
DRAFTING NOTE:

Please note that all highlighted items indicate instances where you will need to insert information relevant to your company. Be sure to read this agreement carefully and make amendments that suit your particular business requirements, bearing in mind the rights and obligations created when doing so. Take particular care to clause references as these may change as you amend the document. This MSA and its Schedules and Annexures need to be tailored to the service being provided. If you are unsure of such amendments, contact the Regulatory Council for guidance. We recommend that you have the MSA and its Annexures vetted by a legal representative. (And remember to remove this drafting note from your final version of the Agreement.)

[TEMPLATE]

MASTER SERVICES AGREEMENT

BETWEEN

[YOUR COMPANY]

REGISTRATION NUMBER

(SERVICE PROVIDER)

AND

CLIENT NAME

REGISTRATION NUMBER

(CLIENT)

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WHEREBY THE PARTIES AGREE AS FOLLOWS –

1. INTERPRETATION

In this Agreement (as hereinafter defined) –

- 1.1. clause headings are for convenience and are not to be used in the interpretation of this Agreement in which such headings appear;
- 1.2. no provision shall be construed against or interpreted to the disadvantage of any Party by reason of such Party having or being deemed to have structured or drafted such provision; and
- 1.3. unless the context indicates a contrary intention, an expression which denotes –
 - 1.3.1. any gender includes the other genders;
 - 1.3.2. the singular includes the plural and vice versa;
- 1.4. the words “clause” or “clauses” and “Annexure” or “Annexures” refer to clauses of and Annexures to the Contract Documents;
- 1.5. a “person” includes a natural person or juristic person, corporate or unincorporated body (whether or not having a separate legal personality);
- 1.6. any reference to “days” shall be construed as being a reference to calendar days unless qualified by the word “business” in which instance a “business day” shall be any day other than a Saturday, Sunday and/or a public holiday as gazetted by the government of the Republic of South Africa from time to time;
- 1.7. any reference to “business hours” shall be construed as being the hours between 08h00 and 17h00 on any business day. Any reference to time shall be based upon South African standard time being Greenwich Meantime plus 2 (two) hours;
- 1.8. the words “include”, “includes”, “including” or “in particular” means “include without limitation”, “includes without limitation”, and “including without limitation”. The use of the word “including” followed by a specific example/s shall not be construed as limiting the meaning of the general wording preceding it;
- 1.9. “Writing” or “written” includes email;

- 1.10. any substantive provision, conferring rights or imposing obligations on a Party and appearing in any of the definitions in clause 2 or elsewhere within the Contract Documents, shall be given effect to as if it were a substantive provision within the body of the Contract Documents;
- 1.11. defined terms, appearing in the Contract Documents in title case shall be given their meaning as defined, unless the context otherwise indicates;
- 1.12. terms other than those defined in the Contract Documents and defined terms appearing in the Contract Documents in lower case shall be given their plain English meaning (which in the case of defined terms appearing in lower case shall include the term as defined);
- 1.13. a reference to any statutory enactment shall be construed as a reference to that South African enactment as to the date of signature of this Agreement, as amended or substituted from time to time and includes all regulations to such enactment;
- 1.14. unless specifically otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a Saturday, Sunday or public holiday, the next succeeding business day;
- 1.15. in the event that the day for payment of any amount due in terms of this Agreement should fall on a day which is not a Business Day, the relevant day for payment shall be the subsequent Business Day;
- 1.16. in the event that the day for performance of any obligation to be performed in terms of this Agreement should fall on a day which is not a Business Day, the relevant day for performance shall be the subsequent Business Day;
- 1.17. where figures are referred to in numerals and in words, and there is any conflict between the two, the words shall prevail, unless the context indicates a contrary intention; and
- 1.18. any reference in this Agreement to a Party shall, if such Party is liquidated or sequestrated be applicable also to and binding upon that Party's liquidator or trustee, as the case may be.
- 1.19. Unless inconsistent with the context or save where the contrary is expressly indicated:
 - 1.19.1. each Accepted Estimate and each Annexure shall be construed and interpreted in accordance with the provisions of this Agreement and in the event of a conflict between an Accepted Estimate and this Agreement (with the exception of any conflict contemplated in clause 7), the provisions of this Agreement shall prevail.

2. DEFINITIONS

As used in the Contract Documents the following words bear the following meanings –

- 2.1 **“Accepted Estimate”** means an Estimate accepted by the Client in accordance with clause 7 (Estimates);
- 2.2 **“Agreement”** means this Master Services Agreement together with any Annexures and/or Schedules and each Accepted Estimate hereto;
- 2.3 **“Annexure”** means any annexure to this Agreement;
- 2.4 **“Business Day”** means any day other than a Saturday, Sunday or official public holiday in South Africa;
- 2.5 **“Client Representative”** means such person as the Client may notify Service Provider in writing from time to time or, in the absence of any such notification, a representative of the Client that Service Provider customarily deals with in the providing the Services in the ordinary course;
- 2.6 **“Commencement Date”** means, unless otherwise agreed between the Parties, the date of signature of this Agreement by the Party last in time to do so;
- 2.7 **“Confidential Information”** means any information or data of any nature, tangible or intangible, oral or in writing and in any format or medium, which by its nature or content is or ought reasonably to be identifiable as confidential and/or proprietary to the Disclosing Party or which is provided or disclosed in confidence, and which the Disclosing Party or any person acting on behalf of the Disclosing Party may disclose or provide to the Receiving Party or which may come to the knowledge of the Receiving Party by whatsoever means. Without limitation, the Confidential Information of the Disclosing Party shall include the following even if it is not marked as being “confidential”, “restricted” or “proprietary” (or any similar designation) –
- 2.7.1 information relating to the Disclosing Party’s business activities, business relationships, products, services, processes, data, and Staff, including agreements to which the Disclosing Party is a party;
- 2.7.2 the Disclosing Party’s technical, scientific, commercial, financial and market information, methodologies, formulae and trade secrets;

