

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No: _____ / _____

In the matter between:

**ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION UNION**

Applicant

and

SAMANCOR CHROME LIMITED (REG: 1926/008883/0)

First Respondent

FRANZ JURGEN SCHALAMON

Second Respondent

AMRE ABDELHAMID YOUNESS

Third Respondent

ELIZE ISENSCHMID

Fourth Respondent

WESSEL ERASMUS

Fifth Respondent

VANESSA GOUNDEN

Sixth Respondent

SIVANDRAN MUNSAMI GOUNDEN

Seventh Respondent

DANKO KONCAR

Eighth Respondent

BRANISLAV LAZOVIC

Ninth Respondent

ALISTAR PAUL RUITERS

Tenth Respondent

MOGAMMED RAFIQUE BAGUS

Eleventh Respondent

JOHANNES SITTARD

Twelfth Respondent

**SYLVANIA RESOURCES LIMITED
(REG AUSTRALIA: CAN 091415968)**

Thirteenth Respondent

**SINOSTEEL CORPORATION
(REG CHINA: 1000000101449)**

Fourteenth Respondent

**SAMCHROME LIMITED
(REG MALTA: C 35840)**

Fifteenth Respondent

**SAMCHROME FZCO
(REG UAE: LOB 18-803)**

Sixteenth Respondent

SAMCHROME FZE

(REG UAE: 128739)	Seventeenth Respondent
BATHO BARENA INVESTMENTS HOLDINGS (PTY) LTD (REG: 2005/008190/07)	Eighteenth Respondent
EHLOBO RESOURCES (REG: 2005/008195/07)	Nineteenth Respondent
NANKA INVESTMENTS (PTY) LTD (REG: 2005/032786/07)	Twentieth Respondent
SIBILO INVESTMENTS (PTY) LTD (REG: 2005/032692/07)	Twenty-First Respondent
TAKESHI AMANO	Twenty-Second Respondent
VICTOR OMOKHODION DANJUMA OMOIGHE	Twenty-Third Respondent
PENGCHENG LU	Twenty-Fourth Respondent
ZHENGYI LYU	Twenty-Fifth Respondent
FHENGZHI NAN	Twenty-Sixth Respondent
DESMOND MARCUS	Twenty-Seventh Respondent

FOUNDING AFFIDAVIT

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I, the undersigned,

JEFFREY KHEHLA MPHABLELE

do hereby make oath and say:

- 1 I am an adult male South African citizen.
- 2 I am the General Secretary of the Association of Mineworkers and Construction Union (“AMCU”), the Applicant, with addresses at 25 Botha Rd, Clewer, Emalahleni, 1039.
- 3 I am duly authorised to depose to this affidavit on behalf of AMCU.
- 4 Save to the extent that the context indicates otherwise the facts deposed to herein are within my personal knowledge and belief. To the extent that I make legal submissions in this affidavit, I do so on the advice of my legal representatives, whose advice I believe to be correct.
- 5 I note at the outset that AMCU’s knowledge and understanding regarding the allegations on which this application are brought is sourced solely from the allegations of a whistle-blower – Miodrag Kon. His affidavit forms part of this application. While I attempt to make clear throughout this affidavit that the issues raised are allegations that must be proven in court, in some places in this affidavit I do not always state that the allegations are as yet unproven. I do this so as to

not unduly burden this affidavit and do not mean to suggest that the allegations are proven.

OVERVIEW OF THIS APPLICATION

- 6 AMCU is a registered trade union that strives to represent and empower workers. Founded in 2002, AMCU has a “dramatically rising membership”¹ as workers increasingly place their faith in AMCU to represent their interests. AMCU has close to 200 000 members, and its numbers continue to grow dramatically.
- 7 AMCU has over five hundred members at Samancor, most of which joined AMCU after 2014. AMCU’s challenge to Samancor’s dismissal of over 150 AMCU members is currently pending before the Labour Appeals Court.
- 8 Samancor employees are meant to be beneficiaries of the Samancor Ndizani Workers’ ESOP Trust (“Ndizani Trust”), which indirectly holds 5.6% of Samancor’s shares via a stake in Batho Barena.
- 9 In 2018, AMCU was approached by Miodrag Kon, a former director of Samancor. Mr Kon bravely revealed to AMCU that from 2005 to present Samancor’s majority shareholders, and some or all of its directors, have entered Samancor into a series of transactions that have siphoned a massive amount of funds from Samancor to the prejudice of its minority shareholders. In this affidavit, I refer to these transactions as the “impugned transactions.”

¹ *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 (3) SA 242 (CC) at para 7.

- 10 These transactions first benefitted Kermas Limited (British Virgin Islands) registration number 504889 (“Kermas BVI”). They then benefitted International Mineral Resources AG registration number CH-020.3.027 (“IMR”), a subsidiary of multinational giant Eurasian Natural Resources Corporation (“ENRC”). From 2013, the transactions and arrangements benefitted the Terris Mining Group (“Terris”), a chain of entities incorporated in Mauritius and the Cayman Islands that appears to be related to IMR and, we suspect, ENRC.
- 11 These allegations are set out in detail in Mr Kon’s supporting affidavit and the annexures thereto.
- 12 I summarise them here for ease of reference:
 - 12.1 Samancor entered into a generous contract for chrome and Platinum Group Metals (“PGM”) reprocessing with Sylvania. In exchange, Sylvania gave 14.1 million shares to an entity registered on the British Virgin Islands named Portpatrick as a commission. Portpatrick was a front for some of Samancor’s directors and shareholders at the time.
 - 12.2 When Samancor sold 50% of its subsidiary Tubatse to the Chinese company Sinosteel, \$100 million was officially paid to Samancor. An undisclosed \$125 million was paid offshore by Sinosteel to Samancor’s then majority shareholder Kermas BVI even though Kermas BVI’s only interest in Tubatse was as a shareholder in Samancor. Tubatse was not Kermas BVIs to sell.

- 12.3 Under the ownership of Kermas BVI, Samancor entered into a marketing agreement wherein Samchrome Malta earned a sales commission of at minimum 9%. This was a marked increase from the previous rate of 2.5%. Samchrome Malta provided no meaningful service to Samancor. Indeed, confidential documents reveal it did not have any paid employees. The undisclosed owner of Samchrome was Kermas BVI as well as Samancor's then CEO Mr Jurgen Schalamon. Samchrome was shifted to Dubai, first as Samchrome FZCO and then as Samchrome FZE, ostensibly to reduce its already minimal tax burden to the advantage of its shareholders. As IMR acquired Samancor, it received a stake in Samchrome FZCO, and then ownership of Samchrome FZE. To our knowledge, Samchrome FZE is now owned by Terris and the 9% sales commission remains in place.
- 12.4 Kermas BVI and IMR agreed to write off \$29 million of Samchrome Malta debt to Samancor in the 2008 financial year without official approval from the board of directors. This was to the benefit of Samancor's majority shareholders, and to Samancor's prejudice.
- 12.5 In 2008, the board of directors of Samancor approved a management contract with RCS Limited. It appears that this contract went to RCS Ltd (Malta), in which then Samancor director Danko Koncar had an undisclosed interest. RCS Ltd (Malta) had no employees, but invoiced Samancor management fees for 2008 to the amount of \$4 million.

- 13 Mr Kon argues that if these transactions and agreements had been negotiated at an arms-length, Samancor would be in a much stronger financial position today.
- 14 By his estimate, Samancor was deprived of \$1.9 billion (about R28.5 billion at today's exchange rate).
- 15 If these funds had been paid out as dividends to shareholders, Mr Kon's rough estimate is that around \$100 million (about R1.5 billion at today's exchange rate) would have been paid to the Ndizani Trust for the benefit of Samancor's workers.
- 16 Of course, if Samancor had an additional R28 billion that it did not pay in dividends, it would be in a better position to provide its workers better wages and improved benefits.
- 17 If the allegations are true, the conventional party to seek a legal remedy would be Samancor. AMCU approached Samancor in March 2018. It has not taken any steps to seek such a remedy.
- 18 Anticipating that majority shareholders may not always act in a company's best interests, the 2008 Companies Act² provides for:

² 71 of 2008.

- 18.1 extended standing to litigate in the interest of a group of affected persons³ or in the public interest with leave of the court;⁴ and
- 18.2 a range of remedies to provide redress for oppressive or prejudicial conduct by a shareholder or director,⁵ including:
- 18.2.1 an order for the trial of any issue as determined by the court;⁶
 - 18.2.2 an accounting in any form the court may determine;⁷
 - 18.2.3 the appointment of directors in place of or in addition to current directors;⁸
 - 18.2.4 the variance or setting aside of transactions to which the company is a party together with compensation;⁹ and
 - 18.2.5 an order of compensation to an aggrieved person.¹⁰

19 In this application, AMCU seeks:

19.1 Declaratory relief that its members at Samancor are affected persons;

³ Ibid at s 157(1)(c).

⁴ Ibid at s 157(1)(d).

⁵ Ibid at s 163(1).

⁶ Ibid at s 163(2)(l).

⁷ Ibid at s 163(2)(i).

⁸ Ibid at s 163(2)(f)(i).

⁹ Ibid at s 163(2)(h).

¹⁰ Ibid at s 163(2)(j).

- 19.2 The court's leave to act in the public interest;
 - 19.3 An accounting of any and all expenditures incurred from and income generated by the impugned transactions;
 - 19.4 The ordering to trial, on particulars of claim to be produced, of the following issues:
 - 19.4.1 Whether some or all of Samancor's directors should be replaced;
 - 19.4.2 Whether some or all of the impugned transactions should be varied or set aside, and whether and what amount of compensation ought to be paid arising from this; and
 - 19.4.3 Whether compensation ought to be paid to aggrieved persons.
- 20 I motivate for this relief in the following by briefly:
- 20.1 Describing the parties;
 - 20.2 Providing a background to this matter;
 - 20.3 Explaining why there is a triable case;
 - 20.4 Articulating why AMCU should be granted the court's leave to act in the public interest;
 - 20.5 Describing why AMCU's members at Samancor are affected persons in the transactions impugned in this application;

20.6 Explaining why AMCU requires, and is entitled to, an accounting of the impugned transactions; and

20.7 Concluding.

PARTIES

- 21 The Applicant is AMCU.
- 22 The First Respondent is Samancor Chrome Limited (“Samancor”), registration number 1926/008883/06, with registered address at Block B, Cullinan Close, Cullinan Place, Morningside, Sandton, 2196.
- 23 The Second Respondent is Franz Jurgen Schalamon, an adult male German national who is a director of Samancor as well as the former Chief Executive Officer, with registered address at 1628 Bridgewater, Dainfern, 2191.
- 24 The Third Respondent is Amre Abdelhamid Youness, an adult male who is the Chairperson of Samancor’s board with registered address at 1 Queens Way, Hendon, England, NW4 2TN.
- 25 The Fourth Respondent is Elize Isenschmid, an adult female and former director of Samancor. Her residential address per the Companies and Intellectual Property Commission (“CIPC”) is listed as Block B, Cullinan Close, Cullinan Place, Morningside, Sandton, 2196. I note that this is also Samancor’s address.
- 26 The Fifth Respondent is Wessel Erasmus, an adult male director of Samancor with registered address at 8 Gigi Avenue, Northcliff Extension 10, Johannesburg, 2195.

