



the service provider

Mexcom House, Bastion Close, Bushhill Office Park, Cnr. Ostrich & Hawken, Bromhof

Tel. +27 11 801 4000 • Fax. +27 11 791 798;

Finant 24 (Pty) Ltd t/a Mexcom  
Reg No. 2005/006790/07  
VAT No. 422019853;

TERMS AND CONDITIONS

1. DEFINITIONS

"the Service Provider" means Finant 24 (PTY) Ltd 2005/006790/07 t/a Mexcom with full rights of usage regarding the provision of products;

"agreement" means the agreement set out in this document together with any appendices hereto and referred to as the Service Provision Agreement;

"Confidential Information" shall mean: any information of whatever nature, which has been or may be obtained by either of the Parties from the other, whether in writing or in electronic form or pursuant to discussions between the Parties, or which can be obtained by examination, testing, visual inspection or analysis, including, without limitation, scientific, business or financial data, know-how, formulae, processes, designs, sketches, photographs, plans, drawings, specifications, sample reports, models, Applicant lists, price lists, studies, findings, computer Product, inventions or ideas; analyses, concepts, compilations, studies and other material prepared by or in possession or control of the recipient which contain or otherwise reflect or are generated from any such information as is specified in this definition; any dispute between the Parties resulting from this Agreement;

"Copyright" shall mean all rights of Copyright whether existing now or in the future in and to the Products including initial drawings, sketches, flow charts and designs relating thereto;

"Intellectual Property Rights" shall mean all present and future rights in the Products and other rights which may in the future be based thereon, including but not limited to Copyright;

"Usage" shall mean a non-transferable and non-exclusive right granted to the Applicant to Use the Products;

"Service Fee" shall mean as per the schedule of prices for products in the application form and appendices;

"Notice" shall mean a written document;

"Product" shall mean the specified service/s or computer hardware and software item/s prescribed in the application form;

"Promotional Item/s" shall mean any product offered free with the signing of a term contract. It is implied that such promotional item is given on condition that the contract term is fulfilled.

"License / Loan / Rental Item/s" shall mean any product offered on License, Loan or Rental and is available to the applicant for the term of contract, as well as renewal period, only. The Service Provider retains all rights of ownership of such Item/s.

"Use" shall mean that the Applicant is entitled to allow the Product/s to operate for the benefit of the Applicant on the Designated Site on the Service Provider's own internal operating systems or central processors;

"the territory" means South Africa, Lesotho and Swaziland;

"initial registration" means the initial supply and registration of the Product/s and documentation;

"monthly fee" means the monthly charge as set out in the application form to this agreement;

"documentation" means the user manual and any other related paperwork supplied by the Service Provider or its authorised dealer or agent, which may or may not be related to the Product;

"product" means the products listed in the schedule of services to this agreement;

"working hours" means the hours of 08h00 to 17h00 on a Monday to Thursday and 08h00 to 14h00 on a Friday in South Africa, excluding official public holidays;

"activation date" the date of acceptance of this agreement by the Service Provider;

This agreement shall be construed and interpreted in accordance with the laws of South Africa and phrases and words defined here shall apply in the remainder of this agreement. When the Applicant subscribes to the product/s, the Service Provider will issue a (or multiple) username/s and/or password/s and/or activation code/s to the Applicant. By using the username/s and password/s to access the product/s, the Applicant will be signifying their acceptance of these terms and conditions of use, which is a binding agreement between the Service Provider and the Applicant.

2. USE

- 2.1 The Applicant hereby agrees to comply with reasonable use pertaining to the Product/s and documentation as specifically recorded in the Product/s or documentation. The Applicant is granted a non-exclusive, non-transferable use of the Product/s and documentation.
- 2.2 The Applicant shall not have the right to assign sub-use of or transfer the Product/s in any way, either in whole or in part, to any third party.
- 2.3 The Applicant shall not copy nor permit any party to copy the Product, except to make sufficient copies solely for backup or archival purposes.
- 2.4 The Applicant shall not modify, de-compile, disassemble or otherwise reverse-engineer the Product, or attempt to do any of these provided that this stipulation shall not be applicable where de-compilation is permitted by law.
- 2.5 The Applicant shall allow the Service Provider, upon reasonable notice, access to its premises to audit the Applicant's compliance with the Agreement.

