. Unless 5 there's a new document about him? 6 MR NTSEBEZA SC: I'm instructed it the 7 same, Mr Chair. 8 CHAIRPERSON: Alright, its bigger, it's 9 easier for those of us with tired eyes to read it. A4 10 paper as well. What did I say that was – 11 MS PILLAY: Chair, that's ZZZZ33 and 12 ZZZZ34 is the report in respect of Mr Sokanyile. Dr 13 Naidoo's report in respect of Mr Sokanyile. 14 CHAIRPERSON: Alright, so we've got these 15 are now clearer copies for us, for the benefit of those 16 parties who need larger print. Okay and then you've also 17 got a lot of other things that you've given us. Other 18 documents as well. If they're not exhibits, they can 19 be marked but perhaps to save your time we can ask Ms Pillay 20 her usual highly efficient services for us during the tea 21 adjournment and mark them then so that we don't waste your 22 time now. 23 MR NTSEBEZA SC: Thank you, Mr Chair, I'm 24 sure Ms Pillay will conform. Now Mr Chair, we say there's 25 no justification that has been provided by or explanation,</p>

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1 the nearest by means of an explanation that we get is that
 2 they draw an inference that his death must have been a
 3 result of police spawns an attack on the police by him or
 4 his fellow strikers.
 5 [13:53] So they do not even allege that Mr Jkanisi was
 6 involved in the attack on Warrant Officer Lepaaku. They
 7 make the assumption that he is or one of the strikers was
 8 and we submit that it is clearly not sufficient to
 9 discharge their burden of justifying his killing. We
 10 therefore call upon the Commission to find that on this
 11 basis alone the failure to justify the killing of Mr
 12 Jkanisi amounts to them having killed him unlawfully. But
 13 originally the contention is that by the SAPS and the
 14 evidence leaders that Mr Jkanisi's body was found close to
 15 that of Mr, of Warrant Officer Lepaaku, is manifestly
 16 inconsistent with the objective evidence. The objective
 17 evidence is that he was found 80 to 100 metres from Warrant
 18 Officer Lepaaku, 150 metres from Warrant Officer Monene.
 19 And the post-mortems in addition –
 20 CHAIRPERSON: I seem to recall when the
 21 copies of the statement were first produced we did say that
 22 we thought that the pathologist who did the original post-
 23 mortem should be given a copy and asked to comment. I take
 24 it the comments from the original pathologist has not yet
 25 been received, is that correct? The way we will deal with

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1 it, I think is this way to save time. When we get those
 2 reports, we will make sure they are circulated and any
 3 counsel who have comments they wish to make, will obviously
 4 send them to us in writing. It's unlikely we will get them
 5 before the end of the week, and likely that those who wish
 6 to answer will be able to do so but we will, as you know,
 7 we've got until the end of March to do the report. It's
 8 going to be quite a steep climb up a very steep mountain
 9 but we've got some assistance, and during that period,
 10 obviously sooner rather than later, we would like to
 11 receive responses. We don't know of course when the
 12 comments, if any, will come and we don't know how long
 13 those who may wish to comment on them will need but clearly
 14 it's no good sending it to us in February because by that
 15 time hopefully the report will be largely written and we
 16 will just be proof reading and checking that that kind of
 17 thing. But it seems the practical way to deal with the
 18 situation.
 19 MR NTSEBEZA SC: Mr Chair, I think that I
 20 concur. Now, Mr Chair, the further submission we make
 21 relevant, Mr Jkanisi is – okay. Now, Mr Mati on the basis
 22 that the Chair has indicated relevance, then we can get to
 23 Mr Mati. You will recall, Mr Chair, that Mr Mati was a
 24 striker who was shot and killed outside the yard in the
 25 informal settlement. Now we submit on the same basis that

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1 you must find that he was shot and killed unlawfully.
 2 There seems to be a persistence on the part of the SAPS
 3 that Mr Mati died from a stab wound because that's what
 4 seems to appear in their heads of –
 5 CHAIRPERSON: I think that point is no
 6 longer being persisted in. Initially it looked like it.
 7 As far as I understand it, it is now common cause, if I am
 8 incorrect, I will be corrected.
 9 MR NTSEBEZA SC: Mr Chair but in
 10 paragraph 136.5 –
 11 CHAIRPERSON: I see, I am advised that I
 12 am wrong, we haven't yet got a response from the first
 13 pathologist, who said it was a stab wound. So I was wrong
 14 in thinking that it's now accepted that it was a –
 15 MR NTSEBEZA SC: Yes, Mr Chair. As I say
 16 –
 17 CHAIRPERSON: But let's see if Mr Semanya
 18 can help us. Mr Semanya are you able to help us in that?
 19 MR SEMENYA SC: Chair, no we are not
 20 conceding, it's not common cause that it was a shot wound.
 21 CHAIRPERSON: Mr Wesley is looking after
 22 that part of the case. Mr Wesley, can you help us? We
 23 have the statement of Mr Semanya, they are not conceding it
 24 wasn't a stab wound.
 25 MR WESLEY: Mr Chair, we will have to

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1 follow up with the pathologist. There is no further report
 2 that says anything new. I am not sure how we will -
 3 CHAIRPERSON: Now what I suggested is,
 4 the new reports that we've got must be sent to the – what
 5 we call the second pathologist in each case, must be sent
 6 to the original pathologist, asked for comment. The
 7 comment must come back to us, submitted to all the parties,
 8 and those who have comments to make on the comments by the
 9 first pathologist will have an opportunity to do so in
 10 writing, but as I've indicated, it's difficult to fix time
 11 limit at this stage but it will be rather foolish to send
 12 them in too late, because we don't have the time to look at
 13 them. So clearly, these are important matters, we want to
 14 give careful consideration.
 15 MR WESLEY: Yes, Chair, what we will do
 16 is we will send them all the new reports to the particular
 17 pathologists and ask for their comment.
 18 MR NTSEBEZA SC: Well, Mr Chair, we make
 19 our submissions all the same but we had to record what we
 20 perceive to be the position of the evidence leaders and –
 21 because we understood Ms Pillay to be arguing that on a
 22 balance of probabilities Mr Mati was shot by members of the
 23 police service.
 24 CHAIRPERSON: - the evidence leaders were
 25 approached but Mr Semanya for SAPS says he doesn't make