- 27 The Sixth Respondent is Vanessa Gounden, an adult female director of Samancor with registered address at 218 Bootes Street, Waterkloof Ridge, Pretoria, 0181.
- 28 The Seventh Respondent is Sivandran Munsami Gounden, an adult male former director of Samancor, with registered address at 218 Bootes Street, Waterkloof Ridge, Pretoria, 0181.
- 29 The Eighth Respondent is Danko Koncar, an adult male former director of Samancor, with registered address at Seferova 6, Zagreb, Sagreb, Croatia.
- 30 The Ninth Respondent is Branislav Lazovic, an adult male former director of Samancor, with registered address at 28 Avenue Mansions, Finchley Road, London, NW3 7AX United Kingdom.
- 31 The Tenth Respondent is Alistair Paul Ruiters, an adult male former director of Samancor, with registered address at 14th Avenue, Silverhurst Estate, C, Constantia Main Road, Constantia, Cape Town, 7806.
- 32 The Eleventh Respondent is Mohammed Rafique Bagus, an adult male with registered address at 7 Willow Brooke Lane, Constantia, Constantia Cape Town, 7806.

- 33 The Twelfth Respondent is Johannes Sittard, an adult male _ with registered address at Willowmead, Pinner Hill, Middlesex, England HA5 3XU, United Kingdom.
- 34 The Second to Twelfth Respondents are cited in their capacity as directors or former directors in Samancor.
- 35 The Thirteenth Respondent is Sylvania Resources Limited, a company with registered address at 98 Colin Street, West Perth, Western Australia, 6005, Australia.
- 36 The Fourteenth Respondent is Sinosteel Corporation Limited, a company with registered address at Sinosteel Plaza, 8 Haidian Street, Haidian District, Beijing, 100080, China.
- 37 The Fifteenth Respondent is Samchrome LTD, a company with registered address at 2nd Floor, Europa Centre, St Anne Street, Floriana Malta, F R N 901.
- 38 The Sixteenth Respondent is Samchrome FZCO, an entity with registered address at LOB 18-803, Jebel Ali Free Zone (Jafza), United Arab Emirates.
- 39 The Seventeenth Respondent is Samchrome FTZE, an entity with registered address at LOB 18-803, Jebel Ali Free Zone (Jafza), United Arab Emirates.

- 40 The Thirteenth to Seventeenth Respondents are cited due to their interest in transactions that AMCU seek to challenge in this application.
- 41 The Eighteenth Respondent is Batho Barena Investments Holdings (Pty) Ltd, a company with registered address at Holgoun House, 269 Veale Street, New Muckleneuk, Pretoria, 0181.
- 42 The Nineteenth Respondent is Ehlobo Resources, a company with registered address at Edelstein Bosman Inc, 220 Lange Street, New Muckleneuk, Pretoria, 018.
- 43 The Twentieth Respondent is Nanka Investments (Pty) Ltd, a company with registered address at 381 Ontdekkers Road, Florida Park Ext 3, Roodeport, 1709.
- 44 The Twenty-First Respondent is Sibilo Investments (Pty) Ltd, a company with registered address at 381 Ontdekkers Road, Florida Park Ext 3, Roodeport, 1709.
- 45 The Eighteenth to Twenty-First Respondents are cited as they are direct or indirect shareholders in Samancor and may due to their interest in transactions that AMCU seek to challenge in this application.

- 46 The Twenty-Second Respondent is Takeshi Amano, an adult male director of Samancor, with registered address at 7th Floor, 55 Strand, London, London, United Kingdom, WC2N, 5LS.
- 47 The Twenty-Third Respondent is Victor Omokhodion Danjuma Omoighe, an adult male director of Samancor, with registered address at Block B Cullinan Place, Cullinan Close, Morningside, Sandton, 2196.
- 48 The Twenty-Fourth Respondent is Pengcheng Lu, a director of Samancor, with registered address at Room 201, Unit 6 Building 9, Yangguang Shangdong, Haidan District, Beijing, China, 100000.
- 49 The Twenty-Fifth Respondent is Zhengyi Lyu, a director of Samancor, with registered address at Suite 302 Block 12, Wanda Plaa Jianguo Road, Chaoyang Beijing, China, 100000.
- 50 The Twenty-Sixth Respondent is Fengzhi Nan, an alternating director of Samancor, with registered address at 17th Floor, Sinosteel Plaza, 159 Rivonia Road, Sandton, 2196.
- 51 The Twenty-Second to Twenty-Sixth Respondents are cited in their capacity as directors of Samancor.

- 52 The Twenty-Third Respondent is Desmond McManus, the Chief Executive Officer of Samancor.
- 53 AMCU wishes to join the trustees for the time-being of the Ndizani Workers' Trust (also known as the Samancor Workers' Trust), but we have not been able to identify them at this stage nor have we been able to identify an address at which the Trust has any operations. We will continue to seek to identify the trustees in order to join them to this application, and will serve this application upon the Trust's premises as and when we locate them. Should any other Respondent seek to join the trustees, AMCU would support such a joinder.
- 54 I note that some of the addresses for some of the parties - particularly former directors - may be outdated. I confirm that AMCU will do its utmost to ensure effective service prior to proceeding with this litigation, and will report to this court should it face any challenges.

BACKGROUND

- 55 Nearly all that AMCU knows regarding this matter is what it has been told by Mr Kon. The majority of the background appears from his affidavit.
- 56 AMCU was advised of Mr Kon's allegations in late 2017. As appears from the document annexed hereto marked **JM1**, we wrote to Samancor alerting them to the allegations.
- 57 As appears from annexure **JM2**, Samancor responded promptly, stating that it takes "these matters seriously and are prepared to investigate them immediately."
- 58 Our President, Joseph Mathunjwa, met with Samancor's CEO and the Board Chairperson to outline AMCU's concerns regarding the impugned transactions. For a period, there were engagements regarding the allegations which I do not describe here as they were confidential and without prejudice. Suffice it to say that these engagements have not produced any progress in addressing these transactions.
- 59 AMCU has accordingly been compelled to approach this court to seek the relief set out in its notice of motion.

THERE IS A TRIABLE CASE

- 60 As I have said, AMCU relies upon the evidence of Mr Kon.
- 61 We have been advised by Dr Dick Forslund, who will file a supporting affidavit in this matter, that he believes the allegations are credible and that, if proven, the prejudice to Samancor, and the Ndizani Trust, is severe.
- 62 In the circumstances, we believe that there is a *prima facie* case that some or all of Samancor's current and former directors seriously breached their fiduciary duties in approving, alternatively in not challenging, the impugned transactions. We therefore believe that there are prospects that some or all of the current directors may be removed and/or replaced as contemplated by section 163(2)(f)(i) of the Companies Act.
- 63 As each of the impugned transactions were entered into in breach of the directors' fiduciary duties, and were entered into with third parties that are not genuinely independent from Samancor, we believe that there are prospects that a court may set aside or vary some or all of the transactions and that, if this is done, a court may order compensation to be paid to Samancor as redress for the transactions as contemplated by section 163(2)(h) of the Companies Act.

- 64 It is possible that a court may decline to make an order setting aside or varying some or all of the impugned transactions on the grounds that it may be impracticable or unduly prejudicial to third parties or on other grounds.
- 65 I note, for example, that it may well be that Sinosteel was unaware that Kermas was not entitled to the payment it received. If this is the case, it is unlikely that the court will set aside a transaction that is more than a decade old.
- 66 As some remedy must be forthcoming for the impugned transactions, we believe there are reasonable prospects that a court may order some or all of the directors to compensate Samancor, alternatively Batho Barena, alternatively Ndizani and/or Nanka and/or Sibilo as contemplated by section 163(2)(j) of the Companies Act.
- 67 We also believe that there are reasonable prospects that a court may rely upon section 163(2)(j) to find Mr Kon an aggrieved person entitled to compensation commensurate to the value of the compensation paid to Samancor or any other party as a consequence of this application, alternatively, to pay him any other amount deemed fit. We record that while AMCU has not made any payments to Mr Kon, we have given him a good faith undertaking that we will ask the court to order the payment of some compensation to him.
- 68 AMCU therefore seeks an order that these issues be ordered to trial. Before the matter is ripe for trial, however, a preliminary order is required.

- 69 Section 163(2)(i) of the Companies Act empowers a court to make an order, if it considers it fit, requiring a company to produce an accounting. In this matter, AMCU seeks orders requiring Samancor to make an accounting of all expenditures and income from all of the impugned transactions. Without this order, AMCU is unable to quantify the value of the compensation it intends to seek at trial, and thus unable to file particulars of claim.
- 70 The accounting will also clarify whether the impugned transactions have persisted since Mr Kon was removed as a director. This will establish whether all directors - particularly those appointed after 2016 – are potentially liable for some or all of the compensation AMCU will seek.
- 71 It is important to record that at this stage AMCU is not certain which directors are liable for the impugned transactions. Some of the directors - particularly those not associated with Kermas, IMR, and/or Terris – may not be liable for some or even all of the transactions.
- 72 Indeed, this is precisely why a trial is appropriate.

AMCU IS ACTING IN THE PUBLIC INTEREST

73 As noted above, section 157(1)(d) of the Companies Act provides that a person may bring an application to court in the public interest with the leave of the court.

74 I am advised that a court will consider the following criteria:

74.1 the nature of the allegations advanced as to why the public interest is implicated;

74.2 the relevant provisions of the Companies Act;

74.3 whether there are other reasonable and effective ways in which the challenge may be brought; and

74.4 the range of persons or groups who may be directly or indirectly affected by any order, and the opportunity that those persons have had to present evidence and argument to the court.¹¹

75 As the relevance of the provisions of the Companies Act are addressed above, I only address the other requirements in this section.

76 Before doing so, I briefly note that this application is supported by the Alternative Information and Development Centre (“AIDC”), a non-profit that seeks to be:

¹¹ *REDISA NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at para 134.

“A united, self-aware and self-confident alliance of labour, community, faith-based, environmental and women’s organisations and movements are increasingly effective in developing a democratic, socially just, economically viable and ecologically sustainable development responses to the legacy of underdevelopment, neoliberal globalisation and extractivist modes of development.”

77 AIDC’s support, confirmed in Dr Forslund’s affidavit, is significant for two reasons:

77.1 It underscores that the issues raised in this matter are of significant public interest, and affirms that AMCU can be trusted to litigate in the public interest in good faith; and

77.2 It demonstrates that AMCU will have sufficient expertise and capacity to engage in this commercially complex litigation.

78 On the issue of expertise, capacity, and the public interest, I pause to note:

78.1 AMCU is represented in this matter by Richard Spoor Inc, Attorneys, a firm with a proven track record litigating complex matters in the public interest in the mining sector.

78.2 AMCU has secured the services of Sasha Wales-Smith for the litigation of this matter. Ms Wales-Smith is a corporate/forensic investigator, researcher and award-winning investigative journalist who specialises in corruption and human rights violations in extractive industries and natural resource sectors. I annexe Ms Wales-Smith’s CV hereto marked **JM3**.

79 I also note that we have instructed our attorneys to transmit a copy of this application to the following authorities:

79.1 The South African Revenue Service;

79.2 The Broad-Based Black Economic Empowerment Commission; and

79.3 The United Kingdom's Serious Fraud Office, which we understand is investigating ENRC.

80 I submit that this alone demonstrates that AMCU is not merely litigating to benefit itself or its members alone.

The public interest is implicated

81 I submit that the public interest is plainly implicated in this matter:

81.1 The abuse of minority shareholders is one of great public concern.

81.2 This public concern is particularly pronounced in the context of black economic empowerment, as BEE can only be successful where historically disadvantaged persons are empowered to participate in the economy in a meaningful and economically successful manner. If Mr Kon's allegations are proven, it will be in the public interest to provide a remedy for BEE shareholders who have been deprived.

81.3 If successful, thousands of Samancor employees will benefit as beneficiaries of the Ndizani Trust as well as from Samancor's improved ability to pay higher salaries and/or better benefits.

82 I note that Dr Forslund's affidavit provides further reasons why this application is in the public interest. I associate AMCU with these reasons, and ask that they be read as if they are incorporated herein.

