

**IN THE MARIKANA COMMISSION OF INQUIRY  
(HELD IN CENTURION)**

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**AMCU'S HEADS OF ARGUMENT**

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## Section A – Introduction

### 1. “MARIKANA”

1.1 Some call it a “massacre”, others a “tragedy.” It was, in our submission, undoubtedly both. Many simply use the term “Marikana” to encapsulate the horror and the shame of the events of 16 August 2012.

1.2 In order to understand how “Marikana” happened and to assess the responsibility of the various parties in relation thereto, it is crucial to understand how and why the strike happened. Since August 2012, a number of misconceptions regarding who was on strike and why the strike happened have taken hold – at least in the mind of the public. As we will demonstrate below, the most serious of these were the result of deliberate misrepresentations perpetrated by Lonmin.

1.3 The true facts pertaining to how and why the strike happened have now been established. We begin our heads of argument by setting them out. We do so in order to separate fact from fiction and in order to lay a proper foundation for our examination of the events of 9 to 16 August 2012 and our assessment of the responsibility of the various parties in relation thereto.

1.4 A number of key background facts must be highlighted. These are:

1.4.1 The fact that Rock Drill Operators (“RDOs”) at Lonmin were grossly underpaid and had been so for some years.

- 1.4.2 The fact that Lonmin had anticipated, as a result of the unprotected industrial action that had engulfed the Impala Platinum Mine (“Implats”) earlier that year, that its RDOs would demand a wage increase.
- 1.4.3 The fact that Lonmin regarded the wage demand by its RDOs, when it came, “*as an RDO issue independent of the trade unions.*”
- 1.4.4 The fact that Lonmin negotiated with its RDOs over their wage demand before the strike.
- 1.5 As we will demonstrate below, each of these facts has important implications for the events of 9 to 16 August 2012 and for how those events should be understood.

## 2. **THE CONDUCT OF VARIOUS PARTIES**

- 2.1 Having established the background facts, we will proceed to examine the conduct of the relevant parties in relation to the events of 9 to 16 August 2012.
- 2.2 AMCU’s primary interest in the Commission’s proceedings has been to present evidence and argument which addresses the Commission’s terms of reference relating to it. However, AMCU also has an interest in the findings and recommendations made in relation to other parties. This is because many of those who participated in the strike and who were injured and killed on 16 August 2012 were AMCU members. It was for this reason that AMCU called for a Commission of Inquiry into the events of 16 August 2012. We note that AMCU was the first party, or at

least one of the first, to do so.

- 2.3 In a letter addressed to the President of South Africa, dated 17 August 2012, AMCU said:

"Regrettably, yesterday more loss of life has taken place at Lonmin Platinum Mine after the police had opened fire to the miners who gathered on the mountain.

As the NEC of Association of Mineworkers and Construction Union (AMCU), we are deeply saddened and shocked by these brutal killings. It is our view that this unfortunate situation could have been avoided should all parties had treated the matter with the sensitivity deserved.

We hereby humbly request an urgent intervention from the office of the President by calling all the affected and interested parties together to seek an amicable solution on this matter.

We further call upon the office of the President to institute a commission of inquiry to investigate the cause of these unnecessary killings.

In conclusion, we want to pass our condolences to the families, friends and relatives of all the workers whom their lives were lost."<sup>1</sup>

- 2.4 Thus, AMCU has participated in the proceedings with a view to assisting the Commission to identify the direct or indirect causes of the conflict, and particularly the unnecessary killings, which occurred in the week of 9 to 16 August 2012.

- 2.5 We will begin, in Section C of our heads of argument, with AMCU. We will provide a detailed analysis of the conduct of AMCU and of its President, Mr Mathunjwa, during the week of 9 to 16 August 2012. Our

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<sup>1</sup> This letter does not form part of the record, but can be made available should it be required.

analysis will ultimately show that:

- 2.5.1 AMCU was committed to finding a negotiated solution to the conflict that had engulfed Marikana.
- 2.5.2 Mr Mathunjwa requested Lonmin on no less than six occasions to hold a meeting of all relevant stakeholders, including all the trade unions recognised at Lonmin, to discuss the RDO grievance. The first of these requests was made *before* the strike commenced, when the RDO demand first surfaced. The last request was made on 16 August 2012, the day of the massacre. On that occasion Mr Mathunjwa proposed that a “central forum” be established outside the normal bargaining structures, on which all stakeholders would be represented, at which the RDO demand could be discussed. As we will demonstrate below, there was no difference at all between the central forum that Mr Mathunjwa proposed on 16 August 2012 and the forum that was ultimately established to resolve the strike after the massacre had occurred. Mr Mathunjwa’s repeated calls for the crisis at Marikana to be dealt with through a structured engagement fell on deaf ears. Had he been listened to, it is highly likely that the massacre would not have occurred.
- 2.5.3 AMCU, and Mr Mathunjwa in particular, did all it could to avert the bloodshed that was foreseen on 16 August 2012.
- 2.5.4 As we will demonstrate below, bloodshed as a result of the police operation on 16 August 2012 was foreseen by the relevant parties, including SAPS and Lonmin. AMCU was however the only party that took steps to attempt to avert it. It did so first by attempting to



negotiate right up until the bitter end and then, when this finally proved futile, by attempting to persuade the strikers to leave the koppie. We will demonstrate below that Mr Mathunjwa was in an invidious position on 16 August 2012: he had to go and tell a group of angry strikers, only a minority of whom were his constituency, that what he had told them the previous day was incorrect and that Lonmin management was no longer prepared to engage with them on their grievance if they returned to work. Mr Mathunjwa nevertheless did so and did his best to persuade the strikers to leave the koppie. Ultimately, Mr Mathunjwa went down on his knees and begged the strikers to leave.

- 2.6 In the course of our analysis of AMCU's conduct we will deal with allegations that have been levelled against AMCU by various parties, including Mr "X". We will demonstrate that they are without foundation.
- 2.7 We will conclude that there can be no doubt that AMCU used its best endeavours to resolve the crisis which had arisen at Marikana and that no adverse finding should be made against it.
- 2.8 In Section D of our heads of argument we will deal with NUM's response to the strike.
- 2.9 We will submit that NUM ought to have sought to represent the interests of the RDOs, who were largely its members, particularly because it recognised that they were grossly underpaid and had been so for some time. Indeed, as we will show below, NUM was so concerned about the underpayment of RDOs at Lonmin that it called the situation a "*ticking timebomb*". However, instead of taking up the RDOs' cause, NUM told

them that their demand could not be entertained because it constituted a *breach* of the two year wage agreement, advice which was legally wrong.

2.10 We will submit that once the strike commenced, NUM ought to have sought a negotiated solution. Instead however the evidence shows that NUM:

2.10.1 took active steps to break the strike, *inter alia* by teaming up with Lonmin's security personnel;

2.10.2 provocatively called on the strikers to return to work;

2.10.3 sought to portray AMCU as the villain behind the strike; and

2.10.4 labelled the strikers criminals; and

2.10.5 publicly called on the SAPS to bring in the Special Task Force or the army to deal with the situation.

2.11 We will submit that the shooting by NUM officials on 11 August 2012 was unnecessary and unlawful. The evidence shows that instead of locking up their office and leaving, as they had been instructed to do by Lonmin security, the NUM officials armed themselves and readied themselves for a fight. They then attacked the strikers, according to the undisputed evidence of two Lonmin security guards who witnessed the incident. We will submit that there can be no claim to self defence in these circumstances. The shooting by NUM had dramatic consequences. It led to the strikers arming themselves and positioning themselves on the

koppie. It was undoubtedly a turning point.

2.12 We will conclude that the Commission ought to find that NUM did not use its best endeavours to resolve the dispute and further that it ought to be held responsible in law for the shooting on 11 August 2012.

2.13 In Section E of our heads of argument we deal with Lonmin's response to the strike.

2.14 We will submit that the evidence shows that:

2.14.1 Lonmin refused to engage with the strikers. This was in violation of its own policy which required engagement in the event of unprotected strike action. In any event, Lonmin's stance in this regard was manifestly unreasonable, particularly because it had negotiated with the RDOs over their demand prior to the strike.

2.14.2 Lonmin embarked on a campaign of misinformation both in relation to who was on strike and in relation to the causes of the strike. Specifically, Lonmin disavowed knowledge of the identity of the strikers and sought to create the impression that the strike was caused by rivalry between the two unions. As we will show below, Lonmin's goal in spreading these falsehoods was to attempt to remove the locus of control and responsibility for the strike from itself.

2.14.3 Lonmin exhibited an extremely hostile attitude towards AMCU in 2012, labelling it "the hyena" and accusing it of such things as "covert operations" and "intimidation tactics" in the absence of any

evidence. We submit that this explains a particularly blatant instance of misrepresentation perpetrated by Lonmin during the week of 9 to 16 August 2012: the claim that AMCU was behind the strike. As we will show below, there has never been any evidence to support this claim and ultimately Lonmin's witnesses were forced to retract all allegations that AMCU was behind the strike. Lonmin's campaign to blame AMCU for the strike did however obtain some credence – at least in the mind of the public – and has been profoundly damaging and unfair to AMCU.

- 2.14.4 We will submit that the reason for Lonmin's obdurate stance in refusing to engage with the strikers during the week of 9 to 16 August 2012 was that it was confident that the SAPS would launch an operation to break the strike. If this occurred there would of course simply be no need for Lonmin to engage with the strikers. We will submit that the evidence shows that Lonmin lobbied SAPS (and government) and colluded with SAPS to break the strike. It did so despite foreseeing that injury or death may occur as a result.
- 2.15 We will conclude that Lonmin did not use its best endeavours to resolve the dispute which had arisen; did not respond appropriately to the threat or outbreak of violence on its premises and created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees and other harmful conduct.
- 2.16 We will submit further that Lonmin's conduct in lobbying and colluding with SAPS to break the strike, despite foreseeing that injury or death might occur as a result, constitutes *prima facie* grounds for a finding that Lonmin is criminally responsible for the injuries and deaths committed

by SAPS on 16 August 2012 on the basis of accomplice liability.

- 2.17 It is beyond the scope of these submissions to address the case against SAPS in detail. Nevertheless, in Section F, we will make brief submissions on the key findings that the Commission ought to make in relation to the action taken by SAPS at Scene 1 and Scene 2 on 16 August 2012. We will submit that the killings and injuries at the hands of SAPS were unlawful and that SAPS is responsible in law for the killings and injuries at Scene 1 and Scene 2 on 16 August 2012.
- 2.18 Finally, in Section G, we will set out the findings and recommendations that we submit the Commission ought to make.

## Section B – Background to the Strike

### 3. **INTRODUCTION**

In this section we set out the relevant facts pertaining to how and why the strike happened.

### 4. **ROCK DRILL OPERATORS AT LONMIN WERE GROSSLY UNDERPAID**

4.1 Mr Gcilitshana, NUM’s Chief Negotiator at Lonmin, testified that NUM had for some time been concerned that Rock Drill Operators (“RDOs”) at Lonmin were significantly underpaid. Mr Gcilitshana testified that in wage negotiations in 2009 and 2011 NUM tabled a demand for a significant differential increase for RDOs at Lonmin.<sup>2</sup> The demand was that RDOs be “rolled up” from grade 4 to grade 7.<sup>3</sup> This would have entailed a wage increase for RDOs of approximately 25%.<sup>4</sup> Mr Gcilitshana testified that NUM tabled this demand after conducting the necessary market research to ensure that it was both market-related and reasonable.<sup>5</sup> Despite this, in both sets of wage negotiations – in 2009 and 2011 – NUM’s demand was rejected.

4.2 Mr Gcilitshana testified that at the conclusion of the 2011 wage negotiations, NUM was so concerned about the failure to achieve a

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<sup>2</sup> T, Day 36, 3925, lines 23 – 25.

<sup>3</sup> T, Day 36, 3954, lines 18 – 21.

<sup>4</sup> T, Day 36, 3957, lines 19 – 21.

<sup>5</sup> T, Day 36, 3957, lines 14 – 19

differential increase for Lonmin RDOs that it warned that the situation was a “ticking timebomb.”<sup>6</sup>

4.3 This evidence was not contested in the Commission. Indeed, Mr Barnard Mokwena, Lonmin’s Executive Vice President for Human Capital at the time, (“**Mr Mokwena**”) confirmed that:

4.3.1 He was aware that RDOs at Lonmin considered themselves to be underpaid.<sup>7</sup>

4.3.2 He was aware that NUM was of the view that the RDOs at Lonmin were underpaid.<sup>8</sup>

4.3.3 He was aware that at the conclusion of the 2011 wage negotiations, NUM was so concerned about the failure to achieve a differential increase for Lonmin RDOs that it warned that the situation was a “ticking timebomb.”<sup>9</sup>

## 5. NUM WAS LOSING TOUCH WITH ITS MEMBERS AT LONMIN AND LOSING THEIR CONFIDENCE

5.1 NUM was losing touch with its members at Lonmin and losing their confidence in 2012. This was recognised by Lonmin.

5.2 This was reflected in a “scenario planning document” prepared by

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<sup>6</sup> Exhibit XX1, p 10, para 30.6; T, Day 36, 3958, lines 18 – 24.

<sup>7</sup> T, Day 291, 37908, lines 15 – 19

<sup>8</sup> T, Day 291, 37908, lines 20 – 22

<sup>9</sup> T, Day 291, 37909, lines 11 – 15.

Lonmin's Human Capital Division and presented to Lonmin's Executive Committee ("**Exco**") in April 2012.<sup>10</sup>

- 5.3 Mr Albert Jamieson, Lonmin's Chief Commercial Officer at the time ("**Mr Jamieson**") conceded that there was an appreciation by Exco in 2012 that NUM was losing support to such an extent that it "*may no longer be the legitimate voice of the workers of Lonmin.*"<sup>11</sup>

6. **THE COLLECTIVE BARGAINING STRUCTURES AT LONMIN WERE OF DOUBTFUL RELEVANCE IN 2012**

- 6.1 In 2012, increasing numbers of workers at Lonmin were either non-unionised or had lost confidence in the recognised majority union. The established collective bargaining structures at Lonmin were unable to cater for this. This meant that the established collective bargaining structures at Lonmin were of doubtful relevance in 2012. This was recognised by Lonmin.

- 6.2 The "scenario planning document" prepared by Lonmin's Human Capital Division and presented to Exco in April 2012 stated the following in this regard:

- 6.2.1 "The current recognition agreements are based on the Marikana total operations; and the NUM is the current majority trade union for the bargaining unit it operates in, despite its declining impact in

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<sup>10</sup> Exhibit VVVV1, p 133 and 143. See also T, Day 291, 37914, lines 11 – 13.

<sup>11</sup> T, Day 287, 37254, lines 17 – 20.



exerting influence over its members.”<sup>12</sup>

6.2.2 “The current thresholds and other legal relationships are no longer relevant”<sup>13</sup>

6.2.3 “Some organisational systems are geared at the old framework. Therefore a total overhaul of organisational systems, policies and procedures should be considered.”<sup>14</sup>

6.3 Both Mr Mokwena<sup>15</sup> and Mr Jamieson<sup>16</sup> conceded that Lonmin, and Exco in particular, recognised that the collective bargaining structures at Lonmin were of doubtful relevance in 2012.

## 7. **THE IMPLATS TRIGGER STRIKE**

7.1 The RDO led strike at Implats in the first quarter of 2012 is widely regarded as a key “trigger” for the unprotected strike action which engulfed Lonmin in August 2012.<sup>17</sup>

7.2 The Implats strike was itself was triggered by two very significant events. The first was the failure to achieve a differential wage increase for RDOs at Implats in the 2011 wage negotiations.<sup>18</sup> The allegation has

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<sup>12</sup> Exhibit VVVV1, p 143.

<sup>13</sup> Exhibit VVVV1, p 142.

<sup>14</sup> Exhibit VVVV1, p 142.

<sup>15</sup> T, Day 291, 37915, lines 12 – 21.

<sup>16</sup> T, Day 287, 37254, line 12 – 37256, line 7.

<sup>17</sup> See for example Exhibit XX7, p 4.

<sup>18</sup> See Exhibit XX7 at p 4. Mr Mokwena conceded this - T, Day 291, 37916, lines 15 – 21.

been made that Impala management had supported a differential increase for RDOs in those negotiations but that NUM had been opposed to this.<sup>19</sup> This has been disputed by NUM. It is not necessary for our purposes that this dispute be resolved. It is sufficient to note that, for whatever reason, no differential increase was achieved for RDOs at Implats in the 2011 wage negotiations.

- 7.3 The second trigger of the Implats strike was what has been described as “a highly unusual and ill considered”<sup>20</sup> decision by Impala management. This was a decision to grant “Miners”<sup>21</sup> a whopping 18% increase outside the two year wage agreement shortly after it had been signed. This was apparently done in order to stem the flow of Miners to competitor companies.<sup>22</sup> Again there is a dispute about whether or not NUM was party to this decision and again it is not necessary for our purposes that this dispute be resolved. What is clear is that Miners at Implats were granted an 18% increase outside wage agreement and within a month of it having been signed.<sup>23</sup> Gavin Hartford makes the following comment in this regard:

“This unilateral adjustment to miner’s pay packets after consultation with NUM, during the currency of a collective agreement was a highly unusual and ill-considered act that sent a very clear message to every mining work team that the company, notwithstanding the settlement of the wage agreement, had additional cash to spare for

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<sup>19</sup> Exhibit XX7, p 4, para 2; Exhibit XX8, p 2.

<sup>20</sup> Exhibit XX7 at p 4.

<sup>21</sup> The term “Miner” refers here not to mine workers in general but to a specific category of worker who has certain technical training and is in possession of a blasting certificate.

<sup>22</sup> Exhibit XX8, p 2.

<sup>23</sup> Exhibit XX7, p 4, para 2; Exhibit XX8, p 2. Mr Mokwena conceded this – T, Day 291, 37917, lines 8 – 16.

certain categories of workers within the bargaining unit.”<sup>24</sup>

- 7.4 There is little doubt that the RDOs at Implats would have been deeply aggrieved by these events. They would have been told that a differential increase for them was not possible and that they would have to be satisfied with a 10% inflationary based increase, only to learn a couple of weeks later that Miners, with whom they work on daily basis, had been granted a whopping 18% increase outside the wage agreement which had just been signed. Gavin Hartford states the following:

“The RDOs would have felt the wage settlement of just 10% in their pay packets after the October settlement. And they work in teams on every panel with the very miners who benefitted from the additional 18% adjustment within a month of the wage agreement being settled. There is no doubt that they would have left the mine for the Christmas shut down deeply aggrieved by a perception of unfair treatment they had suffered at the hands of the management and the NUM leadership. On the hills of Lusikisiki and Flagstaff they planned to take the law into their own hands when they returned to work in January.”<sup>25</sup>

- 7.5 This is precisely what the RDOs at Implats did. The Implats strike commenced on 12 January 2012. The strikers had two demands: R9000 net pay (which was equivalent to the Miners’ net pay after the 18% adjustment) and no negotiations with NUM.<sup>26</sup>

- 7.6 The Implats strike was violent<sup>27</sup> and protracted<sup>28</sup> and ultimately

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<sup>24</sup> Exhibit XX7, p 4, para 3.

<sup>25</sup> Exhibit XX7, p 4, para 3.

<sup>26</sup> Exhibit XX7, p 4, para 3; T, Day 291, 37919, line 23 – 27920, line 8 .

<sup>27</sup> There were 3 deaths during the strike and scores of injuries – See Exhibit XXX7, p 4, para 5.

<sup>28</sup> The strike lasted for almost 2 months. See Exhibit XX7, p 2.

culminated in Impala management buckling under the pressure and granting massive increases to RDOs and certain other categories of employees. The increases were implemented on 20 April 2012. RDOs at Implats received increases of up to 25%.<sup>29</sup>

- 7.7 The effect of this was that RDOs at Lonmin were now paid significantly less than their counterparts at Implats.<sup>30</sup> For other reasons, RDOs at Lonmin were also paid significantly less than their counterparts at Amplats.<sup>31</sup>

## 8. **A PERFECT STORM**

- 8.1 Having regard to all of the above, we submit that it is apparent that, as at April 2012, Lonmin ought to have been aware of three critical facts:

- 8.1.1 First, there was a significant differential between what RDOs at Lonmin and RDOs at other platinum mines were earning.<sup>32</sup>
- 8.1.2 Second, RDOs at Lonmin had for at least four years, and with some justification according to NUM, considered themselves to be significantly underpaid.<sup>33</sup>
- 8.1.3 Third, RDOs at Implats had taken matters into their own hands, embarked on a massive unprotected strike and secured very

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<sup>29</sup> Exhibit XX2.4.

<sup>30</sup> T, Day 2291, 37921, lines 20 – 23.

<sup>31</sup> T, Day 291, 37921, line 24 – 37922, line 1.

<sup>32</sup> T, Day 272, 34609, line 25 – 34610, line 6.

<sup>33</sup> T, Day 272, 36610, lines 7 – 11.

significant increases for themselves.<sup>34</sup>

- 8.2 Mr Ramaphosa conceded under cross examination that these three facts, taken together, created the recipe for a perfect storm.<sup>35</sup> This being the case, one would have expected Lonmin to have taken steps to put contingency plans in place to deal with a demand for higher wages from its RDOs – in the event that such a demand came - which seemed almost inevitable in the circumstances.
- 8.3 Mr Ramaphosa testified however that neither he nor the Lonmin Board was aware of the above facts at the time.<sup>36</sup> Had the Board been aware of those facts, said Mr Ramaphosa, it would indeed have been concerned to ensure that steps were being taken and contingency plans put in place to deal with the matter.<sup>37</sup>
- 8.4 Mr Mokwena, who headed Lonmin’s Human Capital Division and served on Exco, was however fully aware of the above facts.<sup>38</sup> Not only this, but Mr Mokwena conceded that he anticipated that what had happened at Implats may well spread to Lonmin.<sup>39</sup>

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<sup>34</sup> T, Day 272, 34610, lines 12 – 20.

<sup>35</sup> T, Day 272, 34613, line 22 – 34614, line 6.

<sup>36</sup> T, Day 272, 34614, lines 7 – 10.

<sup>37</sup> T, Day 272, 34614, lines 11 – 23.

<sup>38</sup> T, Day 291, 37919, line 23 – 37922, line 7.

<sup>39</sup> T, Day 291, 37922, lines 2 – 7. Mr Da Costa also conceded that Lonmin was concerned that what had happened at Implats could spread to Lonmin. T, Day 241, 30395, lines 2 – 21. The “scenario panning document” prepared by the Human Capital Division and presented to Exco in April 2012 recognised what it termed “risk of contagion” as a result of the Implats strike but failed to address the risk in any meaningful way. Exhibit VVVV1, p 148.

- 8.5 Notwithstanding this, it is evident, as we will demonstrate below, that Lonmin took no meaningful steps and put no contingency plans in place to address what was manifestly a looming crisis.

9. **THE LONMIN RDOs' DEMAND IN JUNE 2012**

- 9.1 The storm finally broke on 21 June 2012 when RDOs at Lonmin's Karee mine marched to the office of Mr Mike Da Costa, the Vice President of Lonmin's Karee Mining Operations ("**Mr Da Costa**") and demanded a hefty wage increase.
- 9.2 There are three important points to be made in relation to this demand and the events which followed it. The first is that the RDO delegation to Mr Da Costa was led by one NUM member and one AMCU member causing Lonmin to form the view that the RDO issue at Lonmin may well have "*assumed a life of its own independent of trade unions.*"
- 9.3 The second point is that despite Lonmin having anticipated that it could see a repeat of the events at Implats, it is apparent that when the demand came, Lonmin had not planned for it, had no clear idea of how to handle it and took a full six weeks before it was able to give its RDOs any meaningful response.
- 9.4 The third point is that Lonmin engaged in a negotiation over wages with its RDOs. We will submit that, notwithstanding Lonmin's attempts to deny this, the facts show that what transpired was engagement between the parties with a view to reaching a compromise or settlement. That is the very definition of negotiation.

9.5 We will deal with each of these points in turn below.

#### **THE APPROACH TO DA COSTA: AN RDO ISSUE INDEPENDENT OF THE UNIONS**

9.6 A memorandum written by Mr Peter Fanyana (“Jomo”) Kwadi, Senior Manager: Employee Relations (“**Mr Kwadi**”) on 26 June 2012, shortly after the RDOs initial approach to Mr Da Costa on 21 June 2012 reads as follows:

“The RDOs at Karee Mine approached management with a ‘request’ for an increase in their remuneration. They have requested a package of R 12 500 per month. Although there is no proof of AMCU’s involvement in the Lonmin “RDO” request suspicions are that they may be behind it directly or indirectly. Of particular interest though, is that the RDOs were led by one member from AMCU and another one from NUM. This may suggest that the RDO issue has assumed a life of its own independent of trade unions.”<sup>40</sup> (emphasis added)

9.7 The memorandum prepared by Mr Da Costa for Exco and dated 27 June 2012 is to the same effect:

“The Rock Drill Operators at Karee called a meeting on the afternoon of Thursday 21 June 2012. Following the meeting, a delegation of approximately 50 people arrived at the office of the Vice President and requested a meeting with him. Two representatives were chosen to meet with the Vice President and they put forward their request to have their basic wage increased to R 12 500 per month. When asked how they had arrived at the requested number, they replied that this is what they would consider fair compensation for the work that they do under extremely difficult conditions.

One of the representatives is a member of the NUM and the other is a member of AMCU. However, they seemed to be making the request in their capacity as Rock Drill Operators and not as union members.”<sup>41</sup>

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<sup>40</sup> Exhibit WWW1 at p 399.

<sup>41</sup> Exhibit XXX3 at p 3.

(emphasis added)

9.8 Mr Mokwena confirmed that what is contained in Mr Kwadi's memorandum reflected his understanding of the situation and that this remained his understanding of the situation from 28 June 2012, when this matter was first discussed at Exco, to 14 August 2012 when he met with General Mbombo.<sup>42</sup>

9.9 We deal with Mr Mokwena's meeting with General Mbombo in detail below. The point we wish to make at this stage is that, having regard to Mr Mokwena's evidence, the Commission must accept that his understanding throughout the relevant period was that:

9.9.1 There was no proof that AMCU was behind the RDO demand for R12 500; and

9.9.2 It appeared that the RDO issue may have assumed a life of its own independent of the trade unions.

9.10 We will return to these matters in more detail below.

#### **LONMIN ANTICIPATED THE RDO DEMAND YET FAILED TO PLAN FOR IT**

9.11 Mr Mokwena conceded that he had anticipated that the events at Implats could spread to Lonmin<sup>43</sup> and that he was accordingly not particularly surprised when the RDOs at Lonmin began demanding a wage

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<sup>42</sup> T, Day 38076, line 1 – p 38077, line 10.

<sup>43</sup> T, Day 291, p 37922, lines 2 – 7.



increase.<sup>44</sup>

9.12 Despite this, it is apparent that when the demand came, Lonmin had not planned for its and had no clear idea of how to handle it. Exco requested benchmarking exercises to be conducted to compare its RDO wages with those of RDOs at other platinum mines – apparently for the first time. This despite the fact that Mr Mokwena conceded that he became aware of the hefty increases granted at Implats shortly after they were implemented on 20 April 2012.<sup>45</sup> One would have expected that some thought would have been given, at the time – or at some stage prior to 21 June 2012 – to what the implications of this might be for Lonmin and how they ought to be dealt with. Apparently this was not done.

9.13 In the end, it took Lonmin a full six weeks to provide a meaningful response to the RDOs' demand. In circumstances in which the situation was tense and had the potential to escalate into the kind of violent, unprotected strike action which had engulfed Implats earlier in the year, this was far from ideal.

9.14 We deal with the implications of this later in our heads of argument.

#### **LONMIN NEGOTIATED OVER WAGES WITH ITS RDOs**

9.15 Lonmin engaged with the RDOs wage on their wage demand. Moreover, it did so despite the fact that the demand was brought outside the collective bargaining structures. Mr Mokwena conceded this in terms:

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<sup>44</sup> T, Day 291, 37922, lines 17 – 21.

<sup>45</sup> T, Day 291, 37920, line 20 – 37921, line 13.

“MS BARNES: Now we know then that Mr Da Costa had meetings with the Karee RDOs about their demand, is that correct?

MR MOKWENA: That is correct.

Ms BARNES: And so Mr da Costa engaged with the RDOs on their demand, correct?

MR MOKWENA: Yes

MS BARNES: Even though that wage demand had not been brought through the structures, correct?

MR MOKWENA: Yes.”<sup>46</sup>

9.16 Mr Da Costa conceded that if the RDOs had made him a counter-offer he would have informed Exco of this. He conceded further that he performed the function of communicating between the RDOs and management and vice versa:

“MR BUDLENDER SC: Yes, and the would be strikers had told you what they wanted and you had told them what management was prepared to give them, is that correct?

MR DA COSTA: That is correct.

MR BUDLENDER: And if they had said it is not quite enough but it is nearly enough surely you would have gone back to your executive and said, we can avert the strike action, we can achieve our goal if we pay them for example another R250 a month, surely you would have told them that. I want to put it to you that if you hadn't - if that situation had arisen and you hadn't told your executive that for another R250 a month we can avert strike action and as a result strike action took place, you would have been in big trouble with the company. The executive would have said, why didn't you tell is that?

MR DA COSTA: You know as I said to you previously no doubt I would tell than that but –

MR BUDLENDER SC: Yes –

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<sup>46</sup> T, Day 291, 37923, lines 6 – 15.

MR DA COSTA: I had no mandate to give any indication or make any commitment to the rock drill operators, that that is what I would do.

MR BUDLENDER SC: No, I understand that, all I'm trying to do, what I'm coming to is that what you were doing is, you were in effect communicating between the rock drill operators and management and vice versa. That was the function you were performing.

MR DA COSTA: Yes, I was.<sup>47</sup>

9.17 These concessions belie Lonmin's claim that what occurred was a unilateral decision on its part and not a negotiation with its workers. The definition of "negotiation" is "*confer with a view to compromise or agreement.*"<sup>48</sup> We submit that this is plainly what was transpiring from the point of view of both the RDOs and Lonmin.

9.18 Lonmin's claim that it was giving its workers a "market allowance" and not a "wage increase" is equally disingenuous. Mr Da Costa effectively conceded this under cross examination during the following exchange:

MR DA COSTA: I think they did understand the difference in that, you know whether it comes as an increase to the basic wage it brings some other increases along, whether in terms of some of the other allowances and so on, this is just an allowance on top of the basic wage.

MR BUDLENDER SC: Are you suggesting that if Lonmin had given an allowance which made up the difference between the basic wage and the R12 500 the rock drill operators would have said, hang on, no we don't want an allowance, we want a wage, we want a wage increase, or do you think they would have said, we're very pleased, thank you very much, we've achieved our purpose.

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<sup>47</sup> T, Day 239, 30061, line 15 – 30062, line 17.

<sup>48</sup> Concise Oxford Dictionary, p 807.

MR DA COSTA: No, most likely the latter.<sup>49</sup>

9.19 We submit that the facts clearly establish the following:

9.19.1 The RDOs made a demand for an increased wage.

9.19.2 Lonmin engaged or conferred with the RDOs in respect of their demand.

9.19.3 Lonmin took a decision to give the RDOs more money in the hope that this would satisfy them and that strike action would be averted.<sup>50</sup>

9.19.4 Had the RDOs made Lonmin a counter-offer within parameters that were acceptable to Lonmin, it is inconceivable that Lonmin would not have seriously considered it, particularly if accepting it would have ensured that strike action would be averted.

9.20 Having regard to the above we submit that the Commission must find that for all intents and purposes Lonmin engaged in a negotiation over wages with its RDOs.

9.21 The implications of this will become clear later in our heads of argument.

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<sup>49</sup> T, Day 239, 30067, line 18 – 30068, line 5.

<sup>50</sup> This was the “monthly drilling allowance” of R750 for RDOs decided on by Exco on 27 July 2012. See Exhibit XX3, p 20 – 21.

## Section C – AMCU

### 10. **INTRODUCTION**

10.1 If there was one party that demonstrated an unwavering commitment to finding a negotiated solution to the conflict at Marikana in the week of 10 to 16 August 2012, it was AMCU.

10.2 As we will demonstrate below, AMCU's President Mr Mathunjwa requested Lonmin, on no less than six occasions, to hold a meeting of all the relevant stakeholders in order to discuss the RDO grievance. His pleas fell on deaf ears. Had he been listened to and had something akin to the forum that was established after the massacre, on which all stakeholders were represented, been set up before 16 August 2012, it is highly likely that the massacre would not have occurred.

10.3 In what follows below we will provide a detailed analysis of AMCU's response to the strike during the week of 9 to 16 August 2012 in order to demonstrate that AMCU used its best endeavours to resolve the dispute which had arisen. In the course of our analysis we will deal with certain criticisms that have been levelled against AMCU by various parties. We will demonstrate that they are without foundation. Finally, in this section, we will deal with the allegations that were levelled against AMCU by Mr 'X'.

### 11. **AMCU'S RESPONSE ON 10 AUGUST 2012**

11.1 On the morning of Friday, 10 August 2012, Mr Mathunjwa was in

AMCU's head office in Witbank. He received a phone call from Mr Mokwena. Mr Mokwena informed Mr Mathunjwa that workers were marching at Lonmin and intended to deliver a memorandum to Lonmin management.<sup>51</sup>

- 11.2 Mr Mokwena has confirmed that on the morning of 10 August 2012, he was working at his office at Lonmin's premises in Melrose Arch. He was contacted by the Head of Protection Services, Graeme Sinclair ("**Mr Sinclair**") as well as Abey Kgotle ("**Mr Kgotle**"), who was, at the time, with his team at the LPD. Mr Mokwena says that he "*was advised that a large group of people had gathered near the Wonderkop Stadium and were intending to march to present their demands to management*".<sup>52</sup> Mr Mokwena says that he then contacted the Secretary of NUM, Frans Baleni ("**Mr Baleni**"), as well as Mr Mathunjwa, to establish whether they were aware of the march and whether their members were marching. He says that "*they both answered my questions in the negative.*"<sup>53</sup>

- 11.3 Mr Mokwena told Mr Mathunjwa that Lonmin management would not be receiving any memorandum, but he advised that the SAPS would receive it.<sup>54</sup> This was the first time in Mr Mathunjwa's experience as a trade union leader that an employer had refused to receive a memorandum from workers and said that it must be received by the

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<sup>51</sup> Exhibit NN, para 15.

<sup>52</sup> Exhibit OO15, para 4.1.

<sup>53</sup> Exhibit OO15, para 4.2.

<sup>54</sup> Exhibit NN, para 16.

police instead.<sup>55</sup>

- 11.4 During their telephone conversation, Mr Mokwena referred to the people marching as “workers” and as RDOs. He did not refer to them as members of AMCU, nor did he say how many there were.<sup>56</sup>
- 11.5 Mr Mathunjwa reminded Mr Mokwena of the proposal he had made three weeks earlier that Lonmin management and all the unions meet. Mr Mathunjwa said he had been waiting for Mr Mokwena to get back to him in relation to that proposal. Mr Mokwena did not have an answer.<sup>57</sup>
- 11.6 Mr Mathunjwa advised Mr Mokwena that if the police received the memorandum from the workers, then they should tell the workers that they were not setting a precedent by doing so.<sup>58</sup>
- 11.7 Mr Mathunjwa also said to Mr Mokwena that once the memorandum had been received, management should call a meeting with all the unions to discuss the matter. This was the same proposal he had made three weeks previously.<sup>59</sup> Mr Mokwena confirms that Mr Mathunjwa “*did suggest that I should convene a meeting with the unions upon receipt of this memorandum*”.<sup>60</sup> His excuse for *not* convening a meeting with all the unions was that no memorandum was received from the workers.<sup>61</sup> This was, we submit, an unfortunate stance. As we will demonstrate below,

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<sup>55</sup> T, Day 21, 2248, lines 11 – 16.

<sup>56</sup> Exhibit NN, para 16.

<sup>57</sup> Exhibit NN, para 17.

<sup>58</sup> Exhibit NN, para 18.

<sup>59</sup> Exhibit NN, para 19.

<sup>60</sup> Exhibit OO15, para 4.3.

<sup>61</sup> Exhibit OO15, para 4.3.

Lonmin management knew exactly who was on strike and what they were demanding.

