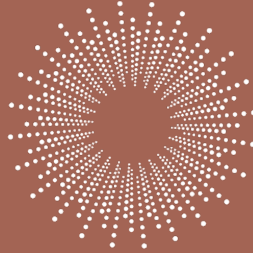


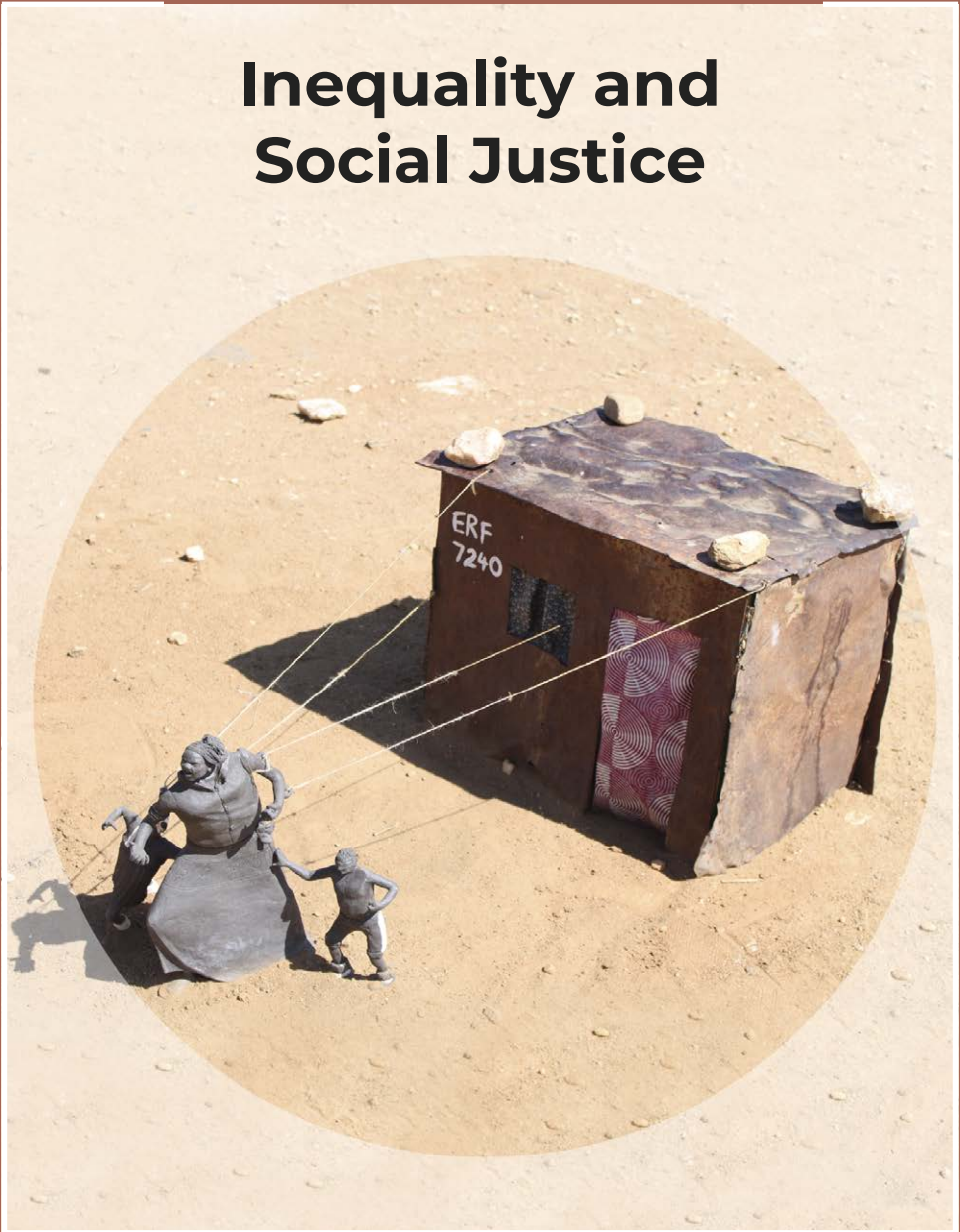
Volume 2

November 2022



Namibian
Journal
of Social
Justice

Inequality and Social Justice



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Artwork on the cover: “Pulling into Tomorrow” by Mitchell M. Gatsi

