INTRODUCTION

1. Provision has been made for replying submissions to be filed. In this reply we intend only to address new criticisms and different angles of incidence explored by parties in their primary heads, all from the perspective of Lonmin. We do not engage in a debate on the actions of either SAPS or the strikers, or for that matter the unions.

2. As most of the criticisms raised against Lonmin have already been addressed in our primary heads of argument, we do not intend to revisit those submissions.

3. We also do not comment on each of the written submissions separately. Except for certain submissions made by the evidence leaders, we deal with phases and issues collectively. We commence by making two introductory observations.

INTRODUCTORY OBSERVATIONS

(a) The Legal Framework and the Rule of Law

4. In Lonmin's primary heads, we have dealt with the legal framework for collective bargaining in South Africa.¹

5. Other than in the written submissions of the NUM, and cursorily in the SAPS's written submissions, this legal framework, and its implications in the

¹ Lonmin's heads, pages 15 - 20
assessment of the events of 9 - 16 August 2012 at Marikana, has been left unexplored.

6. We emphasise the following:

6.1 In keeping with South Africa’s constitutional democracy, the LRA was promulgated and continues to operate in order to regulate the relationship between capital and labour in all its many facets, including in the sphere of collective bargaining. The introduction to the LRA spells this out. The LRA intends, *inter alia*,

“... to give effect to section 27 of the Constitution;

to regulate the organisational rights of trade unions;

to promote and facilitate collective bargaining at the workplace and at sectoral level;

to regulate the right to strike and the recourse to lock-out in conformity with the Constitution; ...

to provide simple dispute procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established) ...;

to establish the Labour Court and the Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;

..."
6.2 That framework exists in order to promote stability in industrial relations and to guide parties on how they can be expected and are entitled to act. Section 1 of the LRA provides:

"that its purpose ... is to advance economic development, labour peace ... and to promote – orderly collective bargaining; ... and the effective resolution of labour disputes."

6.3 Any suggestion made with the benefit of hindsight that an employer should act differently in a particular situation should be assessed against this backdrop, and consideration should be given to the future implications of the suggested alternative course of conduct. There is a contradiction between, on the one hand, suggesting that the law and our Constitutional democracy should be respected, and on the other hand seeking to impose an obligation on Lonmin to act outside that legal framework and to negotiate wages with individual strikers embarking on unprotected strike, and in the face of violence.

6.4 There is no suggestion that Lonmin acted outside the framework established by the LRA. On the other hand, Lonmin was faced with conduct on the part of strikers which was not only outside of the framework provided for by the LRA, but in defiance of a court order. Negotiations in these circumstances would have sent a message of encouragement to employees to engage in conduct outside the existing framework to achieve their aim. This would create an arena of uncertainty in the relationship between capital and labour.
6.5 None of this is explored by the parties criticising Lonmin for not “talking” to the strikers.

7. On a wider front, the rule of law is involved. In circumstances where a strike turns violent and is characterised by high levels of intimidation, damage to property and injury and deaths of persons, it is not the role of the employer to equip itself to deal with and to contain such conduct. That is the role of the SAPS.

8. Where an employer employs a large workforce, it cannot be expected of him to establish an internal security force to deal with the type of events which were experienced by Lonmin in the period under discussion. That responsibility falls squarely within the Constitutional mandate of SAPS, being the primary organ of State responsible for maintaining and upholding the rule of law and protecting the public and property.

9. In considering the framework of the LRA and the rule of law, a question which the Commission squarely faces is whether a party which acts within its rights, should be criticised for not “talking” to the strikers. On the evidence, the strike had been started and continued not in order to force Lonmin into “talks”, but to obtain a basic wage increase to R12 500 per month. Nothing less would have satisfied the strikers during the period which the Commission is inquiring into.

(b) The Terms of Reference and the Conduct of the Commission
10. In Lonmin’s primary heads, we deal with the appointment of the Commission, its terms of reference as well as the ruling of 8 November 2012 and 25 August 2014. We add one additional observation.