- 2.7.3 the Disclosing Party's architectural information, demonstrations, plans, designs, drawings, processes, process maps, functional and technical requirements and specifications, and the data relating thereto;
- 2.7.4 Intellectual Property that is proprietary to the Disclosing Party or that is proprietary to a third party, including but not limited to Third Party Products and data relating to the Clients of the Disclosing Party; and
- 2.7.5 where the Disclosing Party is the Client, demographic and other data relating to any Staff or potential Staff of the Client, which data may be disclosed to the Service Provider by the Client in order for the Service Provider to perform the Services for the Client in terms of this Agreement.
- Confidential Information excludes information of data which –
- 2.7.6 is lawfully in the public domain at the time of disclosure thereof to the Receiving Party; or
- 2.7.7 subsequently becomes lawfully part of the public domain by publication or otherwise; or
- 2.7.8 is or becomes available to the Receiving Party from a source other than the Disclosing Party which is lawfully entitled without any restriction on disclosure to disclose such Confidential Information to the Receiving Party; or
- 2.7.9 is disclosed pursuant to a requirement or request by operation of law, regulation or court order but then only to the extent so disclosed and then only in the specific instance and under the specific circumstances in which it is obliged to be disclosed;
- provided that –the onus shall at all times rest on the Receiving Party to establish that such information falls within such exclusions; and
- the information disclosed will not be deemed to be within the foregoing exclusions merely because such information is embraced by more general information in the public domain or in a Party's possession; and any combination of features will not be deemed to be within the foregoing exclusions merely because individual features are in the public domain or in a Party's possession, but only if the combination itself is in the public domain or in a Party's possession; and
- the determination of whether information is Confidential Information shall not be affected by whether or not such information is subject to, or protected by, common law or statute related to copyright, patent, trademarks or otherwise;

- 2.8 **"Contract Documents"** means this Agreement and all Annexures executed under this Agreement, as each may be amended from time to time and shall be interpreted and construed accordingly;
- 2.9 **"Client Intellectual Property"** means all Intellectual Property owned by the Client;
- 2.10 **"Data Subjects"** means the Client's Affiliates, Clients, Staff and any other Person/s to whom Personal Information relates, as applicable;
- 2.11 **"Deliverables"** means any designs, Software, programs, creative work, copy, documents, data or other materials developed by Service Provider expressly, specifically and exclusively at the request and instance of the Client in terms of an Accepted Estimate and which, for the avoidance of doubt, excludes all Service Provider Proprietary Material;
- 2.12 **"Designated Representatives"** means any director or any senior manager of the Client or the Service Provider, as the case may be, or alternates appointed by them;
- 2.13 **"Electronic Communications Network"** means any system of electronic communications facilities (excluding subscriber equipment), including satellite systems, fixed systems (circuit and packed switched), mobile systems, fibre optic cables (undersea and land-based), electricity cable systems (to the extent used for electronic communications services) and other transmission systems, used for conveyance of electronic communications;
- 2.14 **"Estimate"** means a quotation, proposal or cost Estimate issued by Service Providers to the Client in respect of Services to be provided and/or Deliverables to be delivered;
- 2.15 **"Intellectual Property"** means all patents, rights to inventions, copyright and related rights, all other rights in the nature of copyright, trademarks, trade names and domain names, business names, logos, service marks, moral rights, know-how, business methods and trade secrets, rights in get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in design, database rights and any other Intellectual Property Rights (including but not limited to moral rights), in each case whether registered or unregistered and including all applications (and rights to apply) for, and renewals, extensions or revivals of, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist, now or in the future and in any part of the world (and **"Intellectual Property Rights"** means any ownership, license or associated rights relating to Intellectual Property);
- 2.16 **"Key Service Provider Staff"** means the Key Service Provider Staff identified as such in an Annexure;

- 2.17 **“Losses”** means all losses, liabilities, costs, expenses, fines, penalties, damage, damages and claims, and all related costs and expenses (including legal fees on the scale as between attorney and own client, tracing and collection charges, costs of investigation, interest and penalties);
- 2.18 **“Material”** means all reports, documentation, information, data, software or inventions in material form, irrespective of the media on which they occur, and includes, without limiting the generality thereof, all written and printed material, all micro-graphic and other reproductions of the written word, depiction and pictorial material, and all audio-visual, machine-readable and other information;
- 2.19 **“Operator”** means a Person who processes Personal Information for the Responsible Party in terms of a contract or mandate, without coming under the direct authority of the Responsible Party;
- 2.20 **“the Parties”** means the parties to this Agreement, being –
- 2.20.1 “the Client” being, [insert], Registration Number together with its successors in title and assigns of [address insert] which address it hereby selects as its *domicilia citandi et executandi* for the purposes of clause 22 and postal address [insert] and facsimile [insert] which foregoing 3 (three) addresses it hereby selects as addresses for the purposes of receiving notices as contemplated in clause 22; and herein represented by [INSERT REPRESENTATIVES NAME], who warrants that he/she is duly authorised to do so; and who is also the Responsible Party;
- 2.20.2 **“the Service Provider”** being [insert], Registration Number together with its successors in title and assigns of [address insert] which address it hereby selects as its *domicilia citandi et executandi* for the purposes of clause 22 and postal address [insert] and facsimile [insert] which foregoing 3 (three) addresses it hereby selects as addresses for the purposes of receiving notices as contemplated in clause 22; and herein represented by [INSERT REPRESENTATIVES NAME], who warrants that he/she is duly authorised to do so; and that may be fulfilling functions as an Operator;
- 2.21 **“the Disclosing Party”** being either of the Parties referred to in clauses 2.20.1 and 2.20.2 whose Confidential Information is disclosed, or either of the Parties referred to in clauses 2.20.1 and 2.20.2 disclosing Personal Information relating to Data Subjects, as determined by the context;
- 2.22 **“the Receiving Party”** being the Party, other than the Disclosing Party, that receives disclosure of any of the Confidential Information or Personal Information relating to Data Subjects, as determined by the context;