83 I also note that AMCU undertakes that any settlement will be to the benefit of all of Samancor's workers, not only AMCU members.

There are no other reasonable and effective ways to bring this challenge

84 I submit that there is no reasonable alternative to bring this challenge.

85 Samancor has failed to act on the allegations.

86 While we do not know if and to what extent all the directors and other shareholders are involved in the impugned transactions, the allegations in Mr Kon's affidavit, together with the complacency of the directors and fellow shareholders, establish that it is important that AMCU be allowed to participate in any litigation in the public interest.

87 I submit that if any other directors or shareholders also wish to challenge any or all of the impugned transactions, this should not be seen as an alternative to AMCU acting in the public interest.

88 AMCU would welcome their involvement as fellow Applicants/Plaintiffs in this litigation, and would have no objection to separate litigation being initiated.

89 As noted above, AMCU is also sharing this information with the relevant authorities. We submit that their processes run parallel to this litigation, and are no substitute.

The persons affected by any order

90 The question of the persons affected by any order strongly militates in favour of granting AMCU to litigate in the public interest:

90.1 As noted above, thousands of Samancor employees will benefit if this application is successful.

90.2 While the Respondents/Defendants to the application/action may be adversely affected, they will have sufficient notice of the allegations to admit or deny them and to defend against the action if necessary.

91 Generally, any affected parties will have the opportunity to present evidence and argument in this matter should they wish to do so.

WORKERS AT SAMANCOR ARE AFFECTED PERSONS THAT AMCU MAY REPRESENT

- 92 Section 157(1)(c) provides that a person may bring an application to court in the interest of a group of affected persons. I submit that AMCU, alternatively Samancor's workers, including AMCU's members, are affected persons in terms of the impugned transactions.
- 93 Affected persons is not defined generally in the Companies Act.
- 94 For the purpose of business rescue proceedings in the Companies Act, affected persons is defined to include any registered trade union representing employees of the company, as well as unrepresented employees in their individual capacity.
- 95 Given the overlapping nature of the substance of the impugned transactions and business rescue proceedings, I submit that the same or similar definition should be applied to section 157(1)(c).
- 96 I also submit that the beneficiaries of the Ndizani Trust are plainly affected, and prejudiced, by the impugned transactions. They are affected persons on this basis as well.
- 97 As this matter is not straightforward, I ask the court for a declaratory order to this effect.

98 I am advised that this issue is primarily a legal one. Further legal submissions on this point will be made at the hearing of this matter.

CONCLUSION

99 In the circumstances, AMCU prays for an order as set out in the notice of motion, with costs, including costs of two counsel, against Samancor and any other Respondent that opposes this application.

100 Costs are sought against Samancor – even if it does not oppose – as this application has been made solely because of Samancor’s failure to take steps to address the allegations made by Mr Kon through litigation, a credible investigation, or even a denial that the conduct occurred.

JEFFREY KEHLA MPHAHLELE

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit was signed and sworn to at _____ on this the ___ of _____ 2019 in accordance with the provisions of Regulation R128 dated 21 July 1972 as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR 774 of 23 April 1982.

COMMISSIONER OF OATHS

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No: _____ / _____

In the matter between:

ASSOCIATION OF MINeworkERS AND

CONSTRUCTION UNION

Applicant

and

SAMANCOR CHROME LIMITED (REG: 1926/008883/06)

First Respondent

and Others

SUPPORTING AFFIDAVIT

I, the undersigned,

DICK FORSLUND

do hereby make oath and say:

- 1 I am an adult Swedish national admitted to the Republic for permanent residence employed at the Alternative Information and Development Centre, which has its address at 129 Rochester Rd, Observatory, Cape Town, 7705.

- 2 The facts set forth in this affidavit are true and correct, and fall within my personal knowledge unless the context indicates otherwise.

MY BACKGROUND

- 3 My early professional background from 1977 was as a metal and factory worker, and from 1991 to 1997 as a journalist. In January 1997, I enrolled at Stockholm University. I graduated in 1999 with a BSc in Economics and a BSc in Business Administration.
- 4 After working as a back office economist for two years I was recruited to a research program at Stockholm University School of Business and Gotland University College to study for my PhD.
- 5 I graduated with my PhD in 2008.
- 6 My PhD dissertation - "Give Me the Money! : The Genealogy of Saving and the Knowledge-Art of Financial Persuasion" - was published in 2008 by a commercial publishing house. I continued to work as a Senior Lecturer at the business schools of Stockholm University and Gotland University College from 2008 to 2010, teaching Science & Methods, Management, and Organisation Theory to undergraduate students.
- 7 In 2010, I moved to South Africa and started to work as an economist and researcher at Alternative Information and Development Centre ("AIDC") in Cape Town. I was introduced to AIDC by its director - Brian Ashley. Mr Ashley was involved in the struggle against apartheid from his youth and had a short exile in

Europe around 1988 where I met him. Back in South Africa, he told me about the plight of the “Upington 26”. In 1989-1990 I engaged my local branch of the Swedish Metal Workers Union at Atlas Copco MCT in Stockholm in solidarity for those arrested in Upington. Mr Ashley and myself stayed in contact after this.

- 8 My designation at AIDC today is Senior Economist. I married a South African in 2012, and received my permanent residence permit in 2013.
- 9 A copy of my CV is annexed hereto marked **DF1**.
- 10 In 2013, I did research for the Bench Marks Foundation (“BMF”) about the Social Labour Plans (“SLP”) of Lonmin Plc (“Lonmin”). In my research I recorded that Lonmin’s 2006 SLP made a legally binding commitment to build 5500 mine worker houses by 2012, but Lonmin had only built three with no consequences.
- 11 In March 2014, I was contacted by the Research Leader at the Marikana Commission of Inquiry (“the Commission”), Dr Kally Forrest. This was during the second phase of the Commission’s work dealing with the background to the disastrous events in August 2012 and the 16 August massacre. The assignment was, in short, to study and report to the Commission on the affordability of the demand for R12,500 in basic monthly net wage put to Lonmin by 4200 rock drill operators in July 2012.

- 12 I had an experience in 2013 from assisting in a Section 189 negotiation at the Barplats Mine Ltd. Over 1000 jobs were to be lost and we asked for the financial statements (AFSs) of a subsidiary of a Canadian transnational company, Eastern Platinum Ltd (“EPL”). The local management gave them to us, probably without thinking much about it. The documents revealed large interest payments from the mine to another of EPL’s subsidiaries in the Bahamas on a loan instead of paying the profit from the mine in the form of dividends that would have been taxed in the country. On the face of it, this was why the South African mining operation for many years had registered losses in the books.
- 13 Coming from that eye-opening experience, I asked the Commission for access to the audited AFSs of Lonmin subsidiaries in South Africa.
- 14 The financial statements of Lonmin’s two largest subsidiaries, showed that one of them, as far back as the record went to 2003, had been paying an average R250 million in sales commissions annually to an associated company on Bermuda that had the same address as the law firm Appleby Services, a firm that specialises in off-shore arrangements. Notably, no one ever worked from Bermuda to sell Lonmin’s platinum.
- 15 The position of Lonmin in the hearings of the Commission was that the firm on Bermuda had been dormant from 2008, but the audited AFSs of the subsidiary reported that the payments to Bermuda continued to the 2012 financial year.

- 16 Lonmin argued that its BEE partner Incwala refused to change the arrangement up until 2012, but maintained that payments were stopped in 2008 despite the audited AFSs of its South African subsidiary.
- 17 If there had been information available of the kind we find in the affidavit by Mr Kon, it would have been easier to shed light on that contentious detail. I and my colleague Tamara Paramoer only had access to the AFSs of the subsidiaries. We did not have access to email conversations, business contracts and, indeed, the sworn testimony of a whistle-blower with recollections of events.
- 18 In August 2014, I reported in writing and met Dr Kally Forrest and the Evidence Leader, Matthew Chaskalson SC, before two cross examinations of Lonmin's Director Mohamed Seedat in September.
- 19 One focus of Mr Chaskalson's questions was how Lonmin could fail to finance 5500 mine worker houses if the company could afford both to pay dividends and over 2% of Lonmin's total sales revenue in commission to an account in Bermuda. Mr Seedat argued that he had seen such arrangement everywhere: *"I've seen these charges range from, in Lonmin's case while it had this arrangement, around 2% to cases where it could be as high as 7, 8%, depending on the risk"*.
- 20 Mr Seedat's idea about top rates has bearing on the matter between AMCU and Samancor Chrome and others. Mr Seedat's argument about payments for risk-

taking is wrong and it is head-on contradicted by the Notes on ownership and risk in Lonmin's own AFSs. In my understanding, it was made to counter the allegation of lack of substance in the alleged service provided from Bermuda, because the issue of substance is crucial in Section 80 of the Tax Income Act to decide if an arrangement can be regarded as tax evasion.

21 A report was prepared regarding Lonmin's sales commissions, and was published by AIDC in June 2015.¹ A briefing of the report was published in Review of African Political Economy later the same year.²

22 I confirm that at all times AMCU was supportive of the research done at the Marikana Commission, and passionate about holding Lonmin to account for the benefit of their members but also for other workers and the general public

23 I note that I also participated in the team that assisted AMCU during the platinum wage negotiations in 2014 and in the 2015 gold sector negotiations. I was engaged by AMCU 2018/2019 as an expert witness before the Competition Tribunal regarding the Sibanye and Lonmin merger.

¹ URL: <https://aidc.org.za/download/Illicit-capital-flows/BermudaLonmin04low.pdf>.

² Review of African Political Economy, Vol. 42, No. 146, pp. 657-665: <https://www.tandfonline.com/doi/abs/10.1080/03056244.2015.1085217> (2019-09-27).

ASSESSMENT OF MR KON'S EVIDENCE

- 24 As I can recall, I met Mr Kon in a first meeting at Richard Spoor Inc's offices in Johannesburg in August 2015. I was invited to attend the meeting given my experience at the Marikana Commission.
- 25 There have been several macro-economic studies made about illicit financial flows from South Africa. South African macro-data are also included in the well-known reports from Global Financial Integrity. I am not aware of any studies of a particular company in South Africa, other than my report on Lonmin and AIDC's submission to the Davis Tax Committee.³
- 26 I do not think this is because of a lack of interest among other researchers. The problem is the lack of data and documentation such as that furnished by Mr Kon.
- 27 It is, of course, open to the Respondents to deny or confirm the truthfulness of Mr Kon's accounts and present on what points their versions of events differ from his version.
- 28 That said, I find the evidence presented logically consistent with the narrative in the affidavit and convincing.
- 29 From the end of 2015, I have had increasing access to Mr Kon's documents.

³ URL: <http://aidc.org.za/download/Illicit-capital-flows/aidcDTCsubmis11.pdf> (2019-10-01)

- 30 I have been given access to hundreds of documents of all kinds, including email conversations with their meta-data remaining.
- 31 Mr Kon has answered dozens of my questions in a manner that leads me to believe he is credible.
- 32 I note that if the truthfulness of the allegations is denied, these denials can be tested through a trial to enable the court to make a determination:
- 32.1 Further documents will be produced by the Respondents/Defendants;
 - 32.2 The meta-data of Mr Kon's emails can be examined for authenticity by experts;
 - 32.3 Samancor's records submitted to SARS and the Reserve Bank can be subpoenaed;
 - 32.4 Bank staff of Nedbank and Standard Bank appearing in email conversations can be called; and
 - 32.5 Witnesses, including Mr Kon, can be cross-examined.
- 33 I note two errors in Mr Kon's affidavit. At paragraph 6 of Mr Kon's affidavit "US\$125" should read "US\$125 million", just as in what follows in the affidavit. In paragraph 33, the correct reference to the document where the Competition Tribunal gave its reasons for approving the 2006 merger is **03//LM/Jan06**.

