

# HUMAN RESOURCES AND LABOUR RELATIONS CONSIDERATIONS WHEN TRANSFERRING A BUSINESS AS A GOING CONCERN



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## 1. Introduction and Background

The current restructuring processes that are underway within the electricity industry, will result in municipalities undertaking detailed investigations and cost-benefit analyses to create appropriate structures to perform the functions currently being performed by the municipality. In some instances, it may not be viable to create municipal entities, however, it will be necessary to prepare for the establishment of Regional Electricity Distributors, where electricity functions will be removed from the ambit of the municipality. Where Electricity currently forms an internal department within the municipality, the establishment of a municipal entity or the RED will mean that a separate, independent corporate entity will be created to perform the current functions of municipality's electricity department.

The restructuring process outlined above could have vast ramifications for employees. It is widely recognised that employees will contribute largely to the successful operation of the RED or municipal entities. In order to achieve greater efficiencies, effectiveness, enhanced quality and greater accessibility, it is imperative to consider a strategic comprehensive approach to human resources in the transition and following establishment.

## 2. Objectives of this Paper

The following paper will provide an overview of the human resources and labour relations considerations when transferring a business as a going concern, as will be the case in municipal entity and / or RED establishment. Specifically, the paper will address:

- ❖ The legal framework that enables the establishment of municipal entities
- ❖ The legal framework informing the general transfer process when transferring a business as a going concern
- ❖ The practical process of transferring employees from the municipality to a new entity
- ❖ The key people drivers for enhancing the overall success of the operation

## 3. The meaning of “Transfer”

**Transfer** entails a change of employer by operation of statute. In other words the process by which the municipal entity / RED is substituted in the place of the municipality under section

197 of the Labour Relations Act, the Municipal Systems Act and any other relevant industry legislation.

## **4. Legislative Framework**

### **4.1 The Labour Relations Act**

On the establishment of the municipal entity or the RED, "Municipal Electricity employees" [i.e. those employees performing the majority of their functions on a daily basis within the Electricity Department, will be transferred to the municipal entity in terms of Section 197 of the Labour Relations Act 66 of 1996, as amended ["LRA"]. This transfer comes with various legal consequences for both the municipality as well as the new entity. More specifically, section 197 established four major legal implications on MLM and the MBE:

1. The transfer of employees is automatic and occurs by operation of law, unless agreement is reached to the contrary between municipality and the Unions / new entity.
2. The length of service of the transferring employees is transferred in tact to the municipal entity / RED and cannot be waived or altered even with the employees' agreement.
3. Organisational rights, arbitration awards and collective agreements are transferred automatically to the municipal entity / RED, unless otherwise specifically agreed by the parties.
4. All contractual and other rights as between the employees and municipality become enforceable as between the employees and the municipal entity / RED after transfer. This would include all claims and disputes between employer and employee that arose from the employment relationship.

In addition to the above obligations, the amended Section 197 also provides that the municipal entity / RED must agree a valuation with the MLM as at the date of transfer of the following employee liabilities:

1. accrued leave pay
2. severance pay that would have been payable to the transferring employees in the event that they had been dismissed for operational requirements;
3. any other payments that have accrued to the transferring employees

The abovementioned agreement will also need to stipulate which employer would be liable for payment of any of the amounts mentioned above. More importantly, in terms of Section 197 both the municipal entity and the municipality will be jointly and severally liable for any employee liability, for a period of 12 months after transfer, in the event that an employee is retrenched or the new entity is liquidated or sequestered and/or in respect of any claim concerning any term and conditions of employment that arose prior to the transfer.

### **4.2 The Municipal Systems Act**

The Systems Act of 2000 directs Municipalities towards the steps that must be carried out to achieve a successful municipal service partnerships or the establishment of municipal entities. This is essentially the enabling legislation which:

- ❖ Governs and regulates alternate service provision in the form of MSPs
- ❖ Stipulates the powers of the municipalities entering into such agreements
- ❖ Governs the procedural aspects of such agreements
- ❖ Governs the responsibilities and accountabilities of each party to the agreement

The Systems Act outlines the process of consultation with Labour when Local Government decides to utilize an internal or external service delivery mechanism.

