REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994

PUBLIC PROTECTOR
SOUTH AFRICA

TRANSNET SOC LTD AND KUMBA IRON ORE 25 YEAR CONTRACT

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, CORRUPTION AND ENTRENCHMENT OF MONOPOLIES IN THE TWENTY FIVE (25) YEAR CONTRACT BETWEEN TRANSNET AND ANGLO SUBSIDIARY, KUMBA (Pty) Ltd.

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LIST OF ACRONYMS

ABSA	Amalgamated Banks of Southern Africa
ACEO	Acting Chief Executive Officer
ADV	Advocate
AUTUMN SKIES	Autumn Skies and Logistics (Pty) Ltd
BBBEE ACT	Broad-Based Black Economic Empowerment Act
BEE	Black Economic Empowerment
CEO	Chief Executive Officer
CFO	Chief Financial Officer
Constitution	The Constitution of the Republic of South Africa No. 108 of 1996
CPI	Consumer Price Index
DMR	Department of Minerals and Resources
EM	Emerging Miners
Fe	Iron
GCE	Group Chief Executive
ISCOR	South African Iron and Steel Industrial Corporation
LCR	Lime-Chem Resources (Pty) Ltd
PPI	Producer Price Index
PPPFA	Preferential Procurement Policy Framework Act
SIOC	Sishen Iron Ore Company (Pty) Ltd
TRF	Transnet Freight Rail
TPT	Transnet Port Terminal
VAT	Value Added Tax
PPA	Public Protector Act 23 of 1994
PPSA	Public Protector South Africa

"Public procurement is an important strategic vehicle for developing local industries, broadening economic participation and creating work opportunities". These were the sentiments expressed by the then Minister of Finance during the 2017 Budget speech.

Executive Summary

(i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

(ii) The report communicates my findings and the appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation in connection with allegations of maladministration, corruption and entrenchment of monopolies in the twenty five (25) year contract between Transnet and Anglo subsidiary, Kumba (Pty) Ltd.

(iii) The investigation was conducted following a complaint lodged by Mr Mzwanele Manyi (the Complainant) on 06 September 2016, in connection with the allegation of maladministration, corruption and entrenchment of monopolies in the twenty five (25) year contract between Transnet and Anglo subsidiary, Kumba (Pty) Ltd (Kumba) as a result of a contract allegedly signed by Ms. Maria Ramos in 2005.

(iv) In essence, the allegations by Mr Manyi were that,Transnet entered into a 25 year contract in 2005 with Anglo subsidiary, Sishen Iron Ore Company (Propriety) Limited (SIOC) which later became Kumba for the supply of Iron ore products by Kumba and the transportation thereof to wherever required and loading for export through Saldanha Bay by Transnet.

(v) He further stated that the contract was from the beginning very one-sided in favour of the Anglo subsidiary.

(vi) He also alleged that notwithstanding that the market value of the transaction was estimated at about R185 per ton, the contract was "set for a fixed amount at around R145 per ton yet the contract was signed at about R100 per ton, thus prejudicing Transnet from the start.

(vii) Mr. Manyi further stated that at an estimated tonnage of 35 million to 45 million per year, Transnet has been suffering an estimated negative of R2 billion per year and thus a loss of R4bn which has accumulated to a total loss of about R80 billion for the contract period ending in 2027.

(viii) Further thereto Mr. Manyi also alleged that the R2 billion penalty which would otherwise be payable to Transnet was converted to a mere R700 million by Transnet management with Ms. Maria Ramos at the helm.

(ix) Mr. Manyi also alleged that, in 2008, a few months before Ms. Maria Ramos joined Amalgamated Banks of South Africa (ABSA) as Chief Executive Officer (CEO), this contract was revised and virtually ALL the penalty specification clauses were **DELETED**, and thus giving the Anglo subsidiarity a licence to operate with impunity.

(x) He also alleged that it is not clear as to what led to this sudden revision of this contract.

(xi) **Based on the analysis of the complaints as well as media reports and information that came to my attention from various sources, the following issues were identified to inform and focus the investigation:**

a. **Issue 1-** Whether the 25 year contract entered into between Kumba and Transnet has provided for a monopolistic avenue for Kumba such that Black Economic Empowerment (BEE) firms would find it impossible to get an allocation in the national asset as in rail line to export their products, as the contract provides for a 75% allocation to Anglo subsidiary and it furthermore grants the Anglo Subsidiary a first (1st) right of refusal to 85% of new capacity in the event Transnet is able to do so, and;

b. **Issue 2**-Whether in 2008, a few months before Ms. Maria Ramos resigned as Chief Executive Officer (CEO), the contract between Transnet and Kumba was revised and virtually all penalty clauses were deleted, and thus giving the Anglo subsidiary a licence to operate with impunity.

(xii) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included an exchange of documentation between the Public Protector and the Complainant as well as the Group Chief Executive (GCE), Acting Group Chief Executive of Transnet and the Commissioner of the Competition Commission.

(xiii) All relevant documents and correspondence were obtained and analysed and relevant laws, policies and related prescripts were considered and applied throughout the investigation.

(xiv) A Discretionary Notice was sent to the Complainant on 3 September 2019 of which he acknowledged the notice on 6 September 2019.

(xv) Notices in terms of section 7(9) of the Public Protector Act were issued to Dr Popo Molefe, the Chairperson of Transnet Board and to Mr. Mohammed Mahomedy, the Acting Group Chief Executive of Transnet on 25 October 2019.

(xvi) Responses to the notice were received from Mr. Mohammed Mahomedy, the Acting Group Chief Executive of Transnet on 15 November 2019 and 17 January 2020.

(xvii) Having considered the evidence obtained during the investigation, I now make the following findings.

1. **Issue 1- Regarding whether the 25 year contract entered into between Kumba and Transnet has provided for a monopolistic avenue for Kumba such that Black Economic Empowerment (BEE) firms would find it impossible to get an allocation in the national asset as in rail line to export their products, as the contract provides for a 75% allocation to Anglo subsidiary and it furthermore grants the Anglo Subsidiary a first (1st) right of refusal to 85% of new capacity in the event Transnet is able to do so:**

(aa) The allegation that the 25 year contract entered into between Kumba and Transnet has provided for a monopolistic avenue for Kumba such that Black Economic Empowerment (BEE) firms would find it impossible to get an allocation in the national asset as in rail line to export their products, as the contract provides for a whopping 75% allocation to Anglo subsidiary and it furthermore grants the Anglo Subsidiary a first (1st) right of refusal to 85% of new capacity in the event Transnet is able to do so, **is not substantiated**;

(bb) Transnet has made an effort to afford capacity to emerging contractors and BEE firms and has in fact contracted with a number of emerging contractors and further allocated 25% of rail to them.

(cc) The contract between Transnet and SIOC has been lucrative and beneficial to Transnet in that in the financial year ending March 2019, and with specific reference to the iron ore channel, Transnet exceeded its annual volumes target and recorded over R8 billion in revenue and R5 billion in profit, which translates into 0,8% and 7% increase respectively.

(dd) The Sishen 1A Agreement is an agreement concluded between Transnet and SIOC, Kumba is not a party to the agreement.

(ee) The costs associated with mining operations appear to be the main contributor for the demise of the majority of the EMs.

(ff) The failure by some contractors were not caused by Transnet, for example, Autumn Skies Resources and Logistics terminated their contract with Transnet because of high silica content, delays in mining production cycle and they were also converting from an iron ore mine to a manganese mine.

(gg) Ringside Trading 520 (Pty) also cancelled their contract with Transnet as they wanted to focus their iron ore sales on the local market and as a result would not need access to export capacity and they also declined allocation of rail when they were offered by Transnet.

(hh) Transnet suspended its rail capacity to Lime Chem Resources as they were not fulfilling their contractual obligations and they have never responded to Transnet in this regard.

(ii) Transnet is willing to avail rail capacity to any other business at a reasonable fee.

(jj) With regard to the right of first refusal Transnet will have to first offer 85% and not the entire network available of the new rail capacity to Kumba. Even if Kumba should opt to take the 85% capacity, the emerging miners will still have 15% of the new / future capacity available for them to utilise in addition to the 25% of the current capacity.

<u>2.</u> **<u>Issue 2-</u> Regarding whether in 2008, a few months before Ms. Maria Ramos resigned as Chief Executive Officer (CEO), the contract between Transnet and Kumba was revised and virtually all penalty clauses were deleted, and thus giving the Anglo subsidiary a licence to operate with impunity**

(aa) The allegation that in 2008, a few months before Ms. Maria Ramos resigned as Chief Executive Officer (CEO), the contract between Transnet and Kumba was revised and virtually all penalty clauses deleted, thus giving the Anglo subsidiary a licence to operate with impunity is **<u>unsubstantiated</u>**:

(bb) The allegation that the R2 billion penalty which would otherwise be payable to Transnet was converted to a mere R700 million by Transnet management with Ms. Ramos at the Helm is incorrect.

(cc) On 18 July 2008, Transnet and SIOC signed a "Settlement and Amendment Agreement" which amended certain aspects of the Sishen 1A Agreement and settled various disputes that had risen between the parties.

(dd) There had been significant capital overruns in the 1A Expansion and there were a number of disputes between SIOC and Transnet, some of which related to penalties which have been resolved.

(ee) The Settlement and Amendment Agreement was approved by the Board of Directors of SIOC and Transnet and was duly signed by Ms. Ramos, in her capacity as the Group Chief Executive (GCE) of Transnet and by Mr. Chris Griffith who was the then Chief Executive of SIOC as authorised representatives of both entities.

3. **The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, is the following:**

a. Due to the absence of any negative findings against Transnet, I am not taking remedial action against them.

b. Regarding the need that the rail is principally used for the benefit of the populace, I hope that Transnet ensures that their long-term strategic supplier relationship objectives with EMs and BEE miners are in line with socio-economic transformation objectives with the view of ensuring that these miners are accommodated by Transnet for the transformation of the sector and for the benefit of all South Africans.

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1. INTRODUCTION

1.1. This is my report as the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8 of the Public Protector Act to the following to note the outcome of this investigation and implementation of the remedial action:

1.2.1. The Chairperson of the Board of Directors of Transnet, Dr Popo Molefe; and,

1.2.2. The Acting Group Chief Executive of Transnet, Mr Mohammed Mahomedy.

1.3. **A copy of the report is also submitted to:**

1.3.1. The Complainant, Mr Mzwanele Manyi.

1.4. This report relates to an investigation into allegation of maladministration, corruption and entrenchment of monopolies in the twenty five (25) year contract between Transnet and Anglo subsidiary, Kumba (Pty) Ltd.

2. THE COMPLAINT

2.1. On 06 September 2016, a complaint was lodged by Mr Mzwanele Manyi (the Complainant), in connection with allegations of maladministration, corruption and entrenchment of monopolies in the twenty five (25) year contract between Transnet and Anglo subsidiary, Kumba (Pty) Ltd as a result of a contract allegedly signed by Ms. Maria Ramos in 2005.

2.2. In his complaint, the Complainant stated, *inter alia* that:

2.2.1. Transnet entered into a 25 year contract in 2005 with Anglo subsidiary, Sishen Iron Ore Company (Propriety) Limited (SIOC) which later became Kumba for the supply of Iron ore products by Kumba and the transportation thereof to wherever required and loading for export through Saldanha Bay by Transnet.

2.2.2. He further stated that the contract was from the beginning very one-sided in favour of the Anglo subsidiary.

2.2.3. He also alleged that notwithstanding that the market value of the transaction was estimated at about R185 per ton, the contract was "set for a fixed amount at around R145 per ton yet the contract was signed at about R100 per ton, thus prejudicing Transnet from the start.

2.2.4. Mr. Manyi further stated that at an estimated tonnage of 35 million to 45 million per year, Transnet has been suffering an estimated negative of R2 billion per year and thus a loss of R4bn which has accumulated to a total loss of about R80 billion for the contract period ending in 2027.

2.2.5. Further thereto, Mr. Manyi also alleged that the R2 billion penalty which would otherwise be payable to Transnet was converted to a mere R700 million by Transnet management with Ms. Maria Ramos at the helm.