AIDC'S SUPPORT OF AMCU'S APPLICATION

- 34 As I noted above, AIDC have partnered with AMCU to advance their members' interests in complex negotiations. We can attest to their credibility in effectively representing their members in those contexts. We fully believe that AMCU will litigate in the public interest in this matter, as well as in the interest of their members and all workers at Samancor.
- 35 We are also keenly aware of the limitations in alternative solutions.
- 36 As is pointed out in the founding affidavit, it may be that other minority shareholders in Samancor will be shocked by this evidence and will wish to join the litigation. If this occurs, it will still be important that AMCU be allowed to litigate on behalf of its members and in the public interest to ensure that the public interest is served in such litigation.
- 37 We note that the tax authorities cannot be relied upon to resolve this issue.
- 38 The Tax Income Act was amended in 2006/2007 to empower authorities to better deal with tax avoidance. As AIDC, we are not aware of any case that has been brought to Court under Section 80 of the Companies Act, much less a successful one.

- 39 Neither are we aware of any case of litigation under the Companies Act that deals with betrayal of minority shareholders, corruption that has led to irrational business agreements, or massive diversion of proceeds to wrong accounts that appears to be the case in the agreement with Sinosteel Corporation Ltd.
- 40 As for cross-border management fees and sales commissions as means of profit shifting, this case provides a compelling argument for the South African authorities to pull up their socks.
- 41 The debate about Base Erosion and Profit Shifting (“BEPS”) got momentum when the so called Thabo Mbeki Report to the African Union was published in 2014.⁴ This report, which I do not annexe due to its length, made salient findings, of which some were:
- 41.1 That the amount lost to Africa from illicit financial flows (“IFF”) “exceeds US\$50 billion by a significant amount”.
- 41.2 That the size of illicit financial flows from South Africa is around 4% of GDP per year.⁵ In 2019/20 this would mean that over R200 billion flowed out of South Africa illicitly, depriving minority shareholders of dividends, the fiscus of tax revenue, and removing large sums from the wage bargaining tables.

⁴ “Illicit Financial Flows from Africa”: Report of the High Level Panel appointed by the United Nations Economic Commission for Africa https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf (2009-09-30), page 13.

⁵ Ibid at table 3.1, p 57.

41.3 That “[t]he South African authorities informed the Panel about a case in which a multinational corporation was found to have avoided \$2 billion in taxes by claiming that a large part of its business was conducted in the United Kingdom and Switzerland”⁶, but that its business rather was conducted from South Africa.

41.4 I note that the identity of this corporation could not be disclosed in the report and this is instructive in the matter at hand.

42 The BEPS phenomena was also important in the reports of the Davis Tax Committee.

43 Despite this, there has been minimal progress on this issue. Indeed, it seems that the debate around BEPS is losing energy lately. The recently published “Mauritius Leaks” did not get much attention and it looks to us at AIDC that the Members of Parliament are giving up. As AIDC, we are not aware of any new initiatives, aside from an August 2018 announcement from Honourable Floyd Shivambu of the Economic Freedom Fighters that he is preparing a Private Members Bill for a separate Tax Avoidance Act. We do not know what the status of this proposed Bill is.

44 The problem of BEPS remains an important factor behind the economic and social problems in South Africa. It cuts the resources of the government and it

⁶ Ibid at p 27.

affects economic growth. What has allegedly happened at Samancor Chrome and its subsidiaries, and with a great deal of the questionable capital outflows still going on, has been and is changing the Gross Domestic Product statistics in South Africa for the worse. Mr Kon's affidavit indicates that Samancor, during his 2005-2009 tenure alone, was deprived of more than US\$450 million in incomes.

- 45 The Department of Mineral Resource's Bulletin B1/2018 reports exports sales of about R37.5 billion of Chromium Alloys in 2017 and R12.6 billion in export sales of Chromite. These are the two export commodities of Samancor. If every South African exporter of chrome products have a 9% cross border sales commission policy, then R4.5 billion disappeared to associated companies in tax havens abroad in 2017 alone.
- 46 Samancor workers appear to be victims of an economic injustice also in terms of the law, not only in the moral sense, which is the angle from which the social problem of inequality and exploitation usually is addressed.
- 47 If successfully brought to closure, I believe this case will have wider repercussions than just compensating Samancor workers, just as Mr Kon hopes at the end of his affidavit. It has the potential of becoming a cardinal case in the discussion about corporate use of so called tax havens, illicit financial flows, and profit shifting, if AMCU is allowed to litigate in this matter, and able to achieve a favourable outcome.

- 48 The SARS does of course act against tax evasion, but is prohibited by law to make the cases public. We hope this case, also because of its enormous size, will breathe new life into the BEPS issue and increase the political will needed to deal with it.
- 49 The case affords the opportunity to widen our view on the effects of BEPS on South Africa. If Mr Kon's allegations are correct and this case is successful, AMCU's litigation will illustrate that the SARS is not the only stakeholder that loses out from illicit outflows and so called tax evasion. Profit shifting is not only evading taxes or eroding the tax base. It also erodes the base for wealth accumulation for historically disadvantaged shareholders and workers and community trusts, workers' pensions, as well as the base for wage increases.
- 50 Clearly this drastically exacerbates South Africa's entrenched problems of inequality, social instability, and low economic growth.
- 51 Addressing this is plainly in the public interest, and AMCU's application should be granted.

CONCLUSION

52 AIDC stands ready to assist in this litigation. With our skillset, I submit that this will significantly assist AMCU in litigating this matter effectively and in the public interest.

53 In conclusion, AIDC supports AMCU's application as set out in its notice of motion.

DICK FORSLUND

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit was signed and sworn to at _____ on this the ___ of _____ 2019 in accordance with the provisions of Regulation R128 dated 21 July 1972 as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR 774 of 23 April 1982.

COMMISSIONER OF OATHS

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No: _____/____

In the matter between:

**ASSOCIATION OF MINeworkERS AND
CONSTRUCTION UNION**

Applicant

and

SAMANCOR CHROME LIMITED (REG: 1926/008883/06)

First Respondent

and Others

SUPPORTING AFFIDAVIT

I, the undersigned,

PHUTHUMA ELFAS MANYATHI

do hereby make oath and say:

- 1 I am an adult South African male working as a Regional Secretary for Associated Mineworkers and Construction Union ("AMCU") in the North West and Rustenburg region, which has its offices at 192 President Mbeki Drive in Rustenburg.

- 2 The facts set forth in this affidavit are true and correct, and fall within my personal knowledge unless the context indicates otherwise.

- 3 My responsibilities as an AMCU official includes overseeing and protecting the wellbeing and rights of AMCU members employed at Samancor.
- 4 I have investigated the relation between AMCU members working at Samancor and the Samancor Ndizani Workers' ESOP Trust ("Ndizani Trust").
- 5 I have also consulted with three AMCU shop stewards, two from Millsell and one from Mooinoi. The shop stewards and I have interviewed thirteen AMCU members regarding this issue:
 - 5.1 Amos Leinaing Makokomae, who has worked five years at Samancor and signed a stop order for AMCU in 2015;
 - 5.2 Tebogo Jan Magosi, who has worked eight years at Samancor and signed stop order for Amcu in 2015;
 - 5.3 Mosebetso Isaac Mokoena, who has worked at Samancor for 11 years and signed a stop order for AMCU in 2015;
 - 5.4 Seekane Joseph Tsikoane, who has worked at Samancor for five years and signed stop order for AMCU in 2015;
 - 5.5 Daniel Kenneth Dikale, who has worked at Samancor for 24 years and signed a stop order for AMCU in 2015;
 - 5.6 Jacob Mvezi Ncanini, who has worked at Samancor for seven years and signed a stop order for AMCU in 2015;
 - 5.7 Funekile Zolwana, who has worked at Samancor for nine years and signed a stop order for AMCU in 2015;

- 5.8 Zithulele Fulani, who has worked at Samancor for 12 years and signed stop order for AMCU in 2015;
 - 5.9 Benjamin Buki Montsiwa, who has worked at Samancor for 30 years and signed a stop order for AMCU in 2015;
 - 5.10 Wellington Makhwenkwonke Mzwana, who has worked at Samancor for 24 years and signed a stop order for AMCU in 2015;
 - 5.11 Sandile Notoyi, who has worked at Samancor for seven years and signed a stop order for AMCU in 2015;
 - 5.12 Pule Petros Bob, who has worked at Samancor for 12 years and signed a stop order for Amcu in 2016; and
 - 5.13 Kabelo Solomon Putu, who has worked at Samancor for 11 years and signed a stop order for AMCU in 2015.
- 6 All 13 members responded that they have received some payments from the Ndizani Trust. Most of them remembered that they had got one payment during the previous five year period. About half of the 13 workers mentioned two payments of R10 000 each last year. The second payment to the others was R4 000 or R8 000.
- 7 A couple of the 13 workers remembered a payment of R8 000 in 2013.
- 8 No workers remember any other payments remember any other payments from the Trust.

- 9 At Tweefontein mine in Limpopo, AMCU members also report that they have been paid two times in 2018, first time R10 000. After that they were paid R4 000 a second time. They don't know why.
- 10 The large payments in 2018 were the most significant payments made by the Trust. They were made after AMCU wrote to Samancor regarding Mr Kon's allegations.
- 11 I explained to the shop stewards who interviewed members that the Ndizani Trust owns shares in Samancor. I informed them that AMCU has been furnished allegations that some majority shareholders and directors have unduly benefited at Samancor's expense, to the prejudice of minority shareholders such as the Ndizani Trust.
- 12 All 13 workers want this to be investigated.
- 13 They support AMCU's litigation on their behalf, on behalf of all Samancor workers, and in the public interest.

PHUTHUMA ELFAS MANYATHI

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit was signed and sworn to at _____ on this the ____ of _____ 2019

in accordance with the provisions of Regulation R128 dated 21 July 1972 as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR 774 of 23 April 1982.

COMMISSIONER OF OATHS

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

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In the matter between:

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Applicant

and

SAMANCOR CHROME LIMITED (REG: 1926/008883/06)

First Respondent

and Others

SUPPORTING AFFIDAVIT

I, the undersigned,

MIODRAG KON

do hereby make oath and say:

- 1 I am an adult male. I previously served as one of the first nominated directors on the Boards of Samancor Chrome Holdings, previously Kermas SA (Pty) Ltd REG: 2004/034987/07 ("Kermas SA"), and of Samancor Chrome Limited REG: 1926/008883/06 ("Samancor").

- 2 I do not disclose my further personal details regarding employment or address due to concerns regarding my personal safety. Should the Court require these details, I will seek leave to disclose them to the Court on such terms regarding confidentiality that the Court may be amenable to.

- 3 The facts set forth in this affidavit are true and correct, and fall within my personal knowledge unless the context indicates otherwise.

MY PERSONAL BACKGROUND WITH SAMANCOR

- 4 In January 2005, I was approached by Dr Danko Koncar. He asked me to come and work on a project in South Africa. Dr Koncar is a distant relative of mine and he had heard that I am an economist and about my background. I thought it was an interesting offer to work in South Africa.

- 5 I arrived in South Africa in February 2005 and took a post in April as a director in the Board of Kermas SA together with Branislav Lazovic and Dr Koncar. From June 2005 I was appointed as one of the directors in the Board of Samancor. My designation was Relations Manager, with special focus on the relation between the shareholders and the BEE partners. I received emails to Dr Koncar as well and took care of some of that correspondence.

