



## WEBSITE DEVELOPMENT AGREEMENT

### RECITALS

- A. The Customer intends to operate a website at the registered domain name [insert domain name]; and
- B. The Service Provider is able to develop the website to meet the Customer's requirements as set out in the functional layout and flow-chart specifications, with the co-operation of the Customer.

### WHEREBY IT IS AGREED AS FOLLOWS:

#### 1 Interpretation

The headings of the clauses in this Agreement are for the purposes of convenience and reference only and shall not be used in the interpretation of, nor modify nor amplify the terms of this Agreement nor any clause hereof. Unless a contrary intention clearly appears–

- 1.1 Words importing:
  - 1.1.1 any one gender includes the other two genders;
  - 1.1.2 the singular includes the plural and vice versa; and
  - 1.1.3 a natural persons includes juristic persons (corporate or unincorporated) and vice versa;
- 1.2 A reference to a statute or statutory provision is a reference to it as it is in force for the time being, taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.
- 1.3 References to clauses, and annexures are to the clauses and annexures of this Agreement; references to paragraphs are to paragraphs of the relevant annexures to this Agreement.
- 1.4 If any provision in a definition is a substantive provision conferring rights or imposing obligations on any Party, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in the body of the Agreement.
- 1.5 When any number of days is prescribed in this Agreement, same shall be reckoned exclusively of the first and inclusively of the last day unless the last day is not a business day, in which case the last day shall be the next succeeding business day.
- 1.6 The expiration or termination of this Agreement shall not affect the provisions of this agreement that 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.

#### 2 Definitions

- 2.1 The definitions and rules of interpretation in this clause apply to this Agreement:
  - 2.1.1 "Acceptance" means the issue of an acceptance certificate by the Customer, which will constitute the Customer's acceptance of the Website;
  - 2.1.2 "Acceptance Date" means the date on which the Customer issues the acceptance certificate;
  - 2.1.3 "Acceptance Tests " means the tests conducted for the purposes of determining the compliance of the Website with the Specifications, and "Acceptance Testing" shall have a corresponding meaning;



- 2.1.4 “AFSA” means the Arbitration Foundation of Southern Africa;
- 2.1.5 “Agreement” means this website development agreement and any schedules and annexures thereto;
- 2.1.6 “Charges” means the fixed price quotes specified in Annexe “D”;
- 2.1.7 “Commencement Date” means [insert date];
- 2.1.8 “Confidential Information” means information that is proprietary or confidential and is either clearly labelled as such or identified as Confidential Information by a Party, or information which the receiving Party knows or reasonably should have known is of a proprietary or confidential nature;
- 2.1.9 “Content” means the content supplied by the Customer to be used to populate the Website as set out in Annexe “B”;
- 2.1.10 “Contract Period” means a period of [insert number] years from the Acceptance Date;
- 2.1.11 “Electronic Signature” means (in relation to any written document communicated electronically) the scanned version of the hand signature of the author of the written document and any other method used to identify the author, and to indicate his or her approval of the information communicated in a sufficiently reliable way at the time the communication was first made;
- 2.1.12 “Implementation Period” means a period of [insert number] following the Acceptance Date;
- 2.1.13 “Intellectual Property Rights” means all the rights in and to intellectual property including (without limitation) the rights in and to trademarks, service marks, trade names, domain names, logos, get-up, patents, provisional patents, inventions (whether patentable or not), know-how (including confidential industrial and commercial information and techniques in any form), utility models, registered and unregistered design rights, copyright, semi-conductor topography rights, database rights, and all similar proprietary rights which may subsist in any part of the world, as well as any Confidential Information or processes relating to that subject matter; and specifically includes any other proprietary rights in and to any business plans and proposals, business processes and functional and technical specifications and any related material;
- 2.1.14 “Milestone Delivery” means the Website or any of its elements to be completed and delivered to the Customer for Acceptance Testing as provided for in Annexe “C”, and “Milestone Deliveries” must be interpreted accordingly;
- 2.1.15 “Milestone Schedule” means the timetable which will set out the date of delivery and all necessary details of the Website or any element to be completed and delivered to the Customer for testing, and as set out in Annexe “C”;
- 2.1.16 “Notice” means a written document carrying the hand signature or Electronic Signature of the author of the written document;
- 2.1.17 “Party” means either the Customer or the Service Provider, and “Parties” means both the Service Provider and the Customer;
- 2.1.18 “Software” means the application computer programs to that en-ables the proper functioning of the Website, which includes both third party software and the Service Provider’s proprietary software, but specifically excludes the Website;
- 2.1.19 “Specifications” means the concept design, functional layout and flow-chart specifications provided by the Customer and set out in Annexe “A”;
- 2.1.20 “Support Schedule” means Annexe “E” hereto, in which the Service Provider’s support functions are specified; and
- 2.1.21 “Website” means all and any content in and to the Website, whether visible when the Website is accessed and viewed under normal conditions or not, but specifically excludes the Software.