11.8 After his conversation with Mr Mokwena, Mr Mathunjwa did two things:<sup>62</sup>

11.8.1 First, he called AMCU's national organiser, Mr Dumisani Nkalitshana ("**Mr Nkalitshana**"), and asked him to telephone the AMCU branch chairman at Karee, Mr Mceli Baliman ("**Mr Baliman**"), to find out what was going on. Mr Nkalitshana did so and reported back to Mr Mathunjwa that the march had been organised by the RDOs themselves who said that it had nothing to do with the unions and that they did not want them involved.<sup>63</sup>

11.8.2 Second, he wrote a letter to Mr Mokwena in which he recorded the content of their telephone call and specifically referred to his request that management convene a meeting with all the unions to discuss the workers' demands.<sup>64</sup> He instructed Ms Esther Mabena, the Senior Office Administrator of AMCU to e-mail the letter to both Mr Mokwena and Mr Kwadi.<sup>65</sup> It is not disputed that Mr Mokwena received the letter.<sup>66</sup>

11.9 Also on 10 August 2012, AMCU's office received an application by Lonmin to interdict the unprotected work stoppage taking place on its

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<sup>62</sup> Exhibit NN, para 20.

<sup>63</sup> Exhibit NN, para 20(a).

<sup>64</sup> The letter is Exhibit OO1. Its contents were read into the record at T, Day 21, 2249, line 17 – 2250, line 21.

<sup>65</sup> Exhibit NN, para 20(b)

<sup>66</sup> See Exhibit OO15, para 4.10.



premises.<sup>67</sup> Mr Mathunjwa was not in the office at the time,<sup>68</sup> but he was notified of the application and he discussed it with those present in the office, including the General Secretary, the National Treasurer and Mr Nkalitshana.<sup>69</sup> It was decided that AMCU would not oppose the interdict application because the work stoppage was unprotected.<sup>70</sup>

## 12. **AMCU'S CONDUCT ON 13 AUGUST 2012**

12.1 At about 7:40 am on Monday, 13 August 2012 Mr Mathunjwa received a telephone call from Mr Kwadi. He told Mr Mathunjwa that there was violence at Lonmin and asked for AMCU's intervention.<sup>71</sup>

12.2 Mr Mathunjwa asked whether other union leaders were also being called. Mr Kwadi advised him that there had been a meeting at Lonmin on Sunday, 12 August 2012, which had been attended by the leadership of NUM, Solidarity and UASA. Mr Mathunjwa asked why AMCU had not been invited to that meeting and mentioned his letter of 10 August 2012,<sup>72</sup> in which he had proposed such a meeting. Mr Kwadi could not provide Mr Mathunjwa with an answer. He also did not explain the nature of the intervention he required from AMCU at Marikana, he merely said that he required AMCU to intervene.<sup>73</sup>

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<sup>67</sup> Exhibit NN, para 21.

<sup>68</sup> T, Day 21, 2252, lines 1 – 6.

<sup>69</sup> Exhibit NN, para 21.

<sup>70</sup> T, Day 21, 2253, lines 17 – 21.

<sup>71</sup> Exhibit NN, para 23.

<sup>72</sup> Exhibit OO1.

<sup>73</sup> Exhibit NN, para 24.

- 12.3 Mr Kwadi makes no mention of this telephone call in his statement.<sup>74</sup> Nor was Mr Mathunjwa's evidence regarding the telephone call with Mr Kwadi on the morning of 13 August 2012 challenged. Mr Mathunjwa's version must, therefore, be accepted. It follows that the allegation made by Mr Kwadi in paragraph 5.2 of his statement<sup>75</sup> that "*AMCU was invited but did not attend the meeting*" between Lonmin and the other unions on the afternoon of 12 August 2012 falls to be rejected.
- 12.4 After the phonecall from Mr Kwadi, there was an urgent meeting at AMCU's offices in Witbank. Mr Mathunjwa, the National Organiser (Mr Nkalitshana), the General Secretary (Jeffrey Mphahlele),<sup>76</sup> the National Treasurer, and two AMCU administrators participated. Mr Mathunjwa relayed the telephone conversation he had had with Mr Kwadi. He then delegated the General Secretary and Mr Nkalitshana to go to Lonmin to meet with Lonmin management as well as the AMCU branch committee. They did so immediately.<sup>77</sup>
- 12.5 Mr Mathunjwa's understanding was that Mr Mphahlele and Mr Nkalitshana first met with the AMCU branch committee and then with Lonmin management.<sup>78</sup> Mr Mathunjwa did not accompany them to Lonmin.<sup>79</sup> He received a report from them the following day, 14 August 2012.
- 12.6 Mr Mphahlele and Mr Nkalitshana reported to Mr Mathunjwa that they

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<sup>74</sup> Exhibit KK.

<sup>75</sup> Exhibit KK.

<sup>76</sup> See T, Day 21, 2257, lines 10 – 11.

<sup>77</sup> Exhibit NN, para 25.

<sup>78</sup> Exhibit NN, para 26.

<sup>79</sup> T, Day 21, 2258, lines 15 – 17.

had met with the strikers. Mr Mathunjwa testified that Mr Mphahlele and Mr Nkalitshana had said that “*the striking workers told them that they were demanding R 12 500 and asked them to convey this to Lonmin management. They did so and management advised them that they would not negotiate with the striking workers outside the structures*”.<sup>80</sup>

12.6.1 We submit that there was no basis for Lonmin’s objection to this evidence.<sup>81</sup> Mr Mathunjwa’s witness statement<sup>82</sup> merely records what Mr Mphahlele and Mr Nkalitshana reported to him. In any event the truth of the contents of their report has never been disputed, and indeed is confirmed in all material respects by Lonmin’s own witnesses, in particular Mr Da Costa. Mr Da Costa testified that a meeting was indeed held on 13 August 2012 between Lonmin representatives and AMCU representatives and:<sup>83</sup>

“The meeting between AMCU representatives was held at the LPD offices. Prior to the meeting, they held their own meeting and thereafter went to address the crowd at the koppie (so they told us). They then met with us. At the meeting, the AMCU representatives distanced themselves from the strike. They told us that they condemned the violence and killings. However, they then said to us that the issue could easily be resolved if Lonmin had agreed to pay a basic salary of R12500 to the RDOs. Munro asked the AMCU representatives if they were formally tabling a demand on behalf of the striking workers. Their response was that they were not doing so.”<sup>84</sup>

12.7 In the light of Mr Da Costa’s evidence it was unnecessary for AMCU to

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<sup>80</sup> Exhibit NN, para 28.

<sup>81</sup> See T, Day 21, 2259, lines 1- 10 and the lengthy debate which followed.

<sup>82</sup> Exhibit NN, para 28.

<sup>83</sup> Exhibit OO17, para 10.3.

<sup>84</sup> Exhibit OO17, para 10.4.

call Mr Mphahlele or Mr Nkalitshana. There is, quite simply, no dispute that Mr Mphahlele and Mr Nkalitshana met the strikers on 13 August 2012 or that the striking workers told them that they were demanding R 12 500 and asked them to convey this to Lonmin management.

- 12.8 It should also be noted that the Minute of the meeting between AMCU and Lonmin on 13 August 2012<sup>85</sup> is materially inaccurate. Mr Da Costa conceded that the Minute (and he himself<sup>86</sup>) was wrong in as much as it recorded that Mr Mathunjwa was present at the meeting. Mr Da Costa said that he recalled engaging with Mr Mphahlele at the meeting.<sup>87</sup>
- 12.9 It should be noted that the Minute creates two very serious false impressions in relation to AMCU. First, it creates the impression that AMCU did not denounce violence in the meeting when in fact AMCU did so. Mr Da Costa conceded that AMCU denounced violence in the meeting<sup>88</sup> and that the Minute ought to have recorded this.

“CHAIRPERSON: [Microphone off, inaudible] if you have the minutes of the meeting and this is something that was said, then surely it should have been recorded. I mean you accept they did denounce it at the, they did indicate at the meeting that they denounced it?

MR DA COSTA: Yes.

CHAIRPERSON: Right, and surely that was a material point which should have been recorded. Isn't that right?

MR DA COSTA: Yes, it should have been.”<sup>89</sup>

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<sup>85</sup> Exhibit XXX9.

<sup>86</sup> In Exhibit OO17, para 10.3.

<sup>87</sup> T, Day 241, 30429, line 12 – 30430, line 12

<sup>88</sup> T, Day 241, 30432, lines 21 – 25.

<sup>89</sup> T, Day 241, 30433, lines 2 – 11.

12.10 Second, the Minute creates the false impression that AMCU was in fact tabling a demand on behalf of the strikers.<sup>90</sup> Mr Da Costa conceded that AMCU had specifically said in the meeting that it was not doing so.<sup>91</sup> He then confirmed that his version of the meeting, as set out in paragraph of 10.4 of his witness statement<sup>92</sup> and his oral evidence, was correct, not the Minute.<sup>93</sup>

12.11 There can, therefore, be no doubt that in the meeting:

12.11.1 AMCU's representatives distanced themselves from the strike;

12.11.2 They also told Lonmin's representatives that they denounced the violence and condemned the killings; and

12.11.3 While AMCU's representatives relayed the strikers' demand for R12 500 and told Lonmin's representatives that this would resolve the issue, they made it clear that AMCU was not formally tabling a demand on behalf of the striking workers.

12.12 Mr Da Costa could not explain the very serious discrepancies between what is contained in the Minute and what actually happened in the meeting.<sup>94</sup> Having regard to the nature of the discrepancies and to the other evidence of Lonmin attempting to create the false impression that AMCU was behind the strike (which we deal with below) it is, with respect, difficult to avoid the inference that the Minute was intentionally

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<sup>90</sup> Exhibit XXX9.

<sup>91</sup> T, Day 241, 30436, lines 12 – 20.

<sup>92</sup> Exhibit OO17, para 10.4.

<sup>93</sup> T, Day 241, 30437, lines 1 – 13.

<sup>94</sup> T, Day 241, 30437, lines 1- 7.

misleading. We will return to this matter below.

13. **AMCU'S CONDUCT ON 14 AUGUST 2012**

13.1 During the report back meeting between Mr Mphahlele, Mr Nkalitshana and Mr Mathunjwa on the morning of 14 August 2012, it was decided that AMCU should call a press conference.<sup>95</sup>

13.2 The press conference was scheduled for 11:00 am in Kempton Park.<sup>96</sup>

13.3 AMCU issued a press statement<sup>97</sup>, which Mr Mathunjwa read out. The press statement:

13.3.1 noted the violent incidents that had taken place at Lonmin Platinum Mine which had left nine (9) people murdered and others severely injured;

13.3.2 condemned the killings in the strongest terms;

13.3.3 said that AMCU did not believe that any form of violence could bring about change in the workplace, nor could it benefit anyone;

13.3.4 emphasised that AMCU believes in peaceful engagement in labour matters and that where parties do not agree, they should follow legitimate dispute resolution mechanisms involving the CCMA or other agreed private processes;

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<sup>95</sup> Exhibit NN, para 28; T, Day 21, 2265, lines 3 – 10.

<sup>96</sup> Exhibit NN, para 29.

<sup>97</sup> The media statement is Exhibit OO2.

13.3.5 said that parties should not resort to violent tactics to pursue demands in the Platinum Mines.

13.4 AMCU addressed the issue of the strikers' demands as follows:

“Now let me deal with the issue of Lonmin workers' demands, during the mid-July we received a telephone call from the middle management of Lonmin Platinum who stated that they got rumours that the RDO's were planning to make salary adjustments demands on their own. We immediately advised management not to set precedence by trying to entertain these individual demands but urged management to be proactive and coordinate an urgent meeting for all recognised Unions so that these issues will be dealt with speedily to avoid similar situation as it happened at Impala Platinum.

Subsequent to that call, Mr Bernard Mokoena who is the Senior Group HR Director also phoned saying the same thing. We again urged him to arrange a meeting but unfortunately management kept quite afterwards. All of a sudden we were informed by our branch executive committee members at Lonmin that management is engaging RDO's on the matter and that some offers has been made which was rejected by RDO's. This happened despite our appeal to Lonmin management to deal with trade Unions on the matter.

...

AMCU has got nothing to do with neither the killings nor it behind the demands by the RDO's. We have got nothing to do with the demands. However, since the demands are there, it is our belief that parties should constructively engage on them and find a common ground in order for the Mine to resume its operation.”

13.5 The press statement concluded as follows:

“In conclusion, we want to call upon all stakeholders in Platinum Industry to accept the reality that AMCU is one of the major stakeholders that need to be respected, accommodated and learn to work with. Trying to side-line AMCU and using dirty tricks in labelling AMCU as a hard line Union which uses violence will not assist the situation. We have been into the Mining industry for about twelve (12) years, if we were destructive and violent how come that

other Companies where we operate still exists and are doing extremely well.

Employers in the Platinum Industry need to accept the fact that there are real challenges of salary discrepancies which requires honest attention. The majority of employees in the industry are paid very little while owners are making a fortune. This shortfall will not disappear simply because you dismiss workers and re-employ them on new conditions. It is better to seek long lasting solutions that will assist the industry rather than to resort to short term solution that would make the situation worse. It is high time we think out of the box and pull together in saving jobs and stopping violence. This is not about individuals, it's about the nation.”<sup>98</sup>

13.6 If there was any doubt that AMCU publicly condemned the killings and denounced the violence, it should have been dispelled by the contents of this press statement.

13.7 We highlight that this was the fourth occasion (albeit the first time publicly)<sup>99</sup> on which AMCU had called upon Lonmin management to deal with the matter through constructive engagement with all the parties.

#### 14. **THE SAFM INTERVIEW ON THE MORNING OF 15 AUGUST**

14.1 On 15 August 2012, Mr Mathunjwa, the president of NUM, Senzeni Zokwana (“**Mr Zokwana**”) and Mr Mokwena were invited by the radio station SAFM to speak on air on the unfolding events at Marikana. The show, “*The Forum at 8*”, was hosted by Mr Xolani Gwala (“**Mr**

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<sup>98</sup> Exhibit OO2, p 3.

<sup>99</sup> The first occasion was on or about 20 July 2012 (see Exhibit NN, paras 12 – 13). The second occasion was orally to Mr Mokwena on 10 August 2012 (see Exhibit NN, paras 19). The third occasion was in writing to Lonmin on 10 August 2012 (see Exhibit OO1).



**Gwala”).**<sup>100</sup>

- 14.2 The transcript of the debate is Exhibit LL. It commenced at 08h00.
- 14.3 Mr Mokwena was not in the room with Mr Mathunwa and Mr Zokwana but was part of the debate over the telephone.<sup>101</sup> He joined in from the Pretoria studios of SAFM.<sup>102</sup>
- 14.4 During the debate, Mr Gwala said that he would like Mr Mathunjwa, Mr Zokwana and Mr Mokwena to indicate what they were prepared to do, respectively, to resolve the situation at Marikana:

“MR GWALA: And what I would like, and I’m going to take some calls but I would like us to come to a point where we say from here what is AMCU going to go and say to the members, what is NUM going to go and say to the members, what is the company going to go and say to the employers, to the employees, that is what I would like us to get to.”<sup>103</sup>

- 14.5 A little later in the debate, the following exchange occurred:

“MR MATHUNJWA: I also tried to phone the management last night, no one received my call but as AMCU’s position we regret of what has happened and two, what we want to see, let all the stakeholders sit around the table and go to those workers and address them and try to pursue them to go back to work and let the management sit with the union.

MR GWALA: Will you do that, will you do that as AMCU?

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<sup>100</sup> Exhibit NN, para 30. See also Exhibit OO15, para 7.1 (Mr Mokwena’s statement).

<sup>101</sup> Exhibit NN, para 30.

<sup>102</sup> Exhibit LL, p 2, lines 12 – 15.

<sup>103</sup> Exhibit LL, p 36, lines 6 – 13.

MR MATHUNJWA: We can go even now and it's unfortunately when AMCU is taking a responsibility of being a leader to go to the workers we are labelled as thugs, we are labelled as the people who are irresponsible, are the people ...".<sup>104</sup>

14.6 We highlight the proposal made by Mr Mathunjwa in the portion of the transcript which we have underlined above. It has various elements to it:

14.6.1 First, he proposed that all stakeholders (including all the unions) should sit around the same table and then "go to those workers and address them";

14.6.2 Second, he said that they should try to persuade the strikers to go back to work and "let the management sit with the unions".

14.7 We submit that what Mr Mathunjwa envisaged was a process whereby all stakeholders (including all recognised unions) should be permitted to meet with management so that the strikers' grievances could be addressed.

14.8 This was the fifth time he had made such a proposal.

14.9 Mr Mathunjwa expressly called upon Mr Zokwana to join him in going to Lonmin to address the strikers:

"MR MATHUNJWA: Yes, I mean people must refrain from violence but the question is let the president of NUM, president of AMCU go to the mine and address those workers, why are you shifting the blame to the structures?!

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<sup>104</sup> Exhibit LL, p 45, line 14 – p 46, line 4.

MR GWALA: Mr Zokwana, is that too difficult? These are difficult times.

MR ZOKWANA: I'm saying Xolani as I'm speaking to you now our people are on the mine. Already even yesterday we were 15 addressing mass meetings. As NUM Xolani, what we want more than anything is a process by which violence is not used by anybody.

MR GWALA: Sure, and one way, one way of achieving that is if the leader of the unions come together, go there publicly together and say okay for now let's go back to work and afterwards we'll discuss the little issues amongst ourselves, is that too difficult?

MR ZOKWANA: I can announce that now NUM is prepared to do everything ...

MR GWALA: Are you prepared, are you going to do that at night?

MR ZOKWANA: Even NUM Xolani ...

**NOTE: Parties speaking simultaneously.**

MR GWALA: Don't talk about two weeks, don't talk about two weeks, talk about now.

MR ZOKWANA: I'm saying Xolani ...

MR MATHUNJWA: We are ready, is the car outside ready to take us there?

MR GWALA: We can organise that, we can organise that.

MR MATHUNJWA: We are ready as AMCU!

MR GWALA: Mr Mokwena, do you have a car? Do you have a car?

MR MATHUNJWA: We are ready!

MR GWALA: Mr Mokwena? When the leaders are ready go, everybody must go to Lonmin.

MR MOKWENA: Yes I'm on the operations every day, I don't go there for a visit or to go meet workers, I'm there every day ...

MR GWALA: Yes, but what I'm saying is now.

MR MOKWENA: Yes Xolani, our position as management is as follows, we agree people must be disarmed, we want to release the buses to go collect workers for them to go to work, we want to

meet the structures of the unions to discuss any grievance or concern in the most civilised manner without panga's and without guns, we can do it now, we can do it as soon as possible.<sup>105</sup>

- 14.10 Thus, Mr Mathunjwa said that he would be willing to travel to Marikana immediately after the debate. It is apparent that Mr Zokwana was initially reluctant to do so but ultimately was prevailed upon and agreed.
- 14.11 It is of importance that Mr Mokwena announced to the South African public that Lonmin was prepared to “*meet the structures of the unions to discuss any grievance or concern*”. We submit that he had essentially publicly committed Lonmin to the proposal made by Mr Mathunjwa that Lonmin meet with all the recognised unions to discuss the strikers’ grievances or concerns. At the very least, we submit that the Commission should conclude that Mr Mokwena’s use of the plural (“unions”) would have led Mr Mathunjwa to conclude that the proposal he had repeatedly made had finally found some favour with Lonmin.
- 14.12 At 09h00, Mr Mathunjwa left the studios of SAFM and headed directly for Marikana. He travelled with the general secretary.<sup>106</sup> While travelling to Marikana, they advised Lonmin management and the AMCU branch committee that they were on their way.<sup>107</sup>
- 14.13 As they were entering Marikana, Mr Gwala, phoned Mr Mathunjwa. Mr Mathunjwa testified that he believed that this phone call was broadcast live. Mr Gwala asked him if he had kept his promise and gone to Marikana. Mr Mathunjwa told Mr Gwala that he was just entering

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<sup>105</sup> Exhibit LL, p 49, line 6 – p 51, line 9.

<sup>106</sup> Exhibit NN, para 33.

<sup>107</sup> Exhibit NN, para 34.

Marikana.<sup>108</sup>

## 15. THE FIRST MEETING WITH GENERAL MPEMBE

15.1 When they arrived they were asked to attend a meeting with Lonmin management at Lonmin's LPD offices. Present at this meeting were:

15.1.1 On behalf of AMCU, Mr Mathunjwa, AMCU's general secretary and approximately 10 AMCU branch officials.

15.1.2 A little later, on behalf of NUM, Mr Zokwana and about 15 – 20 other NUM office bearers arrived.

15.1.3 On behalf of Lonmin, Mr Mokwena, Mr Kwadi, a person called "Patrick" and 2 other Lonmin personnel.

15.1.4 On behalf of the SAPS, General William Mpembe ("**General Mpembe**") and two white female officers.<sup>109</sup>

15.2 The transcript of the meeting is Exhibit OO4.<sup>110</sup> Mr Kwadi facilitated the discussion.

15.3 After the introductions, Mr Kwadi handed over to General Mpembe who explained the importance of the meeting and the position of the SAPS regarding the situation. He said that the koppie was now a security zone

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<sup>108</sup> Exhibit NN, para 35.

<sup>109</sup> Exhibit NN, para 36.

<sup>110</sup> The document purports to be a "corrected transcript" but it contains innumerable mistakes. It *must* be read while listening to the audio recording of the meeting, Exhibit OO5.

and he needed the intervention of the leadership of both unions:<sup>111</sup>

“GENERAL MPEMBE: ... The intervention has to come in this way. When we spoke, when we were given a brief [*sic – the word “briefing” is clearly used in the audio recording*] that is my boss Provincial Commissioner Deputy General Mbombo who seats now at National Management Meeting also to National Commissioner General Rea Phiyega ... [i]t was said that we do not know who are doing this by this, but through the operation that is taking place, people have been identified and some of them belong to both unions. They belong to both unions. So I am here to do a humble request. We are now faced with a situation where we don’t want to be seen as the police that is brutally killing people and at the sae [*sic – the words “same time” are clearly used in the audio recording*] we do not want to be seen as the police that is not complying with international [*sic – the words “national” and “international” are audible on the recording*] standards.

We are policing in a democracy where negation its weapon [*sic – the words “negotiation, its a weapon” are clearly audible in the audio recording*], not the bloodshed. My request is one, we need both your intervention. The operation has reached to a sensitive stage that we might be, we might go and lose more lives.”<sup>112</sup>

- 15.4 There can be no doubt that General Mpembe was saying that the SAPS’s operation had reached a sensitive stage and that it might lead to further loss of life. General Mpembe was concerned that the operation might well be seen as the police brutally killing people. On the assumption that General Mpembe is not prescient, the Commissioners must conclude that the killing of strikers on the koppie was anticipated.<sup>113</sup>

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<sup>111</sup> Exhibit NN, para 37.

<sup>112</sup> Exhibit OO4, p 1, line 21 – p 2, line

<sup>113</sup> That conclusion would be fortified by General Mpembe’s statements later that evening in the debriefing session that “We are sitting with a situation that we want to avert the bloodshed and I even indicated we still have to strategise how do we - how do we avert that bloodshed” (Exhibit GGG4, p 2, lines 24 –7); and “I cannot go there and disarm people. It would be bloodshed.” (Exhibit GGG4, p 5, lines 29 – 30); and “I need to go to the

15.5 General Mpembe asked NUM and AMCU for assistance in defusing the situation.<sup>114</sup> He suggested that they should go to the koppie and talk to the strikers and tell them to disperse.<sup>115</sup> It is important to note, however, that he did not, during that meeting, specifically say to Mr Mathunjwa and Mr Zokwana that they should tell the strikers to disarm and leave all of their weapons on the koppie. Those logistics were discussed with Mr Mathunjwa in the debriefing session later that evening.

15.6 General Mpembe made it clear that the people on the koppie consisted of both NUM and AMCU members.<sup>116</sup> The following was said, specifically in response to Mr Zokwana's claim that there were no NUM members on the koppie:

"Some of the people that are at the mountain now whom I have identified as the people who are also causing a problem. They are the NUM members, and that is when you confirm in terms of documentary clips. But it's my job as a police officer to find out who did these things. What I am saying is this now that I have identified and I said when I started here the same management told me that, "we do not know who we are dealing with because we have unions that we are talking to. We are not talking to anybody." And they were refusing to talk to anyone.

And I can tell you I have been asking them to say, "Please, maybe even send somebody who can talk funagalore with these people. So that they can understand that we want them to move" and the management said, "no, we are only talking to the unions, we are not talking to these people we don't know". But I am saying through

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house [i.e. engage in a search and seizure operation] because that is the only way. Beating this elephant bit by bit because me going there to the mountain, disarming people, it is going to be bloodshed. It is going to be bloodshed. That one I can assure you." (Exhibit GGG4, p 6, lines 7 – 10).

<sup>114</sup> Exhibit OO4, p 8, lines 13 – 14.

<sup>115</sup> See, Exhibit OO4, p 7, line 23 – p 8, line 1 ("*May you please, go there and say to your members, to those that are there, "I did not send you here to the mountain. Come back"*").

<sup>116</sup> Exhibit OO4, p 2, lines 3 – 8.

crime intelligence we have identified that people are belonging to both unions.”<sup>117</sup>

- 15.7 Mr Zokwana said that NUM would not go to the koppie and that those who had put the people on the koppie – insinuating that this was AMCU – should go and speak to them. He said that NUM had never promised any worker R 12 500.<sup>118</sup> He implied that AMCU had done so.<sup>119</sup> Finally, he insisted that even if NUM were to consider any form of any meeting, it would not be together with AMCU. He was adamant that this was a stand that NUM had taken as a union.<sup>120</sup>
- 15.8 In response, Mr Mathunjwa highlighted that AMCU had been calling upon Lonmin for weeks to call an urgent meeting involving all the unions to look at the workers’ demands.

“The management of Lonmin phoned me two weeks ago saying, “There are a group of employees...” The person who phoned me is Mr Bernard [Mokwena]. “That there is this group of employees who wants to bring demands”.

Then I said to him, “Mr Bernard, upon the receipt of those demands, make sure you call an urgent meeting with all leadership of the unions, Solidarity, UWESA, AMCU, NUM... We are prepared to look at those demands collectively as all unions”. That was two weeks ago. And then he said to me, “I am going to contact General-Secretary of NUM, Frans Baleni about your proposal.” I said, “This I am doing not because I know anything, but for the fact that you have phoned me. This is what I will propose., Reason being: trying to set a wrong precedence from the workers who have joined the unions. Those unions being recognised and the structures being recognised to attend the employer in the absentia of the union elected stewards.”

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<sup>117</sup> Exhibit OO4, p 6, line 22 – p 7, line 20.

<sup>118</sup> Exhibit NN, para 39; Exhibit OO4, p 10, lines 3 – 8.

<sup>119</sup> Exhibit OO4, p 3, lines 24 – p 6, line 11.

<sup>120</sup> Exhibit OO4, p 12, lines 15 – 20.



Two weeks gone by no response to that effect. I received another call, I think it was on Friday. What I did. He said to me there will be employees that will be marching to present a memorandum. I said to him, "Since then I am still waiting for the meeting. That you were going to talk to General Secretary of the NUM to set up a meeting. It looks like it is water under the bridge. Therefore, hence you are informing us that there will be a memorandum that are to be served and will be received by the SAPS... And then we therefore request you upon receipt of such memorandum call an urgent meeting, again..."

I even put that one on writing. I copied to Jomo Kwadi. I even stated in that letter, which it can be given to the General – that copy of letter from our office... Tabling what steps should be taken in terms of addressing that memorandum that is about to be served to management. No response was received from management. Subsequent, the only report that I received was on Monday when I was phoned by Mr Kwadi saying, "We need your intervention as a leadership of AMCU. Things are bad at Lonmin".<sup>121</sup>

- 15.9 Then, in what can only be described as a demonstration of exceptional leadership, Mr Mathunjwa said to those present at the meeting:

"... we made that intervention. Not to say that we went to the mountain, General, to seek demands but we were there to get the information. *"Why guys are you here? What really transpired?"* And they said, *"We want money. We want R12, 500."* And then the leadership of AMCU came back from the mountain and meet with management and say, *"We have been to get facts of what really transpired, what led the employees to be at the mountain? These are the demands."* Secondly they saying, *"the management did engage us as RDOs, did engage us. We had a delegation that was meeting management. And subsequent to that, management made an offer of R700 (seven-hundred-rand) to us"*. And then AMCU came back and reported to management that this is what we got from the mountain, and is not only AMCU members who are there. All unions, non-unions are there. That is our intervention. But I am saddened today when the President of NUM is openly suggesting that AMCU was there to seek demands, whereas we were intervening.

Because we cannot be a union when the sun rise and when the sun

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<sup>121</sup> Exhibit OO4, p 15, line 21 – p 17, line 19.

shines they are our members. We received those one per cent subscriptions. But when our members have fallen into a certain direction where it needs our leadership and we start pointing fingers and saying, "It is this union..." No, that doesn't show leadership. That doesn't show leadership! We have to own whether it was AMCU or whether it was NUM, but the fact of the matter collectively those groups of employees have embarked into this situation where it need a collective leadership to address those issues, that was our intention.

That was our bottom line why we took a decision to get into the mountain. It was not about point scoring. Or about trying to put other unions down and saying AMCU is a better union. That was not an issue. The issue was why the workers are there?

...

So the point is, as the way forward. I was trying to address all these allegations, General. Trying to give you another side of the story where we stand as AMCU. Where we are coming from and where we want to go. The point is we want to get those workers back to normality, jointly. Not pointing fingers. I mean whether we go there or we don't go there but the lives will be lost, according to the information we receive from General.

We are not a leader when we are driving a fancy car. We are not a leader we are in a studio protected. We are not a leader when we are in a big TV. We are not a leader. you are a leader when the challenges arises, and that is when you show your leadership, hence I have said to the SABC get me a car and I will go there. If they kill me they kill me. What's next? How many martyrs have died for this freedom?

We cannot be seen as leaders in the boardroom. We cannot be seen as leader in our comfort zone. Let's show leadership today. Let's show leadership ... NUM and AMCU let's go there and address those workers. We've got General next to us. They have got all the police... They have got everyone. Let's go and show the world that this violence we are against it jointly to prevent this carnation. I thank you."<sup>122</sup>

15.10 In summary, AMCU indicated that it was prepared to go to the koppie

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<sup>122</sup> Exhibit OO4, p 19, line 12 – p 23, line 12.

and ask the people to leave.<sup>123</sup>

- 15.11 Mr Mathunjwa understood Mr Mokwena to state that the workers must renounce violence and return to work peacefully and then Lonmin would engage with their grievances.<sup>124</sup> This understanding cannot be criticised, given what Mr Mokwena in fact said:

“MR MOKWENA: Our position General is, as Lonmin management our position is as follows ... We are willing to engage our employees within the structures that are known. In a very safe environment where there are no weapons. Not on the mountain. So we are willing to meet our employees through their structures, through their leaders to discuss any issue. Not when they are armed. Not when they are actually outside the Lonmin property.

So when the workers are back, disarmed, tomorrow, tonight, through their leaders we will meet them. That is our position. So we are not against meeting, discussing issues with the employees through their right structures. We are prepared to do that ...”<sup>125</sup>

- 15.12 What Mr Mokwena meant was that he and Lonmin were only prepared to engage with the workers through the NUM. He repeatedly conceded this in cross examination:

“MS BARNES: Mr Mokwena, when you said in the passage that we’ve just read in that meeting that you would engage the employees through the structures, did you mean that you would engage with them through NUM?

MR MOKWENA: Yes, that’s the assumption.

MS BARNES: Because it couldn’t of course have been AMCU because AMCU did not have bargaining rights at Lonmin at the time, correct?

MR MOKWENA: Exactly.

MS BARNES: So what you were actually saying is that if the workers

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<sup>123</sup> Exhibit NN, para 40. See also Exhibit OO4, p 25, lines 17 – 23.

<sup>124</sup> Exhibit NN, para 40.

<sup>125</sup> Exhibit OO4, p 27, lines 17 – p 28, line 9.

came back to work you would engage with them on their demand through NUM. Is that what you're saying?

MR MOKWENA: Yes.

MS BARNES: Even though you knew, Mr Mokwena, that the workers had lost faith in NUM and had not in fact brought their demand through NUM?

MR MOKWENA: Ja, but engaging workers through NUM if workers, as you say, had left NUM at Karee, the Labour Relations Act actually provides for more if that were to be the case. So all I needed at the time would have been to get NUM's consent.

MS BARNES: You see, what I'm really trying to understand, Mr Mokwena, is what you meant in this passage here. The only relevant structure really here is NUM because it's the only trade union at the time that represent these particular workers that are on strike that has bargaining rights, correct?

MR MOKWENA: That is correct.

MS BARNES: So when you said what you said here at the meeting on the 15th did you mean that we will engage through NUM, or did you mean that we will engage with the leaders of all the unions?

MR MOKWENA: I meant the kind of employees we're talking about here would have been in the bargaining unit at the time represented by NUM. So it would have been NUM, not Solidarity, not UASA, and not AMCU because AMCU had no bargaining rights.

MS BARNES: So what you were saying here is that if the workers come back to work we will engage with them on their demand through NUM. That's what you meant?

MR MOKWENA: Yes.<sup>126</sup>

- 15.13 We deal in detail below with the implications of this cynical position. For present purposes it is necessary only to highlight that the passage quoted above contains the clear statement: "*So when the workers are back, disarmed, tomorrow, tonight, through their leaders we will meet them*".<sup>127</sup> It must be accepted that this legitimately led Mr Mathunjwa to believe that Mr Mokwena had made a commitment to engage with the striking workers "*tomorrow, tonight, through their leaders*" if they

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<sup>126</sup> T, Day 291, 37974, line 11 – 37976, line 4.

<sup>127</sup> Exhibit OO4, p 19, line 12 – p 23, line 12.

disarmed, dispersed from the koppie and returned to work.<sup>128</sup> This is particularly so, given Mr Mokwena's statement to the public during the SAFM radio debate that morning.

16. **MR MATHUNJWA'S ADDRESS ON 15 AUGUST 2012**

16.1 At about 17h00, the meeting concluded and NUM requested time to caucus with its delegation. The break was supposed to be for 10 minutes. The delegation dispersed and the AMCU members remained in the boardroom.<sup>129</sup>

16.2 No one came back. The AMCU delegation waited for over 45 minutes. Mr Mathunjwa then phoned Mr Kwadi who informed him that everyone had gone to the base. He asked Mr Kwadi why everyone had left for the base without telling AMCU. Mr Kwadi said that they must go down to the base and join the others.<sup>130</sup> Mr Mathunjwa, the general secretary and the national organiser, drove from the LPD offices to the SAPS JOC, which was about 300 meters from the LPD offices. Mr Mathunjwa saw a large number of police vehicles, including Nyalas. Some vehicles carried barbed wire.<sup>131</sup>

16.3 At the JOC, the SAPS explained the protocol that was to be followed to reach the koppie. It was explained that each union could take three officials or office bearers who would be escorted in police vehicles and that they were not permitted to use their own vehicles. They would be

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<sup>128</sup> See, for example, T, Day 24, 2555, line 23 – 2556, line 16.

<sup>129</sup> Exhibit NN, para 41.

<sup>130</sup> Exhibit NN, para 42.

<sup>131</sup> Exhibit NN, para 43.

escorted to a holding point near the koppie, where they would be transferred to armoured vehicles and from there each union would go to the koppie and address the workers.<sup>132</sup>

16.4 NUM went first.<sup>133</sup> Mr Zokwana attempted to address the crowd, but he was not well received.

16.5 After NUM went to the koppie, it was AMCU's turn. Mr Mathunjwa went with the national organiser and the branch chairman. They were transported to the holding point (Forward Holding Area 1) in a SAPS minibus. From there, they were transported to the koppie in a SAPS Nyala.<sup>134</sup>

16.6 It was getting dark when they arrived at the koppie. They were about forty meters away from the workers. Mr Mathunjwa wanted to get out of the vehicle to speak to the workers face to face. He was told by the SAPS that he was not allowed to get out of the Nyala as it was not permitted in terms of their protocol.<sup>135</sup>

16.7 They were given a loudhailer. The branch chairperson spoke first. He greeted the workers and stated that Mr Mathunjwa and the national organiser were present. Next, the national organiser greeted the workers. He introduced Mr Mathunjwa to the workers and then Mr Mathunjwa took the loudhailer. He greeted the workers and they welcomed him in

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<sup>132</sup> Exhibit NN, para 44.

<sup>133</sup> Exhibit NN, para 44.

<sup>134</sup> Exhibit NN, para 46.