- 2.23 **"the Indemnitor"** being either Party of the Parties referred to in clauses 2.20.1 and 2.20.2 that indemnifies the other; and
- 2.24 **"the Indemnitee"** being the Party, other than the Indemnitor, that relies upon the indemnity of the Indemnitor;
- 2.25 **"Person"** means an identifiable natural or existing juristic person or any other person who is not a natural or juristic person;
- 2.26 **"Personal Information"** means information relating to any Person, as defined in Section 1 of the Protection of Personal Information Act 4 of 2013;
- 2.27 **"Premises"** means any Client or Service Provider premises where the Services shall be carried out by the Service Provider;
- 2.28 **"Prescribed Rate"** means the rate of interest charged from time to time by Standard Bank of South Africa Limited on its prime overdraft facilities plus 3% (three percent);
- 2.29 **"Processing"** means any operation or activity or any set of operations, whether or not by automatic means, concerning Personal Information, as defined in Section 1 of the Protection of Personal Information Act 4 of 2013;
- 2.30 **"Regulator"** means the appropriate Regulator as defined in applicable Personal Information protection legislation;
- 2.31 **"Reimbursable Expenses"** means out-of-pocket expenses actually and reasonably incurred by the Service Provider in performing its obligations under the Contract Documents, including courier, telephone charges, travel and living expenses for Staff, and charges for any non-routine expenses required under this Agreement and as approved by the Client;
- 2.32 **"Responsible Party"** means the person who, alone or in conjunction with others, determines the purpose of and means for processing Personal Information, and who is also the Client;
- 2.33 **"Schedules"** means the Schedules to this Agreement;
- 2.34 **"Services"** means the services that the Service Provider undertakes to perform for the Client as set out in this Agreement incorporating the Annexures as and when executed by the Parties;
- 2.35 **"Service Annexure"** means the document executed by the Parties in terms of this Agreement, specifying the Services to be provided by the Service Provider to the Client and shall form part of this Agreement as and when executed by the Parties as Annexures to this Agreement;

- 2.36 **"Service Levels"** means the qualitative performance metrics for the Services contained in the relevant Annexure;
- 2.37 **"Staff"** means permanent, fixed term and temporary employees as well as sub-contractors, independent contractors of the Supplier and/or Client, as applicable;
- 2.38 **"Termination / Expiration Assistance"** means the provision by the Service Provider of all reasonable information and assistance to the Client to enable the Client or a third party designated by the Client to take over the Service Provider's obligations under this Agreement in the event of termination or expiration of this Agreement as provided for in clauses 18, 19 and 21;
- 2.39 **"Trigger Event"** means (i) any termination of this Agreement by the Client under clauses 18 or 21 of this Agreement; or (ii) a Causal Event;
- 2.40 **"Service Provider Intellectual Property"** means any and all Intellectual Property owned by the Service Provider;
- 2.41 **"VAT"** means Value-Added Tax at the rate prescribed from time to time.

3 RECORDAL

- 3.1 The Client requires the Services: The Client represents that it requires the specialist expertise and knowledge of the Service Provider to perform the Services as set out in this Agreement.
- 3.2 Service Provider can provide the Services: The Service Provider represents that it has the necessary expertise, skill, training, know-how, qualifications, professional registrations, resources and systems, and ability to undertake the Services as set out in this Agreement.

4 APPOINTMENT

- 4.1 The Client hereby appoints the Service Provider, and the Service Provider hereby accepts such appointment, to perform the Services for the Client, upon the terms and conditions contained herein.

5 COMMENCEMENT AND DURATION

- 5.1 This Agreement shall commence on the Commencement Date and continue indefinitely, unless terminated by either Party in accordance with this Agreement.

6 SERVICES ANNEXURE

- 6.1 Each Service Annexure shall include the following details, which shall be applicable to that Service Annexure only –
- 6.1.1 Service definitions and descriptions, as applicable to ascertain the Service Provider's responsibilities and the criteria for fulfilment of the Services; and
 - 6.1.2 The Service Levels and remedies for failure to adhere to such Service Levels as agreed to between the Parties pertaining to the relevant Services.
 - 6.1.3 if applicable, the Premises at which the Services shall be performed on behalf of the Client and the use thereof;
 - 6.1.4 the approaches/or methodology that will be utilised by the Service Provider, as applicable;
 - 6.1.5 the Service Provider's Intellectual Property used in the delivery of the Services and the terms of use;
 - 6.1.6 the Service Provider's Key Staff and other resources used to provide the Services;
 - 6.1.7 the commencement date and relevant timelines for completion of the relevant Services;
 - 6.1.8 the names and contact details of the Representatives of the Client and the Service Provider in respect of such Service Annexure;
 - 6.1.9 the Fees payable by the Client to the Service Provider in respect of the Services;
- 6.2 The Services Annexure may amend the terms and conditions of this Agreement only with respect to the subject matter of such Service Annexure. For the avoidance of doubt it is recorded that, the terms of one Service Annexure shall not apply to any other Service Annexure. Amendments to this Agreement (and consequently all Service Annexures) of general application shall be dealt with in accordance with clause 23.7.

7 FEES, PAYMENT AND ESTIMATES

- 7.1 The fees and charges applicable to performing the Services under an Annexure shall be as stated in such Service Annexure.
- 7.2 Unless otherwise specified, all fees and expenses set out in the Service Annexures are exclusive of Value Added Tax.
- 7.3 Unless otherwise agreed in writing, invoices shall be rendered in arrears and payment of the Service Provider's invoices shall be made by the Client within 30 (thirty) days of receipt.
- 7.4 The Client shall stipulate immediately, on request, any invoicing requests, procedures or standards applicable to any Fees levied by the Service Provider.
- 7.5 The Client shall maintain complete and accurate records of all amounts billed to and payments made by the Client to the Service Provider in accordance with generally accepted accounting principles applied on a consistent basis.
- 7.6 Any undisputed amount payable by the Client to the Service Provider shall bear interest at a rate equal to that of the Repo Rate from due date to date of actual payment, both days inclusive
- 7.7 Where the Client requests the Service Provider to provide an estimate in respect of any additional Services, the Service Provider shall furnish the Client with a detailed written estimate upon which shall be stated the additional Fees payable for such Services and the details as to the date until which such estimate shall be open for acceptance by the Client. In the absence of the Parties' specific written agreement to the contrary, it is the intention of the Parties that Services Annexure(s) will be concluded in respect of any accepted additional estimate and that the terms and conditions of this Agreement read together with such Service Annexure(s) will govern such arising additional contractual relationship between the Parties.
- 7.8 The Client agrees that any and all third party media costs and expenses relating to the Services and/or Deliverables shall be payable in advance upon receipt by the Client of each relevant invoice issued by Service Provider;

8 SERVICE LEVELS

- 8.1 The Service Provider shall execute the Services in a professional and ethical manner in accordance with the practices and professional standards in performing services similar to the Services.
- 8.2 Each Service Annexure shall contain any additional Service Levels as may be required and the remedies available to the Client for failure to adhere to the Service Levels.
- 8.3 The Service Provider shall be excused from failing to comply with the Service Levels to the extent that non-performance or delayed performance is caused by –
 - 8.3.1 the Client or the Client's Staff; or
 - 8.3.2 third parties; or
 - 8.3.3 an instance of force majeure as referred to in clause 21 of this Agreement.

