

# **CHAPTER 3**

## **TRADE UNIONISM**

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## CHAPTER 3

### TRADE UNIONISM

#### 1. INTRODUCTION

The advent of democracy in South Africa not only introduced democracy into the general life of South Africans but also in the work place. In both the Interim Constitution and the Final Constitution, the workers' right to join trade unions was entrenched in the South African Bill of Fundamental Rights.<sup>1</sup>

As discussed in the second Chapter, this not only brought major changes to the outlook within the Department, but also introduced a new dimension where ordinary workers who had been employed as warders were now entitled to join trade unions.<sup>2</sup> This is notwithstanding the fact that in the previous dispensation,

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<sup>1</sup> Section 27 of Act 200 of 1993 and section 23 of Act 108 of 1996.

<sup>2</sup> See section 4 of the Labour Relations Act No. 66 of 1995 dealing with employees' right to freedom of association:

*"4. Employees' right to freedom of association. –*

- (1) Every employee has the right-*
  - (a) to participate in forming a trade union or federation of trade unions; and*
  - (b) to join a trade union, subject to its constitution.*
- (2) Every member of a trade union has the right, subject to the constitution of that trade union-*
  - (a) to participate in its lawful activities;*
  - (b) to participate in the election of any of its office-bearers, officials or trade union representatives; and*
  - (c) to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office; and*
  - (d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement.*
- (3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation-*
  - (a) to participate in its lawful activities;*

the Department of Correctional Services had been regarded as an “essential service” and thus the workers were not allowed to strike. The right to strike was also enshrined in the Constitution, which gave workers the right to strike irrespective of the nature of the Department’s work.

The fact that the workers now had the right to join trade unions led to an upsurge in trade unionism in the Department of Correctional Services, and a number of unions<sup>3</sup> started organising and recruiting members.

Trade unionism, coupled with the concept of affirmative action, led to a situation in the Department where members who had been ordinary warders were promoted to senior management positions in extraordinary ways. According to the evidence, which was led before the Commission,<sup>4</sup> the Department had to look within the ranks of trade union leadership to identify candidates for leadership positions in the Department. This obviously led to a situation where trade union membership was “the ticket” to a senior management position.<sup>5</sup>

The issue of union membership being a ticket to senior management positions has led to a number of complaints, which members of the Department raised with various investigating bodies, including this Commission. In particular, it has been alleged that the union, Popcru, has taken control of the Department. As this

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(b) *to participate in the election of any of its office-bearers or officials; and*

(c) *to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office”.*

<sup>3</sup> In section 213 of the Labour Relations Act 66 of 1995 (“the Labour Relations Act”) a trade union is defined as follows:

*“ ‘trade union’ means an association of employees whose principal purpose is to ‘regulate relations’ between employees and employers, including any employers’ organizations.”*

<sup>4</sup> See the evidence of Mr G.J. Fourie (a.k.a. Hardy Fourie) in Head Office Transcript - Vol.1 at page 24.

<sup>5</sup> The issue of trade union membership giving access to senior positions within the Department has been the subject of investigation by a number of agencies, which have looked into the Department of Correctional Services, for example, the Public Service Commission investigation, the Department of Public Service and Administration investigation etc.

allegation, if shown to be correct, can have a serious impact on the functioning of the Department, the Commission is of the view that it is important to consider its veracity.

In this Chapter, the Commission will also consider the anomaly that exists in the Department of managers and workers belonging to the same union, and highlight potential tensions and conflicts of interest. After examining practices in other countries, and the legal implications, the Commission will make recommendations to address the problem.

## 2. UNION MEMBERSHIP

As at 31 January 2005, union membership in the Department at all levels was as follows:

●	POPCRU	22 577 (63,59%)
●	PSA	9 918 (27,934%)
●	NUPSAW	950 (2,676%)
●	DENOSA	305 (0.86%)
●	SAPAWU	185 (0,521%)
●	HOSPERSA/INDEMNITY	56 (0.158%)
●	NEHAWU	35 (0.099%)
●	SASAWU	4 (0.0112%)
●	SADNU	4 (0.0112%)
●	PSCBC (Agency Shop Fees For Non-Unionised Members)	1 470 (4.140%)
	<b>TOTAL</b>	<b>35 504 (100%)</b>

It is clear from the above that Popcru is the union with the most members, which has always been the case.<sup>6</sup> Popcru's dominance can be seen in all the service areas of the Department, including the more strategic positions like personnel, management services and prison administration.<sup>7</sup> At some stage, staunch Popcru supporters were even strategically placed in the Minister's office.

## 2.1 The Issues

A number of factors, which have a bearing on union representation within the Department, have reinforced the perception in some quarters that Popcru is in effect running the Department. These factors include the following:

- (a) The existence of the Agency Shop Agreement,<sup>8</sup> which was concluded by the parties to the Public Service Co-Ordinating Bargaining Council on 26 May 1998. This agreement obliges the employer to deduct an agency fee equal to 1% of the employee's basic salary to a maximum of sixty rand

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<sup>6</sup> In 2001, when the Public Service Commission investigated the Department, the representation was as follows:

POPCRU	45%
PSA	23%
DENOSA	0%
SAPAWU	0%
HOSPERSA	0%
NEHAWU	0%
SADNU	0%
INST OF PUBLIC SERVICE	0%
PSCBC	32%

<sup>7</sup> See Mr Matshoko's evidence – St Albans Transcript, Volume 14, page 1 439.

<sup>8</sup> See section 25 of the Labour Relations Act 66 of 1995. Section 25(1) provides as follows: "25 Agency shop agreements-

(1) *A representative trade union and an employer or employer's organization may conclude a collective agreement, to be known as an agency shop agreement, requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof.*"

- (R60,00) from all employees, who do not belong to any of the unions who are signatories to the Agreement.<sup>9</sup>
- (b) Senior members of the Department with management responsibilities, including Provincial Commissioners, belong to unions, which is an unusual phenomenon, given that the unions also negotiate with management for junior workers' rights. This, on its own, has the potential to create problems and will be dealt with later in this Chapter.
- (c) There was also an allegation that the agency fees may be higher than the normal subscriptions to the union. The problems associated with this Agreement will be dealt with later in this Chapter.<sup>10</sup>

These are some of the factors that led to the complaints the Commission received alleging that Popcru is “effectively running the Department” or influencing the management of the Department.