### **3 Appointment and commencement**

- 3.1 The Agreement will commence on the Commencement Date.
- 3.2 Unless otherwise terminated in terms of the Agreement, the Agreement will automatically terminate upon the expiry of the Contract Period; provided that the Customer does not exercise its right to reject the Website, as stipulated in the Agreement.

### **4 Rights and obligations of the customer**

- 4.1 The Customer will use its reasonable efforts to:
  - 4.1.1 arrange for the installation of all the computer hardware and software, excluding the Software, which is required for the Website to be operational; and
  - 4.1.2 deliver the Specifications to the Service Provider on or before the Commencement Date.

### **5 Rights and obligations of the service provider**

- 5.1 The Service Provider:
  - 5.1.1 shall develop the Website using competent, trained staff;
  - 5.1.2 ensure that the Website functions error free;
  - 5.1.3 agrees to support and maintain the Website free of charge during the Implementation Period; and
  - 5.1.4 will not provide continuing maintenance and support services to the Customer beyond the Implementation Period, unless otherwise agreed between the Parties in writing.

### **6 Variations**

- 6.1 The Customer may at any stage during the existence of the Agreement, change any aspect of the Specifications, if:
  - 6.1.1 the Service Provider has been notified of the changes by way of a Notice; and
  - 6.1.2 the Service Provider has notified the Customer by way of a Notice that the changes are executable; and
  - 6.1.3 the Delivery Date is extended with not less than the same number of days resulting from the change.

### **7 Development of the website**

- 7.1 The Service Provider must develop the Website to:
  - 7.1.1 to allow for the proper functioning and interaction of the differing elements of the Website, and the proper presentation of the Content;
  - 7.1.2 be consistent with and operate in accordance with:
    - 7.1.2.1 the Specifications; and
    - 7.1.2.2 the prevailing standards and norms of the international Internet industry and applicable Internet Protocols.
- 7.2 The Service Provider acknowledges that the timely completion of the development of the Website is of the essence of this Agreement.



7.3 If the Service Provider cannot deliver the Milestone Deliveries according to the Milestone Schedule, the Service Provider must, immediately on becoming aware of a delay, notify the Customer of the delay and of the revised time that the applicable Milestone Delivery will be delivered to the Customer. The Service Provider must, at its own expense, use its best endeavours to provide the delayed Milestone Delivery at the revised time without further delay.

## 8 Implementation

8.1 The Parties must arrange a meeting within [insert number.] days after the Commencement Date:

8.1.1 to determine Acceptance Tests which will be used to establish whether the Website meets the requirements set out in the Specifications; and

8.1.2 to compile the Milestone Schedule; and

8.1.3 to determine the dates upon which the Service Provider will deliver the Milestone Deliveries.

## 9 Acceptance procedures

9.1 The Service Provider must conduct the Acceptance Tests using test data developed by the Service Provider. The Customer may continue with the Acceptance Tests if the Service Provider fails to attend at the time and place agreed upon between the parties.

9.2 The Customer must notify the Service Provider within [insert number] days following each Acceptance Test, of the defects that are required to be rectified for each Milestone Delivery.

9.3 The Service Provider must rectify the defects within [insert number] days of such notification, and will notify the Customer of the time when the Acceptance Tests can be re-conducted.