<p style="text-align: right;">Page 39196</p> <p>1 that concession, so it's a matter we have to - 2 MR NTSEBEZA SC: Well, I can only make 3 the submissions, Mr Chair, but I don't know whether these - 4 it seems therefore it is going to be still a contested area 5 but Dr Naidoo's post-mortem report concludes that the 6 features are in his opinion confidently that of a gunshot 7 wound through the thigh not a stab wound he says so in so 8 many words. And in many of them when the family made its 9 presentation to the Commission, Mr Mati's cousin 10 specifically is the concern that it was alleged that Mr 11 Mati was stabbed as opposed to having been shot and insofar 12 as the Chair of course correctly considered now by the 13 Chair, that he had told Mr Mati's cousin that this should 14 no longer be an issue, pretty much the same way as the 15 Chair has said was indicating as much to me. It is clear 16 that even though at that time that impression was not 17 corrected by counsel for SAPS because when the Chair said 18 that that is no longer an issue, whoever was present on 19 that day did not contradict the Chair in this regard and 20 that's the impression under which we had been labouring. 21 We would suggest that to the extent that that was a tacit 22 concession they should be bound by that concession. And it 23 also appears from Lonmin's case book regarding the death of 24 Mr Mati that he was shot by members of the SAPS whilst 25 fleeing from the scene of the main confrontation. Blou</p>	<p style="text-align: right;">Page 39198</p> <p>1 killed Mr Mati. Now Mr Sokanyile is the striker whom you 2 know, Mr Chairman, who was shot across the river. There's 3 been a lot of debate about his fate. The objective 4 evidence in our view is sufficient for you to find that he 5 was shot and killed by SAPS members. The only reasonable 6 inference that can be drawn from these objective facts is 7 that he was shot and killed execution style from the other 8 side of the river and our full argument as you will have 9 known and you have acknowledged Mr Chair, is contained in 10 paragraph 71 to 111 of our heads of argument and we would 11 really ask you, Mr Commissioner and Commissioners to have 12 regard to those heads of argument and arguments remain 13 there. We will not repeat them in full. All we want to 14 say to summarise our position contained there, 1) there has 15 been no attempt to justify Mr Sokanyile's death in any way 16 at all by the SAPS, and on that basis alone we submit they 17 must be found to have acted unlawfully in killing him. 18 Further, the objective evidence clearly shows that Mr 19 Sokanyile was shot and killed unlawfully in the following 20 ways. He was short 620 metres away from the other side of 21 the river or from the main confrontation. And then the 22 distance was 74,4 metres away from the other side of the 23 river. He was clearly fleeing whenever he was shot. He 24 was killed by an R5 bullet to the head. The new PM report 25 by Dr Naidoo states that the entrance wound was the wound</p>
<p style="text-align: right;">Page 39197</p> <p>1 confirmed this in his evidence - to deal with the 2 suggestion that Mr Mati was shot by one of his fellow 3 strikers. Again this proposition, Mr Chair, is 4 contradicted by the Lonmin security case book regarding the 5 death of Mr Mati, because that case book records that he 6 was shot by members of the SAPS. The possibility of Mr 7 Mati having been shot by one of the strikers was not 8 canvassed with Mr Blou or any other witness for that matter 9 and in any event, there is no evidence to support the 10 allegation that strikers fired at each other on the 13th of 11 August 2012 and or that Mr Mati was possibly shot and 12 killed by a fellow striker. On the contrary there is this 13 unchallenged evidence on the record that establishes that 14 the SAPS members fired at him whilst he was fleeing the 15 scene of the main confrontation. It seems however, all 16 having been said the evidence leaders are quite happy to 17 make the following recommendation, or to make the following 18 conclusion, it is now clear that Mr Mati was killed by SAPS 19 members. You will find that in the heads of argument in 20 paragraph 13.10. We submit subject to what is still going 21 to be done by - exercise that your Commission must reject 22 the submissions that have been made that Mr Mati was 23 stabbed, alternatively that he may have been shot by one of 24 the strikers as opposed to members of the SAPS. In fact 25 the Commission must find that the SAPS unlawfully shot and</p>	<p style="text-align: right;">Page 39199</p> <p>1 to the back of his head and the exit wound was the wound to 2 his cheek. The previous one had actually reversed these 3 findings. But either way, he was shot in the head by an 4 R95 rifle which in terms of Warrant Officer Wessels can 5 take out a person's life at more than 300 to 400 metres 6 away. That's why therefore the submission is that the only 7 reasonable conclusion in this regard was this man was shot 8 execution style. He was fleeing and he was at the head. 9 In our heads of argument, we submit that the most probable 10 inference was that he was shot and killed by that posse of 11 SAPS members who were led by Lieutenant-Colonel Vermaak and 12 we heard that Vermaak was determined to chase whomsoever he 13 thought had taken hold of their R5 rifle. Now, it may well 14 be that the argument will be put as to whether we are able 15 to establish which member or which commander shot and 16 killed Mr Sokanyile. We are making an intelligent guess 17 about saying Vermaak's posse or Vermaak himself was the 18 author of this execution. What is clear however from the 19 evidence is that he was unlawfully shot and he was killed 20 by an SAPS member. So at the very least, Mr Chair, you 21 must find and therefore recommend that further 22 investigations and prosecutions must follow as a 23 consequence of our submissions. We have submitted that 24 Vermaak's version of precisely when Sokanyile's body was 25 found is incorrect. This we make in our heads of argument</p>

<p style="text-align: right;">Page 39200</p> <p>1 paragraph 77 to 79. The evidence leaders have argued that 2 this submission is undermined by the fact that the families 3 did not cross-examine Colonel Botha in relation to when Mr 4 Sokanyile's body was found. First of all, I don't think – 5 we have dealt with this submission fully in our heads in 6 reply, and that would be paragraphs 23 to 24, because we 7 made the point there that Colonel Botha had not even 8 testified or, ja, Vermaak had not even been – did not even 9 testify at that time that Colonel Botha gave his evidence 10 and in any event Colonel Botha does not contradict what he 11 says. We say the evidence leaders have argued that these 12 submissions undermined by the fact that the families did 13 not cross-examine Colonel Botha in relation to. With 14 respect, the evidence leaders overlooked the fact that the 15 families placement of where Mr Sokanyile's body was found 16 is consistent with that of Colonel Botha, across the river 17 and directly in line with the cartridges that were found on 18 the scene. Colonel Vermaak's version on the other hand 19 placed Mr Sokanyile's body approximately 60 to 65 metres 20 from the position identified by the families and Colonel 21 Botha. Put simply, Colonel Vermaak got it wrong, there was 22 no necessity to cross-examine Colonel Botha on the issue. 23 In any event Colonel Vermaak had not yet given his 24 evidence. So there can be no question of undermining 25 anything.</p>	<p style="text-align: right;">Page 39202</p> <p>1 matter be investigated further. The cases where the 2 potential accused is a member of the police service the 3 investigation will presumably be done by IPID. In the case 4 of other persons the investigation will be done by the SAPS 5 and we would then, and this was put to us, we would then 6 recommend that in the light of the investigations, the 7 material that is before us and the extra material that is 8 obtained in any, by any further investigation, the 9 Provincial DPP should then consider whether it is 10 appropriate to prosecute. I don't see how we can make a 11 recommendation that something must be investigated and 12 someone must be prosecuted because we don't know what the 13 result of the investigation would be. So the – 14 MR NTSEBEZA SC: No, I said that, Mr 15 Chairman. 16 CHAIRPERSON: No, I think that your 112 17 should be, paragraph 112 – 18 MR NTSEBEZA SC: Should be modified. 19 CHAIRPERSON: - should be modified in the 20 light – 21 MR NTSEBEZA SC: Well, I mean that 22 would – 23 CHAIRPERSON: The Human Rights Commission 24 gave us a very helpful section in their heads dealing with 25 the proper approach by a commission of this kind dealing</p>
<p style="text-align: right;">Page 39201</p> <p>1 We therefore request your good selves too make 2 the findings and recommendations that are set in paragraph 3 1.10 of our heads. These are the recommendations, Mr 4 Chair. We submit that Mr Mati, Mr Jokanisi and Mr 5 Sokanyile were killed unlawfully by the police and our 6 conclusions are that the following findings must be made. 7 The strikers did not change direction towards the informal 8 settlement. The firing of teargas and stun grenades 9 amounted to an unprovoked attack by the SAPS against the 10 strikers. It was this attack that caused the confrontation 11 between the police and the strikers. Mr Mati, Jokanisi, Mr 12 Sokanyile were killed unlawfully and Mr Sokanyile was shot 13 execution style from the other side of the river. The 14 Commission must therefore make the following 15 recommendations in that regard. Vermaak must be 16 investigated and prosecuted for the murder of Mr Sokanyile 17 – 18 CHAIRPERSON: Do you really mean that? 19 We have had some discussion already about what 20 recommendation we should make in respect of prosecutions. 21 What was contended was we should investigate to see whether 22 there's a prima facie of criminal defence by a particular 23 person on the evidence before us. 24 [14:13] We should refer that to the Provincial Director 25 of Public Prosecutions with the recommendation that the</p>	<p style="text-align: right;">Page 39203</p> <p>1 with allegations of criminal conduct. 2 MR NTSEBEZA SC: Yes, well then Mr Chair, 3 the following, Mguye, Yende, Sekgweleya, Mogale, Rikhotso, 4 they all should be investigated on the basis that you have 5 indicated so that should the investigation bear any fruit 6 and support by other evidence then the appropriate 7 recommendation should be made for their prosecution. 8 CHAIRPERSON: One thing that has to be 9 remembered is that as far as the people who have given 10 evidence before us are concerned, what they tell us can't 11 be used – 12 MR NTSEBEZA SC: Yes. 13 CHAIRPERSON: - as part of the 14 prosecution against them, unless the prosecution is for 15 perjury in which case different considerations apply. So 16 it may well be that one can say in the light of what people 17 have told us there's a case, but regard being had to the 18 fact that that, what they told us can't be put before the 19 criminal courts, the DPP might well consider that a 20 prosecution wouldn't be successful. But anyway, that's a 21 matter for him to decide - 22 MR NTSEBEZA SC: Oh yes. 23 CHAIRPERSON: - not for us. 24 MR NTSEBEZA SC: No, no, we are ad idem, 25 Mr Chairman, we're on the same page then.</p>