3. FEES AND PAYMENT

The Applicant shall pay to the Service Provider, including pro-rata usage fees for the first month of usage or part thereof, all amounts due in terms of this agreement in full prior to the commencement of the Agreement and on any term renewal of this agreement as contemplated in paragraph 4. The monthly fee payable by the Applicant will be paid by means of debit order / direct transfer, in advance. Should the payment method be direct transfer, the monthly fee payable shall be by no later than the 5<sup>th</sup> of every month.

- 3.1 The Service Provider shall be entitled to increase the Monthly Fee from time to time. Details of such increases will be published on the Service Provider's website.
- 3.2 Failure to pay any amount due in terms of the Agreement on the due date, shall entitle the Service Provider, without prejudice to any other remedies, to charge interest on a daily basis at 2.5% (two comma five per centum) per month from the due date of payment to the actual date of payment.
- 3.3 Failure to pay any amount due in terms of the Agreement on the due date, shall further entitle the Service Provider, without prejudice to any other remedies, to claim all professional and legal fees incurred in the pursuance of collecting the amount due.
- 3.4 The Service Provider shall be entitled to increase the debit order from time to time for any sundry fees chargeable as contemplated in the Agreement.

4. TERM, ESCALATION AND UPGRADE

- 4.1 This agreement shall commence on the activation date and shall continue until end of the initial term, the initial term being 12 months. If notice of termination is not given at least 90 days prior to the end of the initial term, this agreement shall automatically be renewed for a further period similar to the initial term.

- 4.2 The renewal period shall be subject to an escalation being calculated with regards monthly fees and payment equivalent to such increase as apportioned in terms of the Consumer Price Index rate at the time and further that the provisions above shall, mutatis mutandis, apply in respect of such further renewal period.

- 4.2 The Applicant, subject to the terms and conditions as contained herein, shall be entitled to an update free of charge (if such update exists at the time) of the Product/s applicable herein in the event that the initial term is to be renewed.

5. SERVICE PROVIDER OBLIGATIONS

- The Service Provider undertakes that -
- 5.1 The Service Provider shall use reasonable endeavors to support the Product/s during the term of this agreement by providing telephonic and e-mail support during working hours; upon the purchase of a Router, there will be a 12 month guarantee, should the Router be faulty we will replace it, however, we cannot be held responsible for lightning damage, after the 12 month guarantee is up, no further claims will be entertained.
- 5.2 The Service Provider shall only be responsible to provide support for the Product/s on the current versions of the Product/s and the most recent version of the Product/s in existence prior to the current version of the product.
- 5.3 The Service Provider, at its sole discretion, reserves the right to issue new versions of the Product/s and documentation.
- 5.4 The Service Provider shall endeavour to provide corrections, updates and releases to the Product/s at such times as it in its sole discretion shall determine. The Applicant shall be responsible for the installation of corrections, updates and releases to the Product/s and for ensuring that he/she or its staff have the capability of carrying out such installations. Should the Applicant fail to install such systems correctly or at all in accordance with the Service Provider's instructions, the Service Provider or appointed dealer / agent shall have the right to charge for services rendered in this regard. Corrections, updates and releases to the Product/s arising as a result of a change in database used by the Product/s are specifically excluded from this agreement;
- 5.5 If the Service Provider cannot effect any correction telephonically, the Service Provider or an appointed dealer / agent, upon receipt of authorization from the Applicant, may in its sole discretion attend at the Applicant's premises to effect the correction, in which event such attendance together with traveling time and expenses shall be charged to the Applicant by the Service Provider or an appointed dealer / agent;
- 5.6 The Service Provider shall not be responsible for and shall not be obliged to correct errors which result -
- 5.6.1 From failure of computer or telephony equipment or other Product, including, but not limited to machine operating Product, Switchboards, PABX's, telephone hand units, third party applications not developed by the Service Provider and which are not covered by this agreement including faults in electrical supply and operator error from whatever cause or caused by cable or connector malfunction or breaks;
- 5.6.2 From environmental conditions including, but not limited to, conditions associated with humidity and air-conditioning, and lightning;
- 5.6.3 From accident, negligence, misuse or default by the Applicant or any third party or due to a force majeure;
- 5.6.4 From failure of fixed or removable storage media;
- 5.6.5 From any version of the products other than the current version of the product;
- 5.6.6 From incompatibilities with handheld phone units or PABX's.
- 5.7 Any time spent by the Service Provider investigating an error caused by any of the above shall be charged for by the Service Provider as an additional cost at the Service Provider's then current rates of service and traveling on a time and material basis.
- 5.8 The Applicant further undertakes to provide sufficient information on application in order to comply with FICA requirements in terms of law in concluding this agreement.
- 5.9 Furthermore the Applicant shall comply with any reasonable request by the Service Provider in terms of any obligations in the event that legislation in terms of law requires same.

