

CONFIDENTIALITY & NON-DISCLOSURE AGREEMENT

THIS AGREEMENT is made thisday of202_

BETWEEN

Party One (description and address) (hereinafter referred to as “Name of Party”) which expression shall where the context so admits include it successors and assigns of the first part;

And

..... (hereinafter referred to as “the writer” or “Party 2”) which expression shall where the context so admits include it successors and assigns of the second party;

1. Introduction

- 1.1 The parties, for their mutual benefit, wish to exchange certain information (including but not limited to business plans and strategy, trade secrets and proprietary know-how) in order that each of them may evaluate such information for the purpose of determining and furthering their respective interest in establishing a business relationship (herein after referred to as “the Objective” .
- 1.2 The parties wish to record the terms and conditions upon which each shall disclose confidential information to the other, which terms and conditions shall constitute a binding and enforceable agreement between the parties and their agents.
- 1.3 This agreement shall also bind the parties, notwithstanding the date of signature hereof, in the event that either party shall have disclosed any confidential information to the other party prior to date of signature hereof.
- 1.4 For the purposes of this agreement the party which discloses confidential information shall be referred to as “the disclosing party” and the party which receives the confidential information shall be referred to as “the receiving party”.

2. The Confidential Information

“Confidential Information” shall, for the purpose of this agreement include, without limitation, any financial, technical, commercial, know-how, secrets, process, designs, drawings, technical specifications, and data, in whatever form whether oral, written or any other means, disclosed to or accessed by either party during the course of its relationship with the other party and shall not include any information that;

- 2.1 is or becomes publicly known, otherwise than as a result of a breach of this agreement by the receiving party;
- 2.2 is developed independently of the disclosing party by the receiving party in circumstances that do not amount to a breach of the provisions of this agreement;

- 2.3 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 regulation in force from time to time; provided that in these circumstances, the receiving party shall advise the disclosing party to take whatever steps it deems necessary to protect its interests in this regard and provided further that the receiving party will disclose only that portion of the information which it is legally required to disclose and the receiving party will use its reasonable endeavours to protect the confidentiality of such information to the greatest extent possible in the circumstances;
- 2.4 is disclosed to a third party pursuant to the prior written authorization of the disclosing party;
- 2.5 is received from a third party in circumstances that do not result in a breach of the provisions of this agreement.

3. Disclosure of confidential information

- 3.1 The disclosing party shall only disclose the confidential information to the receiving party to the extent deemed necessary or desirable by the disclosing party in its sole discretion.
- 3.2 The receiving party acknowledges that the confidential information is a valuable, special and unique asset proprietary to the disclosing party.
- 3.3 The receiving party agrees that it will not, during or after the course of their relationship and/or the term of this agreement as described in Clause 6, disclose the information to any third party for any reason or purpose whatsoever without the prior written consent of the disclosing party, save in accordance with the provisions of this agreement. For avoidance of doubt, in this agreement “third party” means any party other than the two parties of this agreement.

Notwithstanding anything to the contrary contained in this agreement the parties agree that the confidential information may be disclosed by the receiving party to its professional advisors on a need-to-know basis only; provided that that receiving party takes whatever steps as necessary to procure that such professional advisors agree to abide by the terms of this agreement to prevent the unauthorized disclosure of the confidential information to third parties. For purpose of this clause, the receiving party’s professional advisers and employees, directors or managers shall be deemed to be acting, in the event of a breach, as that party’s duly authorized agents.

- 3.5 The receiving party agrees:
 - 3.5.1 to maintain the confidential information and use it only for the furthering their business relationship and for no other purpose;
 - 3.5.3 to apply thereto no lesser security measures and degree of care than those which the receiving party applies to its own confidential or proprietary information and which the receiving party warrants as providing adequate protection of such information

from unauthorised disclosure, copying or use; and

3.5.4 that the unauthorized disclosure of the confidential information to a third party may cause irreparable loss, harm and damage to the disclosing party. Accordingly, the receiving party indemnifies and holds the disclosing party harmless against any loss, claim, harm or damage including consequential damage, of whatever nature, suffered or sustained by the disclosing party pursuant to a breach by the receiving party of the provisions of this agreement.

4. Title

All confidential information disclosed by the disclosing party to the receiving party is acknowledged by the receiving party:

4.1 to be proprietary to the disclosing party; and

4.2 not to confer any rights to the receiving party of whatever nature in the confidential information.