9.4 The Acceptance Tests procedure will be repeated until the Customer is satisfied that each and every Milestone Delivery, complies with the Specifications, and issues an acceptance certificate to that effect, thereby Accepting the Website.

## 10 Support

10.1 The Customer may consult the Service Provider on matters concerning the development of the Website up and to the Acceptance Date. The Service Provider must reply to any enquiries within the timescales specified in Annexe "E".

10.2 The Service Provider must appoint [insert number] of its employees to deal with the Customer's enquiries. The names of the employees and their contact details will be communicated to the Customer within [insert time period] of the Commencement Date, and any changes to the personnel will be communicated to the Customer by Notice immediately.

10.3 The Service Provider will provide the support, and must–

10.3.1 respond to the Customer's queries via telephone or email within [insert number] working hours of receiving each query;

10.3.2 correct errors and errors caused by corruption to the Website within the timelines specified in Annexe "E". The corrected Website or any element thereof, will be supplied as requested by the Customer within the time specified in Annexe "E"; and

10.3.3 provide access to a full database dump for the purposes of emergency recovery of the Customer's database, within [insert number] hours from the request being made by the Customer.

## 11 Payment

11.1 The Customer will pay the Service Provider a fee of [insert amount] within [insert number] days of Acceptance.



11.2 The Customer will pay or reimburse the Service Provider for any and all sales and use taxes, duties or levies imposed by any authority, government, or government agency (other than the property taxes and taxed levied on the Service Provider's net income) in connection with the development of the Website.

## 12 Warranty

12.1 Each of the Parties hereby warrants to and in favour of the other that–

12.1.1 i t has the legal capacity and has taken all necessary corporate action required to empower and authorise it to enter into this Agreement;

12.1.2 this Agreement constitutes an agreement valid and binding on it and enforceable against it in accordance with its terms;

12.1.3 the execution of this Agreement and the performance of its obligations hereunder does not and shall not–

12.1.3.1 contravene any law or regulation to which that Party is subject;

12.1.3.2 contravene any provision of that Party's constitutional documents; or

12.1.3.3 conflict with, or constitute a breach of any of the provisions of any other agreement, obligation, restriction or undertaking which is binding on it.

12.1.4 to the best of its knowledge and belief, it is not aware of the existence of any fact or circumstance that may impair its ability to comply with all of its obligations in terms of this Agreement;

12.1.5 it is entering into this Agreement as principal (and not as agent or in any other capacity);

12.1.6 the natural person who signs and executes this Agreement on its behalf is validly and duly authorised to do so; and

12.1.7 no other party is acting as a fiduciary for it.

12.2 The Service Provider warrants that the Website will comply with the Specifications.

12.3 The Service Provider warrants that the development of the Website will be carried out in a proper and professional manner by properly qualified personnel.

12.4 The Service Provider warrants furthermore–

12.4.1 that it shall at all times perform its responsibilities under the Agreement in a manner that does not infringe, or constitute an infringement or misappropriation of, any Intellectual Property Rights or other proprietary rights of any third party; and

12.4.2 that it holds and shall at all relevant times continue to hold, the rights required to meet its obligations under this Agreement.

12.5 The Service Provider further warrants and guarantees that any faults or defects in the Website discovered by the Customer and rendering the Website unsuitable for the purpose for which it was acquired shall be corrected by the Service Provider at no charge to the Customer within a reasonable time and as quickly as possible, provided that the faults or defects are not solely directly attributable to the actions of the Customer.

12.6 The terms of this clause will apply, despite the fact that the Customer may have Accepted all or part of the Website and despite that payment in respect of the Website may already have been effected by the Customer.

