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## INFORMATION TECHNOLOGY MAINTENANCE AGREEMENT

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DATED THE \_\_\_\_ DAY OF \_\_\_\_\_ 20\_\_

Company Pty Ltd

## INFORMATION TECHNOLOGY MAINTENANCE AGREEMENT

DATED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 20\_\_\_\_\_.

**BETWEEN:**     **Company Pty Ltd** a company incorporated in Cape Town and having its registered office at 1 Angus Close Cape Town 2000 (the “**Service Provider**”);

**AND:**           **Other Company Pty Ltd** a company incorporated in Western Province and having its registered office at 1 Smith Street Pietersberg 7000 (the “**Customer**”).

### RECITALS

- A.     The Service Provider has presented a proposal (the “**Proposal**”) to the Customer for the provision of maintenance and support for the Customer’s information technology requirements (the “**Services**”). The Proposal is for the provisions of the Services and has been prepared based upon an inspection by the Service Provider of all of the computer hardware and software used by the Customer in the ordinary course of the Customer’s Business conducted at the Customer’s Premises.
- B.     The Proposal has also been prepared after a full and complete disclosure (the “**Disclosure**”) by the Customer of all of its needs and requirements in respect of Information Technology requirements of the Customer’s Business.
- C.     A copy of the Proposal and the Disclosure are respectively Schedule One and Schedule Two to this Agreement.
- D.     The Service Provider and the Customer have entered into this Agreement to set out the terms on which the Service Provider will maintain and support the Customer’s Information Technology requirements.

### BY THIS AGREEMENT THE PARTIES AGREE AND DECLARE AS FOLLOWS

#### 1.     **DEFINITIONS**

These words and phrases have the following meanings:

**Agreement** means this agreement together with any amendments or modifications that might at any time be made to it and includes all Schedules and other attachments to it.

**Business** means the business currently conducted by the Customer at the Premises.

**Confidential Information** means:

- (a)     all the Customer’s information of whatsoever kind or nature that is expressed to be confidential either by the use of words such as “private”, “in confidence”, “strictly

confidential”, “not to be disclosed,” and all other information which is by its nature is confidential, including but not limited to business records, employment records, agreements or arrangements with customers, suppliers and/or contractors and advices and/or reports to the Customer;

- (b) all information of whatsoever kind or nature relating to the affairs of third Parties in the possession of the Customer and to which the Service Provider may have access to at any time during the Term.

Confidential information *excludes* all information which is or becomes at any time in the public domain except where such information comes into the public domain as a consequence of any act or omission by a Party constituting a breach of this Agreement.

**Customer** means the company or individual named and described as such as a Party to this Agreement and includes all his or her or its lawful successors, or assigns.

**Fees** means the fees and rates set out in Item One of Schedule Three which the Customer must pay to the Service Provider for the provision of the Services.

**Information Technology** means all current software, programs, systems, electronic document retention, storage and retrieval processes and all other information technology of whatsoever kind or nature reasonably required by the Customer in order to efficiently conduct the Business and includes all additional information technology which the Customer may acquire, develop or create during the Term and which the Service Provider agrees in writing to maintain and support under this Agreement.

**Intellectual Property** includes all of the intellectual property of the Customer.

**Law(s)** means all applicable laws that in any way govern or regulate the terms of this Agreement, or anything done or to be done under it. Law includes all relevant statutes, regulations, codes of practice and/or by-laws together with all amendments.

**Maintenance Program** means a program prepared by the Service Provider to provide the Services having regard to the Business, the Proposal and the Disclosure, and includes any agreed amendment or modification to the Maintenance Program made during the Term.

**Party** means a Party to this Agreement and includes, its, his or her lawful successors or assignees.

**Premises** means 1 Smith Street Pietersberg 7000 or such other place to which the Customer may move the Business at any time during the Term of this Agreement.

**Schedule** means a schedule to this Agreement.

**Service Provider** means the company or individual named and described as such as a Party to this Agreement and includes all its lawful successors, or assigns.

Initial: \_\_\_\_\_

**Services** means all the maintenance, support, advice and consulting services to be provided by the Services Provider to the Customer during the Term pursuant to the Proposal in respect of the Information Technology requirements.