6. INTELLECTUAL PROPERTY

The Service Provider retains the right, title and interest in respect of the copyright and all other intellectual property rights in the Product/s and the documentation. The Applicant acknowledges that nothing contained in this agreement shall give the Applicant any right, title, or interest in the intellectual property. At all relevant times the parties acknowledge the ownership rights of the copyright holder namely Finant 24 (PTY) Ltd.

7. LIMITATION OF LIABILITY

- 7.1 The liability of the Service Provider for faulty execution of the Product/s as well as all damages suffered by the Applicant, whether direct or indirect, as a result of the malfunctioning of such Product, will be limited to the Service Provider rectifying the malfunction, within a reasonable time and free of charge, provided that the Service Provider is notified immediately of the damage or faulty execution of the Product.
- 7.2 This liability is completely excluded if the Applicant attempts to correct or allows third parties to correct or attempt to correct the Product/s without the prior written approval of the Service Provider.
- 7.3 Any other liability on the part of the Service Provider arising from any cause whatsoever is specifically excluded. Without limiting the generality of the foregoing, the Service Provider shall not be liable for any delay, failure, breakdown, damage or injury caused by:
- 7.3.1 Product/s, programs and support services supplied by or obtained by the Applicant without the consent or knowledge of the Service Provider; or
- 7.3.2 Product/s or programs modified by the Applicant or any third party not authorised to do so in terms of the Agreement; or
- 7.3.3 the actions or requirements of any telecommunications authority or a supplier of telecommunications services or Product.
- 7.3.4 Computer viruses, spam or denial of service (DOS) attacks
- 7.4 In no event shall the Service Provider be liable to the Applicant for loss of profits or for incidental, special or consequential damages arising out of or in connection with the Product/s or the delivery, installation, servicing, performance or use of it in combination with other computer Product.
- 7.5 The Service Provider shall further not be held liable for any tampering with regards the Product/s which is beyond the control of the Service Provider. It is specifically stated that the Product/s is not tamper proof.
- 7.6 In conclusion the liability of the Service Provider is limited as what is stated herein if any and under no other circumstances shall the Service Provider be held liable for any damages in favour of the Applicant or any other third parties. The Applicant accordingly specifically hereby indemnifies the Service Provider against any liability as a result of the operation of this agreement or otherwise.

8. THE APPLICANT'S OBLIGATIONS

- The Applicant undertakes
- 8.1. to keep master copies of the product/s and documentation in a safe place at it's principle place of business;
- 8.2. to assign a contact person to deal with all correspondence and communication with the Service Provider in respect of his agreement;
- 8.3. to select only suitably trained staff for operation of the product;
- 8.4. to institute any new releases or error fixes and versions of products in line with the Service Provider's recommendations and to keep machine operating Product/s up to date and to pay all costs associated therewith;
- 8.5. not to reverse engineer, disassemble, or translate, decode or modify the product;
- 8.6. not to loan, rent, assign, sub-lease or in any other manner or form, transfer the Product/s to any unauthorised third party;
- 8.7. to comply with the registration requirements, including the initial registration, of the product, which requirements the Service Provider will determine from time to time and in its absolute and sole discretion;



