

Moonmoth Interactive CC t/a
MOONMOTH INTERACTIVE
Standard Terms and Conditions

INTERPRETATION

In this agreement, unless inconsistent with or otherwise indicated by the context –

“**the/this agreement**” means the agreement as set out in this document;

“**business day**” means a day which is not a Saturday, Sunday or South African public holiday;

“**Internet**” means the world-wide network of computers commonly understood to provide some or all of the following features, among others: electronic mail, file transfers through File Transfer Protocol (“FTP”), access to local and remote computers, UseNet Newsgroups, Gopher access to information on local and remote computers, Wide Area Information Servers (“WAIS”), and World Wide Web access.

“**prime**” means the publicly quoted rate of lending as quoted from time to time by Nedbank Limited;

“**Web page**” means a document or file that is intended to be accessible by Internet users with a Web Browser.

“**Web server**” means the computer or computers that the third-party Internet Service Provider or Hosting Provider uses to make Web Sites accessible to Internet users 24 hours per day.

“**Web site**” means a series of interconnected Web Pages residing in a directory or set of directories on a Web Server or Web Servers, as well as Web Pages that execute within the aforesaid; and “Site” has a corresponding meaning.

any reference to the singular includes the plural and vice versa;

any reference to natural persons includes legal persons and vice versa;

any reference to gender includes the other genders;

The clause headings in this agreement have been inserted for convenience only and shall not be taken into account in its interpretation.

Words and expressions defined in any sub-clause shall, for the purpose of the clause of which that sub-clause forms part, bear the meaning assigned to such words and expressions in that sub-clause.

If any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, effect shall be given to it as if it were a substantive clause in the body of the agreement, notwithstanding that it is only contained in the interpretation clause.

If any period is referred to in this agreement by way of reference to a number of days, the days shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a day which is not a business day, in which case the day shall be the next succeeding business day.

In the event of any part of this Agreement being found to be unenforceable or invalid it shall in no way affect the validity and obligatory nature of any part of this agreement.

This agreement shall be governed by and construed and interpreted in accordance with the law of the Republic of South Africa.

PAYMENT

All moneys due to Moonmoth by the client shall be paid to Moonmoth in South African currency.

The Client shall not be entitled to set off any amounts against amounts that the Client is indebted to Moonmoth.

Unless otherwise agreed in writing, all payments shall be made by the Client upon delivery of products or commencement of service.

All monthly payments shall be made in advance.

All overdue payments shall attract interest at a rate of 2% above prime.

Moonmoth reserves the right to suspend services without prior notice should the Client be in default with any payment.

Any deposit paid in terms of this agreement shall be non-refundable.

OWNERSHIP AND RISK

All products and the copyright in all works will remain the property of Moonmoth and ownership shall only pass to the Client once all outstanding fees and costs have been settled.

The full risk associated with any products and services shall pass to the Client upon delivery thereof to the Client.

Moonmoth shall endeavour to deliver all products and services timeously as far as reasonable possible. Moonmoth shall however not be liable for any loss of damage, including consequential damages, should the delivery be delayed.

SELLING OF THIRD PARTY SOFTWARE

Software is supplied subject to the following terms and conditions:

Unless otherwise agreed in writing, Moonmoth shall not be under any obligation to support any software sold by Moonmoth to the Client.

All software shall be sold subject to a Licence Agreement and it shall be the obligation of the Client to ensure compliance therewith.

It is the responsibility of the Client to ensure that the software is suitable for its intended purpose.

WEB SITE HOSTING

1.1 Should the client desire Moonmoth to arrange for hosting of the website on the Internet, Moonmoth shall recommend a third-party Internet Service Provider or Hosting Provider to host the Clients' website. As such the Client will be required to enter into a separate and distinct contract with an Internet Service Provider or Hosting Provider.

1.2 Moonmoth disclaims all liability for any loss or damage, however arising, that the Client may suffer as a result of the contract entered into between the Client and the aforesaid Internet Service Provider or Hosting Provider.

CONTENT PROTECTION

The Client undertakes not to alter in any manner the programming code of the web site, unless otherwise agreed between the parties.

Should any error occur as a result of a breach of this clause, the Client acknowledges that he or she shall be liable to pay Moonmoth its standard time and materials costing to rectify the error.

CONFIDENTIALITY

The parties shall at all times ensure that all its employees and agents treat the business processes, confidential information, application systems and contents of the information services and the terms contained in this agreement as confidential and undertake not to disclose to any third party any such information except insofar as such disclosure is authorised in writing by both parties or is ordered by a Court of law, or is otherwise essential for application in judicial action.

INTELLECTUAL PROPERTY

1.3 The Client undertakes not to infringe on the intellectual property of Moonmoth, including without limitation registered and unregistered trademarks, in any manner whatsoever without the prior written permission of Moonmoth.

1.4 The copyright in any work created by Moonmoth shall vest in the Client, except for the copyright in relation to:

Interface design;

Database programming code; and

Any other elements of the work designated as such in the Proposal.

BREACH

1.5 If the Client:

fails to pay any amount payable to Moonmoth in terms of this Agreement on the due date;

fails to remedy any breach within 7 days from receiving written notice to do so;

commits any act of insolvency;

endeavours to generally compromise with its creditors or does or causes anything to be done which may prejudice Moonmoth's rights under this Agreement;
allows any judgement against it to remain unsettled for more than 10 days without taking immediate steps to have it rescinded and successfully prosecuting the application to its final end; or

is placed in liquidation or under judicial management (in either case, whether provisionally or finally) or, being an individual, his estate is sequestrated or voluntarily surrendered

then, without prejudice to any other rights which Moonmoth may have in terms of this Agreement or according to law, Moonmoth shall be entitled to:

a) treat as immediately due and payable all amounts which would otherwise become due and payable over the un-expired period of this agreement, and to claim such amounts as well as any other amounts arrears, including interest, and to cease performance of its obligations under this agreement as well as any other contract with the Client, until the Client has paid the aforesaid amounts and remedied the breach; or

b) cancel the agreement

without prejudice to Moonmoth's rights to claim damages.

