



Terms & Conditions of Sale

1. INTERPRETATION

1.1 In these Terms, the following words and expressions shall, save where the context or the express provisions of the Terms otherwise state have the following meaning:

1.1.1 "Business Day" means any day which is not a Saturday, a Sunday or a public holiday in the Republic of South Africa;

1.1.2 "Business Hours" means from 08h00 to 20h00 Central African Time, on Business Days only, and 09h00 to 12h00 Central African Time on Saturdays and Sundays;

1.1.3 "Device" means any self contained operational Hardware;

1.1.4 "Hardware" means the electronic and mechanical parts of a computer or system related piece of equipment;

1.1.5 "Management Software" means the software that is downloaded onto Your System to facilitate the provision of the Services;

1.1.6 "Management Software Provider" means any person who provides Management Software used by Winstel;

1.1.7 "Parties" means Winstel and You, or any of them or a combination of them as the context may indicate;

1.1.8 "Personal Data" means information about you referred to in clause 3.1 below;

1.1.9 "RSA" means the Republic of South Africa;

1.1.10 "Services" means those services provided by Winstel in respect of its Home and/or Business Offering as detailed on Winstel's website (www.winstel.co.za) and which are in fact ordered by you pursuant to clause 4.2 below;

1.1.11 "Service Agreement" means the service agreement referred to in clause 5.1 below;

1.1.12 "Software" means a set of instructions comprehensible by a computer that provides use, purpose and the inter-relation of Hardware;

1.1.13 "Software Provider" means the provider of any Software;

- 1.1.14 "System" means a collection of Hardware and Software and processes brought together and utilised for a purpose;
- 1.1.15 "Terms" means these standard terms and conditions;
- 1.1.16 "Website" means www.winstel.co.za;
- 1.1.17 "Winstel" means Winstel Technologies CC (Registration Number 2003/046507/23); and
- 1.1.18 "you" means the purchaser of the Services to which these terms and conditions apply, and where the purchaser is a corporate entity, its directors, shareholders and any employee or contractor who is authorised to deal directly with Winstel on Your behalf.

2. **CONSTRUCTION**

In these Terms:

- 2.1 unless the context clearly indicates otherwise, words importing natural persons shall include a reference to juristic persons and *vice versa*, a reference to one gender includes a reference to the other gender, and a reference to the singular includes a reference to the plural and *vice versa*;
- 2.2 schedules, if any, to these Terms shall be deemed to have been incorporated herein and shall form an integral part hereof;
- 2.3 a reference to a Party in a document includes that Party's successors and permitted assigns;
- 2.4 any reference to an enactment is to that enactment as at the date of signature and as amended or re-enacted from time to time;
- 2.5 where the day on or by which anything is to be done is not a Business Day, it shall be done on or by the first Business Day thereafter;
- 2.6 when any number of days is prescribed in these Terms, same 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 last day shall be the next Business Day;
- 2.7 the headings appearing in these Terms are for reference purposes only and shall not affect the interpretation hereof;
- 2.8 in its interpretation these Terms shall not be construed in favour of or against either Party by reason of the extent to which that Party or its professional advisors participated in the preparation of these Terms;
- 2.9 records shall be binding on the Parties and are not merely for information purposes;

- 2.10 words and expressions defined in any sub-clause shall, for the purposes of the clause of which that sub-clause forms part, bear the meaning assigned to such words and expressions in that sub-clause;
- 2.11 if any provision is a definition (or under this heading and/or any other heading in these Terms) and is a substantive provision conferring rights or imposing obligations on any Party, notwithstanding that it is only in the definition (or such other clause) effect shall be given to it as if it were a substantive provision in the body of these Terms;
- 2.12 where figures are referred to in numerals and words, if there is any conflict between the two, the words shall prevail;