- 6 In 2006, I started to be uncomfortable with what was going on at the company. I had informal discussions with the CEO of Samancor, Mr Jürgen Schalamon, about Samancor's deal with Sylvania. I did not understand the rationale of this deal. Sylvania then announced its first payment of 4 million shares to "Portpatrick" for facilitation. I had never heard of this company, and I was sure that the agreement hadn't been facilitated by any third party. I also became aware of US\$125 wrongly not paid to Samancor in an agreement with Sinosteel

Corporation in 2007, but it was hard to believe that colleagues would deliberately break the law. In 2008, I approached Ahmed Youness and Dr Johannes Sittard questioning Samancor's and their own disadvantageous relations with Samchrome Ltd Malta. The US\$150m BEE agreement was a transfer of shares against an interest bearing loan. I was aware of the growing complaint by BEE partners that in 2009 the actual shares had not been delivered. They were finally delivered after a meeting with the Department of Minerals and Energy and their persistent requests later that year.

- 7 In October 2009, Samancor's 2008 annual financial statement arrived late. I saw that US\$29 million had been written-off from accounts receivable. Samancor only had one customer with such turnover, which was Samchrome Ltd Malta. I challenged this write-off as the existing contract did not envisage it. As a manager of shareholder relations, I travelled to London for a meeting with the Chair of the Board, Mr Youness. The discussion touched on the write-off, but centred on what to do with Samchrome Malta. In 2009, IMR was about to take ownership of Samancor and the company on Malta had been used to lift out hundreds of millions of dollars to Kermas BVI from Samancor. Mr Youness told me at the meeting that he already knew that Dr Koncar had taken out "500 million dollars" to Kermas BVI.
- 8 I saw no action taken by Mr Youness after this meeting. Indeed, I had also questioned the write-off in an email to the CEO. In his response to me, he wrote that the Chair of the Board, Mr Youness, had "attended partly" the meetings

about the US\$29 million write-off and that Dr Sittard, apart from Dr Koncar, had been part of that discussion. My email exchange with the CEO about this and other contentious matters is hitherto annexed as **MK0**.

- 9 In December 2009, I received an email from Mr Schalamon where he informed me that I was dismissed for not visiting his office, which was 10 meters apart from mine, and for not performing my duties as relations manager. My service as director ended in January 2010.
- 10 I did not think what had happened was right. I thought that small shareholders should be aware of how they had been defrauded. On recommendations from friends, I had meetings with two attorneys - Larry Davis and Ayoob Kaka - in 2010 and 2011 to explain what had happened and see what could be done. I believe Mr Kaka made some unsuccessful attempts to contact unions, but all in all the lawyers did not come back to me. They were probably busy with many other matters. I saw no reason to pressure them with something they did not have time to attend to.
- 11 In 2012, I explained the matter to one of the minority shareholders - the Japanese company Hanwa. They did not respond to my email.
- 12 I had to attend to my family and work, but on 4 February 2015 I explained the whole matter to the law firm ENS Africa in an email, suggesting a class action. There was no response to the email.

- 13 During my time at Samancor, I met Richard Spoor of Richard Spoor Inc, Attorneys (“RSI”) to solve a dispute as a representative of the company. I contacted him in the beginning of 2015. We had a meeting in July 2015. He and his colleagues agreed to explore whether there was a viable case. It was a slow process.
- 14 In November 2017, RSI contacted the National Union of Metalworkers of South Africa (“NUMSA”) to see whether the union was interested in the matter. My understanding is that after some initial interest their representatives stopped responding to messages. My understanding is that AMCU was contacted in February 2018. AMCU agreed to take up this case on behalf of workers who ought to have benefitted from the Ndizani Trust.
- 15 Samancor was approached after that. I have been informed that a meeting with Mr Schalamon and Mr Youness took place in March 2018.
- 16 One year later, I was informed that there was no action taken by Samancor or Messrs Schalamon and Youness.
- 17 I now hope that justice will be done and that this case will set a precedent to leaders and majority shareholders of other big corporations that might want to enrich themselves personally at the expense of all other stakeholders who have less power and insights in what is going on.

- 18 It is my belief that this court application would not have occurred without my assistance.
- 19 I believe that I have exposed myself to great risk in disclosing the contents of this affidavit to AMCU.
- 20 I therefore have asked AMCU to seek an order that I be compensated should any compensation be paid as a result of this application.

BACKGROUND ON SAMANCOR

- 21 Samancor was established in 1975 from the merger between SA Manganese Ltd and Amcor Ltd.
- 22 Samancor was listed on the Johannesburg Stock Exchange until 1998 when the minority shareholders were bought out by then majority shareholders, BHP Billiton ("BHPB") and Anglo American. This resulted in the delisting of the company and the majority shareholding split of 60% African Metals Ltd and 40% Anglo South Africa Capital (Pty) Ltd.
- 23 Samancor then consisted of chrome and manganese operations and stainless steel investments with marketing and distribution arrangements via structures held wholly and partly by BHPB and Anglo American.

24 The manganese and stainless steel components have been in a process of separation out of Samancor. Towards the end of 2004, bids were invited for the purchase of Samancor's chrome operations. The outcome of those bids are set out below.

Samancor's Business

25 Samancor produces in excess of 1.6 million metric tonnes (Mt) of charge chrome per annum. It is the second largest company in this industry. At the time of my employment in the company, Samancor had about 5500 employees. I do not know how many employees it has now, but I believe that the number has increased.

26 Over 70% of Samancor's chrome ore output is consumed in the production of ferrochrome in South Africa. The remainder of the ore is exported. Some 85% of chrome alloy production is exported to stainless steel producers across the globe. Samancor also sells more than 2 million metric tonnes (Mt) of chrome ore per annum on the local and export market.

27 Samancor has five chrome alloy plants. The company's total chromite resources exceed 650 million tons and are expected to support current mining activity for well over 100 years at the current rate of extraction.

Recent Ownership History

- 28 On 1 June 2005, Kermas South Africa (Pty) Ltd (“Kermas SA”), registration number 2004/034987/07, acquired 100% of the shares in Samancor. The transaction had been approved by the South African Commission Tribunal in a decision referenced 22/LM/Mar05. The acquisition was largely made possible by a US\$165m loan facility provided to the main shareholder of Kermas SA, which was Kermas Limited, a company incorporated on British Virgin Island with registration number 504889 (“Kermas BVI”).
- 29 The provider of the loan facility was International Mineral Resources AG, a company incorporated in Switzerland (“IMR AG”). I will return below to who the owners of IMR AG were and to certain conditions in the Facility Agreement, annexed hereto as **MK1**.
- 30 HANWA Co Limited, which lists on the Tokyo Stock Exchange with registration number 541-8484A, simultaneously became a 2% shareholder in Kermas SA on 1 June 2005. Later, its stake increased to 9%, and on 28 April 2017, HANWA announced that it will increase its share in Samancor Chrome Holdings Ltd (previously Kermas SA) to 19.02% through a new company called Japan South Africa Chrome.
- 31 After an announcement in 2005, Kermas SA and Batho Barena signed an Initial Shareholder’s Agreement on 13 February 2006, hereto annexed as **MK2**. On 16 March 2007 the parties signed a new Sale of Shares Agreement hereto annexed as **MK3**, in terms of which Batho Barena was to acquire 28% of Kermas SA for

US\$150 million. Batho Barena financed the whole purchase with an interest bearing loan from Kermas BVI. The 16 March 2007 loan agreement is hereto annexed as **MK4**.

32 Half of Batho Barena's shares were held by Ehlobo Resources ("Ehlobo"). Three entities were established to hold the remaining 50% of Batho Barena's shares:

32.1 Nanka Investments (Pty) Ltd, which was established to represent women, held (15%);

32.2 Sibilo Investment Holdings (Pty) Ltd, which was established to represent communities, held 15%; and

32.3 the Ndizani Workers' ESOP Trust, established to represent workers, held 20%. It is also called "Samancor Workers' Trust".

33 On 20 April 2006, the SA Competition Tribunal approved the merger between IMR and Kermas SA. The Tribunal said in the decision referenced 22/LM/Mar05, that "IMR whose principal business is in Switzerland, controls Eurasian Natural Resources Corporation ("ENRC") which owns TNC Kazchrome JSC..."

34 According to a PowerPoint presentation before the SA Competition Tribunal hereto annexed as **MK5**, it is rather that ENRC owns IMR. ENRC is described in the presentation as the Swiss "general partner" of UIM Limited Partnership ("UIM LP"), incorporated in the Netherlands, in its turn owned by CIM Global Investment N.V. ("CIM NV"), also incorporated in the Netherlands.

- 35 CIM NV, finally, was described in the presentation as controlled by Alexander Machkevitch, Patokh Chodiev and Alijan Ibragimov with each holding a third of the entity via majority ownership in three private companies, also incorporated in the Netherlands.
- 36 The ownership structure of the IMR group is difficult to uncover from open sources and was only partly described in the presentation before the Competition Commission. During this period, the same or similar names were used whether an “IMR” company was incorporated in Switzerland, Luxembourg, the Netherlands, UK, Mauritius, South Africa or the British Virgin Islands. On page 216 in the 2007 Prospectus that introduced the ENRC group on the London Stock Exchange, the companies are described as “informally managed collectively with a number of other non-Group businesses owned or controlled by the Founders” and “ultimately controlled by them” up until 2006, referring to the three aforementioned individuals.¹
- 37 ENRC was listed on the London stock exchange in 2007. It delisted in 2013 after several controversies and a fall in the share price. It was bought by Eurasian Resources Group (Luxembourg), controlled by the same three individuals, but of which the Kazakhstan government also owns 40%.² Reporting on the delisting

¹ URL: <http://preqveca.ru/placements/memorandum/download/16/> (2018-12-05).

² URL: <https://www.erg.kz/en/content/o-kompanii/obzor-deyatelnosti-erg> (2018-12-09)

on 22 November 2013, The Guardian claimed that ENRC was under investigation by the Serious Fraud Office in the UK.³

- 38 After the 2006 approval of the merger by the Competition Tribunal, IMR AG in January 2007 acquired 32.5% of the shares in Kermas SA for the price of US\$117.5 million.
- 39 That IMR AG was destined to acquire a minimum of 30% of the shares in Kermas SA was already agreed in a strictly confidential Memorandum of Understanding (“MOU”) between Kermas BVI and UIM LP, “acting through its subsidiary company”, IMR AG. The MOU was signed on 10 January 2005 by Dr Koncar and Dr Sittard. The MOU is hereto annexed as **MK6**.
- 40 The MOU describes IMR AG and Kermas BVI as “equal partners”. It stipulates that IMR AG “shall act as an undeclared advisor” of Kermas BVI “in all its dealings concerning its acquisition” of Samancor. It envisions Kermas BVI’s acquisition of Samancor as the first step in a process that aims to create a large corporation, namely, “to merge the operational assets of Kermas with the Chrome assets of Universal” at a later stage. Clauses 1 and 2 in the MOU speak of loan amounts that will be provided to Kermas BVI for the sole purpose of acquiring Samancor Chrome. Two weeks later this became the US\$165 million loan and the Facility Agreement mentioned above.

³ URL: <https://www.theguardian.com/business/2013/nov/22/mining-enrc-leaves-london-stock-exchange> (2018-02-05).

