

# CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

entered into between

**COMPANY NAME:** \_\_\_\_\_

**Registration Number:** \_\_\_\_\_

Herein represented by

**FULL NAME AND SURNAME:** \_\_\_\_\_

**Identity Number:** \_\_\_\_\_

(“hereinafter referred to as “\_\_\_\_\_”)

and

**COMPANY NAME:** \_\_\_\_\_

**Registration Number:** \_\_\_\_\_

Herein represented by

**FULL NAME AND SURNAME:** \_\_\_\_\_

**Identity Document:** \_\_\_\_\_

(hereinafter referred to as the “**Service Provider**”)

Collectively hereafter referred to as (the “Parties”)

**TABLE OF CONTENTS**

**1 PARTIES..... 3**

**2 BACKGROUND ..... 3**

**3 DEFINITIONS AND INTERPRETATION ..... 3**

**4 DURATION ..... 6**

**5 CONFIDENTIALITY ..... 6**

**6 STANDARD OF CARE ..... 8**

**7 RETURN OF INFORMATION ..... 8**

**8 EXCLUDED INFORMATION..... 8**

**9 LIABILITY ..... 9**

**10 BREACH..... 10**

**11 JURISDICTION ..... 10**

**12 *DOMICILIA CITANDI ET EXECUTANDI*..... 10**

**13 GENERAL PROVISIONS..... 12**

**14 APPLICABLE LAW ..... 133**

**15 REPRESENTATIONS AND WARRANTIES..... 143**

**16 STANDARD TERMS AND CONDITIONS ..... 14**

**17 ANTI-TRUST AND ANTI-COMPETITION BEHAVIOUR. .... 144**

**18 DATA PROTECTION..... 15**

## WHEREBY IT IS AGREED AS FOLLOWS

### 1 PARTIES

- 1.1 The Parties to this Agreement are:-
  - 1.1.1 \_\_\_\_\_; and
  - 1.1.2 The Service Provider.

### 2 BACKGROUND

- 2.1 The Parties are of the intention to engage each other in relation to services to be rendered or related to various projects (the "Project"). Before and during the possible Project, the Parties shall share Confidential Information.
- 2.2 The Parties wish that their relationship and the disclosure of such Confidential Information shared to be regulated by the terms of this Agreement.
- 2.3 Each Party represents that it is the owner of the Confidential Information or has been authorised to make the Confidential Information available to the other Party strictly on the terms as set out in this Agreement.

### 3 DEFINITIONS AND INTERPRETATION

#### 3.1 Definitions

In this Agreement, unless clearly inconsistent with or otherwise indicated by the context -

- 3.1.1 **Anti-Trust Legislation**" shall mean any and all national and international legislation, conventions, treaties, regulations and any other regulatory directives relating to antitrust and competition law including any policy, standard or procedure prescribed by \_\_\_\_\_, or its holding company, from time to time.
- 3.1.2 **"the/this Agreement"** means the agreement as set out in this document;
- 3.1.3 **"Confidential Information"** means, without limiting the generality of the term, any Party's technical, trade, commercial, financial, sales, marketing and management secrets and information, Personal Information, directly or indirectly obtained, including, but not limited to -
  - 3.1.3.1 any information in respect of operating know-how, processes, formulae, statistics,

systems, business methods and techniques used by a Party in the conduct of its business;

- 3.1.3.2 all trade secrets, know-how, ideas, formulations, sketches, photographs, plans, drawings, sample reports, models, studies, analyses, compilations, inventions, profiles, technical data, product development data, user consumer data, research development data, equipment, product or process specifications, designs, software, computer programs, concepts, exclusivity arrangements, methodologies and all other technical, mechanical computer and similar information, belonging to or in the possession of a Party and used by its business operations;
- 3.1.3.3 knowledge of details and particulars in regard to suppliers, clients and business associates;
- 3.1.3.4 a Party's method(s) of conducting business, management and source(s) of material;
- 3.1.3.5 the contractual, financial, management and supply arrangements between a Party and its clients, business associates, and suppliers;
- 3.1.3.6 names, addresses and requirements of clients of a Party (including potential clients of a Party with whom a Party has not yet entered into any formal contractual arrangement, but is negotiating a contract for purposes of doing business);
- 3.1.3.7 any and all information related directly or indirectly to the Project;
- 3.1.3.8 any other matter(s) which relates to the business of a Party in respect of which information is not readily available in the normal course of business to a competitor of a Party and which may come to the knowledge of the other Party.