9 THIRD PARTY SERVICES

- 9.1 The Service Provider may from time to time appoint and/or sub-contract third parties to perform Services or provide Deliverables (in part or in full) provided that Service Provider shall remain primarily responsible to the Client for the performance and provision of such Services and/or Deliverables.
- 9.2 Service Provider shall use due care and skill in selection and appointment of third parties in accordance with clause 9.1.

10 CHANGE CONTROL

- 10.1 If either Party wishes to change the scope or execution of the Services or Deliverables, it shall submit details of the requested change to the other in writing.
- 10.2 If either Party requests a change to the scope or execution of the Services and/or Deliverables, Service Provider shall, within a reasonable time, provide a written Estimate to the Client of:
 - 10.2.1 the likely time required to implement the change;
 - 10.2.2 any necessary variations to Service Provider's charges arising from the change;
 - 10.2.3 the likely effect of the change on the scope, execution, milestones and/or other issues relating to the Services and/or Deliverables; and

10.2.4 any other impact of the change on this Agreement.

10.3 If the Client wishes Service Provider to proceed with the change, Service Provider shall have no obligation to do so unless and until the Parties have agreed the necessary variations to its charges, the Services and/or the Deliverables and any other relevant terms of this Agreement to take account of the change and this Agreement has been varied in accordance with clause 10.2.

10.4 Notwithstanding clause 10.3, Service Provider may, from time to time and without notice, change the Services and/or the Deliverables in order to comply with any applicable safety or statutory requirements, provided that such changes do not materially affect the nature, scope of, or the charges for the Services and/or the Deliverables. If Service Provider requests a change to the scope, cost or execution of the Services and/or the Deliverables for any other reason, the Client shall not unreasonably withhold or delay consent to it.

11 OBLIGATIONS OF THE CLIENT

11.1 The Client shall provide the Service Provider with the resources, information, Material and direction required by the Service Provider to perform the Services.

11.2 The Client acknowledges and agrees that it has material obligations crucial to the performance of the Services by the Service Provider in accordance with the Service Levels and that its failure to perform any of its responsibilities may cause delays to the milestones of the Service Provider and/or place limitations on the Service Provider's ability to perform the Services. In accordance, the Client will use reasonable efforts to fulfil these responsibilities in a timely, diligent and courteous manner.

11.3 The Client shall be accountable for any use of the Services or Service Provider's Intellectual Property in connection with this Agreement including Use by Client's Staff. Notwithstanding that the Service Provider shall have the right to directly enforce any enforce the User Agreement against any User, the Client acknowledges and agrees that any act or omission by a Staff User shall be deemed a breach of this Agreement by the Client.

12 INTELLECTUAL PROPERTY RIGHTS

12.1 The Client retains all right, title and interest in and to the Client Intellectual Property.

- 12.2 The Service Provider retains all right, title and interest in and to the Service Provider Intellectual Property including the Intellectual Property specifically described in the relevant Service Annexure(s).
- 12.3 There are no implied licences granted to the Client and any rights not expressly granted are reserved by the Service Provider or its third party suppliers.
- 12.4 The Client shall not use, modify, delete, access or otherwise interfere with any Service Provider Intellectual Property except as expressly authorised in writing.
- 12.5 The Service Provider shall not use any third party Intellectual Property to provide the Services to the Client in an unauthorised manner.

13 PROTECTION OF PERSONAL INFORMATION

- 13.1 The Service Provider acknowledges that in providing the Services, it may have access to Personal Information relating to the Data Subjects. Accordingly, the Service Provider shall treat the Personal Information as strictly confidential in accordance with the provisions of clause 14.
- 13.2 The Client shall -
 - 13.2.1 ensure that all access and processing of the Personal Information by the Service Provider are in accordance with appropriate and legally binding consents from data subjects in relation to such access or processing of the Personal Information;
 - 13.2.2 take appropriate, reasonable technical and organisational measures to ensure that the integrity and accuracy of the Personal Information used in the Platform or otherwise made available to the Service Provider and ensure that such Personal Information is protected against unauthorised or unlawful processing, accidental loss, destruction or damage, alteration, disclosure or access;
 - 13.2.3 delete Personal Information that is no longer lawfully retained by the Client;
 - 13.2.4 comply with all applicable laws, regulations and best practices concerning data protection and privacy; and
 - 13.2.5 implement and maintain appropriate safeguards against the risks to the Personal Information identified by the Service Provider.

13.3 In the event that cross border transfer of personal information is required in the course of the performance of the Services, the Client hereby consent to the transfer and agrees that it has the consent of the data subjects to consent to such transfers.

13.4 In the course of use of the Services and the Service Provider's Intellectual Property, should the Client have access to Personal Information of data subjects that are not their Staff use such Information only as reasonably necessary in accordance with the purposes of this Agreement and the User Agreement including refraining from sending unsolicited communications to such persons.

14 CONFIDENTIALITY

14.1 **Acknowledgement of importance of Confidential information:** The Receiving Party acknowledges the great importance of the Confidential Information to the Disclosing Party and, where applicable, third party proprietors of such information, and recognises that the Disclosing Party and/or third party proprietors may suffer irreparable harm or loss in the event of such information being disclosed or used otherwise than in accordance with this Agreement.