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**FRIEDRICH
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STIFTUNG**
Namibia Office

Acronyms and Initialisms

AMCU	Association of Mineworkers and Construction Union
BEPS	base-erosion profit shifting
BIEN	Basic Income Earth Network
BIG	basic income grant
CCN	Council of Churches in Namibia
CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women
CSOs	civil society organisations
DSD	Differences of Sexual Development
ELCN	Evangelical Lutheran Church in Namibia
ELCRN	Evangelical Lutheran Church in the Republic of Namibia
ESOP	Employee Share Ownership Plan
FMS	Finnish Missionary Society
GBV	gender-based violence
GDP	gross domestic product
GEWE	gender equality and women's empowerment
GRB	gender-responsive budgeting
GRN	Government of the Republic of Namibia
HDI	Human Development Index
HTA	Hai om Traditional Authority
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	information and communication technology
IFFs	illicit financial flows
ILO	International Labour Organisation
IMF	International Monetary Fund
IMR	International Mineral Resources
IOC	International Olympic Committee

LMS	London Missionary Society
MAWLR	Ministry of Agriculture, Water and Land Reform
MGEPEWSW	Ministry of Gender Equality, Poverty Eradication and Social Welfare
MGEPEWSW	Ministry of Gender Equality, Poverty Eradication and Social Welfare
MPI	Multidimensional Poverty Index
MPUCT	Madhya Pradesh Unconditional Cash Transfer
MTEF	Medium-Term Expenditure Framework
NLF	Namibia Labour Force
NNSCH	Namibian Senior Secondary Certificate Higher-level
NPC	National Planning Commission
NSA	Namibia Statistics Agency
NSSCH	Namibian Senior Secondary Certificate Higher
OECD	Organisation for Economic Cooperation and Development
PDS	Public Distribution System
PIT	personal income tax
RMS	Rhenish Missionary Society
SADC	Southern African Development Community
SEM	structural equation modelling
SEWA	Self-Employed Women’s Association
TAA	Traditional Authorities Act (No. 25 of 2000)
TVUCT	Tribal Village Unconditional Cash Transfer
UCT	unconditional cash transfer
VAT	value added tax
WHO	World Health Organization
WMMS	Wesleyan Methodist Missionary Society
WSWB	willing-seller-willing-buyer

Mining and Social Justice

Extractivism

Chrome Miners and Corporate Crocodiles: Illicit Financial Flows, Profit Shifting, and Samancor Chrome

Jaco Oelofsen

Introduction

In October 2019, the Association of Mineworkers and Construction Union (AMCU) filed an application against Samancor Chrome at the Johannesburg High Court, accusing the company's directors and board members of self-enrichment through corporate corruption, fraud, and profit shifting practices in the form of billions of Rand sent to tax havens overseas (Alternative Information & Development Centre, 2019).

This is a landmark case and deserving of study for a number of reasons. It is one of the only – if not the only – known cases of workers attempting to take their company's senior management to court specifically over profit shifting practices. The testimony provided by an ex-director turned whistleblower also provides a rare inside look at how transnational corporate corruption operates on the 'inside'. However, what is most important for this study is the

fact that the Samancor case yields clear insights on the linkages between the broader issue of profit shifting (and illicit financial flows (IFFs) generally) and inequality at the ground level.

Illicit financial flows and base-erosion profit shifting (BEPS) are often discussed in terms of their effects on tax revenues, development, security and state integrity. In Africa, key efforts led by the African Union and the United Nations to stem this problem, such as the High-Level Panel on Illicit Financial Flows (United Nations Economic Commission for Africa, 2015) have tended to focus on how these outflows influence African countries' prospects for development, act as a component of state corruption, and worsen north-south inequality. However, the Samancor case study demonstrates that the concrete effects of IFFs/BEPS are felt first and foremost by workers and communities at companies engaged in profit shifting.

Because the discourse around IFFs/BEPS so often frames it as a tax problem, we imagine that the solution must lie with tax officials or policymakers' top-down solutions. Here too the Samancor case offers us a glimpse of what bottom-up resistance against commercial IFFs/BEPS might look like from those who stand the most to gain: workers and working-class communities at the coalface of multinational corporate activity.