## **THE STEPS THAT MUST BE TAKEN TO CONSULT WITH LABOUR WHEN DECIDING ON AN INTERNAL SERVICE DELIVERY MECHANISM**

### **Step 1 – Assess the views of organized labour before taking a decision.**

- ⇒ This could be achieved via the Local Labour Forum.
- ⇒ Place the issue of reviewing and considering service delivery on the agenda 7 days before the monthly meeting takes place (or raise it as a new item at the meeting under adoption of agenda if it is urgent), in terms of an organisational rights agreement with labour.

OR:

- ⇒ Call a special meeting of the Local Labour Forum on 48 hours' notice if it is urgent.
- ⇒ The Local Labour Forum may consider the establishment of a subcommittee (if one does not already exist) on Workplace and Services Restructuring, for preparatory consultation.
- ⇒ Information sharing and consultation with the unions must take place to ensure that unions are given the opportunity to make representations and ensure that the views of organized labour are considered in a proper and bona fide manner.

### **Step 2 – Decision by the Municipality**

- ⇒ The Municipality must then assess the views of organized labour.
- ⇒ The Municipality can then:
  - decide to explore the possibility of an external mechanism to provide the service (e.g. municipal entity), or
  - make a decision on an appropriate internal mechanism (administrative unit etc).

### **Step 3 – Deciding on an internal mechanism**

- ⇒ The Municipality must formally adopt the decision and thereafter implement that decision to provide the municipal service via an internal mechanism.

### **Step 4 – Implementing the internal mechanism**

- ⇒ Consult with labour on the structure and design of the internal mechanism.
- ⇒ Develop a process for the fair and expeditious ring fencing of employees that will fall into the internal mechanism.
- ⇒ Design a process for the fair migration (placement) of staff into the new structures of the internal mechanism.
- ⇒ Consult with labour and attempt to obtain consensus where feasible.
- ⇒ Communicate with staff – regarding the decision, process followed (Local Labour Forum, etc), what the impact will be for them, the process that will be followed in implementing the internal mechanism, etc.
- ⇒ An internal mechanism does not envisage a change of employer. Accordingly, it is 'internal restructuring' and there will be no transfer to another employer.
- ⇒ Implement the ring fencing and placement of staff into the structures.
- ⇒ Consult with staff throughout, and negotiate with employees who may experience a material change in their contracts of employment (position, status, responsibilities, etc) in being placed into the structures of the internal mechanism.

## **THE STEPS THAT MUST BE TAKEN TO CONSULT WITH LABOUR WHEN DECIDING ON AN EXTERNAL SERVICE DELIVERY MECHANISM**

### **Step 1 – Obtaining the views of organised labour**

- ⇒ This could be achieved via the Local Labour Forum.
- ⇒ Place the issue of reviewing and considering service delivery on the agenda 7 days before the monthly meeting takes place (or raise it as a new item at the meeting under adoption of agenda if it is urgent), in terms of an organisational rights agreement with labour.

OR:

- ⇒ Call a special meeting of the Local Labour Forum on 48 hours' notice if it is urgent.
- ⇒ The Local Labour Forum may consider the establishment of a subcommittee (if one does not already exist) on Workplace and Services Restructuring, for preparatory consultation.
- ⇒ Information sharing and consultation with the unions must take place to ensure that unions are given the opportunity to make representations and ensure that the views of organized labour are considered in a proper and bona fide manner.

### **Step 2 – Decision by the Municipality**

- ⇒ Consider the views of organised labour.
- ⇒ Make a decision as to whether or not to opt for an external mechanism to provide the service, or to instead opt for an internal mechanism.
- ⇒ Implement the decision.