14.2 **Receiving Party's undertaking:** The Receiving Party agrees and undertakes –

14.2.1 **No publication of Confidential Information:** Except as permitted by this Agreement, not to disclose or publish any Confidential Information in any manner for any reason or purpose whatsoever without the prior written consent of the Disclosing Party and provided that in the event of the Confidential Information being proprietary to a third party, it shall also be incumbent on the Receiving Party to obtain the consent of such third party;

14.2.2 **No exploitation of Confidential Information:** Except as permitted by this Agreement, not to utilise, employ, exploit or in any other manner whatsoever use the Confidential Information for any purpose whatsoever without the prior written consent of the Disclosing Party and provided that in the event of the Confidential Information being proprietary to a third party, it shall also be incumbent on the Receiving Party to obtain the consent of such third party;

14.2.3 **Restricting dissemination of Confidential Information:** To restrict the dissemination of the Confidential Information to only those of its Staff who are actively involved in activities for which use of Confidential Information is authorised and then only on a "need to know" basis and the

Receiving Party shall initiate, maintain and monitor internal security procedures reasonably acceptable to the Disclosing Party to prevent unauthorised disclosure by its Staff; and

- 14.2.4 **Obligations with regard to Staff:** To take all practical steps, both before and after disclosure, to impress upon its Staff who are given access to Confidential Information the secret and confidential nature thereof.
- 14.3 **Further acknowledgements:** All Confidential Information disclosed by the Disclosing Party to the Receiving Party or which otherwise comes to the knowledge of the Receiving Party, is acknowledged by the Receiving Party –
- 14.3.1 Confidential Information is proprietary: to be proprietary to the Disclosing Party or where applicable, the relevant third party proprietor; and
- 14.3.2 Disclosure does not confer rights: not to confer any rights of whatsoever nature in such Confidential Information on the Receiving Party.
- 14.4 **Standard of care:** The Receiving Party shall protect the Confidential Information in the manner, and with the endeavour, of a reasonable person protecting his/her own Confidential Information. In no event shall the Receiving Party use less than reasonable efforts to protect the confidentiality of the Confidential Information.
- 14.5 **Return of Confidential Information:** The Disclosing Party may at any time on written request to the Receiving Party, require that the Receiving Party immediately return to the Disclosing Party any Confidential Information and may, in addition, require that the Receiving Party furnish a written statement to the effect that upon such return, it has not retained in its possession or under its control, whether directly or indirectly, any such Confidential Information or material. Alternatively, the Receiving Party shall, as and when required by the Disclosing Party on written request to the Receiving Party, destroy all such Confidential Information and material and furnish the Disclosing Party with a written statement to the effect that the same has been destroyed. The Receiving Party shall comply with any request in terms of this clause 14.5 with 7 (seven) days of receipt of such request.
- 14.6 **Retention of Confidential Information:** The Service Provider may retain Confidential Information to the extent required by, and for the duration of, any Services performed for the Client in terms of agreements between the Parties, provided that the Client has not waived performance of such

Services and subject to the right of the Client to recover the Confidential Information at any time in terms of clause 14.5.

14.7 **Procure undertakings from Staff:** The Service Provider shall procure that the Service Provider's Staff who have access to Confidential Information, shall have signed a written undertaking in regard to the Confidential Information on substantially the same terms and conditions contained within this Agreement.

14.8 **Exceptions to this clause 14:** The Parties record that this clause 14 shall not be applicable where the Receiving Party discloses Confidential Information to attorneys or auditors, provided that such disclosure is reasonably required by the Receiving Party for the purposes of conducting its business activities.

Disclosure required by law, regulation or court order: In the event that the Receiving Party is required to disclose the Confidential Information, the Receiving Party –

will advise the Client and the Disclosing Party thereof prior to disclosure, if possible;

will take such steps to limit the extent of the disclosure to the extent that it lawfully and reasonably practically can;

will afford the Client and the Disclosing Party a reasonable opportunity, if possible, to intervene in the proceedings; and

will comply with the Client's and the Disclosing Party's requests as to the manner and terms of any such disclosure.

14.9 **Residual knowledge:** Nothing contained in the Contract Documents will restrict either Party from the use of any generic ideas, concepts, know-how, or techniques developed or learned by such Party in the course of this Agreement, provided that in doing so such Party does not disclose Client Confidential Information to third parties or infringe the Intellectual Property rights of the other Party or third parties who have licensed or provided materials to the other Party.

14.10 **Obligations in terms of this clause:** The obligations of the Receiving Party with respect to each item of Confidential Information shall endure for an indefinite period from receipt of that item of Confidential Information. The obligations referred to in this clause 14 shall endure notwithstanding any termination of this Agreement, any other agreement entered into between the Parties or any discussions between the Parties.

15 SERVICE PROVIDER'S WARRANTIES

- 15.1 **General Warranties:** The Service Provider represents and warrants that it shall for the duration of this Agreement provide the Services in a workmanlike manner and in accordance with the practices, high professional and ethical standards.
- 15.2 **Intellectual Property warranties:** The Client represents and warrants that it shall (i) at all times perform its responsibilities under the Contract Documents in a manner that does not infringe, or constitute an infringement or misappropriation of, any Intellectual Property or other proprietary rights of the Service Provider or any third party.
- 15.3 **Regulatory Requirements:** The Client represents and warrants that it shall for the duration of this Agreement remain fully cognisant of and compliant with any relevant legislative or regulatory requirements and/or rulings or codes of practice of any competent authority or industry body that has jurisdiction over the provision of or is relevant to the Services under the Contract Documents. The Client shall promptly identify and notify the Service Provider of any relevant changes in law, legislative enactments and/or regulatory requirements and rulings or codes of any competent authority or industry body that may relate to or have an impact on the Service Provider's provision of the Services. The Service Provider and the Client shall co-operate to identify the impact of such changes on the provision of the Services by the Service Provider. The Client shall be responsible for any fines and penalties arising from any non-compliance with any law, legislative enactment or regulatory requirement, code or ruling of any competent authority or industry body relating to the Client's instructions to the Service Provider.

16 INDEMNITIES

- 16.1 **Reciprocal indemnity in respect of Confidential Information:** The Indemnitor hereby indemnifies and holds the Indemnitee harmless from any and all Losses arising from, or in connection with, any claim or action arising from the Indemnitor's breach of any obligation with respect to Confidential Information.

- 16.2 **Personal Information Indemnity:** The Client, as the Responsible Party hereby indemnifies and holds harmless the Service Provider and their respective staff, successors, cessionaries delegates and assigns, from any and all Losses arising from Personal Information breach claims by affected Data Subjects.