5. Return of material containing or pertaining to the confidential information

5.1 The disclosing party may, at any time, request the receiving party to return any material containing, pertaining to or relating to confidential information disclosed pursuant to the terms of this agreement and may, in addition request the receiving party to furnish a written statement to the effect that, upon such return, the receiving party has not retained in its possession, or under its control, either directly or indirectly, any such material.

5.2 As an alternative to the return of the material contemplate above, the receiving party shall, at the instance of the disclosing party, destroy such material and erase it from computer files and furnish the disclosing party with a written statement to the effect that all such material has been so destroyed.

5.3 The receiving party shall comply with a request in terms of this clause, within 7 (seven) days of receipt of such a request.

5.4 Notwithstanding the return or destruction of the confidential information, each party shall continue to be bound by the obligations of this agreement for the term defined in Clause 6 hereof.

6. Term

This agreement shall commence upon the date of signature of the last signing party hereto (“the effective date”) and shall endure for a period of twenty-four (24) months (“the term”) thereafter, or for a period of months twenty-four (24) from the date of the last disclosure of confidential information to the receiving party, whichever is the longer period, whether or not the parties continue to have any relationship for that period of time. The agreement may be extended by mutual agreement of the parties in writing.

7. Amendments

No amendment, interpretation or waiver of any of the provisions of this agreement shall be effective unless reduced in writing and signed by both parties.

8. Enforcement

The failure by the disclosing party to enforce or to require the performance at any time of any of the provisions of this agreement shall not be construed to be a waiver of such provision, and shall not affect either the validity of this agreement or any part hereof or the right of the disclosing party to enforce the provisions of this agreement.

9. Representations & Warranties

Each party represents that it has authority to enter into this agreement and to do all things necessary to procure the fulfillment of its obligations in terms of this agreement.

10. Entire agreement

This agreement contains the entire agreement of the parties with respect to the subject matter of this agreement and supersedes all prior agreements between the parties, whether written or oral, with respect to the subject matter of this agreement.

11. Governing Law

This agreement and the relationship of the parties in connection with the subject matter of this agreement and each other shall be governed and determined in accordance with the laws of the Republic of South Africa.

12. Mediation and/or Arbitration

12.1 Any dispute arising out of or in connection with this Agreement shall be resolved amicably between the parties with or without the services of a mediator agreed to by both parties. In the event of such dispute resolution failing, the dispute shall be referred for arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within 14 days of the notification of a dispute, upon the application of either of the parties by a mutually agreed arbitrator from The Arbitration Foundation of Southern Africa (AFSA, a private dispute resolution authority which manages and administers the confidential resolution of a wide-range of local and international disputes by way of mediation, adjudication, arbitration and related processes. AFSA's head office is in Sandton, Johannesburg, with branch offices in Cape Town, Pretoria, Durban and Mthatha.)

12.2 Such arbitration shall be conducted in Johannesburg or one of the above cities nearest to both parties in accordance with the Rules of Arbitration of the said institute and subject to and in accordance with the provisions of the law. (All domestic arbitrations are governed by the provisions of the Arbitration Act, No. 42 of 1965.)

12.3 To the full extent permissible by law, the determination of the arbitrator shall be final and binding upon the parties.

13. Communication/Notices

13.1 Any communication regarding the potential agreement, requests for approval or additional agreement discussions or questions regarding procedures and notice in connection with this agreement shall be in writing and addressed,

in the case of Party 1 to:

ADDRESS & EMAIL ADDRESS OF PARTY 1
Telephone number of Party 1

in the case of Party 2 to:

ADDRESS & EMAIL ADDRESS OF PARTY 2
Telephone number of Party 2

13.2 If any notice is to be sent by mail, it shall be sent by prepaid registered mail and shall then be deemed until and unless the contrary is proved, to have been received 10 (ten) days after the date of posting.

13.3 If any notice is sent by email, it will be deemed, until and unless the contrary is proved, to have been received on the day following the date recorded on the sender's email.

13.4 If any notice is delivered by hand, it will be deemed to have been received on proof of the date of delivery and receipt.

In witness whereof, the parties have executed this contract on the day specified herein:

For: **Party 1**

For: **Party 2**

Name:
Title:
Date:

Name:
Title:
Date:

Witnessed by:

Witnessed by:

Name & Address

Name & Address