2.2.6. Mr. Manyi also alleged that, in 2008, a few months before Ms. Maria Ramos joined Amalgamated Banks of South Africa (ABSA) as Chief Executive Officer (CEO), this contract was revised and virtually ALL the penalty specification clauses were **DELETED**, and thus giving the Anglo subsidiarity a licence to operate with impunity.

2.2.7. He also alleged that it is not clear as to what led to this sudden revision of this contract.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. The Public Protector is an independent constitutional institution established under section 181(1) (a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2. Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action."

3.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

3.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.5. The Public Protector is also bestowed with power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism that may be expedient under the circumstances.

3.6. In the constitutional court, (in the matter of ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016),*** Chief Justice Mogoeng stated the following, when confirming the powers the Public Protector:

3.6.1. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.6.2. An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);

3.6.3. Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints. That is the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.6.4. The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (para 69) ;

3.6.5. Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);

3.6.6. The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71);

3.6.7. Implicit in the words *"take action"* is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure and *"action"* presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (para 71(a));

3.6.8. She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.6.9. *"Appropriate"* means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.7. The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, *"When remedial action is binding, compliance is not optional, and whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."*

3.8. Transnet is an organ of state and its conduct amounts to conduct in state affairs, and, as a result the matter falls within the Public Protector's mandate to investigate. The Public Protector's power and jurisdiction to investigate, report and take appropriate remedial action was not disputed by any of the parties.

3.9. Transnet is a Schedule 2 Public Entity in terms of the Public Finance Management Act, 1999 (PFMA). The business units of Transnet include:

3.9.1. Transnet National Ports Authority and Transnet Port Terminals;

3.9.2. Transnet Pipelines;

3.9.3. Transnet Freight Rail railway operator; and,

3.9.4. Transnet Rail Engineering.

3.10. Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

3.11. Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years of the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar me from investigating. Instead, it is mainly ***the interests of justice*** that dictate whether I should investigate the matter or not. It is axiomatic that I have to identify special circumstances using my discretion should I decide to entertain such a complaint. In this case, I submit that there is a huge ***public interest*** in the public administration or in the governing of public affairs.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2. The Public Protector Act confers on the Public Protector, the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2. Approach to the investigation

4.2.1. The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1. What happened?

4.2.1.2. What should have happened?

4.2.1.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or to maladministration?

4.2.1.4. In the event of improper conduct or maladministration what would it take to remedy the wrong occasioned by the said improper conduct or maladministration?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. In this particular case, the factual enquiry focused on whether and to what extent the Transnet fulfilled its responsibilities.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by Transnet to prevent maladministration and prejudice.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the improper conduct or maladministration where possible and appropriate.

4.3 Based on analysis of the allegations contained in the media reports as well as information that came to my attention from various sources, I identified the following issues to inform and focus this investigation:

4.3.1. Issue 1- Whether the 25 year contract entered into between Kumba and Transnet has provided for a monopolistic avenue for Kumba such that Black Economic Empowerment (BEE) firms would find it impossible to get an allocation in the national asset as in rail line to export their products, as the contract provides for a 75% allocation to Anglo subsidiary and it furthermore grants the Anglo Subsidiary a first (1^{st}) right of refusal to 85% of new capacity in the event Transnet is able to do so, and;

4.3.2. Issue 2-Whether in 2008, a few months before Ms. Maria Ramos resigned the contract between Transnet and Kumba was revised and virtually all penalty clauses were deleted, and thus giving the Anglo subsidiary a licence to operate with impunity.

4.4 The Key Sources of Information

4.4.1. Documentation

4.4.1.1. Contract between Transnet Limited and Sishen Iron Ore Company(Pty) Ltd dated 26 March 2002;

4.4.1.2. Contract between Transnet Limited and Sishen Iron Ore Company(Pty) Ltd dated 16 February 2005;

4.4.1.3. Service Level Agreement between Transnet Limited and Sishen Iron Ore Company(Pty) Ltd dated 21 September 2005;

4.4.1.4. Contract between Transnet Limited and Sishen Iron Ore Company(Pty) Ltd dated 18 July 2008; and

4.4.1.5. Settlement and Agreement- between Transnet Limited and Sishen Iron Ore Company (Pty) Ltd dated 18 July 2008.

4.4.2. Correspondence exchanged;

4.4.2.1. A letter from the Complainant dated 05 September 2006;

4.4.2.2. Correspondence addressed to Mr. Siyabonga Gama, the former Group Chief Executive of Transnet dated 30 January 2018;

4.4.2.3. Correspondence from Mr. Siyabonga Gama, the former Group Chief Executive of Transnet dated 13 June 2018;

4.4.2.4. Correspondence from Mr. Stanley Mamaregane, the General Manager: Group Legal Services dated 2 May 2019;

4.4.2.5. Correspondence from Mr. Stanley Mamaregane, the General Manager: Group Legal Services dated 27 August 2019;

4.4.2.6. Correspondence addressed to Mr. Thembinkosi Bonakele, the Commissioner of the Competition Commission, dated 22 May 2019;

4.4.2.7. Correspondence from Mr. Thembinkosi Bonakele, the Commissioner of the Competition Commission, dated 24 June 2019;

4.4.2.8. Correspondence from Mr. Jonathan Scott of Lime-Chem Resources dated 2 September 2019;

4.4.2.9. Correspondence from Mr. Lionel Koster of Autumn Skies dated 5 September 2019;

4.4.2.10. Correspondence from Mr. Nicolas Loubser of Ringside Trading (Pty) Ltd dated 25 September 2019;

4.4.2.11. Discretionary Note to the Complainant dated 3 September 2019;

4.4.2.12. Email correspondence from Transnet dated 22 February 2019, 14 March 2019 and12 April 2019;

4.4.2.13. Notice in terms of section 7(9)(a) of the Public Protector Act to Dr Popo Molefe, the Chairperson of the Transnet Board issued on 25 October 2019;

4.4.2.14. Notice in terms of section 7(9)(a) of the Public Protector Act to Mr. Mohammed Mahomedy, the Acting Group Chief Executive of Transnet issued on 25 October 2019;

4.4.2.15. Correspondence from Mr. Mohammed Mahomedy, the Acting Group Executive of Transnet dated 15 November 2019;

4.4.2.16. Correspondence addressed to Dr Popo Molefe, the Chairperson of the Transnet Board dated 26 November 2019, and;

4.4.2.17. Response to the section 7(9) notice from Mr. Mohammed Mahomedy, the Acting Group Executive of Transnet on 15 November 2019 and 17 January 2020.

4.4.3. Interviews, Meetings and Inspections *in loco*

4.4.3.1. A meeting with the officials of Transnet on 15 May 2018,and;

4.4.3.2. A meeting with the officials of Transnet on 7 August 2019.

4.4.4. Legislation and other prescripts

4.4.4.1. The Constitution;

4.4.4.2. The Public Protector Act;

4.4.4.3. The Broad-Based Black Economic Empowerment Act No 53 of 2003 as Amended by Act 46 of 2013;

4.4.4.4. Preferential Procurement Policy Framework Act No. 5 of 2000, and;

4.4.4.5. Preferential Procurement Regulations, 2017

4.4.5. Case Law

4.4.5.1. *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT143/15; CCT171/15) [2016] ZACC 11; (2016) (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the 25 year contract entered into between Kumba and Transnet has provided for a monopolistic avenue for Kumba such that Black Economic Empowerment (BEE) firms would find it impossible to get an allocation in the national asset as in rail line to export their products, as the contract provides for a 75% allocation to Anglo subsidiary and it furthermore grants the Anglo Subsidiary a first (1^{st}) right of refusal to 85% of new capacity in the event Transnet is able to do so.

Common cause issues

5.1.1. The rail and port export channel which is commonly referred to as the "Iron Ore Channel" comprises the Sishen-Saldanha heavy-haul railway line which is approximately 861 kilometers in length and associated port infrastructure in the Port of Saldanha including a bulk Iron Ore terminal and related off-loading, stacking, reclaiming and ship-loading infrastructure and equipment.

5.1.2. The Iron Ore Export Channel is almost exclusively dedicated to the rail transportation and export of Iron Ore from Iron Ore mines in the Northern Cape where most of South African's Iron reserves are located.

5.1.3. The Sishen-Saldanha heavy-haul railway line was constructed by the South African Iron and Steel Industrial Corporation (ISCOR) and began operating in 1976, at the time, ISCOR was a state-owned enterprise and was the predecessor of the company that would later come to be known as Sishen Iron Ore Company (SIOC) following its privatisation disposal.

5.1.4. In 1977, the Sishen-Saldanha heavy-haul railway line was transferred from ISCOR to Transnet (which was then known as South African Railways and Harbours).

5.1.5. During the transfer, ISCOR contracted with Transnet to provide rail and port related services to enable the transport and export of Iron Ore through the Port of Saldanha.

5.1.6. At all material times, ISCOR was the sole Iron Ore exporter and thus the sole user of the Sishen-Saldanha heavy-haul railway line.

5.1.7. ISCOR was unbundled and two separate listed companies, a steel entity and mining entity were formed.

5.1.8. To date, SIOC remains the largest miner and exporter of Iron Ore in South Africa by a very great margin. To place this in perspective, SIOC produces approximately 75% of all Iron Ore that is exported from South Africa with all remaining Iron Ore mines exporting the remainder.

5.1.9. Although SIOC's predecessors were instrumental in the establishment of the Iron Ore Channel, the capacity was not created for SIOC, but instead the capacity contracted for by SIOC represents its mining output.

Contractual Arrangements

5.1.10. In 2002, the mining entity, SIOC signed a contract with Transnet for the transportation and export of Iron Ore and the provision of rail and port services. This is known as "the Main Agreement".

5.1.11. The parties entered into this relationship in respect of:

5.1.11.1. The supply by SIOC of Iron Ore Products at SIOC Operations; and

5.1.11.2. The transportation to, off-loading of and, where necessary, stocking, reclaiming and loading onto vessels for the export of such Ore Products of the Port of Saldanha by Transnet.

5.1.12. On 16 February, Transnet concluded a further agreement with SIOC. The agreement of 2005 ("the Sishen 1A Agreement") amended the Main Agreement and Heads of Agreement signed on 17 December 2004:

"5.3. Clause 2 of the Sishen 1A Agreement states:

The parties have an existing relationship in respect of:

The supply by SIOC of Iron Ore Products at SIOC Operations; and

the transportation to, off-loading of and, where necessary, stacking, reclaiming and loading onto vessels for export of such Iron Ore Products at the Port of Saldahna by Transnet.

The Parties' existing relationship is governed by the Main Agreement as modified by the Heads of Agreement.

The Head of Agreement contemplate that Parties will agree to a definitive agreement, based on the principles set out in the Heads of Agreement and, where relevant, the Main Agreement. The parties accordingly set out in this Agreement the definitive agreement contemplated in the Heads of Agreement".

5.1.13. The Sishen 1A Agreement is an agreement concluded between Transnet and SIOC, Kumba is not a party to the agreement.

5.1.14. The Sishen 1A Agreement came about and was directly linked to a long term capital expansion by Transnet of what is commonly referred to as the "Iron Ore Channel".

5.1.15. This expansion was referred to as the "1A Iron Expansion" and sought to increase the throughput capacity of the Iron Ore Channel from the existing 23.5 million tons per annum (Mtpa). The 1A Expansion entailed a very significant capital investment by Transnet as such it required the security of a long term take-or-pay agreement to underpin and support such capital investment.

5.1.16. The Sishen 1A Agreement thus provided Transnet with the necessary contractual and commercial certainty, through long term take-or-pay commitments, to enable it to fund the 1A Expansion.

5.1.17. The Sishen 1A Agreement was the product of intense negotiations between SIOC and Transnet and that the rail and port service related tariffs arrived in the agreement were premised upon a financial model developed by Transnet at the time, which model was independently verified.

5.1.18. The Sishen 1A Agreement became effective on 1 January 2005 and will endure until 31 December 2027. It was accordingly an agreement with a Twenty Two (22) year duration. This lengthy contract duration favours the long life assets deployed and construed by Transnet, many of which have economic life of over forty (40) years.

5.1.19. Other agreements entered into by Transnet, with other Iron Ore exporters were:

5.1.19.1. **Sishen Iron Ore Company (Pty) Ltd contract dated 16 February 2005.**

5.1.19.1.1. The Sishen (Sishen 1A) Agreement is concluded.
5.1.19.1.2. Replaced the 2002 Main Agreement and 2004 Heads of Agreement.