### **Step 3 – Implementing the external mechanism that will provide the municipal service via a SDA with a municipal entity**

- ⇒ Information-sharing with labour regarding the proposed establishment of a municipal entity (via the same process in Step 1, paragraph 4).
- ⇒ Consult with labour in terms of Section 197 of the LRA regarding the transfer of staff to the municipal entity as new employer.
- ⇒ Disclose all relevant information to labour to ensure proper engagement on the transfer
- ⇒ Consultation with labour on the terms and conditions of employment that will govern employees in the new entity (since their terms and conditions of employment are determined by collective agreement, they must be the same with the new employer as existed with the old employer), or
- ⇒ An agreement can be concluded with labour governing the transfer to the new employer. Either the Municipality can negotiate with labour to agree to varied terms and conditions of employment that will apply post-transfer, or the new employer can undertake such negotiations with labour; alternatively, it can take place between the old and new employers and labour.
- ⇒ Provide to labour a generic copy of the agreement disclosed to each employee; i.e. of the agreement to be concluded between old and new employer regarding -
  - Which employer is liable for paying the accrued leave value, severance pay that may be payable after transfer, and any other payments that may have accrued to the employees with the old employer.
  - What provision has been made to make such payments if and when they become due and payable.

## 5. Practical Implications of the Legislative Framework

It is imperative that a comprehensive human resources and labour relations audit is undertaken when considering the establishment of a municipal entity / RED. The purpose of the audit will be to:

- ❖ outline a comprehensive list of Human Resources issues in order to gain a status report of HR issues within the organization;
- ❖ understand the current status of HR / LR and to prioritise strategic initiatives that will promote the restructuring process.
- ❖ *Provide a broad overview of the labour relations environment in which restructuring will take place and aims to identify any possible barriers or pitfalls that may hinder the process.*
- ❖ *Document the conditions of employment, salaries and benefits applicable to all employees in the organisation*
- ❖ To identify employees to be ring fenced for transfer to the new organisation. This is the process used to group or draw an imaginary ring around 'like' employees or all employees whose core job it is to work in a particular department, division or sector for the purpose of transferring them into a new business entity. E.g. the municipality decides to create a separate electricity entity. Section 197 provides that when the whole or part of a business is transferred as a going concern, the employment contracts of those employees who do 'electricity work' must be transferred to the new entity, unless otherwise agreed between the affected parties and employees.

## 6. Success Through People

### 6.1 People drivers of organisational success

The restructuring of the Electricity Industry, through municipal entity and / or RED establishment demands that serious consideration is given to the manner in which organisational effectiveness can be heightened. More specifically, goals of enhanced accessibility, equitable service delivery and quality will need to be realised. Critical to the achievement of such strategic objectives is the organisation's human capital. Therefore, in considering organisational effectiveness, it will be imperative to design a Human Resources Strategy that enables and supports the organisational objectives.

In recognising that employees are valuable assets requires an in-depth understanding what motivates, attracts and retains key individuals and groups within the organisation. Some of the critical issues that need to be addressed within the context of restructuring are:

- ❖ Job security
- ❖ Role clarity
- ❖ Training and Development
- ❖ Conditions of Service Parity (internal and external to the market)

The restructuring process itself aims to create an organisation that is flexible, performance oriented, innovative and committed to quality & service excellence. In achieving these objectives through restructuring, a number of potential consequences exist for employees. Such consequences could include changes to:

- ❖ Reporting structures
- ❖ Position responsibilities
- ❖ Position titles
- ❖ Employer
- ❖ Way of working
- ❖ Location of work
- ❖ Filling of critical vacancies