<sup>135</sup> Exhibit NN, para 47.

return.<sup>136</sup>

- 16.8 Mr Mathunjwa explained that it was not his desire to address them from within an armoured vehicle, but that it was SAPS protocol which he had to adhere to. He told the workers that they had been to management and that management was asking all the workers to renounce violence and leave the koppie. He told the workers that management said the workers should also return to work peacefully. He said management indicated that it would then engage with the workers on their grievances.<sup>137</sup>
- 16.9 Thereafter one of the workers came up to Mr Mathunjwa and spoke through the small window in the Nyala. He then took the loudhailer. Mr Mathunjwa could not see him as it was dark. He thanked Mr Mathunjwa for coming to the koppie. He said that the workers did not want to listen to Mr Zokwana because NUM leaders had shot at them. At some stage the loudhailer was given to a second person – though Mr Mathunjwa could not see him in the dark. The workers indicated that they understood the message from management but it was now getting dark. They said he should come back the next morning and they would then see how they would go back to work.<sup>138</sup>
- 16.10 Mr Mathunjwa's account of this exchange is rather modest. There is a recording of the strikers' response to his address.<sup>139</sup> In fact the workers said in no uncertain terms that they were not prepared to deal with Mr Zokwana (and thus NUM), but that they were prepared to talk to AMCU

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<sup>136</sup> Exhibit NN, para 48.

<sup>137</sup> Exhibit NN, para 49.

<sup>138</sup> Exhibit NN, para 50.

<sup>139</sup> This is Exhibit OO6.

even if they came with the police and the soldiers:

“MR MAHLANGU [translating]: We do not want Zokwana, we want the people that come from AMCU. We want the people from AMCU to come back tomorrow and we talk to them. If this last piece would again just be repeated?

[VIDEO IS REPLAYED]

MR MAHLANGU [translating]: Even if they could come together with the police. To there –

[VIDEO IS REPLAYED]

MR MAHLANGU [translating]: Even if they would come back with the police or the soldiers we ...

[VIDEO IS REPLAYED]

MR MAHLANGU [translating]: Even if they can come with the police and the soldiers, we will talk to them and then we will go back

...

MR MAHLANGU [translating]: We hear that it is AMCU that is – we that it is AMCU, it's you that are coming with help, we hear it's you, the people that are locked up inside there. Please come back to us tomorrow at nine. Come and talk to us as you are talking to us now.<sup>140</sup>

- 16.11 We highlight that one of the strikers who spoke is recorded as having said “*we will talk to them [i.e. AMCU] and then we will go back*”. In the context, this could only have meant “*then we will go back to work*”.
- 16.12 Mr Mathunjwa addressed the workers from inside the Nyala. Present in the Nyala with him was Lieutenant Colonel McIntosh as well as other police officers. One of the police officers in the Nyala was recording the

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<sup>140</sup> T, Day 22, 2306, line 6 – 2308, line 7.



events on a video camera.<sup>141</sup> Mr Mathunjwa believed that the police officers in the Nyala were able to hear and see his address to the workers and their responses.<sup>142</sup>

16.13 It was put to Mr Mathunjwa during cross-examination by Counsel for the SAPS that no-one would have held the view that the workers were going to return to work the following day. In the light of what the strikers had said, that was plainly not correct. The relevant portion of the evidence is worth setting out in full:

“MR SEMENYA SC: And the workers said “Yes, we are going to go back to work tomorrow?”

MR MATHUNJWA: And the workers responded by saying, “Come back tomorrow morning at nine because it’s at night, we want to see you face to face<sup>143</sup>] and then we’ll discuss the matter further on how we should return back to work.”

MR SEMENYA SC: Then explain to me what you mean by them being receptive to the proposal to go to work? What – what do you mean they were receptive to that proposal?

MR MATHUNJWA: It’s because they say come back tomorrow and discuss the matter further.

MR SEMENYA SC: How can that, in the world, convey that they are receptive to the proposal when they just say, come back tomorrow?

MR MATHUNJWA: Can you repeat your question again?

MR SEMENYA SC: You make the management proposal. Management wants you to lay down your weapons, go back to work and only then will they discuss your requests and demands, correct?

MR MATHUNJWA: That's correct.

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<sup>141</sup> Exhibit BB6 shows Mr Mathunjwa’s address to the strikers. It is translated at T, Day 16, 1811, line 1 – 1823, line 12.

<sup>142</sup> Exhibit NN, para 51.

<sup>143</sup> For confirmation of this version, see T, Day 22, 2313, lines 10 – 22.

MR SEMENYA SC: You tell that to the workers, am I right?

MR MATHUNJWA: That's correct.

MR SEMENYA SC: They say to you, no, it's too late, it's night, come back tomorrow, we will take the matter further.

MR MATHUNJWA: That's correct.

MR SEMENYA SC: And you write in your statement that they were receptive to that proposal.

MR MATHUNJWA: Yes, you are correct.

MR SEMENYA SC: By what logic, I then ask?

MR MATHUNJWA: I believe in dialogue, I believe in engagement. So in an event when the parties engage each other, there must be a solution to any challenges that they are facing, so that's the reason that I was saying that.

MR SEMENYA SC: Chair, would this stage of my confusion be an opportune time for –

COMMISSIONER HEMRAJ: May I just, Mr Semenya, please? Mr Mathunjwa, when you spoke with the workers, the response that you got was not categorically that we will put our arms down and return to work, it was merely, come back tomorrow and we will talk.

MR MATHUNJWA: That's correct.

COMMISSIONER HEMRAJ: And was your understanding that if you continued the talks the following day, that they might put down their arms and return to work?

MR MATHUNJWA: Yes, ma'am.

COMMISSIONER HEMRAJ: Yes, thank you.

...

CHAIRPERSON: Mr Semenya, do you have any more questions for the witness?

MR SEMENYA SC: Yes, Chair, thank you.

CROSS-EXAMINATION BY MR SEMENYA SC (CONTD): Mr Mathunjwa, to the question by Commissioner Hemraj, you said that you believed that the protesters might disarm the following morning at

9 o'clock. Do you recall the answer?

MR MATHUNJWA: Yes.

MR SEMENYA SC: And your belief was founded on them saying that they will take the matter further tomorrow when you come back?

MR MATHUNJWA: That's correct.

MR SEMENYA SC: I want to put it to you that only on that version, nobody would've held the view that the workers were going to go to work the following day. What's your reaction?

MR MATHUNJWA: That's not correct because that was an ongoing engagement that they proposed. I couldn't speculate what will be the outcome of that engagement but there was an indication that once we talk, they will think of how they can return back to work.

MR SEMENYA SC: Because from management the proposal was that if they put their arms down and they go back to work, there could be negotiation and to workers saying to you that they will take the matter further tomorrow, couldn't have given anybody optimism that that problem will be resolved.

MR MATHUNJWA: I cannot pre-empt but I was hopeful.<sup>144</sup>

- 16.14 Mr Mathunjwa's response to the strikers was also recorded. The audio is Exhibit OO8. It was translated when Mr Mathunjwa gave his evidence in chief before the Commission. In the relevant part of the Transcript, Mr Mathunjwa is recorded as having said:

"It's only a fool that can say he did not understand what you were saying. We are asking your permission that we take this matter back to the employer, that you are not refusing to go back to work but you want to be given permission to talk to your leaders tomorrow at nine, that we determine the way forward. I believe that if the employer is wise enough, he would not deny you that request. I think this is the way that is taking us forward, but what I'm asking from you, my fellow South Africans, is that we should persevere. The name of AMCU has been dirtied, it has been made dirty throughout the world, in the whole South Africa – world – in the whole South Africa, that it

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<sup>144</sup> T, Day 23, 2445, line 3 – 2448, line 23.

is AMCU that is killing people. I am making a request to you people that, my plea to you is that such things should not happen again. I am not, by so saying, that as you are seated there that you are killing people, because the stories that are being spread inside the country and outside the country is that this union has come to kill people. My plea to you, comrades, is that you give me a chance so that we go back to the employer to talk to him, not to act stupid, so that tomorrow – until tomorrow, so that we come tomorrow and talk to you personally whilst the sun is shining, so that we can together proceed forward.”<sup>145</sup>

16.15 Notably, one of the strikers took a further opportunity to respond to Mr Mathunjwa. He did not contradict Mr Mathunjwa. All he said was that their *“request is ... to the police that all the vehicles that are here, they should go away, but that when you come tomorrow at nine you can come with them but for the moment our request is that, as you are leaving now, please go with them so that we see them tomorrow.”*<sup>146</sup>

16.16 For the timing of these events, and indeed for some confirmation of the evidence set out above, the Commissioners are respectfully referred to the SAPS Occurrence Book, which contains the following entries:<sup>147</sup>

221	17:55	Situation report:  Papa 1 reported that they gonna move to forward holding area with AMCU reps to the koppie area and there is certain camera man giving them problems.
222	17:56	Situation report:  Papa 1 reported that AMCU reps said they don’t want backup or get into nyala but police officials refused as is

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<sup>145</sup> T, Day 22, 2316, line 20 – 2317, line 18.

<sup>146</sup> T, Day 22, 2318, lines 8 – 13.

<sup>147</sup> Exhibit FFF25, p 19, entries 221 – 228.

		dangerous.
223	18:05	<p>Situation report:</p> <p>Papa 1 reported that AMCU people are giving them problems as they want to address the group while outside the Nyala but that cannot be done.</p>
225	18:10	<p>Situation report:</p> <p>Papa 1 reported that AMCU rep addressing the group while in the nyala and the crowd are giving good response.</p>
226	18:20	<p>Situation report:</p> <p>Papa 1 reported that AMCU rep is done with the presentation and now they gave the group for questioning and they have group leaders and they asked nyala to move little bit closer to the group.</p>
227	18:40	<p>Situation report:</p> <p>Papa 1 reported that one of the negotiator is going bring the document to rep and the president will close the conversation they are coming to conclusion.</p>
228	18:45	<p>Situation report:</p> <p>Papa 1 reported that they concluded that they will meet tomorrow 9 o'clock and they will give feedback from management on what they've said today.</p>

## 17. **THE DEBRIEFING**

- 17.1 After Mr Mathunjwa had addressed the workers, AMCU went back for a de-briefing with the SAPS, NUM and Lonmin. Because NUM had taken a principled position that it would not talk to AMCU around the same table, SAPS had a separate briefing with management and NUM<sup>148</sup> and

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<sup>148</sup> The Transcript of this debriefing meeting is Exhibit GGG4.

thereafter AMCU was called.<sup>149</sup>

- 17.2 Mr Mathunjwa reported to Lonmin management and to the SAPS jointly regarding the discussion with the strikers. Present on behalf of SAPS were Major Generals Mpembe, Annandale and Naidoo. Mr Mathunjwa said that the strikers had been receptive to the proposal that they return to work and that they would see them again in the morning to discuss the matter further. His report was as follows:

“Yes, we spoke to the workers. They did welcome us but they were annoyed about being inside the cage but we explained that it is a protocol that we have to work from it and subsequent to that they did mention – we want to stress that they mentioned that they were disappointed that NUM killed two of their colleagues and then which by that it surprises them because there were peaceful marching ... That is what we got from them ... I think in your cameras you will also pick up and then they said they told ZOKWANA – wanted to tell ZOKWANA that he no longer welcome in there because he used to take their monies, when they are in trouble instead of addressing he just opened fire to them and then according to the way forward they said they want us tomorrow at 09h00 when there is sun and then in order to engage in how to return back to work based on what we table to them. So our impression is that they are willing to go back to work but we must come at 09h00, police must be there but they do not appreciate to talk while you are inside the cage ... [B]ut the impression, overall impression they did welcome us and they are prepared that by tomorrow surely there will be a way forward by all these things will be over. That is our impression and our interpretation – not even interpretation, that is what they said.”<sup>150</sup>

- 17.3 In view of what the strikers had said (which we have highlighted above), this report cannot be faulted.

- 17.4 Mr Mathunjwa has been accused, by SAPS, of giving an undertaking that

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<sup>149</sup> Exhibit NN, para 52.

<sup>150</sup> Exhibit GGG4, pp 10 – 11.

the strikers would put down their weapons and return to work at 9:00am on 16 August 2012 and, by Lonmin, of failing to deliver the “agreed” message to the strikers in his address. We note that Lonmin has never accused Mr Mathunjwa of giving an undertaking that the strikers would return to work on 16 August 2012 and that SAPS has never accused Mr Mathunjwa of failing to deliver the agreed message to the strikers. This in itself, we submit, gives the lie to these accusations. In any event, they are without foundation.

- 17.5 We submit that it is plain from what we have set out above that Mr Mathunjwa did not give an undertaking that the strikers would put down their weapons and return to work on 16 August 2012. It is true that he expressed great optimism but nothing in the transcript of the de-briefing with General Mpembe can be construed as an *undertaking* that the strikers would return to work on 16 August 2012. In any event, there were SAPS members in the nyala with Mr Mathunjwa who heard the exchange between him and the strikers and would surely have taken issue with Mr Mathunjwa, if he had, on the basis of that exchange, given an undertaking that the strikers would put down their weapons and return to work at 9:00am on 16 August 2012:

“CHAIRPERSON: So did the police hear everything, or perhaps more accurately, were they able to hear everything that the strikers said to you?

MR MATHUNJWA: Yes, they should

CHAIRPERSON: So – and we can find out exactly what was said by looking at the tapes again.

MR MATHUNJWA: Yes.

CHAIRPERSON: Right.

MR MATHUNJWA: Thank you.

CHAIRPERSON: So if you're correct in saying that the workers never said we will hand over our weapons at 9 o'clock the police knew that because they heard it when you heard it.

MR MATHUNJWA: Yes.

CHAIRPERSON: They heard what was said when you heard what was said, is that right?

MR MATHUNJWA: That's right.

CHAIRPERSON: Right. Then the next question is, if you had given the undertaking later that night at the debriefing to the police, how could the police have believed you if the police themselves had heard what the workers had said and what they hadn't said.

MR MATHUNJWA: That I don't know.<sup>151</sup>

- 17.6 In his statement, Mr Mokwena, who was not present at either Mr Mathunjwa's address to the strikers on 15 August 2012 or the subsequent debriefing, accuses Mr Mathunjwa of not having delivered the "agreed" message to the strikers. Mr Mokwena says that Mr Kgotle and Mr Kwadi told him this:

"Early on the morning of 16 August 2012, I was at LPD when my team (Kgotle and Kwadi) provided me with feedback that Mathunjwa had not delivered on the agreed script set by General Mpembe on 15 August 2012, namely that Mathunjwa was supposed to call upon the strikers to

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<sup>151</sup> T, Day 23, 2442, line 15 – 2443, line 12.



disarm, disperse and return to work. My team also informed me that Zokwana had been shunned by the strikers. I felt very hurt, disappointed and betrayed by Mr Mathunjwa.”<sup>152</sup>

17.7 Mr Mokwena’s complaint is somewhat bizarre if one considers that Mr Mathunjwa told the strikers exactly what Mr Mokwena had said in the meeting that afternoon: viz that the workers should renounce violence and return to work peacefully and then management would engage with them on their grievances. As we have indicated above, General Mpembe did not during the afternoon meeting, say to Mr Mathunjwa and Mr Zokwana that they should tell the strikers to disarm and leave all their weapons at the koppie. Those logistics were only discussed at the later debriefing. But in any event, we point out that Mr Mokwena was not present at these events and has no personal knowledge of what was said. We point out further it has never been suggested by SAPS that the message delivered by Mr Mathunjwa to the strikers on 15 August 2012 was in any way “incorrect” or inappropriate. There is accordingly no foundation to Mr Mokwena’s complaint.

17.8 Mr Mathunjwa’s evidence was that after the debriefing, everyone was positive. Mr Mathunjwa was given no indication whatsoever that there was any intention of launching a police operation the next day. Mr Kgotle thanked Mr Mathunjwa as the President of AMCU for accepting the invitation to intervene at Marikana. He said to Mr Mathunjwa that he had no doubt that the strike would be over the next day.<sup>153</sup>

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<sup>152</sup> Exhibit WWW1, p 171, para 7.1.

<sup>153</sup> Exhibit NN, para 55.

- 17.9 Mr Mathunjwa also testified that he asked Mr Kgotle and Mr Kwadi for a meeting the next day in order to discuss the process of how the workers would report back to work in terms of mine health and safety – as they cannot just return to work but must go through certain health and safety processes. Mr Kgotle and Mr Kwadi agreed with Mr Mathunjwa that they should meet the following morning at 08:00 to discuss this.<sup>154</sup> Mr Mathunjwa's evidence in this regard is corroborated by the transcript of the discussion between him and Mr Kwadi the following morning. The transcript records a Lonmin employee saying:

“MR MATHUNJWA... Where they must report what has happened then that is it.

LONMIN: Yes, you see in fact I was under the impression that this session is mainly for that – for the return to work procedure which I will gladly take you through. It is not complicated ... (INAUDIBLE) ... so essentially people must just report at the shafts and then the shafts will arrange on the shaft induction.”<sup>155</sup>

## 18. **AMCU'S CONDUCT ON THE MORNING OF 16 AUGUST 2012**

- 18.1 At about 08h20 on 16 August 2012, Mr Mathunjwa, the AMCU national organiser and the general secretary arrived at the LPD offices. While standing outside the offices, they asked one of the security personnel to call for Mr Kwadi to come and meet them. There were a large number of NUM officials and members present at the LPD offices.<sup>156</sup>

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<sup>154</sup> Exhibit NN, para 55.

<sup>155</sup> Exhibit OO13, p 2, lines 9 – 15.

<sup>156</sup> Exhibit NN, para 56

- 18.2 Mr Kwadi informed Mr Mathunjwa that there was a press conference, which had been called by the SAPS, being held in the LPD offices. Mr Mathunjwa asked why AMCU was not invited as NUM was present. Mr Kwadi responded by saying that it was a SAPS press conference. Mr Mathunjwa then asked again why NUM was there. No answer was given. Mr Mathunjwa did not hear what SAPS said at the press conference.<sup>157</sup>
- 18.3 Mr Mathunjwa and Mr Kwadi then had a discussion in the foyer of the LPD offices. As noted above, a recording was made of this discussion, although it is clear from the transcript,<sup>158</sup> as well as the audio recording,<sup>159</sup> that the start of the discussion was not captured. The recording begins with Mr Mathunjwa saying “*That is my plea to you ...*”.
- 18.4 The plea that Mr Mathunjwa was making was that Lonmin should not use AMCU to persuade the strikers to go back to work and then turn around and say that AMCU could not be involved in the solution of the strikers’ grievance because Lonmin had a recognition agreement with NUM. Put differently, Mr Mathunjwa’s plea was that Lonmin should not duplicitously expect AMCU to persuade the strikers to end the strike, on the promise that Lonmin would engage with their grievances, only for them to find that Lonmin was not prepared to do so unless it was through the NUM.
- 18.5 Despite the criticism that has been levelled at Mr Mathunjwa, nothing in his plea to the Lonmin representatives can be read as AMCU demanding

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<sup>157</sup> Exhibit NN, para 57.

<sup>158</sup> Exhibit OO13.

<sup>159</sup> Exhibit OO13A.

bargaining rights to which it had no due. The strike was an unprotected one, outside the bargaining structures. As we have set out above, Mr Mathunjwa had repeatedly called upon Lonmin to convene an urgent meeting, involving all of the recognised unions, to address the unfolding situation. As at 16 August 2012, Mr Mathunjwa had made this call five times. During his discussion with the strikers the previous evening, they had told him that they recognised and appreciated that AMCU was coming with help. While it is true that no formal mandate had been given to Mr Mathunjwa, the strikers had rejected the NUM, but were prepared to meet and discuss the way forward with AMCU. Mr Mathunjwa was simply seeking an assurance from Lonmin that if the strikers did ask AMCU to help them in any attempt to resolve the crisis, Lonmin would not reject AMCU's future involvement on the 'technicality' that there was a recognition agreement in place and that AMCU was not a bargaining agent.

18.6 It is notable that Mr Mathunjwa never asked for bargaining rights to be conferred upon AMCU during the discussion.

18.6.1 First, Mr Kwadi said to Mr Mathunjwa that "You[re] basically saying you will go to the mountain on condition that you get some kind of guarantee that the company will negotiate with AMCU on the demands of the people that are on the mountain. Mr Mathunjwa's answer was not an unequivocal yes. He said: "*or whether AMCU will be part of the demand. I mean according to those people whom they want to negotiate on their behalf, yes*". Although this was somewhat clumsily put, one can discern what Mr Mathunjwa was getting at here. He was simply saying that AMCU should be part of a negotiation if, according to the strikers, they

wanted AMCU to negotiate on their behalf. This is, with respect, not a request for bargaining rights to be conferred upon AMCU.

18.6.2 Second, having not yet received an unequivocal answer from Mr Mathunjwa, Mr Kwadi suggested to him that what AMCU was saying was that if “this issue” is to be resolved, *“there has to be, call it a central discussion for lack of a better word ... There has to be a central forum to deal with the issues of RDO's across Marikana operations and you are saying the only way you will go to the mountain as if you are guaranteed a place there.”* Mr Mathunjwa responded by saying *“exactly”*.

18.6.3 Third, Mr Kwadi made reference to the agreement between AMCU and Lonmin in relation to Karee, where the majority of workers were AMCU members. Mr Kwadi put to Mr Mathunjwa that what he was saying was that while AMCU may have limited rights in relation to Karee, *“... that is not the point. You are saying the issue is bigger than KAREE mine and you want the guarantee that you will not be told that the agreement says KAREE mine”*. Mr Mathunjwa's response was *“Because of the situation”*.

18.7 The Transcript of the meeting on the morning of 16 August 2012 must be read with Mr Mathunjwa's evidence. Under cross-examination, Mr Mathunjwa explained to Adv Burger SC, Lonmin's Counsel:

“MR MATHUNJWA: If I may read it, it says “So you are saying that if this issue is to be resolved there has to be, call it a central discussion for lack of a better word, okay.”

CHAIRPERSON: Sorry, sorry to interrupt, that's actually Exhibit OO13 and it's the foot of page 3 of that document and he's now going

on to page 4.

MR MATHUNJWA: May I continue? “- a better word, okay. There has to be a central forum to deal with the issues of RDOO across Marikana operations and you are saying the only way you will go to the mountain is if you are guaranteed a place there.” That’s the central forum that I was referring to.

MR BURGER SC: Yes. That’s a forum outside the bargaining structure.

MR MATHUNJWA: You are correct. And if you go, if I can refer you back, 697 on your page on the same exhibit where you, from the bottom paragraph – right on top where it is said “Mr Mathunjwa” and followed by “Mr Kwadi” and again the third one says “Mr Mathunjwa,” because of the situation, I wanted a seat in this special forum for these circumstances, for this extraordinary situation that has happened at Karee, not on the normal bargaining forum.”

MR BURGER SC: But that would mean that you wanted to negotiate on behalf of AMCU with workers partaking in an unprotected strike.

MR MATHUNJWA: That is not correct. If I can also draw your attention to the – I don’t have that copy but I think because you’ve got a bundle there, it will be easy for you. The concluded agreement after the shootings were, the very same central forum that was confirmed by Jomo Kwadi took place, which I wanted a seat on. It’s where then the strikers themselves had its own delegation, which that delegation of the strike is not a recognised entity, it’s just workers forming delegations. So it’s where then we said – and then to come closer to your question, AMCU never influenced anything there. They signed on their behalf. They got the mandate on their own from the mountain, so we just had a seat there.

MR BURGER SC: Mr Mathunjwa, that was a different situation. 34 people had been killed and NUM had by then agreed that there would be a negotiation in order to obtain peace at Lonmin. That was after the tragedy. This was before the tragedy, you’re trying to avoid it here.

MR MATHUNJWA: The point is, the central forum was set whereby all unions were called in and even the parties that were not recognised by the company, referring to workers’ delegation.”<sup>160</sup>

18.8 With respect, there is no difference at all between a central forum outside

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<sup>160</sup> Day 25, 2581, line 5 – 2583, line 3.

the normal bargaining structures, which Mr Mathunjwa was proposing before the massacre on 16 August 2012 and in order to avoid a tragedy, and the forum that was ultimately established to resolve the strike after the tragedy had occurred. The agreement that was ultimately signed is Exhibit OO10. It took the form of an addendum to the 2 year wage agreement.

18.9 We submit that it is clear that Mr Mathunjwa envisaged a negotiation, which could be called a “central forum” for lack of a better word, outside of the established bargaining structures, at which AMCU would have a place. Mr Mathunjwa plainly saw this as being limited to a resolution of “the situation”.<sup>161</sup> This is very far removed from a demand for bargaining rights to be conferred upon AMCU in circumvention of the recognition agreement.

18.10 He clarified this further during cross-examination in response to a question from Commissioner Hemraj:

“COMMISSIONER HEMRAJ: Mr Mathunjwa, this forum that you speak of that you wanted to be part of, do I understand that forum that you refer to, to be separate from the bargaining structures?

MR MATHUNJWA: That's correct.

COMMISSIONER HEMRAJ: Yes, thank you.”<sup>162</sup>

18.11 During the discussion between Mr Mathunjwa and Mr Kwadi, Mr Mohammed Seedat, a director of Lonmin, walked into the foyer of the LPD offices. Mr Mathunjwa saw him and they greeted one another. Mr

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<sup>161</sup> Day 25, 2581, line 24 – 2582, line 2.

<sup>162</sup> T, Day 25, 2578, lines 4 – 9.

Mathunjwa knew Mr Seedat from when he was a chief executive at BHP Billiton.<sup>163</sup>

18.12 Mr Seedat testified as follows:

“MR SEEDAT: I arrived in Johannesburg on the 15th, as per Mr Phillimore’s request. We met at Melrose Arch. We got an update from Albert and then we agreed we would travel to the mine on the morning of the 16th and meet with the management team there to get an update from them. So it is in that context on the morning of the 16th that I travelled to Marikana. I travelled alone. Mr Phillimore travelled with Albert, and I went straight to the main admin building at LPD. I still have my access card, so I got straight through the access control and as I stepped into the reception area I noticed Joseph and a few other people sitting on the lounge suites at reception, and Joseph immediately recognised me. We had met previously when I was in BHP Billiton when I was responsible for the South African Coal Operations, and he recognised me. He stood up, he greeted me and I greeted him back and he enquired from me what am I doing here and I said, “Joseph, what are you doing here?” in a joking way. I explained to him why I was there; I was a non-executive director of Lonmin, I was asked by the chairman to come and assist and it’s in that capacity that I’ve come now to assist.”<sup>164</sup>

18.13 It is now clear that the interaction between Mr Mathunjwa and Mr Seedat on the morning of 16 August 2012 occurred when “*Mohamed*” is recorded as having “*joined the meeting*” in the transcript of the discussion between Mr Mathunjwa and Mr Kwadi<sup>165</sup> The transcript simply says that “*there is a greeting between Mohamed and Mathunjwa*”. But the audio recording reveals that Mr Mathunjwa is a little surprised when he sees Mr Seedat. He says “*Hello! What are you doing here?*” Mr Seedat responded: “*What are YOU doing here?*” Mr

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<sup>163</sup> Exhibit NN, para 59.

<sup>164</sup> T, Day 289, 37696, lines 3 – 24.

<sup>165</sup> Exhibit OO13, p 8, lines 3 – 4.



Mathunjwa can be heard saying, “*running after you*” in reply. They both then laughed.<sup>166</sup> Mr Seedat confirmed that this was the first time that they had seen or spoken to one another on that day.<sup>167</sup>

18.14 It is common cause that Mr Mathunjwa and Mr Seedat proceeded to have a side discussion<sup>168</sup> in which Mr Mathunjwa advised Mr Seedat of the situation at the mine and they exchanged telephone numbers.<sup>169</sup>

18.15 What is not common cause is the allegation made by Mr Seedat that Mr Mathunjwa said to him, during their side discussion: “*Give me a place at the bargaining table and I will get the workers off the koppie*”<sup>170</sup> Mr Mathunjwa denied having said this.<sup>171</sup> We submit that Mr Seedat’s evidence leaves much to be desired:

18.15.1 First, in his evidence in chief before the Commission, Mr Seedat testified that Mr Mathunjwa had used the words “*negotiating table*”, not “*bargaining table*.”<sup>172</sup> Under cross examination Mr Seedat confirmed that he was not sure of the precise words used by Mr Mathunjwa but they were “*words to that effect*.”<sup>173</sup>

18.15.2 Second, even while giving his evidence, Mr Seedat did not

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<sup>166</sup> Exhibit 13A at 13:53 – 14:15 (the time on the audio clip).

<sup>167</sup> T, Day 293, 38385, lines 3 – 17.

<sup>168</sup> Mr Seedat says that “*we then moved to one of the passages leading from the reception area as there was a SAPS. press conference in progress in the adjoining Hossy Boardroom and we were asked not to make any noise*”. (Exhibit OO14, para 5.1; T, Day 289, 37697, lines 3 – 6).

<sup>169</sup> Exhibit NN, para 59;

<sup>170</sup> Exhibit OO14, para 5.1.

<sup>171</sup> T, Day 24, 2570, lines 4 – 9.

<sup>172</sup> T, Day 289, 37697, lines 8 – 9.

<sup>173</sup> T, Day 293, 38379, line 23 – 38380, line 7.

appreciate that there is an important difference between the two concepts, at the very least in the context of the discussions that were taking place.<sup>174</sup>

18.15.3 Third, by his own admission, Mr Seedat had only become involved at Marikana on the morning of 16 August 2012. Accordingly, he admitted that he didn't know "*any of the details of what was happening at Marikana*". He admitted further that he did not have the background.<sup>175</sup> It is thus likely that he did not appreciate the nuances of what Mr Mathunjwa was proposing.

18.15.4 Fourth, it was alleged that Mr Kwadi would testify that immediately after Mr Mathunjwa and Mr Seedat had spoken, Mr Seedat went back to Mr Kwadi and he said to Mr Kwadi, Mr Mathunjwa had said to him, "*give me a place at the bargaining table and I will get the workers off the koppie*", or words to that effect.<sup>176</sup> But Mr Kwadi's witness statement does not mention this at all.<sup>177</sup> Given the importance of this issue and what was put to Mr Mathunjwa, it should have done so, if Mr Seedat's evidence was correct.

18.15.5 Fifthly, it is important to note that the discussion between Mr Mathunjwa and Mr Kwadi – in which it had been clarified that what Mr Mathunjwa wanted was the establishment of a central forum on which AMCU would have a seat – had occurred a mere

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<sup>174</sup> T, Day 293, 38381, lines 1 – 6.

<sup>175</sup> T, Day 293, 38374, lines 21 – 25.

<sup>176</sup> T, Day 24, 2571, lines 14 – 23.

<sup>177</sup> See Exhibit KK, paras 9.1 – 9.3.

minute or two before the side discussion between Mr Mathunjwa and Mr Seedat.<sup>178</sup> We know precisely what Mr Mathunjwa had been saying to Mr Kwadi. We submit that it is most unlikely that Mr Mathunjwa said, or meant, something completely different when talking to Mr Seedat a few moments later.<sup>179</sup>

18.16 In summary, we submit that the criticism that Lonmin has levelled at AMCU is unwarranted. It is plain that Mr Mathunjwa was proposing a central forum and he had the foresight to appreciate that the workers might ask various questions, including whether AMCU would be present in any engagement with management in such a forum.<sup>180</sup> He needed an answer to that question. And again he needed a guarantee that Lonmin would not turn around and tell the strikers that it would only engage with them through the NUM.<sup>181</sup>

18.17 Lonmin's attempt to caricature Mr Mathunjwa's efforts to establish a negotiating forum in order to resolve the crisis as a self-interested attempt to secure bargaining rights for AMCU falls to be rejected for a further reason. As a matter of law, Lonmin could not confer bargaining rights on AMCU. Mr Mathunjwa, an experienced trade union leader, knew this. Indeed, when it was put to him directly that he wanted AMCU to be recognised as a bargaining agent, this is what he said:

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<sup>178</sup> T, Day 293, 38387, lines 8 – 16.

<sup>179</sup> There was an objection when this proposition was put to Mr Seedat (T, Day 293, 38388). We submit that the Commission can and should find, on the probabilities, that it is most unlikely that Mr Mathunjwa would have said "Exactly" to Mr Kwadi's clarification and then said something different to Mr Seedat.

<sup>180</sup> This is clear from various passages of the transcript of the meeting; see Exhibit OO13, p 5, lines 14 – 18 ("*Because, I mean, those things will be asked ...*"); p 7, lines 9 – 15; and p 10, lines 15 – 18.

<sup>181</sup> Exhibit OO13, p 10, lines 15 – 18.

“MR BURGER SC: You wanted AMCU to be recognised as a bargaining agent?

MR MATHUNJWA: I know the processes of being recognised at the mine as a bargaining agent, I’m clearly with that one. In these instances we wanted to be part of that forum, of that point. Remember many things have been said that AMCU is on strike, it’s forcing people to go on strike, people are killed under the disguise of AMCU. So we wanted to be part of that forum.”<sup>182</sup>

18.18 Finally, we highlight that the reasonableness of Mr Mathunjwa’s stance is confirmed by the fact that even Mr Da Costa had proposed, in his June Memorandum, that the RDO demand be discussed with NUM as well as AMCU (at a national level and local level). This appears from the Memorandum that Mr Da Costa prepared for Exco, dated 27 June 2012:

“The feedback outlined above is not likely to resolve the matter and more work will be required over the next few weeks

In this regard, the following is proposed:

- Engage both the NUM and AMCU at National level to inform them of this development and to solicit their opinion on the matter.
- ...
- Engage with the NUM and AMCU at Marikana to reach an agreement on the matter.”<sup>183</sup>

18.19 Mr Mokwena was asked specifically about this proposal.<sup>184</sup> He conceded that Lonmin did in fact not engage either NUM or AMCU at national level to discuss the RDO demand, despite Mr Da Costa’s proposal.

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<sup>182</sup> T, Day 24, 2566, lines 1 – 9.

<sup>183</sup> Exhibit XXX3, pp 4 (449) – 5 (450).

<sup>184</sup> See T, Day 292, 28203, line 9 – 38210, line 7.

“MS PILLAY: So in other words what we see in this memorandum is Mr Da Costa, the vice – saying to EXCO that the default position is unlikely to resolve the matter and that what he is suggesting is, firstly, that NUM and AMCU be engaged at national level in order to discuss the way forward. Do you see that?

MR MOKOENA: Yes, I see that.

MS PILLAY: Now the question, Mr Mokoena, now we know from the evidence that has been placed before this Commission that that Lonmin did in fact not engage either NUM or AMCU at national level to discuss the RDO demand isn't that correct?

MR MOKOENA: That is correct.”<sup>185</sup>

18.20 Mr Mokwena also conceded that he was part of the Exco meeting during which Mr Da Costa’s memorandum was tabled for discussion. He was, in answer to questions from the Chairperson, unable to explain why the proposal that the RDO demand be discussed with NUM as well as AMCU at a national level and local level was not accepted by Exco.<sup>186</sup>

18.21 Quite apart from the fact that Mr Mokwena’s answers were less than satisfactory, it must be noted, for present purposes, that Mr Da Costa appreciated and proposed that AMCU had to be consulted, at both national and local level. That proposal was little different to what Mr Mathunjwa had sought all along.

18.22 We submit that Mr Mathunjwa’s proposal that a central forum be established was effectively the sixth time that he called on Lonmin to facilitate a structured engagement, involving all the stakeholders, in order to discuss the crisis. Yet again Mr Mathunjwa’s call fell on deaf ears.

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<sup>185</sup> See T, Day 292, 28205, lines 13 – 25.

<sup>186</sup> See T, Day 292, 28208, lines 2 – 28209, line 3.

19. **LONMIN RENEGED ON THE COMMITMENT**

- 19.1 At the end of the discussion, Mr Kwadi said, “*you give me a few minutes, I will see if I can get you the answer that is required.*”<sup>187</sup>
- 19.2 Mr Mathunjwa testified that Mr Kwadi, after some time, came back and called them into one of the offices at the LPD. Mr Kwadi said that he did not have good news. He said that management could not commit to engaging with the workers if they returned to work.<sup>188</sup>
- 19.3 This was a clear departure from the commitment given the previous day. Management had changed its mind overnight.<sup>189</sup>
- 19.4 Mr Mathunjwa said to Mr Kwadi that Lonmin had betrayed them. He said that Lonmin had asked AMCU go to the workers and convey Lonmin’s commitment. When they tried to take the necessary steps to ensure the implementation of this undertaking, Lonmin had reneged on its undertaking.<sup>190</sup> Mr Mathunjwa believed that management had used AMCU to try and persuade the workers to leave the koppie particularly by offering to address their grievances once they had come off the koppie. Mr Mathunjwa had conveyed this message to the workers. Now, management was saying that it wanted to return to the two year agreement in respect of wages and did not want to engage with the

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<sup>187</sup> Exhibit OO13, p 10, lines 21 – 24.

<sup>188</sup> Exhibit NN, para 60.

<sup>189</sup> Exhibit NN, para 60.