Definition of IFFs and BEPS

In the most widely accepted definition, an 'illicit financial flow' (IFF) is a cross-border transfer of "money that is illegally earned, transferred, or utilised. If it breaks laws in its origin, movement, or use it merits the label" (Kar & Cartwright-Smith, 2009).¹⁴ The kinds of activities labelled as IFFs are generally broken up into three camps: corporate tax evasion; transfers of the proceeds from criminal activities (such as drug smuggling or arms dealing); and corruption (especially state-related corruption).¹⁵

The precise definition of IFFs remains contested terrain, partly because the term covers a range of activities which, although interlinked, tend to be dealt with in different contexts: fiscal policymaking, international efforts against organised crime, tax justice campaigns, and so on. As Erskine and Eriksson (2018, p. 6) write: "the IFF agenda is a complex yet young subject, involving several multi-disciplinary strands that have to combine to find effective ways forward." For our purposes, we will be focusing on IFFs related to corporate corruption and tax evasion, including BEPS.

BEPS specifically refers to aggressive tax evasion or avoidance by multinational or transnational corporations. BEPS activities usually fall under the umbrella of IFFs, although this is sometimes contested on the basis that they are often perfectly legal (Chowla & Falcao, 2016, p. 10). In order to avoid confusion, this study will use 'IFFs/BEPS' as shorthand for illicit financial flows specifically linked to the 'licit' (not forbidden, lawful) economy, especially acts of corporate corruption and outflows that can be linked to aggressive tax evasion or avoidance, including profit shifting schemes which may not be strictly illegal, as well as instances of fraud.

14 A strictly legalistic interpretation of IFFs has been widely criticised and rejected by experts (See Cobham, 2014 and Cobham and Jansky, 2017 for examples). Others, such as the landmark UN/AU High Level Panel Report (2015) place emphasis on the fact that 'illicit' may also include activities which are not strictly illegal, but nonetheless contravene "established norms and conventions."

15 This is most clearly put in the 2015 Report of the High Level Panel on IFFs in Africa (United Nations Economic Commission for Africa, 2015), but this disaggregation can also be found in some of the earliest attempts to understand the problem (such as in Baker, 2005).

Understanding Existing Linkages Between IFFs/ BEPS and Inequality

In order to understand the existing linkages between IFFs and inequality, it would be instructive to look at the context of the mid-2000s in which the concept emerged. By the time the new millennium was underway, years of relentless financialisation, aggressive globalisation of value chains, and the dominance of neoliberal orthodoxy had fundamentally reshaped the global economy. Most of the developing world had, whether willingly or unwillingly, dismantled their capital controls, trade restrictions, and other protections in order to integrate with global markets. Defenceless, they found themselves plugged into a global economy that moved at frightening speeds and with often devastating effects. Foreign capital surged in to reshape economies, creating dependencies that would lead to crises when these inflows dried up or were destabilised as in the 2008 financial crisis (Bond, 2014). In the developing world, including sub-Saharan Africa, this dependence kept economic policymakers focused on attracting inflows of foreign capital and appeasing colossal multinational corporations while doing their best to avoid capital outflows – the dreaded ‘capital flight’ (Mohamed & Finoff, 2004).

As Kar and Cartwright-Smith (2009) point out, the discourse around

capital flight had a tendency to frame capital outflows as an almost natural phenomenon, a neutral consequence of the actions and policies of developing countries. The fact that the Global South had been unable to effectively mobilise and utilise capital to grow and thrive in the global economy could therefore be attributed to either insufficiently attractive investment environments, or to grand-scale corruption by high-level political officials.

However, it was becoming increasingly clear that the capital outflows plaguing developing countries could not be attributed simply to neutral, rational market actors or to grand-scale corruption. Instead, groundbreaking work by insiders, experts, and activists was showing that the developing world was suffering from a haemorrhaging of capital in the form of unrecorded (hidden) capital outflows, complex tax evasion schemes by huge multinationals, public and private sector corruption, and more.

The usage of the term ‘illicit financial flows’ to describe these activities was popularised by none other than a repentant American businessman-turned-activist, Raymond Baker. In *Capitalism’s Achilles Heel* (Baker, 2005), Baker estimated that, from his experience, the outflows of capital linked to abusive behaviour from powerful tax-evading multinationals

far outstripped the losses attributed to corruption in the Global South. The immediate implication was that these commercial IFFs robbed countries of tax revenues desperately needed for development. A nascent tax and financial justice movement, led by the Tax Justice Network and a host of experts including Baker's own organisation (Global Financial Integrity), subsequently led efforts to identify the enablers of these IFFs, quantify the scale of the losses, and engage in international advocacy (Cobham & Jánský, 2020).