For the purposes hereof, "*Confidential Information*" shall also include the Confidential Information of each of the subsidiary companies of any of the Parties which may come to the knowledge of the other Party.

- 3.1.4 "**Disclosing Party**" means any of the Parties disclosing Confidential Information to the other Party;
- 3.1.5 " \_\_\_\_\_ " shall mean \_\_\_\_\_ (Pty) Limited, a company duly registered in terms of the laws of South Africa with registration number \_\_\_\_\_, as amended, and shall include any subsidiary, affiliate or holding company of \_\_\_\_\_ (Pty) Limited.
- 3.1.6 "**Effective Date**" means the date upon which this Agreement is signed by the Party

doing so last in time;

- 3.2 **“Personal Data”** shall mean any information or an opinion about an identified Person, or who is reasonably identifiable, whether the information is true or not, or whether the information is recorded electronically or otherwise;
- 3.2.1 **“Person”** includes any natural or juristic person, association, business, close corporation, company, concern, enterprise, firm, partnership, joint venture, trust, undertaking, voluntary association, body corporate, the state or state owned enterprise and/or any other similar entity;
- 3.2.2 **“the Parties”** means \_\_\_\_\_ and the Service Provider and **“Party”** means either one of them as the context may indicate; and
- 3.2.3 **“Receiving Party”** means any of the Parties receiving Confidential Information from the other Party.
- 3.2.4 **“Service Provider”** shall mean \_\_\_\_\_ (Pty) Limited with registration number \_\_\_\_\_ a company duly incorporated and duly represented by \_\_\_\_\_ in his capacity as \_\_\_\_\_ who warrants that he is duly authorised.

### **3.3 Interpretation**

- 3.3.1 In this Agreement, unless clearly inconsistent with or otherwise indicated by the context:
- 3.3.1.1 any reference to the singular includes the plural and *vice versa*;
- 3.3.1.2 any reference to natural persons includes legal persons and *vice versa*; and
- 3.3.1.3 any reference to a gender includes the other genders.
- 3.3.2 Where appropriate, meanings ascribed to defined words and expressions in clause 3.1 shall impose substantive obligations on the Parties.
- 3.3.3 The clause headings in this Agreement have been inserted for convenience only and shall not be taken into account in its interpretation.
- 3.3.4 The use of the word "including" or "includes" followed by a specified example/examples

shall not be construed as limiting the meaning of the general wording preceding it and the *eiusdem generis* rule shall not be applied in the interpretation of such general wording or such specific examples.

3.3.5 The rule of construction that an agreement shall be interpreted against the Party responsible for the drafting or preparation of the agreement, shall not apply.

3.3.6 This Agreement shall be governed by and construed and interpreted in accordance with the laws of the Republic of South Africa.

#### **4 DURATION**

This Agreement shall commence on the Effective Date and shall terminate \_\_\_\_\_ years thereafter. It being recorded that the terms of this Agreement shall continue to bind the Parties whether or not a transaction are concluded between the Parties as envisaged in clause 2.1 hereof, and whether or not this Agreement terminates, it being agreed that one of the main reasons for the Parties wishing to obtain the undertakings set out in this Agreement is to prevent the disclosure or use by the other Party of the information obtained in the course of the discussions and the Confidential Information which may be disclosed to it therein in the event that any transactions, as per clause 2.1, are not concluded between the Parties.