17 LIMITATION OF LIABILITY

- 17.1 **Direct damages:** The Parties agree that, in the event of a breach of any of the provisions of the Contract Documents, the defaulting Party shall be liable to the other Party for all Losses which constitute direct and/or general damages.
- 17.2 **Indirect damages:** The Parties agree that, in the event of a breach of any of the provisions of the Contract Documents, the defaulting Party shall not be liable to the other Party for any Losses which constitute indirect, special and/or consequential damages.

18 TERMINATION

- 18.1 **Breach:** If either Party commits a breach of a Contract Document and fails to remedy such breach within 30 (thirty) days of notice therefore from the other, the notifying Party shall be entitled, in addition to any other rights and remedies that it may have in terms of the Contract Documents or otherwise, to terminate this Agreement and/or any or all Service Annexures upon written notice to the other, without prejudice to any claims which such Party may have for damages against the other.
- 18.2 **Other grounds for termination with cause:** If (i) a Causal Event occurs in respect of either Party or (ii) the Client fails to adhere to any legal requirement or breaches any term or condition of any licence, authorisation or consent required for the provision of the Services and which failure or breach the Service Provider, in its sole discretion, considers to be detrimental to the Services for sound business reasons; then the Service Provider shall be entitled, but not obliged to, terminate this Agreement and/or any or all Service Annexures on written notice to the Client, in which event such termination shall be without any liability to the Service Provider and without prejudice to any claims which the Service Provider may have for damages against the Service Provider.

- 18.3 **Termination of Service Annexures:** For the avoidance of doubt, all Service Annexures will terminate as of the effective date of any termination of this Agreement.

19 TERMINATION FOR CONVENIENCE

- 19.1 Either Party may terminate this Agreement or any Service Annexures in whole or in part for convenience and without cause at any time by giving the other at least 90 (ninety) days prior written notice designating the termination date.

20 TERMINATION/EXPIRATION ASSISTANCE

- 20.1 **Service Provider's obligation to provide Termination/Expiration Assistance:** At expiration or termination of this Agreement and/or any or all Service Annexures or part thereof, the Service Provider shall, at the request of the Client, make itself available to provide Termination/Expiration Assistance. The Termination/Expiration Assistance to be provided by the Service Provider in the case of termination or expiration of an Annexure will include the Termination/Expiration Assistance described in such Service Annexure.
- 20.2 **Costs of Termination Assistance:** If this Agreement or any Service Annexure or part thereof expires, or if this Agreement or any Service Annexure or part thereof is terminated by the Client, Termination Assistance may be provided to the Client. The Service Provider shall be entitled to charge for such assistance. Service Provider will provide Client with a Statement of Work to cover Termination Assistance and Service Provider's then prevailing Services Rates will apply where Service Provider is entitled to charge for Termination Assistance.

21 FORCE MAJEURE

- 21.1 **No liability for force majeure:** No Party shall be liable to the other for any Losses which are a result of any default or delay in the performance of its obligations under the Contract Documents if and to the extent such default or delay is caused, directly or indirectly, by: fire, flood, earthquake, elements of nature or acts of God, riots, civil disorders, rebellions or revolutions in any country or any other cause

beyond the reasonable control of such Party; provided that: (i) the non-performing party is without fault in causing such default or delay; and (ii) such default or delay could not have been prevented by reasonable precautions; and (iii) such default or delay cannot reasonably be circumvented by the non-performing Party through the use of alternate sources or other means.

22 DISPUTE RESOLUTION

Any dispute arising from any of the Contract Documents shall be subject to the following dispute resolution procedures –

22.1 **Informal dispute resolution:** Prior to the initiation of formal dispute resolution procedures, the Parties shall first attempt to resolve their dispute informally as follows –

22.1.1 **Referral to joint committee:** Upon the written request of a Party, any dispute, which arises between the Parties relating to or arising out of the Contract Documents, including the validity, implementation, execution, interpretation, rectification, termination or cancellation of any of the Contract Documents, shall be referred to a joint committee of the Designated Representatives. The Designated Representatives shall meet as often as the Parties reasonably deem necessary in order to gather and furnish to the other all information with respect to the matter in issue which the Parties believe to be appropriate and germane in connection with its resolution. The Designated Representatives shall discuss the problem and attempt to resolve the dispute, without the necessity of any formal proceeding, within 14 (fourteen) days of the dispute having been referred. During the course of discussion, all reasonable requests made by one Party to another for non-privileged information, reasonably related to this Agreement, shall be honoured in order that each of the Parties may be fully advised of the other's position. The specific format for the discussions shall be left to the discretion of the Designated Representatives.

22.1.2 **Referral to formal proceedings:** Formal proceedings for the resolution of a dispute may not be commenced until the earlier of: (i) the Designated Representatives concluding in good faith that amicable resolution through continued negotiation of the matter does not appear likely; or (ii) the expiry of a period of 14 (fourteen) days after the initial written request referred to in clause

22.1.1 (this period shall be deemed to run notwithstanding any claim that the process described in clause 22.1.1.1 was not followed or completed).

22.2 **Informal dispute resolution does not reduce Parties' rights:** Proceedings in terms of this clause 21 shall not be construed to prevent a Party from instituting formal proceedings earlier to avoid the expiration of any applicable limitations period, or to preserve a superior position with respect to other creditors.

22.3 **Arbitration:** If the Parties are unable to resolve any dispute, then, such dispute shall on written demand by either Party to the dispute be submitted to arbitration at the Arbitration Foundation of Southern Africa, in Sandton and in accordance with the rules thereof by an arbitrator or arbitrators agreed on by the Parties or should the Parties fail to agree an arbitrator within 10 (ten) days after arbitration has been demanded, the arbitrator shall be nominated at the request of any Party to the dispute by the Arbitration Foundation of Southern Africa. The arbitration shall be held in the English language.

22.3.1 Commencement of arbitration: The following shall apply to the arbitration: (i) the Parties shall request that the arbitrator/s commence the arbitration within 21 (twenty one) days and proceed as if time is of the essence in the arbitration proceeding. The Parties shall request that the arbitrator render his or her decision within 14 (fourteen) days following the conclusion of the hearing. Recognising the express desire of the Parties for an expeditious means of dispute resolution, the arbitrator shall limit or allow the Parties to expand the scope of discovery as may be reasonable under the circumstances; (ii) the Parties undertake not to withhold their consent to join another party to the Arbitration; and (iii) the Parties irrevocably agree that the submission to arbitration is subject to the Parties' rights of appeal. Any Party may appeal the decision of the arbitrator within a period of 20 (twenty) days after the arbitrator's ruling has been handed down by giving written notice to that effect to the other Party to the arbitration. The appeal shall be dealt with in accordance with the rules of the Arbitration Foundation of Southern Africa by a panel of 3 (three) arbitrators appointed by the Arbitration Foundation of Southern Africa.