Following these initial efforts, the 2010s saw an explosion of interest in the issue of commercial IFFs from multinational and intergovernmental institutions. In the aftermath of the 2008 financial crisis and a long string of scandals exposing the ties of multinational companies and politicians with tax havens and secrecy jurisdictions, the flaws in the global financial architecture had become impossible to ignore. The Organisation for Economic Cooperation and Development (OECD), an organisation set up to advance the economic interests of its members and a key authority in the development of international taxation architecture, put the issue on their agenda by initiating the BEPS Project, aimed at combating BEPS. The African Union (in cooperation with the United

Nations) in 2012 established a High-Level Panel on Illicit Financial Flows from Africa (hereinafter referred to as the High-Level Panel; also commonly known as the Mbeki Panel after its chair, former South African President Thabo Mbeki). Its brief was to investigate the nature, scale, and impact of IFFs on development in Africa.

The political climax that resulted from this coalescence of activism and international cooperation came in 2015, when the United Nations formally included the combatting of IFFs as one of the targets necessary to achieve the Sustainable Development Goals at the Third International Conference on Financing for Development in Addis Ababa. Cobham and Jánský (2020) write that the work of the High-Level Panel and its report was instrumental in securing the political backing necessary for this objective.

The High-Level Panel and its report had found that illicit financial flows from Africa were a critical issue, occurring on a massive scale and with serious effects on inequality. The report found that:

High and increasing IFFs from Africa impact on development through losses in tax revenue and the opportunity cost of lost savings and investment in various sectors of African economies.

These impacts are of particular policy significance now due to the increased importance of domestic resource mobilisation at a time when the role of official development assistance is declining.

United Nations Economic Commission for Africa (2015, p. 64)

The implications of this finding are particularly relevant when read in the light of the COVID-19 pandemic. Before COVID-19, many low-income countries, especially in the Global South, were faced with inadequate funding for vital public services as a result of a combination of mounting debt, pressure from international finance institutions, economic stagnation, and ideological commitments from policymakers. In the wake of the COVID-19 crisis, many countries in the Global South have opted to intensify cuts to public services, with 87% of the International Monetary Fund's loans to these countries calling for the implementation of further austerity measures (Oxfam, 2022a). As a result, the disruptions caused by the pandemic have led to an intensification in inequality as those most reliant on public services have historically been the economically vulnerable working class and unemployed. Oxfam (2022b) famously reported that, throughout the pandemic, a new billionaire was

created every 26 hours, while 160 million people were pushed into abject poverty.

South Africa serves as a clear example of this phenomenon. Since global trade winds stopped blowing in its favour in the early to mid-2010s, the state has been consistently underspending on vital public services such as education and healthcare, following a kind of mild austerity in order to close the budget deficit and reduce the debt-to-GDP ratio (Sibeko, 2019). From 2020, this turned into full-blown austerity. Between 2020 and 2022, the Treasury continued to announce large cuts (in real terms) to many vital public services and social support (namely the COVID-19 relief grant) in real terms.¹⁶ Crucially, this also included cuts to the public sector wage bill, which in effect meant that thousands of vacant posts in education and healthcare (two core 'frontline' sectors during the pandemic) would be left vacant (Forslund, 2021). The unemployed and working class majority are overwhelmingly reliant on public services, especially in the wake of a pandemic, and so the results of these cuts have been predictably devastating.¹⁷

¹⁶ Examples and calculations can be found in the February 23 press release by Cry of the Excluded, 2022.

¹⁷ See for example the rise in deaths attributed to severe acute malnutrition, as reported by Maverick Citizen (2022, 29 March).

At the same time, the 2015 High Level Report found that South Africa loses up to 4% of its GDP to illicit financial flows each year, while Global Financial Integrity (2017) estimated losses of up to 8% of GDP. The Davis Tax Committee (2019) estimated that the tax losses from these IFFs amounted to a conservative minimum of R50 bn per year, while the South African Revenue Service Commissioner (2020) stated that over R100 bn was lost to tax evasion each year in general, in part due to BEPS activities. Given the fundamentally clandestine nature of IFFs combined with the systematic underfunding of a South African Revenue Service still recovering from its hollowing out during the State Capture years, the true amount of tax revenues lost to IFFs/BEPS each year would likely dwarf these estimates. If these amounts were reclaimed and used for progressive social spending, then they would at the very least ameliorate some of the most devastating effects of South Africa's inequality.

