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

Ad SAPS Submissions [Section ‘O’]

1. *Ad paras 421.6, 422.5 and 422.10*: NUM is criticised for calling upon employees to report for work and for escorting those who needed assistance to do so. SAPS contends that this fuelled the conflict. We contest this view. Although it is correct that NUM was aware that strikers would be angered by activity that was directed towards the performance of work rather than compliance with the call to strike, NUM does not accept that the prospect of strikers being angered is a good ground for what amounts to the surrender of the rule of law and/or the *de facto* submission to unlawfulness.

2. NUM was opposed to unprotected strike action. More than that, it was opposed to the enforcement of such a strike through intimidation and violence. Conversely, NUM fully supported the right of those who wished to work to be able to do so. Hence, NUM was willing to provide escort assistance in circumstances where it was apparent that Lonmin itself was unable to do so, to a sufficient extent. It seems to NUM that there is an unarticulated premise underlying these contentions by SAPS (which we accept is confined to the Marikana context), namely that strikers who break the law
must not be resisted for fear that they become angered by such resistance. We respectfully consider that to be an unpalatable premise.

3. *Ad paras 421.7, 422.3, 422.6 and 423.1:* NUM is similarly criticised by SAPS for electing to defend its office against the strikers on 11 August 2012. It is plain from these paragraphs that SAPS has not accepted that the strikers were conducting an attack on the office. SAPS goes further and suggests that NUM mobilised its members and arranged weapons beforehand, in preparation for a confrontation with strikers.

4. The NUM office and its content were essential for the viability of the presence of the union. There is ample evidence in this regard. In these circumstances, we submit that the NUM members and officials were entitled to resist an attack that was manifestly hostile and reportedly intent on burning down the office. We reiterate the submissions made above that it is the position of NUM that unlawful conduct should be resisted where, as in this case, it is appropriate to do so.

5. We have dealt with the intention of the strikers in our main submissions. Nevertheless, it will be convenient to set out here an abbreviated account of the key evidence, which we submit establishes a clear case of hostile intent on the part of the strikers. Shortly put, this was an attack: (i) during the evening of 10 August 2012, Mr Dibakoane was informed by certain informants that there was much unhappiness about NUM's escorting of workers and that a mass meeting had been called for the next morning, the purpose of which was to confront and challenge NUM at its offices because it was not adhering to the "no work embargo";¹ (ii) as the strikers set off towards the NUM offices on 11 August 2012, the two security officers received information that it was now the intention of the crowd to burn down the NUM offices;² (iii) having regard *inter alia* to the songs that were being sung, the security officers decided to go ahead of the march and to warn those at the NUM office of the crowd's intention and to request that they should vacate the office; (iv) shortly before the security officers arrived a Mr Kolkati (who was present in the NUM office)

¹ Dibakoane "ZZ3" paras 2.5 at 2.6.
² Dibakoane "ZZ3" para 2.10.
independently received a warning from a friend of his who was amongst the strikers, being that the strikers had decided to march to the NUM office intending to deal with the branch leadership and to take over the office;\(^3\) (v) at the point of confrontation at the NUM office, strikers started shouting at NUM members, including threatening words like "here are these dogs"; it was clear that they were very hostile and that there was at no stage any indication from them that they had come there in order to speak to the NUM people;\(^4\) (vi) even the rather pro-striker witness, Mr Motlogelo, confirmed that the NUM people at the office were in danger from the crowd and that is why they were advised to leave; the two security officers themselves also left the scene because the advancing strikers made it unsafe for them to stay;\(^5\) (vii) to complete this picture, there is an important \textit{ex post facto} report by a Lonmin undercover operative who gave an account of what was said at the koppie in the course of the afternoon of 11 August 2012, which included the desire of the mass to retaliate after the shooting of two persons \textit{"during an attempt earlier the day to torch the NUM offices"}.\(^6\)

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

---

3 Gegeleza "ZZ2" para 11.
4 Gegeleza "ZZ2" para 19.
6 "RRRR2.4"; NUM submissions paras 242 and 243.
7 See for instance: Setelele "YY1" para 19.
Cheadle Thompson & Haysom Inc
Attorneys for NUM and Mrs Fundi

Sandton
3 November 2014