11. During the period 8 November 2012 to 25 August 2014 when most of the evidence relating to Phase 1 was dealt with, the Commission operated pursuant to a ruling which drew a direct causal link between the evidence received and the events of 9 - 16 August 2012. The Commission had ruled that the first phase would be confined to the direct causes of legal responsibility of parties for the deaths of and injuries to any persons and damage to property during the said period.

12. The Commission’s terms of reference insofar as it relates to the conduct of Lonmin generally, are wider. Yet, the ruling of 8 November 2012 was the basis upon which the Commission’s hearings were conducted up to 25 August 2014.

13. Notwithstanding this, there has been a suggestion by a number of parties that Lonmin bears responsibility for the events which occurred during the said period. Under rubrics such as “Lonmin’s failure to talk”, “toxic collusion”, “missing out on lost opportunities offered to Lonmin by the likes of Muthunjwa and Bishop Seoka”, and suggestions that Lonmin had taken “inadequate security steps” to protect people during the said period, submissions have been advanced that the Commission should find Lonmin responsible, whether directly or indirectly, for the loss of life or damage to persons or property.
14. These submissions assume a causal nexus between Lonmin's alleged failures to engage with the strikers and the events in question. But without the counterfactual, and exploring questions such as:

- what would have been discussed;
- what offer was likely to be made by Lonmin to the strikers;
- what offer was likely to be accepted by the strikers (RDOs or everyone?);
- what would have been the result of an inability to reach agreement between the parties;

the causal connection between the failure to engage and the tragedy is absent. Perhaps not surprisingly, none of the counterfactual questions posed above are addressed by any of the criticising parties.

15. The absence of a causal connection between the refusal to negotiate and the tragedy is illustrated on a different approach:

15.1 Two Lonmin security staff members were brutally murdered on 12 August. This related to and arose from the conduct of the strikers - there has yet to be an explanation regarding why, in the context of the demand made for wage increases, the strikers chose to conduct themselves in a manner which led to the deaths of Messrs Fundi and Mabelane.

15.2 Five of the fatalities were a result of the confrontation between SAPS and the strikers on 13 August 2012. Lonmin was not a party to that
confrontation and could in no way have impacted upon what actually occurred, nor foreseen it. It was the conduct of striking mine workers and SAPS which characterised the confrontation - it arose from the manner in which the conduct in the strike unfolded, not the demand for R12 500 itself.

15.3 Directly flowing from the conduct of the strikers, were the deaths of Messrs Mabebe, Langa and Twala. Again, this was causally unrelated to any omission by Lonmin.

16. In view of the ruling of 5 November 2012, there is no evidence to suggest that Lonmin was the direct cause of or bore legal responsibility for any of the deaths of or injuries to persons and damage to property which occurred during the period under consideration.

CAPITA SELECTA

(a) The Demand for R12 500 in context

17. A number of parties, in contextualising the events of August 2012, examined the strike at Impala earlier that year, including the levels of violence which characterised that strike and the ultimate decision by Impala to grant its RDOs an increase in their wages.

18. No reference is made in this context to the wage increase demanded by the RDOs at Impala. It was in an amount of R9 000 per month, not R12 500 with which Lonmin was subsequently confronted.
19. The basis upon which the R12 500 was demanded was not explained. The persons who initially engaged in discussions with Da Costa could not explain the origin and the basis of calculating the demand. Indeed, not one of the striking mine workers who had testified was able to shed any light on this demand.²

20. There was no direct evidence of a causal link between the Da Costa discussion and the 10 August strike. One possibility is that the strike had been embarked upon because Lonmin did not yield to the demand for R12 500, and that the strike would only have been averted if Lonmin had agreed to the demand. Nzuza stated this in so many words.³

21. This is difficult to reconcile with the testimony of the strikers that at the commencement of the strike, there had been no feedback given on the Da Costa talks: the body of striking mine workers was neither informed of the fact of those talks nor of the content thereof, nor of the outcome. To this extend, any misapprehension on the part of the striking mine workers that Lonmin had not in any way engaged with RDOs on their demand for R12 500 is a result of them not having been informed of the fact of Da Costa’s talks.