The 2015 High Level Panel Report also notes the way in which IFFs/BEPS play a role in perpetuating North-South inequality, making Africa a net creditor to the world, and this framing of IFFs/BEPS as a form of continued neo-colonial extraction (put more diplomatically by the AU) is a valuable perspective to explore. However, this aspect of the issue has not been central to IFFs/BEPS advocacy work.

Instead, the framing of IFFs/BEPS and inequality through the issue of public finances or 'financing for development' has been at the core of activism around commercial IFFs. The reason for this might be reflective of the context in which the term originally gained traction; the international tax justice movement's campaign around IFFs/BEPS has been primarily targeted at high-level intergovernmental institutions, hoping to win victories in the form of progressive resolutions, recommendations, and reforms that could then filter down to the national level. This has been strategically advantageous, as this framing of IFFs/BEPS 'softens' the more radical facets of the issue which may lead to a political stalemate at the level of multinational North-South forums.

However, this advocacy focus means that relatively little work has been done on trying to concretise and demonstrate the ways in which IFFs/BEPS impact workers at companies that conduct profit shifting, or how it may impact communities reliant on or affected by those companies' activities.¹⁸ This may partly account for the fact that the movement to combat IFFs/BEPS

¹⁸ This is not to say that these issues are omitted from the literature. For example, research by Alstadsæter, Bjørkheim, Davies and Scheuerer (2022) has demonstrated that BEPS leads to wage inequalities within companies. The point is that explorations of the ground-level impacts of this aspect are few and far between, relative to studies on the concrete impacts of the development-finance aspect of IFFs/BEPS.

has not found traction in any mass-based movements, despite its relevance to fundamental issues of economic justice. The purpose of this case study is, in part, to attempt to remedy this.

Background: A Brief History of Samancor

Samancor Chrome is a private company registered and headquartered in Johannesburg, South Africa, concerned with the mining and smelting of chrome, and it is the single largest integrated producer of ferrochrome in the world (Samancor, n.d.). It operates six ferrochrome plants and two chrome ore mining complexes situated from one end of South Africa's extractive heartland to the other, with operations in the North-West, Limpopo, and Mpumalanga provinces.

Samancor's history contains many of the key notes in the development of South Africa's political economy. Like many of the other corporate giants that survived the post-apartheid transition, it can trace the roots of its existence directly to South Africa's minerals-energy complex (the term conceptualised by Fine and Rustomjee (1998) to describe the system of accumulation and industrial development that defined the structure of South Africa's economy during the 20th century).

Following the post-apartheid transition and the adoption of the neoliberal Growth Employment and Redistribution Framework in 1998, capital controls were relaxed, and foreign investment reshaped the South African extractives sector. Samancor was first bought out by BHP Billiton and Anglo American in 1998, before being bought out again by a company named Kermas SA in 2005, during a surge of foreign capital investment in the ferro-alloy industry (Basson et al., 2007).

Kermas SA was able to purchase Samancor thanks to a loan provided to Kermas SA's parent company, Kermas BVI.¹⁹ Kermas BVI allegedly received this loan from International Mineral Resources (IMR), a Dutch-registered multinational controlled by three oligarchs from Kazakhstan. In 2009, IMR took effective control of Samancor through a series of actions, including a merger with Kermas' South African subsidiary (Founding Affidavits: AMCU vs Samancor Chrome and Others, [2019]).

This core of this case study concerns events stemming from the Kermas takeover in 2005.

¹⁹ For clarification, Kermas SA was the direct majority shareholder of Samancor at the time. Kermas SA was wholly owned by Kermas BVI, which was incorporated in the British Virgin Isles and controlled by Croatian businessman Danko Koncar.

Trouble at Samancor: Issue Faced by Samancor Workers

Samancor has an estimated total of well over 6 000 employees spread across its operations (Solidarity, 2017).²⁰ These are represented by a number of trade unions, including Solidariteit, NUMSA (the National Union of Metalworkers of South Africa), NUM (the National Union of Mineworkers), and the Association of Mineworkers and Construction Union (AMCU), a minority union at Samancor representing 500 members (Founding Affidavits: AMCU vs Samancor Chrome and Others, [2019]).