- 41 Clause 10 in the MOU gave IMR AG veto power over a range of strategic decisions. In the same vein, the Facility Agreement stated in clause 4.1.(vi) that IMR AG shall be treated as if it owns “45%” of the shares “whether or not it is a fully registered shareholder”, “including but not limited to receipt of dividends or distributions” from Samancor “and or its affiliated mining operations.”
- 42 The purchase of 32.5% of the shares in Kermas SA two years later followed clause 4.1(ii) in the Facility Agreement. In that clause the parties had declared their intention to let the repayment of the loan be done in the form of giving IMR AG a stake in Samancor’s operations, equally large to the stake of Kermas BVI. This is also what happened with the remaining US\$117.5 million debt according to paragraph (A) in the recitals of the 18 January 2007 Share Purchase Agreement, annexed hereto as **MK7**. The remaining US\$117.5 million debt was paid back in the form of shares.
- 43 in April 2009, IMR BV (the Netherlands) acquired a further 7% shareholding in Kermas SA when it first bought Ehlobo’s 14% percent shareholding for US\$7 million, and three days later sold half of those shares to Holgoun Exploration and Mining (Pty) Ltd. Two of Holgoun’s beneficiaries are also directors in Samancor - Sivandran and Vanessa Gounden. The agreement under which IMR BV bought Ehlobo’s shares in Kermas SA is hereto annexed as **MK8**.
- 44 In 2009, IMR BV also acquired an additional 34.5% shareholding in Kermas SA from Kermas BVI. After also buying an additional 3% of the shares in Kermas SA

around 2010 from a company called Vollmet, IMR had an effective 77% ownership. Seven percent of their total shareholding was held indirectly in a warehousing capacity through Batho Barena and supposed to be dealt with in accordance with the Department of Mineral and Energy's ("DME") directions. In my understanding the reason for warehousing the shares was to give them to another person or entity. I do not know who received these shares.

- 45 A draft of a document dated 23 September 2009, informing the DME on ownership structure before and after take-over is annexed as **MK9**.
- 46 The IMR group was now in control of Samancor. The confusion that surrounded the control can be illustrated by a 29 October 2009 news article on Metalbulletin.com "ERNC will buy Samancor stake from IMR", an excerpt of which is annexed hereto as **MK10**. To my information, ERNC formally separated some IMR companies from ERNC before it was listed on the London stock exchange in 2007. If IMR BV had sold Samancor to ERNC at that time, it would no doubt have been a sale within the family, even if IMR BV not formally controlled by ENRC.
- 47 IMR BV was "controlled by Summerside Investments Sarl ("Summerside"), a firm incorporated in terms of the laws of Luxembourg", said the Competition Tribunal of South Africa in its 11 September 2013 Reason for Decision with reference 017608, to approve the merger between IMR BV and Terris Mining, hereto

annexed as **MK11**. My understanding is that Summerside is also controlled by Mr Machevitch, Mr Chodiev, and Mr Ibragimov.

- 48 To illustrate the difficulties in regard to business ownership in the world of today, I would like to mention that the Competition Tribunal in 2013 approved a merger between IMR BV and Terris Mining, but it adds in a footnote to the Reason for Approval that the direct ownership of Samancor at that time belonged to “IMR Chrome Limited (Mauritius)”, which at the time was “a wholly owned subsidiary” of IMR BV. The document has numerous redactions.
- 49 In the case of Samancor some clarity can however be achieved by combining information fragments on ownership that were left in two redacted documents, namely the above mentioned Case No: 017608 from 2013, annexed above as **MK11**, and another Samancor merger decision from 2016, reference LM004Apr16, annexed hereto as **MK12**.
- 50 From the above mentioned two documents it emerges that Samancor Holdings in 2016 was controlled by Chrome Ltd (Mauritius C116590), which was controlled by Terris Stainless Ltd (Mauritius C10788), which was controlled by Terris Mining Ltd (Cayman Island), which was controlled by Terris Fund SPC (Cayman Island), which “is controlled by a financial investor, resident in London”.

- 51 I note that after my departure in 2010 I no longer have certain details on the ownership of Samancor. I note, however, that Mr Youness remains the Chairperson of Samancor's board.
- 52 The 2009 Annual Financial Statement ("AFS") of IMR Management Services ("IMR UK"), with registration number 06167954 in United Kingdom, informs that Mr Youness was appointed as director of IMR UK on 21 April 2009, where he was the CEO. A filed 288a(ef) form at the Companies House instead gives 1 September 2008 as the appointment date. It is hereto annexed as **MK13**. An excerpt of the AFS is annexed hereto as **MK14**. The AFS informs on its page 10 that IMR UK was controlled by IMR BV. IMR UK was deregistered in 2016.
- 53 As Samancor's Chairperson is the CEO of IMR, I believe that IMR remains central in Samancor's shareholding.

QUESTIONABLE TRANSACTIONS

- 54 In the following section, I will set out the details of several transactions that I believe accrued to the benefit of IMR and Kemas and to the prejudice of Samancor, and particularly, the minority shareholders of Samancor.

The Sylvania Contract

- 55 On 31 March 2006, Samancor and Sylvania entered into a Service and Supply Agreement for the re-treatment and extraction of chromium and platinum group

metals (“PGMs”) from Samancor’s tailings dumps. The contract was for a period of five years.

56 The transaction was not an arm’s length one and it accrued to the prejudice of Samancor’s minority shareholders. I attended all meetings of the Samancor Board during my service as a director. The original contract and subsequent changes in that contract were never discussed at a board meeting. There is no record of this business agreement between Samancor and Sylvania in any of the Board minutes.

57 I have in my possession a signed copy of the 2006 agreement, with a revision added and signed on 6 February 2007. Appendix 4 show that the price per metric ton of chrome concentrate from tailings sold to Samancor was changed, from an originally agreed sliding scale R49.99-R72 per metric ton of saleable product to a fixed price of R49.99 per metric ton. The document is annexed hereto marked **MK15**.

58 In another revision of the agreement on 13 February 2008, called the Second Addendum to the Services and Supply Agreement (“Second Addendum”), the sales price of the chromium concentrate from tailings was reduced again, to R1 per metric ton. The addendum also stated: “In consideration for the right to exercise the PGM disposal right, Sylvania shall pay Samancor (...) 1% (percent) of the gross receipts derived from the sale of PGMs to third parties free of set off or any deduction of any nature whatsoever.” The document is annexed hereto

marked **MK16**. The Second Addendum also transferred the rights to a subsidiary of Sylvania. I will come back to that point below.

- 59 Even after February 2008, the contract gave favourable terms to Sylvania at the expense of Samancor. Samancor's tailings dams contain both Chromium and PGMs. In my view, the business agreement is disadvantageous to Samancor as Sylvania has been given access to the PGMs in Samancor's tailing dams for free or, starting from February 2008, almost for free. This disadvantage to Samancor has not been balanced by Samancor selling chromium concentrate to the market with a mark-up, even when the price was reduced to R1 per metric ton in 2008.
- 60 Sylvania's benefits from this arrangement are illustrated by page 19 of a 2009 investor presentation made by Sylvania to the Australian Securities Exchange. I annexe pages 1 and 19 of this presentation as **MK17**. The diagram dated March 2008 (after the February 2008 addendum) shows that Sylvania had the lowest production costs of production per ounce of PGMs in this branch of the PGM industry.
- 61 After the Second Addendum in February 2008, the CEO of Samancor, Mr Schalamon, characterised Sylvania's operations as inefficient in an email to Dr Koncar. He complained that the deal was disadvantageous to Samancor.
- 62 The date of the email is 14 October 2008. It is annexed hereto as **MK18**. The formulation in the email that "*All products irrespective of tonnage should be for*

ZAR 1/mt” might indicate that Mr Schalamon was unaware that the price had been changed earlier in the year to this price. In principle, his argument is however correct. He wrote: *“I am sure if we go out for the tender we will get much better conditions i.e we will get the Cr for free and 50% of the profit from the PGM’s. Cause if somebody has no rights on PGM — he will be more than willing to share 50% of a profit he never would have!”*

63 To summarise: In the first year of the agreement Sylvania charged Samancor a price for chromium concentrate on a sliding scale of up to R72/mt and had access to PGMs in the tailings dams for free. From 2007, the price of chromium was fixed at R49.99/mt. The price was again changed to R1/mt in February 2008. Under the new agreement, Sylvania started to pay Samancor 1% of the proceeds from sales of PGMs to third parties. This was still very advantageous to Sylvania.

64 The background to this contract is important to set out.

65 I remember that Sylvania’s CEO, Terry McConnachie, was in Samancor’s offices in 2005 starting a conversation with me and Mr Branislav Lazovic. I believe it happened on 1 June, when Kermas SA became the owner of Samancor. At that time we were in talks with a German company about financial support for our BEE agreements. The German government had obligations to support development in South Africa as a part of the so-called “Arms Deal”. Mr McConnachie was in the offices in relation to those talks.

66 Mr McConnachie and myself were in the office when Mr Lazovic came out from a meeting room. Mr McConnachie immediately said to us that we could do business together with Samancor's tailings dams. He had a proposal. Mr Lazovic interrupted him and said "we will talk about it later".

67 I did not hear about this matter further, but understood that Mr Lazovic later met with Dr Koncar to present the proposal to get 50% of the deal without involving the CEO, Mr Schalamon.

68 I have in my possession a seven page PowerPoint Presentation. I was managing some of Dr Koncar's email correspondence at the time. As I recall, this PowerPoint came in an email. Judging from the information in the properties menu, it was created by "Terry" on 23 May 2005. A copy of the PowerPoint presentation is annexed as **MK19**.

69 On slide 4, under the headline "Chrome Ore Tailings dams" there are the following bullet points:

•Sylvania to negotiate with Samancor for the right to rewash all of the chrome tailings dams.

•Samancor to buy back the washed chrome at market related prices.

•Sylvania to extract the PGM's and give Samancor ?% of the PGM's profits."

70 On the last and 7th slide, under the headline "How do we get value", there are the following bullet points:

“We value the companies before they get the new Samancor business.

•We value the Samancor business that we arrange for them.

•We divide the value of the Samancor business between three groups and take up the value in Sylvania paper.

•The Sylvania paper will appreciate and is listed so it is freely tradable.

•Our Sylvania shares to be housed in offshore trusts or offshore companies.”

71 I am not sure what the “three groups” referred to above are, but believe that Sylvania organised all the other projects, depicted on slide 3 in said PowerPoint, into one business unit and the Samancor tailings dams project into a second unit.

72 In Sylvania’s announcement of the agreement on the Australian Securities Exchange on 01 May 2006, annexed hereto as **MK20**, the company stated:

“As consideration for the facilitation of this agreement, Sylvania will issue to Portpatrick Ltd (or its nominee) up to a further 14 million shares in Sylvania. This consideration is comprised of 4 million shares for having successfully obtained the relevant chrome rights for Sylvania, and up to 10 million shares for successfully obtaining the rights to the PGM’s which will be issued on a pro rata basis as the PGM rights are approved on each tailings dump.”

73 There is no “Portpatrick Ltd” to be found. The full name of the company seems to be Portpatrick Inc (B.V.I.). It is also referred to as Portpatrick Inc in the shareholder list of the 2006 Annual Report (“AR”) and in the Sylvania 2008 AR on page 83. Both are public documents.

- 74 In the so called “Offshore Leaks” one can find a Portpatrick Inc registered on the British Virgin Islands.⁴ Its designated address was ABA Services Ltd in Hong Kong (Reg No. 0936824), a company that the Offshore Leaks alleges is handling the affairs of 142 companies registered in the British Virgin Islands.
- 75 Two directors of Kermas BVI had undisclosed interests in Portpatrick (or its nominee).
- 76 The directors received 14.1 million shares in Sylvania. The transactions are declared in Sylvania’s annual reports as payment to “Portpatrick Ltd (or its nominees)” or as payments to “Portpatrick Inc”. They received the payments through two companies:
- 76.1 One was Benix Limited (FI 002-007-334-5), also called “Benix”.
- 76.2 The second was Levante Shipping Establishment (FI 001-080-470-9) (“Levante”).
- 77 Both companies are registered in Liechtenstein. They were set in liquidation in November and October 2016, respectively.
- 78 The beneficiary of Benix was Branislav Lazovic. This can be ascertained from reading two documents together:

⁴ Offshore Leaks on Portpatrick Inc; URL: <https://offshoreleaks.icij.org/nodes/10210496> (2019-09-23).