22. All that is before the Commission is that Da Costa was told that the R12 500 was a “good number”.⁴ The danger of Lonmin giving in to such a demand is self-evident. In considering the demand Lonmin would have had to

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² The primary heads filed on behalf of the injured and arrested persons suggested in paragraph 16 that, with the exception of Bishop Seoka, witnesses were carefully selected to provide a spread of evidence covering the vast majority of the main events under investigation by the Commission.
³ Transcript, 28 August 2014; page 35997, line 22; page 35998, line 7 and page 36075, line 5 – 16.
⁴ Transcript, 3 June 2014, page 30028, lines 8 - 10
understand the makeup, and the implications for the remaining Lonmin workforce in the event of such an increase being granted.

23. As events unfolded, what started as a Karee RDO demand for a wage increase, eventually metamorphosed into a strike which involved RDOs from across Lonmin’s operations and other categories of workers. Consequently, the characterisation of the demand for R12 500 as being one by RDOs, fails to take into account evidence that the strikers were not limited to RDOs.

(b) Negotiating with the strikers: to talk or not to talk

24. A recurring theme in criticisms levied against Lonmin is that it should have negotiated with the strikers. Deputy President Ramaphosa accepts this criticism in the heads filed on his behalf. We have addressed this criticism in some detail in our principal heads: at the risk of being repetitive, we stress that:

24.1 There is no engagement with the question what the outcome might have been if the demands of the strikers were not met by Lonmin; it is highly unlikely that they would have put down their arms and gone back to work.

24.2 Nor is there a suggestion as to where such negotiations should have taken place, with whom representing the strikers (RDOs or all involved?), what preconditions had to be in place - to be debated in the “talks about talks” which would have had to proceed such negotiations

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5 Paragraph 56.1 to 56.3 and 56.6
- and when these negotiations should have been commenced (before or after the first killings took place?).

24.3 Mr Ramaphosa, a seasoned negotiator in conditions of labour unrest in this country, never once suggested negotiation with the strikers as an option in August 2012. We submit the reason being that he did not consider it appropriate at the time.

24.4 Without the benefit of hindsight his motive, namely to stabilise the situation and to bring the acts of violence to an end, cannot be faulted.

24.5 After the events of 13 August it would have been unprecedented to expect wage negotiations between Lonmin and the strikers outside established collective bargaining structures. The ambivalence in the heads filed on behalf of Mr Ramaphosa is illustrated by the submission made in paragraph 56.3:

"Mr Ramaphosa accepted that he might have sought to use such influence as he had over the direction of the company to seek to change the approach of Lonmin management in this respect. However, in his assessment of the situation, the most immediate priority was to stabilise the situation and to restore peace and order."

24.6 His most recent criticism of Lonmin's approach -

("Mr Ramaphosa was critical of the approach of Lonmin to seek to discipline and dismiss the strikers rather than to negotiate with them")

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5 Ramaphosa’s heads, paragraph 56.4
is accordingly unjustified.

25. The criticism against Lonmin on the Da Costa talks vacillates between criticism of Lonmin for having engaged in discussions with Karee RDO representatives, to praise for having done so. The praise for Lonmin for the Da Costa talks comes essentially from the injured and arrested persons. That praise though is a poisoned chalice, because it is then used as a foundation for later criticism against Lonmin for not similarly engaging in talks during the period 9 - 16 August 2012.

26. The criticism in turn ranges from the suggestion that by engaging in the Da Costa talks, Lonmin acted outside the collective bargaining framework, to a suggestion that in entering into "negotiations", Lonmin communicated to the striking workers that it was willing to "negotiate" outside of the collective bargaining structures.

27. Both in the praise for Lonmin on the Da Costa talks and in the criticism against Lonmin regarding the Da Costa talks, there are fundamental mischaracterisations of these talks, based in part on attempts to draw inferences and in part on attempted concessions sought (unsuccessfully) of Lonmin’s witnesses, in particular Da Costa.