22.3.2 Status of arbitration ruling: The decision of the arbitrator shall be binding on the Parties to the arbitration after the expiry of the period of 20 (twenty) days from the date of the arbitrator's ruling if no appeal has been lodged by any Party or upon the issue of determination by the appeal

panel, as the case may be. A decision, which becomes final and binding in terms of this clause

21.3 may be made an order of court at the instance of any Party to the arbitration.

22.4 **Continued performance:** Each Party agrees to continue performing its obligations under the Contract Documents while any dispute is being resolved except to the extent the issue in dispute precludes performance (dispute over payment shall not be deemed to preclude performance).

22.5 **Rapid resolution of disputes:** The Parties shall use commercially reasonable efforts to resolve disputes arising under the Contract Documents as rapidly as possible.

22.6 **Excluded relief:** This clause 21 shall not preclude either Party from seeking urgent relief from the High Court of South Africa or any other competent organs of state created for the specific purpose of regulating the business or industry activities in which the Parties are engaged.

22.7 **Confidentiality of proceedings:** Any dispute resolution or arbitration process under this clause 22 shall be conducted in camera and the Parties shall treat as confidential and not disclose to any third party the existence of the dispute, details of the dispute, the conduct of the informal or formal dispute resolution proceedings or the outcome of the dispute resolution proceedings, without the written consent of the other Party provided that the Parties shall be entitled to disclose such information to such persons as are necessary to enable them to conduct their case.

23 NOTICES AND DOMICILIUM

23.1 Selection of addresses for receiving notices and selection of *domicilia*: The Parties hereto select the 3 (three) addresses appearing in clauses 2.20.1 and 2.20.2 respectively as addresses for the purposes of receiving notices as contemplated in this clause 23 and select as their respective *domicilia citandi et executandi* the physical addresses appearing therein. The addresses and/or facsimile numbers may be substituted by notice given as herein required.

23.2 Requirement for validity of notices: All notices, requests, demands, and determinations under the Contract Documents shall be valid and effective only if in writing and if delivered by hand, mail or facsimile. In this regard, a notice, request, demand and determination under the Contract Documents: (i) delivered by hand shall be deemed duly given when delivered by hand during business hours as evidenced by a receipt declaration by a member of the addressee's Staff or a

delivery declaration by a person authorised to deliver the notice, request, demand and determination by the addresser; (ii) delivered by mail shall be deemed duly given when mailed in a properly addressed envelope to the addressee's Designated Representative as stipulated in this Agreement, as the case may be, at the addressee's *domicilium* by registered mail, which delivery shall be evidenced by the registered mail receipt; and (iii) delivered by facsimile shall be deemed duly given when sent to the addressee's facsimile number set forth in clause 2.21, which delivery shall be evidenced by the sender's facsimile confirmation sheet. For the avoidance of doubt, notice shall be deemed to have been given upon receipt of such delivery confirmation whether or not such notice has actually been read.

23.3 Time of receipt of notices: Notices, requests, demands and determinations sent by facsimile and received prior to 13h00 on a business day shall be deemed duly given on such business day; notices, requests, demands and determinations sent by facsimile and received at other times shall be deemed duly given on the first business day following the date that such facsimile is received. A notice, request, demand and determination sent by mail shall be deemed to have been received 5 (five) days after posting if addressed within the Republic of South Africa to an address within the Republic of South Africa and 10 (ten) days after posting in all other instances.

23.4 Communication and notices: The Parties record that while they may correspond via email during the currency of this Agreement for routine operational reasons, no formal notice, demand or request required in terms of the Contract Documents may be given or concluded via email.

23.5 Persons authorised to give and receive notices: All notices relating to any Service Annexure shall be given by the sender's Designated Representative for that Service Annexure and addressed to the addressee's Designated Representative for that Service Annexure. All notices relating to this Agreement shall be given by the sender's Designated Representative as stipulated in this Agreement and addressed to the addressee's Designated Representative as stipulated in this Agreement. A notice given by or addressed to any Staff of either Party of equivalent status to those persons referred to in clause 23.4 shall be deemed to be given by or addressed to a Designated Representative as stipulated in this Agreement as the case may be. Any other purported notice shall be deemed void.

23.6 Notices actually received: Notwithstanding the foregoing, any notice given in writing, including one sent by data message, actually received by the Party to whom the notice is addressed, will be

deemed to have been properly given and received, notwithstanding that such notice has not been given in accordance with the provisions of this clause 22.

24 GENERAL

- 24.1 **No assignment without consent:** The Contract Documents shall be binding on the Parties hereto. Neither Party shall be entitled to assign or otherwise transfer the benefit or burden of all or any part of the Contract Documents without the prior written consent of the other Party.
- 24.2 **Non-solicitation:** Either Party shall not without the prior written consent of the other Party, either during, or within 6 (six) months after termination or expiration of this Agreement, directly solicit for employment, any person who, at any time during the duration of this Agreement, was a member of the other Party's Staff who was directly involved with any activity relating to the Contract Documents.
- 24.3 **Severability:** Should any of the terms and conditions of the Contract Documents be held to be invalid, unlawful or unenforceable, such terms and conditions shall be severable from the remaining terms and conditions which shall continue to be valid and enforceable. If any term or condition held to be invalid is capable of amendment to render it valid, the Parties agree to negotiate an amendment to remove the invalidity.
- 24.4 **Waiver:** No change, waiver or discharge of the terms and conditions of the Contract Documents shall be valid unless in writing and signed by an authorised representative of the Party against which such change, waiver or discharge is sought to be enforced, and any such change, waiver or discharge will be effective only in the specific instance and for the purpose given. No failure or delay on the part of either Party hereto in exercising any right, power or privilege under the Contract Documents will operate as a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.
- 24.5 **No withholding of consents:** Except where expressly provided as being in the sole discretion of a Party, where agreement, approval, acceptance, consent, or similar action by either Party is required under the Contract Documents, such action shall not be unreasonably delayed or withheld. An approval, acceptance, consent or similar action by a Party under the Contract Documents (including in respect of a plan or Deliverable) shall not relieve the other Party from responsibility for complying

with the requirements of the Contract Documents, nor shall it be construed as a waiver of any rights under the Contract Documents, except as and to the extent otherwise expressly provided in such approval, acceptance or consent.