#### **5 CONFIDENTIALITY**

5.1 Each Party hereby irrevocably agrees and undertakes in favour of the other Party and in order to protect the other Party's proprietary interests in and to the Confidential Information that it will: -

5.1.1 not, at any time, save in accordance with the provisions of this Agreement, divulge or disclose to any third party in any form or manner whatsoever and for any reason or any purpose whatsoever, either directly or indirectly, any of the Confidential Information without the prior written consent of the other Party;

5.1.2 not, at any time, use, exploit, permit the use of, employ, apply or in any other manner whatsoever, whether directly or indirectly, use the Confidential Information disclosed to it pursuant to the provisions of this Agreement for any purpose whatsoever other than for the purpose for which it was disclosed and otherwise than in accordance with the provisions of this Agreement, without the prior written consent of the other Party;

5.1.3 at all times maintain in secrecy any and all Confidential Information of the other Party which may be acquired by or disclosed to it;

- 5.1.4 not, directly or indirectly, at any time after the coming into force of this Agreement and irrespective of the termination of this Agreement for any cause at any time subsequent to the coming into force and effect of this Agreement: -
- 5.1.4.1 do or purport to do anything or assist any other person in doing anything which may or could impair, prejudice or interfere with the other Party's vested rights, title and interest in and pertaining to the Confidential Information;
  - 5.1.4.2 represent that a Party has any right, title or interest in and pertaining to the other Party's Confidential Information; and
  - 5.1.4.3 disclose to any publishing or news media (such as newspapers, magazines, trade publications, radio, internet websites, television and the like) any Confidential Information or any information of any nature whatever with regard to the products, services or activities of the other Party, which such Party has not already made known to the public at large, without the prior written consent of the other Party.
- 5.2 Unless the Parties otherwise agree to in writing, any documentation or records relating to either Party's Confidential Information which comes into the possession of the other Party during the existence of this Agreement or at any time thereafter: -
- 5.2.1 shall be deemed to form part of the Confidential Information of the Disclosing Party;
  - 5.2.2 shall be deemed to be the property of the Disclosing Party;
  - 5.2.3 shall not be copied, reproduced, published or circulated by the Receiving Party; and
  - 5.2.4 shall be surrendered to the Disclosing Party forthwith on request, and in any event on the termination of this Agreement, and the Receiving Party shall not retain any copies or précis thereof or extracts therefrom.
- 5.3 The Parties shall furnish the Confidential Information only to those employees, contractors, officers, agents, directors, representatives, associates, professional advisors and consultants of any Party on a strictly "need to know" basis.
- 5.4 The Parties will procure that any of those persons referred to in clause 5.3 to whom any Confidential Information in terms of this Agreement is disclosed, pursuant to the provisions of clause 5.3, are aware of, will comply with and be bound by the terms set out in this Agreement.
- 5.5 Subject to the provisions of clause 9.8, each Party hereby accepts liability for all acts of its employees, contractors, officers, agents, directors, representatives, associates, professional advisors and consultants who shall have access to the Confidential Information pursuant to the provisions of clause 5.3.

5.6 No representations or warranties are given by either Party to the other Party regarding the accuracy of the Confidential Information made available to the other Party pursuant to this Agreement.

## **6 STANDARD OF CARE**

Each Party agrees to protect the Confidential Information of the other Party using the same standard of care used to safeguard its own information of a confidential nature and that the Confidential Information shall be stored and handled in such a way as to prevent any unauthorised disclosure thereof. Should a Party become aware of any unauthorised copying, disclosure or use of confidential information, it shall immediately notify the other party thereof in writing and, without any way detracting from the Disclosing Party's rights and remedies in terms of this Agreement, take such steps as may be necessary to prevent a recurrence thereof.

## **7 RETURN OF INFORMATION**

7.1 Either Party may, at any time, request the other Party, in writing, to return any material containing, pertaining to or relating to Confidential Information belonging to it (including any material contained in any electronic retrieval system or database) and may, in addition, request the other Party to furnish a written statement to the effect that, upon such return, the other Party has not retained in its possession, or under its control, either directly or indirectly, any such material.

7.2 Alternatively, and at the request of the Disclosing Party, the Receiving Party shall destroy such material and furnish the Disclosing Party with a written statement to the effect that such material has been destroyed.

7.3 The Receiving Party shall comply with the request in terms of this clause 7, within 7 (seven) days of receipt of such a request.