28. Da Costa was adamant that:

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7 Ramaphosa’s heads, paragraph 56.2
28.1 he was not engaging in "negotiations" with the RDOs. He had told them that Lonmin would not negotiate their wage demands outside of recognised structures. The objective facts in this regard support Da Costa: while the RDO representatives spoke to him about a R12 500 wage demand, he did not negotiate this figure with them at all; an RDO allowance was granted; there was never any suggestion, let alone negotiations, about this; the decision was a unilateral one by Exco. Even though the RDO demand for R12 500 prompted a review by Lonmin of the wages which other platinum mines were paying to their RDOs at the time, the consequent RDO allowance had nothing to do with the R12 500: the benchmark used was the wages at neighbouring platinum mines;

28.2 at no stage did the RDOs revert to Lonmin on the RDO allowance. They embarked on the strike because their demand for R12 500 had not been agreed to;

28.3 when Da Costa agreed to talk to RDO representatives, he did so because these were employees for whom he was responsible. He explained why he could not negotiate their demands with them; ultimately, when he communicated the RDO allowance, he stated that this was to bring parity with wages earned by RDOs at other platinum mines.

29. It is also unrealistic to expect that Bishop Seoka’s belated intervention might have led to a negotiated truce.
30. At the time when Bishop Seoka sought to intervene, there had been two essential developments. First, the SAPS had taken operational control of the area around the Koppie. Second, there was no indication that the striking mine workers would have been satisfied with anything less than Lonmin conceding their demands.

31. Mathunjwa sought to take advantage of the situation for the benefit of AMCU. This was preceded by his letter of 10 August 2012 to Mokwena where he had referred to the striking mine workers as “sinister forces”, and exhorted Mokwena not to engage with any persons outside of union structures.

(c) Perception of the strikers

32. A separate theme emerged in the criticism of Lonmin: it is submitted that the perception of RDOs was that Lonmin was willing to engage in “negotiations”. In circumstances where parties were allowed to and did in fact lead evidence, not a single striker was asked about their “perceptions” regarding the Da Costa talks. The suggestion of what the mine workers may have “perceived” was not supported by the only persons who could have spoken to such “perceptions”, namely those RDO representatives or the Karee RDOs who were involved in the discussions with Da Costa.

(d) The shootings of 10 August 2012

33. On the evening of 10 August 2012, Lonmin security shot at persons using rubber bullets. Botes testified that the shooting occurred to deter striking mine
workers from intimidating workers who were walking from the hotel complex to
the Rowland shaft.  

34. The evidence leaders criticised Lonmin in this regard by stating that:

"bland references to strikers intimidating workers are insufficient grounds to
justify shooting at people."  

They rely upon the evidence of Captain Govender in this regard.

35. The following emerged during the cross-examination of Captain Govender:

35.1 He could not explain why there would be individuals standing around at
18h30 armed with knobkerries, in an area where workers would pass
on their way to report for duty.

35.2 He could not explain why individuals who stated that they were waiting
for a taxi happened to move away a few minutes later without any taxi
arriving.

35.3 His explanation is inconsistent with the acts of violence against non-
striking employees which was reported to him later that evening.  

36. Finally, he conceded that he did not have any training of crowd control, and
that he had underestimated the situation when Botes had asked him to assist

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8 Transcript, 29 July 2014, page 33435, lines 4-10
9 Evidence leaders’ heads, page 107, paragraph 198
10 Transcript 14 August 2014, pages 35090 - 35101
in dispersing the crowd who would be intimidating workers wishing to go to work.\textsuperscript{11}

37. The adverse findings suggested by the evidence leaders to be made against Lonmin relates to these shootings,\textsuperscript{12} which involve Messrs Botha and Kellerman.\textsuperscript{13} What is not addressed is:

37.1 the nexus between these incidents and the events from 12 - 16 August;

37.2 who, if anyone, was injured in the incidents, and the extent of any injuries suffered;

37.3 why there was no request for any of the protagonists (Botha, Kellerman or any of the strikers involved) to testify, nor efforts to explore the circumstances leading to the shootings.