3. **PERSONAL DATA**

- 3.1 Personal Data refers to any data which identifies you or your account with Winstel. It includes, but is not limited to:
- 3.1.1 your identity and contact details, which you agree to supply to us accurately and to keep up to date by notifying us of any changes to the information held;
 - 3.1.2 any correspondence between Winstel and you;
 - 3.1.3 any information contained on your Systems; and
 - 3.1.4 any billing information.
- 3.2 Personal Data will be collected, processed and used by Winstel for the purposes referred to in these Terms.
- 3.3 In providing the Services, Winstel may be required to work with other organisations that produce the Software and Hardware and may be required under its licences to such organisations to provide certain information about you. By agreeing to these Terms, you agree and authorise Winstel to make the Personal Data available to such organisations.
- 3.4 Winstel may also collect Personal Data for statistical purposes. Such data will only be used or disclosed on an anonymous aggregated basis.
- 3.5 Winstel may hold Personal Data relating to the transactions which you enter into with us. Winstel will disclose this Personal Data only insofar as it is necessary in order for Winstel to comply with its obligations under these Terms.
- 3.6 Any telephone calls made to Winstel's offices may be monitored or recorded. Such monitoring and recordal is used for training purposes and in order to enable Winstel to track reported problems and to improve our service to you.
- 3.7 Winstel shall be obliged to disclose Personal Data where it is compelled to do so by law or order of court.

3.8 You hereby confirm that you understand and acknowledge that some of the Software may be programmed to track the number of copies deployed and to provide the Software Provider with such deployment and usage information. You hereby consent to this operation and agree at all times not to hinder, impede, alter, prevent or otherwise distort, the operation of such tracking and reporting functions.

4. **SERVICES**

4.1 Winstel shall endeavour to provide the Services during Business Hours or as otherwise agreed.

4.2 The Services provided by Winstel will only be provided to you upon the receipt by Winstel of an order for such Services which order shall be placed in the manner provided for on Winstel's website. Failing receipt of an order for the Services, Winstel shall not be obliged to provide any Services to you.

4.3 In providing the Services, it may be necessary, where any problem cannot be fixed remotely by Winstel, for Winstel to dispatch a technician to provide the Services on site. You agree that Winstel may, in its sole discretion, determine whether it is necessary to dispatch a technician in order to properly provide the Services. In the event that a technician is dispatched, you agree to pay the dispatch fees as well as the technician travelling costs, both of which are detailed on the Website.

4.4 Winstel shall use reasonable endeavours to ensure that any routine service work or upgrade to the Management Software causes minimum disruption to the provision of the Services and your business.

4.5 The provision of the Services may be temporarily suspended without notice in the case of system failure, security issues, unexpected maintenance or repair of either the Hardware or the Software on your System, where urgent or unexpected remedial action is required to protect the Services or Your System or for reasons beyond Winstel's control. In such instances, it may be necessary to withdraw the Services in whole or part.

4.6 Winstel shall not be held liable for the occurrence of any of the events envisaged in clauses 4.4 and 4.5 above and you shall not have any claim against Winstel for any losses arising therefrom.

4.7 Where Services are unavailable due to third party acts or omissions or where factors are outside the control of Winstel, including without limitation the withdrawal of support by Winstel's licensors and/or business partners, virus attack or System sabotage, Winstel shall endeavour to have such support reinstated as soon as is reasonably practicable but shall provide no guarantee in this regard. Any such work or remedy shall be at your cost unless it is due to gross negligence on the part of Winstel.

4.8 Winstel shall not be liable to you if, for any reason whatsoever, the Services are unavailable at any time and for any period.

- 4.9 Winstel, its Software Providers and any other third party suppliers, may from time to time modify, add to or remove aspects of the Services.
- 4.10 In order for Winstel to provide the Services, you agree that it will be necessary for Winstel to download appropriate Management Software onto your System for its sole use.
- 4.11 If you are entering these Terms as a consumer as defined under the Consumer Protection Act 68 of 2008 then these Terms do not affect your statutory rights and will be interpreted accordingly.