<p style="text-align: right;">Page 39204</p> <p>1 Now the second, or the further submissions I want 2 to make are with respect to scene 1. Again Mr Chair, 3 there's been an extensive debate around these issues and my 4 sense is that we have, you have been given a fair amount of 5 material to deal with by all the parties. We merely would 6 like to reiterate that insofar as we talk about a trap in 7 scene 1 it is to the extent that that term is used in 8 exhibit KKK49, and to the extent that whatever it is that 9 Mr Gotz on behalf of AMCU has admitted, I mean has 10 submitted with regard thereto, we align ourselves – 11 CHAIRPERSON: He didn't go as far as to 12 suggest it was a trap. What he contended was that 13 Brigadier Calitz's intention in getting the Nyalas to park 14 themselves in the formation that we see on some of the 15 exhibits was to channel the strikers down – 16 MR NTSEBEZA SC: Yes. 17 CHAIRPERSON: - down the passage towards 18 the TRT, but he didn't necessarily intend that they should 19 be mowed down by the TRT as they came into sight. In other 20 words they weren't being channelled towards a firing squad. 21 Mr Gotz in fact said in his submission that it may well be 22 that Brigadier Calitz simply intended that the TRT people 23 should do the disarming and dispersing of these people. I 24 think that's an accurate summary of his submission. Is 25 that right, Mr Gotz?</p>	<p style="text-align: right;">Page 39206</p> <p>1 B, people get channelled towards a waiting TRT line which 2 has been aligned. Now what was foreseeable to him when in 3 fact people are lined up in a way, or are channelled in a 4 way that would expose them to TRT fire, people whom he knew 5 were armed with lethal weapons? 6 So we can't say there was a direct intention, but 7 what we cannot accept is that it was a function of a 8 haphazard slapdash work by those who operated the plan. If 9 it was foreseeable and he reconciled himself with that 10 possibility, then we are not able to say that he did not 11 act unlawfully in the manner in which he gave his command. 12 We say even if the version of the police service 13 were to be accepted, it is clear that the killings at the 14 kraal were unlawful because the force that the SAPS used 15 was entirely disproportionate to any threat that they faced 16 or thought they faced. We have made the argument time and 17 again that one R5 bullet – and we are supported here by the 18 SAPS's own expert – if one of the bullets from the R5 had 19 been directed at the lower limbs it would have stopped 20 them. We know that the evidence that is set out in our, I 21 mean the evidence for this submission as I indicated is set 22 out in our heads of argument and I read it to you, Mr Chair 23 and Commissioners, and yet when we – and I will merely 24 mention them, Mr Chair, because you have made it clear to 25 us that you are on the strength of what we have detailed in</p>
<p style="text-align: right;">Page 39205</p> <p>1 MR GOTZ: Yes, Chair, indeed. We do use 2 the term "trap" in our heads of argument, although I didn't 3 use it specifically today. 4 CHAIRPERSON: But you explained what you 5 meant – 6 MR GOTZ: Yes. 7 CHAIRPERSON: - orally by – 8 MR GOTZ: Indeed. 9 CHAIRPERSON: - the section that I've 10 endeavoured to summarise. 11 MR GOTZ: Indeed. 12 CHAIRPERSON: The question is did I 13 summarise it correctly. 14 MR GOTZ: You did indeed, Chair. I'm 15 just pointing out that we did in fact use the word "trap" 16 in our heads of argument, but you have accurately 17 summarised it. 18 MR NTSEBEZA SC: I think, Mr Chair, it's 19 one of those shady areas of – well, I won't use the – it's 20 one of those grey areas when we deal with this whole issue 21 of dolus eventualis. If we are going to say Colonel Calitz 22 in everything that we say in our heads of argument did, he 23 knows the terrain, he knows that there are these two 24 notions of what a perfect block is, but the effect of what 25 he orders is that there is no passage close at B, at A and</p>	<p style="text-align: right;">Page 39207</p> <p>1 our heads of argument, you have paid particular attention 2 to what we say. All the people who were shot, Mr Monesa, 3 Mr Noki, all of them, and I'll just mention their names 4 without giving the details of where on the bodies they were 5 hit, though in my presentation at the end of my argument 6 I'll try and illustrate this, but the one thing that we are 7 submitting at this stage is that the people who were killed 8 at the kraal, they were shot multiple times with a fatal 9 wound being to the upper body, which is why we're making 10 the point about disproportionateness. If you look at Mr 11 Monesa's body, if you look at Mr Noki's body, we have 13 12 shots, 14 shots, Zibambele's body, Tukuza's body, Lehupa's 13 body, Ntenetya's body, all of them were shot in the upper 14 body. Sompeta's body. In fact with respect to Ntenetya 15 the private pathologist found that the main cause of his 16 death was a high velocity gunshot wound to his chest and 17 abdomen. The State pathologist did not state what the 18 cause of death was, but presumably in his view what he 19 considered to be the gunshot wound to Ntenetya's head. 20 Sompeta's body, Ngweyi's body, Yona's body, Ntsenyeha's 21 body, Jijase's body, shot to the head, to the left forearm, 22 Mr Yawa, shot in the back, and in most of these cases, if 23 not all these cases, Mr Chair and Commissioners, the State 24 and private pathologists are in agreement about the main 25 cause of death, for instance in Mr Yawa's case, that it was</p>

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1 a gunshot wound to his chest and abdomen, even Jijase.
 2 Now Ndze is a sorry case, as Mr Chaskalson
 3 referred both in evidence as well as in his address. He
 4 was also shot in the upper body and there's agreement
 5 between the State and the private pathologist. This is the
 6 man who bled to his death with members of the police
 7 service milling around and doing nothing, with Major-
 8 General Naidoo chosen not to do that which he is the head
 9 of, to attend to the injured, but deciding to go and enter
 10 the fray in scene 2, and we must be made to believe that
 11 this was just an accident.
 12 Mr Chair, in addition to the nature of the
 13 injuries we are in agreement with the evidence leaders, one
 14 of those rare moments that we are, when they talk about the
 15 disproportionate nature of the firing at scene 1. No care
 16 was taken to shoot at the strikers' lower limbs. The
 17 objective evidence shows that the strikers continued – I
 18 mean the TRT shooters, some were calling them shottists,
 19 continued to fire after any perceived threat could be seen.
 20 But even after there was a debate that was had between the
 21 Chair and one of the – I'm not so sure who, but it was
 22 clear that even after the first volley, I think it was with
 23 Ms Le Roux, that there is no justification for any firing
 24 at the mineworkers beyond the first three seconds, even
 25 assuming that there was a justification for firing within