38. We accordingly submit that there has been an insufficient investigation of the events around the shootings on 10 August 2012 for the Commission to arrive with any confidence at a finding or a recommendation adverse to Lonmin.

(e) Characterisation of the strike

39. In the primary heads submitted on behalf of the injured and arrested parties and the families, there remains a persistent attack against Lonmin for the characterisation of the strike by, \textit{inter alia}, Jamieson. Mr Ramaphosa is similarly criticised.

\textsuperscript{11} Transcript 14 August 2014, pages 35100 - 35101
\textsuperscript{12} Evidence leaders’ heads, paragraphs 1217 - 1223
\textsuperscript{13} Evidence leaders’ heads, paragraphs 183 - 201
40. From 10 August 2012, violence began to creep into the events unfolding at Marikana. This included deaths of non-striking mineworkers, Lonmin security personnel and police officers.

41. In those circumstances Lonmin was justified in its characterisation of the conduct of the strikers as “criminal”.

42. Lonmin was also acting within its rights to call upon SAPS to deal with matters which fell squarely within SAPS’s constitutional mandate.

43. The criticism is ultimately directed towards suggesting that the characterisation resulted in political pressure having been placed on Ministers and ultimately SAPS, to break the back of the strike. This thesis was not supported by evidence from any of the senior SAPS officers on site.

44. The criticism is also opportunistic if compared to the criticism levied at Lonmin for having failed to provide a security service able to provide a safe environment for employees; and it leaves unexplored similar requests made by Mr Zokwana of NUM.

(f) Capacity of Lonmin’s security

45. The request for SAPS’s assistance should be viewed against Lonmin’s security capacity. Blou testified that Lonmin had, during 2005, taken the decision to demilitarise its security. That decision was implemented. The effect of demilitarisation was that Lonmin did not have the capacity to deal with events as they unfolded in the period 9 - 16 August 2012.
46. The criticism that Lonmin had failed to take adequate steps to provide security to employees during that period do not deal with the effect of demilitarisation, nor are there any positive suggestions regarding what Lonmin might or ought to have done to deal with the strikers and the ensuing violence. The sole suggestion made was that Lonmin ought to have purchased vehicles such as Nyalas. Why private entities should acquire paramilitary vehicles to do crowd control involving their employees and others, is difficult to follow. What is also not explored is how many security personnel would have been required to control the 2000 to 3000 armed and hostile strikers during the relevant period.

47. To the extent that Lonmin is criticised for the deaths of Messrs Mabelane and Fundi, the evidence was that these deaths occurred in circumstances where Lonmin security personnel, based on past experience, did not and could not have anticipated that they would be attacked in the barbaric manner that happened. The criticism fails to address the fundamental tragedy of the deaths of these two men: they were murdered, needlessly and without any justification, by a group of strikers who were busy marching onto the NUM offices. Any attempt at placing blame on Lonmin simply serves to shift focus away from those who were directly responsible for these barbaric acts of violence.

48. Similarly, the attacks at K4 shaft, the deaths of Messrs Mpembe and Langa, and that of Mr Twala cannot be attributed to any act or omission on the part of Lonmin. These persons were killed by strikers who had run out of control.
The killings were barbaric and senseless. To seek to apportion blame on Lonmin is unwarranted.