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<sup>9</sup> Signatories to this Agreement are:

1. South African Police Union (SAPU);
2. Police, Prisons and Civil Rights Union (POPCRU);
3. South African Democratic Teachers' Union (SADTU);
4. South African State and Allied Workers Union (SASAWU) ;
5. Suid Afrikaanse Onderwysers Unie (SAOU);
6. National Professional Teachers Organisation of South Africa (NAPTOSA);
7. National Education, Health & Allied Workers Union (NEHAWU);
8. Public Servants Association (PSA) ;
9. Democratic Nursing Organisation of South Africa (DENOSA);
10. Health & Other Services Personnel Trade Union of South Africa (HOSPERSA);
11. National Union of Public Services and Allied Workers (NUPSAW);
12. National Public Service Workers Union (NPSWU); and
13. Public and Allied Workers Union of South Africa (PAWUSA).

<sup>10</sup> In *Solidarity and Others v Minister of Public Service and Administration* (2004) 6 BLLR 593 (LC) the court declared the said Agency Shop Agreement to be void *ab initio*. (The matter is currently pending before the Labour Appeal Court).

## 2.2 The Public Service Commission Investigation

A similar complaint about Popcru effectively running the Department was also raised with the Public Service Commission when it investigated the Department in 2001. The Public Service Commission, after investigating the allegations, concluded that it was not “easy and straightforward” to assess these allegations.

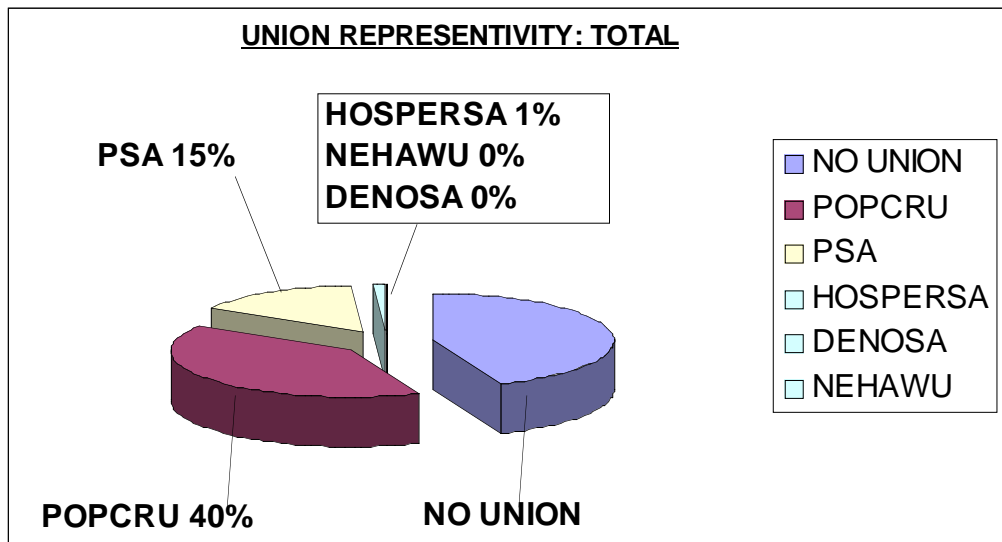
The Public Service Commission nevertheless came to certain findings and conclusions, which confirm Popcru’s monopoly of union membership and managerial positions in the Department, as the following extract indicates.

### ***“FINDINGS***

*In comparison to other trade unions recognized by the Department, POPCRU seems to have the majority of members as is evident from the graph below ...*

*POPCRU also has the majority of members at managerial levels (Deputy Director and higher) as depicted by the graphs below. It must be noted that a very large portion of managers do not belong to any trade union. This should serve to neutralize any undue influence that managers belonging to POPCRU may wish to exert. However, such dynamics also require in-depth analyses, which the Commission could not attend to, due to time limitations and the inherent complexity of such investigation. (Graphs per rank level and per province, including Head Office, appear at Annexures K11-K43).*

9.17.2



*As far as POPCRU's membership in key positions such as Head of Personnel, Area Manager, Head of the Prison, Provincial Commissioner, Deputy Commissioner and Chief Deputy Commissioner goes, the following graph<sup>11</sup> shows that POPCRU has a majority:*

<sup>11</sup> The bar graph in the original document/report has been excluded. The information in the graph is the same as the information in the table.

**DEPARTMENT OF CORRECTIONAL SERVICES**  
**UNION MEMBERSHIP OF PERSONNEL ON MANAGERIAL LEVEL**  
**(Key positions)**

	HOSPERSA	NEHAWU	POPCRU	PSA	NO UNION
AREA MANAGER	1	0	82	44	6
PROVINCIAL CONTROL OFFICER:FUNCTIONAL SERVICES	0	0	5	3	1
PROVINCIAL CONTROL OFFICER : OPERATIONAL SUPPORT	0	0	7	1	1
PROVINCIAL CONTROL OFFICER : RESOURCE MANAGEMENT	0	0	7	2	1
HEAD OF PRISON	1	0	130	75	8
DEPUTY COMMISSIONER	0	1	5	0	19
CHIEF DEPUTY COMMISSIONER	0	0	4	2	7
COMMISSIONER	0	0	0	0	2

*The above analysis does not provide any evidence that POPCRU is manipulating the functioning of the Department. It does, however, show that POPCRU would indeed be in a strong position to do so if this had been its intentions.*

*Incidents were reported where POPCRU members prevented their colleagues from taking up their work in the Eastern Cape, and their insistence to have the Provincial control Officer of KwaZulu-Natal*

*transferred. Reports were also received of officials of the Department that were formally seconded to POPCRU. Although this is permissible in terms of Public Service Coordinating Bargaining Council Resolution 8 of 1998, it did not help to dispel many officials' concerns that POPCRU is exerting undue influence over the Department.*

*It may be considered that certain officials in key positions, who happen to be POPCRU members, may be pursuing their own agendas without the official sanction of POPCRU. When the beneficiaries of their partisan actions also happen to be POPCRU members, it may seem to be a POPCRU-driven process.*

## **PROPOSALS**

*It is proposed that the Department should engage in a consultative process with its recognized unions to co-plan a strategy to curb mismanagement and maladministration.” (Own emphasis)*

The Public Service Commission found that there was no conclusive evidence to suggest that Popcru was manipulating the appointments. While this Commission accepts the Public Service Commission's findings, it is clear that at the time of the investigation, the role Operation Quiet Storm<sup>12</sup> played in the Department had not been brought to the notice of the Public Service Commission.