5. **SERVICE CONTRACT**

- 5.1 In order to qualify for the provision of the Services, you agree to enter into a 12 (twelve) month service agreement with Winstel.
- 5.2 The Service Agreement shall, after the expiry of the 12 (twelve) month period referred to in clause 5.1 or any subsequent 12 (twelve) month period, automatically be renewed for a further period of 12 (twelve) months, unless one of the Parties has notified the other in writing at least 20 (twenty) Business Days before the expiry of the initial 12 (twelve) month term, that it does not wish to renew the Service Agreement.
- 5.3 Notwithstanding the provisions of clause 5.2, either Party to the Service Agreement may, at any time, cancel the Service Agreement on 20 (twenty) Business Days' written notice to the other Party that it intends to cancel the Service Agreement.
- 5.4 Winstel's solutions provides you with the advice and labour (whether remote or on-site) necessary to determine and fix any faults, whether caused by hardware, software or user.
- 5.5 Should a fault be hardware related we will charge you for the part/s replaced. Where possible, we will attempt to replace parts with identical units but reserve the right to use compatible parts where identical parts are unavailable.
- 5.6 Winstel's ability to fix a problem may from time to time be limited to the quality and build of the hardware or software in use on your System. Should this be the case, Winstel will investigate and discuss alternative solutions with you.
- 5.7 Winstel will not service any equipment that is still under any non-Winstel warranty unless given authority to do so by you. Any valid warranty claim is your sole responsibility, and not that of Winstel.

6. **PAYMENT TERMS**

- 6.1 Upon your entering into the Service Agreement, an account will be created for you in respect of which the costs of any Services ordered by you will be debited to your account on the date which the Services were ordered by you from Winstel.
- 6.2 Any amount which remains outstanding on your account shall be debited from your account on the final day of the month in which the Services were ordered by

you, as per the payment method which you have elected when setting up your account.

- 6.3 The Services, including the fees charged in respect of the dispatch of a technician as envisaged in clause 4.3 above, shall be charged out at the prices contained on the Website, which prices are subject to change at any time at the sole discretion of Winstel and without notification to you.
- 6.4 Should you experience any issues or discrepancies on your account, you are required to notify Winstel, in writing, of any such issue or discrepancy within 14 (fourteen) days of the issue or discrepancy appearing on your account. Should you fail to bring any such issue or discrepancy to Winstel's attention, you will have waived your right to dispute any such issue or discrepancy and the account shall be regarded as true and correct.
- 6.5 Where an issue or discrepancy in your account has been rectified by Winstel after receiving notification from you as envisaged in clause 6.4, any amount which remains outstanding on your account shall be debited from your account within 14 (fourteen) days of the rectification of such issue or discrepancy.
- 6.6 Any late payment shall accrue interest from the date on which payment was due to the date of payment calculated monthly in advance at the prime overdraft lending rate of interest as charged by Standard Bank of South Africa Limited from time to time plus 2% (two percent). In this regard, a certificate by any manager of Standard Bank of South Africa Limited shall constitute *prima facie* proof of such rate.

7. **RETURNS POLICY**

You shall be entitled to terminate the Service Agreement for convenience and without cause within 30 (thirty) days of entering into the Service Agreement by providing Winstel with written notice of such termination. You shall have no liability to Winstel in respect of such termination.

8. **MATERIAL AND CONDUCT**

- 8.1 Winstel reserve the right to refuse to provide or stop providing any Services where it reasonably believes that your System contains material:
- 8.1.1 that is threatening, defamatory, obscene, indecent, seditious, offensive, pornographic, abusive, liable to incite racial hatred, discriminatory, menacing, scandalous, inflammatory, blasphemous, in breach of confidence, in breach of privacy or which may cause annoyance or inconvenience;
 - 8.1.2 for which you have not obtained all necessary licences and/or approvals;
 - 8.1.3 which constitutes or encourages conduct that would be considered a criminal offence, give rise to civil liability, or otherwise be contrary to the law of or infringe the rights of any third party, in the RSA or any other country in the world; or

8.1.4 which is technically harmful (including without limitation, computer viruses, logic bombs, Trojan horses, worms, harmful components, corrupted data or other malicious software or harmful data).

8.2 Winstel will fully co-operate with any law enforcement authorities or court order requesting or directing Winstel to disclose the identity or locate anyone dealing with or storing any material in breach of clause 8.1.

8.3 Winstel will not use your System for any purpose other than hosting any Management Software and in providing the Services.

9. **INTELLECTUAL PROPERTY RIGHTS**

9.1 The Management Software upon or through which the Services are provided are owned by licensors ("Management Software Providers") who under agreement licence the use of the Management Software to Winstel.