5.1.20. **Sishen Iron Ore Company (Pty) Ltd contract dated 18 July 2008.**

5.1.20.1. The 1st Settlement and Amendment of the Sishen Agreement.
5.1.20.2. The Kolomela (Sishen South) Agreement.
5.1.20.3. Amended certain aspects of the Sishen 1A Agreement and which settled various disputes that had arisen between Transnet and SIOC.

5.1.21. **Sishen Iron Ore Company (Pty) Ltd contract dated 02 February 2011.**

5.1.21.1. The 2nd Amendment of the Sishen Agreement.
5.1.21.2. Letter amendment detailing which clause are amendment January 2011 Amendment.
5.1.21.3. Transnet increased and re-based the tariffs payable by SIOC.

5.1.21.4. Transnet removed the CPIX from the index and introduced a composite Index of PPI (60%) Electricity Price Index (18%) and Labour Index (22%).

5.1.21.5. Transnet re-based the Super Tariff.

5.1.21.6. Removed the tariff review mechanism.

5.1.22. **Sishen Iron Ore Company (Pty) Ltd contract dated 20 September 2013.**

5.1.22.1. The 3rd Amendment of Sishen Agreement and First Amendment of Kolomela Agreement.

5.1.22.2. Reducing the total guaranteed tonnage from Sishen with commensurate increases in the guaranteed tonnage from Kolomela.

5.1.22.3. Introducing a new Super Tariff in the Kolomela Agreement for 2013 and 2014 financial years.

5.1.22.4. Allowed for shortfalls in guaranteed tonnage to be made up either the Sishen or Kolomela mines.

5.1.22.5. Provided for SIOC to pay Transnet penalties.

5.1.23. **Sishen Iron Ore Company (Pty) Ltd contract dated 25 November 2014.**

5.1.23.1. The 4th Amendment of the Sishen Agreement and Second Amendment of the Kolomela Agreement.

5.1.23.2. Provided for penalties on guaranteed tonnage to be calculated on combined tonnage of Sishen mine and Kolomela and not the discrete volumes of each mine.

5.1.23.3. Provided for Kumba to move volumes interchangeably between Sishen and Kolomela.

5.1.23.4. Provided for SIOC to pay a penalty payment to Transnet.

5.1.24. The table below depicts the top 10 shareholders of Kumba Iron Ore

Register date: 19 October 2018 - Issued capital (IC): 322 085 974

	Top 10 shareholders	City	Holdings at 30 June 2019	% IC	Holdings at 31 March 2019	% IC
1.	Anglo South Africa	Johannesburg	224,535,915	69.71%	224,535,915	69.71%
2.	Industrial Development Corporation	Johannesburg	41,498,615	12.88%	41,498,615	12.88%
3.	Public Investment Corporation	Pretoria	4,501,699	1.40%	4,382,348	1.36%
4.	BlackRock Investment Mgt	San Francisco	2,871,063	0.89%	2,931,514	0.91%
5.	Acadian Asset Mgt	Boston	2,407,707	0.75%	2,031,643	0.63%
6.	Robeco Asset Mgt	Rotterdam	2,387,754	0.74%	1,475,305	0.46%
7.	GMO	Boston	2,235,728	0.69%	1,847,441	0.57%
8.	Vanguard Group	Philadelphia	1,897,956	0.59%	1,907,705	0.59%
9.	Fairtree Capital	Cape Town	1,633,172	0.51%	1,211,414	0.38%
10	Dimensional Fund Advisors	London	1,436,558	0.45%	1,548,582	0.48%

Issues that are in dispute

5.1.25. The issue for my determination is whether the 25 year contract entered into between Kumba and Transnet provided for a monopolistic avenue for the Anglo subsidiary such that Black Economic Empowerment (BEE) firms find it impossible to get allocation in the national asset as in rail line to export their products, as the contract provides for a 75% allocation to Anglo subsidiary and it furthermore grants the Anglo Subsidiary a first (1st) right of refusal to 85% of new capacity in the event Transnet is able to do so.

5.1.26. According to Transnet, to date, SIOC remains the largest miner and exporter of Iron Ore in South Africa by a very good margin and to place it into perspective, SIOC produces approximately 75% of all Iron Ore that is exported from South Africa with all remaining iron ore mines exporting the remainder.

5.1.27. In dealing with capacity contracting based on mining output, Transnet stated that although SIOC's predecessors were instrumental in the establishment of the Iron Ore Channel, the capacity was not created for SIOC, but instead the capacity contracted for by SIOC represents its mining output, which means that the allocation of the 75% capacity to Kumba is proportional to their throughput-volumes being made available and moved through their network.

5.1.28. The Sishen 1A agreement thus provided Transnet with necessary contractual and commercial certainty, through long term take-or-pay commitments, to enable it to fund the 1A expansion.

5.1.29. The Sishen 1A agreement became effective on 1 January 2005 and will endure until 31 December 2027 and was accordingly an agreement with a twenty two (22) year duration and this lengthy contract period favours the long life assets deployed and constructed by Transnet, many of which have economic life of over forty (40) years.

5.1.30. Transnet have expanded the Iron Ore line and related Port Infrastructure where demand for additional capacity was established and thus warranted additional capacity and all such expansions have been underpinned by long term take-or-pay contracts.

5.1.31. According to Transnet, they have not created spare capacity as this would lead to unrealised value and stranded assets as well as potential fruitless and wasteful expenditure and they respond to confirmed demand irrespective of whether such demand is from BEE firms or otherwise and in addition, in recent years they have made concerted effort to afford capacity to emerging BEE miners and has in fact contracted with a number of BEE firms.

5.1.32. A meeting was held with Transnet officials including Mr. Navesh Ragoonanthun the General Manager: Business Development, Mr. Earle Peters, Executive Manager: Business Development, Mr. Stanley Mamaregane, the General Manager: Group Legal Services, Mr. Samkelo Mtwana, Senior Legal Adviser and Mr. Risiba who is also a Senior Legal Adviser at Transnet on 7 August 2019 and in this meeting clarity was sought with regard to the allegations mentioned above.

5.1.33. According to Transnet, the rail line is not only dedicated to iron ore alone, but also to export manganese.

5.1.34. Furthermore Transnet stated that, their main iron ore customers are SIOC, Assmeng, Sedibeng Iron Ore (Emerging Miner), Afrimat (Emerging Miner) and though they welcome emerging miners to come on to the rail, they cannot take on more capacity which means that Transnet and/or the Government have to extend the rail which can cost over billions of rands.

5.1.35. Transnet also stated that they tried to assist the emerging miners, in 2015 the iron ore price was in the region of $60 dollar a ton and when in 2016 the price dropped to the average of $32 to $35 dollars a ton that is when most of the emerging miners dropped out. Some closed down and others went on business rescue.

5.1.36. Transnet further stated that they serviced these emerging miners, but some of them have no market to sell their product and some cannot mine this product as they are not financially viable to keep going.

5.1.37. Transnet further stated that they have over extended themselves in trying to accommodate emerging contractors and have done everything possible to assist them. According to Transnet, if these miners can mine iron ore and have a market to sell it, they will always be willing to assist in transporting their iron ore.

5.1.38. Transnet further stated that the emerging miners pay the same tariffs as any other miner and the tariff is based on what the fixed cost was for in the rail line and 73% of the rail line is dedicated to Kumba and Kolomela and the remaining is dedicated to emerging contractors.

5.1.39. On 27 August 2019, Transnet further responded stating that the right of first refusal relates to 85% of any such additional rail capacity created in such expansion and thus not the entire network is available and that this is contractual and emanates from the investment made by the Parties in relation to the current rail network capacity. Transnet further stated that the current rail network capacity is sitting at 60m/t per annum and included in this is the 75% allocation to Kumba and 25% reserved for emerging contractors.

5.1.40. According to Transnet this means that the current rail capacity allocation of 75%: 25% is based on the current infrastructure and the volumes being made available by Kumba on the one hand, and the emerging miners on the other hand and the 85%:15% rail capacity allocation is with respect to future expansion programs aimed at increasing rail volumes.

5.1.41. According Transnet should in the future decide to embark on an expansion program with respect to the available land or rail network, Transnet is required by law to first obtain the buy-in of all the customers because expansions are funded by customers.

5.1.42. Ordinarily Transnet would fund the expansion and thereafter recoup the money spent as capex by increasing the tariff accordingly and what this means, and based on the current volume trends, is that Transnet will recoup 85% of the cost of expansion from Kumba and 15% from emerging miners.

5.1.43. According to Transnet what this also means is that in direct proportion of the increase in tariff, Transnet will have to first offer 85% (i.e. right of first refusal) (hence "not the entire network available") of the new rail capacity to Kumba. Even if Kumba should opt to take the 85% capacity, the emerging miners will still have 15% of the new / future capacity available for them to utilise in addition to the 25% of the current capacity as stated above.

5.1.44. Transnet further clarified that the 2005 Agreement is not an "evergreen" contract, but rather a fixed long term agreement with clear demonstrated benefits to Transnet.

5.1.45. Transnet also stated that over the years, they have seen the emergence and demise of emerging miners and the costs associated with mining operations appear to be the main contributor for the demise of the majority of the emerging miners and this has nothing to do with Transnet as their main business is to move the mined commodities from one location to the another.

5.1.46. According to Transnet, the total capacity or volumes that can be railed or moved by Transnet on the network per annum is at the maximum of 60 million tons per annum, of the 60 million tons, 75% of the capacity is taken up by Kumba and the remaining 25% is allocated to emerging miners.

5.1.47. Transnet further stated that the shutdown of some emerging miners results in unutilised capacity which is then taken up by Kumba at times so as to ensure that there are no financial losses for Transnet. Out of seven (7) known miners, only two (2) are in operation and they use Transnet rail transportation services to move their commodities, the remaining five (5) are inactive or closed down.

NO	CUSTOMER	TONNAGE	RAIL LOADING POINT	STATUS	COMMENTS
1.	Sedibeng Iron Ore (Klipfontein Mine)	1,855mtpa	Postmasburg siding and Assmang Khumani	Current Customer	Largest emerging miner
2.	Afrimat (previously Diro)	0,870 mtpa	Lyleveld siding (Adjacent to the mine)	Current Customer	Afrimat acquired the Diro Iron ore mine that went into business rescue in 2017
3.	Tau Mining(Erf 1) Mine	0.5 mtpa	Postmasburg siding	No longer a customer mine closed	Tau Mining was a customer. This mine has closed
4.	Solter Timasani(Helpbietjie Mine)	0.5 mtpa	Kumba Kolomela	No longer a customer	Kumba announced in March 2017 that they cannot support the loading operations for emerging miners as to loading capacity with a courtesy service offered in support to emerging miners. Kumba needed the capacity as per their mine ramp up plans Soliter subsequently closed
5.	Rindside Trading(Aucampsrus Mine)	0.5 mtpa	Kumba Kolomela	No longer a customer	Ringside was a customer: Ringside subsequently declined Transnet's direct capacity and then utilized Kumba load out facility as in 4 above, when Kumba required their load out capacity back and Ringside had previously declined their capacity with Transnet- Ringside subsequently closed and sold its operations

6.	Lime Chem Resources (Rooinekke Mine)	0.5 mtpa	Kumba Kolomela	No longer acustomer	Company in Business Rescue
7.	Autumn Skies (Kapstewel Mine)	0.5 mtpa	Kumba Kolomela	No longer a customer	

5.1.48. Transnet further stated that the failure to take up capacity reserved for emerging miners leaves Transnet with no other option, but to allocate the capacity elsewhere, and in this case to SIOC to mitigate against financial losses.

5.1.49. On 16 June 2019, a meeting was held with Mr. James Hodge, the Chief Economist at the Competition Commission and the investigating team and he confirmed that the Competition Commission is also investigating allegations that Transnet is engaging in excessive pricing and price discrimination in the provision of freight rail services, this will assist to determine whether these emerging firms are not being prejudiced by excessive pricing or price discrimination by Transnet.