## **8 EXCLUDED INFORMATION**

8.1 The confidentiality obligations set out in this Agreement shall not apply to any information which: -

8.1.1 the Receiving Party can demonstrate, is already in the public domain or becomes available to the public through no breach by the Receiving Party;

8.1.2 was rightfully in the Receiving Party's possession without obligation of confidence prior



- to receipt from the Disclosing Party as proven by its written records;
- 8.1.3 is independently developed by the Receiving Party as proven by its written records;
- 8.1.4 is disclosed to a third party pursuant to the prior written authorisation being obtained by the Receiving Party from the Disclosing Party; or
- 8.1.5 is disclosed by the Receiving Party to satisfy an order of a court of competent jurisdiction or to comply with the provisions of any law or regulations in force from time to time; provided that in these circumstances, the Receiving Party shall advise the Disclosing Party in writing prior to such disclosure to enable the Disclosing Party to take whatever steps it deems necessary to protect its interest in this regard; provided further that the Receiving Party will use its reasonable endeavours to protect the confidentiality of such information to the widest extent possible in the circumstances.

## **9 LIABILITY**

- 9.1 The Receiving Party recognises that the unauthorised disclosure or use of Confidential Information to or by a third party may cause damages or losses to the Disclosing Party.
- 9.2 Subject to the provisions of clause 9.8, the Receiving Party hereby indemnifies, defends and holds the Disclosing Party harmless against any claims, direct loss, liabilities, harm, damage or costs suffered or incurred by the Disclosing Party pursuant to a breach by the Receiving Party or any of the persons referred to in clause 5.3.
- 9.3 Each Party will use its best endeavours to assist the other Party in identifying and preventing any unauthorised or improper use or disclosure of the Disclosing Party's Confidential Information, and will promptly notify the Disclosing Party if it learns of or has reason to believe that any third party has violated or intends to violate the terms of this Agreement or any right to use granted pursuant to this Agreement.
- 9.4 Each Party will co-operate with the other Party in seeking injunctive or other equitable relief against any such third party: -
- 9.4.1 at the Receiving Party's own costs and expense, if such third party obtained such Confidential Information directly or indirectly from the Receiving Party; and
- 9.4.2 at the Disclosing Party's expense, if such third party obtained such Confidential Information from a source other than the Receiving Party.
- 9.5 For the avoidance of doubt, no provision of this Agreement should be construed in such a way that the Disclosing Party is deemed to have granted its consent to the Receiving Party to disclose the whole or any part of the Confidential Information in the

event that the Receiving Party receives a request, for the whole or any part of the Confidential Information in terms of the provisions of the Promotion to Access to Information Act, No. 2 of 2000, as amended (the “**Act**”).

9.6 In the event of either of the Parties receiving a request from a third party for the disclosure of and access to the Confidential Information of the other Party, such Party shall, in accordance with the provisions of section 65 of the Act, refuse to disclose and provide such third party with access to the Confidential Information requested.

9.7 The Parties acknowledge that the provisions of clause 9.6 shall not be construed in such a manner as to exclude the applicability of any other ground of refusal contained in the Act which may be applicable in the event that either Party receives a request for the whole or any part of the Confidential Information in terms of the Act.

9.8 Notwithstanding any provisions in this Agreement to the contrary, neither Party shall be liable to the other Party, whether in contract or in delict, for any indirect, special, consequential, punitive or incidental loss, claim or damage suffered or incurred by the other Party incidentally arising out of a breach of the provisions of this Agreement.

## **10 BREACH**

Should any Party (the “**Defaulting Party**”) commit a breach of any of the provisions of this Agreement, then the other Party (the “**Aggrieved Party**”) shall be entitled to, in addition to any other common law or statutory remedies it may have (including the right to claim damages suffered by the Aggrieved Party pursuant to such breach) bring an application in any court of competent jurisdiction, whether on an urgent basis or not, for the granting of an interdict against the Defaulting Party to prevent any further breach of the terms of this Agreement.

## **11 JURISDICTION**

The Parties hereby consent to and submit themselves to the jurisdiction of any court of competent jurisdiction in the Republic of South Africa to hear and adjudicate upon any claims, actions or legal proceedings of whatsoever nature arising out of or in relation to this Agreement.

## **12 DOMICILIA CITANDI ET EXECUTANDI**

12.1 The Parties hereby select as its *domicilium citandi et executandi* their respective physical addresses set out in this clause for all purposes arising out of or in connection

of this Agreement at which address all legal notices, processes and legal communications arising out of or connection with this Agreement, its breach or termination may validly be served upon or delivered to this Parties.