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1 those first three seconds.
 2 It shocked me, Mr Chair, talking about people who
 3 subjectively, even erroneously thought they were, their
 4 lives were under threat. You know there are things that
 5 indicate, or from which inferences can be drawn, which
 6 people do, at the scene, I can never forget that every time
 7 that first volley of rounds is shot after the cease fire
 8 command has been given, it is clearly audible that there's
 9 someone who says, "I will shoot you. I will shoot you."
 10 Now whether that can be interpreted as an expression of
 11 shock or by an expression of triumphalism is a question of
 12 debate, but I make this submission that if there is
 13 anything to be inferred from that kind of conduct it is
 14 certainly not the conduct of a person who regrets an
 15 erroneous mistake he made as to whether he was under attack
 16 or not. He says, it's as though he says I'll give you a
 17 dose of your medicine. So even if there was a threat or a
 18 perceived threat to the TRT line at scene 1, what the
 19 police officers did was absolutely disproportionate to what
 20 they could have done.
 21 Now our position of course has been very clear
 22 and unequivocal; there was no threat in all the ways that
 23 we canvass in the heads, and which has been conceded in
 24 some instances by the SAPS themselves, there was no
 25 incident 1, there was no incident 2, and so the scale of

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1 things that were used as justification becomes, when the
 2 scale becomes smaller and smaller.
 3 Now there were those victims who were shot behind
 4 and away from the kraal. These victims are Mr Nqongophele,
 5 Mr Mtshazi and Mr Gwelani. Now Mr Chair, I think there's
 6 been a lot of debate about that before us. We can only say
 7 that we are quite amazed that the submission is even made
 8 in the circumstances of these deaths. The temerity to
 9 submit that these three were clearly among the group of
 10 strikers who were attacking the police or could reasonably
 11 have been believed were among were meaning to attack them,
 12 there could not have been any innocent individual amongst
 13 the group, they all made common cause with Mr Noki's
 14 leadership and utterances that they were to kill the
 15 police, now this is what is contained in paragraph 178 of
 16 the SAPS's heads. We submit in that regard that there is
 17 no evidence absolutely to support this proposition. It has
 18 no base, it has no merit. We would like to submit that
 19 this is a desperate and last minute attempt by the SAPS to
 20 escape, or to avoid an inescapable conclusion that the
 21 strikers never posed any threat to the TRT line both in
 22 terms of the distance where they are found and that their
 23 deaths were therefore clearly unlawful. It is clear from
 24 the objective evidence that they were killed unlawfully.
 25 [14:33] Mr Mtshazi Nqongophele was shot 100 to 150 metres

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1 away from the TRT line. Mr Gwelani was shot 250 metres
 2 away from the TRT line. These instances alone,
 3 Mr Chairman, are clearly indicative of the fact that these
 4 two mineworkers could not have posed a threat to the TRT
 5 line. That much was conceded by Colonel Claassens. And as
 6 my juniors are eager to let me make the submission they
 7 were all killed by a single R5 bullet to the head. It was
 8 very significant. At that distance an R5 bullet to the
 9 head could only in our submission be a function of aiming
 10 at a particular part in the body or could be a function of
 11 firing wildly irrespective of the consequences of the use
 12 of that lethal weapon at your disposal.
 13 Now, Mr Chair, we will say that the failure to
 14 render medical evidence in the context of what we have
 15 argued is a clear indication of the unlawfulness of the
 16 conduct of the SAPS after the injured were shot in scene
 17 one both in terms of that medical assistance having failed
 18 – both in terms of the SAPS having failed to provide the
 19 medical assistance timeously and we submit that this is a
 20 demonstration of the way in which they have absolute
 21 disregard for the sanctity of human life and we would go so
 22 far as to say it is the kind of attitude that one would
 23 associate with a person or persons seeking revenge.
 24 You see, Mr Chair, it's one thing to say I've
 25 never been trained in first aid. The most rudimentary

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1 first aid methods we know it. You don't have to get a
 2 degree. You don't have to be trained in any course. If a
 3 person is bleeding you try to stop the bleeding between the
 4 heart and where the wound is. You don't have to be
 5 qualified to do this. And I cannot be persuaded to accept
 6 that trained police officers do not have that rudimentary
 7 training. But we see more at the scene. Some of them, you
 8 know, kick in the face or trample on people who are injured
 9 and there's that spectacle of the man who is writhing with
 10 pain who dies – Ntenetya. Ntenetya dies a horrible death.
 11 In fact when his family see how he dies they get reduced to
 12 painful tears because he dies in circumstances where people
 13 are milling around. Whether or not he would have died in
 14 any event is a separate issue. What we see there is this
 15 callousness, this absolute disregard for people who have
 16 been injured.
 17 And again I will ask the question is this what we
 18 expect in a democracy? That was not a warzone, but even in
 19 war the Geneva Conventions make provision for the
 20 treatment, treatment of those who get injured in a
 21 battlefield. The standards that were adopted at scene one
 22 are far below what you would expect of any civilised
 23 society, let alone a constitutional democracy. I
 24 respectfully request you, Mr Chairman and Commissioners
 25 Tokota and Hemraj, to be persuaded by the recommendations

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1 which we make in paragraphs 412, 414 of our heads and on
 2 the same basis as before where we recommend or we make
 3 submissions for recommendation for prosecution. We do the
 4 same thing. Yes, what we set out there, Mr Chair, is not
 5 something I think we need to read out because we have
 6 argued it extensively as we were – except that we say you
 7 need to make the recommendation on the basis of the
 8 instructions that Brigadier Calitz gave for the deployment
 9 of tear gas, rubber bullets and water cannons, the
 10 instruction for the TRT to open fire, make the appropriate
 11 recommendations for him to be investigated.
 12 CHAIRPERSON: Mr Ntsebeza, there's one
 13 point I want to raise with you in relation to paragraph
 14 4.13.6 on page 303. You refer to what happened at scene
 15 one and you make the points that you've orally repeated to
 16 us and you then say, "Accordingly SAPS members are prima
 17 facie guilty of murder alternatively culpable homicide for
 18 the deaths of 17 people and injuries and attempted murder
 19 and/or assault," etcetera. Now, the difficulty that we
 20 have of course is that because R5s were used we can't link
 21 any shooter to any death. The most we can do as far as
 22 individual liability is concerned I would imagine would be
 23 to say that the SAPS members concerned – if you're correct
 24 in the submissions you make – are guilty of attempted
 25 murder because many of them who shot would not have fired

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1 fatal shots because we know the – I take it only 17 people
 2 fired fatal shots or possibly even less than 17 because
 3 there may have been some who fired more than one fatal
 4 shot.
 5 Now, of course if you are correct in your
 6 submissions in relation to the planners, Brigadier Calitz
 7 giving order where there would be a generalised order which
 8 you say was accompanied by the foresight of possible death,
 9 the recklessness as to whether at death would ensue, and
 10 then of course one doesn't have to prove a direct
 11 connection between a particular death and the person you
 12 say would be the potential accused. And there if you are
 13 correct in your submissions a charge of murder would be the
 14 appropriate charge to consider, but in relation to the
 15 matter dealt with in paragraph 4.13.6 I take it you'll
 16 accept the problem that I mentioned to you in relation to
 17 murder. I was proposing to take tea at quarter to three.
 18 Would it be convenient for you if we took the adjournment
 19 now? You could then consider the point I've put to you,
 20 discuss it with your juniors and give us the benefit of the
 21 inputs thereafter.
 22 MR NTSEBEZA SC: Indeed, Mr Chair.
 23 CHAIRPERSON: 15 minutes.
 24 [COMMISSION ADJOURNS COMMISSION RESUMES]
 25 [15:01] CHAIRPERSON: The commission resumes. Mr