**Term** means the period set out in Item Two of Schedule Three commencing from the date hereof provided that the Term may be a shorter period if this Agreement has been lawfully and properly terminated by a Party pursuant to this Agreement.

## **2. APPOINTMENT OF SERVICE PROVIDER**

- 2.1. The Customer hereby appoints the Service Provider to provide the Services for the Term and the Service Provider hereby accepts its appointment and agrees to provide the Services to the Customer during the Term. Both Parties agree that the express provisions of this Agreement shall govern all of their respective rights and obligations to each other and no terms shall be implied into this Agreement unless by Law they cannot be excluded.
- 2.2. The Customer acknowledges that the Service Provider has in entering into this Agreement relied upon the Disclosure made by the Customer and that the Disclosure fully and comprehensively sets out all of the needs and requirements of the Customer in respect of the Information Technology.

## **3. THE SERVICES**

- 3.1. The Service Provider shall within 30 days of the date hereof prepare the Maintenance Program and shall submit it to the Customer for approval. The Customer shall be deemed to have approved the Maintenance Program if no objection or request for a change is made within 14 days of the Maintenance Program being provided to it.
- 3.2. The Maintenance Program will set out the basis upon which the Services will be provided by the Service Provider to the Customer during the Term.
- 3.3. Unless otherwise stated in the Maintenance Program the Service Provider will:
- (a) attend the Premises during ordinary office hours at least once per month to perform the Services including any pre-emptive maintenance of the Information Technology;
  - (b) in cases of emergency breakdowns use its best endeavours to attend the Premises within 24 hours of the next working day (in ordinary office hours) after being required by the Customer by telephone or email to do so. The Customer must when reporting the breakdown provide the Service Provider with all reasonable details and information required by the Service Provider of the breakdown.



- 3.4. The Service Provider may (but is not obliged) from time to time make recommendations, directions and/or give advice to the Customer in respect of upgrades or uses of Information Technology, hardware, componentry, software generally, and any available alternatives for the use and /or storage of electronic information.
- 3.5. The Service Provider may use employees or consultants to provide the Services. Where the Service Provider uses employees or consultants to carry out the Services, the Service Provider must ensure that they are all competent, experienced, trained and otherwise suitable to perform the Services. The Service Provider will be exclusively responsible for all the acts, omissions and conduct of its employees and consultants.
- 3.6. Where the Customer acquires upgrades, new software systems, new hardware or other computer componentry without consulting the Service Provider, the Service Provider may refuse to maintain such new electronic systems and hardware under this Agreement, or may increase the Fees to cover any additional maintenance requirements.
- 3.7. The Customer must ensure that all its employees that are permitted users of its Information Technology are competent, trained and do not misuse or recklessly or negligently damage the Information Technology.
- 3.8. In the event that the Customer ceases to carry on Business at the address of the Premises at the date of this Agreement and moves the Business to another address (the New Premises) and the New Premises are located more than twenty-five kilometres from the Premises then in that event the Service Provider may, if such relocation involves the Service Provider's personnel in having to travel a greater distance to perform the Services, terminate this Agreement by giving the Customer three months' prior written notice to that effect. A termination of this Agreement under this clause will not constitute a breach of the Agreement and will not entitle the Customer to any compensation or damages whatsoever.
- 3.9. The Service Provider will from time to time as reasonably requested by the Customer conduct acceptance testing of all Services, namely such tests as either Party may reasonably require to ensure that the Information Technology continues to meet with the Customer's requirements. In the event that acceptance testing is unsuccessful, the Service Provider will remedy the fault/s pursuant to the Services set out in this clause. Acceptance testing will form part of the Fees. In the event that the Service Provider is unable to remedy any fault within a reasonable period, the Customer may terminate

this Agreement by giving one month's prior written notice to that effect. Such termination will not entitle either Party to claim damages or compensation from the other.