9.2 All title and intellectual property rights in and to the Management Software (and the constituent elements thereof, including but not limited to any images, photographs, animations, video, audio, music, text and "applets" incorporated into the Management Software) are owned by Winstel's various Management Software Providers. The Management Software is protected by copyright laws and international copyright treaties, as well as other intellectual property laws and treaties. Your hosting of parts of the Management Software does not transfer any ownership of the Management Software or any intellectual property rights to you.

9.3 You shall not remove, modify or obscure any copyright, trademark or other proprietary rights notices that appear on the Management Software or that appear during use of the Management Software.

9.4 You may not reverse engineer, de-compile, or disassemble the Management Software.

9.5 The Management Software is for Winstel's use in providing you with the Services and under no circumstances are you to use, access or copy the Management Software.

9.6 You may not rent, lease, lend, pledge, or directly or indirectly transfer or distribute the Management Software to any third party, and you may not permit any third party to have access to and/or use the Management Software.

9.7 Winstel may terminate the provision of Services if you fail to comply with these Terms. In the event of termination or cancellation for any reason whatsoever, you must permit or assist Winstel or its agents to delete and destroy any Management Software and all of its component parts from Your System.

9.8 In addition to any liability you may have to Winstel, you agree that you will also be legally responsible directly to the Management Software Providers for any breach of these Terms.

10. **DISCLAIMER**

- 10.1 Winstel, and its officers, directors, employees, shareholders or agents do not accept any liability for the use made by you of the Services other than as is provided under statute.
- 10.2 To the extent permitted by law, Winstel excludes all representations, warranties, conditions and other terms whether actual or implied and whether given by Winstel or the Software Providers (including without limitation, the conditions implied by law of satisfactory quality, fitness of purpose and the use of reasonable care and skill) which but for these Terms might have effect in relation to the Services.

11. **LIABILITY**

- 11.1 Winstel (whether or not involved in creating, producing, maintaining, or delivering the Goods or Services) and its officers, directors, employees, shareholders or agents exclude all liability and responsibility for any amount or kind of loss or damage that may be suffered by you or any third party, including without limitation, any direct, indirect, punitive, or consequential loss or damages, or any loss of income, profits, goodwill, data, contracts, use of money or loss or damages arising from or connected in any way to business interruption, and whether (including without limitation negligence, contract or otherwise) in connection with the Services, in any way or in connection with the use, inability to use or the results of use of the Services, including but not limited to loss or damage due to viruses that may infect your System or other property on account of your using the Services, your downloading of any material from any website, disc or other medium, or from opening an email or any of its attachments. Provided that nothing in this agreement shall exclude or limit Winstel's liability for death or personal injury caused by gross negligence, fraud, misrepresentation as to a fundamental matter or any liability which cannot be excused or limited under statutory law.
- 11.2 All costs associated with servicing, repair or correction of equipment, software or data or any other work carried out by Winstel that is required due to your actions or inactions in relation to, or use of, your System will be at your additional expense.
- 11.3 You are obliged to have adequate system protections (anti-virus, firewall, and spyware, malware, malicious code detection/prevention) installed and configured to provide regular updates. All problems relating to viruses, spyware, malware, and/or malicious code are chargeable even if under a service contract agreement. Consumables are not covered under any service contract agreement. You have responsibility to ensure each consumable item (such as ink cartridge, toner, paper etc.) is installed correctly and at a level in accordance with the manufacturer's instructions. All costs associated with servicing, repair or correction of equipment, software or data due to a consumable item will be chargeable at our standard rate.

- 11.4 Winstel shall not be held liable for any costs or claims whatsoever that may arise from your neglect to meet the minimum requirements specified in clause 11.3 or to upgrade your System when and in the manner recommended by Winstel.

12. **YOUR OBLIGATIONS AS A CUSTOMER**

You are responsible for agreeing to a product or service. You must supply Winstel with reasonable courtesy, information and cooperation so that Winstel may perform its duties. You are responsible for having backups of all data from your Device and/or System.

13. **WAIVER AND REMEDIES**

- 13.1 Any failure by Winstel to exercise or delay in exercising any right or remedy provided by these Terms or by law does not constitute a waiver of that right or remedy or a waiver of any other rights or remedies which it may have.
- 13.2 A waiver by Winstel of any breach of these Terms or of any default under these Terms does not constitute a waiver of any other breach or default and shall not affect the rest of the Terms.
- 13.3 A waiver by Winstel of any breach of any of the Terms or of any default under these Terms shall not prevent Winstel from subsequently requiring compliance with the waived obligation.
- 13.4 The rights and remedies provided by the Terms are cumulative and (subject as otherwise provided in the Terms) and are not exclusive of any rights or remedies provided by law.