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1 Ntsebeza, are you now able to deal with the point that
 2 arose before the adjournment?
 3 MR NTSEBEZA SC: Yes, Mr Chair. Mr
 4 Chair, there seems to be a view which I will put to you as
 5 the submission that one never knows what might come out of
 6 an investigation, so if we submitted to your good selves to
 7 refer the killings for further investigation on two bases,
 8 firstly that even though there's the difficulty that was
 9 indicated with respect to whether you can trace any bullet
 10 to who the shooter was because the bullets disintegrate one
 11 can never know what might come out in investigation and
 12 therefore if the, if there's the assumption or the finding
 13 that those who shot had at least dolus eventualis or the
 14 prima facie case that they committed murder on that basis
 15 then there is no reason even if as I would submit at the
 16 end the commission came to the view that the
 17 disproportionateness in the shooting of those who became
 18 victims justifies a prima facie finding that the shooting
 19 was unlawful then on that basis there would be
 20 justification to refer the matter for further
 21 investigation.
 22 Now, secondly if it is not possible to identify
 23 who each shooter was it's clearly possible to identify who
 24 were there and the doctrine of common purpose should form a
 25 sufficient basis to make a recommendation that they all

<p style="text-align: right;">Page 39216</p> <p>1 must be taken to have acted in common purpose. I know it's 2 not a doctrine which is endearing itself to the chairman. 3 It may well conjure up the past in trials that your chair, 4 your, the chair has been dealing with in Upington and all 5 related places where the doctrine of common purpose was 6 very discredited, the Upington 20 but whatever the number 7 was, but it is still part of our law, Mr Chair, and it is 8 one on the basis of which a prima facie view can be formed 9 by you sufficient for you to refer the matter for further 10 investigation. So those are our submissions. Rather than 11 not do anything we would recommend that you should in line 12 with our recommendations recommend.</p> <p>13 CHAIRPERSON: - then is that I presume 14 amounts to this that there's a prima facie case that all 15 the shooters who were in the front line of the TRT who 16 fired had a common purpose or were parties to a common 17 purpose to kill some at least of the strikers who were 18 approaching them, that even if you can't say that shooter 19 one shot deceased one doesn't matter. If shooter one was 20 party to a common purpose with shooters two to 60 and the 21 people who were killed were killed by one or other of 22 shooters one to 60 then on the common purpose basis they 23 all can be convicted of murder of all the people who were 24 killed at the entrance to the channel next to the kraal at 25 scene one. That's your case, not your case, that your</p>	<p style="text-align: right;">Page 39218</p> <p>1 demonstrate why the objective evidence does not bear out 2 the self-defence agitated for by the SAPS. Now, we also do 3 the same relevant to Xalabile and Pato. You will find 4 those in paragraphs 456 to 477 of our heads. Now, in 5 respect to Mpumza we canvass in paragraphs 569 to 604 of 6 our heads. And Mkhonjwa we deal with in paragraphs 558 to 7 568.</p> <p>8 Now, there are of course other victims who were 9 killed at scene two and those are Mr Mangcotywa, Mr Liau, 10 victims D and E respectively, Mr Mosebetsane, victim G, Mr 11 Mabiya, victim H, Mr Nokamba, victim I, Mr Samphendu, 12 victim J, Mr Ngxande, victim K, Mr Gadlela, victim L, 13 Mr Pato, victim M, Mr Talabile, victim O, Mr Mohai, Mr 14 Sagalala, Sogalala and Mr Ntsoele. Now, relative to those 15 no account has been given of the circumstances under which 16 they were shot. In their opening statement the police 17 service appeared to concede as well as Mr De Rover it also 18 appears that these were caught in the crossfire between the 19 various SAPS units at scene two and our submission is that 20 for the first time in their heads the SAPS justifies the 21 killings of these victims in the killing zone on the basis 22 of statements of SAPS members.</p> <p>23 Now, there are two other victims, Mr Sagalala – 24 now, the statements that have been provided to justify the 25 killings provide no justification at all for the killings</p>
<p style="text-align: right;">Page 39217</p> <p>1 submission.</p> <p>2 MR NTSEBEZA SC: That's the submission, 3 Mr Chair. Now, Mr Chair, honourable commissioners, we 4 would like to run and deal with scene two. Again we have 5 said that if the SAPS is not able to establish that the 6 killings were lawful since there's no onus on the families 7 to establish that the killings were not justified then the 8 commission must find that the killings in scene two were 9 unlawful. Now, the evidence before you and as well as the 10 opening statement by the SAPS only sought to justify the 11 killings at scene two of Mdizeni, victim A, Thelejane, 12 victim B, Mr Mpumza, victim C, and Mr Mkhonjwa, victim N. 13 Now, their version is that these victims were shot whilst 14 they were charging at SAPS members. Now, we have argued to 15 refute that. The version by the SAPS in relation to Mr 16 Mdizeni, Thelejane and Mkhonjwa and Mr Mpumza in the 17 argument we have proffered is entirely inconsistent with 18 the objective evidence and our sense is that, in fact our 19 submission is that the only reasonable inference is that 20 the killings of these people were unlawful.</p> <p>21 Now, Mr Chair, we deal extensively and the 22 constraints of time would only be such that we should refer 23 you to the paragraphs where we deal with our submissions 24 relevant to firstly Thelejane, Mdizeni and Thelejane. In 25 paragraphs 433 to 455 of our heads of argument we</p>	<p style="text-align: right;">Page 39219</p> <p>1 so they had nothing really. The other two victims is Mr 2 Galala or Segalala and Mr Ntsoele who are believed to have 3 been shot at scene two and to have died later in hospital. 4 Now, there's no information about how they were killed. It 5 isn't even known where in the koppie they were shot and 6 killed and the only reasonable conclusion therefore is that 7 they were killed unlawfully.</p> <p>8 And we therefore submit that these killings must 9 be found to have been unlawful because there's been a 10 failure to justify them. Now, the point I'm also, to which 11 my attention is drawn is all of these died as a consequence 12 of a single or two shots to the upper body of the victims, 13 hence the inference is strong that the killings were not 14 justified. Now, Mdizeni and Thelejane we would like to 15 make – Mr Chair, we have, we are trying to avoid having to 16 go through each victim page by page because –</p> <p>17 CHAIRPERSON: All the material is before 18 us.</p> <p>19 MR NTSEBEZA SC: Yes, yes.</p> <p>20 CHAIRPERSON: That's why I said we've 21 read them. We will read them again and again in the time 22 ahead of us, so you can, you don't have – unless there's a 23 particular point you want to stress or highlight –</p> <p>24 MR NTSEBEZA SC: Yes.</p> <p>25 CHAIRPERSON: It's not necessary in order</p>