5.1.50. On 2 September 2019, Mr. Jonathan Scott of Lime-Chem Resources (Pty) Ltd ("LCR") who was one of the Emerging Contractors responded to correspondence from my office and stated that they started work on its Rooinekke Iron ore project in 2004 and by 2007 LCR had established the extent and quality of its surface resource.

5.1.51. He stated that economic viability of the project was dependent primarily on the iron ore price, production and transport costs and that the iron ore price and production costs were easily determined at any time, while transport costs were dependent on the logistic solution available to deliver the iron ore to LCR's customers and most, if not all the alternatives for delivering material to potential customers, were investigated exhaustively.

5.1.52. According to Mr. Scott, options available to LCR included inland solutions such as selling the ore to the SIOC mine at Sishen or selling it to Arcelor Mittal who was at that time engaged in revised pricing negotiations with its sole supplier, SIOC, and the alternative to selling ore to inland customers was to export the material through the available South African ports.

5.1.53. He further stated that it became clear to them that the inland sales option was not viable as the indicative prices offered were too low to sustain the project and the various options for moving the ore to port were investigated at the same time.

5.1.54. According to Mr. Scott these included trucking the ore to East London, Port Elizabeth and Cape Town, as well as railing it from Postmasburg or Draghoender to these and other destination ports and both bulk rail and containerised options were considered, but none of these alternatives proved viable at an acceptable level of iron ore price risk.

5.1.55. He further stated that it gradually became clear to them that the only long term viable logistics solution was to rail the iron ore on the iron ore export rail line ('the Orex line") to the Saldanha Bay iron ore terminal from one of the three Orex line load out stations located at Kolomela, Khumani and Sishen, but the problem with this logistics solution was that the entire capacity of the Orex line was committed by Transnet Freight Rail ("TFR") to the Sishen and Kolomela mines, both owned by SIOC, a subsidiary of Kumba Iron Ore which itself is a subsidiary of Anglo American, and the Khumani and Beeshoek mines owned by Assmang.

5.1.56. Mr. Scott further stated that during 2012, TFR announced that government policy required Orex line capacity to be made available to smaller iron ore miners ("Emerging Miners" or "EMs") and at a meeting held at TFR's head office at the Carlton Centre in Johannesburg on 28 March 2013, LCR was invited, along with several other EMs, to form an EM forum with the objective of determining the expected demand on the Orex line by the EMs, and at which load out stations this demand could be met and this information was subsequently compiled at an EM meeting held at Kathu on 3 April 2013.

5.1.57. He further stated that based on the information provided by the EMs, TFR made a provisional short term allocation of Orex rail capacity to the EMs at the beginning of 2013. In terms of this short term allocation four EMs were each allocated 25 000 tons (equivalent to two rakes of 11 400 tons per rake) per month of capacity from the Kolomela load out. According to Mr. Scott, the four EMs were LCR, Timisani, Autumn Skies and Sedibeng (a Tata operation) and all these EMs other than LCR were in a position to commence deliveries of iron ore to Kolomela from about August 2013, in order to secure its 25 000 ton allocation, LCR signed a letter of acceptance with TFR on 7 August 2013 and indicated that it expected to commence deliveries of ore in October or November 2013.

5.1.58. He stated that the short term allocation was contemplated by TFR to cover a six month trial period during which the ongoing viability of this arrangement would be determined assuming that if the arrangement proved viable, the short term allocation would be replaced by a five year medium term agreement between TFR and each of the qualifying EMs.

5.1.59. According to Mr. Scott, in order to qualify for the short term allocation and continue with the medium term allocation, each EM was required to have its own mining licence and have all the necessary regulatory and other approvals in place. He further stated that intermediaries, traders and logistic companies were excluded from any Orex capacity allocations.

5.1.60. Mr. Scott further stated that key terms of the short term arrangement were that the contractual agreement for the entire logistics chain from the Kolomela load out station to vessel loading at Saldanha Bay would be entered into between each respective EM and TFR and TFR would conclude the necessary use agreements between Kolomela and the port.

5.1.61. He further stated that consequently the EMs would not have any direct contractual relationship with Transnet Port Terminals ("TPT") whose facilities would be used to off load the ore from the train at the port, and load the material at the port onto a vessel, or with Kumba for access to the Kolomela mine and the use of Kolomela's load out station to load the iron ore onto the Orex trains.

5.1.62. According to Mr. Scott, an additional Kolomela requirement was that Kumba would only communicate with the EMs regarding the movement of their material through a single, third party logistics service provider whose role was to ensure compliance by the EMs with Kolomela's mine access regulations, and to manage the movement of the respective EMs material into the Kolomela mine area.

5.1.63. Mr. Scott further stated that the allocation of Orex capacity by TFR in August 2013 was confirmed to the EMs by way of a letter communicated on or about 7 August 2013 on the expectation that the EMs would commence utilising their capacity immediately, or at the earliest possible opportunity.

5.1.64. He further stated that on TFR's recommendation the EMs consented to the appointment of Saflog as the logistics coordinator for the movement of EM deliveries from the mine gate at Kolomela through to the EM stockpile area adjacent to the Kolomela load-out station and the EMs were responsible for arranging transport for the conveyance of their ore to Kolomela and, through the intermediation of Saflog, for complying with Kolomela's regulations governing access to and egress from the Kolomela mine and at this stage the EMs were also introduced to the Kolomela management team responsible for the iron ore logistics at the Kolomela mine.

5.1.65. He further stated that it becomes apparent that the proposed stockpiling system that would apply to the EMs at Kolomela was likely to be problematic and Kolomela had made two stockpile pads available to the EMs, each with a 40 000 ton capacity as per the 3 April 2013 meeting held in Kathu the various EMs had set out their anticipated monthly production forecasts and the grade of iron ore they expected to produce.

5.1.66. According to Mr. Scott, Timisani, Autumn Skies and Sedibeng all expected to produce 64% iron ore while LCR intended initially to produce a 58% product and this meant that there would be a requirement for four separate stockpile areas at Kolomela because each grade would be produced in both lumpy and fine aggregates.

5.1.67. He further stated that TFR had originally anticipated that the EMs would merely pool their ore into common stockpiles at Kolomela, and therefore one lumpy and one fines stockpile would be adequate. According to Mr. Scott, pooling the ore in this manner was not viable as even within a specified iron ore grade, each EM would produce a distinctive iron ore product with differing percentages of contaminants (e.g. silica) with consequential pricing variances.

5.1.68. Mr. Scott further stated that because of this looming logistical problem at the Kolomela stockpile area, TFR prompted LCR to enter into discussions with Sedibeng with the objective of LCR selling its product directly to Sedibeng and as such an arrangement would remove LCR from the Kolomela stockpile mix, thereby simplifying the usage of the Kolomela stockpiles.

5.1.69. He further stated that the discussions commenced on 16 May 2013 and continued through to October 2013 and despite the best efforts of the parties, they were unable to reach a commercially acceptable agreement and as a result this avenue for selling its iron ore was abandoned by LCR in October 2013.

5.1.70. Mr. Scott further stated that based on its allocation of 25 000 tons per month, and TFR's assurance that the stockpiling logistics at Kolomela would be resolved by introducing a third stockpile pad for use by LCR at Kolomela's load out station, LCR fine-tuned its feasibility study and determined that the facilities to be provided by TFR and Kumba provided an economic solution to re-commencing processing of the ore stockpiles at the Rooinekke mine.

5.1.71. According to Mr. Scott, the key logistical assumptions included in this feasibility were the cost of crushing and screening the stockpiles at the Rooinekke mine site, the cost of transporting the resulting ore from Rooinekke mine to Kolomela via the East gate entrance to the Kolomela mine which is located on the South side of Postmasburg, the cost of managing the conveyance of the ore into the Kolomela mine and stockpiling it there, the cost of loading the ore onto the train at Kolomela's load out station, the rail cost to the Saldanha Bay bulk iron ore terminal, stockpiling the iron ore at the bulk terminal, and loading the stockpiled iron ore onto a vessel either at the bulk terminal or the multi-purpose terminal ("MPT").

5.1.72. He further stated that all these costs were clearly established in advance and it was on this basis that LCR could make the decision to commence operations at Rooinekke at the then iron ore price of $95 per ton for 58% iron ore Saldanha Bay, based on the Platts 62% cost, insurance and Freight China price, and the Rand (R)/ dollar ($) exchange rate of R8.5/$, LCR estimated that it would achieve a profit margin of approximately 46% and this was considered a very attractive margin which was wide enough to cater for price risk as well as a reasonable margin for hidden costs.

5.1.73. According to Mr. Scott, having been finally issued its converted old order Mining Right by the Department of Mineral Resources ("DMR") during August 2013, LCR commenced with establishing operations at Rooinekke, erecting plant, buildings and laboratory facilities. He further stated that the roads were constructed where necessary and existing roads were upgraded.

5.1.74. He further stated that an agreement was obtained from the Department of Public Roads & Works ("DPR&W") to take over the maintenance of the R309, the public gravel road leading from the farm Nek, on which the Rooinekke mine is situated, to the East gate into Kolomela mine and this 63km stretch of gravel road was in a particularly poor state of repair, its maintenance having been neglected by DPR&W for many years.

5.1.75. He stated that he was encouraged by TFR to accelerate its project to commence deliveries to Kolomela mine as soon as possible, LCR based its planning on the target of loading a first vessel of 55 000 tons of iron ore through the MPT by the middle of December 2013. He stated that contracts were accordingly entered into with the buyers of the product based on the mid-December shipping target which would be achieved through loading one rake, comprising 11 400 tons, per week at Kolomela mine and based on this scheduling it would take approximately five weeks to build up the shipment of 55 000 tons at Saldanha Bay port given that test production would commence in late September 2013, scaling up to the required levels of production to supply the necessary tonnages by November 2013, the planning appeared to contain a wide margin for any unforeseen delays in the logistics chain.

5.1.76. Mr. Scott stated that on 23 of August 2013, LCR was informed by TFR that contrary to what was agreed at the previous EM meeting with Kolomela, LCR would not be permitted by Kolomela to make use of the East gate for access into the Kolomela mine area, but rather LCR would have to transport its material through the centre of Postmasburg to access the main entrance gate to Kolomela mine, a detour that added some 26 km to its transport route, with a concomitant 33% direct increase in its transport costs and furthermore, the longer route exposed the community in Postmasburg to the inconvenience of large ore trucks moving through the town centre at all hours.

5.1.77. He further stated that this exposed the community to incremental traffic congestion as well as introducing dust problems associated with the ore trucks and this unilateral decision of Kolomela mine had dire implications for LCR.

5.1.78. According to Mr. Scott, the maintenance by LCR of the R309 road that was originally budgeted to cover a distance of 63 km (from the turn off from the R309 onto Nek farm to the turn off to the Kolomela east gate) now extended to the edge of Postmasburg town, adding 7 km of gravel road to the R309 maintenance programme.

5.1.79. He also stated that this particular stretch of road also happened to be the worst stretch of the entire 70 km gravel route and added considerably to the road maintenance costs.

5.1.80. Mr. Scott stated that the total distance to transport the ore (excluding road distances inside the Kolomela mine area) to the Kolomela mine gate now increased from 78km to 104km, increasing this component of the transport costs by 33%.

5.1.81. He further stated that an added complication of changing the access point to the Kolomela mine arose through the restrictions placed by Kolomela mine on the hours during which the EMs trucks were permitted access through the Kolomela main gate.

5.1.82. Mr. Scott also stated that the original planning provided for direct access by trucks transporting ore from Rooinekke mine to the Kolomela mine East gate and then on to the EM stockpiling area inside the Kolomela mine.

5.1.83. According to Mr. Scott the longer route, and the greater congestion at the Kolomela mine main gate meant that the trucks transporting ore from Rooinekke could no longer travel directly to the Kolomela mine main gate, wait to gain access through the main gate, tip the ore onto the stockpile area and return through the Kolomela mine main gate and back to the Rooinekke mine in a logistically acceptable time frame.

5.1.84. He further stated that an intermediate iron ore stockpiling depot now had to be established between Postmasburg and the Kolomela mine gate, and a separate transport arrangement made to move the ore from the intermediate stockpile through the Kolomela main gate.

5.1.85. According to Mr. Scott this arrangement would allow the movement of sufficient tonnages through the Kolomela main gate during the access hours made available by Kolomela mine, and within the constraints of the traffic congestion limitations faced at the Kolomela mine main gate.