In reading the definition of a trade union in section 213 of the Labour Relations Act, it is clear that the purpose of a trade union is the lawful “regulation of relations between the employer and its employees”. Such regulation of the relationship must be lawful both in terms of the manner in which a trade union seeks to regulate the relationship and the content of such regulation. If that is the

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<sup>12</sup> See the Chapter on Historical Background which deals with Operation Quiet Storm in greater detail. The reference to Quiet Storm in this Chapter also includes “Operation Thula” and “Amagqugula” as discussed in the Chapter on Historical Background, above.

case, then the appointment of employees, their promotion and the termination of the contract of employment are matters that fall within the power of the employer. However, the employer must exercise this power lawfully and, to this extent, its managerial prerogative is limited by the regulatory framework and whatever agreement the employer may have with the union.

### 2.3 The DPSA Gauteng Investigation

Popcru has, obviously, denied that this is the role it plays within the Department. However, its denial can at best be dealt with by referring to the contents of the report by Mr Govender, of the Department of Public Service and Administration<sup>13</sup>, prepared in terms of the Department's mandate to investigate the hostage-taking of the Gauteng Provincial Commissioner at the time, Mr M.Z.I. Modise.<sup>14</sup> Mr Govender set out the various concerns that union members put to him on behalf of Popcru. Amongst others, he noted the following:

*"9. Both Mr Modipane and Mr Chaba highlighted their (POPCRU's) concerns – these were:*

- (a) their inability to see the Provincial Commissioner (PC);*
- (b) no platform to air their grievances;*
- (c) agreements not implemented after joint meetings;*
- (d) members of POPCRU are charged, harassed, suspended and dismissed;*
- (e) it was through POPCRU's efforts that a number of the current managers were promoted; therefore POPCRU can remove them;*
- (f) the PC allows other unions to recruit their members and this only happens in Gauteng." (Own emphasis)*

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<sup>13</sup> Hereinafter referred to as "the DPSA".

<sup>14</sup> See Leeuwkop Exhibit 'B7'.

The other issues that have been raised will be dealt with elsewhere in the report. However, the main issue of concern is paragraph (e) where it is stated that a number of managers were promoted through Popcru's efforts and that the members said Popcru could, as a result, also remove them from these positions.

It is apparent from reading (e) above that it is Popcru's view that it appoints people to various positions. This should obviously be looked at in the context of:

- (a) Operation Quiet Storm; and
- (b) Amagqugula, in which the selection process of personnel, was manipulated to achieve the union's end.

This on its own is a concession by Popcru to the fact that the selection process is not fair, objective or free of any influence by outside forces, and in particular, the union.

This Commission is of the view that the evidence relating to Operation Quiet Storm and the other union operations, does confirm that there was manipulation of the Department<sup>15</sup> to the advantage of the members of Popcru and with the intention of realising Popcru's strategic objectives, whatever these may be. It is interesting to note that the National Commissioner, Mr Mti, does not fear such influence and is of the view that the Department had managed to establish clear roles for management and the unions.<sup>16</sup>

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<sup>15</sup> While Operation Quiet Storm played out mainly in KwaZulu-Natal, the Commission heard detailed testimony by Mr Thembile Goodman Matshoko in Port Elizabeth of the manipulation of the Department by the union in the Eastern Cape. (See Exhibit 'U' of St Albans proceedings.) The evidence of Provincial Commissioner Z.A.K. Modise was to the effect that Operation Quiet Storm was a national programme (Leeuwkop Transcript Vol. 10 at page 868).

<sup>16</sup> See Correctional Services Portfolio Committee meeting dated 25 June 2002, where the National Commissioner, Mr Mti, informed the Portfolio Committee of this view at <http://www.pmg.org.za/docs/2002/view-minute>, accessed 17.1.2005.

### **3. CONSEQUENCES OF UNION INFLUENCE**

It is the Commission's view that Mr Ntuli, in testifying about Operation Quiet Storm, gave the most plausible explanation of what caused the state of lawlessness in KwaZulu-Natal. The KwaZulu-Natal prisons were plagued by problems and, prior to this Commission, several inquiries bore no results. Instead, the various inquiries and investigators were sent around in circles without finding any root causes because the lawlessness in KwaZulu-Natal was so pervasive.

It was apparent that even though Quiet Storm was conceived and driven from the Pietermaritzburg Management Area, it resulted in forced removals and strike actions all over the province. As a result, the Department had to embark on litigation to try to stop this spate of unlawful actions. Quiet Storm also spread to other provinces, thus impacting on the entire Department. Mr M.Z.I. Modise's evidence regarding the national character of Operation Quiet Storm also gave a plausible explanation as to why the unlawful behaviour was copied by other provinces.<sup>17</sup>

The main feature of the Operation was that there was extensive violence, or threats of violence, against employees of the Department in all the Management Areas.

A culture of lawlessness had been introduced into the Department in that it had become the norm for members to be forcibly removed from their positions and for unlawful actions to happen with impunity. This culture was reinforced by the benefits, which were derived from the unlawful activities. The members were getting appointed on the strength of their influence within the union, and management, which did not have union protection, was intimidated. They ended

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<sup>17</sup> See the Chapter on Historical Background for more details.

up resigning and those who remained had to “toe the line” or be forcibly removed. The union’s intentions were not in doubt as this was happening in various Management Areas. It was clear that the union was no longer playing its lawful role in the Department, and appointments, even that of the Commissioner, had to get union approval.<sup>18</sup>

The union influence within the Department of Correctional Services has had such a profound effect that even the appointment of senior, critical and technical staff has been affected. Some of those appointed do not qualify to be in their positions, while those who might assist in the effective management of the Department are sidelined or, if appointed, made to carry out menial duties that have nothing to do with their specific qualifications. The strategic and influential positions are left to those people loyal to the union.<sup>19</sup>

It should be noted that there has been a slight change in this trend at head office, where a number of new recruits have been appointed from the outside since the new Commissioner of Correctional Services was appointed.