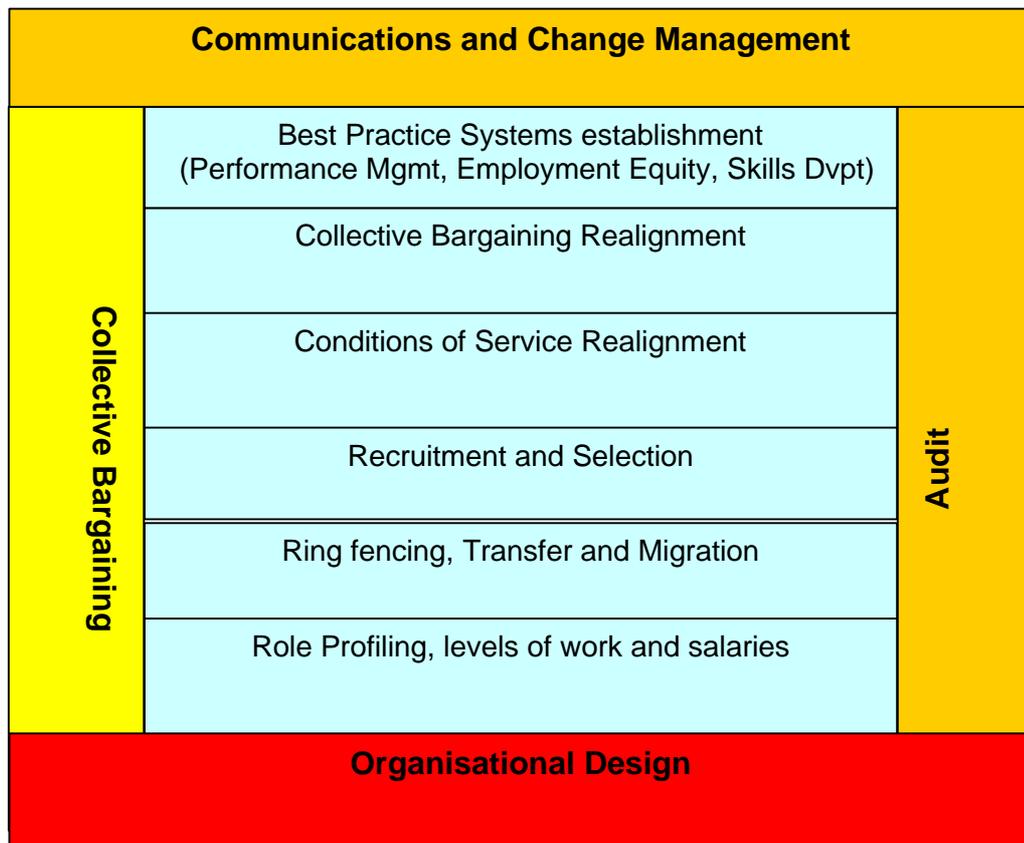
In addition to the direct consequences of the transformation, municipalities would likely develop a strategy to move Human Resources and Labour Relations policies and practices into the realm of best practice. In this way, a number of consequences could be experienced:

- ❖ Redefinition of position responsibilities
- ❖ Performance management
- ❖ Consolidated terms and conditions of employment
- ❖ Salary and benefits parity strategy
- ❖ Collective bargaining structure realignment
- ❖ Career and Succession Planning
- ❖ Employment Equity
- ❖ Skills Development

It will be necessary to deal with a number of these issues in a coordinated fashion in order to ensure a consistency in approach, as well as to implement the strategy of becoming a best practice employer.

## 6.2 Process framework of HR and LR considerations in the transition

The following framework represents the Human Resources and Labour Relations considerations when embarking on our during a transformation process. It is clear from the process framework that the organisational design forms the basis of the transformation process with respect to HR and LR. A number of other key processes should occur throughout the duration of the project – these processes including, an initial audit process, collective bargaining and general communication and change management. The “inside tiers” contain those issues that form part of the transformation at a substantive level.



## **6.2.1 Organisational Design**

Organisational Design will involve the development of a high level organisational structure depicting the overall design of the new entity and its key functions. Arising from the high level design, it will be necessary to develop more detailed structures depicting all levels of the organisation. To date, this process has been completed for the top four levels of the organisation.

In summary, it is best practice to utilise the skills and knowledge of employees throughout the organisation to develop new organisational structures. This is due to the expansive knowledge that employees have with respect to “how things work on the ground”. In addition, employee involvement early in the process facilitates higher degrees of buy-in and less resistance to the newly designed structures.