LEGAL COSTS

The Client shall be liable for all legal costs on an attorney and own client scale, including tracing fees, which may be incurred by Moonmoth as a result of the Client being in breach of this Agreement.

DISCLAIMER

Moonmoth shall not be held liable by the Client, its employees or agents for any loss or damage, however arising, including without limitation consequential damages, arising from the operation of this agreement.

JURISDICTION

The parties hereby consent to the jurisdiction of the Magistrate's Court having jurisdiction in respect of all proceedings in connection with this agreement.

Notwithstanding the aforementioned, Moonmoth shall be entitled at its option to institute any proceedings in connection with this agreement in any division of the Supreme Court of South Africa having jurisdiction.

RELAXATION

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

ARBITRATION

Should any dispute (other than a dispute in respect of which urgent relief may be obtained from a court of competent jurisdiction) arise between the parties in the widest sense in connection with -

the formation or existence of;

the carrying into effect of;

the interpretation or application of the provisions of;

the parties' respective rights and obligations in terms of or arising out of;

the validity, enforceability, rectification, termination or cancellation, whether in whole or in part of;

any documents furnished by the parties pursuant to the provisions of,

this agreement or which relates in any way to any matter affecting the interests of the parties in terms of this agreement, that dispute shall, unless resolved amongst the parties to the dispute, be referred to and be determined by

arbitration in terms of this clause, provided that a party to the dispute has demanded the arbitration by written notice to the other parties.
Should the parties fail to reach agreement on the identity of the arbitrator, same shall be appointed by the President for the time being of the Arbitration Forum.

ASSIGNMENT

- 1.6 The Client may not assign, transfer, sub-contract or otherwise part with this agreement or any part thereof or any right or obligation under it, without obtaining Moonmoth's prior written consent thereto.
- 1.7 Moonmoth reserves the right to cede or otherwise make over this agreement, provided that same shall only take place after one month prior written notice to the Client.

VARIATION

No addition to or variation, consensual cancellation or novation of this agreement and no waiver of any right arising from this agreement or its breach or termination shall be of any force or effect unless reduced to writing and signed by all the parties or their duly authorised representatives.

WHOLE AGREEMENT

This agreement constitutes the whole agreement between the parties as to the subject matter hereof and no agreements, representations or warranties between the parties regarding the subject matter hereof other than those set out herein are binding on the parties.

NOTICES AND DOMICILIA

The parties choose as their *domicilia citandi et executandi* their respective addresses set out in this clause for all purposes arising out of or in connection with this agreement at which addresses all processes and notices arising out of or in connection with this agreement, its breach or termination may validly be served upon or delivered to the parties.

- 1.8 For purposes of this agreement the parties' respective addresses shall be as stated in the Service Agreement, or at such other address in the Republic of South Africa of which the party concerned may notify the others in writing provided that no street address mentioned in this sub-clause shall be changed to a post office box or *poste restante*.

Any notice given in terms of this agreement shall be in writing and shall -
if delivered by hand be deemed to have been duly received by the addressee on the date of delivery;
if posted by prepaid registered post be deemed to have been received by the addressee on the 8th (eighth) day following the date of such posting;
if transmitted by facsimile or e-mail be deemed to have been received by the addressee on the day following the date of dispatch,
unless the contrary is proved.

Notwithstanding anything to the contrary contained or implied in this agreement, a written notice or communication actually received by one of the parties from another including by way of facsimile transmission shall be adequate written notice or communication to such party.

ADDENDUM TO MOONMOTH STANDARD TERMS

This addendum is enforced and limited to the service agreement of which this addendum forms part.

All other terms and provisions of said contract shall remain in full force and effect. The parties agree to make the following additions or changes a part of said service agreement and terms therein:

BREACH IN TERMS OF LATE DELIVERY BY MOONMOTH

Provided that delays in the delivery of services in terms of the service agreement result solely from failure by Moonmoth and is not caused by:

- 1 failure of the client to
 - 1.1 provide required information or instruction
 - 1.2 clearly and timeously communicate amendments, additions to and deviations from the agreed specification
 - 1.3 reach agreement that amendments, additions to and deviations from agreed specification is included in the original specification
 - 1.4 commission and establish third party services such as hosting services
- 2 failure of third party and other agents to render services relevant to the delivery of the project referenced in the specification

Moonmoth shall discount the value of services not yet delivered by 10% (ten per cent) per month to a maximum of three months after the conclusion of the first month that delivery is delayed.

In the event that this agreement is terminated prior to delivery of all services rendered, Moonmoth undertakes to deliver all services rendered completed on the date of the early termination of this agreement to the client. The client undertakes to pay Moonmoth for all services rendered and/or products delivered, in addition to the value of costs already paid, prior to the early termination of this agreement.

In the event of services not delivered solely as a result of failure on the part of Moonmoth and not reasons as stipulated in 1 above, Moonmoth undertakes to return to the client portions of the any deposit or commencement fees relating to work not yet completed or delivered

Should either party wish to terminate this agreement prior to the stipulated date, then the termination shall be subject to either party giving a minimum of 30 (Thirty) days notice in writing of termination thereof.