<sup>190</sup> Exhibit NN, para 61.

workers at all.<sup>191</sup>

19.5 Mr Mathunjwa requested Mr Kwadi and the others present to reconsider their position. Mr Kwadi said that management would not reconsider its position.<sup>192</sup>

19.6 Whilst they were still in the LPD offices with Mr Kwadi, Mr Mokwena came in and handed Mr Mathunjwa his cellular phone. Mr Mathunjwa took the phone, greeted the person on the other end and asked who it was. The person did not introduce herself and asked Mr Mathunjwa where he was. She told Mr Mathunjwa that he had made a commitment to the strikers on the koppie to meet them at 09h00 that morning. Mr Mathunjwa asked who was on the other end of the phone. The person said that it was not important. The person said that what was important was that Mr Mathunjwa had made a commitment to meet the workers. The manner in which Mr Mathunjwa was being addressed was rude. Mr Mathunjwa indicated that he had been advised of the police protocol and that he was required to report to General Mpembe. The person then indicated that she was the Provincial Commissioner of the North West. Mr Mathunjwa explained to the Provincial Commissioner that he had not arrived late but that he had been at the Lonmin offices since 08h20 trying to address the situation.<sup>193</sup>

19.7 The Provincial Commissioner said that Mr Mathunjwa had not made a commitment to management but had made a commitment to the workers. Mr Mathunjwa registered his dissatisfaction to the Provincial

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<sup>191</sup> Exhibit NN, para 62.

<sup>192</sup> Exhibit NN, para 63.

<sup>193</sup> Exhibit NN, para 64.

Commissioner about the manner in which she was speaking to him.<sup>194</sup>

- 19.8 Mr Mathunjwa handed the phone back to Mr Mokwena and advised him that he did not appreciate the manner in which he had conducted himself. Mr Mokwena did not respond, he took his phone and walked away.<sup>195</sup>
- 19.9 Mr Mathunjwa suggested that this phone call happened just after 11 am. It appears that it may have been 15 to 20 minutes earlier. Exhibit WWW4 is a schedule of cell phone calls between Lt Gen Mbombo and Mr Mokwena. It records that there were four calls between them on 16 August, all between 10:39:13 and 10:47:36. One of these lasted 186 seconds (3 minutes and six seconds) and this may have been the call during which Mr Mokwena handed Mr Mathunjwa his phone.<sup>196</sup>
- 19.10 Mr Mathunjwa, the general secretary, the national organiser and five branch officials then left for the JOC where the SAPS were waiting for them.<sup>197</sup>
- 19.11 At the JOC they met Major Generals Mpembe, Annandale and Naidoo. Mr Mathunjwa then also met Provincial Commissioner Mbombo. General Mpembe introduced the AMCU delegation to Lt Gen Mbombo. and said that she was now in charge of the operation. Lt Gen Mbombo confirmed that she was now in charge of the operation and said “*this*

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<sup>194</sup> Exhibit NN, para 65.

<sup>195</sup> Exhibit NN, para 66.

<sup>196</sup> See also, Lt General Mbombo’s witness statement, Exhibit GGG5, para 19.2.

<sup>197</sup> Exhibit NN, para 67.



*thing must end today because it is costing the state a lot of money.*”<sup>198</sup>

19.12 Lt General Mbombo has confirmed Mr Mathunjwa’s evidence that she told him that “*this thing must end today because it is costing the state a lot of money.*”<sup>199</sup>

19.13 SAPS has, however, vehemently denied that Mr Mathunjwa was ever told that Lt Gen Mbombo was now in charge.<sup>200</sup> But Mr Mathunjwa’s evidence is supported by Mr Kgotle, whose witness statement records that, after the SAPS press conference, various members of the Lonmin Exco proceeded to the JOC, and met with Lt Gen Mbombo. Mr Kgotle says:

“Soon after we arrived at the JOG, we were all advised by SAPS that they had the situation under control. In fact, General Mbombo's words were to the effect that the “*situation is now under my control.*”<sup>201</sup>

19.14 Lt Gen Mbombo was plainly announcing that she was now in control of the situation.

19.15 Mr Mathunjwa told the Provincial Commissioner that he did not appreciate the way in which she had spoken to him. She responded by saying that she was not happy with the way in which Mr Mathunjwa had conducted himself. The Provincial Commissioner repeatedly referred to the fact that Mr Mathunjwa had made a commitment to speak to the

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<sup>198</sup> Exhibit NN, para 68.

<sup>199</sup> T, Day 183, 22072, lines 7 – 15.

<sup>200</sup> Lt General Mbombo said that she was introduced as “the person who is charge of the police in this province (T, Day 183, 22072, lines 1 – 6).

<sup>201</sup> Exhibit OO16, p 15, para 58

strikers at 09h00. Mr Mathunjwa told her that it was not his fault, that they had been delayed by Lonmin management. She said that she was not interested in that. Mr Mathunjwa asked where the leaders of the other unions were. She said that she did not care. Mr Mathunjwa advised Lt Gen Mbombo that management had reneged on its promise to engage with the workers in relation to their grievances. The Provincial Commissioner said that was not her problem. However, Lt Gen Mbombo said to Mr Mathunjwa that he must present Lonmin's position in such a way as to not annoy the workers. Mr Mathunjwa told the Provincial Commissioner that he would tell the workers the truth.<sup>202</sup>

19.16 Mr Mathunjwa then requested transport to take them to the koppie, in terms of the protocol that had been explained the day before. A female SAPS officer was appointed to arrange transport. They waited but no transport arrived. After waiting for 15 to 20 minutes, Mr Mathunjwa approached General Mpembe. General Mpembe said there was no transport. Mr Mathunjwa pointed to three Vito Mercedes Minibuses. General Mpembe looked into using these vehicles and came back to Mr Mathunjwa and said that there were no keys for the minibuses.<sup>203</sup>

19.17 General Mpembe then advised them that they should use their own vehicles. Mr Mathunjwa reminded him of the protocol of the day before and the clear instruction that they were not to use their own vehicles. Mr Mathunjwa asked why this had changed and why they now had to use our own cars. Mr Mathunjwa asked whether no transport was available

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<sup>202</sup> Exhibit NN, para 68.

<sup>203</sup> Exhibit NN, para 69.

because the President of NUM was not here. He received no answer.<sup>204</sup>

- 19.18 Mr Mathunjwa told his AMCU colleagues that he would go to the koppie in his own car. He nevertheless asked for a security escort. A SAPS officer was called on to organise an escort. They waited but no escort came.<sup>205</sup> They then left for the koppie.<sup>206</sup>

20. **MR MATHUNJWA'S FIRST ADDRESS TO THE STRIKERS**

- 20.1 At the koppie, there was a massive police presence. Mr Mathunjwa saw armoured vehicles, some with barbed wire and a lot of policemen.<sup>207</sup>
- 20.2 It appears that Mr Mathunjwa arrived at the koppie shortly after 12 noon. The SAPS Occurrence Book contains the following two entries:<sup>208</sup>

1004	11:55	<p>Situation report:</p> <p>Brigadier Tsiloane reported that <u>the president of AMCU just left the base on his own to visit the group at the koppie and he left the rest of the group of AMCU behind</u> and the Lonmin branded combi with other members of AMCU drove to the koppie and Capt Seleke of Mobile operations escorted them.</p>
1006	12:12	<p>Situation report:</p> <p>P1 reported that <u>the AMCU member arrived and they addressed the media.</u> They then went to the group together with the media. The group of women are also at the gathering.</p>

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<sup>204</sup> Exhibit NN, para 70.

<sup>205</sup> Exhibit NN, para 71.

<sup>206</sup> Exhibit NN, para 72.

<sup>207</sup> Exhibit NN, para 73.

<sup>208</sup> Exhibit FFF25, p 24, entries 1004 and 1006.

20.3 Brigadier Calitz has alleged as follows in paragraph 85 of his consolidated statement.<sup>209</sup>

“Somewhere around 12:00, the president of AMCU arrived. He addressed the media and proceeded to the front of the koppie with some of the media people. On his request I offered a megaphone from our nyala to the president of AMCU for him to use in his address to the strikers. He also requested that the chopper fly in a bigger radius because the sound was disturbing. This was arranged by me. Before the AMCU president left to address the strikers, I requested him to explain to the strikers that the barbed wire is not intended to be used against them but for the protection of the police, the media and the community. I informed him of the threat made by the strikers to the SAPS and asked him to ask the strikers not to threaten the police.”

20.4 Mr Mathunjwa prepared a supplementary statement when he was shown Brigadier Calitz’s statement.<sup>210</sup> He confirmed that he spoke to Brig Calitz, but he says he has no recollection of Brig Calitz asking him to convey to the strikers that the barbed wire was for the “*protection of the police, the media and the community*”.<sup>211</sup> His evidence is as follows:

“11.2 Prior to speaking to Brigadier Calitz I had spoken with the strikers. They asked me to request SAPS to move the helicopter away from the Koppie as it was too noisy and for SAPS officers to move further away from the Koppie.

11.3 I made both requests of Brigadier Calitz. In addition, I asked for the use of a megaphone.

11.4 I was given a megaphone and Brigadier Calitz requested that the helicopter fly in a wider circle.

11.5 With respect to the request for SAPS to move further away from the Koppie, my recollection is that Brigadier Calitz asked me to convey to the strikers that SAPS were not there

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<sup>209</sup> Exhibit JJJ107.

<sup>210</sup> Exhibit KKK46.

<sup>211</sup> Exhibit KKK46, para 11.1.

to do anything to the strikers.

- 11.6 The media were not seeking protection. It was at this time that I was approached by a number of journalists and TV crews who asked me if they could move closer to the strikers. I made the request to the strikers who agreed that the media could come forward.
- 11.7 I recall that the media came so close that some of them mingled with the strikers.
- 11.8 I furthermore deny that Brigadier Calitz told me of the alleged threat that had been made against the police or that he me to ask the strikers not to threaten the police. If such a request had been made of me I would have remembered and I would have carried it out..<sup>212</sup>

20.5 Mr Mathunjwa's version is corroborated by Exhibit CC6 at 02:20 – 02:35 on which Brig Calitz can be seen talking to Mr Mathunjwa and heard saying:

“... We've got no ... its out of our control. We've got no intention to whatever. So please convey that message to them. Because when we arrived and they see all this [*Calitz points his finger in the direction of the barbed wire*] they thought it was for them and its bothering them. Its not. Its just for the safety of our members, so ...”

- 20.6 Brig Calitz cannot be heard saying that the barbed wire was there for the protection of the “*media and the community*”.
- 20.7 The AMCU delegation approached the crowd. Mr Mathunjwa says he saw that the crowd was calm. The AMCU delegation started by apologising for the delay and explaining why they were late. The national organiser and the general secretary addressed the strikers, after

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<sup>212</sup> Exhibit KKK46, paras 11.2 – 11.8.

which Mr Mathunjwa spoke.<sup>213</sup>

20.8 Exhibit OO9 is a transcription and corresponding translation of Mr Mathunjwa's address on 16 August 2012. In summary, Mr Mathunjwa told the strikers:<sup>214</sup>

20.8.1 that management had reneged on the commitment it had given the day before.<sup>215</sup>

20.8.2 that staying on the koppie would just lead to more bloodshed and that was not a solution.<sup>216</sup>

20.8.3 that even though their demands do not come through AMCU, AMCU is a registered trade union and after they have returned to work, AMCU could look into their demands.<sup>217</sup>

20.8.4 that AMCU has attorneys who can assist and that the CCMA can be approached.<sup>218</sup>

20.8.5 that if they obtain a certificate of non-resolution then they can embark on a protected strike;<sup>219</sup> and

20.8.6 that AMCU did not want people killed but rather that their demands

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<sup>213</sup> Exhibit NN, para 74.

<sup>214</sup> Exhibit NN, para 74.

<sup>215</sup> Exhibit OO9, p 10.

<sup>216</sup> Exhibit OO9, p 13

<sup>217</sup> Exhibit OO9, p 12.

<sup>218</sup> Exhibit OO9, p 12.

<sup>219</sup> Exhibit OO9, p 12.

be addressed.<sup>220</sup>

- 20.9 Mr Mathunjwa conceded that he did not say to the strikers explicitly, in so many words, “put down your arms and go back to work.” Mr Mathunjwa had however been placed in an invidious position: he had to go and tell a group of angry strikers, only a minority of whom were his members, that what he had told them the day before was incorrect and that management was in fact not prepared to engage with them on their grievance if they went back to work. Mr Mathunjwa explained himself as follows:

“CHAIRPERSON:....You also said you didn’t say explicitly, in as many words, to them put down your arms and go back to work.

MR MATHUNJWA: Yes, Sir

CHAIRPERSON: The question is why you didn’t do that and what my colleague Commissioner Hemraj was asking you, I’d like to ask you again. You were concerned to get the trust of the workers. As we know the majority of the workers weren’t members of AMCU anyway.

MR MATHUNJWA: Yes.

CHAIRPERSON: And you obviously didn’t know the numbers but you certainly knew that a number of them weren’t AMCU members. Is that right?

MR MATHUNJWA: Correct, yes.

CHAIRPERSON: You went out of your way to gain their trust –

MR MATHUNJWA: Yes to give them hope that their problem can be resolved in another way.

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<sup>220</sup> Exhibit OO9, p 13.

CHAIRPERSON: Now do you – did you fear that if you put it to them directly, lay down your arms, go back to work, you would lose their trust. Is that why – either you lose their trust or not gain their trust and is that why you put the appeal to them in the implicit way that you and I have discussed?

MR MATHUNJWA: Yes, I mean when you mean the trust, meaning that they will know that there are issues that can be dealt with in the better way. So I concur. I am putting myself in their shoes, hence this side, the management, what it has done, they renege, they change altogether what we committed the previous night.

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MR BRUINDERS SC: How did you fear that the strikers might respond if you simply said to them, put down your weapons, go back to work?

MR MATHUNJWA: You must also remember that I was one foot behind now, I mean my steps were no longer accurate because management had took something that I had communicated to them, so at the end of the day I might be labelled by something else. So in that situation, so I had no platform, much ground, firm ground that I can stand on and pursue the matter in which, that was the wisdom that prevail to me by that time.

MR BRUINDERS SC: What do you think might have happened if you had simply said to them, lay down your weapons, go back to work?

MR MATHUNJWA: I cannot pre-empt what could have happened.

MR BRUINDERS SC: That's why I asked, how do you think they might have responded if you had addressed them in that way?

MR MATHUNJWA: One can draw an opinion that they might be annoyed and saying, I am a traitor."<sup>221</sup>

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<sup>221</sup> T, Day 27, 2857, line 17 – 2859, line 24.



20.10 Mr Mathunjwa was accused by Lonmin of being inflammatory. Indeed, it was put to him that if he had not said certain things about NUM during his speech, the killings by the SAPS later that afternoon would have been avoided.<sup>222</sup> That is an absurd proposition. There is, with respect, no logic to it. We submit that it was an attempt by Lonmin to avoid the obvious fact that the tragedy would have been avoided if Lonmin had engaged with the strikers, as Mr Mathunjwa pointed out:

“MR BURGER SC: You were asked yesterday in closing, whether this tragedy could have been avoided, “I put to you that this tragedy could have been avoided by Mr Mathunjwa on the noon of the 16th of August at the koppie, if he hadn’t been so inflammatory and so derogatory of NUM in talking to the workers.”

MR MATHUNJWA: I am disputing that. I am still maintaining that this massacre could have been avoided, if your client never engaged the workers outside the bargaining structure and if your client hasn’t reneged into its commitment of the night of the 15 of August 2012.<sup>223</sup>

20.11 The workers responded to Mr Mathunjwa by saying that they should go and get management to come and speak to them and listen to their grievances. Mr Mathunjwa’s uncontested evidence was that the strikers told him that they were aware that management might not have R12500 from the start, but perhaps such a position could be achieved through a process and over some time.<sup>224</sup>

20.12 Mr Mathunjwa told the workers that AMCU go and would convey their

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<sup>222</sup> T, Day 24, 2500, lines 17 – 18.

<sup>223</sup> T, Day 24, 2521, line 24 – 2522, line 9.

<sup>224</sup> Exhibit NN, para 76.

message to management.<sup>225</sup>

- 20.13 We respectfully draw the Commissioners' attention to the fact that before leaving the scene, Mr Mathunjwa had a discussion with Brig Calitz. There is a video recording of their exchange. It is Exhibit KKK55 from 06:40 to 07:00. Brig Calitz asked Mr Mathunjwa what the way forward was. Mr Mathunjwa responded that they were rushing back to try to persuade management to come to the table. He said "Management must take responsibility to save further loss of life". As Mr Mathunjwa was driving away Brig Calitz was asked by journalist, "What are you going to do? Are you going to execute?"<sup>226</sup> Brig Calitz answer was simply "We will just wait for them to come back".<sup>227</sup> Lt General Mbombo readily conceded that the video reveals that the negotiations were ongoing, but she had been told that they had failed:

"MS BARNES: Alright, General, if I can take you back to the beginning of the clip that we've just seen, you'll agree with me that Mr Mathunjwa is saying there to Brigadier Calitz that he's going to go and attempt to speak to management to try to get them to the table, as he puts it, and then he's going to go back to the koppie. Is that correct?

1 GENERAL MBOMBO: I hear that, yes, he says it.

MS BARNES: Which meant that the negotiations were still ongoing, is that correct?

GENERAL MBOMBO: As I hear it, yes, he says so.

[11:48] MS BARNES: And do you agree with me also that what Brigadier Calitz says, when he's asked by the journalist what is going to happen now, he says, "We're going to wait and see. We're going to wait until they come back" and then as he puts it, "We will take the way forward from there." Do you agree with me?

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<sup>225</sup> Exhibit NN, para 76.

<sup>226</sup> Exhibit KKK55 from 07:00 to 07:06.

<sup>227</sup> See, Exhibit KKK55 from 07:06 to 07:24.

GENERAL MBOMBO: I agree with you, Chair.

MS BARNES: Now General, you didn't get any of this information, did you?

GENERAL MBOMBO: It is so, I did not get it.

MS BARNES: You were in fact told that the negotiations had failed, correct?

GENERAL MBOMBO: That is what I was told, yes.

MS BARNES: And you were told before the 13:30 JOCCOM meeting, before that time, that the negotiations had failed, correct?

GENERAL MBOMBO: It is so.

MS BARNES: Now, General, if you had had the information that has just been revealed to us on the video clip, if you'd had the information that Mr Mathunjwa was still going to go and speak to management and then go back to the workers and if you'd had the information that your commanding officer on the ground was of the view that the police should wait and see what the position was when Mr Mathunjwa came back – I know that's a long question but if you're with me, the last part is if you'd had all of that information, would it have made any difference to your decision to implement the tactical part of the operation?

GENERAL MBOMBO: Certainly if – you must remember that we had allowed them a chance.

MS BARNES: No, General, the point is at that particular time just before your JOCCOM meeting started, if you had all the information – negotiations were still going on, Brigadier Calitz thinks you must wait and see what Mr Mathunjwa comes back with – if you had that information at half past one or just before half past one, would it have made any difference to your decision?

GENERAL MBOMBO: I agree, yes, that it would have been so.<sup>228</sup>

20.14 Moreover, the SAPS Occurrence Book records:<sup>229</sup>

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<sup>228</sup> T, Day 183, 22065, line 19 – 22067, line 22

<sup>229</sup> Exhibit FFF25, p 24, entry 1010.

1010	13:25	<p>Situation report:</p> <p>P1 reported that the AMCU people addressed the group and the group are unhappy and AMCU promised that they will be back after half an hour with the mine management, because the group are not satisfied. They said they want R12 500. The group of women were still at gathering.</p>
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20.15 Despite the fact that the Occurrence Book records, and the video evidence confirms, that Mr Mathunjwa's efforts to resolve matters were ongoing, Lt General Mbombo was told that he had failed. She initially suggested that Brig Calitz was at fault.<sup>230</sup> She ultimately blamed General Mpembe for the misinformation:

“CHAIRPERSON: Do you persist in your evidence that Brigadier Calitz gave a different report which you heard before you gave the instruction that you gave? Did you persist in that evidence under oath in the light of both the video clip and the entry in the occurrence book?

GENERAL MBOMBO: According to the report I received, Chairperson, that was the only thing I knew, that which was reported to me.

CHAIRPERSON: You didn't get the report which is recorded in the occurrence book, is that what you're saying?

GENERAL MBOMBO: I was not told in this manner, Mr Chair.

CHAIRPERSON: And the report that you heard was not recorded in the occurrence book but another report was, which appears to be have been correct.

GENERAL MBOMBO: Unfortunately when General Mpembe told me, he did not mention this was an entry in the OB. He only said to me this is what papa 1 is reporting.

CHAIRPERSON: So it's General Mpembe's fault, he wrongly

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<sup>230</sup> See T, Day 180, 21614, line 3 – 21615, line 4.

reported to you what Brigadier Calitz had said over the radio, is that what you're saying?

GENERAL MBOMBO: That's what I heard from him, yes, Chairperson.

CHAIRPERSON: This was never in General Mpembe's evidence. Anyway, that's a matter that we don't – we can take up, not necessarily take up with you. Anyway you persist in your evidence that what you've told us is what General Mpembe told you and it appears to have been incorrect. Would you agree to that –

GENERAL MBOMBO: Chairperson, yes, I persist in that way because I think he also wrote it in his second statement.

CHAIRPERSON: Just for the sake of those of us who have to read the record later, the evidence that you gave to which I referred appears at page 21613 on the 4th of February 2014.<sup>231</sup>

## 21. **MR MATHUNJWA'S FINAL PLEA TO SAPS AND LONMIN**

21.1 At about 13h30, Mr Mathunjwa together with the other AMCU officials, left the koppie. Mr Mathunjwa went back to the JOC. At the JOC he asked to see the Provincial Commissioner. He would probably have arrived as the 13h30 JOCCOM meeting had just commenced. Lt General Mbombo was in the JOC. They waited for about 30 minutes. Mr Mathunjwa then asked a SAPS officer to ask for either of the generals to come speak to him.<sup>232</sup>

21.2 Mr Mathunjwa's evidence is that General Mpembe came out of the operations room and said to Mr Mathunjwa that he was no longer in charge of the operation and that the Provincial Commissioner was in charge. Mr Mathunjwa said to General Mpembe that he would like to

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<sup>231</sup> T, Day 183, 22069, line 8 – 22070, line 20.

<sup>232</sup> Exhibit NN, para 77.

see the Provincial Commissioner. He testified that General Mpembe told him that Lt Gen Mbombo was not around as she had gone to an ANC torch bearing ceremony with the Premier of the North West. Mr Mathunjwa asked General Mpembe how the Provincial Commissioner could leave the area. General Mpembe said that he would try and phone Lt Gen Mbombo. Mr Mathunjwa told him that he was concerned about time as he needed to get back to the workers. General Mpembe then left. He never came back to Mr Mathunjwa.<sup>233</sup>

- 21.3 On the issue of whether Mr Mathunjwa was told by General Mpembe that the Provincial Commissioner was not present because she had gone to an ANC torch bearing ceremony with the Premier of the North West, Lt General Mbombo ultimately conceded that General Mpembe might not have given “a true explanation”:

“GENERAL MBOMBO: Chairperson, if, Chairperson, Mr Mathunjwa had mentioned when he was giving evidence that he was told by General Mpembe my response to that, Mr Chairperson, was that there could have been a misunderstanding or that General Mpembe did not give a true explanation.

MS BARNES: Yes, so you accept that Mr Mathunjwa may have been given incorrect information by General Mpembe.

GENERAL MBOMBO: If it was given to him by General Mpembe.”<sup>234</sup>

- 21.4 We submit that the relevance of the somewhat heated debate about the ANC torch is twofold. First, it reflects on General Mpembe’s credibility. Second, and perhaps more importantly, we submit that the failure to give a true explanation to Mr Mathunjwa is indicative of the fact that there

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<sup>233</sup> Exhibit NN, para 78.

<sup>234</sup> T, Day 183, 22081, line 19 – 22082, line 4.

was a concerted effort to fob him off. A decision had been taken by SAPS to execute the tactical plan and Mr Mathunjwa's continued efforts stood in the way.

21.5 Mr Mathunjwa phoned Mr Kwadi. Mr Mathunjwa advised Mr Kwadi that they had spoken to the workers and that he wanted to give Lonmin feedback. Mr Kwadi said he would phone Mr Mathunjwa back.<sup>235</sup>

21.6 Mr Kwadi contacted Mr Mathunjwa about five minutes later. He told Mr Mathunjwa to give the feedback to the Generals. Mr Mathunjwa reminded him that in terms of the protocol, he had to discuss labour related matters with Lonmin management and that he was the representative with whom they had been engaging. Mr Mathunjwa also told him that the Generals were nowhere to be found. Mr Kwadi said that he would get back to Mr Mathunjwa.<sup>236</sup>

21.7 About ten minutes later Mr Kwadi contacted Mr Mathunjwa again. He said that management was not prepared to meet with Mr Mathunjwa. He gave Mr Mathunjwa no reason. Mr Mathunjwa asked him whether he was insane. Mr Mathunjwa asked him "*what kind of substance have you taken, have a glass of water*" so that he could be sober. Mr Mathunjwa asked how Lonmin management could do such a thing. Mr Mathunjwa told him that AMCU had been set up.<sup>237</sup>

21.8 Mr Mathunjwa then phoned Mr Seedat. Mr Mathunjwa told him that the situation he was facing was that Lonmin management was not prepared

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<sup>235</sup> Exhibit NN, para 79.

<sup>236</sup> Exhibit NN, para 80.

<sup>237</sup> Exhibit NN, para 81.

to meet with him to receive feedback from the workers. Mr Seedat told Mr Mathunjwa that he could not make any commitments but that he would try to contact Lonmin management. Mr Seedat never came back to Mr Mathunjwa.<sup>238</sup>

21.9 We now know that this phone call to Mr Seedat occurred at 14h07<sup>239</sup> and lasted for just over 3 minutes.<sup>240</sup>

21.10 Mr Seedat did not dispute Mr Mathunjwa's account of their telephone conversation.<sup>241</sup> Indeed, he added the following:

“MR SEEDAT: Well, I do recall a little more that, in the sense that he did talk about Lonmin management going back on their word or words to that effect as well, somersault I think is one of the words he used.”<sup>242</sup>

21.11 Mr Seedat accepted that, at the time, there was a heavy police presence on the mine,<sup>243</sup> things were tense,<sup>244</sup> and Mr Mathunjwa was clearly concerned.<sup>245</sup>

21.12 Mr Seedat confirmed that he conveyed Mr Mathunjwa's message that he wished to give Lonmin management feedback from the strikers to those sitting in the boardroom with him and that he never reverted to Mr

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<sup>238</sup> Exhibit NN, para 82.

<sup>239</sup> T, Day 292, 38371, line 18 – 38372, line 3.

<sup>240</sup> T, Day 292, 38372, lines 10 – 11.

<sup>241</sup> As set out in Exhibit NN, para 82.

<sup>242</sup> T, Day 292, 38374, lines 2 – 5.

<sup>243</sup> T, Day 292, 38374, lines 6 – 11.

<sup>244</sup> T, Day 292, 38374, lines 12 – 14.

<sup>245</sup> T, Day 292, 38375, lines 1 – 3.



Mathunjwa.<sup>246</sup> His only recollection of Lonmin management's response was that they were frustrated with Mr Mathunjwa. In the context, we submit that it is clear that Lonmin had become annoyed with Mr Mathunjwa's attempts to resolve the matter through negotiation. We note that not a single person expressed interest in hearing the feedback that Mr Mathunjwa wanted to convey from the strikers:

“CHAIRPERSON: Was Mr Mokwena there as well, in the mining boardroom?

MR SEEDAT: Ja, I can't recall exactly, there were a whole lot of people. We'd gone to the operations centre, we'd come back and we were in this room with the Chairman of Lonmin, Albert Jamieson I think, Simon Scott, and people were walking in and out. So I can't recall exactly who was there, all the participants at the time.

CHAIRPERSON: I see. And can you recall what the response was of the person or persons to whom you spoke, conveying what Mr Mathunjwa had said?

MR SEEDAT: No, except that, you know, it appeared like they were frustrated with his, with his – you know, with him. I got the impression that they were frustrated with him but not more than that.

CHAIRPERSON: Did anyone express an interest in listening to what he was bringing from the koppie, what he was going to say or proposed to say in relation to what the strikers were saying to him?

MR SEEDAT: Well, he was having the conversation with me and I felt I should have the conversation with him and then pass the message on, I mean, it didn't strike me at the time to put the phone on speaker phone. I'm not sure, as I say, who was in the room at the time when I had the conversation, so after the conversation who was in the room and I think I do recall Mr Kwadi was there, I passed the message on to them.

CHAIRPERSON: Yes, no, I understand that but were you able to ascertain what the attitude was of the management person or people to whom you spoke about what Mr Mathunjwa had to say, whether did they want to hear what he had to say, were they not interested in hearing what he had to say or aren't you able to assist?

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<sup>246</sup> T, Day 292, 38377, lines 1 – 24.

MR SEEDAT: All I can remember is there was frustration in the management team in terms of their discussions with Joseph but exactly whether they were going to talk to him or not, I can't say.<sup>247</sup>

21.13 Mr Mathunjwa then met with the AMCU branch committee and explained to them that neither the SAPS nor Lonmin management was willing to engage with him. By this time the situation was tense. The Provincial Commissioner had left. The Generals who had welcomed AMCU's intervention the day before were no longer willing to engage. The protocol of the previous day was not being followed. Management had reneged on its commitment of the previous day. The strikers wanted to speak to management but management would not engage with them at all. Mr Mathunjwa also realised that the SAPS were carrying rifles with them now. Mr Mathunjwa recalled Mr Mokwena's statement of the previous day to the effect of "*let the police go to the mountain and do their job*". In the light of all of this, Mr Mathunjwa feared for the worst.<sup>248</sup>

21.14 As Mr Mathunjwa was leaving the JOC on the way to the koppie, and at about 14:15, he sent an SMS to Major General Annandale which stated: "*Since no person is available to give feedback to we are going back to the employees to inform them no one is available we have tried our best without cooperation from anyone let Peace Prevail.*" Mr Mathunjwa sent the same SMS to Mr Gwala.

21.15 At 14:28 Major General Annandale replied as follows: "*SAPS is available at exactly the same spot as they had our earlier discussions.*"

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<sup>247</sup> T, Day 292, 38378, line 5 – 38379, line 17.

<sup>248</sup> Exhibit NN, para 83.

*We are always available and willing to have discussions towards finding an amicable and peaceful solution.”*<sup>249</sup>

21.16 Before going back to speak to the workers, Mr Mathunjwa had an interview with e-TV. Mr Mathunjwa said that there was no co-operation from SAPS and no co-operation from management. He says the interviewer asked him “what now?” Mr Mathunjwa said that the writing was on the wall, as it was clear to him that the police were going to shoot these people. Mr Mathunjwa said that the matter was out of his hands and in God’s hands now.<sup>250</sup> Once again Mr Mathunjwa’s testimony is corroborated by the objective evidence. Slide 187 of Exhibit L is a Media report (eTV) on AMCU’s final plea to the strikers. The journalist recorded that Mr Mathunjwa told him of his frustration with Lonmin management’s response, that police action seemed inevitable, that he had done everything he could, and that the matter was now in God’s hands.

## 22. **MR MATHUNJWA’S SECOND ADDRESS TO THE STRIKERS**

22.1 When Mr Mathunjwa arrived at the koppie, he made another attempt to engage with the SAPS. Mr Mathunjwa spoke to a SAPS officer and asked who was in charge. He referred Mr Mathunjwa to a white SAPS officer, who said that he was in charge. Mr Mathunjwa told the white SAPS officer that he was not receiving cooperation from the SAPS, that no General was available, nor was Lonmin management nor the Provincial Commissioner. The officer said to Mr Mathunjwa that he would phone General Naidoo. Mr Mathunjwa waited and waited, but the

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<sup>249</sup> Exhibit NN, para 84. Mr Gwala replied as follows: “Baba, Mr Mathunjwa don’t know what to say ... Where are you?”

<sup>250</sup> Exhibit NN, para 85.

officer did not return.<sup>251</sup> In his evidence in chief, Mr Mathunjwa said that he waited for 10 to 15 minutes.<sup>252</sup>

- 22.2 The SAPS occurrence book confirms Mr Mathunjwa's version that General Naidoo would be contacted to speak to him. It contains the following entry "Item 1014 at 14:40":

"P1 reported that the union rep wants to go to the koppie to tell the group that the mine management does not want to negotiate. Gen Naidoo to talk to the union rep as he requested to talk to the SAPS management."<sup>253</sup>

- 22.3 In his supplementary statement,<sup>254</sup> Mr Mathunjwa explained that the white SAPS officer who had said that he was in charge and who had promised to get General Naidoo to speak to him was Brig Calitz. Brig Calitz denied this, saying that he was at FHA1 at 14:40, receiving the briefing from Lt Col Scott. We submit that even if Brig Calitz had attended the briefing, it is still possible that the entry was incorrectly recorded at the time of 14:40.<sup>255</sup>

- 22.4 In any event, Brig Calitz did not deny that the Mr Mathunjwa was there, or that the incident he had described had taken place, or that Papa 1 had given the report recorded in the Occurrence Book through to the JOC.<sup>256</sup>

- 22.5 Mr Mathunjwa then proceeded to speak to the strikers at the koppie.

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<sup>251</sup> Exhibit NN, para 86.

<sup>252</sup> T, Day 22, 2375.

<sup>253</sup> Exhibit "FFF25", p 25.

<sup>254</sup> Exhibit KKK46, para 4 – 6.

<sup>255</sup> See, T, Day 198, 24250, line 17 – 24251, line 13.

<sup>256</sup> T, Day 17398, lines 5 – 15.

There is unfortunately no complete recording of his second address. Snippets of the address have, however, been located and a transcript has been prepared.<sup>257</sup>

22.6 Mr Mathunjwa commenced by singing the song “Senzeni Na”.<sup>258</sup> Mr Mathunjwa told the strikers that there was no one to whom he could give a report of what the workers wanted. Mr Mathunjwa pleaded with them. Mr Mathunjwa told them that if they did not leave the koppie the police were going to kill them. Mr Mathunjwa said that AMCU did not want people to be killed, but rather that their demands be addressed.<sup>259</sup> Mr Mathunjwa pleaded with them. He said, “*comrades it has already been decided please leave this place*”.<sup>260</sup>

22.7 Mr Mathunjwa recalls that some of the workers came to the microphone to speak and explained how they had come to be on the koppie. They said that they were marching to NUM’s offices when they were shot at by NUM officials.<sup>261</sup>

22.8 Other workers came and said that they appreciated the effort that Mr Mathunjwa had made as president of AMCU. They then said to Mr Mathunjwa that he should leave because he had tried everything. They said that the employer did not want to speak to them. They would remain on the koppie because they had not attacked anyone. Let the

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<sup>257</sup> Exhibit KKK56.

<sup>258</sup> Exhibit KKK55, from 08:25.

<sup>259</sup> Exhibit NN, para 87.

<sup>260</sup> Exhibit NN, para 88.

<sup>261</sup> Exhibit NN, para 89. This is confirmed by the transcript of the second address, Exhibit KKK56, p 2.

police come and kill them, they said.<sup>262</sup>

22.9 Mr Mathunjwa told them that this was not necessary and said they should leave the koppie. Mr Mathunjwa explained to them that the life of a black worker was cheap, that they would be replaced and that their demands would not have been realised.<sup>263</sup>

22.10 Mr Mathunjwa pleaded with them to leave the koppie.<sup>264</sup> The workers again asked Mr Mathunjwa to leave.<sup>265</sup>

22.11 Mr Mathunjwa got into the car with his colleagues. No barbed wire had been rolled out at that stage. They travelled a couple of meters. Mr Mathunjwa said that they could not leave as people were going to be killed. One of his colleagues responded by saying “*if we are all killed who is going to tell the story.*” The workers were waving to them indicating that they must leave.<sup>266</sup>

22.12 For the convenience of the Commissioners, we have prepared a chronology setting out the times for the events described above,<sup>267</sup> as well as some others to put things in context. We also indicate the relevant objective evidence:

eTV Time	Event	Evidence
15:32:32	Mr Mathunjwa has arrived at	Exhibit JJJ10, Vermaak Pentax

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<sup>262</sup> Exhibit NN, para 90.

<sup>263</sup> Exhibit NN, para 91.

<sup>264</sup> Exhibit NN, para 91.

<sup>265</sup> Exhibit NN, para 92.

<sup>266</sup> Exhibit NN, para 93.

<sup>267</sup> All times in the left column are converted eTV time.