However, there is still a problem in that at the middle and lower management level of the Department appointments are not aimed at employing the best person for the job. This is apparent if one looks into the specialist posts and the manner in which so-called specialists are treated. For example, warders end up playing the role of various specialists and technical people, such as medical doctors, psychologists, dieticians, human resources specialists, lawyers, accountants, strategic planners etc.

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<sup>18</sup> See the evidence of Mr Matshoko – St Albans transcript, Volume 14, page 1 439 and Mr Ntuli in the Chapter on Historical Background.

<sup>19</sup> See Mr Ntuli’s evidence in the Chapter on Historical Background.

This demotivated professional staff in the Department. Even court orders<sup>20</sup> and directives of the Office of the Inspecting Judge of Prisons are sometimes ignored.<sup>21</sup>

Because of this union influence the strategic direction taken by the Department, or the lack thereof, is because of union influence. Moreover, if one considers that the majority of senior managers<sup>22</sup> belong to Popcru, then one should be concerned as to which officials are protecting the interests of the Department when these are not the same as those of Popcru.

This indicates that the Department was, at one stage, generally under the control of the union. The Ministry and the Commissioner's office had lost total control of the Department. The current Minister and Commissioner are, under difficult conditions, endeavouring to reverse the situation.<sup>23</sup>

From the evidence led before the Commission, it has become clear that the issue of trade unionism is one of the most divisive issues within the Department. There were even employees who said "trade unionism" was non-existent in some of the Management Areas and that it had been replaced by "gangsterism".<sup>24</sup>

The reference to trade unionism as gangsterism has everything to do with the role the union has played in the various violent and illegal activities in the Department. This, unfortunately, has been the trend to date where there has

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<sup>20</sup> See the disregard of court orders set out in Chapter One of this report. In particular, see also the Chapter on Conversion of Sentences for the manner in which the Marimuthu matter was discussed and other matters.

<sup>21</sup> See also the Chapter dealing with the Office of the Inspecting Judge where the frustrations experienced by some of the Independent Prison Visitors are set out.

<sup>22</sup> See statistics *infra*.

<sup>23</sup> For example, warders who were involved in unlawful activities at Pollsmoor and disrupted a visit by the Minister were suspended and charged. (See *The Cape Argus*, Friday 4 June 2004). A similar approach was adopted at Barberton Prison when there was unlawfulness.

<sup>24</sup> See the evidence of Mr B.B. Mchunu at Pietermaritzburg. (Pietermaritzburg transcript Vol. 8 page 810).

been a clear disregard for the law and the union carries on trying to influence the manner in which the Department is run through, sometimes, unlawful means.<sup>25</sup>

The Commission will now consider in more detail the other issues, referred to above, that have a bearing on the issue of trade unionism.

#### **4. AGENCY SHOP AGREEMENT**

Section 25 of the Labour Relations Act gives a union the right to enter into a collective agreement with non-union members, which is referred to as an Agency Shop Agreement. This agreement requires the employer to deduct an agreed agency fee from the wages of employees who are not members of a trade union, but who are eligible to be members of a trade union.

The mischief, which this section seeks to address, is, briefly, the fact that non-unionised employees should not benefit from the achievements of union negotiations if they do not belong to a union. Thus, even though they do not belong to a union, they are obliged to pay an agency fee as the union acts as their agent in negotiations.

The effect of the Agency Shop Agreement is profound in that it influences the manner in which members approach trade unionism or trade union membership. The effect of the agreement is that even if officials have no desire to join a trade union, they might as well join because membership costs less in subscriptions, if the allegation is true that the agency fees are higher. Even if the allegation is not

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<sup>25</sup> The issue of overtime payment and the issue of the 131 employees who were disciplined by the Department is relevant here, especially the manner in which the union has dealt with these matters. While it is clear that if they have any complaint they could either raise it in the Bargaining Council or they could appeal the dismissals within the structure set out in terms of the Labour Relations Act, they instead chose to embark on industrial action.

true, a person might as well join the union not only to get representation within the Bargaining Council but also to get other benefits, which might be derived from being a member of a union.<sup>26</sup> It is clear then that the agreement does have a bearing on how union membership has swelled.

Evidence has been presented that agency fees are higher than the normal subscription to the union in some instances. It is the Commission's view that the Department needs to investigate this.

Section 25(3) of the Labour Relations Act provides that:

- “(3) An agency shop agreement is binding only if it provides that-*
- (a) employees who are not members of the representative trade union are not compelled to become members of that trade union;*
  - (b) the agreed agency fee must be equivalent to, or less than-*
    - (i) the amount of the subscription payable by the members of the representative trade union;*
    - (ii) if the subscription of the representative trade union is calculated as a percentage of an employee's salary, that percentage; or*
    - (iii) if there are two or more registered trade unions party to the agreement, the highest amount of the subscription that would apply to an employee.” (Own emphasis)*

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<sup>26</sup> On the evidence before the Commission, the benefits may include promotion, merit awards etc.

To avoid a situation where non-union members are paying an agency fee higher than the normal union subscriptions, the Commission will recommend that under no circumstances should non-union members be required to pay an agency fee, which is higher than the normal union subscriptions in contravention of section 25(3)(b)(i) of the Labour Relations Act.

## **5. SENIOR MANAGERS JOINING TRADE UNIONS**

The Constitution of the Republic and the Labour Relations Act recognise that all employees, as defined in the Labour Relations Act, can join a trade union of their choice.

The right of employees to freedom of association as provided for in section 4 of the Labour Relations Act, draws no distinction between managerial and non-managerial employees.<sup>27</sup> The definition of “employee” in section 213 of the Act also does not distinguish between managerial and non-managerial employees. It is standard practice in the Department that senior managers belong to the same trade unions as other employees. The information the Commission received is that as at 31 January 2005, the union membership at senior management positions was as follows:

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<sup>27</sup> Except that such a distinction is drawn in section 78(1) of the Labour Relations Act.