5.1.86. He further stated that the ore transported from the Rooinekke mine was then offloaded at the intermediate depot, reloaded onto a different truck at a later stage, and then transported through the Kolomela mine main gate to the EM stockpile area. He stated that this additional logistics leg added to the road transport costs of LCR.

5.1.87. He also stated that LCR trucks were now competing with the normal town traffic, adding to congestion on the town's streets and owing to the greater distance that now needed to be travelled, the size of the fleet of trucks transporting ore from Rooinekke had to be increased; and

5.1.88. According to Mr. Scott, EMs including Sedibeng and Timisani were in a position to commence deliveries of iron ore into Kolomela mine from August 2013 as they were already in production prior to confirmation of the Orex line allocations by TFR.

5.1.89. He further stated that LCR had consistently indicated to TFR that it would follow some six months later as it had not at this point commenced with site establishment at Rooinekke mine and the reason why LCR needed six months' notice before starting to utilise its Orex allocation was because the Rooinekke mine business model was critically dependent on the Orex rail allocation and the logistics supporting the use of that allocation hence LCR was not in a position to commence with the establishment of the Rooinekke operation until it had confirmation from TFR of its Orex allocation.

5.1.90. Mr. Scott further stated that pending the commencement of production at Rooinekke Timisani and Sedibeng, being the only two EMs using the Kolomela mine load out station at that time, were each allocated by Saflog one of the two stockpile pads at the EM stockpile area.

5.1.91. He stated that Timisani was stockpiling its lumpy iron ore on one of the pads, while Sedibeng, which was using the Khumani load out station for its lumpy iron ore, was stockpiling its iron ore fines at the second EM stockpile at Kolomela mine. He further stated that in due course Sedibeng accumulated some 16 000 tons of fines on the second EM stockpile pad at Kolomela mine and at this point and prior to Kolomela mine loading any of these fines onto the Orex line, Transnet Port Terminals ("TPT") directed that, owing to dust concerns in Saldanha Bay, the Sedibeng fines would not be permitted to be off-loaded at the Saldanha Bay iron ore terminal.

5.1.92. According to Mr. Scott it furthermore transpired that this directive would apply to the fines produced by each of the EMs, however it did not apply to fines produced by the Kolomela mine, which had already railed several million tons of dust prone fines to Saldanha Bay since production commenced there in 2012.

5.1.93. He further stated that at the request of TFR, who wanted LCR to start using its Orex allocation as soon as possible LCR had accelerated the commencement of production at Rooinekke mine, albeit at an increased production cost of 22%. LCR accordingly commenced production at Rooinekke in late September 2013 and gradually ramped up production through October 2013 and into November 2013, by which time it was ready to transport ore to Kolomela mine and this was approximately three months earlier than LCR had originally planned.

5.1.94. According to Mr. Scott, during November 2013, LCR had arranged for contract transporters to truck the Rooinekke ore from the Rooinekke mine to the intermediate depot in Postmasburg. Because Kolomela mine would only allow accredited transporters through its gate, the EMs were obliged to put their trucks and drivers through a lengthy accreditation process and furthermore, Kolomela mine initially would only allowed one EM transporter to be accredited, but fortunately by the time LCR was ready to bring ore into the Kolomela mine, it had decided to allow two EM transporters to be accredited.

5.1.95. Mr. Scott further stated that Timisani had already received accreditation for its trucks and drivers, and Sedibeng had received accreditation for its transport contractor's trucks and drivers. Mr. Scott further stated that LCR was therefore faced with a decision whether to use one of the existing accredited transporters, or try to obtain accreditation for a third transport contractor and because of the lengthy delays in gaining accreditation, the Kolomela mine policy of only allowing the simultaneous accreditation of two EM transporters, LCR resolved to use Sedibeng's contractor, Crossmoor which was already accredited.

5.1.96. According to Mr. Scott, this state of affairs did limit LCR's ability to negotiate on price with that particular contractor as a result of which LCR was committed to paying a premium for its transport from the intermediate depot at Postmasburg into the Kolomela mine and having made all its transport arrangements, and having already commenced deliveries of ore from Rooinekke mine to the intermediate depot at Postmasburg, LCR was in a position to commence deliveries of ore from the intermediate depot to the EM stock pile area inside Kolomela mine.

5.1.97. Mr. Scott also stated that having successfully ramped up production at Rooinekke mine to the levels necessary to support the export via Kolomela mine of the 25 000 tons of iron ore per month, LCR entered into a supply agreement with a third party purchaser of the ore in November 2013 and based on TFR's assurances, LCR and its customer targeted the delivery of 55 000 tons of lumpy iron ore to port by the middle of December 2013.

5.1.98. He further stated that on 21 of November 2013, TFR informed LCR that Kolomela mine refused to accept any Rooinekke mine ore at the EM stockpile area until such time as all the Sedibeng fines had been removed from the second stockpile pad at Kolomela mine, and presumably taken back to Sedibeng. Kolomela mine refused to allow LCR use of the second EM stockpile pad simultaneously with Sedibeng, even though Sedibeng was occupying less than 50% of the second pad's capacity and in the face of TFR's prior assurances to LCR that the two EM stock pile pads would each be divided into two, thereby allowing LCR to stockpile at least one rake's worth of ore at a time.

5.1.99. According to Mr. Scott the consequence of this unexpected action by Kolomela mine was that LCR was now blocked from using the Kolomela mine load out facility, and hence unable to load its ore onto the Orex line until such time as the Sedibeng fines had been removed and having stockpiled its fines at Kolomela mine in good faith, and presumably with the approval of TFR via Saflog, Sedibeng understandably refused to uplift its fines from Kolomela mine at its own cost. He further stated that TFR and Saflog were also not prepared to make arrangements for Timisani to share its pad with LCR, despite an overarching commitment by TFR that access by the EM's to the Kolomela mine load out station would be managed in a fair and equitable manner.

5.1.100. Mr. Scott further stated that by this stage the Rooinekke mine was approaching optimum production, and consequently incurring substantial production and related costs, however having been actively prevented from delivering ore to its customer by the action of Kolomela mine and TFR's inability to intervene, LCR was unable to generate revenue to pay for the mounting production costs.

5.1.101. He further stated that on 11 December 2013, TFR finally resolved with Kolomela that the LCR material could be delivered into Kolomela and on 12 December 2013, LCR was however again barred again from entering Kolomela as a newly communicated requirement from Kolomela via Saflog to LCR was that the accredited trucks and drivers had to be supported by an accredited mechanic.

5.1.102. He further stated that Crossmoor, the accredited transport company which LCR had engaged to transport its material into Kolomela because they had already delivered the fines for Sedibeng into Kolomela, had not faced this requirement previously when delivering the Sedibeng fines into Kolomela.

5.1.103. According to Mr. Scott, on 13 December 2013, Kolomela directed that each Crossmoor truck moving LCR's ore into Kolomela would have to remove a load of the Sedibeng fines out of Kolomela and this condition was only imposed on LCR, despite the fact that the EM stock pile area was a common use area for all the EMs and Timisani was actively using it as well.

5.1.104. He stated that the result of this directive was that the Crossmoor trucks had to transport Sedibeng fines back to Sedibeng after delivering a load of LCR ore to Kolomela as Sedibeng is located some 30 Km from Postmasburg and extra travelling distance increased the Crossmoor truck turn-around time from approximately one and a half hours to about four hours.

5.1.105. He further stated that where LCR had expected Crossmoor to deliver 1 600 tons per day from the intermediate depot in Postmasburg to Kolomela, the tempo slowed down to an average of 600 tons per day.

5.1.106. According to Mr. Scott on 14 December 2013,Kolomela again stopped Crossmoor's trucks from entering the Kolomela mine owing to alleged permitting problems and Kolomela accused Crossmoor of fraud because one of its drivers was found to be using another driver's permit and declared that Crossmoor would not be allowed access to Kolomela mine in the future and upon investigation however it turned out that the problem arose because of a procedural failure at Kolomela where Kolomela staff had failed to produce the necessary documentation for the offending driver who was already properly accredited.

5.1.107. He further stated that in the face of this provocative stance by Kolomela's staff, TFR intervened to ensure the Crossmoor could continue accessing Kolomela mine and by this time it was understandable that LCR believed Kolomela was deliberately frustrating its efforts to deliver ore to the EM stockpile site at Kolomela mine.

5.1.108. Mr. Scott further stated that the LCR's ore trucks were then prevented by the Postmasburg Municipality from entering the town on 17 December 2013 and the reason for this action was that with increased traffic in the town ahead of Christmas, there was heightened risk that the ore trucks could potentially cause accidents.

5.1.109. He stated that in consultation with the municipal authorities an alternative route was agreed with the Mayor and trucking continued on 18 December 2013.

5.1.110. According to Mr. Scott the two sets of contractors employed by LCR on the one hand to deliver products from Rooinekke mine to the intermediate depot at Postmasburg and on the other hand to deliver ore from the intermediate depot to Kolomela both unilaterally decided to stop transporting from 20 December and close up for Christmas and this action was taken despite their agreement to continue working through the Christmas and New Year period.

5.1.111. He also stated that ore deliveries to the Kolomela stockpile area were therefore terminated from that date until 7 January 2014. He further stated that transport activities resumed on 7 January 2014 and apart from the sporadic unavailability of the Crossmoor trucks due to continuous Kolomela permitting related issues and repair matters, LCR achieved deliveries of up to 300 tons per day into Kolomela.

5.1.112. He also stated that on 11 January 2014, after a couple of hours offloading product into Kolomela, LCR was again not permitted to offload, this was due to the fact that the front end loader which was being used by a Kolomela contractor to load the Sedibeng fines at the Kolomela stockpile area was broken and because the fines couldn't be loaded, LCR's ore could not be brought in, owing to Kolomela's stipulation that for every LCR load that was brought in, one load of Sedibeng's fines must be taken out. He also stated that the same situation prevailed on 12 and 13 January 2014 resulting in the loss of at least three days of loading time.

5.1.113. Mr. Scott further stated that on 22 January 2014, the Sedibeng weighbridge printer ran out of cartridge ink and because Sedibeng could not print the mass certificate of the incoming truck carrying the return load of Sedibeng fines, no offloading of the fines could take place, thus the trucks had to wait at Sedibeng until they could receive their weighbridge certificates, and this again interrupted the loading of LCR ore at the intermediate depot which interrupted the delivery of LCR ore into Kolomela.

5.1.114. He further stated that on 23 January 2014, Kolomela experienced a technical glitch on their IT system which was apparently being upgraded at the time, rendering it impossible to use their printer. He also stated that to conform to Kolomela's permitting regulations, new access permits needed to be printed for the trucks and because the printer could not print the new permits, the trucks were refused entry to Kolomela causing the loss of a further day of deliveries.

5.1.115. He further stated that in order to be able to load an 11 400 ton rake comprising 114 wagons at Kolomela, LCR needed to build a stockpile of 15 000 tons of ore at the EM stockpile area inside Kolomela mine and it finally achieved this milestone on 26 January 2014, when its first rake was loaded. According to Mr. Scott this milestone was achieved almost two months late because LCR had expected its first rake to move at the end of November 2013 and to have in fact delivered 55 000 tons of ore to port by 19 December 2013.

5.1.116. Mr. Scott stated that on 13 February 2014 all the Sedibeng fines had finally been removed by Crossmoor from Kolomela and LCR then expected that deliveries from the intermediate depot to Kolomela would proceed without further interruption. He stated that this optimism was however short-lived.

5.1.117. Mr. Scott also stated that on 14 February 2014 Kolomela again stopped LCR from offloading its material at the stockpile area and the reason given for this action was that during the off-loading of the rake at Saldanha Bay on 27 January, excessive dust had been observed by TPT originating from the LCR lumpy ore.

5.1.118. He further stated that although this event had occurred some two weeks previously, the problem had not been brought to LCR's attention. TFR and Saflog also denied that they had been told about this problem either, but apparently it was discussed at the iron ore channel meeting to which LCR had not been invited. At this meeting which was attended by Kumba, TFR and TPT, TPT stated that the LCR ore that had been offloaded at Saldanha Bay contained too much dust and told Kumba that LCR ore would not be accepted at the port if it contained dust.