	Koppie for his second address. (Note, he would have arrived earlier than this.)	IMGP4525 – VPT 15:34:14 (This is the first of Vermaak's photos for the afternoon)
<b>15:34:12</b>	Mr Mathunjwa was still with / addressing the strikers for the second time.	Exhibit JJJ10, Vermaak Pentax IMGP4530 – VPT 15:35:54
<b>15:37:48</b>	Mr Mathunjwa had completed his second address and his car was driving / pointing towards Papa 1.	Exhibit JJJ10, Vermaak Pentax IMGP4538 – VPT 15:39:30
<b>15:38:38</b>	Mr Mathunjwa's car was just leaving the scene. (It can be seen between the two Nyala's on the left of Papa 1 and below Nyala 4).	Exhibit JJJ10, Vermaak Pentax IMGP4539 – VPT 15:40:10.
<b>15:38:41</b>	Mr Mathunjwa's car was driving away from the Koppie (It can be seen in the bottom right hand corner).	Exhibit JJJ11, IMG01511-20120816-1542 – Vermaak Blackberry Time 15:42:18
<b>15:41:24</b>	Capt Adrio's briefing to the media began. (It lasted for 02:27 (2 minutes, 27 seconds)	Exhibit JJJ194.05
<b>15:41:53</b>	Col Scott called Brig Calitz and spoke to him for 01:26 (1 minute, 26 seconds).	Exhibit JJJ188
<b>15:42:35</b>	The roll-out of the barbed wire had just begun. (Note many people had left the Koppie at this time. <sup>[268]</sup> )	Exhibit JJJ11, IMG01514-20120816-1546 – VBT 15:46:02

22.13 The AMCU leaders left the koppie at 15h38. They intended to take a back route to Witbank. As they drove behind the koppie they were confronted by a convoy of police who indicated that they must stop. Mr Mathunjwa stopped the car. The police got out of the minibus, they

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<sup>268</sup> KKK55, from 10:42.

cocked their rifles ready for action.<sup>269</sup>

22.14 A SAPS officer asked who they were. Mr Mathunjwa said that they were union officials. The officer told them to go back. They said that they would not. Again the officer asked who they were. There was a black jeep about ten to fifteen meters away from the minibus.<sup>270</sup> The officer went to the black jeep and came back. Mr Mathunjwa thinks he verified who they were because when he came back he told them that they could proceed.<sup>271</sup>

22.15 About twenty minutes later, while they were driving through Marikana, the branch chairperson was called and told that the police were killing the strikers.<sup>272</sup>

22.16 Having regard to all of the above we submit that AMCU, and Mr Mathunjwa in particular, did all that it possibly could to encourage a negotiated solution to the crisis in Marikana and to avert the bloodshed that was foreseen on 16 August 2012.

22.17 Finally, in this section, we deal with the allegations made against Mr Mathunjwa by Mr “X.”

## 23. **MR X’S ALLEGATIONS AGAINST MR MATHUNJWA**

23.1 The SAPS’s star witness, Mr X, put in a dismal performance. We submit

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<sup>269</sup> Exhibit NN, para 94.

<sup>270</sup> Capt Kidd drove a black jeep.

<sup>271</sup> Exhibit NN, para 95.

<sup>272</sup> Exhibit NN, para 96.



that he was proven to be a liar so many times that no reliance can be placed on any of his evidence.<sup>273</sup> One of the many lies Mr X told concerned Mr Mathunjwa. It is to be found in his supplementary statement of 19 February 2014.<sup>274</sup> In stark contrast with Mr X's initial statement, in which he had mentioned Mr Mathunjwa only in passing,<sup>275</sup> Mr X's supplementary statement contains the following serious allegations:

“During the night on the 14th of August 2012, Xolani advised us that he received a telephone call from Mr Mathunjwa (“Mathunjwa”) as he would like to come to the Koppie to have a discussion with us. After some discussions, we agreed that he could come, on condition that he did not come to the specific spot where the rituals were performed. I saw Xolani making a call but did not pay attention to the conversation that he had. After some time, I noticed a vehicle with its lights on, approaching the Koppie and indeed Mathunjwa arrived. Mathunjwa advised us that there was an attempt on the part of the police to bring him and Zokwana to the Koppie to address the strikers and that the strikers should not welcome Zokwana. He further indicated that he is interested in numbers and that once we mobilised enough people to join AMCU he would ensure that our demand is met.”<sup>276</sup>

- 23.2 An obvious flaw in this concocted version is that the evidence shows that the idea of the two union Presidents going to the koppie to address the strikers originated for the first time during the SAFM debate hosted by Mr Gwala on the morning of 15 August 2012.

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<sup>273</sup> It is unnecessary to deal with all of his lies in these heads of argument.

<sup>274</sup> Exhibit LLL26

<sup>275</sup> See Exhibit AAAA1.2, paras 24 and 25 (We do not dispute the evidence of Mr X contained in these paragraphs. In paragraph 25 of his initial statement, Mr X said, in relation to Mr Mathunjwa's address to the strikers on 16 August 2012: “*He told the crowd they are still talking to the Employer to address our demands, he asked us (crowd) to move away from the mountain. He said that we must surrender our weapons and move away from the mountain as there will be bloodshed there, Mr Mathunjwa was crying and kneeling down when asking us to leave the mountain.*”)

<sup>276</sup> Exhibit LLL26, para 34.

23.3 There is an allegation in General Mpembe's witness statement that on 14 August 2012, at 20h30, he contemplated "a meeting" with the union Presidents, and Lonmin, the following day. He says:

"At about 20:30 on the same day I arranged, through the mine management, a meeting for the following day with the management and the two (2) Union Presidents. I deemed such a meeting necessary so as to hear from the management and unions of what plans, if any, they had to address the situation. My sole interest was to find an end to the daily gatherings of armed people at the koppie and restore public order in the area."<sup>277</sup>

23.4 General Mpembe claimed that he asked Mr Kwadi to arrange such a meeting.<sup>278</sup> However, General Mpembe conceded under cross examination that he had no personal knowledge of whether Mr Kwadi had in fact arranged the meeting on 15 August 2012 or when he had done so."<sup>279</sup> General Mpembe confirmed that he was only advised of the meeting with the two union Presidents some time on the morning of 15 August 2012.<sup>280</sup>

23.5 In his statement Mr Kwadi says that on 15 August 2012:

"I contacted both the union Presidents and arranged a meeting which was held at LPD, which they both attended."<sup>281</sup>

23.6 We point out that this allegation has never been confirmed by Mr Kwadi or any other Lonmin witness. Having regard to the evidence before the

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<sup>277</sup> Exhibit, GGG12, para 31.

<sup>278</sup> T, Day 146, 16114, lines 7 – 10.

<sup>279</sup> T, Day 146, 16114, line 7 – 16116, line 21.

<sup>280</sup> T, Day 146, 16115, lines 6 – 9.

<sup>281</sup> Exhibit KK, para 8.2.

Commission we submit that it must be accepted that if Mr Kwadi did indeed contact the two union Presidents on 15 August 2012 he must have done so while they were already on their way to Marikana to address the strikers on the koppie, the decision to do so having been taken during the SAFM debate as set out earlier.

23.7 In short, there is simply no evidence of any request or proposal that the two union Presidents address the strikers at the koppie prior to the SAFM debate on the morning of 15 August 2012. It follows that Mr Mathunjwa could not have told the strikers “*that there was an attempt on the part of the police to bring him and Zokwana to the Koppie to address the strikers*” on 14 August 2012 as Mr X alleges.

23.8 But there are far greater problems with Mr X’s version. The Evidence Leaders subpoenaed and obtained Mr Mathunjwa’s cellular phone records for the period 14 August 2012 (at 07h12) to 15 August 2012 (at 23h38).<sup>282</sup> They also subpoenaed the cellular phone records of Mr Xolani Nzuza, the striker who Mr X alleged had communicated with Mr Mathunjwa on 15 August 2012.<sup>283</sup> In cross-examination of Mr X it was revealed that neither Mr Mathunjwa’s nor Mr Nzuza’s phone records supported Mr X’s contention that the two had phoned one another during the relevant period:

“MR BUDLENDER SC ... This is what Mr Mathunjwa’s cell phone record shows, Mr X. Firstly they show that on 14 and 15 August Mr Mathunjwa never phoned Mr Nzuza. Can you explain that?”

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<sup>282</sup> See T, Day 253, 31896, line 25 – 31897, line 8. Mr Mathunjwa’s cell phone records are Exhibit AAAA31.

<sup>283</sup> See T, Day 252, 31766, line 3 – 31768, line 3. See also, 253, 31896, lines 11 – 24.

MR X: He could have been using someone else's phone. He could have been using another phone, not his phone.

MR BUDLENDER SC: You were expecting that question, weren't you?

MR X: No, I was not.”<sup>284</sup>

And

“MR BUDLENDER SC: Now we also examined Mr Nzuza's phone records and I want to tell you what they show. Firstly, they show that between 3:50PM, 10 to four on the 14th of August and midnight on the 14th of August Mr Nzuza received 13 phone calls on his phone. Then further during that period Mr Nzuza did not receive a phone call from Mr Mathunjwa's phone. Can you explain that?”<sup>285</sup>

23.9 Mr X avoided the question. He did so several times.<sup>286</sup> Ultimately he sought to suggest that Mr Nzuza was using a different phone to call Mr Mathunjwa.<sup>287</sup> He also repeatedly avoided answering the Chairperson's questions about whether he had actually heard Mr Nzuza speaking on his phone to Mr Mathunjwa.<sup>288</sup>

23.10 But the most damning evidence in answer to Mr X's testimony came in the form of a supplementary affidavit filed by Mr Mathunjwa.<sup>289</sup> In that affidavit, Mr Mathunjwa dealt comprehensively with Mr X's allegations that he had used someone else's phone on the evening of 14 August 2012 or alternatively that he had dashed to Marikana from Pretoria (or Witbank) to address the strikers. Mr Mathunjwa:

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<sup>284</sup> T, Day 253, 31897, lines 9 – 17.

<sup>285</sup> T, Day 253, 31900, line 24 – 31901, line 5.

<sup>286</sup> T, Day 253, 31901, line 6 – 31904, line 22.

<sup>287</sup> T, Day 253, 31905, lines 2 – 6.

<sup>288</sup> T, Day 253, 31905, lines 22 – 31906, lines 25.

<sup>289</sup> Exhibit AAAA43.

- 23.10.1 said that he did not have any other cell phone in his possession on 14 August 2012 and that he had no recollection of using the cellular phone of anyone else at any time on that day;<sup>290</sup>
- 23.10.2 demonstrated, with reference to Annexure JM1, that in the evening of 14 August 2012, he had phoned: the E-News Channel; his own Son; Mr Edwin Hlatswayo of Glencor; Mr Kwadi of Lonmin; the AMCU General Secretary; as well as Major Shadrack Zamokwakhe Ntshangase from the Salvation Army, all from his cellular phone. Half of those calls were made from a location in Witbank, which is where he lives.<sup>291</sup>
- 23.11 We submit that the evidence in Exhibit AAAA43 proves beyond any doubt that Mr Mathunjwa's cellular phone had travelled east from Pretoria to his home in Witbank in the evening of 14 August 2012 and that he was with his phone, using it to make calls to people that he knows. There was also insufficient time for Mr Mathunjwa to have travelled west to Marikana to address the strikers.<sup>292</sup>
- 23.12 The content of the supplementary affidavit was put to Mr X for his comment:

“MS BARNES: I’m saying to Mr X that while Mr Mathunjwa was travelling from Pretoria to Witbank on the evening of the 14th of August 2012, he had his cell phone with him and he used it to make a number of calls to people close to him, such as his son and his pastor, and all of this, Mr X, is borne out by objective evidence, being Mr Mathunjwa’s cell phone records and the cell site analysis thereof.

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<sup>290</sup> Exhibit AAAA43, para 16.

<sup>291</sup> Exhibit AAAA43, para 17.

<sup>292</sup> Exhibit AAAA43, paras 21 – 24.

MR X: I deny that. He could have left his phone in Witbank whilst he was at Marikana.

MS BARNES: It will be shown in the affidavit which you've either read or has been explained to you, that that is not possible; Mr Mathunjwa had his phone with him during that evening and he used it to make a number of calls to people that are close to him.

MR X: I hear you say so but I'm saying Mathunjwa was there on the 14th.

MS BARNES: So Mr X finally we will argue that Mr Mathunjwa's affidavit together with the objective evidence established that he could not have been at the koppie on 14th of August 2012 and that your evidence in this regard is false and must be rejected.

MR X: He appears on the video, appears there on the 14th.”<sup>293</sup>

23.13 We submit that Mr X's answers were most unsatisfactory. Rather than accepting the undeniable objective evidence that Mr Mathunjwa had travelled home to Witbank in the evening of 14 August 2012, and not to Marikana, Mr X resorted to insisting that there was video evidence to back up his claim. There is of course nothing of the sort.

23.14 Finally, we note that Mr X alleged that he had filled in, but not signed, a stop order authorisation form in favour of AMCU on 14 August 2012.<sup>294</sup> Mr X's AMCU authorisation form was produced by Lonmin. It showed that he had signed it on 19 September 2012,<sup>295</sup> proving that Mr X had, once again, lied to the Commission.

23.15 It follows that Mr X's allegations against Mr Mathunjwa must be rejected.

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<sup>293</sup> T, Day 259, 32645, line 6 – 32646, line 4.

<sup>294</sup> See, T Day, 32648, line 7 – 32650, line 4.

<sup>295</sup> Exhibit AAAA46.1. And see T, Day 269, 34262, lines 14 – 25.

## Section D – NUM

### 24. **INTRODUCTION**

- 24.1 In this section we deal with NUM's response to the strike.
- 24.2 We submit that knowing that it had lost the support of many of its members at Lonmin,<sup>296</sup> and with full knowledge of Lonmin's stance, NUM did nothing to attempt to regain the strikers' confidence and represent their interests. But more problematically, NUM officials set themselves the task of teaming up with Lonmin's security personnel to break the strike and lobbied Lonmin Management to do the same.
- 24.3 Rather than seek a peaceful solution and duly represent the RDOs, NUM also: provocatively called on strikers to return to work; labelled the strikers as criminals; sought to portray AMCU as the villain behind the strike and publicly called upon the SAPS to bring in the Special Task Force ("the STF") to deal with the situation.
- 24.4 We submit further that the NUM officials' shooting at the strikers on the morning of 11 August 2012, injuring two of them, was unnecessary and unlawful. That shooting led to the strikers arming themselves with dangerous weapons. This greatly exacerbated the situation.

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<sup>296</sup> As we have explained in Section A of these heads of argument.

25. **NUM’S ATTITUDE TO THE RDOs’ STRIKE**

25.1 Contrary to some suggestions made during the hearing,<sup>297</sup> NUM officials were well aware of what the RDOs demands were and the likelihood of industrial action, before it commenced.

25.2 NUM’s knowledge of the RDO demand and its position in relation thereto was confirmed in no uncertain terms by Mr Malesela William Setelele (“**Mr Setelele**”), one of NUM’s witnesses, in his witness statement:

“The issue of this demand by the RDOs was discussed at various meetings by the NUM branches in Lonmin. NUM’s position was consistently put forward at these meetings, namely that the wages of RDOs was covered in the two-year collective agreement that had been concluded in December 2011, that it was a breach of this agreement for RDOs to raise fresh wage demands during the term of that agreement, and that NUM was opposed to unprotected and hence illegal strike action.”<sup>298</sup>

25.3 One of the meetings to which Mr Setelele referred in his witness statement was a “*NUM report-back meeting*” which took place on 8 August 2012 at 16h00. The convenor of this meeting was Mr Daluvuyo Bongo. He was the NUM WPL Branch Secretary. The purpose of the meeting has been described as a “*report back to the members concerning the allowances that had been decided upon by Lonmin*”.<sup>299</sup> It is abundantly clear that the RDOs’ attitude to Lonmin’s allowances was

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<sup>297</sup> See, for example, the objection by NUM’s Counsel during the evidence of Mr Mokwena, which was overruled, T, Day 291, 37971, line 6 – 37973, line 11.

<sup>298</sup> Exhibit YY1, para 4.

<sup>299</sup> Exhibit YY1, para 6.



raised and discussed at the meeting. As Mr Setelele described it:

“At this meeting, some of the RDOs indicated that they would approach management directly concerning their R12,500 wage demand and that they did not want to talk to NUM about it. NUM nevertheless made it clear at the meeting that it did not support and resort to unprotected strike action and it cautioned the RDOs of the risks involved in any such action.”<sup>300</sup>

25.4 The RDOs plainly let the NUM officials know that their demand was for a wage of R12 500,00.<sup>301</sup> The NUM officials informed the members present that NUM’s position was that “... *the wages of RDOs was covered in the two-year collective agreement that had been concluded in December 2011, [and] that it was a breach of this agreement for RDOs to raise fresh wage demands.*”<sup>302</sup> Mr Setelele, when pressed by the Chairperson, ultimately conceded that he had told the RDOs this:

“CHAIRPERSON: What did you tell the RDOs at the meeting? Did you tell them there’s room for us to take this demand to management, or did you tell them that by raising this demand you’re acting in breach of the agreement?”

MR SETELELE: I’ve told them that if they have a demand they must bring the demand to us.

CHAIRPERSON: But did you tell them what you say here in your statement, that it was a breach of the agreement for the RDOs to raise fresh wage demands during the term of the agreement? Did you tell them that?

MR SETELELE: Yes, I’ve told them.”<sup>303</sup>

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<sup>300</sup> Exhibit YY1, para 6, See also T, Day 37, 4077, line 7 – 4079, line 1.

<sup>301</sup> This is the only conclusion that one can reach from the sentence: “*the RDOs indicated that they would approach management directly concerning their R12,500 wage demand.*”

<sup>302</sup> Exhibit YY1, para 4.

<sup>303</sup> T, Day 38, 4143, line 25 – 4144, line 11.

25.5 The RDOs who were present said that they would approach management directly concerning their demand for R12 500,00. We submit that the probabilities are overwhelming that this was a *response* to the NUM officials' stated (or known) position. The NUM officials' answer was simply that they would not support the RDOs and any subsequent resort to industrial action would be unprotected. The NUM officials cautioned against that course of action. This is confirmed by the evidence of Mr Eric Gcilitshana: *"At that stage it was clear to NUM that there was an imminent prospect of an unprotected strike. The opportunity was taken at this meeting to caution the RDOs against action of that sort and to warn them of the dangers thereof."*<sup>304</sup>

25.6 There is, of course, nothing objectionable in NUM cautioning against an unprotected strike. The problem with NUM's conduct lies in the fact that its essential position was legally unsound – it was not a "breach of the agreement" for the RDOs to raise the concern that they were grossly underpaid. Mr Setelele ultimately conceded that NUM's position was wrong, again in response to questions from the Chairperson.

"CHAIRPERSON: The point is – let me just put it, make it clear. The point is, you said it was NUM's position that it was a breach of the agreement for the demand to be raised. That means, as I understand it, that what you were saying was that NUM's attitude, position was that until the end of the agreement it was not possible for any demand even to be raised for an increase despite the fact that the whole climate had changed because of what happened at Impala. Now we know that when the climate changes it is possible, despite the fact that there's an agreement, for the union to go back to the employer and say look here, for example, we've agreed on an increase of so much, so much per cent, inflation has gone beyond that amount, therefore the climate has changed, it's appropriate for us to revisit it. That's the point that's

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<sup>304</sup> Exhibit XX1, para 38

been dealt with already. Therefore it would've been possible for NUM to have gone back to Lonmin, to have said, we want to raise this demand again, despite the fact that the agreement is still operative, because of this change brought about by what happened at Impala. Isn't that correct?

MR SETELELE: You're correct.

CHAIRPERSON: In doing so, NUM would not have been acting in breach of the agreement.

MR SETELELE: You're correct.

CHAIRPERSON: So why did you say that it was – that NUM's position was, it was a breach of the agreement for RDOs to raise fresh demands during the term of that agreement? That statement was not correct, was it?

MR SETELELE: I think the statement is not correct since the agreement says, is stating against my statement.”<sup>305</sup>

- 25.7 To the extent that it is argued that NUM was never presented with the RDOs' concern that they were grossly underpaid, and thus “*never had an opportunity to react to the demand*”<sup>306</sup> it falls to be rejected in the light of the evidence relating to the meeting on 8 August 2012. The NUM officials knew full well what the RDOs were asking for. They had been told about the demand in a mass meeting of NUM members.<sup>307</sup> They also knew that the majority of the RDOs belonged to NUM:

“MS BARNES: ... but nevertheless NUM members did participate in the unprotected strike at Lonmin. Correct?

MR GCILITSHANA: That's correct.

MS BARNES: Evidence has been led that the numbers were approximately 55% NUM and 35% AMCU in the unprotected strike.

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<sup>305</sup> T, Day 38, 4142, line 14 – 4143, line 19.

<sup>306</sup> T, Day 291, 37971, line 18.

<sup>307</sup> Mr Setelele appears to have made something of the fact that demands ought to presented in mass meetings, T, Day 38, 4131, lines 8 – 25.

You agree with that?

MR GCILITSHANA: That is correct, yes. It could be correct. I'm not sure exactly about the figures. I won't dispute the figures, but I know that NUM was about 55%, as I indicated, yes."<sup>308</sup>

25.8 Notwithstanding this knowledge, the NUM officials took no steps to deal with the RDOs demand. We submit that NUM ought to have done so particularly in circumstances where it was fully aware of what had happened at Implats earlier in the year. Indeed Mr Gcilitshana conceded that NUM was "on notice" that the events at Implats would spread to Lonmin.<sup>309</sup> The fact that the demand was made during the currency of the two year wage agreement was not a bar to taking it up. Instead, however NUM took a firm stand against the RDOs' demand, in circumstances where it knew that only it had the right to negotiate wages on behalf of the RDOs at Lonmin.

25.9 It is clear that the strikers found this difficult to accept. Even Mr X, a NUM member, testified that "The RDO's did not accept the reason advanced by NUM that it could not negotiate a salary increase because of the two year agreement that had been concluded with LONMIN Management. The perception was that NUM was in cahoots with LONMIN Management."<sup>310</sup> While Mr X was not a credible witness, there appears to be no reason not to accept this allegation. Moreover, the perception that NUM was in cahoots with Lonmin management had more than a grain of truth to it, as we discuss below.

25.10 NUM told Lonmin of its position. This appears from an e-mail that Mr

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<sup>308</sup> T, Day 37, 3989, lines 2 – 12.

<sup>309</sup> T, Day 36, 3936, lines 2 – 9.

<sup>310</sup> Exhibit LLL26, para 4

Bongo addressed to Lonmin's Mr Etienne Hamman and Mr Larry Dietrich, in the evening of 8 August 2012 (at 19h40). It recorded that:

"Our mass meeting went peaceful and the attendance was very good. We educated the RDO' and show the danger they will achieved in their wrong doing. Some NUM members advice them as well."<sup>311</sup>

25.11 Mr Hamman responded "*Hope the [sic] understand and can get back to adding value at the shaft. The rumour is that they will not be at work 2morrow, hope your influence is effective.*"<sup>312</sup>

25.12 On 10 August 2012, the NUM officials, after becoming aware of the march by the RDOs, immediately arranged and held a meeting with Lonmin and called a mass meeting of its members. NUM's position was reiterated in both meetings, as Mr Setelele explains in his witness statement:

- "7. On 10 August 2012 I arrived at the NUM WPL branch office at approximately 07:00. During the course of the morning, Mr Bongo informed me that two NUM members had come to the office and reported tlmt the RDOs were holding a meeting near the Wonderkop Stadium and that they had decided to go on strike.
8. On learning of these developments, I immediately contacted Mr Larry Dietrich, Lonmin 's Vice-President: WPL, and requested a meeting with him. I also requested Mr. Bongo to make the necessary arrangements to convene a mass meeting of workers for later that day.
9. At approximately 13:00, together with Mr Bongo, I met with Mr Dietrich. By that time we knew that the RDOs had marched to the main offices of Lonmin and that they were indeed on strike. I informed Mr Dietrich that the unprotected strike and the march

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<sup>311</sup> Exhibit XX2, p 73.

<sup>312</sup> Exhibit XX2, p 73.

to Lonmin had not in any way been organized or endorsed by NUM. I also requested permission to convene a mass meeting for workers at 14:00 that day at C2 Hostel, Wonderkop so that that we could inform the workers of NUM's position and encourage them not to participate in the unprotected industrial action. Mr Dietrich granted us permission to convene the meeting.”<sup>313</sup>

25.13 NUM officials made no secret of the fact that they were not in favour of the strike. As Mr Saziso Albert Gegeleza, the NUM Vice Secretary – Rowland Shaft Committee (“Mr Gegeleza”) said in his witness statement *“I did not participate in the march to the Lonmin offices on 10 August 2012 or the decision to embark on unprotected strike action. I was however aware of those actions. I was also aware that NUM was opposed to the strike and that it had been urging employees not to take part in it, but to report for work as usual.”*<sup>314</sup>

25.14 Again one cannot cavil with NUM taking the stance that it was opposed to an unprotected strike. But the NUM officials went much further than this. One of their first steps appears to have been to decide to drive around Marikana, in at least one Toyota Quantum minibus<sup>315</sup> which Lonmin had provided, calling upon employees to not heed the call for a strike, over a loudhailer. Mr Setelele explains that he made several trips in the minibus which was entrusted to him, in the evening of 10

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<sup>313</sup> Exhibit YY1, paras 7 – 9.

<sup>314</sup> Exhibit ZZ2, para 5.

<sup>315</sup> Mr X refers to two minibuses in his witness statement, Exhibit LLL26, para 10: *“I personally noticed persons wearing red t-shirts and caps embroidered with the name NUM inside two Quantum mini-busses belonging to LONMIN using loud hailer’s encouraging RDO’s to report for duty”*. The NUM witnesses who gave evidence referred to only one; see Exhibit YY1, para 14 (Setelele’s statement.)

August,<sup>316</sup> and in the early hours of the morning of 11 August 2012, he had,

“... used a loudhailer whilst driving around to inform people that the strike was not endorsed by the NUM and that they should report for duty. I also arranged for other NUM members and shop stewards to do the same on foot in the hostel complex.”<sup>317</sup>

25.15 Mr Gegeleza also says that he joined a group of NUM officials at 06h00 on 11 August 2012, who walked around the Wonderkop Hostel telling employess that they should report for duty because the strike by the RDOs was unprotected. They also used a loudhailer to spread this message.<sup>318</sup> He continues:

“9. When we got to the road that runs past the NUM office we decided to continue broadcasting our message. A number of people had gathered outside the NUM office and we gave them the same message. We next went to the Brits taxi rank, which is along that road in the direction of Wonderkop Township. At the taxi rank I addressed the people there using the loudhailer.”<sup>319</sup>

25.16 What neither Mr Setelele nor Mr Gegeleza say in their evidence is that the second step that the NUM officials took was to place pressure on Lonmin to take similar action to break the strike. The earliest record of this is a Lonmin Log Book entry for 02h19 on 11 August 2012. It reads: “*R Beukes reported that NUM members informed him that they will go through the village and ask the workers to go to work and he (Beukes)*

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<sup>316</sup> Exhibit YY1, paras 14 and 15.

<sup>317</sup> Exhibit YY1, para 16.

<sup>318</sup> Exhibit ZZ2, para 8.

<sup>319</sup> Exhibit ZZ2, para 9.

*must do the same thing inside the hostel’.*<sup>320</sup>

25.17 Then, in a meeting at 08h00 on 11 August 2012, in which Mr Sinclair gave a security briefing, there is a note of a report by “Ludick” that *“NUM requested intervention by security to loud hail around Wonderkop to urge people to go to work while they Loud hail at Wonderkop village.”*<sup>321</sup> This request appears to have been refused.

25.18 Moreover, and of great importance, there is a note of a report, in the same meeting, by Mr Kwadi, which reads:

*“fear of NUM trying to assist and protect its members will lead to NUM taking law into own hands and faction fight between rival unions.”*<sup>322</sup>

25.19 We submit that this is precisely what occurred 30 minutes later; NUM took the law into its own hands, with grave consequences.

25.20 We deal with the NUM’s attack on the strikers in greater detail below. Before doing so, we also highlight that besides lobbying Lonmin to intervene by loudhailing around Wonderkop, NUM officials were also trying to persuade Lonmin security to work with them as a team. An e-mail from Mr Bongo to various Lonmin personnel, dated 10 August 2012 at 22h43, reflects the degree of close cooperation between NUM and Lonmin’s security that he sought. Mr Bongo concluded the email with the following request:

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<sup>320</sup> Exhibit EEEE19A, entry for 11-08-2012 at 02:19.

<sup>321</sup> Exhibit EEEE19A, entry for 11-08-2012 at 08:00.

<sup>322</sup> Exhibit EEEE19A, entry for 11-08-2012 at 08:00.



“we request the following –

1. The extra security.
2. The buses to be in their normal places.
3. Crush to be opened to allow the situation.
4. Security work with the NUM as a team.<sup>323</sup>

25.21 There is further support for the conclusion that the NUM officials began to see themselves as part and parcel of Lonmin’s security operations. Two of the NUM witnesses testified that on the morning of 11 August 2012, Mr Bongo had handed out weapons to the NUM officials who were present in the office. They explained that the weapons were in the office because they had been “taken away” from some of the strikers during the course of the previous evening.<sup>324</sup> In his oral evidence, Mr Gegeleza let slip that they had been “confiscated”:

“MR GEGELEZA: I was not the only one who was, in fact, carrying the spear and there were also the other comrades who were also carrying them and as well as the sticks because that was not going to be enough for us. As I said that those weapons were confiscated or taken from those others.”<sup>325</sup>

25.22 He confirmed that he had been told that they had been “confiscated” in cross-examination:

“MR MPOFU: Yes. You’ve testified that one of the reasons that you – okay no, let’s start with this. The weapons that were in the office, according to your understanding, had been confiscated from strikers,

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<sup>323</sup> Exhibit XX2, p 78.

<sup>324</sup> See, Exhibit YY1, para 19 (Mr Setelele’s witness statement) and Exhibit ZZ2, para 14 (Mr Gegeleza’s witness statement).

<sup>325</sup> T, Day 39, 4267, lines 20 – 25.

is that correct?

MR GEGELEZA: That's how I was told, yes.

MR MPOFU: Do you know from subsequent discussions whether or not there was any violence associated with that confiscation?

MR GEGELEZA: I did not hear anything pertaining to that.

MR MPOFU: Okay, so it's possible that these people just happily and voluntarily handed them over.

CHAIRPERSON: Possible but not very likely.

MR MPOFU: Thank you, Chair. My point exactly, thank you.

MR GEGELEZA: I don't know, I wasn't there."<sup>326</sup>

25.23 As the Chairperson noted, it is indeed not very likely that the strikers from whom the NUM officials had allegedly "confiscated" the spears, sticks and knobkerries would have happily and voluntarily handed them over. It is thus likely that the NUM officials in fact used some strong arm tactics of their own on the night of 10 August 2012.

25.24 We submit that the evidence is clear that by the morning of 11 August 2012, the NUM officials had placed themselves firmly in Lonmin's camp.

26. **THE ASSAULT BY THE NUM OFFICIALS ON 11 AUGUST 2012**

26.1 We submit that in the light of that clear evidence, the Commissioners must consider whether it is a plausible explanation that the strikers marched on the NUM offices to protest the fact that NUM was being obstructive and ask the NUM officials to take up their cause. Mr

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<sup>326</sup> T, Day 40, 4347, line 13 – 4348, line 6

Vusimuzi Mandla Mabuyakhulu gave direct evidence to this effect:

“On the 11<sup>th</sup> at 09h00 we met at Wonderkop and we exchanged views. It was then decided that we should approach NUM and enquire from them why they had prevented the employer from engaging with us. The gathering then marched to the offices of NUM. We walked to the offices, which are situated near the satellite police station. I was in the group immediately behind the front group. We certainly did not have violent intentions and none were discussed.”<sup>327</sup>

- 26.2 Mr Mabuyakhulu’s evidence that the strikers had “*decided that we should approach NUM and enquire from them why they had prevented the employer from engaging with us*” was not squarely challenged. The most that was put to him was that the strikers were disenchanted with NUM for a further reason, namely that the NUM officials in the Lonmin Quantam had allegedly shot a striker the night before, according to one of those who spoke during the discussion before the march.<sup>328</sup>
- 26.3 The mere fact that the strikers were marching on the NUM offices to protest the fact that NUM was being obstructive does not mean that they were doing with so any violent intent. Protest marches are a common feature of South African life. One cannot leap from the fact that people are engaging in a march in order to express a grievance to the conclusion that they wish to do physical harm.
- 26.4 An unidentified “informant” of Lonmin security appears to have the source of the rumour that the strikers were intent on torching the NUM offices on 11 August 2012. The unknown “informant” may have told a certain person by the name of “David” of the rumour, who in turn

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<sup>327</sup> Exhibit BBB8, para

<sup>328</sup> T, Day 49, 5350, line 11 – 5254, line 7.

reported this to Mr Motlogeloa.<sup>329</sup> It is unclear who “David” is.<sup>330</sup> No witness statement has been filed for him. Mr Motlogeloa conceded that it was a rumour and he didn’t know the reliability of its original source:

“MR MPOFU: But the rumour was what they were going to do at the NUM offices.

MR MOTLOGELOA: It is true, sir.

MPOFU: Yes. And you don't know the reliability of the original source of that rumour.

MR MOTLOGELOA: It is true.”<sup>331</sup>

26.5 The information that Mr Motlogeloa had received from “David” was also conveyed to NUM.<sup>332</sup> We submit that the Commission will be very slow to conclude that it has been established that the strikers were intent on burning the NUM office to the ground. Quite apart from the fact that the allegation is hearsay,<sup>333</sup> a rumour of a very similar nature, started the following day (that the NUM offices had in fact been burnt down) turned out to be false. Moreover, as Mr Mpofu pointed out, the offices were not torched the following day, in spite of the fact that the strikers then had every opportunity, and all the more reason, to do so.<sup>334</sup>

26.6 The NUM officials will no doubt rely upon the evidence that they were told by Lonmin security that the strikers were intent on torching their

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<sup>329</sup> Exhibit ZZ4, para 6.

<sup>330</sup> T, Day 264, 33255, lines 8 – 13.

<sup>331</sup> T, Day 264, 33294, line 22 – 33295, line 2.

<sup>332</sup> Exhibit ZZ4, para 6.

<sup>333</sup> The fact that rumour was recorded in the Lonmin Logbook does not make it any more true.

<sup>334</sup> T, Day 264, 33295, line 22 – 33298, line 2.

offices. It is necessary to highlight, however, that that was the extent of the warning given. The NUM officials were not told that the strikers' intention was to do physical harm to them. Mr Motlogeloa confirmed this: “MR MOTLOGELOA: Yes, the rumours were they were going to burn NUM offices, but no mention of lives.”<sup>335</sup> There is thus no evidence that the alleged violent intent extended to physically harming the NUM officials.

26.7 Killing or injuring someone in defence of property alone is justified only in exceptional circumstances. The leading case in this regard is *Ex parte die Minister van justisie: In re S v Van Wyk* 1967 1 SA 488 (A). In that case, a shopkeeper, plagued by burglars, tried various protective measures unsuccessfully and eventually, with the knowledge of the police, set up a loaded shotgun in his shop. The gun was set up in such a way that it would be triggered off by anyone entering the shop via a certain window and would cause a leg wound. A warning notice in English and Afrikaans was pinned to the shop door. A person broke in, triggered the shotgun and suffered fatal wounds. On a charge of murder, the shopkeeper successfully pleaded justification on the grounds of private defence.

26.8 The facts of that case were exceptional. In general, acting in defence of property is justified only if no other less drastic and equally effective means of defence is available, and provided proper warning is given of the presence or possible use of a potentially lethal weapon.<sup>336</sup>

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<sup>335</sup> T, Day 264, 33299, lines 17 – 19. We accept, however, that there may have been a fear that lives would be lost if the offices were torched.

<sup>336</sup> *Ex parte die Minister van Justisie: In re S v Van Wyk*, at 505–508

26.9 In this case, the NUM officials reacted to the information that the strikers might torch the offices by arming themselves, *inter alia* with at least one firearm, and then going out to confront the march. They did so intentionally in circumstances where they had been instructed by the Lonmin security personnel to lock up the offices and leave.<sup>337</sup> We submit that the only conclusion that can be drawn is that they voluntarily readied themselves for a fight against the strikers.