24.6 **Governing law:** The Contract Documents will be governed by and construed in accordance with the law of the Republic of South Africa and all disputes, actions and other matters relating thereto will be determined in accordance with such law.

24.7 **Whole agreement and amendment:** The Contract Documents constitute the whole of the agreement between the Parties relating to the subject matter hereof and no amendment, alteration, addition, variation or consensual cancellation will be of any force or effect unless reduced to writing and signed by the Parties' Designated Representatives as defined in this Agreement or their duly authorised representatives. Any document executed by the Parties purporting to amend, substitute or revoke this Agreement or any Service Annexure or any part thereof, shall be titled an "Annexure" to the applicable Contract Document and assigned a sequential number to be included in the title. All such duly executed Annexures shall constitute Contract Documents.

24.8 **Counterparts:** This Agreement or an Annexure may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same Agreement or Service Annexure, as the case may be, as at the date of signature of the Party last signing one of the counterparts. The Parties undertake to take whatever steps may be necessary to ensure that each counterpart is duly signed by each of them without delay

24.9 **No collateral terms and conditions:** The Parties agree that there are no other collateral terms or conditions to these Contract Documents, whether oral or written.

24.10 **Order of precedence:** Notwithstanding anything else to the contrary as contained in this Agreement, in the event of a conflict between the documents comprising the Contract Documents, such conflict shall be resolved in accordance with the order of precedence (in descending order of priority) as follows (i) this Agreement; (ii) any Annexure to this Agreement that is not an Annexure; (iii) an Annexure; and (iv) any annexure to an Annexure.

24.11 **Relationship of parties:** The Parties warrant and acknowledge that the relationship between them is not in the nature of a partnership and that neither Party is in any manner entitled to make or enter into binding agreements of any nature on behalf of the other Party.

- 24.12 **Survival:** the expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this;
- 24.13 **Implementation and Covenant of good faith:** The Parties warrant to each other that they have taken or caused to be taken all steps, actions and corporate proceedings necessary to cause this Agreement to be binding on themselves. Either Party shall, if requested by the other Party, furnish to the latter sufficient evidence of the authority of the person or person who shall, on behalf of the Party so requested, take any action or execute any documents required or permitted to be taken or executed by such person under this Agreement. Each Party agrees that, in its respective dealings with the other Party under or in connection with the Contract Documents, it shall act in good faith.
- 24.14 **Costs:** Each Party shall bear and pay its own costs of or incidental to the drafting, preparation and execution of the Contract Documents.
- 24.15 **Third Party Rights:** No person who is not a Party to this Agreement shall have any right to enforce this Agreement (or any agreement or document entered into pursuant to this Agreement) or any rights under this Agreement.

SIGNED at _____ on _____

For and on behalf of
CLIENT LIMITED

Who warrants that he is duly authorised

Name:

Designation:

SIGNED at _____ on _____

For and on behalf of CLIENT

Who warrants that he is duly authorised

Name:

Designation:

SIGNED at _____ on _____

For and on behalf of SERVICE PROVIDER

Who warrants that he is duly authorised

Name:

Designation:

SERVICE ANNEXURE 1: Services Schedule

(to be inserted by Service Provider Financial Manager)

CLIENT/ SERVICE	Handover Date
» Name of specific service	
»	
»	

SERVICE ANNEXURE 2: Client Information

(to be inserted by Service Provider Financial Manager)

CLIENT DETAILS	
» Full Legal Name	
» Short Name/Trading Name	
» Country of Incorporation	
» Company Registration Number	
» Vat Registration Number	
» Entity Type (Limited Company, Sole proprietorship, etc)	
» Physical Address	
» Postal Address	
Authorised Client Representative	
» Name	
» Designation	
» Telephone Number	
» Email address	

SERVICE ANNEXURE 3: Retainer

1. Payment:

- 1.1. Where the Parties have agreed in an Accepted Estimate that Services will be provided by Service Provider on a Retainer basis, the Client shall (except to the extent otherwise agreed in the Accepted estimate) for the duration of the Retainer period effect payment thereof in equal monthly instalments, each such payment being due and payable in advance, commencing on the date on which the Services are to commence (the "Retainer"). The remaining provisions of clause 7 shall apply *mutatis mutandis* to all Retainer payments.
- 1.2. To the extent that the full value of any Retainer instalment is not applied by Service Provider in accordance with paragraph 2 below during the month to which the instalment relates, any balance thereof remaining shall be carried over by and credited to the Client for application by Service Provider in accordance with paragraph 2 below for no more than the 2 (two) months immediately following the month in which the remaining balance arose. For the avoidance of doubt, the Client shall not be entitled to any refund in respect of any Retainer instalments paid.

2. Application of Retainer

- 2.1. Service Provider shall be entitled to apply and log against the Retainer all fees, costs and other disbursements as set out in, and in accordance with, an Accepted Estimate.
- 2.2. In applying and logging of fees, costs and other expenses under an Accepted Estimate against the Retainer, Service Provider shall:
 - 2.2.1. Ensure that all fees, costs and other disbursements are properly recorded and, where costs are calculated hourly, that full timesheets are maintained;
 - 2.2.2. not log or apply against the Retainer any fees, costs and other disbursements that have not been agreed under the Accepted Estimate or by the Client in writing.

SERVICE ANNEXURE 4: Hosting

Contact EndCode for a Hosting Agreement if applicable to the MSA

SERVICE ANNEXURE 5: Software Supply, Development, Support and Maintenance

Contact EndCode for a Software Supply Agreement if applicable to the
MSA

SERVICE ANNEXURE 6: Key Service Provider Staff

NAME	DESIGNATION
1	
2	
3	
4	

SERVICE ANNEXURE 7: Fees and costs for services

SERVICES AND DELIVERABLES	TIMELINE	FEES	COSTS
» Planning			
» Consultation and Design			