

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: 100000101449)**

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

TABLE OF CONTENTS

OVERVIEW OF THIS APPLICATION 6

PARTIES..... 13

BACKGROUND..... 19

THERE IS A TRIABLE CASE 20

AMCU IS ACTING IN THE PUBLIC INTEREST 23

THE PUBLIC INTEREST IS IMPLICATED 25

THERE ARE NO OTHER REASONABLE AND EFFECTIVE WAYS TO BRING THIS CHALLENGE ... 26

THE PERSONS AFFECTED BY ANY ORDER..... 27

**WORKERS AT SAMANCOR ARE AFFECTED PERSONS THAT AMCU MAY
REPRESENT 28**

CONCLUSION 30

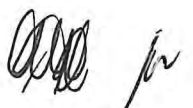


I, the undersigned,

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.

A handwritten signature in black ink, consisting of a stylized name followed by a vertical line.

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.

Two handwritten signatures in black ink, one appearing to be 'AMCU' and the other a stylized signature.

- 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.

Two handwritten signatures in black ink, one appearing to be 'AM' and the other a stylized 'R'.

- 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.

Handwritten signatures in black ink, appearing to be initials or names, located at the bottom right of the page.

- 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.

Handwritten signatures in black ink, consisting of two distinct marks.

- 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.

Handwritten signature and initials in the bottom right corner of the page.

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, and 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.

Two handwritten signatures in black ink, one larger and more stylized, and one smaller and simpler.

- 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.

Two handwritten signatures in black ink, one appearing to be a stylized 'A' and the other a more complex signature.

- 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.

Two handwritten signatures in black ink, one appearing to be 'AMCU' and the other a stylized signature.

- 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 Plaza 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.

Two handwritten signatures in black ink, one on the left and one on the right, located at the bottom right of the page.

- 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.

Two handwritten signatures in black ink, one larger and more stylized than the other, located at the bottom right of the page.

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.

Handwritten signatures in black ink, consisting of a stylized signature on the left and a single letter 'K' on the right.

- 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.

Handwritten signatures in black ink, consisting of two distinct marks.

- 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.

Handwritten signatures in black ink, consisting of two distinct marks.

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.

Two handwritten signatures in black ink, one appearing to be 'AMCU' and the other a stylized signature.

“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.

Handwritten signatures in black ink, appearing to be initials or names, located at the bottom right of the page.

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.

Handwritten signature and initials in the bottom right corner of the page.

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.

Two handwritten signatures in black ink, one on the left and one on the right, located at the bottom right of the page.

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.

Handwritten signature and initials in black ink, located in the bottom right corner of the page.

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.

Handwritten signature and initials in the bottom right corner of the page.

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 Witbank on this the 02 of October 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

| |
|--|
| ALBERTINA VAN DER WALT Commissioner of Oaths Appointed as such by virtue of Section 5(1) of the Justice of Peace and Commissioners of Oath Act, 16 of 1963 on 03 December 2015 02 -10- 2019 Reference 9/1/8/1 Witbank Knightbridge Junction Building, 13 Nevenstreet Witbank Tel: 013 656 1621 |
|--|