5.1.119. Mr. Scott further stated that without any warning to LCR, Kolomela unilaterally resolved to stop LCR delivering its ore the day after the last of the Sedibeng fines had been removed and the inescapable conclusion that has to be arrived at is that Kolomela used LCR to remove the Sedibeng fines, and once this was done, it recommenced with its efforts to frustrate LCR from loading ore at Kolomela.

5.1.120. According to Mr. Scott both Kolomela and LCR operated a dry processing system and Kolomela had been testing the treatment of its ores with dust suppressants but had not formally implemented any such process.

5.1.121. He further stated that TPT's strict approach to LCR's dust content did not at that time seem to apply to Kolomela ore and furthermore Kolomela was also delivering large quantities of fines to port, and this ore contained much higher dust content than the LCR lumpy ore. He further stated that according to Transnet, it appeared to LCR that TPT had decided to employ different standards for different users of the Saldanha iron ore stockpile area, based on their size and influence.

5.1.122. He also stated that LCR requested a dust standard from TPT but the latter's only response was that there must be no dust and given that Kolomela's material contained significant dust, this response seemed grossly unreasonable and nevertheless in order to allay the dust concerns, LCR, on 17 February 2014, commenced treating its stockpiles with a dust suppressant which eliminated the emission of all dust from its lumpy ore.

5.1.123. Mr. Scott further stated that on 20 January 2014, the CEO of Kumba visited Kolomela and all ore deliveries by the EMs were cancelled for that day and in addition, owing to a sudden down pore of rain, Kolomela further regarded it unsafe for trucks to enter the off-loading area. He stated that deliveries continued thereafter in a fairly regular fashion until 13 March 2014 when the Kolomela reclaimer broke down owing to a structural failure, because there was no alternative loading system at Kolomela, all train loadings were discontinued.

5.1.124. He further stated that the reclaimer was re-commissioned on 9 April 2014, with no train loading having taken place for four (4) weeks and while the reclaimer was broken, LCR continued delivering ore into Kolomela and by late March 2014, it had filled the second stockpile pad at Kolomela with some 30 000 tons of ore, although TFR had originally claimed that the two stockpile pads at Kolomela, each had a 40 000 ton capacity, Kolomela restricted the pads to 30 000 tons each, which is approximately two rakes worth of ore.

5.1.125. According to Mr. Scott, following re-commissioning of the reclaimer, LCR sent two rakes of ore to port during April 2014, LCR now had its 55 000 tons in port however, owing to the drastic decline in the price during the six-month ordeal of trying to deliver a vessel load of ore to port, the price of iron ore had declined substantially, the loading and vessel charter costs for the size of vessel use at the MPT was now prohibitive and means were being sought as to whether a cape-size load could be aggregated to load off the bulk terminal.

5.1.126. Mr. Scott further stated that it took six (6) months longer to deliver the 55 000 tons to port than was originally envisaged and this delay, whose cause is almost entirely due to events beyond the control of LCR, and whose resolution LCR depended for on TFR, has turned a very robust project into a marginal enterprise at best and during this period the price of Platts 62 iron ore dropped from US$125.00 per ton to US$95.00 CIF China while the price of 58% iron ore has declined to $65 the shipping costs have also moved from a reasonable low $20 per ton in December 2013 to approximately $35 per ton.

5.1.127. According to Mr. Scott when doing its feasibility study, LCR resolved to start producing at 58/59% Fe ore because of the then strong iron ore price, and its determination to be able to deliver to TFR what it had promised. He added that LCR expected the iron ore price to decline from about April 2014. He stated that based on its forecasts, it would have been in a strong cash flow position by that time, and would have commenced the installation of a beneficiation plant to improve its ore to a 64% iron ore grade.

5.1.128. He also stated that the six month delay in getting the first 55 000 tons to port however rendered the assumptions contained in the original feasibility meaningless and the combination of the lengthy delivery delays, and the added costs arising from the forced change to the route for transporting ore to the Kolomela load out station, have instead led to a major cash shortage in LCR, and forced it to reconsider its future.

5.1.129. He concluded by stating that as a direct consequence of the delays, LCR lost between R30 and R40 million owing to the decline in the price of iron ore during that period, the increased costs of funding and increased costs of production and the last-minute change in the iron ore delivery route from Rooinekke mine to the Kolomela load out station added substantially to the transport costs, depot management costs, road maintenance costs and other added expenses.

5.1.130. He also stated that the original model for this project forecast a profit in the region of R30 million over the initial six-month production period which would easily have been achieved without the various delays and route variations imposed on it by Kolomela, and which Transnet was unable to mitigate.

5.1.131. He also stated that as a post scrip, having insisted at all times that iron ore from the EMs had to be loaded by Kolomela onto the Orex trains, Transnet has subsequently allowed emerging miners to load Orex wagons at the Postmasburg siding and this represents a major advantage to the EMs, and would have solved all the loading problems experienced by LCR.

5.1.132. On 5 September 2019, Mr. Lionel Koster also confirmed that Transnet Freight Rail (TFR) had a direct impact on the closure of Autumn Skies iron ore mine which was caused by the reduction in the TFR allocation which resulted in the closure of their mining operations.

5.1.133. Mr. Nicolas Loubser of Ringside Trading 520 (Pty) (Ringside) also alleged that their mine was also hugely adversely affected by the TFR reduction in allocation to EMs.

5.1.134. On 25 September 2019, Mr. Loubser responded to my investigation team's enquiry and stated that, in 2018 there were five (5) active iron ore miners in South Africa, namely Anglo American (Sishen and Kolomela), Assmang (Beeshoek and Khumani), Sedibeng/TATA, Afrimat and Ringside and of the five (5) active miners, four (4) were owned/majority owned by listed companies and Ringside was privately owned.

5.1.135. Mr. Loubser further stated that Sedibeng/TATA, Afrimat and Ringside were considered Juniors or new entrants and were mines in operation/production and two other Junior entrance which were Autumn Skies and Mashwening Mine were in the process of starting up.

5.1.136. According to Mr. Loubser, of the five (5) active iron ore miners in South Africa at the time, all, except Ringside, had an Orex rail allocation to Saldanha Bay and the three (3) Junior miners, the TATA Steel/Sedibeng Mine were accommodated by Transnet at the Khumani Mine as well the Postmasburg CUF with around 1.85 million tonnes of allocation per annum, Afrimat Mine was given permission by Transnet to load 100 ton wagons with Front-end Loaders on a small siding near Sishen and had around 600,000 tonnes of allocation per annum.

5.1.137. Mr. Loubser further stated that Autumn Skies Mine had 300,000 tonnes of rail allocation per annum (which they did not fully utilise due to production issues) and Mashwening Mine had 200,000 tonnes of rail allocation (which they did not use because the mine never opened) which meant that at the time that Ringside needed an allocation there was at least 500,000 tonnes of junior miner rail allocation, allocated which was not in use.

5.1.138. According to Mr. Loubser, in mid-2018, Ringside was now in the precarious position that without an immediate rail allocation from Transnet, it had no choice, but to close a very successful mine and retrench all their workers and unfortunately Transnet still did not see it fit to extend a rail allocation to Ringside.

5.1.139. Mr. Loubser further stated that there were no reasons as to why Transnet could not extend a rail allocation to Ringside and save hundreds of jobs. According to Mr. Loubser if Transnet wanted to, they were allowed by agreement to take up to 5% from the current Anglo American and Assmang rail capacities to give to juniors/new entrants (that is almost 3 million tonnes per annum).

5.1.140. He further stated that the Port space (usually the biggest bottleneck) was not required because Ringside ore would have gone on to SIOC stockpiles as the loading was not a problem with the offer from Kolomela to use their loading station and all that Ringside needed was a rail allocation.

5.1.141. Mr. Loubser further stated that Transnet eventually gave the reason for them not extending a rail allocation to Ringside and they were informed that Ringside had declined a rail allocation two (2) years prior and Transnet felt that Ringside should have taken the risk to load a high grade product from a low grade loading operation and that Ringside had their chance. He also stated that this attitude from Transnet ultimately cost Ringside their business.

5.1.142. In closing Mr. Loubser stated that Ringside had initiated discussions with Transnet and acquired the land to construct the first ever junior miner owned and operated iron ore loading station on the Orex line and the rapid loading facility was to be built at a cost of R500+ million and would have been able to service up to five (5) junior miners with a total loading capacity of 3 million tonnes of iron ore per annum, but since no rail allocation was made available to Ringside the plans to build the rapid loading station had to be shelved.

5.1.143. A notice in terms of section 7(9) of the Public Protector Act was issued against Transnet dated 25 November 2019. The Acting Group Chief Executive, Mr. Mohammed Mahomedy responded on behalf of the entity in a letter dated 15 November 2019.

5.1.144. In his response, Mr. Mahomedy confirmed that they have provided the relevant contracts and documents supporting its assertions that there is no merit to the complaint, and advanced several, legal submissions, including that the complaint is out of time as the contracts were concluded as far back as 2005.

5.1.145. They informed me that they have extensively dealt with the complaint and provided all relevant information. They further stated that they have informed me of the efforts towards assisting EMs, through their own initiatives towards creating and reserving rail capacity in the iron ore line.

5.1.146. Transnet further stated that I am relying on evidence of *Messrs Scott, Lionel Koster and Nicolas Loubser* who they believe are new Complainants and this is the reason that they believe that I appear to seek to conclude that "*the allegations that Black Economic Empowerment firms and Emerging Contractors find it difficult to get rail allocation*."

5.1.147. Transnet further informed me that they are not in the position to meaningfully respond to the evidence provided by *Messrs Scott, Lionel Koster and Nicolas Loubser.* They further informed me that the shut down by some of the EMs results in unutilized capacity, which results in Transnet making available such capacity to its existing customers to ensure that it does not suffer financial loss.

5.1.148. They reiterated that over the years, Transnet has seen the emergence and demise of EMs, and further stated that the costs associated with mining operations appear to be the main contributor for the demise of the majority of the EMs. According to Transnet, they are not in the business of mining, but its main business is to move the mined commodities from one location to the other.

5.1.149. On 26 November 2019, correspondence was sent to Transnet requesting them to respond to the evidence that was brought by *Messrs Scott, Lionel Koster and Nicolas Loubser.*

5.1.150. The Acting Group Chief Executive (AGCE) of Transnet, Mr. Mohammed Mahomedy responded on behalf of the entity on a letter dated 17 January 2020 and disputed the finding that the Black Economic Empowerment firms and Emerging Contractors find it difficult to get rail allocation to export their products.

5.1.151. With regard to the Transnet contract with Autumn Skies and Logistics (Pty) Ltd, the AGCE stated that on or about 5 August 2013, Transnet offered this entity iron ore export capacity and the offer was extended in 2014 up to 2017.

5.1.152. The AGCE also stated that, In a letter dated 11 June 2018, this entity notified Transnet that "... **it is our sincerest regret that we need to inform you (*sic*) that due to the below listed <u>commercial and technical issues</u>** (emphasis added) **we would hereby like to provide you with notice of termination of the ASR&L 2018/2019 TVP allocation with immediate effect"**

5.1.153. The AGCE further stated that, on 19 July 2018, Transnet representatives met with Mr. Lionel Koster representing Autumn Skies and Transnet was represented by, Mr. Navesh Ragoonanthun of which Transnet requested reasons for the termination and what the future plans for the mine were, and furthermore what impact would this have for the continuation of the mining operations.

5.1.154. According to the AGCE, Mr. Lionel Koster outlined a number of technical reasons impacting on Autumn Skies mining operations and his reasons included: *"The viability of the iron ore operations was further negatively impacted due to penalty imposed by China for ore with high silica content".*

5.1.155. The AGCE further stated that Mr. Koster in the same meeting informed Transnet that: *"...this intention to focus on the Manganese deposits on the mining property and process this through the current constructed plant, The current plan to sustain the mine is through handling approximately 400 kt of manganese due to the multipurpose jig plant. Lionel believes that this is the most opportune strategy for Autumn Skies and that the iron ore is no longer a short term priority".*

5.1.156. Further to the above meeting, the AGCE stated that, Mr. Koster sent an email to Mr. Ragoonanthun, of Transnet and thanked Transnet representatives for meeting him and he also stated as follows *"Thank you for your comprehensive notes and minutes of our meeting and I accept these for the record"*

5.1.157. The AGCE further stated that, in a letter dated 30 August 2018, Transnet accepted Autumn Skies termination and in the very same letter reiterated the reasons advanced by Autumn Skies termination. According to the AGCE the letter records the following factors as advanced by Autumn Skies for terminating the agreement: high silica content, delays in mining production cycle and converting an iron ore mine to a manganese mine.