#### **4. ACCESS TO PREMISES AND CO-OPERATION**

- 4.1. The Customer must give the Service Provider, its employees and consultants all reasonable access required to the Premises and the Information Technology during ordinary business hours on work days to enable the Service Provider to carry out and provide the Services. The Customer acknowledges that such access may cause interruption and disruption to the Business whilst such maintenance is being carried out.
- 4.2. If requested by the Service Provider (acting reasonably) to shut down or not use the whole or any part of its Information Technology so as to allow the Service Provider to provide the Services, then the Customer must promptly shut down and cease using the Information Technology until permitted by the Service Provider to resume use.
- 4.3. The Customer must ensure that all its staff co-operates with the Service Provider, its employees and consultants at all times and provide them with all reasonable support and assistance as may be reasonably required.
- 4.4. The Customer must at all times ensure that the Premises are safe for the Service Provider, its employees and consultants to provide the Services.
- 4.5. Any refusal to give reasonable access to the Premises in ordinary office hours on work days to the Service Provider, its employees or consultants or any refusal or failure to co-operate or provide reasonable support and assistance will for all purposes of this Agreement be a breach of an essential term of this Agreement and will be regarded as a wrongful repudiation by the Customer of this Agreement.

#### **5. FEES AND PAYMENT**

- 5.1. The Customer will pay the Service Provider the Fees for the Services in accordance with the rates specified in Item One of the Schedule Three. The Fees must be paid by the Customer within 14 days of receipt of a tax invoice from the Service Provider setting out the Fees charged, the Services provided and the date the Services were provided.
- 5.2. The Service Provider must promptly and from time to time and at least monthly render to the Customer a tax invoice for the Services provided. A tax invoice that has been posted to the Customer will be deemed received by the Customer two (2) days after posting (whether or not it is in fact received). The Service Provider may also fax

or email the tax invoice as well as posting it. In the case of faxing or emailing the tax invoice, it will be deemed received on the date of faxing, emailing (even if posted as well).

- 5.3. The Service Provider will charge the Customer and the Customer will be liable to pay any and all bank, merchant and other fees and charges incurred by the Service Provider arising from any dishonoured payments from the Customer.
- 5.4. Where there is a change in the Business or a change in the Information Technology during the Term, the Service Provider may at its discretion vary by increasing or decreasing the Fees to reasonably reflect any changes in the Services. The Service Provider must give the Customer 30 days' prior written notice of any variation in the Fees. The Customer may within that time if it does not accept that variation by notice in writing to the Service Provider, terminate this Agreement. Such termination will take effect immediately and will not be a breach of this Agreement. From such termination, the Customer will cease to be liable for any further Fees but must pay all Fees rendered and unpaid up to the date of termination. This provision will continue to be enforceable notwithstanding termination.

## 6. EXCLUSIVITY

- 6.1. The Customer will only use the Service Provider during the Term for the provision of the Services. This is an essential term of this Agreement.
- 6.2. The Customer must not without the express prior written consent of the Service Provider permit any other person to interfere with, alter or change the Information Technology.

## 7. RECOMMENDATIONS

- 7.1. The Service Provider may from time to time give reasonable advice and/or recommendations (**the "Service Provider Recommendations"**) as to the use, storage and maintenance of the Information Technology and as to the acquisition of software and new operating systems. The Customer must ensure that it and its employees promptly follow any such advice and carry out the Service Provider Recommendations.
- 7.2. If the Customer does not promptly follow the Service Provider Recommendations then after 30 days of such recommendations being given, the Service Provider may at its absolute discretion and at its sole option:
- (a) suspend the Services until the Service Provider Recommendations are followed; or



- (b) terminate this Agreement by giving the Customer written notice to that effect;  
or
  - (c) increase the Fees for the Services by giving the Customer written notice to that effect setting out the new Fees for the Services; or
  - (d) continue to provide the Services for the same Fees.
- 7.3. If the Service Provider elects to increase the Fees pursuant to Clause 7.2(c), the Customer may within 14 days of receiving the notice of the increase of Fees terminate this Agreement by giving the Service Provider notice in writing to that effect. This Agreement will be terminated on the date of receipt of that notice by the Service Provider. The Customer will be liable for all outstanding Fees rendered up to the date of such termination and this liability will be enforceable notwithstanding termination.
- 7.4. The Customer may from time to time require the Service Provider to give advice and make recommendations (**"Requests for Advice"**) as to any aspect of the Information Technology and the Service Provider will promptly, competently and professionally respond to such Request for Advice.
- 7.5. The Service Provider will not be liable for any loss or damage that the Customer might sustain as a direct or indirect result of any Service Provider Recommendations or responses to Requests for Advice being followed unless they were made recklessly or were knowingly and deliberately wrong.
- 8. CONFIDENTIALITY**
- 8.1. The Service Provider must keep any Confidential Information it becomes aware of strictly confidential and must not without the express prior written consent of the Customer use or disclose such information to any third Party.
- 8.2. The Service Provider must only use Confidential Information of which it becomes aware for the proper and legitimate purposes of carrying out the Services. In so doing the Service Provider must take all reasonable steps to ensure that such Confidential Information is secure and that no third Parties can directly or indirectly access such Confidential Information.
- 8.3. Where the Service Provider by act or omission places at risk any Confidential Information of the Customer or places at risk any intellectual property of the Customer or the intellectual property of any third Party, then the Customer may take all reasonable steps, including refusing access to the Premises (without being in breach of this Agreement) and including seeking injunctive relief to protect such Confidential Information and/or such intellectual property. In the event of the