26.10 Only Mr Gegeleza gave evidence for NUM in relation to the actual incident.<sup>338</sup> His evidence in chief was unsatisfactory. Importantly, after AMCU's Counsel signalled a concern that leading questions were being put to the witness on this critical issue,<sup>339</sup> Mr Gegeleza was asked to describe the confrontation in his own words. His explanation departed from his witness statement in significant respects:

MR TIP SC: Well, the objection concerned the direction. I'm satisfied with the state of the record, I'm not going to pursue the direction any further. Let me – Mr Gegeleza, you've described now what the position was and where you were, where your colleagues were, where the marchers were moving. You just tell us from this point in your own words what then happened.

MR GEGELEZA: When we were just about then to meet these strikers so that it could be clear as to whether a fight would start or whatever would happen, I then heard gunshots. Then the strikers quickly retreated. I then noticed or realised that they were running away.

CHAIRPERSON: How many gunshots did you hear approximately?

MR GEGELEZA: It was more than three gunshots. We then chased

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<sup>337</sup> See, for example, Exhibit ZZ3, paras 2.18 – 2.23.

<sup>338</sup> Mr Setelele said that he was in the NUM office before the confrontation, but had left with the Lonmin Quatam by the time it occurred, see Exhibit YY1, paras 18 – 20. Nor was Mr Gcilitshana, T, Day 37, 3989, lines 18 – 23.

<sup>339</sup> A concern shared by the chairperson, T, Day 4244, lines 1 – 25.

them and then – we gave chase to them and then they ran towards the hostels and so we followed them to the hostel.<sup>340</sup>

26.11 Mr Gegeleza’s uncertainty about whether a “*fight would start*” or what would happen, at the time that he heard gunshots and just before he saw the strikers fleeing, is a far cry from the emphatic claim in his witness statement that “*I had no doubt that they were going to attack us and I was extremely afraid.*”<sup>341</sup>

26.12 For this reason alone, we submit that the Commission should find that the NUM officials did *not* act in self or private defence of life, putative or otherwise. Mr Gegeleza’s evidence simply did not confirm that there was a reasonable belief that the strikers would attack the NUM officials or offices.

26.13 But equally importantly, Mr Gegeleza’s version was contradicted by the evidence of the two Lonmin security guards who witnessed the incident. Mr Motlogeloa and Mr Dibakoane both saw what happened. They are, at least for this purpose, independent witnesses. Both say they saw the NUM officials attack the strikers. Neither of them say they saw stones being thrown at the NUM by the people marching towards the office.

26.13.1 Mr Motlogeloa evidence was as follows: “The RDO's came singing marching to the direction of the Hostel and they were more or less 2000 in total. They marched past the taxi rank and at a distance of 50 meters from the NUM office. A total of 30 NUM members started attacking the RDO's (protestors) with stones to protect their

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<sup>340</sup> T, Day 39, 4245, lines 1 – 18.

<sup>341</sup> Exhibit ZZ2, para 20.

offices. The RDO' s turned back and runaway. It was a chaos and everyone was running for safety.”<sup>342</sup> He maintained this stance under cross examination from NUM’s Counsel, saying “The NUM officials were the ones I saw pouncing on the strikers”.<sup>343</sup> Indeed his version was not seriously challenged by NUM’s Counsel.

26.13.2 Mr Dibakoane witness statement records the incident as follows: “As the crowd approached the MTN container located on the corner of the cross road in front of the NUM office, approximately 30 (thirty) NUM members started to run towards the crowd. I witnessed the two crowds clash in the general vicinity of the aforesaid MTN container. When the two crowd's clashed, there was “chaos” in that everybody scattered and started running in all directions. The train of the approaching striking workers seemed to have halted and the majority of persons appeared to have turned around and in an attempt to run away. I heard 2 (two) loud sounds which I took to be gunfire and watched as the crowd ran off in the opposite direction towards the Wonderkop Koppie (“Koppie”).”<sup>344</sup>

26.14 Moreover, we submit, the fact that the NUM officials instantly pursued the strikers is inconsistent with the notion that they feared for their lives or the safety of the NUM office. They effectively abandoned the latter. And the idea that 20 to 30 NUM members could so effectively dispel 2000 to 3000 people who’s sole intent was to do harm to them, stretches credulity. The conduct and reaction of the respective parties is far more consistent with the version that the strikers had no violent intentions,

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<sup>342</sup> Exhibit ZZ4, para 7.

<sup>343</sup> T, Day 33284, lines 18 – 24.

<sup>344</sup> Exhibit ZZ3, para 2.26.



were surprised by a NUM attack and fled for their lives when NUM “pounced”.<sup>345</sup>

26.15 Finally, it is clear that the NUM officials did not give a proper warning of the presence or possible use of a potentially lethal weapon, as our law requires.<sup>346</sup>

26.16 At the very least, the Commission should conclude that the subsequent vicious assault on Mr Mabuyakhulu by the NUM officials was not an act of self or private defence. His evidence on this score was not contradicted at all and must be accepted. It was as follows:

“8 ... I did not see who was shooting but it was from the side of the group of NUM members in NUM shirts.

9 We then ran away into different directions. I saw one person fall apparently from a gunshot. I then decided to go through the gap in the concrete fence known as “stop nonsense” and started to run and then I realised that I had been shot in the back. I continued running towards the bus rank. I then fell after losing power and feeling weaker and weaker.

10 I was still lying on the ground when the NUM members appeared. They first asked where I was working. I told them I was employed at Roland and they asked which stage and I said 25. Someone from the group said I was lying and that I am from Karee and they said I must be finished off.

11 I was then assaulted with an assortment of weapons until I lost consciousness. I regained consciousness whilst still at the scene where I had fallen. I then crawled until I got to the fence and crawled underneath the fence. Someone appeared and assisted me. He also phoned the police and my friend, whose number I had shown on my phone as ready to be dialled.”<sup>347</sup>

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<sup>345</sup> To use the words of Mr Motlogeloa, T, Day 33284, lines 18 – 24.

<sup>346</sup> *Ex parte die Minister van Justisie: In re S v Van Wyk*, at 505–508

<sup>347</sup> Exhibit BBB8, paras 8 to 11.

26.17 Mr Gegeleza admits that he and other NUM officials pursued the strikers through the gap in the concrete fence known as “stop nonsense”. It is suggested that this was justified because of a “*concern was that they should not have the opportunity to regroup and launch another attack on the NUM office and us*”.<sup>348</sup> That proposition is not correct. “Defence” against an anticipated future attack or a completed attack is never justified.<sup>349</sup>

26.18 Accordingly, we submit that the Commission should find, at least on a *prima facie* basis, that the NUM officials acted unlawfully and with a common purpose, alternatively unreasonably, on the morning of 11 August 2012.

## 27. **THE CONSEQUENCES OF NUM’S ATTACK**

27.1 The record abounds with evidence that the strikers believed that two of their number had been killed in the NUM incident. Time and again, they told the SAPS that they were carrying their weapons because they needed them for protection. This evidence includes:

27.1.1 **Exhibit Z1**, which is the video recording of the exchange between the strikers and Major General Mpembe at the railway line on 13 August 2013, read along with **Exhibit QQ2**, the translation and transcription of video Z1. One of the strikers is recorded as saying

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<sup>348</sup> Exhibit ZZ2, para 24.

<sup>349</sup> *Kantolo v R* 1912 EDL 154; at 146-147; *R 11 Stephen* 1928 WLD 170 at 172-173; *R v Wesl* 1925 EDL 80 at 88; *R v Nomahleki* 1928 GWL 8 at 9; *Du Plessis v Van Aswegen* 1931 TPD 332 at 335.

*“On Saturday when we came back the mine security shot at us ... Together with the people from NUM ... And killed two of our people ... That is the reason why we are carrying these weapons.... We did not fight with anybody ...”*<sup>350</sup> Another striker said: *“The person from NUM is the one ... Who shot at us ... He killed two of our people ... [Incoherent] ... We did not fight with anyone ... I am begging of you sirs ...”*<sup>351</sup>

27.1.2 **Exhibit HHH14**, the statement of Col McIntosh, in which he explains that one of the first things that Mr Noki said to the SAPS negotiating team on 14 August 2012, was “... *that they are there because members of the National Union of Mineworkers (NUM) killed some of their members the previous Friday at approximately 16h40.*”<sup>352</sup>

27.1.3 **Exhibit KKK56**, which is a transcript of parts of Mr Mathunjwa’s second address on 16 August 2012, in which it is recorded that one of the strikers said: *“Because we had two workers who were killed by NUM on Friday ...”*.<sup>353</sup>

27.2 The incident thus had dramatic consequences. It was undoubtedly a turning point. It was probably the first occasion that live ammunition was used. The NUM attack caused the strikers to arm themselves with more dangerous weapons as they recognised their vulnerability,<sup>354</sup> and at

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<sup>350</sup> Exhibit QQ2, page 9, lines 18 – 22.

<sup>351</sup> Exhibit QQ2, page 11, lines 3 – 7.

<sup>352</sup> Exhibit HHH14, para 6.

<sup>353</sup> Exhibit KKK56, page 2.

<sup>354</sup> See the statements of Mr Mohammed Cassim, the owner of the hardware shop R & H Supermarket Marikana; Exhibits HHH7.1 – 7.3. He says that

least some of them turned to muti in the belief that it might offer additional means of protection. It caused the strikers to move to the koppie. And there is a strong possibility that revenge was the motive for the march on 12 August 2012, which ended in the deaths of the Lonmin security guards.

## 28. **THE CONDUCT OF NUM'S TOP OFFICIALS**

28.1 Once the strike commenced, rather than taking steps to seek a negotiated solution, top NUM officials, including the NUM president, Mr Zokwana, began to label the strikers as “criminals” who needed to be dealt with “decisively” and to call for the intervention of the Special Task Force or the South African National Defence Force.

28.2 Mr Zokwana met with Lonmin officials in the afternoon of Sunday, 12 August 2012. Very little is known about this meeting. No minute, and no recording, of what was discussed has been produced. Mr Zokwana describes the meeting in the following terms:

“... [I] requested a meeting with Lonmin management to discuss the state of affairs. Lonmin was as concerned as I was and a meeting was arranged at Middelkraal for later that afternoon. Several Lonmin managers attended. Their briefing indicated a high level of risk that the strikers would increasingly resort to violent conduct in order to disrupt the operation of the mine. I expressed my view that a larger law enforcement presence, involving both Lonmin and the SAPS, was required at the mine to avoid further violence and loss of life.”<sup>355</sup>

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he opened his shop at 09h00 on 11 August 2012 (which would have been shortly after the incident between NUM and the strikers) and experienced a sudden great demand for pangas, axes and hatchets on that day.

<sup>355</sup> Exhibit BBB1, para 14.

28.3 It does not appear as if any other solution was discussed. Certainly, Mr Zokwana did not propose that all the trade unions come together with Lonmin management so as to establish the facts as to what was going on and attempt to find a resolution.<sup>356</sup>

28.4 After that meeting, Mr Zokwana phoned the Minister of Police, Mr Nathi Mthethwa. The sole purpose of the call to the Minister, which lasted for some time, appears to have been to communicate Lonmin's "frustration" that its security personnel had insufficient backup from the SAPS. This is only conclusion that can be drawn from the following exchange with AMCU's Counsel:

"MS BARNES: We know that what you did do on the 12th of August, Mr Zokwana, was phone the police, is that correct?

MR ZOKWANA: Yes, I said that in my view and in terms of what I was given by the company, that only the presence of the SAPS with the necessary skills in crowd control would assist and they were telling me how frustrated they were and if you read the statement of the witness security Motlogeloa, he will tell you of their frustrations that there was no backup from the police. The reason I called was because I was aware that if, to say that if nothing was done to increase the police – and I was doing that as an NUM person, not on behalf of other unions."<sup>357</sup>

28.5 Notably, this appears to have been the first time that the Minister of Police had been contacted. It was likely to have been at the behest, or at least with the blessing, of Lonmin.

28.6 Then, in a press statement issued the next day, 13 August 2012, NUM officials called for the intervention of the STF or the SANDF to deal

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<sup>356</sup> T, Day 43, 4624, lines 3 – 24.

<sup>357</sup> T, Day 43, 4624, line 25 – 4625, line 12.

with the strikers:

“We call for the deployment of a special task force or the SANDF to deal decisively with the criminal elements in Rustenburg and its surrounding mines” says Frans Baleni, the NUM General Secretary.

...

We appeal for the deployment of the Special Task Force as a matter of urgency before things run out of hand. For months on end we have argued that the situation in Rustenburg requires special intervention and we seeing no difference” says Baleni.

The NUM maintains that there has not been any clashes between its members and members of a rival union. “Our members have been attacked and that cannot be said to be clashes or rivalry, it is pure criminality” says Baleni. Meanwhile, there has not been any work at Karee mine today.”<sup>358</sup>

- 28.7 Notably, there was no attempt to condemn the shooting of miners by NUM branch officials on 11 August 2012 in this press statement.
- 28.8 The Commission will note that the communication strategies of NUM and Lonmin were, at least at that stage, almost perfectly aligned. On the same day, Mr Jamieson, addressed a letter to Ms Susan Shabangu, the Minister of Mineral Resources, in which he too called for the deployment of large numbers of SAPS members or the South African National Defence Force in order to “*resolutely bring the situation under control*”. He said:

“The State should bring its might to bear on this crucial sector of the economy using resources at its disposal to resolutely bring the situation under control. The police and/or army presence needs to be enhanced, sustained and planned to be supported for a period of a number of weeks.

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<sup>358</sup> Exhibit BBB7.

Police breakthroughs on arresting the murderers and perpetrators of these heinous crimes are required, perhaps working with the State intelligence agencies.”<sup>359</sup>

- 28.9 Moreover, despite the statement in NUM’s press release that “The NUM maintains that there has not been any clashes between its members and members of a rival union”, attributed to Mr Baleni, the same Mr Baleni, on 14 August 2014, began to accuse AMCU of being involved in the unrest. He did so in the following strident terms: “*they are trained in this vehicle of lying, they are professional liars, that is why their presence is not sustainable.*”<sup>360</sup> In so doing, NUM was echoing the accusations that Mr Mokwena was levelling at AMCU, in very similar terms, in his meeting with Provincial Commissioner Mbombo, also on 14 August 2014.<sup>361</sup>

## 29. **MR ZOKWANA’S CRITICISM OF AMCU**

- 29.1 Finally, we submit that when Mr Zokwana ought to have been showing leadership, and making every effort to bring an amicable end to the crisis, his sole objective on 15 August 2012 appears to have been to discredit AMCU, first in the eyes of the South African public and then before the SAPS. His criticism of Mr Mathunjwa and AMCU, to the effect that AMCU was behind the strike and behind the strikers’ demand for R12 500,=00, was wholly unwarranted.

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<sup>359</sup> Exhibit VVV1, pp 7 and 8.

<sup>360</sup> Exhibit QQQQ1.1 (Moneyweb Article) (The full paragraph reads as follows: “*Speaking to Moneyweb earlier in the day, National Union of Mineworkers Secretary General Frans Baleni, refuted Association of Mineworkers and Construction Union (AMCU) denials of its involvement in the unrest, stating that ‘they are trained in this vehicle of lying, they are professional liars, that is why their presence is not sustainable.’*”)

<sup>361</sup> See paragraphs 35.5 to 35.11 of these heads of argument.

29.2 On the morning of 15 August 2012, during the SAFM debate that we have discussed earlier, Mr Zokwana directly accused AMCU of instigating the march in which two strikers had been shot by the NUM officials.<sup>362</sup> He said *“the fact that their general secretary go to the mountain to address workers who even the Police could not approach proves that AMCU was behind this march”*. He also accused AMCU of knowing the planning behind the strike:

“MR ZOKWANA: And the fact that their secretary could go to the ..., nobody from NUM addressed the strikers, only AMCU did. It means therefore AMCU knew of the fact that there was a strike planned and the reason they could go and address them is because they knew the planning and of course how do you don’t know why they are striking?

29.3 Mr Mathunjwa’s response to this accusation was measured and conciliatory:

“MR MATHUNJWA: We are a union that has got a concern of the lives of the people. The reason, if you are the leader, you have to take a certain decision and you have to take a certain step in order to show your leadership. By attending to those employees was not because we orchestrated the march, it’s because we are a responsible union, that was the reason, it’s not that because the march was orchestrated by, I mean by us. And when we went to the mountain we never addressed the issue of AMCU and we were advised that when you go to that mountain you mustn’t shout any slogan of any union because these are the workers who are on strike ...”<sup>363</sup>

29.4 Mr Zokwana would not accept this. He accused AMCU of

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<sup>362</sup> See Exhibit LL, p 18, lines 1 – 5.

<sup>363</sup> Exhibit LL, p 19, line 20 – p 20, line 9.



- 29.4.1 being behind the march to the NUM offices;<sup>364</sup>
- 29.4.2 as well as the march to the Lonmin LPD offices on 10 August 2012;<sup>365</sup>
- 29.4.3 and the strikers demands;<sup>366</sup>
- 29.4.4 and of using violence and intimidation as a tactic.<sup>367</sup>
- 29.5 He persisted with some of these allegations in the meeting at Lonmin later that day with General Mpembe, Mr Mathunjwa and others.<sup>368</sup> And he concluded his address in that meeting by excluding any possibility of a joint initiative with AMCU: *“Even if NUM were to consider any form of any meeting. We won’t be with AMCU together. We won’t! That is the stand we take as a union. We are going to consult on our own, but meeting with AMCU on matters is not possible.”*<sup>369</sup>
- 29.6 As we will demonstrate below, there is no evidence that AMCU was behind the strike, the marches, the strikers’ demands or the violence. Mr Zokwana’s attempts to suggest otherwise were misinformed and

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<sup>364</sup> Exhibit LL, p 21, lines 18 – 21 “the fact that AMCU was the only union up to now who were able to address those workers proves beyond doubt that AMCU was behind this plan”.

<sup>365</sup> Exhibit LL, p 31, lines 16 – 19 “For one it is clear that only AMCU was aware of the planned march two weeks ago, the president of AMCU have said publicly to the public they ...”.

<sup>366</sup> Exhibit LL, p 32, lines 4 – 5 “MR ZOKWANA: They were aware of the planned demands ...”.

<sup>367</sup> Exhibit LL, p 32, lines 22 – 24 “AMCU have chosen out of their own volition to use violence as a weapon and to use intimidation.”

<sup>368</sup> Exhibit OO4, p 10 – 11.

<sup>369</sup> Exhibit OO4, p 12, lines 15 – 20 .

unfortunate. Indeed, we submit that if Mr Zokwana had displayed the type of leadership expected of a union President, events may have developed quite differently.<sup>370</sup>

- 29.7 Notably, Mr Zokwana ultimately “withdrew” his allegations in that AMCU was behind the events of 10 to 12 August 2012.<sup>371</sup>

### 30. **CONCLUSION ON NUM**

- 30.1 In the light of the evidence discussed above, we submit that, to borrow a phrase from Mr X, NUM was indeed in cahoots with Lonmin. At the very least, NUM made common cause with Lonmin on the fact that the strike had to be broken, if necessary by the use of force, and that AMCU should be portrayed as the villain behind the strike.

- 30.2 Nothing that we have said should be read as suggesting that the conflict in the week of 10 to 16 August 2012 was caused by inter-union rivalry between NUM and AMCU. It was not. NUM’s conduct can quite easily be explained by a concern that the strike represented a rejection of NUM. A quick end to the strikers’ action would have constituted a confirmation of NUM’s position (as discussed above) and a reaffirmation of NUM’s view (to its benefit) that no demands should be made outside of the established bargaining structures. But in trying to protect its waning position at Lonmin, NUM’s officials conducted themselves in a manner which aggravated the already tense situation at Lonmin. And then the Union did nothing to try to bring about a peaceful resolution to

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<sup>370</sup> Note that the idea in the SAfm interview was that the leaders of the two unions address the strikers together, see Exhibit LL, p 49, lines 6 – 25.

<sup>371</sup> T, T, Day 43, 4659, lines 7 – 4661, line 17.

the conflict.

- 30.3 We submit that NUM did not exercise its best endeavours to resolve the dispute that had arisen. We submit that NUM must bear its share of the responsibility for the conflict and, therefore, the deaths and injuries that occurred during the week of 10 to 16 August 2012. It must also be held responsible for directly causing injury to persons on the morning of 11 August 2012.
- 30.4 The findings and recommendations that, we submit, ought to be made in relation to NUM are set out in the conclusion to these heads of argument.

## Section E – Lonmin

### 31. **INTRODUCTION**

31.1 In this section we will deal with Lonmin's response to the strike.

31.2 We will seek to demonstrate that Lonmin's response to the strike was the following:

31.2.1 At the commencement of the strike, and thereafter, Lonmin refused to engage with the strikers in violation of its own policy, and in any event unreasonably.

31.2.2 Lonmin embarked on a campaign of misinformation both in relation to who was on strike and in relation to the causes of the strike.

31.2.3 Lonmin sought to create the impression that AMCU was behind the strike, despite having no evidence of this.

31.2.4 Lonmin took the position that it would only engage with the strikers through NUM despite the fact that it knew that the strikers had lost confidence in NUM, were in conflict with NUM and saw NUM as the enemy.

31.2.5 Lonmin persisted in its refusal to engage with the strikers despite being implored to do so by SAPS and even after 10 people had lost

their lives.

31.2.6 Lonmin wanted SAPS to break the strike and lobbied and colluded with SAPS to achieve this. It did so despite foreseeing that injury and death might occur as a result.

31.3 We will deal with each of these topics in turn below.

32. **LONMIN REFUSED TO ENGAGE THE STRIKERS IN VIOLATION OF ITS OWN POLICY, AND IN ANY EVENT, UNREASONABLY**

#### **THE MARCH ON 10 AUGUST 2012**

32.1 For the convenience of the Commission, we summarise the evidence relating to the march by the striking RDOs, as well as Lonmin's conduct, on the morning of 10 August 2012. This forms the backdrop to our submission that Lonmin acted in breach of its policy, and in any event unreasonably, from 10 August 2012 onwards, by refusing to engage with the strikers.

32.2 The summary is drawn primarily from several of the Lonmin witness statements. The statements are not entirely consistent with one another, but what follows is the most plausible account of what happened on that day.

32.3 Late in the day on Thursday, 9 August 2012, Lonmin's internal Mine Security personnel received information that a march was planned at the mine the following day, 10 August 2012. It was scheduled to commence

at the Wonderkop Sport Stadium, which is adjacent to the Wonderkop Hostel Complex on the property of Western Platinum Mine. Reports of this intelligence were given to Mr Henry Blou.<sup>372</sup> The reports suggested that it would be a march by the RDOs.<sup>373</sup> Mr Mokwena confirmed that on 9 August 2012, he learnt “*from security services that the RDOs at Karee had gathered at Wonderkop Stadium and resolved to embark upon a march, on the following day (being 10 August 2012), to the LPD offices.*”<sup>374</sup> Mr Mokwena was thus already well aware on 9 August 2012 that the march would be by the RDOs.

- 32.4 At approximately 06h00 on Friday, 10 August 2012, a number of RDOs started to gather at Wonderkop Stadium.<sup>375</sup> The size of the crowd quickly grew to approximately 1500 to 2000 people.<sup>376</sup> Mr Blou was informed that the group comprised mainly of RDOs.<sup>377</sup>
- 32.5 Shortly after 08h00, the group of people who had gathered outside the Stadium began moving towards the Rowland Shaft 4 way crossing.<sup>378</sup>
- 32.6 Mr Blou contacted Graeme Sinclair, Group Mainlining Emergency and Security Manager (“**Mr Sinclair**”) to advise him of this development.<sup>379</sup>

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<sup>372</sup> Exhibit RRRR1.1, para 7.

<sup>373</sup> Exhibit RRRR1.1, para 7.

<sup>374</sup> Exhibit OO15, para 3.3.

<sup>375</sup> Exhibit RRRR1.1, para 8.

<sup>376</sup> Exhibit RRRR1.1, para 11.

<sup>377</sup> Exhibit RRRR1.1, para 11.

<sup>378</sup> Exhibit RRRR1.1, para 12.

<sup>379</sup> Exhibit RRRR1.1, para 12. Mr Sinclair says in his witness statement (Exhibit FFFF1, para 21) that Mr Blou advised him of this development at 10h00, but this time seems most unlikely. It was Mr Sinclair who told Mr

- 32.7 In turn, Mr Sinclair made an urgent telephone call to Mr Kgotle and told him that a group of people were gathering near the Wonderkop Stadium.<sup>380</sup> Mr Sinclair advised Mr Kgotle that this appeared to be the planned march to the Lonmin LPD offices to present demands to management. Mr Kgotle told Mr Sinclair that he was not aware that any such march to the LPD offices had been authorised by Lonmin.<sup>381</sup>
- 32.8 At the same time Mr Blou telephoned the Provisional Commissioner for Police in the North-West Province, General Mbombo. He told General Mbombo of the march which was taking place and requested support from the Public Order Protection Unit of the SAPS. General Mbombo advised Mr Blou that she would ensure that the teams necessary to handle the situation would be sent out to the Lonmin Mine.<sup>382</sup>
- 32.9 After Mr Kgotle received the call from Mr Sinclair, he convened an urgent meeting with other members of management at the LPD offices, including Mr Frank Russo Bello and Mr Kwadi.<sup>383</sup> During the course of their meeting, Mr Sinclair regularly reported about developments vis-a-vis the strikers. He kept the meeting updated as the group of workers swelled to over 3000. Mr Kgotle says he suspected that these were RDOs. There were reports that morning of an almost unprecedented

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Mokwena that a large group of people had gathered near the Wonderkop Stadium and were intending to march to present their demands to management and (Exhibit OO15, para 4.1) and we know that Mr Mokwena knew this at approximately 08h00 (Exhibit NN, para 15).

<sup>380</sup> Exhibit OO16, para 12.

<sup>381</sup> Exhibit OO16, para 13.

<sup>382</sup> Exhibit RRRR1.1, para 13.

<sup>383</sup> Exhibit OO16, para 14.

absence of RDOs on the morning shift.<sup>384</sup>

32.10 Mr Sinclair contacted Mr Kgotle again and reported that the group was marching in the direction of LPD.<sup>385</sup> The strikers' route is indicated in yellow on Exhibit PP1.

32.11 Mr Kgotle asked Mr Sinclair to try to establish who was leading the march. At the same time he told Mr Sinclair that he and his colleagues had resolved not to accept any memorandum of demands from the strikers. The stated reason for this decision was that Lonmin had established procedures for the conduct of authorised mass meetings, gatherings and marches on its premises.<sup>386</sup>

32.12 At approximately 10h00, the crowd had pushed passed the 4 way stop at Rowland Shaft and was proceeding towards the LPD.<sup>387</sup>

32.13 By that stage, SAPS had arrived.<sup>388</sup> The members of SAPS met with Mr Kgotle, who told them that "this was an unprotected, unlawful strike"<sup>389</sup> and that Lonmin did not want to condone the "*unlawful action and that in this regard, Lomin was not prepared to receive the demands of the strikers*".<sup>390</sup>

32.14 Eventually, the march stopped at the Middelkraal 4 way stop, which is

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<sup>384</sup> Exhibit OO16, para 15.

<sup>385</sup> Exhibit OO16, para 16.

<sup>386</sup> Exhibit OO16, para 16.

<sup>387</sup> Exhibit RRRR1.1, para 14.

<sup>388</sup> Exhibit RRRR1.1, para 14.

<sup>389</sup> Exhibit OO16, para 18.

<sup>390</sup> Exhibit OO16, para 18.



approximately 600 metres from the LPD.<sup>391</sup>

32.15 Mr Sinclair, the SAPS Commander and Mr Blou approached the crowd.<sup>392</sup>

32.16 The mood of the crowd was not threatening.<sup>393</sup> As far as can be seen on the footage, no dangerous weapons were being carried.<sup>394</sup> Some workers may have been carrying sticks or knobkerries.<sup>395</sup>

32.17 Mr Sinclair attempted to ascertain what they wanted. In response to Mr Sinclair's approach, approximately six people in the crowd came forward. Speaking in fanagalo, they indicated that they wished to talk to management. Mr Sinclair informed them that management was not willing to negotiate with them.<sup>396</sup>

32.18 Mr Sinclair requested that they put their demands in writing. According to Mr Sinclair, they responded that they were illiterate and for that reason could not write down their demands. They reiterated that they wished to speak directly to management.<sup>397</sup>

32.19 Mr Sinclair and Mr Blou decided to go back to mine management at the LPD offices to inform them of the situation and take further

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<sup>391</sup> Exhibit RRRR1.1, para 15.

<sup>392</sup> Exhibit RRRR1.1, para 15; Exhibit FFFF1, para 22.

<sup>393</sup> Exhibit RRRR1.1, para 16.

<sup>394</sup> Exhibit W3.

<sup>395</sup> Exhibit EEEE2, para 6.

<sup>396</sup> Exhibit FFFF1, para 22.

<sup>397</sup> Exhibit FFFF1, para 23; Exhibit RRRR1.1, para 17.

instructions.<sup>398</sup> They proceeded to the LPD offices. At the LPD offices, Mr Sinclair spoke to Mr Kgotle again. Mr Sinclair informed Mr Kgotle that the marchers wanted to directly engage with management. Mr Kgotle, along with other members of the management team, indicated to Mr Sinclair that management would not speak to a “faceless crowd” when there were recognised and established structures in place at Lonmin to convey demands to management.<sup>399</sup>

32.20 Whilst Mr Sinclair and Mr Blou were in discussions with Mr Kgotle, the crowd managed to move past the 4 way stop.<sup>400</sup> By the time Mr Sinclair and Mr Blou walked out of the LPD offices, the crowd was in front of the building.<sup>401</sup> They arrived at the LPD offices at 11h33.<sup>402</sup>

32.21 At about 11h35, Mr Sinclair conveyed management's response to the strikers' representatives.<sup>403</sup> The representatives were told by Mr Sinclair that management would not negotiate with a “faceless crowd”.<sup>404</sup>

32.22 The crowd was at this stage outside the front office. It congregated in the car park area outside the LPD.<sup>405</sup>

32.23 The workers again asked to speak to management directly. But management's position had not changed. It refused to engage with the

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<sup>398</sup> Exhibit FFFF1, para 24.

<sup>399</sup> Exhibit FFFF1, para 25.

<sup>400</sup> Exhibit RRRR1.1, para 20.

<sup>401</sup> Exhibit RRRR1.1, para 20.

<sup>402</sup> Exhibit EEEE19A, entry for 10-08-2012 at 11:33.

<sup>403</sup> Exhibit EEEE19A, entry for 10-08-2012 at 11:35.

<sup>404</sup> Exhibit FFFF1, para 25.

<sup>405</sup> Exhibit OO17, para 7.4.

strikers.<sup>406</sup>

- 32.24 A note comprising an instruction to stop the unprotected march and work stoppage had been prepared by Mr Kgotle.<sup>407</sup> The note, which took the form of an internal communiqué dated 10 August 2012 was read out to the workers by Mr Sinclair.<sup>408</sup> It instructed them “*to stop the march and immediately report to your respective work stations*” and told them that “*Failure to comply with this instruction will lead to the termination of your employment*”.<sup>409</sup>
- 32.25 By that time, the application for an interdict had already been initiated by management. The marchers were informed of the impending interdict.<sup>410</sup>
- 32.26 Mr Sinclair addressed the crowd until approximately 12:03.<sup>411</sup>
- 32.27 At this stage, the crowd’s representatives addressed the marchers and they started to disperse. Many walked back to the Wonderkop Stadium and dispersed from there.<sup>412</sup>
- 32.28 In summary, the workers were told in no uncertain terms by Mr Sinclair that management would not meet with them, that there were recognised structures in place, and that any and all demands to management had to be conveyed through those structures. The “recognised structures” that

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<sup>406</sup> Exhibit FFFF1, para 27.

<sup>407</sup> Exhibit CCC4.

<sup>408</sup> See Exhibit FFFF6. as well as Exhibit OO17, para 7.4.

<sup>409</sup> Exhibit CCC4.

<sup>410</sup> Exhibit FFFF6.1.

<sup>411</sup> Exhibit EEEE19A, entry for 10-08-2012 at 12:03.

<sup>412</sup> Exhibit EEEE19A, entries for 10-08-2012 from 12:18 to 13:55.

management was referring to was of course NUM.

## **LONMIN’S POLICY**

32.29 Shortly after the Commission commenced, Lonmin made discovery of a document entitled “Lonmin’s Mining Security Procedures: Counter Industrial Action Response.”<sup>413</sup> It is apparent from the cover page of the document that:

32.29.1 the “original document date” is 9 May 2012;

32.29.2 it was approved by the “Manager: Mining Security” and that

32.29.3 it was last printed on 10 August 2012, the day that the strike commenced.

32.30 For convenience we will refer to the document simply as “the policy.”

32.31 Clause 8.3 of the policy is entitled “Unprotected Industrial Actions” and sets out what Lonmin is required to do in the event of unprotected strike action. At the heart of clause 8.3 is provision for a procedure which provides for talks between a management committee and a committee of the strikers. The relevant sections read as follows:

“8.3.6 A management committee will be identified that will engage in talks with the grievance committee that will include the Manager – Mining Security or such an appointed person and the ER liaison officer.

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<sup>413</sup> Exhibit XXX8.

- 8.3.7 A committee that will talk to management will be identified, and only those people will be allowed to engage in talks with management.
- 8.3.8 The committee as mentioned in section 8.3.7 of this document must preferably not exceed 4 people.
- 8.3.9 A central location within the security controlled area will be set up in order to facilitate the talks.”<sup>414</sup>

32.32 Both Mr Da Costa<sup>415</sup> and Mr Sinclair<sup>416</sup> confirmed in their evidence that what these sections require is for a management committee and a committee of strikers to be set up *in an unprotected strike* and for talks to be held between the parties. Mr Da Costa and Mr Sinclair confirmed that this was not done in the strike at hand. Indeed, both witnesses confirmed that Lonmin took no steps to implement the process envisaged in the sections quoted above.<sup>417</sup>

32.33 When Mr Mokwena gave evidence in the Commission in September 2014, almost two years after the policy had been discovered, he made the startling assertion, without any visible proof, that the policy was invalid. Mr Mokwena claimed that this was because the policy had not been authorised by three operational executives and signed by Exco. We submit that this assertion by Mr Mokwena cannot be accepted. We make this submission for six reasons:

32.33.1 Firstly, Mr Da Costa did not testify that the policy was invalid. On

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<sup>414</sup> Exhibit XXX8, p 14.

<sup>415</sup> T, Day 241, 30427, line 10 – 30438, line 20.

<sup>416</sup> T, Day 268, 34147, line 19 – 34148, line 3.

<sup>417</sup> Da Costa – T, Day 241, 30427, line 13 – 30428, line 20; Sinclair – T, Day 34148, line 15 – 34149, line 13.

the contrary, he testified that the reason it had not been followed during the strike was because management felt that it knew what the workers' concern was, felt that it had addressed that concern and considered the matter closed.<sup>418</sup>

32.33.2 Secondly, Mr Sinclair also did not testify that the policy was invalid. On the contrary, Mr Sinclair spoke about the policy in terms which gave the distinct impression that it was a working document the requirements of which he was familiar with:

“MS BALOYI: Now the committee that is contemplated in 8.3.7, was it constituted? Did management request of the strikers to constitute a committee that would speak to management?

MR SINCLAIR: I cannot speak for HR and say whether there was a committee constituted. I cannot speak for them. I definitely was not informed of a committee, although this, in this guidance procedure to security it is in there. Whether it was done I cannot speak. I think HR would be able to confirm that.

MS BALOYI: Yes, but from the security officials, or from your position there was no such committee of people involved with –

MR SINCLAIR: From the security position there was definitely none that I am aware of.

MS BALOYI: If there was you would have been aware of it?

MR SINCLAIR: If there was I am very confident that we would have, that security would have been asked to be involved.

COMMISSIONER HEMRAJ: The manager of mining security referred to in 8.3.6 would have come from your department, I suspect?

MR SINCLAIR: Myself or an appointee from me. Mr

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<sup>418</sup> T, Day 241, 30426, line 14 – 30427, line 2.

Chair.”<sup>419</sup>

- 32.33.3 Thirdly, neither Mr Da Costa nor Mr Sinclair were asked in re-examination whether they were aware of the validity of the policy or the requirements for the validity of the policy. If it was Lonmin’s case that the policy was invalid then we submit that this ought to have been done.
- 32.33.4 Fourthly, Lonmin has provided no explanation for why the policy was discovered or for why it was printed out on 10 August 2012, the day that the strike commenced. We submit that Lonmin had a duty to provide such an explanation, particularly in circumstances where the evidence established that this was the only policy which dealt directly with Lonmin’s duties in the event of unprotected strike action.<sup>420</sup>
- 32.33.5 Fifthly, Lonmin has provided no proof of the requirements for the validity of its policies. We submit, for the reasons set out above, that Mr Mokwena’s mere assertion in this regard is insufficient and that Lonmin had a duty to provide proper proof of the requirements it contends are necessary for the validity of its policies.
- 32.33.6 Sixthly, Mr Mokwena’s evidence on this aspect was contradictory and implausible. On the one hand he claimed that, not having been properly approved, the policy had no status at all. On the other hand he conceded that Lonmin’s security department may have used the

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<sup>419</sup> T, Day 268, 34148, line 18 – 34149, line 13.