As part of an Employee Share Ownership Plan (ESOP), Samancor created the Samancor Ndizani Worker's ESOP Trust (Ndizani Trust), which holds an indirect 5.6% stake in Samancor. ESOPs are often found in the South African mining industry, ostensibly in order to create economic empowerment, but practically used as a means of ensuring that companies remain compliant with affirmative action policies (an especially difficult task in an industry described as a “white boys’ club”, where average ownership is at best 39.2% formerly disadvantaged South Africans [AMCU, MINCOSA (Minerals Council South Africa), 2022]). ESOPs rarely involve

actual share ownership by employees, and are generally structured as a trust, with employees being the beneficiaries.

The Ndizani Trust has been one of the major challenges faced by workers at Samancor for a number of reasons. For one, the trust is not accountable, with AMCU being unable to even ascertain the identity of the trustees (Founding Affidavits: AMCU vs Samancor Chrome and Others, [2019]). More relevant to this case study is the fact that Samancor workers have seen very little benefit from their indirect shareholding in the company. AMCU reported that, upon interviewing workers, a number had not received any benefits from the trust at all. Those who had received irregular and infrequent payments, with the largest coming in 2018 after the allegations dealt with in this case study were brought to the fore. The trust was established by means of a loan from Samancor's parent company, Kermas, which was to be paid back with interest (Van der Merwe, 2008), and other workers had further been told that the lack of further benefits was due to the trust needing to use its dividends to pay back this debt (Samancor shop steward, private correspondence, 2020).

However, the key issue facing Samancor workers has been that of looming retrenchments. In January 2020, Samancor issued a notice in

²⁰ The exact total is not publicly available, but the true number is likely vastly higher.

terms of Section 189 of the Labour Relations Act (66 of 1995) notifying all employees and union representatives from the smelters that 559 employees are likely to be retrenched (Samancor, 2020). This amounts to a fifth of the entire smelter divisions' workforce. Further warnings of retrenchments were made to over 2 000 workers in the mining division, all of which followed a string of similar notices in the past (Kulkarni, 2020).

In its statement, Samancor cited a number of financial pressures on the company, including increased competition from Chinese ferrochrome producers, the cost of electricity, the increasing cost of production, and “the need to restructure its business to reduce costs and ensure future sustainability”. The key point here is that the company had allegedly reached an unsustainably low level of profitability, and that the cutting of labour costs to ensure its own survival was the most rational option.

At the time of the Section 189 notice, the unemployment rate stood at 30.1% without accounting for discouraged job seekers – the highest in the world (Stats SA, 2020). In these conditions, and taking into account the inadequate nature of South Africa's social safety net, the consequences of unemployment in South Africa are dire – and not just for the unemployed worker. According

to some rough estimates, the average mineworker supports between five and 10 dependents (Chamber of Mines of South Africa, 2016). If all of the possible retrenchments were to go ahead, tens of thousands would be immiserated.

The Case Against Samancor

When Samancor changed hands in 2005, Kermas brought on board a number of high-level directors and executives in order to manage affairs at the company. Among them was Miodrag Kon, a distant relative of Kermas BVI director Danko Koncar. Kon took a position on the boards of both Samancor and its major shareholder, Kermas SA.²¹ From 2006, Kon became increasingly suspicious as he saw Samancor enter into various business agreements that ranged from illogical, to financially detrimental, to legally dubious. These activities were allegedly orchestrated by a group within senior leadership consisting of the Samancor CEO, Samancor and Kermas SA directors, and Kermas BVI group director Danko Koncar.²²

After voicing his objections to these transactions, Miodrag Kon was finally

21 Kermas SA was a wholly owned subsidiary of Kermas, and Samancor's majority shareholder. It was through Kermas SA that Kermas allegedly exercised control over Samancor.