UNION	SALARY LEVEL					TOTAL	%
	11	12	13	14	15		
POPCRU	78	78	51	12	1	220	62.678
PUBLIC SERVANTS ASSOCIATION OF SA	30	32	25	1	1	89	25.356
HOSPERSA/ INDEMNITY	1	2	0	1	0	4	1.1396
NEHAWU	3	1	7	0	0	11	3.1339
NUPSAW	2	6	0	0	0	8	2.2792
SAPU	0	2	0	0	0	2	0.5698
DENOSA	0	1	1	0	0	2	0.5698
<b>NON UNION MEMBERS</b>							
PSCBC (AGENCY SHOP AGREEMENT)	6	9	0	0	0	15	4.2735
<b>TOTAL</b>	<b>120</b>	<b>131</b>	<b>84</b>	<b>14</b>	<b>2</b>	<b>351</b>	<b>99.999</b>

The above statistics illustrate that more than 95% of the senior management in the Department belongs to trade unions. The same trade unions organise in the lower echelons of the workforce. This is a very abnormal situation. It can clearly lead to a situation where the trade union positions or tensions amongst them are

reflected in the manner in which the Department is being run. This in turn can lead to a dysfunctional management team.

The only way in which the management team could be cohesive and manage the Department with a single objective, which is to pursue the Department's strategic direction, would be for the senior managers not to belong to the same union as the workforce. Otherwise, at all times there could be a "secret trade union agenda" in the management of the Department. Even if management is not acting in accordance with the union's objective, it will be perceived from the outside that they do. Justice must not only be done but be seen to be done.

At common law, every employee owes the employer a duty of good faith, a duty to advance the interests of the employer, an obligation not to compete with the employer and a duty to maintain as private and confidential those matters of the employer that are private and confidential. If an employee breaches any of these duties, such an employee can be charged with misconduct.

It is apparent that there is some tension between employees' rights to freedom of association and their right to engage in collective bargaining on the one hand and the common law duties of employees on the other. Under the Labour Relations Act, senior managerial employees cannot be precluded from joining a trade union. As long as the employees fall within the bargaining unit, they can join trade unions. However, there can be different bargaining units based on the different interest of the employees.

While the Commission cannot challenge the right of managers to join trade unions since it is a right enshrined in the Constitution, the Commission is, however, of the view that it would be advisable and appropriate if managers were to join a separate union from that which organises within the lower ranks of the Department. As early as February 2000, it was recommended to the Department that there should be a separate Prison Heads Association. It was recommended:

*“There should be a separate Prison Heads Association. This simple and inexpensive step could at a stroke reduce the unhealthy influence of POPCRU (or the perception of such influence) among prison heads and senior managers. It would also provide a much needed professional Association for senior managers. We believe those for whom it is intended would welcome the step.”<sup>28</sup>*

The current situation creates a conflict of interest. Management has to decide on a number of issues that affect the rights of workers in the lower ranks, and, accordingly, it is imperative that they act with impartiality if they are to further the interests of the Department.

Managerial employees, by virtue of their managerial position, are privy to information that is private and confidential to the employer, which, if disclosed to the union, would cause prejudice or even harm. Such employees are required, in the observation of their duties to their employer, to keep such information secret and confidential. This puts managerial employees who are members of a trade union in a very difficult position indeed.

In other organisations, senior management does not belong to trade unions but instead to staff associations, which negotiate and look after the interests of senior management. This approach should be given serious consideration within the Department. Some form of staff association should be formed to provide organised representation to senior members from the rank of director upwards to negotiate their terms and conditions of employment and rights within the Bargaining Council. The Bargaining Council could be the same as that of junior members, or it could be a separate one, to try and facilitate issues.

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<sup>28</sup> See Management Audit of the Department of Correctional Services Final Report dated 18 February 2000, at page 2.

This is the trend in most organisations in the corporate or business world. It has also been found to be the trend within the democratic world in respect of certain categories of civil servants and supervisory and managerial employees.<sup>29</sup>

In its aim to assist the Department to find a workable solution, the Commission considered it necessary to look at the practice in other countries.

## 5.1 The United Kingdom (Great Britain)

The Industrial Relations Act of 1971 introduced a statutory right for employees to belong to trade unions of their choice. This Act was subsequently repealed. Following its repeal, "individual legal rights were introduced to protect trade union membership and activity at the workplace".<sup>30</sup> There are four (4) ILO Conventions dealing with freedom of association.<sup>31</sup>

The government of the United Kingdom did, in 1984, impose a ban on membership of trade unions by employees who worked at the Government Communications Headquarters (GCHQ). The government justified this ban on the grounds of "national security". The courts in the United Kingdom decided that considerations of "national security" did indeed outweigh other considerations. However, the Labour Government had lifted the ban by 1997.

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<sup>29</sup> Refer to Labour Law Regimes in Canada and the United States of America.

<sup>30</sup> Sweet & Maxwell, *Employment Law*, 7A – 102.

<sup>31</sup> The ILO Conventions are the following:

- “(a) No. 87 on Freedom of Association and Protection of the Right to Organise 1948);*
- (b) No. 98 on the Right to Organise and Bargain Collectively (1949);*
- (c) No. 135 concerning Protection and Facilities to be Afforded to Workers’ Representatives in the Undertaking (1972); and*
- (d) No. 151 on Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (1978).”*

## 5.2 Canada

In Canada, categories of “public employees” do not enjoy protection under collective bargaining statutes. This is the result of a peculiarly Canadian legal framework in which the:

*"Crown by operation of rules of interpretation is not bound by legislation unless there is an express provision to the contrary in the statute. Legislative silence has by implication excluded public servants from the general scheme of collective bargaining in many jurisdictions. Express restrictions, however, have been necessary in order to exclude such groups of public employees as policemen, firemen and teachers from collective bargaining legislation. As a general rule, Municipal employees (other than firemen and policemen) are not excluded from the general collective bargaining legislation, nor are the faculties and staffs of universities. Even where public employees are not excluded (either expressly or implicitly) from general collective bargaining legislation, restrictions may be placed on the exercise of general collective bargaining rights (such as recourse to strike action) by separate and more specific legislation. The general pattern, however, has been to establish special collective bargaining regimes for public employees, reflecting a reluctance to extend fully the private sector collective bargaining model to the public sector. While public employee collective bargaining statutes vary from jurisdiction to jurisdiction, the dominant pattern has been some restriction of the right to strike and a significant limitation upon a range of bargainable issues".*<sup>32</sup>

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<sup>32</sup> International Encyclopedia for Labour Law and Industrial Relations-ELL-Suppl.150 (July 1993) paragraph 490 at pages 214-215 in *Kluwer International* (2002) Blainpain, R. Ed.