<sup>420</sup> T, Day 291, 38090, lines 3 – 38091, line 2.

policy regardless.<sup>421</sup> Mr Mokwena cannot have it both ways. Either the policy was valid or it was not. If what Mr Mokwena meant was that Lonmin's security department used the policy despite its invalidity, then this is equally difficult to understand. It is, to put it mildly, difficult to conceive of how the security department in a multi-national company could not have been aware of the requirements for a valid policy or how an invalid policy could have been used without being detected. None of this has been explained by Lonmin.

- 32.34 For all of the above reasons, we submit that Mr Mokwena's claim that the policy was invalid should be rejected. We submit that the evidence establishes that, at the commencement of the strike on 10 August 2012, Lonmin was required to take steps to establish the necessary management committee and committee of strikers to engage in talks and that its failure to do so meant that it acted in violation of its own policy.

**LONMIN'S REFUSAL TO ENGAGE WITH THE STRIKERS WAS IN ANY EVENT UNREASONABLE**

- 32.35 Even however if we are wrong in our above submissions (which we deny) we submit that Lonmin's refusal to engage with the strikers at the commencement of the strike was manifestly unreasonable.

- 32.35.1 Firstly, as we have demonstrated above, Lonmin was, as a result of a particular combination of circumstances, facing a serious and volatile situation which had the potential to escalate into the sort of violent unprotected strike action which had engulfed Implats earlier

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<sup>421</sup> T, Day 291, 38096, lines 2 – 11.



in the year. Lonmin was fully aware of this. For this reason alone, we submit that it was unreasonable of Lonmin to refuse to engage with the strikers.

32.35.2 Secondly, as we have demonstrated above, Lonmin had already engaged in negotiations with the RDOs. Having done so, it was impermissible for Lonmin to change its stance and refuse to engage at all. Lonmin gives its prior engagement with the RDOs as a reason justifying its refusal to talk to them.<sup>422</sup> But there is no logic to this. In fact the opposite is true. Lonmin's prior negotiations provided a basis for further talks with the RDOs and the representatives who had approached Da Costa formed the logical core of a strikers' committee that ought to have been established.

32.35.3 Lonmin contends that engaging with the strikers would have set a *bad precedent*. This it contends was because "*other workers in the business were watching the situation and if the RDOs were successful to bargain outside the engagement structures, it would set a very bad precedent.*"<sup>423</sup>

32.35.4 We submit that this argument holds no water because, as we have demonstrated above, Lonmin had already negotiated with the RDOs outside the collective bargaining structures. If there was a precedent to be set, bad or otherwise, Lonmin had already set it. This was accordingly no basis for Lonmin to refuse to engage with the strikers. This was readily conceded by Mr Ramaphosa in his cross

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<sup>422</sup> See Mokena's Supplementary Statement in Exhibit WWWW1, p 189, para 9.

<sup>423</sup> Exhibit JJJJ1, p 1 – 2.

examination.<sup>424</sup>

32.35.5 It was also manifestly unreasonable for Lonmin to refuse to engage the strikers *because they were acting outside the collective bargaining structures*.<sup>425</sup> This is because, as we have demonstrated above, Lonmin recognised that its collective bargaining structures were of doubtful relevance in 2012. Given this fact, we submit that far from justifying a refusal to engage the strikers, the fact that the strikers were acting outside the structures was all the more reason to engage with them.

32.36 For all of the above reasons, we submit that Lonmin's refusal to engage with the strikers was manifestly unreasonable.

33. **LONMIN KNEW WHO THE STRIKERS WERE AND WHAT THEIR DEMAND WAS**

33.1 It is necessary to highlight that although Lonmin management chose to feign ignorance of who the marchers were (calling them a "faceless crowd") and claimed not to know what they were demanding,<sup>426</sup> it is clear that Lonmin knew precisely who and what it was dealing with.

33.2 This is illustrated by several pieces of evidence.

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<sup>424</sup> T, Day 272, 34619, lines 2- 13.

<sup>425</sup> See Mokwena's supplementary statement, Exhibit WWWW1, p 189, para 10.

<sup>426</sup> See, for example, Exhibit OO15, para 6.3 (Mr Mokwena's statement). See also, Exhibit LL, p 3, lines 15 – 20: "*Mr Mokwena: ... At no point did we receive any memorandum of piece of paper to say this is who we are and these are our concerns ...*".

## LONMIN WITNESSES OWN EVIDENCE

33.3 Mr Mokwena's 9 August 2012 communique stated that *"it has been brought to management's attention that a group of employees, primarily Rock Drill Operators are planning to embark on a march tomorrow morning instead of reporting for their normal duties."*<sup>427</sup>

33.4 Mr Da Costa's statement<sup>428</sup> states the following:

"I was in the LPD with other members of Lonmin's management team when Sinclair entered the offices. Sinclair reported that the crowd which had marched to the 4 way stop close to the LPD (numbering approximately 3000) stated that they wished to speak to Lonmin management. I knew that they wanted to talk about the R12500 issue."<sup>429</sup>

## THE INTERDICT

33.5 The interdict application launched by Lonmin on 10 August 2012, cited NUM as the First Respondent, AMCU as the Second Respondent and "the persons whose names appear in Annexure "A1" as the Third to further respondents.

33.6 The founding affidavit went on to describe the "Third to further respondents" as follows:

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<sup>427</sup> Exhibit WWWW1, p 8. See also Mokwena's supplementary statement in Exhibit WWWW1, p 186 at paras 3 – 6.

<sup>428</sup> This is a statement by Mr Da Costa that appears in Exhibit WWWW1 at p 270. It is similar but not identical to Mr Da Costa's original statement – OO17.

<sup>429</sup> At para 56.

“The third to further respondents whose names are reflected in Annexure “A1” are all employees of the applicants. The list comprises almost 3000 employees. The third to further respondents are participating in the unprotected strike in breach of the provisions of section 64(1) of the LRA. The third to further respondents are making unreasonable demands which primarily centre upon a demand for a basic wage increase to R 12 500 per month.”<sup>430</sup>

33.7 The founding affidavit explained the cause of the strike in the following terms:

“During the course of July 2012, the applicants have noted a continuing trend by certain groups of employees, acting on their own and in the absence of any trade union representation, insisting to engage management in separate wage negotiations.”<sup>431</sup>

And

“the first respondent has distanced itself from the conduct of the third to further respondents...it is not a co-ordinated effort by the first.... The third to further respondents appear to have resorted to self help in pursuit of their demands.”<sup>432</sup>

33.8 We submit that it is plain from the above that, as at 10 August 2012, Lonmin knew precisely who was on strike (the vast majority of its RDOs) and what the reason for the strike was (the RDOs demand for a wage increase to R 12 500).

33.9 If there could still be any doubt in this regard Mr Mokwena conceded

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<sup>430</sup> Exhibit RR, para 8.

<sup>431</sup> Exhibit RR, para 9.

<sup>432</sup> Exhibit RR, para 21.

under cross examination that he was aware: *“that Lonmin’s RDOs were on strike”*;<sup>433</sup> *“that the reason for the strike was a wage demand by RDOs”*;<sup>434</sup> *“that the RDOs were pursuing their demand through self help and had embarked on an unprotected strike as a result”*;<sup>435</sup> that *“essentially what had happened at Impala had happened at Lonmin in the sense that the RDOs at Lonmin had also taken matters into their own hands in support of their demand”*;<sup>436</sup> and that in short *“the contagion that Lonmin had feared as a result of the Implats strike had come to pass.”*<sup>437</sup>

## **PLACARDS ON 10 AUGUST 2012**

33.10 Finally, although no formal memorandum had been prepared and none was handed over, some of the marchers were carrying placards on which their key demand was expressed. Lonmin’s security made a video recording of the march, often focussing in on these placards. For example, Exhibit W3, from 02:14 on the recording, shows a sign carried by a marcher which read “We want R12500”.

33.11 Having regard to all of the above, we submit that there can be no doubt that Lonmin was at all times fully aware of who was on strike and of what the reason for the strike was.

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<sup>433</sup> T, Day 291, 37942, line 24 – 37943, line 1.

<sup>434</sup> T, Day 291, 37944, lines 8 – 10.

<sup>435</sup> T, Day 291, 37944, lines 11 -1 4

<sup>436</sup> T, Day 291, 37944, lines 15 – 20.

<sup>437</sup> T, Day 291, 37946, lines 6 – 12.

34. **LONMIN’S CAMPAIGN OF MISINFORMATION**

34.1 The evidence shows that Lonmin embarked on a campaign of misinformation in order to distort the true facts pertaining to who was on strike and what the reason for the strike was. The campaign was directed at the general public, though the media and also specifically at the SAPS.

34.2 As we will seek to demonstrate below, Lonmin sought to spread two key messages in this regard: to disavow knowledge of the identity of the strikers and to create the impression that the strike was caused by rivalry between NUM and AMCU. We submit that these two messages had the same fundamental goal: to remove the locus of control and responsibility for the strike from Lonmin.

**“FACELESS” STRIKERS”**

34.3 Mr Mokwena admitted that he made the following statements to SAPS:

34.3.1 He told General Mpembe that *“the protestors were faceless and the company does not know them.”*<sup>438</sup>

34.3.2 He told General Mbombo that *“those leading the strike were faceless and the company does not know them.”*<sup>439</sup>

34.3.3 He told General Phiyega that *“the protestors were not Lonmin’s*

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<sup>438</sup> T, Day 291, 38025, lines 8 – 11.

<sup>439</sup> T, Day 291, 38025, lines 12 – 19.

*employees and were unknown to them.”<sup>440</sup>*

- 34.4 Under cross examination, Mr Mokwena’s attempted to explain his use of the term “faceless” away by saying that he had not used the term to mean that the strikers were not known to Lonmin but rather that they were acting outside the structures. When pressed under cross examination Mr Mokwena floundered and ultimately had to concede that the SAPS would not have understood him to be saying the latter:

“CHAIRPERSON: And you must have known from your records who the RDOs were. Faceless, what does faceless mean? Faceless surely means we don’t know who they are. In fact it says that ‘They were faceless, the company does not know them.’

MR MOKWENA: Yes, Chair

CHAIRPERSON: Now doesn’t that mean that these were people whose identity was not known to you.

MR MOKWENA: No – no, I did not mean that

CHAIRPERSON: What else can it mean?

MR MOKWENA: What I meant Chair, was our tradition of receiving demands and memorandum is normally done in a structured way, written down, knowing who the structure or the constituents who are presenting the memorandum - so I used the word ‘faceless’ simply saying we do not have a structure, we do not have a constituency that’s recognised and therefore these are people that actually don’t fall in that structure. That the reference to –

CHAIRPERSON: And did you think that the police to whom you made that statement would have understood you to be, to mean that?

MR MOKWENA: I did not get any question from the police in terms of we don’t understand, explain what it means

CHAIRPERSON: That wasn’t the question. The question was, did you think that by using that language, when you used that language that the police would understand that you didn’t mean faceless in the

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<sup>440</sup> T, Day 291, 38025, line 24 – 38026, line 7.

sense that you didn't know who they were, despite what the statement says, but you would have meant that these were people actually outside the structures. Did you think the police would understand you to be saying that?

MR MOKWENA: Probably, they would not have understood that, Chair.”<sup>441</sup>

34.5 Mr Mokwena also conceded that he understood that the SAPS wanted to establish the identities of the strikers and that his repeated statements that they were “faceless” were entirely unhelpful in this regard.

“MR SEMENYA SC: And when the police were with you, I know you have explained the context, you used the word ‘faceless’ but it could not have escaped you that they are interested in the identity of the individuals who are responsible for the mayhem, correct?

MR MOKWENA: Yes.

MR SEMENYA SC: And it was not helpful to say, I can't give you those identities because they are faceless, with whatever the context you put to that word.

MR MOKWENA: Yes.”<sup>442</sup>

## “UNION RIVALRY”

34.6 Mr Mokwena admitted that he told the National Commissioner, General Phiyega, that the strike was caused by rivalry between AMCU and NUM.<sup>443</sup>

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<sup>441</sup> T, Day 291, 38029, line 9 – 38030, line 19.

<sup>442</sup> T, Day 291, 38093, lines 16 – 25.

<sup>443</sup> T, Day 291, 38025, line 25 – 38026, line 6. General Mbombo also said that she was told by Lonmin that the strike was caused by rivalry between NUM



34.7 Lonmin sought to ensure that the same message was put out in the media. Thus in a media release issued on 12 August 2012<sup>444</sup> Lonmin stated the following:

“Two Lonmin employees have been killed and six injured in three incidents of suspected inter-union conflict at the company’s Western Platinum operations.

The company immediately requested the support of the South African Police Services (SAPS) to try and contain the violence in support of its own security procedures.

The incidents followed an illegal work stoppage and protest march on Friday 10 August 2012 by approximately 3000 Lonmin Rock Drill Operators which quickly spiralled into criminal actions by rival factions.

The illegal march was accompanied by incidents of intimidation and violent action against employees who wanted to report for duty. Four employees trying to report for work were injured on Friday 10<sup>th</sup>, two of whom were hospitalised after receiving gunshot wounds allegedly by rival union supporters. A further two employees were hospitalised on Saturday 11 August, also as a result of gunshot wounds.” (emphasis added)

34.8 Lonmin ensured that this misinformation was given to SAPS. It is for this reason that the following false statement appears in Exhibit L:

“Friday 10 August 2012

Protestors wounded two persons during a clash of rival unions”<sup>445</sup>

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and AMCU (Day 177, 21287, line 21 – 21294, line 13) as did General Naidoo (Day 188, 22855, line 15 – 22856, line 21)

<sup>444</sup> This document does not appear to have been made an exhibit. It appears at p 293 of Lonmin’s bundle of documents (Volume H).

<sup>445</sup> Exhibit “L”, slide 6.

34.9 It has now been established that the two workers wounded at Lonmin on the evening of Friday 10 August 2012 were wounded as a result of fire from Lonmin security guards<sup>446</sup> and not from “*protestors ... during a clash of rival unions.*”<sup>447</sup> There is no doubt that Lonmin was aware of the correct facts at the time. The evidence has established that Lonmin deleted the relevant information in the documents provided to the Commission.<sup>448</sup>

34.10 It was put to Mr Mokwena during cross examination that there was no evidence that the strike was caused by rivalry between the two unions. Mr Mokwena’s only response was to point rather lamely to the fact that there was no love lost between the two union Presidents, Mr Mathunjwa and Mr Zokwana during the meetings held in the week of 9 to 16 August 2012.<sup>449</sup> While that may be so, it hardly constitutes a basis for attributing injuries and even deaths to rivalry between the two unions. Yet this is what Lonmin did in the media statement it issued on Monday 13 August 2012.<sup>450</sup>

“Lonmin regrets to advise that a further two Lonmin employees have lost their lives in the violent incidents sparked by suspected union rivalry taking place at the mine. This brings the total to four employees who have been killed as a result of the rivalry.” (emphasis added)

34.11 Lonmin did not stop there and in October 2013, despite having had over

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<sup>446</sup> See for example, T, Day 265, 33560, lines 15 – 23

<sup>447</sup> Exhibit “L”, slide 6.

<sup>448</sup> See, for example, T, Day 267, 33858, line 21 – 33863, line 1.

<sup>449</sup> T, Day 291, 38032, line 20 – 38033, line 10.

<sup>450</sup> This document does not appear to have been made an exhibit. It is at p 295 of Lonmin’s bundle of documents (Volume H)

a year to reflect on these matters, it attributed the massacre at Marikana on 16 August 2012 to union rivalry. It did so in a speech given by its CEO, Ian Farmer, on the eve of his retirement, in the following terms:

“As already mentioned AMCU and NUM have been in fierce competition for members.

AMCU gained their foothold in the platinum industry at Impala Platinum in early 2012. Historically, the lives of smaller unions that have overpromised and then not been able to deliver have been fairly short lived.

However, AMCU has exploited the fact that the NUM are seen to be out of touch with their grassroots membership. We all underestimated the risk this competition posed and it ignited with the violent and tragic consequences in an altercation with the police on 16 August 2012. The industrial relation landscape has been fractured ever since.”<sup>451</sup>

34.12 Unfortunately this statement reveals that more than a year after Marikana, Lonmin is still intent on blaming the massacre on union rivalry, despite there being not a shred of evidence of this.

34.13 Lonmin’s “scenario planning document” that has been referred to above reveals that Lonmin had an extremely hostile attitude towards AMCU during 2012 labelling it the “hyena”<sup>452</sup> and accusing it of all manner of evil, including “covert operations” and “intimidation tactics.”<sup>453</sup> The scenario planning document candidly records that “*We know NUM, we prefer to mainly deal with them.*”<sup>454</sup> This explains a particularly blatant

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<sup>451</sup> The speech may be found at <http://www.bdlive.co.za/opinion/bdalpha/2013/10/11/ian-farmer-apologies-for-marikana-and-hope-for-sa>.

<sup>452</sup> VVVV1, p 153

<sup>453</sup> VVVV1, p 139.

<sup>454</sup> VVVV1, p 140.

instance of misinformation perpetrated by Lonmin during the week of 9 and 16 August 2012 and subsequently: the claim that AMCU was behind the strike. It is to this topic that we now turn.

35. **LONMIN SOUGHT TO CREATE THE IMPRESSION THAT AMCU WAS BEHIND THE STRIKE**

35.1 We have dealt above with the Minute of the meeting between Lonmin and AMCU on Monday 13 August 2012.<sup>455</sup> We demonstrated that the Minute creates two very serious false impressions about AMCU. First, it creates the impression that AMCU did not denounce violence in the meeting when the truth is that it did so. Second, it creates the impression that AMCU was tabling a demand on behalf of the strikers when the truth is that AMCU stated categorically in the meeting that it was not doing so. We noted that Mr Da Costa could not explain the very serious discrepancies between what is contained in the Minute and what actually happened in the meeting. We submitted that having regard to the nature of the discrepancies and to the additional evidence of Lonmin attempting to create the false impression that AMCU was behind the strike, it is difficult to avoid the inference that the Minute was intentionally misleading. It is that additional evidence that we deal with below.

35.2 It will be recalled that Mr Mokwena conceded that he understood, that while there may have been suspicions in this regard, there was no proof that AMCU was behind the strike. He conceded further that this remained his understanding throughout the relevant period and in particular on 14 August 2012 when he met with General Mbombo.

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<sup>455</sup> Exhibit XXX9.

35.3 However, in his supplementary statement which he signed on 1 September 2014,<sup>456</sup> Mr Mokwena said the following:

“General Mbombo requested the meeting during the late afternoon of Tuesday 14 August 2012. During the meeting I told General Mbombo that Lonmin believed that AMCU was behind the unprotected strike and that Lonmin would like SAPS to arrest those persons who were orchestrating violence and loss of life.

I also drew Mbombo’s attention to various comments which AMCU had made in the media. I also mentioned a recording of a telephone conversation between an AMCU official and Kwadi.

I understood this telephone conversation occurred shortly after a number of AMCU officials had spoken to the strikers at the koppie. Kwadi apparently had recorded this conversation. Kwadi told me that during this conversation Dumisani Nkalitshana tells him that AMCU officials had been to the koppie on 13 August 2012, and had a clear instruction from the strikers that Lonmin will remain ungovernable unless it agrees to the strikers’ wage demands.

It is apparent from the transcript of my conversation with Mbombo that I undertook to provide her with a copy of this recording, as I viewed these threats of violence and intimidation in a serious light and wanted SAPS to urgently take steps to address the situation.”<sup>457</sup>

35.4 We point out that these allegations were made for the first time in Mr Mokwena’s supplementary statement which is dated, we emphasise, 1 September 2014. We point out further that Mr Mokwena confirmed the contents of this supplementary statement under oath in the Commission on 12 September 2012.<sup>458</sup>

35.5 In his meeting with General Mbombo on 14 August 2012, Mr Mokwena accused AMCU of being behind the strike on four separate occasions. He

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<sup>456</sup> Exhibit WWW1, p 185 – 196.

<sup>457</sup> Exhibit WWW1, p 191, para 16 to p 192, para 19.

<sup>458</sup> T, Day 290, 37878, lines 3 – 25.

did so in the following terms:

“Because its very clear AMCU is behind it, very clear, in actual fact we have a recording that we want to play for you. One of them made a clear statement on television last night, that is why I phoned you, I said well I am not a trained intelligence officer but you know these statements they actually they have been to the mountain, they have spoken to the people and they are issuing statements that they have made and they have presented demands to management of 12 500. So we expect people to be arrested because.....”<sup>459</sup>

“Secondly, we believe, honestly speaking with our poor intelligence that it is very, very clear AMCU leaders are behind that. And if they do not get arrested and we do paperwork afterwards, you know, the people who will gather at the mountain will still believe their leaders who are doing this.”<sup>460</sup>

“We have rejected quite a number of positions and people indirectly trying to start negotiating, AMCU you will notice their press statements. So they are throwing stuff into the media to say, oh we’ve asked management to give everybody 12 000. Now the media are going to say, but management then you must talk to AMCU.”<sup>461</sup>

“9 people have died, we are not going to start talking to parties suddenly who say ‘ja but you know these workers they want money’, and that’s what AMCU are saying. So now it means they are taking over.....they are the leaders of that group.”<sup>462</sup>

35.6 Under cross examination Mr Mokwena confirmed that the only “evidence” on which he based these extremely serious allegations against AMCU was the “recording” referred to in paragraphs 17 to 19 of his supplementary statement and “AMCU’s press statement.” Mr Mokwena went on to concede however that he had never heard the recording.<sup>463</sup> Lonmin has since confirmed that the recording is no longer in existence -

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<sup>459</sup> Exhibit WWWW1, p 21.

<sup>460</sup> Exhibit WWWW1, p 22.

<sup>461</sup> Exhibit WWWW1, p 23.

<sup>462</sup> Exhibit WWWW1, p 24.

<sup>463</sup> T, Day 291, 37999, lines 17 – 19.

if indeed it ever was. As for “AMCU’s press statement”, the only press statement issued by AMCU during the week of 9 to 16 August 2012 was the one issued on 14 August 2012. We have dealt with that press statement in detail above. It does not bear out any of the allegations made by Mr Mokwena. But in any event Mr Mokwena conceded in his cross examination that he had not read the press statement prior to his meeting with General Mbombo:

“CHAIRPERSON: When you say on page 4 of this document, page 23 of your bundle, fourth line at the foot of the page ‘You will notice their press statements. So they are throwing stuff into the media to say oh we’ve asked management to give everybody 1200. Now the media are going to say but management you must talk to AMCU.’ Do I understand you to say that you made that statement to general Mbombo without personally having seen any press statements that AMCU had issued.

MR MOKWENA: Yes, Chair.”<sup>464</sup>

- 35.7 When questioned about what he was seeking to achieve by making these allegations to General Mbombo, Mr Mokwena ultimately conceded that he was attempting to persuade General Mbombo to get the police to arrest AMCU leaders:

CHAIRPERSON: On page 21, halfway down the page ‘our priority is we want people arrested, okay because it’s very clear that AMCU is behind it, very clear. In actual fact we have a recording of what took place here.’ We now know that indications are that the recording doesn’t exist. At the foot of the page ‘That’s why its very important for us that we want to see somebody arrested so the message gets across that the nine people were killed, somebody was arrested. Secondly we believe honestly speaking with our poor intelligence its very, very clear AMCU leaders are behind that and if they do not get arrested’ that’s AMCU leaders don’t get arrested ‘and we do the paperwork afterwards, you know, the people gathered at the mountain

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<sup>464</sup> T, Day 291, 38005, line 19 – 38006, line 2.

will still believe that their leaders were doing this.’ Now a very serious allegation. ‘Its’ very clear that AMCU leaders are behind this and if they do not get arrested,’ is that not an attempt to persuade General Mbombo to get the police to arrest the AMCU leaders? Is that not what those words mean?

MR MOKWENA: Yes, Yes, Chair it does mean that and this is a follow up to the conversation I had with legal fraternity that I’d based this on what Jomo had told me about Dumisani had said that Lonmin will be made ungovernable, and knowing that Dumisani at the time was the national organiser of AMCU, so that’s a follow up to what Jomo had told me about the tapes and there’s no other reference other than that tape.”<sup>465</sup> (emphasis added)

35.8 Having conceded under cross examination that there was no evidential basis for his allegations against AMCU, Mr Mokwena was forced to retract them. Mr Mokwena attempted to explain and justify his conduct by stating upon reflection two years down the line and since it was apparent that there was no recording in existence, he was prepared to retract his allegations against AMCU.

“MS BARNES: Isn’t it correct to say that without you being satisfied from your own direct knowledge of what you say here that there was no basis to say it to General Mbombo.

MR MOKWENA: Well upon reflection two years down the line, that afternoon when Jomo told us I had no reason to doubt or that he would have fabricated that I trusted him. Now that you say if there is no such a tape obviously I need to say well it was a bad judgment on myself, but at that time when he came to me as a senior manager and said I’ve got this, I believed him.”

MS BARNES: So are you now prepared to retract that statement?

MR MOKWENA: Yes, I’m prepared to retract it.”<sup>466</sup>

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<sup>465</sup> T, Day 291, 38010, line 2 – 38011, line 3.

<sup>466</sup> T, Day 291, 38004, lines 11 – 25.



35.9 We point out however that these allegations that AMCU was behind the strike did not appear in Mr Mokwena's original statement (undated and filed in November 2012) or in his subsequent statement (dated 4 February 2013)<sup>467</sup> but appeared for the first time in Mr Mokwena's supplementary statement dated 1 September 2014. It is therefore disingenuous – if not dishonest – for Mr Mokwena to seek to explain and justify his conduct on the basis that he had had two years to reflect on these matters. The truth of the matter is in fact the opposite: despite having had two years to reflect on these matters, Mr Mokwena made false allegations in a statement which he confirmed under oath as recently as 12 September 2014.

35.10 Ultimately Mr Mokwena retracted all his allegations that AMCU was behind the strike in writing.<sup>468</sup>

35.11 There is, in the result, no evidence that AMCU was behind the strike. We respectfully point out that Lonmin's campaign to blame AMCU for the strike obtained some credence – at least in the mind of the public – and has been profoundly damaging and unfair to AMCU.

36. **LONMIN TOOK THE POSITION THAT IT WOULD ONLY ENGAGE WITH THE STRIKERS THROUGH NUM**

36.1 We have demonstrated above that despite Mr Mokwena making statements to the effect that Lonmin was prepared to meet with *unions* and *leaders of unions*, Lonmin's position was that it was only prepared to

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<sup>467</sup> Exhibit WWW1, p 159 – 176. This statement is similar but not identical to Mr Mokwena's original statement filed in November 2012.

<sup>468</sup> Exhibit WWW2, p 5.

engage with the strikers through NUM.<sup>469</sup> This was despite the fact that Lonmin knew that the strikers had lost confidence in NUM and indeed had been in conflict with NUM. Mr Mokwena conceded this under cross examination.

“MS BARNES: I take it you knew during the week of 9 to 16 August 2012 that NUM were seeking to persuade the strikers to go back to work? You were aware of that?

MR MOKWENA: Yes

MS BARNES: Essentially, NUM wanted to break the strike correct?

MR MOKWENA: Sorry?

MS BARNES: NUM wanted to break the strike

MR MOKWENA: Yes

MS BARNES: I take it you also knew that on Saturday, Saturday 11 August 2012 there was an incident where the striking workers were marching towards the NUM offices and NUM officials came out of the offices and opened fire. You were aware of that incident?

MR MOKWENA: Yes

MS BARNES: And originally the strikers thought that two of their number had in fact been killed as a result but it turned out that people had been injured but not killed as a result of that incident. You were aware of that?

MR MOKWENA: Yes.

MS BARNES: And of course you were aware that when Mr Zokwana attempted to address the strikers on the koppie on 15 August 2012, he received a very negative reception. The strikers in fact sang a song which had the words ‘kill the NUM’ in it, you were aware of that?

MR MOKWENA: Yes, I am.

MS BARNES: You were aware of all of that at the time, correct? I mean you were aware of all those events as they were unfolding?

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<sup>469</sup> See T, Day 291, 37974, line 11 – 37976, line 4.

MR MOKWENA: Yes.

MS BARNES: And despite that your message to the strikers was if you come back to work we will negotiate with you but only through NUM?

MR MOKWENA: Yes.<sup>470</sup>

### 36.2 Mr Da Costa was cross examined along similar lines:

“MR BUDLENDER SC: So the striking workers didn’t have confidence in the NUM? The NUM itself says that.

MR DA COSTA: Yes, I see they say so.

MR BUDLENDER SC: The RDOs felt they had been let down by NUM in their negotiations with management? Are you aware of that?

MR DA COSTA: They never said that as such to me but it could be so.

MR BUDLENDER SC: There was a physical confrontation on Saturday 11 August when the strikers marched to the NUM offices, correct?

MR DA COSTA: That’s correct.

MR BUDLENDER SC: Some of the strikers who marched on the NUM offices were armed with dangerous weapons.

MR DA COSTA: That’s correct.

MR BUDLENDER SC: NUM officials fired shots at the strikers. They injured two of the strikers and at the time the strikers thought that those two of their members had been killed by the NUM officials.

MR DA COSTA: Yes, that’s right.

MR BUDLENDER SC: It was a source of great anger on their part because they thought their members had been killed by union officials?

MR DA COSTA: That’s how I understand it yes.

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<sup>470</sup> T, Day 291, 38022, line 22 – 38024, line 8.

MR BUDLENDER SC: The strikers repeatedly said that the reason they were carrying dangerous weapons was that they feared that NUM members would attack them and that they wanted to defend themselves.

MR DA COSTA: That was their assertion yes.

.....

MR BUDLENDER SC: The NUM was trying to persuade workers to go back to work.

MR DA COSTA: Yes, they were at the time.

MR BUDLENDER SC: To break the strike.

MR DA COSTA: That's correct. I think it was an unprotected strike. They wanted their members to get back to work.

MR BUDLENDER SC: And the strikers were very angry about this.

MR DA COSTA: Yes

....

MR BUDLENDER SC: When Mr Zokwana of NUM attempted to speak to the strikers at the koppie they were hostile to him. They wouldn't listen to him and they told him to go away.

MR DA COSTA: That's what I heard yes.

CHAIRPERSON: They also sang anti-Zokwana or anti-NUM song when -

MR BUDLENDER SC: Sang a rather rude song in the process, yes

CHAIRPERSON: Yes.

MR DA COSTA: Ja, I heard that that did take place.

MR BUDLENDER SC: In short the strikers' grievance wasn't only against Lonmin, it was also partly against NUM.

MR DA COSTA: It would appear so yes.

MR BUDLENDER SC: Some of them saw NUM as the enemy.

MR DA COSTA: Some of them.

MR BUDLENDER SC: And what Lonmin said was if you want to

talk to us, talk to us through NUM.

MR DA COSTA: I think what Lonmin said was if you want to talk to us talk to us through the recognised structures, the recognised union  
 ....<sup>471</sup>

- 36.3 The position was summarised and put to Mr Da Costa in the following terms:

“MR BUDLENDER SC: So to sum up.... as at August 2012 Lonmin was faced with 3000, approximately, strikers on the koppie who were angry. There had been violence. They said they wanted to talk to Lonmin and Lonmin’s position was we will talk you, but for the foreseeable future, until such time as other processes have taken place, we will talk to you only through NUM, and NUM was the organisation in which they didn’t have confidence, the organisation which they felt had let them down, the organisation with which they were in physical conflict and confrontation, the organisation which they thought had killed two of their members, the organisation which they said they thought they were under threat from, the organisation which had attempted to break the strike by persuading workers to go back to work, and the organisation which some of them saw as the enemy. Lonmin’s position was those are the people you should speak to. Those are the people through whom you should speak to us. As of August, September, October, November, December. Is that correct?

MR DA COSTA: That’s correct. That was the, they were the recognised union at that point in time.”<sup>472</sup>

- 36.4 It was put to Mr Da Costa that Lonmin’s position was in truth an entirely cynical one and that by saying that it would speak to the strikers only through NUM, what it was really saying was that it would not speak to the strikers at all.<sup>473</sup> While Mr Da Costa did not concede this, he did concede that Lonmin knew that the position it had taken would never

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<sup>471.</sup> T, Day 239, 30101, line 1 – 30104, line 17.

<sup>472</sup> T, Day 239, 30110, line 13 – 30111, line 9.

<sup>473</sup> T, Day 240, 30140, line 1 – 11.

satisfy the strikers:

“CHAIRPERSON: But you knew that engaging through the recognised structures would, could never satisfy the strikers because the established structures necessarily involved their representation by the union in whom they had no confidence, who had already indicated as a matter of principle they were opposed to the very demand the strikers were making and which they were expected to present on the strikers’ behalf to Lonmin. That’s right, isn’t it?

MR DA COSTA: That is true.<sup>474</sup>

36.5 We submit that it is clear that Lonmin had no intention of engaging with the strikers. As we will demonstrate below, Lonmin persisted in this position despite being implored by SAPS to speak to the strikers and even after 10 people had died.

37. **LONMIN PERSISTED IN ITS REFUSAL TO ENGAGE WITH THE STRIKERS DESPITE BEING IMPORED TO DO SO BY SAPS AND EVEN AFTER 10 PEOPLE HAD LOST THEIR LIVES**

37.1 Mr Mokwena conceded that SAPS *implored* Lonmin to speak to the strikers.<sup>475</sup>

37.2 Despite this Lonmin refused to do so. It persisted in its refusal even after 10 people had died.

37.3 The Lonmin witnesses were constrained to concede that this was an unreasonable attitude to have adopted.

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<sup>474</sup> T, Day 240, 30142, lines 13 – 22.

<sup>475</sup> T, Day 291, 38084, lines 2 – 4.

37.4 Mr Ramaphosa was of the view that the matter should have been dealt with through negotiation from the outset. He conceded that steps should have been taken at a much earlier stage to deal with the wage dispute<sup>476</sup> but could not explain why he himself had not taken steps to establish what was being done about the wage dispute.<sup>477</sup> He would have found of course that nothing was being done.

37.5 Mr Mokwena conceded that if the situation repeated itself, and provided that he had police protection, he would go to the koppie and engage with the strikers:

MR SEMENYA SC: .....I am saying tomorrow people are on the mountain, they are armed, they are dangerous, there is a potential of life lost and limbs maimed, Lonmin would be wiser tomorrow and just go up the mountain, no?

MR MOKWENA: I would be scared chair to go up the mountain.

CHAIRPERSON: Even in a nyala, even in an armoured vehicle with police protection?

MR MOKWENA: Yes, if those options were available

CHAIRPERSON: You'd go then?

MR MOKWENA: Yes.”<sup>478</sup>

37.6 Of course there has never been any suggestion that Lonmin employees ought to have gone to the koppie other than with police protection and in an armoured nyala. Indeed, the SAPS would not have allowed it otherwise.

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<sup>476</sup> T, Day 272, 34631, lines 20 – 23.

<sup>477</sup> T, Day 272, 34635, line 18 – 34636, line 11.

<sup>478</sup> T, Day 291, 38105, line 17 – 38106, line 5.

37.7 But it was not necessary for Lonmin to go to the koppie at all. There was absolutely no reason why it could not have engaged with a selected group from the strikers in a controlled environment. Mr Da Costa conceded this:

“MR BUDLENDER SC: No, it wasn’t made. What I am – as far as I know – what I am asking is can you think of any reason why Lonmin – 10 people were dead, eight of them employees of Lonmin, surely the sensible thing for Lonmin to say was look, this is a bad situation, we hear that the strikers want to talk to us, we will talk to a group selected by them in a controlled environment. Surely that would have been the sensible thing to do, 10 deaths had already taken place.

MR DA COSTA: Yes, what I’m saying is where I am sitting right now I’m not sure that – it is quite possible that that proposal was made.

MR BUDLENDER SC: Well, there has been no suggestion in any statement by any of the Lonmin witnesses or any of the evidence given before this Commission that Lonmin ever made that proposal.

MR DA COSTA: I wasn’t in those discussions so I, I’m not exactly sure what was –

MR BUDLENDER SC: Well you’re – I’m sorry I didn’t want to interrupt. You’re an experienced mine manager at a very senior level. Do you not think that would have been a sensible thing to do?