Customer seeking injunctive relief, the successful Party will be entitled, in addition to such relief and notwithstanding any other provision of this Agreement limiting liability, to the benefit of any consequential costs order in its favour.

## **9. LIMITATION OF WARRANTIES AND LIABILITY**

- 9.1. To the fullest extent permitted by Law, the Service Provider makes no representation or gives any warranty in respect of the provision of the Services except that it will carry out the Service competently, professionally and to the best of its ability having regard to the Proposal, the Disclosure and the terms of this Agreement.
- 9.2. To the fullest extent permitted by Law, the Service Provider expressly disclaims all implied warranties and conditions, including without limitation implied warranties as to merchantability, fitness for purpose of the Services and the non-infringement of third Party intellectual property in carrying out the Services, except where such infringement is known by the Service provider beforehand.
- 9.3. The Customer expressly acknowledges that the Service Provider is not liable to the Customer for any loss or damage (including loss of profits) of whatsoever kind or nature and however arising from:
- (a) any delay in the Service Provider attending the Premises to fix any breakdowns;
  - (b) any failure by the Service Provider to fix any breakdown;
  - (c) any inability of the Customer to access the Information Technology;
  - (d) any disruption or interference with the Business as a direct or indirect consequence of the Services being carried out or provided.
- 9.4. The Service Provider will not be liable for any costs, expenses, loss, liability or damage (whether direct or consequential) of any kind suffered by the Customer due to:
- (a) any of the Information Technology being properly in the possession or control of the Service Provider;
  - (b) the Information Technology failing to operate at any time or times during the Term for whatever reason;
  - (c) any non-deliberate inaccuracy, error or omission on the part of the Service Provider in carrying out the Services including without limitation inaccuracies, errors or omissions as a result of the Service Provider's negligence;
  - (d) any delay, failure or error in the provision of the Services because of any circumstance beyond the Service Provider's reasonable control including,

without limitation, failure of any communications network or system or electronic power surges, overloads, failures or black outs.

9.5. To the fullest extent permitted by Law, the Service Provider excludes all liability for indirect and consequential loss including without limitation the loss or corruption of the Information Technology, loss of revenue, loss of profits, failure to realise expected profits or savings and any other commercial or economic loss of any kind arising from this Agreement or the provision of any of the Services by the Service Provider.

9.6. The Customer acknowledges that:

- (a) it does not rely upon any prior statement, undertaking or representation made or given by or on behalf of the Service Provider before this Agreement is entered into;
- (b) it is fully aware of the contents of these terms and conditions and all documents referred to herein and has had the opportunity before signing this Agreement to obtain independent legal advice on its terms and the terms of all other related documents;
- (c) to the fullest extent permitted by law the Customer waives any cause of actions or rights it may have at any time hereafter. To the extent that any liability of the Service Provider under any Act cannot be excluded, the Service Provider's liability is limited to either:
  - (i) the supply of the Services by the Service Provider under these terms and conditions again; or
  - (ii) the payment of the cost of having another person provide again to the Customer similar services as the Services supplied by the Service Provider under these terms and conditions.