22 Koncar is a Croatian businessman with extensive interests in other chrome companies. He was also fined €120 million by Finnish authorities for corporate misconduct in 2020.

dismissed on spurious grounds in 2009. Frustrated with what he saw as an injustice against smaller shareholders, Kon attempted to bring the case to various parties over the following years. After a number of fruitless meetings, Kon met with lawyers of Richard Spoor Incorporated as well as AMCU, who together agreed to take up the case based on the evidence and testimony of Kon. This section will outline allegations of two key schemes paradigmatic of IFFs/ BEPS arrangements, as contained in Kon's affidavits and supplementary evidence.²³

Prior to 2005, Samancor's chrome products were marketed by means of a joint venture between its former owners. At the time of the sale to Kermas SA, this joint venture took a sales commission of 2.5% for export sales and 2% for domestic sales. However, Kermas SA ended this arrangement in 2005 as part of their acquisition, and instead handed distribution rights to a company named Samchrome, based in the notorious tax haven of Malta. Samchrome was almost wholly owned by Kermas BVI – a fact which, according to Kon, Samancor directors were not aware of.

According to the distribution agreement, Samchrome was able to charge an incredible 9% commission on

Samancor sales. This led to Samchrome becoming incredibly profitable, reporting a \$72.3 million profit in 2006/7. This arrangement was highly suspicious, given that Samchrome's financial information from the same year reported that wages, pensions, social security, insurance and telephone costs were zero. The actual marketing work was instead sub-contracted out to agents, while Samchrome operated seemingly as an empty 'shell' company. It is worth noting that Samchrome was shifted to Dubai during the period under investigation, so as to take advantage of Dubai's 0% tax rate.

The second arrangement concerns a contract between Samancor and a company named RCS Ltd (Malta), signed in 2008 – the same year in which 'RCS Malta' was established. In 2009, RCS Ltd invoiced Samancor for four months of "management services". The total was a staggering amount of over \$1 million per month, paid out by Samancor.

Kon contends that RCS Malta had no employees and provided no services of any substance. Further, the chain of ownership from RCS Malta leads right back to Kermas BVI and Danko Koncar, meaning that Koncar held an undisclosed interest in this contract. Through emails provided by Kon, it would seem that this transaction was initially blocked by the South African

²³ Some of the documents have been made publicly available, most of which can be found in *The Great Samancor Heist* (van Rensburg, 2019).

Reserve Bank. However, Samancor in the end paid out the \$4 million to an ‘RCS Bahamas’ - the company through which Kermas BVI held an interest in RCS Malta. Kon alleges that this \$4mn was paid out to a bank account based in Jersey, a notorious tax haven and secrecy jurisdiction, so as to avoid Malta’s already low 4% tax rate and avoid further scrutiny by South African authorities.

There are many other, more intricate arrangements in the affidavits, but these two are the closest to textbook case examples of commercial IFFs/ BEPS. Through these two arrangements alone, Samancor’s reported profits were millions of dollars lower than they should have been, given that these arrangements had no commercial substance, and served no purpose other than to shift Samancor profits to companies where the ultimate owner, Kermas BVI, enjoyed direct control and less oversight over the revenue, while enabling them to avoid the 28% corporate income tax rate applicable in South Africa.

Kon’s original estimate was that Samancor might have lost up to \$1.9 billion between 2005 and 2009 from the arrangements and transactions made under Kermas. Worse, both Kon and AMCU believe that many of these arrangements were not halted when Samancor changed ownership to IMR

in 2009. Instead, the new owners may have simply taken over as beneficiaries of these illicit financial flows themselves. For example, following Kermas’ exit, IMR’s wholly owned subsidiary Samchrome FZE Dubai took up the same marketing agreement at the same 9% commission.

Illicit financial flows such as those alleged to have originated (and perhaps still do originate) from Samancor are more commonly dealt with as tax or corruption issues. On what basis have workers then taken up this case? In terms of the legal basis, a provision in the South African Companies Act (2008) allows for a minority shareholder to be granted access to a number of remedial actions in cases where they believe that the company has acted against shareholders’ interests. AMCU is able to take on this case as they represent the interests of minority shareholders through their members being part of the Ndizani Workers’ Trust, which indirectly owns a 5.6% stake in Samancor, and would therefore have a strong and legally sufficient interest in the hidden haemorrhaging of Samancor’s revenue.

At present, the fact that neither AMCU nor Samancor have provided a public update on the status of the case indicates that the matter is fiercely contested and still far from any conclusive outcome. However,

given the weight of evidence provided, in conjunction with a whistleblower testimony, it would seem that AMCU's prospects of success are strong.