It seems that the manner in which Canadian public employees are excluded from collective bargaining legislation or, alternatively, if they are included, then the manner in which the range of bargainable issues applicable to them is limited, is the result of the peculiar rule of interpretation in Canada as to the application of collective bargaining legislation to the Crown.

### 5.3 The United States of America (USA)

The National Labor Relations Act (NLRA) regulates collective labour relations and provides that employees have “the right to form, join, and assist in labor organisations of their own choosing, free of employer interference”<sup>33</sup>. The NLRA statutorily excludes “supervisory” employees from its reach and therefore from the full enjoyment of all of these rights.<sup>34</sup> The US Supreme Court has upheld these rights, which include freedom of association, as constitutional.<sup>35</sup>

The National Labor Relations Board (NLRB) is established under the NLRA as a dispute resolution body. Its powers include determining which employees fall within the bargaining unit that the trade union seeks to represent, recruit and organise. The NLRB, in exercising its right to make decisions on the proper construction of bargaining units, “narrowed the Act's coverage even further ... in addition to an explicit exclusion of supervisory employees, managerial employees have been implicitly excluded from the Act's coverage.”<sup>36</sup> This managerial exclusion, compared to the statutory supervisory exclusion, developed strictly as a result of the decisions of both the Supreme Court and the NLRB.<sup>37</sup> As a consequence of this implied exclusion, managerial employees are denied “the

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<sup>33</sup> National Labor Relations (Wagner) Act, ch.372, 2(3), 49 Stat. at 450 (1935) (codified as amended at 29 U.S.C. 152(3) (1994)) as quoted in 48 *Catholic University Law Review* at page 557.

<sup>34</sup> *Ibid* note 43.

<sup>35</sup> 48 *Catholic University Law Review* 557 at page 2. See also 91 *Columbia Law Review*, 405 (1991), Ben M. Germana, 'Protecting Managerial Employees Under the National Labour Relations Act'.

<sup>36</sup> See Footnote 8 of the abovementioned *Catholic University Law Review*.

<sup>37</sup> See Footnote 9 of the abovementioned *Catholic University Law Review*.

right to self-organization ... [and] to bargain collectively through representatives of their own choosing".<sup>38</sup>

The express exclusion of supervisory employees and the implied exclusion of managerial employees from the reach of the NLRA have not resulted in the NLRA, or in the decisions of the NLRB that prevent managerial employees from being in the same bargaining unit as more junior employees, being declared unconstitutional by the US Supreme Court.<sup>39</sup>

In the matter of *National Labor Relations Board v. Bell Aerospace Co.*,<sup>40</sup> the Supreme Court defined managerial employees as employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."<sup>41</sup> This test is similar to the approach adopted by the South African Labour Relations Act, No. 66 of 1995 in section 78(1) when dealing with "senior managerial employees".

The test adopted by the NLRB is important as employees who do not in fact "formulate and effectuate management policies by expressing and making operative the decisions of their employer", but are otherwise considered to be managerial employees, are not excluded from the full reach of the NLRA. Such employees cannot lawfully be prevented from joining a trade union of their choice, including one that has more junior employees as its members.

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<sup>38</sup> *Ibid* note3

<sup>39</sup> *Ibid* note 5

<sup>40</sup> See 416 US at 289. (414 US 816, 94 S.Ct. 47 (Mem) 1973).

<sup>41</sup> Bell Aerospace, 416 U.S. at page 289 as quoted in 48 *Catholic University Law Review* 557.

## 5.4 The South African Legal Framework

South Africa's legal framework is very different indeed. If a framework were to be developed to restrict or limit the right of senior managerial employees, as defined in section 78(1)(a) of the Act and on a test formulated by the US NLRB, then it would have to pass constitutional muster.

The Constitution of the Republic of South Africa in section 23 provides that every worker and every employer has the right to engage in collective bargaining. Section 23 of the Constitution further provides that every worker and every employer has the right to freedom of association. This right of freedom of association extends not only to joining a trade union but involves also forming a trade union, as well as participating in the lawful activities of the trade union. These rights in section 23 of the Constitution are echoed in sections 4 to 7 of the Labour Relations Act, No. 66 of 1995 (the Labour Relations Act). The Act itself provides some guidance on matters that would properly fall within the phrase "the lawful activities of a trade union", as defined in section 213 of the Labour Relations Act.

The lawful activities of a trade union include the principal purpose of regulating relations between employees and employers, as well as other purposes that are related to this principal purpose. Employees cannot, under the guise of being engaged in trade union activities, do that which is unlawful and wholly unrelated to the principal purpose of regulating relations between them and their employer.

When attempting to craft a framework to protect the interests of the employer during collective bargaining and, for this purpose, to limit the rights of senior managerial employees to join trade unions or to restrict their right to join trade unions to particular trade unions, at issue is the meaning of freedom of association in the Constitution and in sections 4 to 7 of the Act. Freedom of association is part of our common law, is regulated in legislation, and is also an

important part of the conventions of the International Labour Organisation (ILO) which have been adopted by the Republic of South Africa.

Our labour law is familiar with developing concepts for the construction of a bargaining unit from which a trade union may draw its members. The identification of a bargaining unit is largely driven by determining whether the employees have a shared “community of interests”. Such a shared “community of interests” does not ordinarily exist between “managerial” employees and more junior employees. Factors relevant to the identification of a shared “community of interests” include: functional integration in the enterprise, the correspondence of qualifications, skills and training, similarity of terms and conditions of employment, the supervisory and organisational structure of the enterprise.<sup>42</sup>

The “national security” justification may not be so convincing to the Constitutional Court to pass constitutional muster. The Court has been confronted with that argument albeit in a different context. However, the Department could more defensibly propose that (senior) “managerial” employees do not have a shared “community of interests”<sup>43</sup> with more junior employees. The effect of this is that such (senior) “managerial” employees should not be in the same bargaining unit and therefore trade union as more junior employees. In the matter of *Mutual & Federal Insurance Co. Ltd v Banking, Insurance, Finance & Assurance Workers Union*<sup>44</sup>, the employer formulated a bargaining structure that excluded managerial employees from the bargaining unit and put non-managerial employees into three separate bargaining units. The Court held that the evidence of the employer that its proposed bargaining structure was “rational and fair [and]

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<sup>42</sup> *Labour Relations Law: A Comprehensive Guide, 4<sup>th</sup> Edition*, du Toit et al at page 232.