5.1.158. According to the AGCE, from the above, it is quite apparent that the complaint is not consistent with the facts and there is no merit to the complaint lodged by Autumn Skies.

5.1.159. With regard to Ringside Trading 520 (Pty) Ltd (Ringside) the AGCE stated that on 9 December 2014, Transnet offered Ringside rail capacity and the offer was extended between 2015 and 2018.

5.1.160. According to the AGCE having regard to the above rail allocation by Transnet to Ringside, on 9 January 2017 Ringside addressed an email to Transnet and stated as follows: ***"Ringside Trading 520 (Pty) Ltd has decided to focus their iron ore sales on local market and such would not need access to export capacity"*** (emphasis added).

5.1.161. The AGCE further stated that what is most important, in the penultimate paragraph, which Ringside stated as follows: "In light thereof we hereby confirm that will for the time being not be taking up any agreement with Transnet for rail allocation on the Orex Line".

5.1.162. According to the AGCE, in its responses, Transnet confirms the cancellation of Ringside Trading's rail capacity allocation and Ringside confirms same and further notifies Transnet that ***"... we do not foresee us exporting any iron ore going forward*** (emphasis added) *so you may terminate the allocation immediately*".

5.1.163. The AGCE further stated that the parties subsequently entered into discussions for the allocation of rail capacity and to this end in all email exchange between Transnet and Ringside Trading between 17-19 July 2018, the parties were discussing the rail capacity allocation that the latter would require for ensuring the contract period and in the said email exchange, Ringside Trading confirmed that its required rail capacity would be 90,000 to 125,000 tons per month.

5.1.164. The AGCE also stated that on 23 July 2018 Ringside addressed a letter to Transnet and the essence of it is that *"Ringside has submitted a Section 52 to the Minister of Minerals and Resources informing him and his Department of our intent to curtail or more likely to suspend our iron ore operations due to lack of an available rail allocation on the Orex Line to Saldahna Bay".*

5.1.165. According to the AGCE they responded to the above letter, on 31 July 2018 as follows: *"It is with concern to note that Transnet has been cited the primary cause for the mine to suspend mining operations as a result of no rail allocation on the Orex Line. Transnet strongly disagrees with the statement and requests that Ringside immediately withdraws the statement. Our disagreement is based on Ringside's communication sent to Transnet as outlined in Appendix A where rail allocation was declined. Based on the decision taken and notice issued by Ringside to Transnet not to take up any rail allocation, it was only prudent by Transnet as a good operator to re-allocate this capacity to other emerging miners on an already constrained and fully subscribed Line.*

Transnet wishes to emphasize its commitment to facilitate trade through enablement of alternative export channels. Case in point is the Richards Bay Bulk Terminal solution that we offered to Ringside subject to cargo's suitability to store and load the product via bulk appliance".

5.1.166. The AGCE further stated that this is the first time that Ringside has attempted to shift the blame for its business failing to Transnet and according to the AGCE, Transnet was always willing and able to allocate rail capacity to Ringside.

5.1.167. The AGCE further stated that on 5 October 2018, Transnet offered to Ringside Trading rail capacity via the port of Richards Bay and in an email dated 16 October 2018, Ringside Trading declined the offer and from what can be deduced therefrom, the prevailing market price of iron ore made it unaffordable for it to transport its iron ore.

5.1.168. With regard to Lime Chem Resources (Pty) Ltd, the AGCE of Transnet stated that, on 5 August 2013 they offered LimeChem Resources rail capacity on the Saldanha Iron Ore channel and its rail capacity allocation was extended for the period between 2014 and 2017.

5.1.169. The AGCE further stated that on 27 July 2017, Transnet addressed a letter to Lime Chem Resources and recorded the following facts:

5.1.169.1. No mining activity was taking place;
5.1.169.2. Lime Chem had requested rail capacity of 650kt per annum, however had only transported 51kt;
5.1.169.3. That no rakes had moved in a seven(7) week period at the time when the letter was written;
5.1.169.4. That there was a stockpile of 64kt which had not been shipped;
5.1.169.5. Lime Chem was placed on notice to move its stockpile;
5.1.169.6. That Lime Chem was presented with a rail capacity allocation on 12 May 2017 and that no responses had been received from it;
5.1.169.7. Transnet communicated its decision to freeze/suspend its rail capacity allocation to Lime Chem, and;
5.1.169.8. Lime Chem had never responded to the said letter.

5.1.170. Transnet reiterated and submitted that there is no merit to the allegation lodged.

The Application of the relevant laws and prescripts

5.1.171. With regard to whether the contract between Transnet and SIOC has provided for a monopolistic avenue for the Anglo subsidiary such that BEE firms find it impossible to get allocation in the national asset as in rail line to export their products, as the contract provides for a 75% allocation to Anglo subsidiary and it furthermore grants the Anglo Subsidiary a first (1st) right of refusal to 85% of new capacity in the event Transnet is able to do so, the applicable legislation and prescripts with regard hereto are the following:

The Constitution

5.1.172. Section 195 of the Constitution sets out the principles and values governing public administration. These include transparency, responsiveness, accountability and the efficient, economic and effective use of resources.

5.1.173. Section 217(1) of the Constitution provides that "*When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*"

Section 217(2) allows a preferential procurement system.

5.1.174. Section 217(3) empowers and compels parliament to prescribe a framework within which a preferential procurement system must be implemented. The PPPFA and Regulations under it, and B-BBEE Act are the legislation envisaged by section 217(3). All organs of state, as defined in section 239 of the Constitution, must comply with Section 217.

5.1.175. Section 217(2) of the Constitution and the Preferential Procurement Policy Framework Act (PPPFA) both provide for the use of public procurement as a means of development and transformation. An effective SCM system must also have as an objective to ensure that goods and services are available at the best price, in the right qualities, at the right time and in the right place.

5.1.176. The Broad-Based Black Economic Empowerment Act No 53 of 2003 as Amended by Act 46 of 2013, states the following in section 10:

(1) Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in-

(a) Determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;

(b) Developing and implementing a preferential procurement policy;

(c) Determining qualification criteria for the sale of state-owned enterprises;

(d) Developing criteria for entering into partnerships with the private sector; and

(e) Determining criteria for the awarding of incentives, grants and investment schemes in support of Broad Based Black Economic Empowerment.

5.1.177. The BEE Act, places an onus on organs of state to contribute to B-BBEE, including among other aspects, when developing and implementing a Preferential Procurement Policy.

5.1.178. The shutdown of some EMs results in unutilised capacity which is then taken up by Kumba at times so as to ensure that there are no financial losses for Transnet and out of seven (7) known miners, only two are in operation and they use Transnet rail transportation services to move their commodities, the remaining five (5) are inactive or closed down.

5.1.179. According to Transnet the failure to take up capacity reserved for EMs, leaves Transnet with no other option, but to allocate the capacity elsewhere, and in this case to Kumba to mitigate against financial losses.

5.1.180. In looking at the evidence above it is evident that Transnet has tried to assist emerging contractors by ensuring 25% of rail is allocated to them and because of emerging contractors shutting down or being on business recue they have to use Kumba to mitigate against financial losses.

The Conclusions that could be made based on the application of the law to the facts

5.1.181. Based on the information and evidence obtained during the investigation and the application of the legal framework to the facts of the matter it can be concluded that Transnet has made a concerted effort to afford capacity to emerging BEE firms and has in fact contracted with a number of emerging contractors and BEE emerging firms. Transnet has allocated 25% of rail to BEE firms and emerging contractors.

5.1.182. The contract between Transnet and SIOC has been lucrative and beneficial, this is evident by the fact that the financial year ending in March 2019, and with specific reference to the iron ore channel, Transnet exceeded its annual volumes target and recorded over R8bn in revenue and R5bn in profit.

5.1.183. The Sishen 1A Agreement is an agreement concluded between Transnet and SIOC, Kumba is not a party to the agreement.

5.1.184. The failure by some contractors were not caused by Transnet. Autumn Skies Resources and Logistics terminated their contract with Transnet because high silica content, delays in the mining production cycle and some of the EMs were converting from mining iron ore to mining manganese. The high cost of mining iron ore is also a major factor that is contributing to the demise of these EM's.

5.1.185. Ringside Trading 520 (Pty) also cancelled their contract with Transnet as they wanted to focus their iron ore sales on the local market and as a result would not need access to export capacity and they also declined allocation of rail when they were offered by Transnet.

5.1.186. Transnet suspended its rail capacity to Lime Chem Resources as they were not fulfilling their contractual obligations and they have never responded to Transnet in this regard.

5.1.187. Transnet is willing to avail rail capacity to any business at a fee.

5.1.188. With regard to the right of first refusal Transnet will have to first offer 85% (hence "not the entire network available") of the new rail capacity to Kumba. Even if Kumba should opt to take the 85% capacity, the emerging miners will still have 15% of the new / future capacity available for them to utilise in addition to the 25% of the current capacity as stated above.

5.2. Regarding whether in 2008, a few months before Ms. Maria Ramos resigned as Chief Executive Officer (CEO), the contract between Transnet and Kumba was revised and virtually all penalty clauses were deleted, and thus giving the Anglo subsidiary a licence to operate with impunity:

Common cause issues

5.2.1. On 18 July 2008, Transnet and SIOC signed a "Settlement and Amendment Agreement" which amended certain aspects of the Sishen 1A Agreement.

Issues in dispute

5.2.2. The issue for my determination is whether in 2008, a few months before Ms. Maria Ramos resigned as CEO, the contract between Transnet and Kumba Pty Ltd was revised and virtually all penalty clauses were deleted, and thus giving the Anglo subsidiary a licence to operate with impunity.

5.2.3. The Complainant further alleged that notwithstanding that the market value of the transaction was estimated at about R185/t, however, contract was pegged at around R145/t yet the contract was signed at about R100/t, thus immediately, Transnet was on the back foot right from the start.

5.2.4. According to the response of Transnet of 2 May 2019, the Settlement and Amendment Agreement was approved by the Board of Directors of SIOC and Transnet and was duly signed by Ms. Ramos, in her capacity as the Group Chief

Executive (GCE) of Transnet and by Mr. Chris Griffith who was the then Chief Executive of SIOC as authorised representatives of both entities.

5.2.5. Transnet further stated that there had been significant capital overruns in the 1A Expansion and there were a number of disputes between SIOC and Transnet, some which related to penalties and these were resolved by the 1st Settlement and Amendment which settled all disputes at the time between SIOC and Transnet.

5.2.6. Clause 4 of the Settlement and Amendment Agreement recorded that SIOC will pay Transnet an amount of R700 million as follows:

5.2.7. R200 Million (Two Hundred Million Rand) on or before 7 July 2008;

5.2.8. R500 million (Five Hundred million Rand) by way of the super tariff over and above the then ruling tariff, in the amount of R50.00 per metric tonne (It being recorded that the Super Tariff has been determined as at January 2008 and is thus subject to escalation in accordance with the index in terms of the Main Agreement as amended by the addendum, which is payable by SIOC in respect of the first R10 million metric tons of Iron Ore Products which are transported by Transnet for SIOC in excess of an annual throughput threshold of R35,53 Metric tonne Per Annum (Mtpa), it being recorded for the avoidance of doubt, that the said additional volume of 10 million metric tonnes shall be a cumulative volume and as such will not be interpreted or construed as imposing any obligation on Transnet to transport the whole of such additional volume in any given financial Year and that such additional volume may thus be transported by Transnet during any two or more financial years as set out in the Main Agreement.