9.7. Provided that if any event, circumstance, act or omission (**the "Event"**) occurs which would but for the limitations or exclusions of liability in this clause entitle the Customer to bring a claim against the Service Provider, then that Event will entitle the Customer to forthwith by written notice to the Service Provider terminate this Agreement. In such circumstances the Term will be at an end on the Service Provider receiving such Notice and neither Party will be entitled to claim any compensation from the other. Provided however where there are any outstanding Fees, the Customer must at the time it serves such notice also pay all such outstanding Fees. The obligation to pay outstanding Fees is not affected by termination.

## 10. DEFAULT

10.1. In addition to any other provision in this Agreement, the occurrence of any one or more of the following events constitute a default (an “**Event of Default**”):

- (a) failure to pay any sum (including Fees) within fourteen (14) days after written notice being given by the Service Provider to the Customer to the effect that such payment has not been received by the Service Provider;
- (b) breach of any other provision of this Agreement where such breach is not remedied within fourteen (14) days of a written notice being given by the Party not in default to the Party in default requiring such breach to be rectified.

10.2. Where a breach is incapable of remedy and where the breach by one Party causes material and irreparable damage or loss to the other then the Party not in breach may, notwithstanding anything elsewhere in this Agreement, immediately terminate this Agreement by written notice to that effect to the other Party in default.

10.3. Upon the occurrence of an Event of Default, the Party not in default may at its sole option, exercise any or all of the following remedies:

- (a) demand in writing that the Party in default remedy the breach;
- (b) where the Party in default is the Customer, suspend the provision of the Services until the breach has been remedied;
- (c) where the Party in default is the Service Provider, suspend the payment of the Fees until the breach has been remedied;
- (d) subject to any limitations in this Agreement claim damages from the Party in default;
- (e) exercise a lien over any property of the Party in default in the possession of the Party not in default to secure compliance with this Agreement by the Party in default.

## 11. ASSIGNMENT

11.1. If the Service Provider assigns its Business or a majority shareholder in the Service Provider transfers its shares in the Service Provider to a third Party or if there is a change in the constitution of the board whereby the control or management of the Service Provider has shifted to newly appointed directors or managers, then the Customer may by written notice to the Service Provider terminate this Agreement.

11.2. The rights of either Party are not assignable without the prior written consent of the other Party, which consent may be refused without the other Party being required to give any reason. A change in ownership or control of a Party shall be deemed to



constitute an assignment.

## **12. EARLY TERMINATION**

- 12.1. Notwithstanding anything elsewhere contained, if the Customer ceases to carry on the Business it may terminate this Agreement by giving the Service Provider three (3) months' prior written notice or immediately by written notice and paying to the Service Provider an amount equal to three months' Fees.
- 12.2. The Service Provider may terminate this Agreement at any time by giving notice in writing to the Customer in the event of the Customer breaching any of its obligations under this Agreement or failing to pay any of the Fees when due and the Customer failing to remedy that breach or make such payment within 14 days of being requested by notice in writing from the Service Provider to remedy the breach.

## **13. WARRANTIES BY THE CUSTOMER**

- 13.1. The Customer warrants to the Service Provider that all information which it has provided to the Service Provider in the Disclosure and subsequent thereto and which the Service Provider has reasonably relied on in assessing any quotation, making the Proposal or giving estimate of the resources necessary to perform the Services is accurate, complete and not misleading in any way.
- 13.2. The Customer warrants to the Service Provider that it has not withheld any material information about the Information Technology or its Business and that all the Customer's relevant employees who use the Information Technology in the Business are competent and experienced and suitably trained in using the Information Technology.

## **14. PASSWORDS AND ACCESS CODES**

- 14.1. All passwords and access codes to any of the Information Technology at all times remain the sole and exclusive property of the Customer and must not be used or disclosed by the Service Provider except for the proper and lawful purposes of providing the Services.
- 14.2. Notwithstanding anything elsewhere contained, on termination of this Agreement the Service Provider must disclose and handover to the Customer all passwords, access codes that it has or knows and which are reasonably required by the Customer to use or access the Information Technology.
- 14.3. Notwithstanding any other provision of this Agreement, the Service Provider must not claim any lien over any access codes or passwords.