<p style="text-align: right;">Page 39220</p> <p>1 to make sure we're familiar with the contents of the heads 2 to actually read it to us. That's being looked after 3 anyway. 4 MR NTSEBEZA SC: Chair and Commissioners, 5 we would like to make the following submissions as to what 6 the conclusion should be. The first one is that the 7 commanders of the police service must be found to have had 8 ample opportunity to halt the operation after scene one. 9 That much also is said by their own expert and we would 10 urge that you should find it was grossly negligent in the 11 circumstances for that not to have happened and that the 12 SAPS should be held consequently to have been liable for 13 the killings at scene two on that basis alone. It's an 14 operation that ought not to have taken place at all. 15 The second submission is that there was no attack 16 by the strikers on the members of the SAPS in scene two. 17 Consequently they were not acting in self-defence or in 18 private defence or whatever kind of defence because they 19 cannot have been reasonably believing that their lives or 20 the lives of any of their colleagues were in danger. 21 Fourthly the response of the SAPS members to whatever 22 threat or perceived threat they might argue that they were 23 under was disproportionate and therefore whatever they did 24 exceeded the bounds of any legitimate defence that is 25 sustainable at law.</p>	<p style="text-align: right;">Page 39222</p> <p>1 MR NTSEBEZA SC: Including. 2 CHAIRPERSON: You say including. 3 MR NTSEBEZA SC: Yes. 4 CHAIRPERSON: And I don't think you've 5 mentioned what you're saying in paragraph 610.1 that in 6 addition to Brigadier Calitz – 7 MR NTSEBEZA SC: The commanders in the 8 JOCCOM – 9 CHAIRPERSON: - whose name is mentioned 10 there, the commanders in the JOCCOM you say should also 11 be – 12 MR NTSEBEZA SC: Yes. 13 CHAIRPERSON: - investigated to see 14 whether they could be prosecuted for failing to halt the 15 operation after scene 1. 16 MR NTSEBEZA SC: Indeed, Mr Chair. 17 Before I go to consider Lonmin – I've lost my file. Mr 18 Chair, just for the sake of completion of the point that I 19 made earlier on, I'm just trying to make sure that I don't 20 run out of time before I've made the point, what I wanted 21 to – when I talked about clips, the clips I'd like to play, 22 I just wanted us to see if we can show up exhibit – 23 CHAIRPERSON: Before we get to the clips, 24 may I ask you are any warnings required? I don't know what 25 clips we're going to see.</p>
<p style="text-align: right;">Page 39221</p> <p>1 Fifthly insofar as their, on that basis on our 2 submissions and if our submissions are accepted there is a 3 prima facie case which this honourable commission can 4 recommend to be investigated and depending on the 5 investigation pursued for purposes of preferring charges of 6 murder alternatively culpable homicide, attempted murder 7 and/or assault with intent to do grievous bodily harm for 8 the deaths of the 17 people in scene two and as I believe 9 Mr Mpofo will make a submission for the injuries to those 10 whom he represents at scene two. There is also a basis on 11 which you can make a recommendation for civil liability of 12 the South African Police Service if further investigations 13 be allowed, what we consider to be a prima facie case that 14 can be established against the SAPS. We also request your 15 commission to recommend a further investigation of the 16 following members of the SAPS. 17 [15:21] And the prosecution thereof if that is possible, 18 and the members would be Brigadier Calitz, Major-General 19 Naidoo, Colonel Modiba, Captain Kidd, and the individual 20 shooters, Constables Sebatjane, Buthelezi, Mabe, Batsi, 21 Mohlatsi, Pelaelo and Letswalo. 22 CHAIRPERSON: What you say in paragraph 23 610.3 is that the individual shooters at scene 2 should all 24 be charged and the names you just read out are the names of 25 some of those shooters.</p>	<p style="text-align: right;">Page 39223</p> <p>1 MR NTSEBEZA SC: No, no, no, the first 2 clip is – 3 CHAIRPERSON: If there are any clips that 4 require a warning you must please let me know. 5 MR NTSEBEZA SC: Not yet. Not yet. That 6 will come 15 minutes before my time is up. The clips is 7 relevant to the very first point I made, Mr Chair, and it 8 is TTT4, miners shot down, we start at 13:21 into the video 9 to 13:41. It's VTS something, can we play that clip, 10 please? Well, it looks like nobody is ready with it. 11 Where is Craig and is he aware that we want him to place 12 something? He's not even in the chamber I believe. 13 CHAIRPERSON: While the operator is being 14 fetched maybe you can go on to another point. 15 MR NTSEBEZA SC: Yes. 16 CHAIRPERSON: When he comes you can 17 revert to the video clip. 18 MR NTSEBEZA SC: I agree. Mr Chair, the 19 – oh yes, is that 13:21? 20 CHAIRPERSON: 13:07 from what we can see. 21 MR NTSEBEZA SC: Yes. Sound. 22 [VIDEO PLAYED] 23 Mr Chair, it is not achieving the objective if it 24 has no sound. My time. Mr Chair, the clip can be played 25 after I've done my bit. I think Craig, just never mind</p>

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1 about the clip now. Let me just go onto something else.
 2 Mr Chair, we have made some [microphone off,
 3 inaudible] on Lonmin and can I quickly go through those.
 4 CHAIRPERSON: Page 414 of your heads,
 5 part F, beginning of paragraph 611. Is that right?
 6 MR NTSEBEZA SC: Yes. Yes, Mr Chair. We
 7 submit that, I mean the families are very, they are quite
 8 unhappy about obviously the employer, the conduct that the
 9 employer adopted towards their families, or towards those
 10 who died whilst they were serving under them. Our
 11 submission is that Lonmin should be held civilly and
 12 criminally liable for the deaths of the families' loved
 13 ones. In particular we submit that Lonmin wanted SAPS to
 14 break the strike and lobbied and colluded with SAPS to
 15 achieve this, and we rely on what is set out in the
 16 paragraph 610 to 628 of our heads of argument in this
 17 regard.
 18 We also refer to the interrogatories, Mr Chair,
 19 that we handed up this morning – I mean this afternoon.
 20 Those were submitted to Lonmin and the response that was
 21 received on the 24th of October 2014 and on the basis of
 22 those we make the following. Firstly the families dispute
 23 that the only undertaking that was provided on the 9th of
 24 July 2013 was to find employment for only one family member
 25 per family. The undertaking that the families understood

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1 was that the families would not go hungry and this was
 2 understood by the families to be an undertaking that Lonmin
 3 would assist them to put food on the table for their
 4 families.
 5 Secondly we submit that Lonmin should assist
 6 those families whose loved ones were in the process of
 7 building them houses by undertaking the expense of
 8 completing those houses.
 9 Thirdly Lonmin has delayed unduly in upholding
 10 its undertaking to ensure that one family member per family
 11 should be given employment at Lonmin. It must honour this
 12 undertaking without any further delay.
 13 Fourthly Lonmin's position of not providing any
 14 assistance to the Thelejane, Gwelani and Mpumza families on
 15 the basis that their loved ones were not Lonmin's employees
 16 at the time that they were killed is in our humble and
 17 respectful submission a very cruel and arbitrary decision,
 18 very, very unfeeling position to be taken by an employer.
 19 Lonmin in our view – and this is our submission for your
 20 recommendations – should provide assistance to these
 21 families as it does to the other families.
 22 Mr Chair, I would hope that those interrogatories
 23 and the responses are given an exhibit number.
 24 CHAIRPERSON: I've indicated that Ms
 25 Pillay will look after that. She'll report to us first