14. **TERMINATION**

- 14.1 Winstel has the right at any time to terminate the Service Agreement as read with these Terms or part thereof with immediate effect and without liability or penalty to themselves by giving you written notice where:
- 14.1.1 you commit a breach of any of the Terms;
 - 14.1.2 any writ of execution or other process is levied upon any of your assets or your business;
 - 14.1.3 you are placed under provisional or final liquidation, whether voluntarily or by order of court, or an order is granted declaring you insolvent, or otherwise take the benefit of any statutory provision for the time being in force for the relief of insolvent debtors, or (being a body corporate) convene a meeting of creditors (whether formal or informal), or enter into liquidation (whether voluntary or compulsory);
 - 14.1.4 you cease or threaten to cease to carry on business; or

14.1.5 your financial position deteriorates to such an extent that in the opinion of Winstel your capability to adequately fulfil your obligations under the Service Agreement as read with these Terms is been placed in jeopardy.

14.2 Upon receiving notice of termination, all outstanding monies owed to Winstel by you must be settled within 14 (fourteen) days of receipt of the notice referred to in clause 14.1.

14.3 Following termination of the Service Agreement as read with these Terms or part thereof under the Terms, all rights and obligations of the Parties shall cease except for those rights and obligations that are intended, by implication or expressly stated, to continue beyond termination.

14.4 Upon termination of the Service Agreement as envisaged in clause 7 or this clause 14, you agree to immediately erase all software pertaining to the Services from your System as well as, where applicable, return any hardware, manuals or otherwise provided by Winstel to yourselves in terms of the Service Agreement.

15. **NOTICES**

15.1 Any notice or other communication given under these Terms shall be in writing and shall be served to the address and for the attention of the relevant Party, or such other address, or facsimile number as may be notified in writing from time to time by the relevant Party to the other, by delivering it personally or sending it by pre-paid recorded delivery or registered post or fax.

15.2 Any such notice referred to in clause 15.1 shall be deemed to have been received, if delivered personally, at the time of delivery, in the case of pre-paid recorded delivery or registered post, 48 hours from the date of posting and in the case of fax, at the time of transmission, unless out of Business Hours in which case deemed receipt shall be during Business Hours the next Business Day.

16. **ARBITRATION**

Any dispute which arises pursuant to these Terms must be resolved within 15 (Fifteen) Business Days. Failure to resolve the dispute or any other dispute arising under this agreement, either Party may request an arbitrator to intervene and resolve in accordance with the rules of the Arbitration Foundation of Southern Africa ("AFSA") by an arbitrator or arbitrators appointed by AFSA. There shall be a right of appeal as provided for in article 22 of the aforesaid rules. Nothing in this Agreement shall disentitle a Party from applying to a court for urgent injunctive relief in appropriate circumstances.

17. **FORCE MAJEURE**

17.1 Force Majeure means any cause preventing either Party from performing any or all of its obligations which arises from or is attributable to acts, events, omissions or accidents beyond the reasonable control of the Party.

17.2 If either Party is prevented or delayed in the performance of any of its obligations under the Terms by Force Majeure, that Party must forthwith:

- 17.2.1 serve notice on the other Party specifying the nature and extent of the circumstances giving rise to Force Majeure; and
 - 17.2.2 shall, subject to service of such notice and having taken all reasonable steps to avoid such prevention or delay and to clause 14.4, have no liability in respect of the performance of such of its obligations as are prevented by the Force Majeure events during the continuation of such events; and
 - 17.2.3 for such time after they cease as is necessary for that Party, using all reasonable endeavours, to recommence its affected operations in order for it to perform its obligations.
- 17.3 If either Party is prevented from performance of its obligations for a continuous period in excess of 3 (three) months, the other Party may terminate the agreement between the Parties forthwith on service of notice upon the Party so prevented.
- 17.4 The Party claiming to be prevented or delayed in the performance of any of its obligations under the Terms by reason of Force Majeure shall use reasonable endeavours to:
- 17.4.1 bring the Force Majeure event to a close; or
 - 17.4.2 find a solution by which the Agreement can be performed despite the continuance of the Force Majeure event.
18. **RIGHTS OF THIRD PARTIES (EXCLUSION)**
- 18.1 Save as expressly provided in these Terms or as otherwise agreed in writing between the Parties, no provision contained in these Terms shall be enforceable by a third party (being any person other than the Parties and their permitted successors and assignees).
- 18.2 Notwithstanding that any provision contained in these Terms may be or become enforceable by a person who is not a party to it, the terms contained herein or any of them may be varied, amended or modified or the Terms may be suspended, cancelled or terminated by agreement in writing between the Parties or the Terms may be rescinded (in each case), without the consent of any such third party.
19. **JOINT AND SEVERAL LIABILITY**
- 19.1 An obligation of two or more parties to Winstel under these Terms shall bind them jointly and severally to Winstel.
- 19.2 Any claim by you against Winstel under these Terms shall be limited to such amount as Winstel has received from you in the 12 (twelve) months preceding the date the claim was notified to Winstel.

20. NO PARTNERSHIP/AGENCY

20.1 Nothing in these Terms is intended to or shall operate to;

20.1.1 create a partnership or joint venture of any kind between the Parties;
or

20.1.2 authorise any Party to act as agent for the other.

20.2 Neither Party shall have authority to act in the name or on behalf of or otherwise to bind the other in any way (including but not limited to the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

21. ASSIGNMENT

21.1 Winstel is entitled to assign or otherwise transfer any of its rights or obligations under these Terms without the need to obtain prior written consent from you.

21.2 You shall not without the prior written consent of Winstel (such consent not to be unreasonably conditioned, withheld or delayed):

21.2.1 assign or transfer any rights or obligations which you may have under these Terms; or

21.2.2 sub-contract any or all of your obligations under these Terms.

21.3 The Parties are entering into these Terms for their own benefit and not for the benefit of another person.

21.4 Subject to and upon any succession or assignment permitted by the Terms, any successor or assignee of the Parties shall in its own right be able to enforce any these Terms as if it were a party, but until such time any such successor or assignee of the Parties shall have no such rights whether as a third party or otherwise.

22. WHOLE AGREEMENT, NO AMENDMENT

22.1 These Terms, together with the Service Agreement, constitute the whole agreement between the Parties relating to the subject matter hereof.

22.2 No amendment or consensual cancellation of these Terms or any provision or term thereof or of any agreement, bill of exchange or other document issued or executed pursuant to or in terms of these Terms and no settlement of any disputes arising under these Terms and no extension of time, waiver or relaxation or suspension of any of the provisions or terms of these Terms or of any agreement, bill of exchange or other document issued pursuant to or in terms of these Terms shall be binding unless recorded in a written document signed by the Parties. Any such extension, waiver or relaxation or suspension which is so given or made shall be strictly construed as relating strictly to the matter in respect whereof it was made or given.

22.3 No extension of time or waiver or relaxation of any of the provisions or terms of this Terms or any agreement, bill of exchange or other document issued or executed pursuant to or in terms of these Terms, shall operate as an estoppel against any Party in respect of its rights under these Terms, nor shall it operate so as to preclude such Party thereafter from exercising its rights strictly in accordance with these Terms.

22.4 No Party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein, whether it induced the contract and/or whether it was negligent or not.

23. **SEVERANCE**

23.1 If any provision of these Terms shall be found by any court or administrative body of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not affect the other provisions of these Terms which shall remain in full force and effect.

23.2 If any provision of these Terms is so found to be invalid or unenforceable but would be valid or enforceable if some part of the provision were deleted, the provision in question shall apply with such modification(s) as may be necessary to make it valid and enforceable.

24. **SET-OFF**

You may not at any time or times, set off any liability that you have to Winstel against any liability that Winstel may have to you (in either case howsoever arising and whether any such liability is present or future, liquidated or unliquidated).

25. **GOVERNING LAW AND JURISDICTION**

These Terms shall be governed by and construed and interpreted in accordance with the laws of the Republic of South Africa.