12.2 For all communications other than those as set out in clause 12.1 above, the Parties hereby select their respective postal addresses as set out in this clause for such purposes.

12.3 For the purpose of this Agreement the Parties respective addresses shall be as follows: -

12.3.1 Service Provider:

Physical address:

\_\_\_\_\_  
\_\_\_\_\_

E-mail address: \_\_\_\_\_

Postal address:

\_\_\_\_\_

12.3.2 Company name: \_\_\_\_\_

Physical Address:

\_\_\_\_\_  
\_\_\_\_\_

E-mail address: \_\_\_\_\_

Postal address:

\_\_\_\_\_

or at such other address, not being a *poste restante*, of which the Party concerned notifies the other Party in writing.

12.4 Any notice to be given or to be made for any purpose under this Agreement shall be in writing and shall -

12.4.1 if delivered by hand, be deemed to have been duly received by the addressee on the date of delivery; or

12.4.2 if posted by prepaid registered post, be deemed to have been received by the addressee on the 8<sup>th</sup> (eighth) day following the date of such posting; or

12.4.3 if transmitted by facsimile, be deemed to have been received by the addressee on the 1<sup>st</sup> (first) business day after dispatch.

12.5 Any of the Parties shall be entitled to change its respective *domicilium citandi et executandi* by giving 14 (fourteen) days' written notice thereof to the other Party, provided such address is a physical address within the Republic of South Africa.

12.6 The word "Agreement" and the number allocated to this Agreement shall be quoted by both Parties on all correspondence, notices or other documents of any description relating to this Agreement.

### **13 GENERAL PROVISIONS**

13.1 Nothing contained in this Agreement shall, whether by express grant, implication, estoppel or otherwise, create in either Party any right, title, interest or license in or to the Confidential Information of the other Party.

13.2 This Agreement constitutes the whole agreement between the Parties as to the subject matter hereof. No agreements (whether oral or written), representations or warranties between the Parties other than those set out herein are binding on the Parties.

13.3 This Agreement shall not be modified or amended, except in a written instrument executed by the Parties. For the purposes hereof, a "written document" shall exclude any written document that is in the form, either wholly or partly, of a data message as defined in the Electronic Communications and Transactions Act, 25 of 2002, and "signed" shall mean a signature executed by hand with a pen and without any electronic process or intervention.

13.4 No latitude, extension of time or other indulgence which may be given or allowed by one Party to the other Party in respect of the performance of any obligation hereunder or enforcement of any right arising from this Agreement and no single or partial exercise of any right by either Party shall under any circumstances be construed to be an implied consent by either Party or operate as a waiver or novation of, or otherwise affect any of the Parties rights in terms of or arising from this Agreement or estop either Party from enforcing, at any time and without notice, strict and punctual compliance with each and every provision or term hereof.

- 13.5 All provisions in this Agreement are, notwithstanding the manner in which they have been put together or linked grammatically, severable from each other. Any provision of this Agreement which is or becomes unenforceable in any jurisdiction, whether due to voidness, invalidity, illegality, unlawfulness or for any other reason whatsoever, shall, in such jurisdiction only and only to the extent that it is so unenforceable, be treated as *pro non scripto* and the remaining provisions of this Agreement shall be of full force and effect. The Parties declare that it is their intention that this Agreement would be executed without such unenforceable provisions if they were aware of such unenforceability at the time of its execution.
- 13.6 Neither Party shall be entitled to cede its rights and/or delegate its obligations under this Agreement, without the prior written consent of the other Party.
- 13.7 Any provision of this Agreement which contemplates performance or observance subsequent to any termination or expiration of this Agreement, shall survive any termination or expiration of this Agreement.
- 13.8 This Agreement may be signed in separate counterparts, each of which shall be deemed to be an original and all of which taken together shall constitute one and the same instrument. A counterpart of this Agreement in fax form shall be conclusive evidence of the original signature and shall be as effective in law as the counterparts in original form showing the original signatures.

#### **14 APPLICABLE LAW**

This Agreement will be governed by and construed in accordance with the laws of the Republic of South Africa and all disputes, action and other matters relating thereto will be determined in accordance with such law and the Parties hereby submit to the exclusive jurisdiction of the High Courts of South Africa, in any dispute arising from or in connection with this Agreement.