(g) Shutting down mining operations

49. The evidence leaders suggest that Lonmin’s failure to close the mine after the murder of Messrs Fundi and Mabelane required further investigation, and should be referred to the SAPS(!) and the NDPP.14

50. The problem with the criticism of Lonmin in this regard is that none of the submissions engage with the unchallenged evidence of Seedat on the topic:

“Mr Seedat : I’ll deal with the practicalities first and then I’ll go onto the financials. A shaft, at all times, needs to be maintained. So even when you’re not producing, you need essential services. On average a shaft like K3 will need between 150 and 200 people on 3 shaft to maintain it. There’s water pumping, there’s ventilation, there’s electrical, the shaft, you’re using the cage to take people up and down, you have to keep all of those things going. Let me give you one real example of what could happen. If your ventilation stops, in some shafts you could have potentially, methane build-up. You still have electricity, you have the potential of a blast. On the shallower shafts you have water, the water table is higher than the shaft, you have water ingress into the shaft. If it’s not pumped regularly it can decant out of the shaft and create environmental problems. You’ve got 11

14 Evidence leaders’ primary heads, paragraphs 1307 -1308
shafts, so you’re talking of 11 times, whether it is 150 or 200, you’re talking ?? 2000 people you need.

Let’s take it further. Next to each shaft is a concentrator. The concentrator takes the ore, crushes it, mills it, puts it into a liquid solution and then you do the separation and you get roughly the rough cut of the PGMs and the other products. You can’t just switch that off overnight. You’ve got to drain it in an orderly way, otherwise if you just stop, the material settles and you’re going to spend days, weeks, de-blocking the system when you have to restart it, at significant cost. That’s the concentrator.

From the concentrator the material goes to the smelter. Now, the smelter operates, there’s two furnaces in the case of Lonmin, the smelter operates at temperatures above 1000°. These are highly sophisticated electrode furnaces. In other words, you have positive and negative electrodes in the material in between and it arcs and it creates heat and these are water-cooled units. When we have to maintain one of these furnaces, we have to shut it down and that it takes two weeks and if you want to keep it alive but not producing because you’re in this crises situation, you still need people there to maintain it. You’ve got water systems around it, if those water systems fail you can either have water ingress into the furnace and there’s an explosion or you have water not cooling and you can have the furnace failing as well. So not practical to turn the furnace off overnight.
The same with base metals refinery. The base metals refinery is right next to the smelter, the furnaces and similarly it puts all of these products in suspension, through the various circuits and then produces, separates from there the different components and it's a base metal — they're associate minerals that are pulled out there. So you can't just shut that overnight. You have got to do it over a good few days. So those are the practical reasons why you couldn't just, let's say on that Monday the 13th, switch off the lights and let's leave, take everybody out of harm's way. You can't do that, you need the essential service people.

I spoke earlier about Lonmin's financial position. In the midst of this, as I mentioned — well, prior to this, we had gone on a road show to test the market for a bond, not successful. One was not being produced, but when this stopped, when the strike started you had stock piles of ore and you had material in process. To enable Lonmin to maintain its liquidity to a level that satisfies its covenants with the bank, Lonmin literally over a period drained all of that product and produced finished product and sold it and that's how it managed to keep on the right side of its financial covenants. If you recall the last extended strike, legal strike that we had in the country, the analysts were saying that this how many of the companies had managed to keep themselves financially afloat, they'd been draining their system, using up their work in progress.
So those are really the reasons why, I mean I say that with a bit of
cynicism but the guys, the people who are on strike, those that lived in
the hostels still went back to the hostels to have their meal. So if we
had sent the people there doing the cooking away as well, because you
can't selectively – you'd create a further problem for yourself. So not a
real practical solution that could have been implemented, you know,
within a couple of days or in some cases within a couple of weeks.\textsuperscript{15}

(emphasis added)

51. Neither SAPS nor the evidence leaders grapple with these realities.

52. In addition: the employer would have to distinguish between those who did not
come to work because they were on an unprotected strike, and those who did
not come to work because of the “shutdown”. How, in these circumstances is
the employer able to distinguish, and who gets paid and who does not get
paid during the period in question? There would be a real argument that the
employer would be responsible for paying all employees once it closed down
the operation. A greater inducement to prolong the strike is difficult to
envisage.

(h) The Securities Procedures Document

53. A debate is raised around the Counter Industrial Action Response Procedure
(“the securities procedures document”) which was produced as exhibit “XXX8”
during the proceedings.