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1 thing tomorrow morning what the results of this exercise
 2 are.
 3 MR NTSEBEZA SC: Indeed, Mr Chair.
 4 MS PILLAY SC: Chair, I have allocated an
 5 exhibit number; it's ZZZZ38.1 –
 6 CHAIRPERSON: Sorry, perhaps you can give
 7 it to us in writing if you don't mind, tomorrow morning.
 8 Time is short and we want to –
 9 MR NTSEBEZA SC: Yes.
 10 CHAIRPERSON: Mr Ntsebeza wants to
 11 squeeze everything into the time available. But thank you.
 12 MR NTSEBEZA SC: In fact when once one
 13 pays attention to what is contained in the interrogatories
 14 one has a context –
 15 CHAIRPERSON: [Microphone off, inaudible]
 16 I must tell you we haven't got the interrogatories, we got
 17 the answers. Now in some cases the answer is quite full.
 18 Take paragraph 10 for example, ad paragraph 20, the answer
 19 is yes. You know, there are others, there's another one
 20 that says no, you know. So we would like the
 21 interrogatories as well, please, but that again can be
 22 attended to overnight. You don't have to attend to it now.
 23 We certainly will study the interrogatories and study the
 24 answers.
 25 MR NTSEBEZA SC: I don't know how it has

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1 been done, but my attorney insists that there is –
 2 CHAIRPERSON: You see what's happened is
 3 we've been given the answers, but we haven't –
 4 MR NTSEBEZA SC: Oh, yes.
 5 CHAIRPERSON: We've been given Lonmin's
 6 responses to the families' interrogatories, but we haven't
 7 got the actual questions themselves. What we've got is a
 8 letter from SERI to Ms –
 9 MR NTSEBEZA SC: Dated the 23rd of October
 10 2014.
 11 CHAIRPERSON: Dated 23rd of October,
 12 simply saying we gave you these interrogatories, you
 13 haven't answered them, we haven't got a meaningful
 14 response.
 15 2Dated 23rd of October, simply saying we gave you
 16 these interrogatories, you haven't answered them, we
 17 haven't got a meaningful response -
 18 MR NTSEBEZA SC: Oh, I see.
 19 CHAIRPERSON: - we've got to file our
 20 written submissions; what's wrong with you, get on with it.
 21 That's a summary of the letter, but we haven't actually got
 22 the interrogatories as such –
 23 MR NTSEBEZA SC: The interrogatories
 24 itself.
 25 CHAIRPERSON: But that's a matter that

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1 can be attended to. Let's not waste your remaining time on
 2 that point. It can be sorted out.
 3 MR NTSEBEZA SC: Indeed, Chair. That
 4 will be attended to, Chair. Now we have recommendations
 5 set out at paragraphs 49.2 and 49.3 of our replying heads
 6 of argument, which we'd like to draw attention to. In the
 7 recommendations in our reply heads, Mr Chair, are that you
 8 should find that Lonmin is liable to compensate the
 9 dependents of the deceased for loss of support, and that
 10 you should find that the senior executives of Lonmin can on
 11 a prima facie basis be investigated further and depending
 12 on the investigation that they can prima facie be charged
 13 as accomplices to any such crimes as may have been
 14 committed by the SAPS on the 16th of August that resulted in
 15 the deaths of 34 strikers, and I'm sure Mr Mpofo will make
 16 also the recommendation –
 17 CHAIRPERSON: No, I see that in as far as
 18 Lonmin is concerned it appears from paragraph 611 of your
 19 heads that the families submit Lonmin's responsible for the
 20 deaths of their loved ones and you go on to say in 612,
 21 "Lonmin's responsibility is set out in full in AMCU's heads
 22 of argument and we make common cause of these submissions
 23 and don't consider it necessary to repeat them." So we've
 24 already heard that from AMCU. Then you go on to make the
 25 point at 613 and following that Lonmin wanted SAPS to break

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1 the strike –
 2 MR NTSEBEZA SC: Yes.
 3 CHAIRPERSON: - and lobbied and colluded,
 4 as you put it, with SAPS to achieve this. You then set out
 5 the evidence –
 6 MR NTSEBEZA SC: Yes.
 7 CHAIRPERSON: - in certain paragraphs,
 8 and then at the very end you contend, it looks like
 9 paragraph 630, that Lonmin is also, is responsible for the
 10 deaths of our loved ones, then you deal with the
 11 undertakings which was the point dealt with in the
 12 interrogatories, but your contention that Lonmin is
 13 responsible for the deaths of the loved ones of your
 14 clients, the families, and therefore you would have, your
 15 clients would have a dependency action, or dependent claim
 16 against Lonmin. Inasmuch as on your argument I take it
 17 SAPS and Lonmin are jointly and severally liable, you would
 18 only look to each of them for half I would imagine.
 19 MR NTSEBEZA SC: That's the argument.
 20 Now the only subject I would like to touch quickly on was
 21 provoked by Commissioner Tokota, he wanted to find out
 22 about muti. I don't know whether he's still keen to have a
 23 debate, but what we found, Mr Chair, is exhibit KKK10,
 24 which is SAPS's own analysis of the post mortem reports,
 25 and what we found was interesting there was the fact that

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1 it discloses that two of the dead people had fresh
 2 scarification marks, six had fresh traditional healer
 3 marks, 11 had traditional marks, and 12 had no marks. Now
 4 only eight of the dead on the 16th had fresh muti marks. Of
 5 the eight with fresh marks three died at scene 1. Now
 6 Nqongophele was killed approximately 90 metres away with
 7 injuries that suggests that he died where he was shot and
 8 therefore was not part of any alleged attack. Now this
 9 leaves only two miners with fresh markings in scene 1. So
 10 insofar as there would be an argument that the marks were
 11 indicative of muti having been applied to these people,
 12 with whatever effect it is argued that achieved, it seems
 13 to us on the basis only, on the basis of this analysis.
 14 [15:41] There would be no way to account for the other 15
 15 people other than the two who were found with fresh marks
 16 to explain whether or not they acted as a consequence of
 17 muti. And I say this also bearing in mind what Professor
 18 Lamla seems to have given his expert opinion on, on the
 19 relevance otherwise of what the muti was supposed to
 20 achieve. There would also be Magidiwana who was being
 21 cross-examined by Mr Ngalwana who was to consent to a
 22 medical examination to establish whether he had muti
 23 markings from August 2012 when there was a big argument as
 24 to whether you can age the markings. Now on page 6374,
 25 line 18 the Chair seems to explain that there are three

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1 possibilities. One, is that the doctors may say they can't
 2 say what age the mark is. Secondly, they could say they
 3 were more recent than December 2011 and probably done about
 4 August 2012. Thirdly, they could say it could be that they
 5 were consistent with them having been done in 2011. So we
 6 want to argue that there isn't sufficient support for any
 7 argument that is advanced that these people were under the
 8 influence of muti because on their own analysis there
 9 doesn't seem to be a correlation between fresh marks
 10 because we must take it that if it was as a consequence of
 11 the perceived muti that they received closer to the 16th
 12 then the fresh marks must be the ones that must be
 13 relevant. Besides as Mr Tokota will know African people
 14 have these marks for all kinds of things. Some people get
 15 their scarification marks when there's about to be a big
 16 occasion at their homes and they go and they get
 17 scarification marks. So there is just no link, there is no
 18 sufficient evidence to bear out that those weird marks must
 19 have been there for people who had undergone [vernacular]
 20 or the rituals according to Mr X for purposes of causing
 21 them to be invincible or invisible or both. So I would
 22 submit that on the available evidence that is not a strong
 23 case to support that muti was responsible for anything else
 24 because it is not explained how it caused any passive
 25 belligerence on the part of the mineworkers. The nature of