## 13 Intellectual property rights



- 13.1 Intellectual property rights in and to the Software
  - 13.1.1 Ownership of all rights, including Intellectual Property Rights, in and to the Software vest in the Service Provider and/or third party software providers.
  - 13.1.2 The Service Provider grants the Customer a non-exclusive, royalty-free licence for the Contract Period, to use the Software, as is reasonably necessary to provide for the proper functioning and interaction of the differing elements of the Website, and to allow for the proper presentation of the Content, which the Customer accepts.
  - 13.1.3 The Service Provider warrants that it has acquired all necessary licences in and to third party software, where required in law and in contract.
- 13.2 Copyright in the Website
  - 13.2.1 The Service Provider acknowledges that the Customer has spent, and continues to spend, considerable time and resources to conceptualise, develop, collate, compile, and format the Website as an original intellectual creation, and exercises all control over its making.
  - 13.2.2 Accordingly, the Customer owns all copyright in and to the Website.
  - 13.2.3 The Service Provider may not exploit the Website or any element of it for its personal use or gain, or offer the Website or any element of it, to any person other than the Customer without the prior written consent of the Customer.
- 13.3 Copyright in the Content
  - 13.3.1 In addition to the Customer's copyright in the Website, the Service Provider acknowledges that the Customer has spent considerable time and resources to collect, collate, compile, format and verify the accuracy of the contents of the Content.
  - 13.3.2 Accordingly, the Customer owns all copyright in and to the Content to the extent that the same is not the copyright of a third party.
- 13.4 Remedies of the Customer:
  - 13.4.1 The Service Provider acknowledges that civil and criminal penalties may be incurred in the event of any infringement of the copyright or other Intellectual Property Rights in relation to the Website or the Content, and that any infringement by the Service Provider may result in incalculable damage or loss to the Customer.
  - 13.4.2 Therefore the Service Provider agrees that, in addition to any other right or remedy of the Customer, the Customer will be entitled to immediate injunctive relief to restrain any infringement.
  - 13.4.3 The Service Provider also undertakes to indemnify the Customer in full, against all loss, damage, costs and expenses which may be incurred by the Customer by reason of any such infringement by the Service Provider.
- 13.5 Right to develop Website
  - 13.5.1 The Service Provider warrants that it is fully entitled to develop the Website for the Customer.
  - 13.5.2 The Service Provider warrants that the subject matter of this Agreement in no way affects, limits or otherwise infringes on the Intellectual Property Rights of any third party in and to the Software and the Website.
  - 13.5.2 The Service Provider indemnifies and agrees to keep the Customer harmless against:
    - 13.5.3.1 all claims made by a third party that the Software or the Website contains any material or information which infringes any right of that third party; and
    - 13.5.3.2 all costs and damages awarded against the Customer under any judgment in any jurisdiction as a result of a claim.



**14 Limitation of liability**

- 14.1 The Parties agree that, in the event of a breach of any of the provisions of this Agreement, the defaulting Party shall be liable to the other Party for all losses which constitute direct and/or general damages. [include cap on liability for direct damages as appropriate.]
- 14.2 Neither Party shall be liable to the other for any losses which constitute indirect, special or consequential damages.

**15 Confidentiality**

- 15.1 Each Party may be given access to Confidential Information of the other Party in order to perform its obligations under this Agreement. A Party's Confidential Information shall not be deemed to include information that:
  - 15.1.1 is or becomes publicly known other than through any act or omission of the receiving Party;
  - 15.1.2 was in the other Party's lawful possession before the disclosure;
  - 15.1.3 is lawfully disclosed to the receiving Party by a third party without restriction on disclosure;
  - 15.1.4 is independently developed by the receiving Party, which independent development can be shown by written evidence; or
  - 15.1.5 is required to be disclosed by law, by any court of competent jurisdiction or by any regulatory or administrative body.
- 15.2 Each Party shall hold the other's Confidential Information in confidence and, unless required by law, not make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of this Agreement.
- 15.3 Each Party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access, is not disclosed or distributed by its employees or agents in violation of the terms of this Agreement.

**16 Data privacy and protection**

- 16.1 Each Party's data shall be and remain the property of that Party and its affiliates. Neither Party shall divulge the data of the other Party to third parties (unless provided otherwise in this Agreement) and a Party shall use the data of the other Party only for purposes of this Agreement.
- 16.2 Neither Party shall possess or assert any lien or other right against or to the other Party's data, or sell, assign, lease or otherwise dispose of the other Party's data, or any part thereof, to third Parties. Each Party shall take such steps as are reasonably required to prevent its employees, sub-contractors and their employees, and agents from doing the same.
- 16.3 .....

[insert other data protection provisions as appropriate.]