Case Study Analysis

This case has a number of dimensions which deserve to be explored further, but are out of the scope of this paper. This section will instead focus on the aspects of this case related to the core themes of inequality and IFFs/BEPS as introduced earlier.

The core of AMCU's argument in this case has been that these illicit transactions have caused serious losses for Samancor, which may have done long term damage to the company's financial position and created a position of *artificial unprofitability* at the company. The consequences of this have been framed in terms of its impact on the Ndizani Trust because of the necessity of using the Companies Act as an entry point. However, the implications of AMCU's argument are far greater than this.

In their application, AMCU argues that they are taking up this case in the public interest, as "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" (Mphahlele, Founding Affidavits: AMCU vs Samancor

Chrome and Others, ((2018): 26). The latter is a key point to consider: If we assume that Samancor was right in claiming that its financial position left it with no choice but to consider mass retrenchments in 2020, then would this still have been the case had it not been losing billions of Rand to corporate corruption in the preceding years? Given the scale of the losses, it is difficult to imagine hearing an honest yes. In its retrenchment notices, the company also notes its openness to discuss alternatives. If presented with the alternative of recovering and investigating billions lost to IFFs/BEPS, would the proposed retrenchment of workers instead not become an indefensible choice in collective bargaining processes? Taking up the issue of IFFs/BEPS within the wage bargaining context holds the potential to constitute a powerful challenge to income inequality.

Beyond the issue of income inequality and labour, it must also be noted that companies like Samancor are often expected to invest in community and infrastructure development in order to ensure that communities benefit from fundamentally harmful extractive activities. For example, mining companies in South Africa generally need to design and adhere to Social and Labour Plans, which lay out their commitments and strategy for development and employment in each

respective area of operations. However, there are often cases of mining companies failing to implement or adhere to these Social and Labour Plans, with one of the most notorious cases arising in the aftermath of the Marikana massacre. Investigators found that the mining company Lonmin had only constructed three of the 5 500 houses it had committed to and, when pressed for reasons, Lonmin had argued that it simply ran out of money.

At another part of the investigation into Lonmin, the *Bermuda Connection* report (Forslund, 2015) attempted to look at the affordability of the Marikana rock drill operators' demands on Lonmin. This report found strong indications that Lonmin had been engaged in profit shifting schemes much like those at Samancor, including overly generous sales commissions sent to tax havens, and spurious management fees paid to the ultimate parent company. The focus of the report was on the affordability of wage demands and income inequality at Lonmin, but the findings have just as much relevance for the issue of capital for community and local development. In this case, IFFs/BEPS can be seen as further contributing to the ever-present inequality that exists between the conditions of mine-affected communities and the enormous wealth exported from those same mines.

Turning the Issue Upside Down: A Bottom-Up Campaign against IFFs and BEPS?

The concept of IFFs/BEPS has been a valuable tool in achieving the goals of international tax justice campaigns, fostering cooperation and creating space for progressive reforms that may shift the balance of power ever so slightly away from multinational and transnational corporations. This case study and analysis has hopefully shown that the concept of IFFs/BEPS also relates directly to the interests and struggles of those at the coalface of economic value generation. Dick Forslund provided a useful summary of these linkages in support of AMCU's application:

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.

(Forslund, Founding Affidavits: AMCU vs Samancor Chrome and Others, [2018]: p. 13)

There is immense potential in bottom-up campaigns against IFFs/ BEPS that can act in parallel with the work being done by high-level campaigners for a number of reasons. Groupings like organised labour are intimately familiar with the activities of multinational corporations on a company-by-company basis, and once capacitated, have the potential to identify and challenge these practices from the inside. IFFs and BEPS are also politically useful concepts to use as leverage into progressive economic reform due to their cross-cutting nature. However, the political terrain, modes of campaigning, and interests of community-based organisations or mineworkers' unions are different from the world of intergovernmental organisations, development forums, and policy briefs in which the IFFs/ BEPS concept has gained traction. Can the work of building a combined campaign be done, without the value of the concept being lost in translation?

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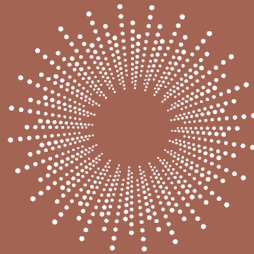
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