## **6.2.2 Role profiling, levels of work and salary scales**

Following the completion of the organisational design at both a high and detailed unit level, it is necessary to define the responsibilities of each of the positions within the organisational structure. This is performed by developing role profiles, highlighting knowledge, skills and experience that are required in the process. The role profile forms the foundation for the appropriate “level” (usually known as grade) to be determined and an appropriate salary to be assigned to the level of work. This is usually performed through an external and internal market survey.

## **6.2.3 Ring fencing, transfer and migration**

Following the completion of the organisational design and the role profiling process, it is possible for the organisation to decide on “how to fill the organisational structure with people”. This is commonly known as a migration or placement process. A number of rules or procedures should be established in order to ensure that employees are treated fairly and consistently and that key principles are applied in the process.

Where a municipal entity and / or a RED is established, it will be necessary to transfer employees from the City to the new entity. This will need to take place with due cognisance to prevailing labour legislation, relevant industry legislation and collective agreements

## **6.2.4 Recruitment, selection and developmental assessment**

Where positions cannot be filled internally – due to additional and new positions being created – it will be necessary to recruit individuals from the external market. It may arise that a decision be taken to recruit both internally and externally simultaneously.

Once the selection process has been undertaken, it is advisable that developmental assessments be undertaken for those individuals in senior positions. This will assist in mapping the key areas of development that will be needed to optimally meet the requirements of the role profile.

## **6.2.5 Conditions of service realignment**

The creation of a municipal entity / RED can enable differentiation of terms and conditions of employment depending on the industry context and strategic objectives. In efforts to treat employees consistently and fairly, it will be necessary to examine the terms and conditions of employment that employees enjoy and highlight the keys areas for potential change. Once the status quo is understood, it is will be necessary to develop a strategy for standardising and amending such policies, procedures and terms & conditions of employment.

It should be noted that not all policies and procedures can be standardised and due consideration will need to be given to the collective agreements that are in place, as well as relevant provisions of the Labour Relations Act.

### **6.2.6 Collective bargaining realignment**

In the event that municipal entities are established, the applicability of the current collective bargaining structures and arrangements will need to be investigated. Arising from this investigation, it may be necessary to establish processes for ensuring effective bargaining arrangements within the municipal entity itself. In addition, a comprehensive collective engagement plan should be developed in order to ensure that employee and union participation regarding issues of employee consequence are addressed.

### **6.2.7 Performance Management**

In order to heighten levels of service delivery, it is imperative that employees throughout the entity understand the strategy of the new organisation at a practical level. Employees should appreciate the role that they play in optimising service delivery to the community. This can occur through performance contracts for senior levels of management, as well as a through the development of a broader performance management system for the new organisation.

### **6.2.8 Skills Development**

A skills development strategy is imperative not only in terms of legislative compliance, but to assist the organisation in practically realising its vision for heightened and equitable service delivery, as well as becoming a best practice employer. The skills development strategy can be developed following the migration process and through the use of the new organisational strategy.

### **6.2.9 Employment Equity**

It is obvious that employment equity is a critical consideration for the new entity in its transformation plan. An employment equity process should be developed with the objective not only of submitting a report to the Department of Labour, but to ensure that employment equity is evident in the human resources practices throughout the organisation. Employment Equity should be an important consideration in the migration process as well as in any recruitment and selection initiatives.

## **7. Conclusion**

The above paper has sought to outline the key human resources and labour relations issues when transferring a business as a going concern. The paper has sought to demonstrate that:

- ❖ The process of transfer is regulated by a number of statutes including, but not limited to the Labour Relations Act and the Municipal Systems Act;
- ❖ The process of transfer can be further regulated through the existence of collective agreements at an industry level;
- ❖ An integrated HR strategy should be developed at the outset. The purpose of such a strategy would be to position the new entity to leverage the value of its human capital.
- ❖ A detailed LR strategy is critical to manage the transition, the process of transfer, migration and broader HR strategic projects.