**17 Termination**

- 17.1 Either Party may terminate this Agreement if the other Party commits a material breach and fails to remedy such breach within [insert period] written notice given by the other Party.
- 17.2 [insert as applicable, other grounds for termination for cause and consider providing the Customer's right to terminate for convenience.]



**18 Force majeure**

Neither Party shall have any liability to the other Party for any losses which are a result of such Party's failure to perform under this Agreement to the extent that such Party is prevented from or delayed in performing its obligations under this agreement, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, strikes, lock-outs or other industrial disputes, an act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, fire, flood, or storm.

**19 Dispute resolution**

- 19.1 In the event of there being any dispute or difference between the Parties arising out of this Agreement, the said dispute or difference shall on written demand by either Party be submitted to arbitration in [insert name of city] in accordance with the AFSA rules, which arbitration shall be administered by AFSA.
- 19.2 Should AFSA, as an institution, not be operating at that time or not be accepting requests for arbitration for any reason, then the arbitration shall be conducted in accordance with the AFSA rules for commercial arbitration (as last applied by AFSA) before an arbitrator appointed by agreement between the Parties to the dispute or failing agreement within [insert number] business days of the demand for arbitration, then any Party to the dispute shall be entitled to forthwith call upon the chairperson of the [insert name of city] Bar Council to nominate the arbitrator, provided that the person so nominated shall be an advocate of not less than 10 (ten) years standing as such. The person so nominated shall be the duly appointed arbitrator in respect of the dispute. In the event of the attorneys of the Parties to the dispute failing to agree on any matter relating to the administration of the arbitration, such matter shall be referred to and decided by the arbitrator whose decision shall be final and binding on the Parties to the dispute.
- 19.3 Any Party to the arbitration may appeal the decision of the arbitrator or arbitrators in terms of the AFSA rules for commercial arbitration.
- 19.4 Nothing herein contained shall be deemed to prevent or prohibit a Party to the arbitration from applying to the appropriate court for urgent relief or for judgment in relation to a liquidated claim.
- 19.5 Any arbitration in terms of this clause 19 (including any appeal proceedings) shall be conducted in camera and the Parties shall treat as confidential details of the dispute submitted to arbitration, the conduct of the arbitration proceedings and the outcome of the arbitration.
- 19.6 This clause 19 will continue to be binding on the Parties notwithstanding any termination or cancellation of this Agreement.
- 19.7 The Parties agree that the written demand by a Party to the dispute in terms of clause 19 that the dispute or difference be submitted to arbitration, is to be deemed as a legal process for the purpose of interrupting extinctive prescription in terms of the Prescription Act, 1969.

**20 Waiver**

- 20.1 A waiver of any right under this agreement is only effective if it is in writing and it applies only to the party to whom the waiver is addressed and to the circumstances for which it is given.
- 20.2 Unless specifically provided otherwise, rights arising under this Agreement are cumulative and do not exclude rights provided by law.

**21 Severance**

- 21.1 If any provision (or part of a provision) of this Agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.
- 21.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the Parties.





**22 Entire agreement**

- 22.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the parties and supersede any previous arrangement, understanding or agreement between them relating to the subject matter they cover.
- 22.2 Each of the parties acknowledges and agrees that in entering into this Agreement it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this Agreement or not) relating to the subject matter of this Agreement, other than as expressly set out in this Agreement.

**23 Assignment**

- 23.1 The Service Provider shall not, without the prior written consent of the Customer, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.
- 23.2 The Customer may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.

**24 Notices**

- 24.1 Each of the Parties chooses their respective addresses set forth in clause 24.2, for the purposes of giving any notice, the payment of any sum, the serving of any process and for any other purposes arising from this Agreement.

24.2 .....

.....

.....

[insert Parties' addresses.]

**25 Governing law and jurisdiction**

- 25.1 This Agreement and any disputes or claims arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) are governed by and construed in accordance with the laws of South Africa.
- 25.2 The Parties irrevocably agree that the High Court of South Africa has exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

**26 Execution in counterparts**

- 26.1 This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same agreement as at the date of signature of the Party that signs its counterpart last in time.

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