MR DA COSTA: It most likely would have been.<sup>479</sup>

37.8 We submit that the reason for Lonmin’s obdurate stance during the week of the 9 to 16 August 2012 was that it was confident that the SAPS would launch an operation to break the strike. If that occurred there would of course simply be no need for Lonmin to engage with the strikers.

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<sup>479</sup> T, Day 239, 30050, line 8 – 30051, line 6.



38. **LONMIN WANTED SAPS TO BREAK THE STRIKE AND LOBBIED AND COLLUDED WITH SAPS TO ACHIEVE THIS**

38.1 We submit that it is clear that Lonmin wanted SAPS to break the strike and lobbied and colluded with SAPS to achieve this. We set out the relevant evidence in this regard below.

38.2 Mr Jamieson and Mr Ramaphosa readily conceded that Lonmin lobbied government and the SAPS firstly to secure a massive police presence at Lonmin and secondly to characterise what was taking place as a criminal rather than an industrial relations event.

38.3 Mr Jamieson conceded the following:

“MS PILLAY: And the first reason is that it was necessary to sustain your insistence that significant numbers of police and even the army needed to be deployed in Marikana – sorry in Lonmin, at Lonmin, to contain the situation.

MR JAMIESON: Yes.

MS PILLAY: And for that reason it was important for you to emphasise that the issue was a criminal issue and not a pure labour issue. That’s the one reason.

MR JAMIESON: Yes.”<sup>480</sup>

38.4 Mr Ramaphosa conceded the following:

“MR NTSEBEZA SC: ....Now against that backdrop tis exchange of e-mails I suggest I put it to you you’re attempting to persuade Minister Shabangu to change her characterisation and characterise it as criminal. What do you say to that?

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<sup>480</sup> T, Day 287, 37337, lines 2 – 12.

MR RAMAPHOSA: Well yes, we're saying that people are getting killed in a criminal way, as you have admitted yourself, and we were saying we wanted the police to be brought on site to prevent further killings, further criminal activity where people are being killed in that way from taking place. So, yes that is the case."<sup>481</sup>

CHAIRPERSON: Did you in fact persuade her in any event to abandon the characterisation that it was just a wage dispute and to take a different view of the matter?

MR RAMAPHOSA: Yes –

CHAIRPERSON: As it were, withdraw her, correct her previous public statement –

MR RAMAPHOSA: Yes.

CHAIRPERSON: - that it was just a wage dispute, management and the workers must get together and sort the thing out.

MR RAMAPHOSA: Yes."<sup>482</sup>

38.5 By 14 August 2012 Lonmin's goal of securing a massive police presence at Lonmin had been accomplished.<sup>483</sup>

38.6 On the afternoon of 14 August 2012, Mr Mokwena met with General Mbombo. It is apparent from the transcript that Mr Mokwena was keen that the police operation be implemented as soon as possible and was concerned that Lonmin's plans should dovetail with those of SAPS. General Mbombo was of the same mind and the two agreed that Lonmin would issue ultimatums the following morning and if the strikers failed to return to work the SAPS would commence their operation the following day, viz Wednesday 15 August 2012.

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<sup>481</sup> T, Day 271, 34590, line 17 – 34591, line 3.

<sup>482</sup> T, Day 271, 34593, line 17 – 34594, line 3.

<sup>483</sup> T, Day 289, 37663, lines 3 – 7.

“MS BARNES: If I can take you to another aspect of your conversation with General Mbombo, its page 31 of the transcript at the bottom of the page. The Provincial Commissioner says ‘Hence I just told these guys that we need to act such that we kill this thing,’ and you then sat ‘Immediately, yes.’ The PC then says at the top of the next page, When tomorrow we have to move in, if today we don’t find co-operation with these people we need to move inn such that we kill it because we need to protect the situation where any Jack and Jay from a political angle and then it tailors off. You see that?

MR MOKWENA: Yes.

MS BARNES: Then if we look at page 33. Halfway down the page you say the following. ‘So I agree with you, Commissioner, if we can arrest this thing tomorrow, because the longer it goes, its giving all the other opportunists to come in and cease the opportunity and then it gets out of control.’ The PC says, ‘That’s it.’ You then say ‘So I think yes let tomorrow be the D day where we issue the ultimatum and say if you don’t show up for work, sorry that’s it. So we’ll go tonight, go and print all those brochures in the languages that we want to use, use out choppers tomorrow, drop them round at all the strategic places.’ And then finally if you can go to page 35, the Provincial Commissioner says about a third of the way down the page, I just need to read halfway through that paragraph, she says, ‘So I think that also I think the plan gels nicely. I support the idea that they must be given the notice tonight rather’ –

CHAIRPERSON: Not be given.

MS BARNES: Sorry. ‘not be given the notice tonight, rather in the early hours of tomorrow so that it works with our plans.’ So essentially reading all of this together you are agreeing with General Mbombo that what must happen is that ultimatums must be issued to the workers early the following morning and if they don’t adhere or obey the ultimatum and go back to work, the police will act on that day, on Wednesday 15 August 2012, correct? That’s what you agreed with her?

MR MOKWENA: That was my understanding, yes.”<sup>484</sup>

38.7 At 6:23 pm on the evening of 14 August 2012, Mr Jamieson addressed an e-mail to Roger Phillimore, Simon Scott and Mahomed Seedat in

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<sup>484</sup> T, Day 291, 38013, lines 2 – 10.

which he stated *inter alia* the following:

“..... The police are commencing their operation as outlined to us earlier to try and break the back of the situation and I’ll get an update later this evening. Although we are glad about the police operation there is always the worry that it goes wrong. Spoke again to the DG this afternoon.”<sup>485</sup>

38.8 On Wednesday 15 August 2012, Mr Jamieson and Mr Ramaphosa continued to lobby government, and Minister Shabangu in particular, to “re-characterise” the situation at Lonmin as a criminal rather than an industrial relations event. We submit however that at this stage an additional lobbying point arose. This was to get the SAPS, now that there were sufficient numbers on site, to take action to break the strike.

38.9 Thus, on Wednesday 15 August 2012 at 9:43 Mr Jamieson addressed an e-mail to Mr Ramaphosa in which he said *inter alia* the following:

“We are grateful the police now have c 800 on site. Our next challenge is sustaining this and ensuring that they remain and take appropriate action so we can get people back to work.”<sup>486</sup> (emphasis added)

38.10 Later that afternoon at 2:58pm Mr Ramaphosa sent an e-mail to Mr Jamieson and others in which he said *inter alia* the following:

“I have just had a discussion with Susan Shabangu in Cape Town.

1. She agrees that what we are going through is not a labour dispute but a criminal act. She will correct her characterisation of what we are experiencing.

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<sup>485</sup> Exhibit JJJJ1, p 24.

<sup>486</sup> Exhibit JJJJ1, p 34.

2. She is going into Cabinet and will brief the President as well and get the Minister of Police Nathi Mthethwa to act in a more pointed way.

3. She will be in Johannesburg by 5pm and would be able to speak to Roger.

Let us keep the pressure on them to act correctly.”<sup>487</sup> (emphasis added)

38.11 We submit that Mr Ramaphosa’s reference to “*getting Minister Mthethwa to act in a more pointed way*” was a direct response to Mr Jamieson’s plea that SAPS be urged to “*take appropriate action to get people back to work.*”

38.12 We note that while this lobbying was going on Mr Mokwena and the two union Presidents were meeting with General Mpembe. During that meeting, Mr Mokwena said the following:

“MR MOKWENA: .....let me just remind everybody. We have asked the police to hold on their plans to execute. For in an interview this morning two presidents committing to come here. That zone is classified as a security zone. It is in the hands of the police. It is not Lonmin. So Lonmin has absolutely nothing to do. Meaning, you and us, so sitting here arguing will not help. We need to say to the man we ae failing to give you a chance to solve the problem, now activate ....”<sup>488</sup>

38.13 Lonmin’s attitude is clear from the above passage. It was obviously required to give the two union Presidents an opportunity to intervene, but as far as Lonmin was concerned it had no role whatsoever to play in terms of attempting to find an amicable solution to the impasse. If the

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<sup>487</sup> JJJ1, p 47

<sup>488</sup> Exhibit OO4, p 23, line 18 – p 24, line 6.

union Presidents were unsuccessful in their efforts then Lonmin would simply tell the SAPS to “activate” their operation which as far as Lonmin is concerned was simply “on hold.”

38.14 In the evening of 15 August 2012 the National Management Forum (“NMF”) took, or at least endorsed, a decision that a SAPS operation would be launched at Lonmin the following day in order to disperse and disarm the strikers.<sup>489</sup>

38.15 It is clear that Lonmin was advised of this decision in advance of the operation. We submit that Lonmin was most likely advised after the NMF meeting on the evening of 15 August 2012. This is borne out by evidence of a phone call between General Mbombo and Mr Mokwena that evening.<sup>490</sup> Somewhat predictably, Mr Mokwena claimed that he could not recall what he and General Mbombo had spoken about that evening but denied that she had told him about the SAPS plan for the following day.<sup>491</sup> In any event it is clear that Lonmin knew about the SAPS decision to launch an operation at Lonmin on 16 August 2012 at the very latest by 6:29am that morning.<sup>492</sup> It was on the basis of this information that Lonmin took a decision to issue an ultimatum on the morning of 16 August 2012 to require the strikers to return to work by 7:00am on Friday 17 August 2012.

38.16 We submit that the above facts, taken together, demonstrate that Lonmin both lobbied SAPS (and government) and colluded with SAPS to break

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<sup>489</sup> Exhibit JJJ177. And T, Day 180, 21574 , line 11 – 21576, line 20.

<sup>490</sup> Exhibit WWW4.

<sup>491</sup> T, Day 292, 38188, line 13 – 38190, line 10.

<sup>492</sup> T, Day 292, 38183, line 23 – 38185, line 1.

the strike. We point out that Lonmin did so in circumstances in which it foresaw that a police operation to break the strike might result in injury and even death.

- 38.17 Mr Jamieson's e-mail of 14 August 2012 to Mr Phillimore, Mr Scott and Mr Seedat has been referred to above. In it Mr Jamieson said "although we are glad about the police operation, there is always the worry that it goes wrong." Mr Jamieson was cross examined on this as follows:

"MR GOTZ: You say 'Although we were glad about the police operation, there is always the worry that it goes wrong' and what I want to put to you is that that reveals that you foresaw that something could go wrong and there might be injuries and possibly even deaths as a consequence of the police operation.

MR JAMIESON: Yes, well what Mark had said on the phone was, you know, we have to be worried here that this is, you know, maybe 2 or 3000 people who are armed, you've got a lot of police on site who are also armed and whilst there is a plan in place that the police have, which is the police's call, its not ours, that sounds like a situation where things might go wrong where you've got an angry group of people who are armed and one other group of people who are intent on taking the arms off them. It's clearly a situation that has the potential to go wrong, but you would think that the police had covered those eventualities."<sup>493</sup>

### 39. CONCLUSION

- 39.1 The findings and recommendations that, we submit, ought to be made in relation to Lonmin are set out in the conclusion to these heads of argument.

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<sup>493</sup> T, Day 289, 37677, lines 3 – 23.

## Section D – SAPS

### 40. **INTRODUCTION**

40.1 It is beyond the scope of these already lengthy submissions to address the case against SAPS in great detail. There are a number of other parties who are doing that.

40.2 Nevertheless, we will briefly deal with SAPS's conduct on 16 August 2012, after AMCU's efforts to resolve the situation peacefully had failed.

### 41. **SCENE 1**

41.1 At 13h30 on 16 August 2012, while Mr Mathunjwa waited outside the SAPS JOC to give feedback to the Provincial Commissioner, Lt Gen Mbombo, she announced to those inside the JOC that she had been involved in meetings with Mr Mathunjwa "*for the whole morning*" to resolve the situation. She alleged that Mr Mathunjwa was supposed to indicate whether the protestors on the koppie were prepared to lay down their weapons, but that he had "*failed to provide feedback as agreed*".<sup>494</sup>

41.2 Mr Mathunjwa was thus blamed for SAPS' decision to "go tactical" on 16 August 2012. The truth is that that decision had been taken the day before, on 15 August 2012, and endorsed by the National Management

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<sup>494</sup> Exhibit EE.



Forum.<sup>495</sup>

- 41.3 That decision resulted in a mad scramble to finalise a plan, which effectively required SAPS to improvise. The tactical plan ultimately adopted and implemented on 16 August 2012 meant that the point at which the razor wire ended, namely the small kraal, became a positive attraction point, towards which the strikers moved. Captain Thupe conceded that he understood that this was the intention of the planned rolled out of the razor wire. He testified that: “*The public order police members laid barbed wire to channel them, the protestors, towards the informal settlement.*”<sup>496</sup>.
- 41.4 The SAPS has alleged that the lead group of strikers attacked the police on two occasions before rounding the kraal. It has called these attacks incidents 1 and 2.<sup>497</sup>
- 41.5 There is no evidence to support the contention that incident 1 occurred at all. Even the evidence of key SAPS witnesses did not support it. Indeed, the route of the strikers as they moved off the Koppie towards the kraal has been comprehensively analysed by many of the parties.<sup>498</sup> These analyses prove that incident 1 was fabricated.
- 41.6 Incident 2 has been described as follows by the SAPS: “*Nyala 4 drove towards the kraal to cut off the approaching group with the barbed wire;*

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<sup>495</sup> See paragraphs 38.14 and 38.15 above.

<sup>496</sup> Exhibit RRR1, para 3. His warning statement, dated September 2012, said materially the same thing; Exhibit RRR2, para 4.

<sup>497</sup> Exhibit L, slides 196 and 197.

<sup>498</sup> See, for example, Exhibit OOO34 (AMCU) and Exhibit UUUU10.3, Video Annexures V2 and V2(a) (SAHRC and the Families).

*the approaching group of protesters attempted to enter in front of Nyala 4 before it reached the kraal; POP members from Nyala 3 and 4 engaged the protesters with rubber and tear gas; water cannons started spraying the attacking protesters to prevent them from entering the police enclosure; this action had no effect on the protesters and kept on coming forward. POP members applied less than lethal measures including stun and tear grenades, firing of rubber rounds within the force continuum in an effort to stop and disperse the group of attacking protesters. This gave Nyala 4 time to close the gap with the remaining barbed wire.”*<sup>499</sup> There is no doubt that Nyala 4 “cut the strikers off”. But it cut them off from their attempt to get on to the road to Nkaneng. If they had intended to enter the police enclosure and attack the SAPS, as alleged, they had had 9 minutes to do so before Nyala 4 reached them. During that period, there was no barrier between the strikers and the SAPS.<sup>500</sup> The objective evidence also contradicts the SAPS version regarding so-called incident 2. In particular, the analyses of the objective evidence prove that tear gas, stun grenades and the water cannon were not used at this time, contrary to the SAPS’s contention.<sup>501</sup>

- 41.7 Once they had reached the small kraal, and after Nyala 4 had blocked their path, the most likely route of the strikers was to attempt to reach the road to Nkaneng by moving around the Northern edge of the small kraal.<sup>502</sup> SAPS members anticipated that they would do precisely that. The relevant SAPS witnesses said they knew the strikers might move around the kraal in the manner that they did. Captain Loest conceded the

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<sup>499</sup> Exhibit L, slide 199.

<sup>500</sup> See Exhibit UUUU10.3, Video Annexures V2 and V2(a).

<sup>501</sup> See Exhibits UUUU10.4 and UUUU10.5.

<sup>502</sup> This is understandable in the light of the fact that they wanted to get onto the road to Nkaneng.

point.<sup>503</sup> Captain Thupe also conceded that by 15:52:40, when the media was ordered to go away and the TRT members were moving up, drawing their weapons and cocking them, the TRT knew that there was going to be a confrontation.<sup>504</sup>

41.8 Notably, at the time that the strikers headed in that direction (i.e. North, to move around the kraal), there were no Nyalas or SAPS members to the North of the small kraal. This is clear from one of Vermaak's blackberry photograph, taken at 15:51:47.<sup>505</sup>

41.9 Moreover, and importantly, the TRT members who were in the so called police enclosure moved forward on the basis of an instruction from Brig Calitz. Lt Col Classens' witness statement recorded that while the TRT members were in the neutral area, they heard Brig Calitz issue an instruction over the radio for the TRT to move in.<sup>506</sup> He confirmed this in his testimony.<sup>507</sup> Captain Thupe conceded that while Nyala 4 was busy deploying its barbed wire, Captain Loest instructed the TRT to run in the direction of the kraal and to form a line.<sup>508</sup> Although Captain Loest testified that he could not remember whether he had received an instruction from Brig Calitz for the TRT to move in, he accepted that Brig Calitz must have done so because he would not have given an instruction to the TRT to move forward in the absence of such an order

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<sup>503</sup> T, Day 230, 28467, lines 3 – 21.

<sup>504</sup> Exhibit JJJ194.16; Exhibit RRR14, slide 4; and T, Day 228, 28167, line 18 – 28168, line 13 and 28172, lines 10 – 16.

<sup>505</sup> Exhibit JJJ11.IMG01515-20120816-1555.

<sup>506</sup> Exhibit RRR11, para 9.

<sup>507</sup> T, Day 236, 29480, lines 16 – 19.

<sup>508</sup> T, Day 227, 28057, line 2 – 28058, line 17.

from Brig Calitz.<sup>509</sup>

- 41.10 The Nyalas under the control of Brig Calitz were called up into the crescent formation as depicted in Exhibit KKK52, which channelled the strikers towards the TRT line. Capt Loest readily conceded this:

““MR GOTZ: Ja, Papa 5 has just moved up and in fact, in fact what happens is that the Nyala, which we’ve marked as Papa 19 which was in fact Papa 10, moves five seconds later, moves right up behind Papa 5 and so a channel was created, Captain Loest, which prevented the strikers from moving in the direction you said they could. Correct?”

CAPTAIN LOEST: I agree on that.

CHAIRPERSON: The case being put is they were, in effect, channelled along that corridor to the right on the photograph of the kraal, by the position of these vehicles.”

CAPTAIN LOEST: No, I agree on that, Mr Chair.

MR GOTZ: And so the reason that they’re moving towards your line and in fact heading directly towards you is because of the fact they’re being channelled in that direction, correct?

CAPTAIN LOEST: Yes, Mr Chair, I agree on that point.”<sup>510</sup>

- 41.11 Lt Col Scott<sup>511</sup> testified that he heard Brig Calitz giving orders for the Nyalas to move up into some type of formation. Mr Botes effectively confirmed this evidence.<sup>512</sup> And if there is any residual doubt that Brig Calitz was controlling the formation of the Nyalas, we highlight that he proudly called the formation of the Nyalas at scene 1 a “perfect block”. It was a perfect block within the meaning of Exhibit KKK47 (esp. slide 16). We submit that this is clear evidence that the crescent formation of

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<sup>509</sup> T, Day 229, 28439, line 19 – 28440, line 8.

<sup>510</sup> T, Day 230, 28473, line 10 – 28474, line 4.

<sup>511</sup> Exhibit HHH20, p 91, para 18.

<sup>512</sup> T, Day 266, 33647, line 21 – 33650 line 13.

the Nyalas, channelling the strikers, was intentional. The evidence of Lt Col Scott, Mr Botes and Brig Calitz, read with Exhibit KKK47, should not be ignored in favour of a theory that the formation that channelled the strikers to the TRT was the unfortunate consequence of chaos and disorder.

41.12 Moreover, teargas and stun grenades were thrown behind the strikers, further channelling the lead group (of approximately 38 strikers) towards the TRT line. It is difficult to understand why not a single stun or tear grenade was thrown or shot *in front of* the advancing group of strikers.<sup>513</sup>

41.13 At the critical moment, Brig Calitz gave an instruction to “engage, engage, engage”. This could only have meant that the TRT line should act. The TRT members opened fire in response to that order, with fatal and shocking consequences. As Mr Botes testified:

“CHAIRPERSON: Tell me, what was the time lapse between the words “engage, engage, engage” and the shooting? Because you say other than hearing the word “engage” which was repeated a few times, immediately before the shooting started, “I didn’t hear any further instruction.” So you obviously heard the shooting, which I will ask you about in a moment. But what was the time lapse between the last “engage” that you heard and the shooting.

MR BOTES: Mr Chairman, sometimes when Brigadier Calitz spoke on the radio, after he said “engage,” you could hear on the radio, that there’s shooting taking place. So that was basically immediately after he said “engage” that the shooting started, which we could hear.

CHAIRPERSON: Immediately, you mean a couple of seconds?

MR BOTES: I would say –

CHAIRPERSON: Immediately, seconds.

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<sup>513</sup> This is clear from Exhibit UU3bis.

MR BOTES: Seconds, yes.”<sup>514</sup>

- 41.14 The objective evidence shows that many of the strikers were, at that moment, moving towards the TRT bent over and with blankets over their heads, to protect themselves from the rubber balls being fired by POP members to their left.<sup>515</sup> The SAPS has also conceded that the strikers would, at the time, have been suffering from the effects of tear gas and it would have been difficult for them to see what was in front of them.<sup>516</sup>
- 41.15 The SAPS members did not issue any warning to the advancing strikers. They could have given a warning, as evidenced by the fact that the media was warned to “go away” more than a minute before the TRT volley.<sup>517</sup> The media were ordered to “go away” at 15:52:40 by means of a loudhailer. This was eight seconds after the TRT were called to form the basic line. As Lt Col Classens conceded there was more than enough time for the strikers to be told to stop, put down their weapons and not come any closer.<sup>518</sup> Nor were any warning shots fired before the TRT volley.<sup>519</sup> Also important is the fact that the POP Nyalas had several opportunities to block the passage of the strikers. They failed to do so. Instead, the strikers were channelled towards the TRT.
- 41.16 The objective evidence shows that the response of the TRT members was wholly disproportionate to the alleged threat. Forty five TRT members, firing lethal R5 rifles, opened fire simultaneously. They continued to fire

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<sup>514</sup> T, Day 266, 33642, line 12 – 33641, line 6

<sup>515</sup> Exhibit RRR15, page 3.

<sup>516</sup> T, Day 238, 29907, line 1 – 29908, line 14.

<sup>517</sup> Exhibit JJJ194.16; Exhibit RRR14, slide 4.

<sup>518</sup> T, Day 238, 29859, line 4 – 29860, line 13.

<sup>519</sup> Exhibit UUUU10.6.

at the strikers long after they were obscured in a cloud of dust.

41.17 Moreover, the SAPS' brutal treatment of the dead and injured strikers after the incident,<sup>520</sup> reveals a mind-set which is wholly inconsistent with the proposition that the TRT members acted in self or private defence.

41.18 In the light of the evidence presented, we submit that the Commission should conclude that:

41.18.1 Scene 1 was a trap, in the sense of an attempt to encircle the strikers and within the meaning contemplated by Exhibit KKK49, slide 5. This does not mean that SAPS premeditated an ambush with intent<sup>521</sup> to kill the strikers. The intention was to disarm and arrest them forcibly. Nevertheless, the SAPS acted with, at least, *dolus eventualis*. We have already referred to the evidence that General Mpembe feared bloodshed the night before.

41.18.2 The strikers were channelled to the TRT line. We submit that the Commission should find that SAPS did so intentionally, but even if the Commission is not inclined to do so, the undeniable fact that they were *in effect* channelled is wholly inconsistent with the notion that they were attacking the TRT members.

41.18.3 There was in fact no attack by the strikers on the TRT line. This is clear, *inter alia*, from the photograph on page 3 of Exhibit RRR15.

41.18.4 Given that Brig Calitz gave the instruction to "engage, engage,

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<sup>520</sup> T, Day 230, 28507, lines 1 – 18 (Loest's evidence).

<sup>521</sup> In the form of *dolus directus*.

engage” a few seconds before the TRT volley, it is difficult to comprehend the claim that TRT members acted in self or private defence or that the TRT members reasonably believed that their lives, or any of their colleagues lives, were in danger. At the very least, given the *prima facie* evidence that they were acting in *response* to an order from the Operational Commander, it was necessary for the SAPS to lead the evidence of the members who actually fired their weapons. They were not led. The Commission cannot, in these circumstances, make a blanket finding that the TRT members in the line acted reasonably in putative self or private defence. With respect, in the absence of oral evidence from even one SAPS member who pulled a trigger at scene 1, the Commission should be very cautious not to make a finding that individual SAPS members in the TRT line had reasonable grounds for believing that they faced an imminent attack. The Commission should also have regard to the fact that the TRT members are highly trained police officers with experience in high risk arrests. The relevant test for whether they acted in putative self defence is not how the average human being would have perceived the alleged threat to his or her life. The relevant test is how a reasonable, highly trained police officer would have responded to the order given to engage.

- 41.18.5 Alternatively, the response of the shooters was disproportionate to any perceived threat. Thus, their shooting exceeded the bounds of reasonable self / private defence. Our law is that if it is necessary to use force to repel an unlawful attack, the measure of force used must be reasonable in the circumstances. And the defence must be



deterrent and not retributive.<sup>522</sup> The measure of force used by the SAPS was, we submit, excessive.

41.18.6 Accordingly, SAPS members are *prima facie* guilty of murder, alternatively culpable homicide, attempted murder and/or assault with intent to do grievous bodily harm (and SAPS civilly liable) for the deaths of 17 people and injuries to others at scene 1.

## 42. **SCENE 2**

42.1 Approximately 13 minutes elapsed between the killings at Scene 1 and the commencement of shooting at Scene 2. This was more than enough time for SAPS to call a halt to the operation. If SAPS had done so, the killings at Scene 2 would not have occurred.

42.2 Mr Botes testified that everyone who was in the JOC heard the shootings and knew that something very serious had happened:

“CHAIRPERSON: ...You’ve told us how you heard the words “engage, engage, engage.” And instantaneously thereafter you heard the beginnings of a lot of firearms being fired, did it sound to you like automatic fire?

MR BOTES: Mr Chair, it sounds like automatic fire, but it also sounds like a lot of people firing. If there is not one firearm that shoots automatically, it sounds like a lot of firearms firing.

CHAIRPERSON: Okay. So it must have been obvious to you that something quite serious had happened.

MR BOTES: We were shocked, I was shocked in the control room

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<sup>522</sup> *S v Trainor* 2003 (1) All SA 435 (SCA); 2003 1 SACR 35 (SCA) in which it was that as far as one can generalise, there should be a reasonable relationship between the attack and the defensive act. See also, *Snyders v Louw* 2009 2 SACR 463 (C); *S v Steyn* 2010 1 SACR 411 (SCA).

there, and expect that the police were severely attacked and a number of people were killed both ways, and I expected –

CHAIRPERSON: Well we know a number were killed, but only one was –

MR BOTES: Yes, yes.

CHAIRPERSON: But you were shocked, it was obviously that something, I don't want to use too strong a word, but the word that comes to mind is catechistic [cataclysmic?], I mean something very, very serious had happened.

MR BOTES: It was.

CHAIRPERSON: It was so serious that it obviously shocked you and it must have shocked everybody else in the JOC.”

MR BOTES: Definitely.”<sup>523</sup>

42.3 Brig Calitz denied knowledge of the cataclysmic killings at scene 1. But his evidence on this score can be rejected on the simple basis that he can be heard saying “*No lethal firearms now unless the target engage you. No need to shoot while they are running unless the target engages you.*”, *just after the shootings at scene 1.*”<sup>524</sup>

42.4 This means that Brig Calitz pursued the strikers to koppie 3, knowing that lethal weapons had been used and that people had been killed or at least seriously injured at scene 1. A halt should have been called to the operation. Instead of stopping the action, koppie 3 was surrounded by various SAPS units, all firing live ammunition into the area to which the strikers had fled.

42.5 As a consequence, 17 more people were killed or fatally wounded, and

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<sup>523</sup> T, Day 266, 33646, lines 7 – 33647, line 10.

<sup>524</sup> Exhibit C22; and Exhibit OOO11, p 1 (entry for 16:04:30).

many others injured, at scene 2.

42.6 SAPS has given an account of the deaths of only a handful of the 17 people killed or fatally wounded at scene 2. The versions that have been provided in relation to those few are so lacking in detail, consistency or credibility that they fall to be rejected by the Commission.

42.7 Accordingly, we submit that the Commission should conclude that:

42.7.1 There was no attack by the strikers on the members of the SAPS at scene 2;

42.7.2 The SAPS members did not act in self or private defence, and the SAPS members did not reasonably believe that their lives, or any of their colleagues lives, were in danger;

42.7.3 The response of the SAPS members was disproportionate to any perceived threat. Thus, their shooting exceeded the bounds of reasonable self / private defence.

42.7.4 Accordingly, SAPS members are *prima facie* guilty of murder, alternatively culpable homicide, attempted murder and/or assault with intent to do grievous bodily harm (and SAPS civilly liable) for the deaths of 17 people and injuries to others at scene 2.

#### 43. **CONCLUSION**

43.1 We submit that the killings and the injuries at the hands of the SAPS, were unlawful.

- 43.2 It is submitted that the SAPS is responsible in law for the killings and injuries at both Scene 1 and Scene 2 on 16 August 2012.
- 43.3 The findings and recommendations that, we submit, ought to be made in relation to SAPS are set out in the conclusion to these heads of argument.

## Section G – Conclusion

### 44. **INTRODUCTION**

We conclude these submissions by setting out the specific findings and recommendations that, we submit, the Commission ought to make.

### 45. **NO ADVERSE FINDING AGAINST AMCU**

45.1 The Commission's terms of reference provide that the Commission must investigate the conduct of AMCU, its members and officials and in particular, evaluate:

45.1.1 whether it had exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between itself and Lonmin and/or NUM or any other parties;

45.1.2 the extent to which it exercised effective control over its membership and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives and property of other persons; and

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

45.2 We submit that the Commission should make the factual findings set out in Section C of these heads of argument and conclude that:

- 45.2.1 AMCU was committed to finding a negotiated solution to the conflict at Lonmin during the week of 9 to 16 August 2012; and
- 45.2.2 AMCU, and Mr Mathunjwa in particular, did all it could to avert the bloodshed that was foreseen on 16 August 2012.
- 45.3 We submit that the Commission should accordingly conclude that AMCU did indeed use its best endeavours to resolve the dispute which had arisen.
- 45.4 It is necessary to emphasise that while some of the people on the koppie were undoubtedly AMCU members, they were not acting qua AMCU members during the strike. It is common cause that members of both NUM and AMCU had rejected union involvement. We submit that, in these circumstances, the Commission cannot find that AMCU had any legal duty to ensure that the strikers' conduct was at all times lawful and did not endanger the lives and property of other persons. AMCU thus cannot be found to have failed to have exercised effective control over its membership.
- 45.5 We submit that there is no basis to conclude that AMCU by act or omission directly or indirectly caused loss of life or damage to persons or property.

46. **NUM – FINDINGS AND RECOMMENDATIONS**

- 46.1 The Commission's terms of reference<sup>525</sup> provide for an inquiry into the

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<sup>525</sup> Proclamation No 5, Government Gazette of 12 September 2012, No.35680

conduct of NUM, its members and officials. In particular, the Commission must evaluate:

- 46.1.1 whether NUM had exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between itself and Lonmin and/or AMCU or any other parties;
  - 46.1.2 the extent to which it exercised effective control over its membership and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives and property of other persons; and
  - 46.1.3 whether by act or omission it directly or indirectly caused loss of life or damage to persons or property.
- 46.2 We submit that the Commission should make the factual findings set out in Section D of these heads of argument and conclude that NUM failed to use its best endeavours to resolve the dispute. This is so in the following respects:
- 46.2.1 It failed to seek to represent the interests of the RDOs and instead wrongly dismissed their demand as a breach of the collective agreement.
  - 46.2.2 It failed to seek a peaceful and negotiated solution to the dispute and instead took active steps to break the strike; sought to portray AMCU as the villain behind the strike and called for the STF and army to deal with the situation.

46.3 Moreover, the Commission should find that NUM's conduct, in particular the active steps it took to break the strike and the shooting by its officials on 11 August 2012 created additional conflict between itself and the strikers and greatly exacerbated the crisis at Marikana and accordingly led, at least indirectly, to loss of life and damage to persons and property during the week of 9 to 16 August 2012.

46.4 For the reasons set out in Section D, the Commission should conclude that the NUM officials' use of force on 11 August 2012 was unlawful and unreasonable, at least on a *prima facie* basis in the light of the evidence of the Lonmin security guards. At the very least, the NUM officials' subsequent pursuit and assault of some of the strikers did not fall within the scope of private defence. Thus, we submit that the Commission should find that there are *prima facie* grounds for a finding that the NUM officials involved in the incident are criminally liable for assault with intent to do grievous bodily harm. Accordingly, the Commission should, in terms of clause 5 of the terms of reference, recommend further investigation by the SAPS for possible prosecution of the NUM officials involved. NUM is also liable in delict to the injured strikers. With respect, in the light of the evidence relating to this event, the Commission should find that there is a possible civil claim against the NUM, and at a minimum be wary of any finding which precludes such an action.

#### 47. **LONMIN – FINDINGS AND RECOMMENDATIONS**

47.1 The Commission is required to inquire into, make findings, report on and make recommendations regarding the conduct of Lonmin. It must consider:



- 47.1.1 whether it exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between it and its labour force on the one hand and generally among it and its labour force on the other;
- 47.1.2 whether it responded appropriately to the threat and outbreak of violence which occurred at its premises;
- 47.1.3 whether it by act or omission created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct;
- 47.1.4 whether it employed sufficient safeguards and measures to ensure the safety of its employees, property and the prevention of the outbreak of violence between any parties;
- 47.1.5 to examine generally its policy, procedure, practices and conduct relating to its employees and organized labour; and
- 47.1.6 whether by act or omission it directly caused loss of life or damage to persons or property.
- 47.2 We submit that the Commission should make the factual findings set out in Section E of these heads of argument and conclude as follows:
  - 47.2.1 that Lonmin, by failing to plan for an RDO demand which it anticipated, failed to respond appropriately to the threat of violence on its premises.

47.2.2 that Lonmin, by refusing to engage with the RDOs failed to respond appropriately to the situation; failed to use its best endeavours to resolve the dispute and created an environment which was conducive to the creation of tension, labour unrest and disunity among its employees; and

47.2.3 that Lonmin, by its campaign of misinformation created an environment which was conducive to the creation of tension, labour unrest and disunity among its employees.

47.3 Finally, we submit that Lonmin's conduct in lobbying and colluding with SAPS to break the strike, despite foreseeing that injury or death might occur as a result of SAPS's action, constitutes *prima facie* grounds for a finding that Lonmin is criminally responsible for the injuries and deaths committed by SAPS on 16 August 2012 on the basis of accomplice liability. We accordingly submit that the Commission should, in terms of clause 5 of its terms of reference recommend further investigation by the SAPS for the possible prosecution of Lonmin in this regard.

#### 48. **SAPS – FINDINGS AND RECOMMENDATIONS**

48.1 The conduct of the SAPS must be investigated in terms of clause 1.2 of the Commission's terms of reference. In particular, the Commission must examine:

48.1.1 the nature, extent and application of any standing orders, policy considerations, legislation or other instructions in dealing with the situation which gave rise to this incident;

- 48.1.2 the precise facts and circumstances which gave rise to the use of all and any force and whether this was reasonable and justifiable in the particular circumstances;
  - 48.1.3 the role played by SAPS through its respective units, individually and collectively in dealing with this incident; and
  - 48.1.4 whether by act or omission it directly or indirectly caused loss of life or harm to persons or property.
- 48.2 We submit that the Commission should ultimately find that the use of force was not reasonable and justifiable in the particular circumstances, particularly having regard to the relevant legislation, standing orders, policies and instructions, as well as the common law.
- 48.3 We submit that there is a *prima facie* case that SAPS is liable in delict for the wrongful deaths and injuries sustained by people on 16 August 2012.
- 48.4 Moreover, the Commission should find that there is a *prima facie* that the relevant members of the SAPS are guilty of the crimes of murder, alternatively culpable homicide, attempted murder and/or assault with intent to do grievous bodily harm. We respectfully submit that the following should be referred for investigation and possible prosecution:<sup>526</sup>
- 48.4.1 The then Minister of Police, Mr Mthethwa;

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<sup>526</sup> In terms of clause 5 of the Commission's terms of reference.

- 48.4.2 The SAPS leadership that endorsed the tactical intervention at the extraordinary session of the National Management Forum (NMF) on 15 August 2012;
- 48.4.3 The SAPS members of the JOCCOM who attended the 13h30 Special JOCCOM Meeting on 16 August 2012 at which the decision to implement the tactical plan was made;
- 48.4.4 The Commanders of the different SAPS units who took part in the operation; and
- 48.4.5 The individual shooters on 16 August 2012.

**Heidi Barnes**

**Anthony Gotz**

**AMCU's Counsel**

**Chambers, 28 October 2014**