#### **15 REPRESENTATIONS AND WARRANTIES**

- 15.1 Each Party represents and warrants that it has the authority necessary to enter into this agreement and to do all things necessary to procure the fulfilment of its obligations in terms of this Agreement.
- 15.2 The Disclosing Party warrants that the disclosure of any information to the Receiving party:

- 15.2.1 will not result in a breach of any other agreement to which it is a party;
- 15.2.2 will not, to the best of its knowledge and belief, infringe the rights of any third party and the Disclosing Party hereby indemnifies and holds the Receiving party harmless against any liability for third party claims on such a basis;

## **16 STANDARD TERMS AND CONDITIONS**

- 16.1 Any clause in the Standard Terms and Conditions not mentioned in this Agreement shall form part of this Agreement, as if specifically incorporated herein, unless such is specifically excluded in the Agreement.
- 16.2 Notwithstanding clause 16.1, should there be any material inconsistency, which is mutually exclusive, between this Agreement and the Standard Terms of Conditions, then the provisions of this Agreement shall apply.

## **17 ANTI-TRUST AND ANTI-COMPETITION BEHAVIOUR.**

- 17.1 The Service Provider shall comply with Anti-Trust Legislation during and after this Agreement and shall not share the Confidential Information. The Service Provider shall ensure that \_\_\_\_\_(PTY) Limited shall not, due to any act or omission of the Service Provider, transgress any applicable Anti-Trust Legislation.
- 17.2 The Service Provider expressly warrants and guarantees that it is aware of any and all Anti-Trust Legislation in relation to the Confidential Information.
- 17.3 The Service Provider shall ensure that no information about competitors is shared, whether directly or indirectly, with \_\_\_\_\_(PTY) Limited or other \_\_\_\_\_ suppliers and that no information of \_\_\_\_\_ is shared with a competitor.
- 17.4 The Service Provider shall immediately inform \_\_\_\_\_ in writing of any potential or actual failure on its part to comply with the provisions of this clause 17.

## 18 DATA PROTECTION

### 18.1 Data Protection

18.1.1 The Service Provider Processes Personal Data by order of \_\_\_\_\_ during the execution of the Services. The Service Provider is responsible for the admissibility of the collection, processing and use of Personal Data. The Service Provider must on his part ensure that the pre-requisites under any data protection law and \_\_\_\_\_ (the company party to this NDA) policies are complied with.

18.1.2 The Service Provider shall only collect, process or use personal data for the purpose of the Services.

18.1.3 All Personal Data or other information shall remain the property of \_\_\_\_\_ and shall be returned to \_\_\_\_\_ (the company party to this NDA) upon the termination of this Agreement.

### 18.2 Data Security

18.2.1 The Service Provider shall take reasonable steps to ensure effective protection of Personal Data of \_\_\_\_\_ (the company party to this NDA) and other Persons against the access by unauthorized third parties. The Service Provider shall ensure compliance with any conditions placed on it by \_\_\_\_\_ (the company party to this NDA) or any policy of \_\_\_\_\_.

18.2.2 The Service Provider shall ensure that all Personal Data remain confidential and that its integrity is not compromised.

18.2.3 The Service Provider shall immediately inform \_\_\_\_\_ (the company party to this NDA) of any possible breach of Personal Data where there is a reasonable believe that access was obtained by an unauthorized third party.

SIGNED by the Parties on the following dates and at the following places respectively:

**SIGNED** at \_\_\_\_\_ on this the \_\_\_\_\_ **DAY** of \_\_\_\_\_

\_\_\_\_\_  
**For: THE COMPANY PARTY TO THIS NDA**

\_\_\_\_\_  
**Duly authorised hereto**

**Name (printed):** \_\_\_\_\_

**Designation:** \_\_\_\_\_

**SIGNED** at \_\_\_\_\_ on this the \_\_\_\_\_ **DAY** of \_\_\_\_\_

\_\_\_\_\_  
**For: The Service Provider**

\_\_\_\_\_  
**Duly authorised hereto**

**Name (printed):** \_\_\_\_\_

**Designation:** \_\_\_\_\_