<sup>43</sup> *SA Municipal Workers Union v Rand Water Board* (2001) 22 ILJ 1724 (ARB). On rationality in the construction of the bargaining unit see also *Mutual & Federal Insurance Co. Ltd v Banking, Insurance, Finance & Assurance Workers Union* (1996) 17 ILJ 241 (A) at pages 249 to 251.

<sup>44</sup> (1996) 17 ILJ 241 (A).

that it was formulated for sound commercial and administrative reasons and that it was designed to promote industrial peace" was not contested by the union.<sup>45</sup>

Section 36 of the Constitution does allow the limitation of fundamental rights to the extent that the limitation is "reasonable and justifiable" on certain conditions. The issue of limitation or restriction of some of the Constitutional rights of employees for work discipline is not a foreign concept in South Africa. For example, in section 50 of The Defence Act No. 42 of 2002, some rights of the members of the South African National Defence Force have been limited. However, the Courts have found a total ban on union membership to be unconstitutional<sup>46</sup> and also contrary to the provisions of the International Labour Organisation Convention.<sup>47</sup>

However, the Commission is of the view that the recommendation contained herein is distinguishable because it is not a total ban on union membership but merely a separation of membership. It should be properly negotiated in the Bargaining Council and then enforced.

## 5.5 The Rationale

The issue of trade unionism also has a major bearing on the manner in which negotiations on terms and conditions of employment are done, including the Disciplinary Code, which has been found by this Commission to have a number of weaknesses. The manner in which Disciplinary Inquiries are conducted within the Department leads to inquiries being compromised because all the people who are appearing before the Chairperson of a Disciplinary Inquiry, including the

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<sup>45</sup> *Mutual & Federal Insurance Co. Ltd v Banking, Insurance, Finance & Assurance Workers Union* (1996) 17 ILJ 241 (A) at pages 249 to 251.

<sup>46</sup> See *SA National Defence Union and Another v Minister of Defence and Another* (1999) 20 ILJ 2265 (CC), and also *SA National Defence Union and Another v Minister of Defence and Another* (1999) 20 ILJ 229 (T).

<sup>47</sup> See Article 2 and 9(1) of the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 of the International Labour Organisation.

Chairperson, the Investigator and sometimes even the Initiator, belong to the same trade union. The will of the union, which might be strongly expressed through the employee's trade union representative, can be intimidating in one way or the other to the Chairperson and other people who are supposed to be acting impartially.<sup>48</sup>

The issues of appointments and merit awards are also affected by this particular aspect as eventually those sitting on selection panels and moderating committees and deciding who should be appointed or be given a merit award are people who belong to the union.<sup>49</sup>

The Commission is of the opinion that if all parties negotiating terms of employment and conditions are from the same union there is a conflict of interest. Nevertheless, the Commission is mindful of the fact that a conflict of interest in itself does not necessarily imply a resolution in favour of, or a personal advantage to one, but merely that a conflict exists, which could be resolved in one of several ways.<sup>50</sup> It is therefore important that the Department bear in mind that some view corruption as a particular method of resolving conflict whereby personal financial interests overcome or distort the exercise of an employee's public duties and responsibilities. This distortion, according to some legal scholars, may be seen as an incidental benefit that is gained. To put it differently, corruption is not an end in itself but simply an illegal way of achieving a particular outcome or effect.

It is therefore quite possible that the general public may perceive that the outcomes of bargaining certain rights and duties between the Department and employees would necessarily advantage one party, if both parties belong to the

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<sup>48</sup> This aspect will be dealt in more detail in the Chapter dealing with Disciplinary Inquiries.

<sup>49</sup> This aspect will be dealt with in more detail in the Chapter dealing with Recruitment.

<sup>50</sup> See "Conflict of Interest: Ethical Dilemma in politics and administration" by Dr M.J.Mafunisa *South African Journal of Labour Relations* ( Winter 2003) at page 12.

same group, and that the advantage would be at the cost of the Department and the general public.

Furthermore, where management belongs to a particular organisation, like a specific union, and promotion and merit awards are discussed, there is the likelihood that those managers will benefit their fellow union members. So even if they act with honesty and integrity, it will always be perceived as a conflict of interest by those belonging to another organization, and that the manager favoured his union members.

The Commission's views on this perception of a conflict of interest are informed by evidence, *inter alia*, that even though Mr Russell Ngubo had been on suspension at the Pietermaritzburg Management Area, he still received a merit award.<sup>51</sup> In some quarters, it was regarded as a merit award given to him because the people who decided on merit awards belong to the same union as he. It could also be argued that this was done because of senior officials' fear of Mr Ngubo. However, the bottom line, in the Commission's view, is that he received an award under very suspicious circumstances and the issue of belonging to the same trade union, as a member of management, has a bearing on this issue.<sup>52</sup>

Ultimately, such behaviour translates into corruption because the conduct is perceived as the gaining of an illegal advantage.<sup>53</sup>

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<sup>51</sup> See Pietermaritzburg Exhibits 'L4' and 'L5' as discussed in the Recruitment Chapter.

<sup>52</sup> It might even have a bearing on the issue of belonging to the same political party. That particular aspect cannot be excluded.

<sup>53</sup> See section 3 of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 that reads as follows:

*"Any person who, directly or indirectly-*

*(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, or*

To act in the interest of the Department should be of paramount importance to every employee. The Commission is of the view that if managers and junior staff belong to the same union, it inhibits the eradication of corruption because it hampers the freedom with which members can report wrongdoing.

During the hearings, it became clear that members showed reluctance to report corruption because they feared reprisals. It is therefore important to create an environment that will nurture a culture of whistle-blowing. Members should then be made aware of the consequences should they not blow the whistle on corrupt colleagues. While it is accepted that the fear of reprisal is complex, it is not insurmountable. One way of addressing such fear is to create impartial managers, who are perceived to be impartial, and who would act against corrupt members. Another way, however, is to grant protection to those who blow the whistle by making use of the Protected Disclosures Act,<sup>54</sup> and to combat any intimidation through the use of the Act.