5.2.9. The R500 million (Five Hundred million Rand) by way of the super tariff has not been paid to SIOC by Transnet.

5.2.10. According to Transnet, the Settlement and Amendment Agreement also amended the Sishen 1A Agreement in the following respects:

5.2.10.1. It updated the contracted and guaranteed tonnage;

5.2.10.2. It rebased the tariffs and split the tariffs into two parts: Export Volumes up to 35,23 Mtpa and Export Volumes above 35,23 Mtpa and similarly Domestic Volumes were split up to 1,83 Mtpa;

5.2.10.3. It introduced a "Super Tariff" in respect of export volumes in excess of 35,53 Mtpa for the financial years 2009 to 2011;

5.2.10.4. It amended the definition of "Financial Model" by removing the references to lodgment with third parties;

5.2.10.5. As regards tariff reviews and financial model, it introduced a bi-annual (every two (2) years interim tariff review and a more comprehensive tariff review every five (5) years and the tariff mechanism was based on maintaining a ROR (Real Rate of Return) for Transnet of 8,5%. The tariff would only be adjusted if a change of more than 10% of the tariff is indicated;

5.2.10.6. It introduced a new loading bonus and penalty scheme; and

5.2.10.7. It replaced the references to "Dry Mass" of Iron Ore Products with references to "Gross Wet Mass" of Iron Ore Products.

5.2.11. Transnet have received various penalty payments from Sishen for payment for Capex overrun, Super Tariff on tons from Sishen and Super Tariff on tons from Kolomela for various years after the signing of the Settlement and Amendment Agreement.

5.2.12. The amendment on the contract dated 18 July 2008 does not revise or delete "*virtually all penalty specification clauses*" and the amendments did not change the penalty provisions contained in the Sishen 1A Agreement as they remain in force and are applied from time to time.

5.2.13. The following table below enunciates the chronology of penalty payments made to Transnet by SIOC i.e.

Year	Comment	Amount (Rand million)
2008	Payment for capex overrun	200
2009	Payment for wet tons, penalties and other disputes from 2008	69
2009	Super Tariff on tons from Sishen	16
2010	Super Tariff on tons from Sishen	81
2010	Payment for cost overrun	287
2011	Super Tariff on tons from Sishen	254
2012	Super Tariff on tons from Sishen	120
2013	Super Tariff on tons from Kolomela	162
2014	Super Tariff on tons from Kolomela	210

5.2.14. According to Transnet, the Settlement and Amendment Agreement introduced a new additional loading bonus and penalty scheme that related specifically to the loading rates of vessels in the Port of Saldanha.

5.2.15. In their response, Transnet further responded as follows to the specific issues:

5.2.15.1. With regard to the allegation that, notwithstanding that the market value of the transaction was estimated at about R185/t, however, the contract was pegged at around R145/t yet the contract was signed at about R100/t, thus immediately, Transnet was on the back foot right from the start.

5.2.15.1.1. Transnet responded and stated that, the Sishen 1A Agreement sets out the tariffs payable by SIOC for the transportation of SIOC's Domestic and Export Iron Ore and the Tariff payable under the Sishen 1A Agreement in respect of the first contract year from 1 January 2005 to 31 December 2005 were as follows:

5.2.15.1.2. *"For Export Operations and cargo Dues, an all –inclusive tariff of R44, 50 per metric tonne (excluding any applicable VAT); and*

5.2.15.1.3. *For domestic Operations, an all-inclusive tariff of R36, 05 per metric tonne (Excluding any applicable Value Added Tax) being 81%"of the Export Operations and Cargo Dues tariff".*

5.2.16. Transnet further stated that, the Sishen 1A Agreement provided for the adjustment on an annual basis of the applicable tariffs by the Index which is:

5.2.16.1. *"For the first 5 years" of the contract: 80% of producer price index (PPI) plus 20% of the sum of Consumer Price Index (CPIX) and 0,75%, and*

5.2.16.2. *For the remainder of the contract: 80% of PPI plus 20% of CPIX."*

5.2.17. Transnet also stated that, the 2011 amendments of Sishen 1A Agreement introduced a new Index: 60% of the PPI, 18% of the Electricity Price Index and 22% of the Transnet Labour-Index and the tariffs in the Sishen 1A Agreement have been escalated consistently in accordance with the agreement and its amendments on an annual basis since January 2006.

5.2.18. According to Transnet, the basis for determining the initial tariffs payable under the Sishen 1A Agreement was the Transnet financial model, which was developed by Transnet at the time and the model was developed primarily to take account of the significant capital expenditure which Transnet was required to incur over a number of years in order to undertake the 1A Expansion.

5.2.19. In conclusion, Transnet stated that it should be noted that Transnet has since undertaken two more expansions which have increased the overall capacity of the Iron Ore Channel to 61 Mtpa as with the 1A Expansion, these expansions were also underpinned by the long term agreements concluded with Iron Ore exporters which agreements contain the incremental tariffs associated with the capital cost of those expansions.

5.2.20. On 27 August 2019, Transnet further reiterated that no penalties were deleted in the 2008 Settlement Agreement, but that all the take or pay penalties as contained in the 2005 Agreement remained in *force* post the conclusion of the 2008 Settlement Agreement.

5.2.21. With regard to the allegation that Transnet continues to suffer financial losses of up to R2 billion annually as a result of the settlement agreement signed by Ms. Maria Ramos in 2008, Transnet disputed the allegation of losses to the tune of R2 billion per annum in execution of the contract with SIOC. Transnet furthermore stated that from 2011 to 2015, there has been a significant increase in volumes moved by Transnet in the Iron ore channel, amounting to billions of rands in revenue for Transnet and this could not have been possible had it not been for investment on the expansion of the channel by both Kumba and Transnet.

5.2.22. According to Transnet the increase in Iron ore volumes and growth in revenue continues to be on an upward trajectory and this is evidenced by the growth volumes and final performance.

5.2.23. Transnet further stated that proof of this, is that the financial year ending March 2019, and with specific reference to the iron ore channel, Transnet exceeded its annual volumes target and recorded over R8 billion in revenue and R5 billion in profit, which translates into 0, 8 % and 7% increase respectively.

5.2.24. With regard to the allegation that the amendments were effected in order to benefit SIOC Transnet responded and stated that this cannot be true because due to the extent of this capital expansion, Transnet required contractual and commercial certainty through long term take-or-pay commitments that would enable Transnet to fund the expansion.

5.2.25. In other words, Transnet needed to be sure that the customer (SIOC) was bound by the contract for a long time not to come up with excuses for not being able to take the services provided by Transnet under the contract and in the event that SIOC was unable to take the services offered by Transnet, it would nevertheless have to pay amounts to Transnet (hence "take or pay"), which would in turn enable Transnet to continue funding the expansion of the rail line.

Application of the relevant law

The Constitution, 1996

5.2.26. Section 237 read with section 195(1)(c), (f) and (g) of the Constitution creates an obligation on all state entities to diligently and without delay perform its duties and in doing so be development orientated, accountable and transparent.

The Conclusions that could be made based on the application of the law to the facts

5.2.27. Based on the information and evidence obtained during the investigation as well as the legal framework that is applicable to the facts of this matter, it can be concluded that, On 18 July 2008, Transnet and SIOC signed a "Settlement and Amendment Agreement" which amended certain aspects of the Sishen 1A Agreement and which settled various disputes that had risen between the parties.

5.2.28. There had been significant capital overruns in the 1A Expansion and there were a number of disputes between SIOC and Transnet, some which related to penalties and these were resolved and the 1st Settlement and Amendment settled all disputes at the time between SIOC and Transnet.

5.2.29. The Settlement and Amendment Agreement was approved by the Board of Directors of SIOC and Transnet and was duly signed by Ms. Ramos, in her capacity as the Group Chief Executive (GCE) of Transnet and by Mr. Chris Griffith who was the then Chief Executive of SIOC as authorised representatives of both entities.

6. FINDINGS

Having considered the evidence obtained during the investigation as against the relevant regulatory framework, I make the following findings:

6.1. **Regarding whether the 25 year contract entered into between Kumba and Transnet has provided for a monopolistic avenue for Kumba such that Black Economic Empowerment (BEE) firms would find it impossible to get an allocation in the national asset as in rail line to export their products, as the contract provides for a 75% allocation to Anglo subsidiary and it furthermore grants the Anglo Subsidiary a first (1st) right of refusal to 85% of new capacity in the event Transnet is able to do so:**

6.1.1. The allegation that the 25 year contract entered into between Kumba and Transnet has provided for a monopolistic avenue for Kumba such that Black Economic Empowerment (BEE) firms would find it impossible to get an allocation in the national asset as in rail line to export their products, as the contract provides for a 75% allocation to Anglo subsidiary and it furthermore grants the Anglo Subsidiary a first (1st) right of refusal to 85% of new capacity in the event Transnet is able to do so, **is not substantiated**:

6.1.2. Transnet has made an effort to afford capacity to emerging contractors and BEE firms and has in fact contracted with a number of emerging contractors and further allocated 25% of rail to them.

6.1.3. The contract between Transnet and SIOC has been lucrative and beneficial to Transnet in that in the financial year ending March 2019, and with specific reference to the iron ore channel, Transnet exceeded its annual volumes target and recorded over R8 billion in revenue and R5 billion in profit, which translates into 0, 8 % and 7% increase respectively.

6.1.4. The Sishen 1A Agreement is an agreement concluded between Transnet and SIOC, Kumba is not a party to the agreement.

6.1.5. The failure by some contractors were not caused by Transnet. Autumn Skies Resources and Logistics terminated their contract with Transnet because of high silica content, delays in mining production cycle and as they were converting from an iron ore mine to a manganese mine.

6.1.6. The costs associated with mining operations appear to be the main contributor for the demise of the majority of the EMs.

6.1.7. Ringside Trading 520 (Pty) also cancelled their contract with Transnet as they wanted to focus their iron ore sales on the local market and as a result would not need access to export capacity and they also declined allocation of rail when they were offered by Transnet.

6.1.8. Transnet suspended its rail capacity to Lime Chem Resources as they were not fulfilling their contractual obligations and they have never responded to Transnet in this regard

6.1.9. Transnet is willing to avail rail capacity to any other business at a reasonable fee.

6.1.10. With regard to the right of first refusal Transnet will have to first offer 85% and not the entire network available of the new rail capacity to Kumba. Even if Kumba should opt to take the 85% capacity, the emerging miners will still have 15% of the new / future capacity available for them to utilise in addition to the 25% of the current capacity as stated above.

6.2. Regarding whether in 2008, a few months before Ms. Maria Ramos resigned as Chief Executive Officer (CEO), the contract between Transnet and Kumba was revised and virtually all penalty clauses were deleted, and thus giving the Anglo subsidiary a licence to operate with impunity:

6.2.1. The allegation that in 2008, a few months before Ms. Maria Ramos resigned as Chief Executive Officer (CEO), the contract between Transnet and Kumba Pty Ltd was revised and virtually all penalty clauses were deleted, and thus giving the Anglo subsidiary a licence to operate with impunity is **unsubstantiated**:

6.2.2. The allegation that the R2 billion penalty which would otherwise be payable to Transnet was converted to a mere R700 million by Transnet management with Ms. Ramos at the Helm is incorrect.

6.2.3. On 18 July 2008, Transnet and SIOC signed a "Settlement and Amendment Agreement" which amended certain aspects of the Sishen 1A Agreement, which settled various disputes that had risen between the parties.

6.2.4. There had been significant capital overruns in the 1A Expansion and there were a number of disputes between SIOC and Transnet, some of which related to penalties and these were resolved and the 1st Settlement and Amendment settled all disputes at the time between SIOC and Transnet.

6.2.5. The Settlement and Amendment Agreement was approved by the Board of Directors of SIOC and Transnet and was duly signed by Ms. Ramos, in her capacity as the Group Chief Executive (GCE) of Transnet and by Mr. Chris Griffith who was the then Chief Executive of SIOC as authorised representatives of both entities.

7. REMEDIAL ACTION

7.1. **Due to the absence of any negative findings against Transnet, I am not taking remedial action against them.**

7.2. Regarding the need that the rail is principally used for the benefit of the populace, I hope that Transnet ensures that their long-term strategic supplier relationship objectives with emerging miners and BEE miners are in line with socio-economic transformation objectives with the view of ensuring that these miners are accommodated by Transnet for the transformation of the sector and for the benefit of all South Africans.

8. MONITORING

8.1. As no remedial action is taken there is no need for any monitoring.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 11/03/2020