\textsuperscript{15} Transcript, 11 September 2014, pages 37794 to 37797.
54. It is submitted that Lonmin had failed to follow its own procedural requirements in dealing with the strike which commenced during the nightshift of 9 August 2012.

55. There are a number of facts which need to be considered in this regard:

55.1 The securities procedure document had not been considered, let alone approved, by Exco.16

55.2 The Da Costa discussions took place with the Karee RDOs. Through those discussions Lonmin’s response to the demand of R12 500 was communicated. Notwithstanding this, the strike took place. No "talks" which would have repeated Lonmin’s response would have changed the course of events. The evidence of the striking workers in this regard was clear - it was either capitulation by Lonmin, or a continuation of the strike.

55.3 Lonmin security had, on 10 August 2012, engaged with the striking workers, who refused to hand over a memorandum containing their demands because, so they said, they were illiterate and could not write. Lonmin was moreover well aware of the R12 500 wage demand since a number of the striking workers were displaying placards which stated that they were demanding such a wage.17

55.4 Lonmin security, to the extent that it was necessary to do so, substantially complied with the securities’ procedures document in that

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16 Transcript, day 267, page 33962, lines 11 - 14
17 Exhibit W3
they determined the reason for the unprotected strike and conveyed this reason to Lonmin Human Capital. Lonmin Human Capital's reasons for not engaging with the striking employees are fully traversed in Lonmin's principal heads of argument.

PHASE 2 ISSUES

56. The evidence leaders do not suggest any findings or recommendation adverse to Lonmin by the Commission arising from the evidence led in respect of Phase 2. That is understandable in view of the limited extent to which Phase 2 issues could be explored.

57. The criticism levied against Lonmin in this context have been addressed in the primary submissions, but we add the following:

57.1 The suggestion that an adverse inference should be drawn based on Lonmin's failure to call further witnesses on its SLP housing obligations ignores the time constraints imposed on Phase 2 evidence, the absence of a final report by Dr Forrest, the absence of any evidence on this issue by DMR, and the agreement with the evidence leaders that Seedat would be the Lonmin witness to address Phase 2 issues.¹⁸

57.2 The criticism is repeated that Lonmin had the financial ability to meet its SLP obligations in the post 2008 era: what is ignored though is

¹⁸ It was generally understood that of the three Lonmin witnesses who could testify in the time available (Jameson, Mokwena and Seedat), Seedat was the most suitable person to speak to Phase 2 issues. It was then agreed with the evidence leaders that Seedat would be the witness giving evidence on Phase 2, which would allow more time to explore Phase 1 issues with Jameson and Mokwena.
Seedat’s unchallenged testimony, referring to the affidavit prepared by Mr Simon Scott, illustrating that shareholders in Lonmin Plc contributed substantially more than what had been received by way of dividends during the relevant period.\[19\] In addition, shareholders of WPL and EPL had financial covenants to comply with: in the case of Shanduka, this was to ensure that it could meet its loan obligations for its investment in WPL and EPL, and in turn enabling those entities to comply with their Charter obligations as to BEE shareholding. Lonmin had raised loans in foreign markets at a low rate to meet the BEE requirements. Those loans had to be repaid, which could only be done through declaring dividends by the two operational companies. In the process Lonmin Plc shareholders not only had a negative return on capital, but eventually had to invest more money into the operating companies than their dividend received.

**PHASE 2: CONCLUDING REMARKS**

58. Having made these submissions, the stark reality is that living conditions of miners generally and of employees of Lonmin in particular are unacceptable. It cannot continue if we hope to learn from and prevent another Marikana type tragedy.

59. The system of migrant labour lies at the root of most of these ills; it permeates the mining industry in South Africa, more particularly on the Rustenburg platinum belt and at WPL and EPL.

\[19\] Exhibit SSSS 11.
60. We accordingly support the recommendations in this context made by the SAHRC as contained in part 4 of their submissions.

S.F. BURGER SC

A.E. BHAM SC

M. VAN AS