If the Department fails to create an environment in which members feel free to report to their seniors, then it will fail to combat and eradicate corruption.

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- (b) *gives or agrees or offers to give any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-*
- (i) *that amounts to the-*
    - (aa) *illegal, dishonest, unauthorized, incomplete, or biased; or*
    - (bb) *misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*
  - (ii) *that amounts to-*
    - (aa) *the abuse of a position of authority;*
    - (bb) *a breach of trust; or*
    - (cc) *the violation of a legal duty or a set of rules;*
  - (iii) *designed to achieve an unjustified result; or*
  - (iv) *that amounts to any other unauthorized or improper inducement to do or not to do anything, is guilty of the offence of corruption.”*

<sup>54</sup>

See Act 26 of 2000.

Having separate bodies to represent all will therefore mean that the interest of the Department and the Government will be protected at all levels. The adoption of the recommendations will depend largely on the manner in which the Department introduces the proposals to the members of the Bargaining Chamber.

## **5.6 Implementation**

The issue of managers and staff belonging to the same union is one, which needs to be addressed by the Department. However, the main challenge for the Department is how to deal with this issue so that the Department does not contravene the provisions of the Labour Relations Act and the Constitution. Should the Department decide to follow the direction of separating the bargaining units of junior and senior members, it is imperative that it act in a constitutional manner.

The separation of managers from the bargaining unit of the more junior employees can be achieved through:

- (a) Agreement at the level of the relevant bargaining council in the public service;
- (b) Seeking such a determination from arbitration proceedings in the bargaining council;
- (c) Other means to achieve the result, including a legislative or regulatory intervention.

However, the last suggestion would be politically contentious and time consuming. The second proposal may not be conducive to good labour relations between the Department and the Unions. Thus, the first proposal is the recommended route.

In the interim, while negotiations are being undertaken in the Bargaining Chamber, the Department can expressly require that senior managerial employees keep secret certain categories of information such as, for example, information that would form the subject matter of negotiation between the parties over terms and conditions of employment. Such a senior employee can lawfully be required to recuse himself from discussions in which the secrecy of the employer's information will be compromised. If the employees do not give such an undertaking, alternatively if they breach the undertaking, then they can be disciplined for misconduct.

The Department should, through the contract of employment, regulate the relationship between it and senior managerial employees who are privy to or exposed to or receive, as a result of their work, secret and confidential financial information about the Department that would affect and inform the stance of the Department or the approach of the Department in collective bargaining and operational requirements matters. The Department should, in the contracts of employment of senior employees, provide for the following:

- a) A specific obligation to keep secret and confidential information that they are privy to or receive as a result of their senior managerial position;
- b) The manner in which this information is to be communicated to them or received by them;
- c) The manner in which such information is to be stored by them and communicated to others who might lawfully receive it;
- d) A closed list of persons to whom they can disclose such information;
- e) That employees who also hold executive positions in their trade unions will remain bound not to disclose such information to the trade union for any purpose.

## **6. CONCLUDING REMARKS**

The issue of trade unionism is a serious matter, which needs to be approached by the Department with the urgency and sensitivity it deserves. Unless there is a clear division between those who purport to be managing the Department and those they are supposed to be managing, there will be ongoing unhappiness and discontent among the members of the workforce.

This view is supported by some senior managers, who feel they are hamstrung by the fact that some senior managers belong to trade unions.<sup>55</sup>

In the light of the above, the only solution to this complex problem would be to consider a recommendation that will create a clear division between management and staff.

## **7. RECOMMENDATIONS**

7.1 The Department needs to address the issue of union influence urgently. This matter can be regulated immediately at the level of the Bargaining Council. In this regard, the Department should table a draft resolution for adoption by the PSCBC and the General Public Service Sector Bargaining Council (GPSSBC) dealing specifically with senior managerial employees on the terms as set out hereinafter:

- a) Serious consideration should be given to encouraging senior managerial appointments to undertake that they will not join any trade union that organises for junior members of staff.

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<sup>55</sup> See the evidence of Mr Modise in Randburg Transcript Volume 2 pages 159, 205 and 211 and Leeuwkop Exhibit 'A' and also the affidavit of Mr D.K.M. Baloyi (Head Office Exhibit 'T').

- b) The people who are currently employed in management positions should give an undertaking that in making management decisions, they are not being influenced or trying to drive the agenda of a trade union or any secret organisation. The interests of the Department should be paramount at all times.
  
- c) Resolution 8 of 1998 should be amended to specifically provide for the regulation of the fiduciary duty that senior managerial employees owe their employer, including the following matters:
  - (i) a very cautious or careful handling of confidential information that such an employee receives or is exposed to by virtue of his or her senior managerial position;
  - (ii) a positive obligation to keep such information secret;
  - (iii) a positive obligation to recuse himself or herself from discussions with the union to which such information might be relevant, either directly or indirectly.

7.2 The Department should seriously consider encouraging senior members of staff and the union to agree with the parties introducing a resolution to be debated in the PSCBC and the GPSSBC that:

- a) Members of staff who are in senior management positions have a different “community of interests” to the one shared by junior members of staff who are in non-management positions;
- b) Managerial employees from the position of Director upwards should be encouraged to belong to an association or union, which is different from the union which junior staff members join;

- c) To protect their constitutional right to collective bargaining, managerial employees should be encouraged to form a staff association or union, which junior members of staff may not join;
  - d) A separate bargaining unit should be formed for managerial employees.
- 7.3 The Department should propose that senior managerial employees who want to be union members and hold office in their trade unions be appointed by their trade unions as their negotiators, and that they, from time to time, go on special secondment for the specific purpose of conducting negotiations on behalf of their trade unions in the bargaining council.
- 7.4 In the event of an agreement not being reached on the abovementioned matters within thirty six (36) months of the commencement of negotiations, the Department should consider referring these issues to arbitration for determination and later to Labour Courts for adjudication.
- 7.5 The Department needs to investigate the issue of agency fees as against union subscription fees that employees must pay to ensure that they comply with the provisions of section 25(3)(b)(i) and (d) of the Labour Relations Act.