## **15. INTELLECTUAL PROPERTY**

- 15.1. The Parties acknowledge and agree that nothing in this Agreement confers any right or interest whether at Law or in equity in the Intellectual Property of the other Party.
- 15.2. The Customer acknowledges and agrees that no aspect of the Services performed by the Service Provider which involves the development of any products or systems may be altered, reproduced, reverse engineered, stored in a retrieval system or transmitted to any third Party by the Customer or any contractor, employee, agent or related entity of the Customer.
- 15.1 The Customer acknowledges and agrees that the Service Provider owns all intellectual property created by the Service Provider to enable it to perform the Services.

## **16. NOTICES**

- 16.1. All notices under these terms and conditions must be in writing. Unless delivered personally, all notices must be addressed to the appropriate addresses noted in this Agreement or as otherwise noted in writing in accordance with this provision. Notices shall be deemed to have been received two days after the posting if mailed in accordance with these terms. Any notice sent by facsimile or electronically shall be deemed received on the day after the day of sending.
- 16.2. A notice shall be deemed to be in writing if sent by post or by any form of electronic communication that is electronically date stamped or which produces an electronic record of the date and time of sending, including without limitation emails and facsimiles.

## **17. GENERAL**

- 17.1. No waiver of any right or remedy will be effective unless in writing and shall not operate as a waiver of that right or remedy or any other right or remedy on a future occasion.
- 17.2. Every provision of these terms and conditions is intended to be severable and the deletion, invalidity or unenforceability of any provision does not affect the enforceability and validity of any other provision.
- 17.3. If any term or provision is illegal, invalid, or unenforceable there shall be added automatically as a part of these terms and conditions a provision as similar in terms as necessary to render such provision legal, valid and enforceable.
- 17.4. Nothing in these terms and conditions shall be deemed or construed to constitute or create a partnership, association, joint venture, employment relationship or agency between the Parties.

17.5. Neither Party will be responsible for any failure to comply with the terms of this Agreement or any loss or damage to the other where such failure, loss or damage is unforeseen and due to causes beyond its reasonable control. These causes include but are not limited to terrorism, acts of terror, fire, storm, flood, earthquake, explosion, accident, interruption to services, industrial disputes, war, rebellion, insurrection and acts of God.

The Parties acknowledge that the provisions of this Agreement represent and contain the whole of their agreement in respect of the subject matter of the Agreement and that no prior representations, undertakings and understandings shall be construed as imposing or implying any term into this Agreement. All implied terms that can be expressly excluded by the Parties are hereby expressly excluded.



**SIGNED** as an **AGREEMENT** by the Parties on the day and year first mentioned.

**SIGNED BY** )  
**Company Pty Ltd** )  
in the presence of: )  
 )

\_\_\_\_\_  
Signature of Witness

Print Name:

\_\_\_\_\_  
Director

Print Name:

\_\_\_\_\_  
Director/Secretary

Print Name:

**SIGNED BY** )  
**Other Company Pty Ltd** )  
in the presence of: )  
 )

\_\_\_\_\_  
Signature of Witness

Print Name:

\_\_\_\_\_  
Director

Print Name:

\_\_\_\_\_  
Director/Secretary

Print Name:

## **SCHEDULE ONE**

### **PROPOSAL:**

[If you as Service Provider have previously provided the Customer with a formal proposal, replace this page with a copy of that proposal and insert the words ‘SCHEDULE ONE’ at the top of the page]

**SAMPLE ONLY**  
YOUR DOCUMENT WILL VARY DEPENDING ON THE ANSWERS YOU  
PROVIDE THROUGH THE BUILDING PROCESS

## **SCHEDULE TWO**

### **DISCLOSURE:**

[If the Customer has previously provided you as the Service Provider with a formal disclosure, replace this page with a copy of that disclosure and insert the words ‘SCHEDULE TWO’ at the top of the page]

**SAMPLE ONLY**  
YOUR DOCUMENT WILL VARY DEPENDING ON THE ANSWERS YOU  
PROVIDE THROUGH THE BUILDING PROCESS



**SCHEDULE THREE**

**ITEM ONE: FEES & RATES:**

R100 per hour and an ongoing monthly fee of R5000 per month.

**ITEM TWO: TERM:**

2 Years

**SAMPLE ONLY**  
YOUR DOCUMENT WILL VARY DEPENDING ON THE ANSWERS YOU  
PROVIDE THROUGH THE BUILDING PROCESS