- 78.1 The shareholding in Kermas BVI is shown in a 2007 letter from Portman International to Standard Bank in London certifying the beneficiaries of Samchrome Malta. It is annexed hereto as **MK21**. This document sets out that Branislav Lazovic holds 5% of the shares in Kermas BVI.
- 78.2 In a separate register of Kermas BVI's members, annexed hereto as **MK22**, Benix is listed as holding 2500 of Kermas's 50 000 shares. Put another way, Benix held 5% of Kermas BVI's shares.
- 78.3 Plainly, Lazovic is the beneficiary of Benix.
- 79 I am in no doubt that the beneficiary of Levante was Dr Danko Koncar.
- 80 I annexe marked **MK23** documents reflecting some transactions made in Sylvania shares on these two companies' accounts. The transactions denominated in British Pounds and Australian Dollars are annexed on three spreadsheets, annexed hereto as **MK24**.
- 81 Dr Aistair Ruiters and Rafique Bagus became beneficiaries of Sylvania at the time when they were directors of Samancor and Samancor Holdings, through their shareholding in Ehlobo. As for Mr Ruiters he entered the Board of Samancor about three weeks after the business agreement with Sylvania in 2006. The 07 April 2006 minutes are hereto annexed as **MK25**.

82 As Sylvania Metal's BEE partner, Ehlobo held 26% of its shares, while only controlling 14% of the shares in Samancor. Dr Ruiters and Mr Bagus, founding directors of Ehlobo in March 2005, as evidenced by registration document of which page one and two are hereto annexed as **MK26**, personally participated in the negotiation of the agreement between Samancor and Sylvania during a time when Dr Ruiters was a director in Sylvania. They never disclosed their interest in Sylvania to the Board of Directors of Samancor nor Samancor Holdings when negotiating and benefitting from this deal annexed above as **MK15**.

83 The service and supply agreement was signed by Samancor's CEO Mr Schalamon. When he did so, he exceeded the rights granted by the Board to executives within the Samancor Authorization Framework that had become effective in June 2005, hereto annexed as **MK27**.

84 At that time Mr Schalamon had authority to approve contracts for goods and services (including raw materials and utilities) with a maximum contract value of US\$15 million and of less than 3 years duration. The service and supply agreement exceeded that value and duration.

85 The parties then signed the aforementioned Second Addendum to the contract on 13 February 2008 in terms of which the rights were ceded to a company called Sylvania Metals (Proprietary) Ltd (Reg. No 2006/010895/07) ("Sylvania Metals"). This was important as Ehlobo held its shares directly in Sylvania Metals, as

shown in a presentation from September 2008, first page of which is hereto annexed as **MK28**.

86 In September 2010, Sylvania announced that it, “amends and extends its Services and Supply Agreement with Samancor to solidify the excellent on-going working relationship between Sylvania and Samancor,” annexed hereto as **MK29**. It was only Sylvania and Africa Asia Capital Limited (“AAC”) that benefited from the deal on account of other Samancor’s’ shareholders.

87 The main shareholder of AAC at that time was the IMR, which had become the controlling shareholder of Samancor in 2009. The independent expert Venmyn confirmed on page “ii” in an 11 January 2011 Competent Person’s report about Sylvania that AAC is a subsidiary of IMR. The first four pages of the report are hereto annexed as **MK30**. Venmyn also importantly stated that:

“Prior to the introduction of Africa Asia Capital Limited, the most critical potential threat to Sylvania was the integrity of the Samancor Chrome Agreement, which provides for the on-going feed material to all of Sylvania’s plants. The Samancor Chrome Agreement was renegotiated to clarify some operational clauses and improve the current working relationship.”

88 Through the renegotiated agreements IMR consolidated its benefits from the deal with Sylvania to the detriment of other shareholders of Samancor.

89 Samancor’s home page indicates that the CEO of Samancor at this time also had a direct interest in IMR and therefore in AAC:

“In November 2009 [Jurgen Schalamon] was also appointed as the COO of International Mineral Resources, a duty he fulfils in addition to his role as CEO of Samancor Chrome Limited.”⁵

90 I believe the relationship between Sylvania and Samancor put Samancor in a worse position than if it had entered into an arms-length relationship with an independent third party. This benefited certain of Samancor’s shareholders and directors. It prejudiced others.

The Sale of 50% in Tubatse to Sinosteel

91 On 25 February 2007, Sinosteel Corporation, (Registration Number 1000000101449), 8 Haidian Street, Beijing, People's Republic of China 100080 (“Sinosteel”), acquired a 50% interest in the Tubatse Group comprised of Lexshell 47 General Trading (Pty) Ltd, reg no. 2006/028430/07, trading as “Tubatse Chrome (“Tubatse”) and its holding company Tubatse Minerals (Pty) Ltd.

92 Prior to the sale Tubatse Minerals was a wholly owned subsidiary of Samancor.

93 To implement the deal, other technical issues had to be clarified from Samancor’s management side. Thus Samancor’s CEO Mr Schalamon met with a Sinosteel delegation on 26 April 2007. Sinosteel indicated that payment would go through the next day. In the message to Dr Koncar, Mr Schalamon is also referring to me:

⁵ URL: <http://www.samancorcrcr.com/content.asp?subld=4> (2019-07-05)

“Miki - If you read that please keep it for you and don't share it with others! Thanks.” This email is annexed hereto marked **MK31**.

94 Numerous announcements made in the media from October 2006 about this acquisition presented US\$230 million as being the price of the deal. In a speech given in January 2007 by the then Deputy Minister of International Relations and Cooperation, Mr Aziz Pahad, repeated this information:

*“During the FOCAC Summit in Beijing, November 2006, it was confirmed that the Chinese parastatal company Sinosteel was committed to investing in a US\$230m (R1.7 billion) ferrochrome mine and smelter project with South Africa’s Samancor.”*⁶

95 Reporting on the deal three years later, in 2010, the South African economist Stephen Gelb wrote in a paper for the Edge Institute that “Sinosteel’s stake in Tubatse reportedly cost US\$230 million (ZAR1.57 billion at end-2007)”.⁷

96 But this is not what Samancor received.

97 The 2008 Annual Report (“AR”) of Samancor, audited by KPMG and hereto annexed as **MK32**, reports in its Note 9 that the transaction took place in May 2007 and that the sales price was R685 130 000 for the 50% stake. Note 1.10 in the AR indicates that it approximates ZAR values of transactions made in foreign currencies based on the exchange rate on the transaction day. If using the most

⁶ URL: <http://www.dirco.gov.za/docs/speeches/2007/paha0124.htm> (2017-06-23). Full speech very long.

⁷ Stephen Gelb (2010), “Foreign Direct Investment Links between South Africa & China”, page 8 for the quote. URL: http://www.tips.org.za/files/foreign_direct_investment_links_between_south_africa.pdf (2019-09-21),

favourable daily average ZAR/US\$ exchange rate in May 2007 reported by the South African Reserve Bank, the sales price in the AR corresponds to US\$99 217 992.⁸ This indicates that Samancor was paid US\$100 million by Sinosteel.

98 Thus, Samancor's 2008 AFS reported an unexplained cut of the price by more than half for the 50% stake in Tubatse JV.

99 The discrepancy has a simple explanation - Kermas received \$125 million from Sinosteel directly. This is confirmed in an email thread from Hermien Visagie of Nedbank Capital annexed hereto marked **MK33** where she first writes that Samancor has been "received USD 25 million and USD 75 million by order of Sinosteel", but then writes in a later email that "I can also confirm that Nedbank London has received USD 125 million on The account for Kermas."

100 On 26 June 2007, the 'Project Manager; Specialized Finance' at Nedbank London wrote an email to Dr Koncar, that was forwarded to Lazovic and Schalamon hereto annexed **M34**:

"I am the head of currency funding and liquidity for Nedbank and noticed that Kermas has a sizeable Dollar deposit with us and we do not seem to have made any formal contact with Kermas from our London office."

101 These emails were a consequence of having Sinosteel dividing the payment. In an email with the subject line "Sinosteel Payment Instruction-URGENT" dated 12

⁸ <https://www.resbank.co.za/Research/Rates/Pages/SelectedHistoricalExchangeAndInterestRates.aspx> (2017-06-23).

March 2007 01.11AM, to Dr Koncar's address and the lawyer from JGM, and CCd to the CFO Mr Erasmus, the Company Secretary, and Mr Schalamon, Mr Lazovic made a proposal in the name of Dr Koncar on how to effect payments from Sinosteel. The document is annexed hereto as **MK35**.

"Dear All,

After discussion with our Chairman Dr. Koncar please be informed as follows:

Kermas would like to see the following solutions for Sinosteel transaction payment instruction:

- 1. 100 Million USD to be paid to Samancor Cr USD account in SA, with Ned Bank, as agreed and finalized with Ned agent.*
- 2. 125 Million USD to be paid to Kermas BVI Ltd. account with Ned Bank, agent, London account ."*

102 Already before the November 2006 conference in Beijing, Mr Lazovic wrote Dr Koncar an email dated 9 October 2006, about necessary actions to take before entering into the sale of the 50 percent share in Tubatse. First the email dealt with other issues, starting with a question about an email from Dr Johannes Sittard that is last in the documented, annexed as **MK36**.

103 In my translation from Serbian, the end of the email at the top reads:

"a) For transfer of 100% of Tubatse to NEWCO we must have consent of IMR according to our solicitor...b)How to explain to Sinosteel not to announce fully paid price?...c) IMR's man saw in China that they offered firstly \$450 then \$225 for half."

104 A price “US\$230”, was however announce again and again in the media. Even in a speech by the Deputy Minister of International Relations in January 2007, quoted above.”

105 It is my belief that some or all of the minority shareholders were not advised that Kermas received the payment of USD 125 million.

106 It is my considered view that the USD 125 million ought to have been paid to Samancor, not Kermas BVI, as the asset being sold - Tubatse - belonged to Samancor.

Samchrome Malta, Samchrome FZCO and FZE sales companies

107 It is a common practice in the mining industry that the minerals produced by an entity are marketed by another entity. This can serve a legitimate purpose: the marketing entities may have skills and networks that the mining entity does not. But this practice can also serve nefarious purposes such as tax avoidance and the abuse of minority shareholders.

108 From my experience at Samancor, I believe there is a *prima facie* case that the marketing of Samancor’s products has been to the advantage of its majority shareholders and the disadvantage of its minority shareholders.

109 Prior to Kermas’s acquisition of Samancor, Samancor’s products were primarily marketed by Samancor AG (Reg: CH170.3.012.805-1) (“SamAG”), a joint

venture between BHP Billiton and Anglo American, in terms of a distribution agreement signed in 2000.

- 110 As part of the transaction, an agreement provided for a loan facility for Kermas. A copy of this agreement is hereto annexed as **MK37**. Through this agreement, BHP Marketing got a five year agreement to market a range of quality chrome grades. The agreement stipulated a 4% sales commission on all sales before the loan was repaid. When it had been repaid, the sales commission would be 2.5% for export sales and 2% for domestic sales.
- 111 In my recollection, IMR objected to these sales commission levels as being too generous.
- 112 As part of Kermas's acquisition of Samancor, SamAG ceded its rights under the distribution agreement to Samchrome Malta in May 2005. I annexe a copy of the cession agreement hereto as **MK38**.
- 113 Unbeknownst to Samancor's fellow directors, Samchrome Malta was no independent third party. As set out in the document annexed above as **MK21**, Kermas BVI owned 1999 of its 2000 shares via Chrome Holding Limited (Reg: C358410). The last share was held by Ms Danica Zagmester, a nominee for Dr Koncar.