<p style="text-align: right;">Page 39232</p> <p>1 which could be relied upon for what was perceived to be the 2 conduct of the mineworkers, much less can it be relied upon 3 as an indication that the mineworkers as a result of the 4 muti decided to attack the police. Our position is that 5 there's not been any attack that has been shown to have 6 existed even subjectively, but if one accepts that the 7 police may have believed that they were being attacked 8 particularly in scene 1 they clearly cannot link what they 9 perceived as an attack to the application of muti. Now, Mr 10 Chair, I will definitely now need a warning to be given for 11 my final submission which will be – 12 CHAIRPERSON: Can you perhaps the warning 13 yourself in Xhosa? 14 MR NTSEBEZA SC: [Vernacular]. 15 CHAIRPERSON: Well one person I think 16 left and there's another lady going. 17 MR NTSEBEZA SC: Yes. 18 CHAIRPERSON: Two ladies. 19 MR NTSEBEZA SC: Can we put up the 20 presentation that has been indicated to? Forget about the 21 - for now. Now, Mr Chairman, before we go to these 22 graphics our submission is the following. The gravamen of 23 what we perceive to be the justification for those who were 24 killed seems to be that the police acted in self defence. 25 Now we have contested that, we have argued that on a wide</p>	<p style="text-align: right;">Page 39234</p> <p>1 shot was capable of killing a person as it did on this day 2 250 metres away. Now in the case of Gwelani, it's like 3 somebody in my team says in order for us to have a sense of 4 scaling, 250 metres is the length of two and a half rugby 5 fields, soccer, regulated soccer fields. So if you can 6 imagine one soccer field, a second soccer field and a half 7 of a soccer field and at that range Gwelani was shot dead, 8 one single shot to the head. 9 CHAIRPERSON: I'm getting a bit worried, 10 Mr Ntsebeza about the time. How long are these pictures 11 going to take? You haven't got much time left, so anyway 12 I'm just warning you. 13 MR NTSEBEZA SC: Well it's about – I 14 don't know how they are going to be, it's not long, it's 15 just four slides. 16 CHAIRPERSON: There's not a problem then. 17 You've got five minutes I'm told. All right, four slides 18 with over a minute per slide, okay. 19 MR NTSEBEZA SC: Put up – that's slide 1. 20 Go back please. 21 CHAIRPERSON: That's Mr Tukusa, I think 22 it reads killer bullet, one high velocity bullet to the 23 head. I take it he was 42 years old isn't it? 24 MR NTSEBEZA SC: Yes. 25 CHAIRPERSON: That's what the meaning of</p>
<p style="text-align: right;">Page 39233</p> <p>1 range of reasons it cannot be so. We have also submitted 2 that if we accept our proposition that the use of lethal 3 force, the use of violence by a gangster should be 4 different to the use of similar force if it is used by a 5 law enforcement agency because the responsibilities of 6 these two entities are different. Then it must be accepted 7 that in a society where certain foundational values have 8 been cherished, in a society where there has been a 9 conscious effort since the dawn of democracy to even change 10 the manner in which our police service is trained. Then 11 there is a lot that is expected by these families in the 12 way in which the police service will react even to a 13 perceived threat because their duty even in the face of 14 danger to themselves, to other human beings, threat to 15 property even theirs is to make sure that what they do in 16 defence of property, of themselves or of others can never 17 be so disproportionate as to defeat any understanding as to 18 why it could have been done. Because they are law 19 enforcement agencies, what we had on the 16th was not a 20 warfare between gangsters, it was a tense situation where 21 there were striking mineworkers armed with assegais and 22 pangas. To date we have only seen one revolver in scene 1 23 that can be attributed to the mineworkers, pistol. On the 24 other hand we have a line of specialised forces, you now 25 know that the weapons they carried on the day one single</p>	<p style="text-align: right;">Page 39235</p> <p>1 the 42 at the first line is. 2 MR NTSEBEZA SC: Next one please. 3 CHAIRPERSON: This one is Mr Jijase, aged 4 26 killer bullet, one high velocity bullet to the head. 5 MR NTSEBEZA SC: Next one. 6 CHAIRPERSON: This one is Mr Pato, aged 7 35. Killer bullet, one high velocity bullet to the neck. 8 MR NTSEBEZA SC: Next one. 9 CHAIRPERSON: You'll have to pronounce 10 that for me. 11 MR NTSEBEZA SC: Ndongophele. 12 CHAIRPERSON: How do you pronounce it? 13 MR NTSEBEZA SC: Ndongophele. 14 CHAIRPERSON: Ndongophele, aged 31. 15 Killer bullet, one high velocity bullet to the head. Then 16 the next reads what about Mr Noki? 17 MR NTSEBEZA SC: Yes. 18 CHAIRPERSON: There's a picture of him in 19 his green blanket and then we have a sketch of the various 20 injuries to the head. 21 MR NTSEBEZA SC: No. 22 CHAIRPERSON: Injuries to his body, the 23 wounds. 24 MR NTSEBEZA SC: Now that, there's a 25 number of bullet wounds in Mr Noki. The man in the green</p>

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1 blanket after he had been shot at less than 30 metres away
 2 with R5 rifles. That was the nature of his body.
 3 CHAIRPERSON: Now we have 14 high
 4 velocity bullets.
 5 MR NTSEBEZA SC: That was Mr Noki.
 6 CHAIRPERSON: That's Mr Noki 2, head and
 7 neck. 3, front left lower leg. Left thigh, elbow, right
 8 buttock, back right thigh, back right calf, left lower leg,
 9 rear lower leg, right thigh.
 10 MR NTSEBEZA SC: Now that's his head, Mr
 11 Chairman.
 12 CHAIRPERSON: Yes his head is depicted
 13 lying it looks like on the green blanket with a number of
 14 frightening looking wounds on his face.
 15 MR NTSEBEZA SC: That is the head that
 16 had been reduced to that state in less than a minute from
 17 the head and the smiling face which you saw before he was
 18 killed. What we ask is this, can this all have been in aid
 19 of self defence? Whether it is putative, whether it's in
 20 defence, you know, Mr Chair, to state the obvious –
 21 CHAIRPERSON: We go back to a picture of
 22 him smiling in his green blanket in front of the koppie.
 23 MR NTSEBEZA SC: To state the obvious we
 24 all live in this country and we all rely on the police
 25 service for our security and protection and whenever I have

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1 We'll now adjourn until 9 o'clock tomorrow morning when Mr
 2 Mpofu will have a turn and he will address us on behalf of
 3 the injured and arrested persons, followed by Mr Tip.
 4 [COMMISSION ADJOURNED]
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1 got threats to my property and my life and I have reason to
 2 call the police service to come and deal with the threat.
 3 And let's assume for once that the threat was against each
 4 one of us and the members of the police service perceived
 5 that they had a duty to defend us against the perceived
 6 threat. I want us to do a soul searching and find out
 7 whether if the threat is 30 metres away the only way an
 8 officer of the SAPS would find that to deal with that
 9 threat and the threat is a spear and an assegai it is to
 10 blow half of the face of that perceived threat in the way
 11 in which these photographs have shown you. One single shot
 12 a person's face is shattered to smithereens.
 13 [16:01] Is that, what can be justified on any basis in a
 14 democratic constitutional State. I have no doubt that even
 15 if it was in my personal safety defence, even if a member
 16 of the SAPS was acting in my interest, I would never find
 17 it was justified for them to use high velocity firepower to
 18 remove a perceived threat 30 metres away in that fashion,
 19 not in my name. It should not be in our name as a society.
 20 It should not be in the name of this Commission that this
 21 Commission has sanctioned the disfigurement of persons in
 22 that fashion. It should never be in the name of our
 23 democracy, not in the name of the Constitution. It just
 24 should not happen. Those are our submissions, Mr Chair.
 25 CHAIRPERSON: Thank you, Mr Ntsebeza.

A				
abandon 39152:17	acknowledged 39094:16 39198:9	39157:25 39183:20 39214:24	ahead 39148:17 39219:22	ample 39151:22 39153:19 39220:8
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