- 114 In 2007, Samancor approved changes to the distribution agreement at the request of Standard Bank. The principal reason that I can recall for the change was that the distribution agreement had previously been of indefinite length. On 18 April 2007 the Samancor Board of Directors approved changes to the distribution agreement Samancor and Samchrome Malta. An unsigned copy of the agreement is annexed hereto as **MK39**.
- 115 A Profit and Loss spreadsheet over Samchrome Malta's finances in the 2006/2007 financial year, reported that wages, pensions, social security, insurance and telephone costs are zero. It is annexed hereto as **MK40**. There are no depreciation costs for tangible or intangible assets. The entity appears to operate without costs for offices. The net profit after 4% corporate income tax was reported at about US\$72.3 million, or about R520 million, assuming an average exchange rate of R 7.2 to USD in 2006/2007.
- 116 The company performed no actual marketing services and added little, if any, value. It sold almost all or all material through sub-agents. Samchrome Malta's reported costs for Commissions averaged 2.53% or US\$16.4 million on US\$650 million in sales. There are however no indications in Samchrome Malta's accounts of any functioning office from which the sales agents were recruited.
- 117 To my knowledge, Samchrome Malta had back offices at EWW accounting services and in Sheffield UK invoicing and collection services. Dr Koncar was traveling on Samancor's expenses when attending to these offices as

Samchrome Malta's representative. I attach a diagram evidencing this as **MK40.1**.

118 As Samchrome Malta has the right to a 9% sales commission on Free on Board terms, Samchrome's Profit/Loss account 2006/07 takes up US\$56.7 million in freight costs

119 As can be seen on page 9 in Samancor's annual report for 2008, annexed above as **MK32**, its 2007 financial year was 18 months. A second spreadsheet made at Samancor, based on management reports from Sheffield or EWW in Germany, reports Samchrome Malta's net profit after tax ("the bottom line") at US\$146.7 million. A main reason for the difference to the other spreadsheet should be that the period June-December 2007 has been taken into account. This second spreadsheet is hereto attached as **MK41**.

120 I have given these examples to show the amounts paid offshore labelled "sales commissions", with little or no service substance, but shifting profits out from Samancor. To my knowledge, the 9% sales commission is still paid by Samancor, but levied from Samchrome FZE in Dubai. In Dubai the corporate income tax is 0%, not 4% as in Malta.

121 In order to reduce the profits declared by Samchrome Malta as well as increase cross border payments out from Samancor in South Africa, Kermas BVI and members of the Samancor Board also used other methods:

121.1 A company by the name of RCS Trading (Panama) was invoicing Samchrome Malta for marketing services and administrative services. Two examples of several invoices in my possession, from 2006 and forward are hereto annexed as **MK42** and **MK43**.

121.2 Mr Schalamon was selling MetCon chrome ore to Mogale at the price of pure chromium ore. I have in my possession and email conversation on this matter between Mr Schalamon, and a manager at BHP Billiton Marketing who here acts on behalf of one of Dr Koncar's "RCS" and with Dr Koncar's email address CCd. The last mail in this conversation, hereto attached as **MK44**, ends by Mr Schalamon asking for confidentiality (emphasis in the original):

"Hello Kurt

It is important NOT to mention RCS with anybody in Samancor 'cause as you know the parent company of Samancor also has other shareholders and in this case we are using not Samchrome as the agent for the FeCr

On the other hand I am getting at this stage 390 ZAR/mt for poor ore

Best regards

Jürgen"

121.3 It is not exactly clear which "RCS" this is. Requests came that were only for the benefit to Kermas BVI or a company named "RCS Ltd", where Dr Koncar had an interests. It could be an "RCS" on Malta, BVI, Bahamas or Panama.

121.4 In view of the prices reported by reputable Ryan's Notes, page 6, March 2007, hereto annexed as **MK45**, Samchrome Malta could in China get about \$200/mt instead of \$58/mt, which was the asked price by Mr Schalamon for the same grade quality when he sold the grade to Samchrome Malta, instead of selling to China directly. Not paying for the freight costs does not compensate for such a difference.

121.5 Samchrome Malta was also under-pricing products sold to Hino in China. An email conversation with Hino representative Mr Dong Wanwu is hereto annexed as **MK46**.

121.6 In the conversation Mr Wanwu is asking from Dr Koncar to reduce the agreed price with Samancor of \$185-195 to \$120, while they could sell the same materials for \$155-160. He then confirms that "*Balance will treated as usual*" [sic]. It seems possible that Hino had as practice to pay some of the difference to Kermas, but I do not know.

122 In 2009, IMR requested clarity in 2009 on what disclosures that had been made during the meeting of the Board of Directors. They wanted to know if Dr Koncar had declared his interest in Samchrome Malta during the board discussions when there was a vote on changes in the Distribution Agreement with Samchrome Malta. As I said above, Samchrome Malta beneficiaries Mr Lazovic, Mr Schalamon, and Dr Koncar had not declared their interests, but neither had or did the directors nominated to the Samancor board by IMR, including Mr Jai

Saraf, Mr Alon Davidov, Dr Sittard and Mr Youness. A copy of this letter is annexed hereto as **MK47**.

123 This threat did not result in any declarations of interests. Instead, IMR received one third of the shares in newly incorporated executive sales agent Samchrome FZCO, LOB 18-803 JAFZA, Jebel Ali, Dubai UAE ("Samchrome FZCO"). By 1 July 2009, all Samchrome Malta's rights, titles and interest were transferred to Samchrome FZCO. The Cession of Distribution agreement is annexed hereto as **MK48**.

124 To my knowledge, Kermas BVI also agreed with IMR to share profits in Samchrome Malta in the same proportions as had been agreed for the two parties shareholding in Samchrome FZCO, once the annual financials 2007-2009 of Samchrome Malta 2007-2009 had been audited.

125 Later, IMR's stake in Samchrome FZCO increased to two-thirds. It continued to charge a sales commission of 9% on all worldwide sales of Samancor products to Samchrome FZCO as the company's exclusive marketing agent.

126 Finally, Kermas exited the relationship and these services were replaced by Samchrome FZE Dubai, which was wholly owned by IMR.

127 This was transferred to the Terris Mining group in 2013.

128 It is my understanding that Samchrome FZE Dubai continues to provide marketing services to Samancor on the same or similar terms. I believe this is to the prejudice of Samancor's minority shareholders as 9% is far too high a fee for the services actually rendered and the interests in Samchrome have not been disclosed.

Samchrome Malta Debt Write-Off

129 As I mentioned in the beginning of this affidavit, Kermas BVI and IMR agreed to write-off US\$29 million of Samchrome Malta debt to Samancor for the 2008 financial year, bypassing the board of directors to the detriment of other shareholders in Samancor. I will now describe this further.

130 The write-off was not declared in Samancor's 2008 AFS, annexed above as **MK32**. The compiler of the statement and the auditor KPMG did however not erase all traces of the write-off. The Balance Sheet for 2008-12-31 shows a huge increase in the company's claims on trading partners ("trade receivables") from 2007 [ZAR266.8 million] to 2008 [ZAR1.5 billion]. Note 25.2 shows however an even bigger outstanding claim on Samchrome Malta of about R1.8 billion.

131 More exactly, the difference between the amount in the Balance sheet and the amount in the Note 25.2 on page 50 is R270 353 379 (rounded). The 2008 AFS says it uses a 9.17 exchange rate to the dollar for the balance sheet. At that rate the R270 353 379 corresponds to the US\$ 29 482 410.

132 In my email conversation with the CEO in October 2009, annexed in the beginning of this affidavit as **MK0**, I speak about “R490 million”. Most probably, that was a mistake.

133 Samancor’s CEO Mr Schalamon and CFO and public officer Wessel Erasmus participated in structuring the write-off. It is evident in the said email conversation that Mr Schalamon defended the write-off in his response to me.

134 I do not believe there was any commercial basis for this write-off. It was to the prejudice of Samancor’s minority shareholders.

Management Fees Paid by Samancor Chrome

135 On 28 January 2008, the Board of Directors of Samancor approved of a management contract with RCS Limited. The minutes are hereto annexed as **MK49**. It is not clear in paragraph 9, but it appears this contract went to RCS Ltd (Malta).

136 I pause to note that RCS Ltd (Malta) was only established in 2008.

137 I contend that RCS Ltd (Malta) had no employees. Despite this, this RCS in 2009 invoiced Samancor management fees for January- April 2008 in the amount of over US\$4 million: US\$1,012,500 per month. The invoice is hereto annexed as **MK50**.

138 In a 5 June 2008 disclosure from the Ruukki stated that Kermas (BVI) owned 28.51% of the shares in Ruukki Group Plc through a company RCS (Bahamas). The document is hereto annexed as **MK51**. In yet another 11 November 2008 disclosure, hereto annexed as **MK52**, Ruukki stated that “The Ruukki Group now owns all the shares in the Maltese RCS Limited”.

139 It follows from this that Dr Koncar had an undisclosed interest in RCS Malta when the Samancor Board decided to hire its management services.

140 On 1 July 2008, Mr Schalamon forwarded to Samancor’s CFO Wessel Erasmus an email report with Subject line: “STATUS: MANAGEMENT FEES:” to Dr Koncar’s email address. It is hetero annexed as **MK53** and it reads:

“Hi Jürgen

Feedback received. SARB has not given approval and have once again referred the application to central treasury. Key questions are now around “back dating of the agreement”, why we have two agreements for the same services etc, why the open ended term, payment in USD and so forth. We have verbally answered the questions and await further feedback.

Regards

Wessel”

141 On 27 October 2008, Samancor’s CEO signed a document stating that no contractual obligations existed between Samancor and RCS Malta. It is hereto annexed as **MK54**.

142 On 29 June 2009, Wessel Erasmus sent an email with the subject headline “Management Fees”, to Mr Schalamon, Mr Youness, and Mr Sittard. It is annexed as **MK55** and reads:

“Gentlemen,

Feedback as requested

The semi approvals for the payment of management fees expired earlier in June 09-June 12 and 18th of June. We would have been hard pressed to comply with the conditions attached — substantiate future benefits, fair, value received and market related. It is something we should rethink and reapply for in the future.”

143 On June 30 2009, Johannes Sittard of IMR replied to all stating that, “*Seems this route is not possible any longer and we had to come up with fresh ideas.*” The CEO of Samancor, Mr Schalamon, replied to all on 1 July to Mr Sittard, Mr Koncar and Mr Youness: “*Good Day Gentlemen, We are checking if they except [sic] a once of [sic] exception. I keep you informed. Regards, Juergen.*”

144 I contend that RCS Ltd Malta did not register the management fees as an income in their books. Samancor instead paid the proceeds of over US\$4 million to RCS Bahamas, which I contend has an account at the UBS Bank on Jersey. This was probably to avoid the already low 4% corporate tax rate on Malta, but also not to be examined by auditors or/and tax authorities about these transactions.

145 Again, I believe this transaction prejudiced the minority shareholders in Samancor.

CONCLUSION

146 Based on my preliminary calculations prepared together with Dr Dick Forslund, I estimate these transactions and agreements may have deprived Ndizani Trust of well over US\$100 million in dividends and/or other revenue from 2005 and to the present.

147 I therefore support AMCU's application to act on behalf of its members and in the public interest to first seek documentation and, if this documentation supports the account of this affidavit, to seek remedies to benefit Samancor's minority shareholders.

MIODRAG KON

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit was signed and sworn to at _____ on this the ___ of _____ 2019 in accordance with the provisions of Regulation R128 dated 21 July 1972 as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR 774 of 23 April 1982.

COMMISSIONER OF OATHS