the service provider

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- 8.8. to notify the Service Provider of any changes to the bank account details listed in the Debit Order Details contained in this agreement;
- 8.9. to pay to the Service Provider an administration fee of R100 for each and every instance that a debit order payment is rejected by the Applicant's bankers;
- 8.10. to ensure that the Product/s is suitable for the purpose intended;
- 8.11. to keep a minimum of one separate backup of your current data of a standard and frequency to allow the Applicant to recover information without any undue loss of staff time;
- 8.12. to notify the Service Provider of any alleged defect within a period not exceeding 5 (five) days from the date the alleged defect becomes apparent;
- 8.13. to use their username/s and/or password/s and/or activation code/s for their own personal or business (depending on applicant type) use only;
- 8.14. not to disclose their username/s and/or password/s and/or activation codes to any other person for any reason whatsoever and will maintain the confidentiality thereof.
- 8.15. All equipment supplied for use remains the property of the Service Provider (unless given away on promotion or sold to the applicant) and the Applicant undertakes to allow the Service Provider to retrieve the equipment on termination of the agreement.
- 8.16. To unconditionally consent to the Service Provider to obtain or submit information of the applicant's business status and payment performance to Trans Union Credit Bureau or any other credit bureau of its choice.
- 9. NOTICES**
- 9.1. The parties choose as their domicilium citandi et executandi the address set out on the front page of this agreement for the purpose of serving any documents or legal process in regard hereto.
- 9.2. Any notice given and any payment made by a party to the other ("the addressee") which:
- 9.2.1 is delivered by hand during the normal business hours of the addressee at the addressee's domicilium for the time being shall be presumed, unless the contrary is proved by the addressee, to have been received by the addressee at the time of delivery; provided that if the delivery is effected by or on behalf of the Applicant at the Service Provider's domicilium, the presumption shall only apply as regards to the Service Provider if proof of receipt is obtained by the party effecting such delivery and duly produced as may be required to prove such delivery;
- 9.2.2 is posted by pre-paid registered post from an address within the Republic of South Africa to the addressee at the addressee's domicilium for the time being, it shall be presumed, unless the contrary is proved by the addressee, to have been received by the addressee on the seventh day after the date of posting.
- 10. GENERAL**
- 10.1 This agreement constitutes the whole agreement between the parties. No variation, addition or cancellation of this agreement or any waiver of any rights shall be of any force unless reduced to writing and signed by the parties.
- 10.2 No indulgence, leniency or extension of time which the Service Provider may show to the Applicant shall in any way preclude the Service Provider or preclude the Service Provider from exercising its rights in the future.
- 10.3 This agreement and all matters or disputes arising there from or incidental thereto shall be governed and construed in accordance with the laws of the Republic of South Africa.
- 10.4 The Service Provider's preferred medium of correspondence and communication with the Applicant will be by means of email. The Applicant is responsible for supplying the Service Provider with a valid email address and notifying the Service Provider of any changes in this email address from time to time.
- 11. JURISDICTION**
- 11.1 The Applicant, by its signature hereto and in terms of the provisions of Section 45 of the Magistrate's Court Act No 32 of 1944, as amended, consents to the jurisdiction of the Magistrate's Court in relation to any action or proceeding instituted against the Applicant in terms of, or arising out of provisions of this agreement, provided that the Service Provider, in its sole and absolute discretion, shall be entitled to institute any such actions or proceedings, in any division of the High Court of South Africa possessed of the requisite jurisdiction.
- 11.2 In the event of the Service Provider instituting legal proceedings against the Applicant to recover amounts due to the Service Provider or take any other legal steps arising out of this agreement, the Applicant shall be liable for legal costs on the scale as between attorney and own client and/or any collection costs.
- 12. BREACH AND TERMINATION**
- 12.1 Should either of the Parties breach any stipulation contained in the Agreement, and that breach is not due to force majeure, then the suffering party may notwithstanding the provisions of clause 4 above: terminate the Agreement; provided that the party to the Agreement who breached its obligations in terms thereof fails to remedy such breach within 7 (seven) calendar days after receiving a Notice from the other party to the Agreement, on expiry of this period;
- 12.1.2 provided further that it confirms this termination, by way of a Notice to the other party, and claim all damages that it might have suffered as a result of that breach.
- 12.1.3 The Service Provider shall be entitled to summarily cancel the agreement in the event that the Applicant commits an act of insolvency as defined in the Insolvency Act.
- 12.2 Notwithstanding the above the Service Provider upon termination is entitled to immediate repossession of any promotional item/s not having reached full contract term, License / loan / rental item/s, product/s, documentation and/or any other property in the possession of the Service Provider. In the event of the Applicant failing to hand over possession of any abovementioned item the Service Provider shall be entitled to claim damages in respect of such item/s amounting to the replacement value specified in the appendices at the prevailing Rand / Dollar exchange rate, as well as all legal and collection fees thereof..
- 12.3 Further in the event that this agreement is terminated for any of the reasons mentioned in paragraph 12, the Applicant shall not be entitled to a refund of any amount paid in terms of this agreement. In the event that this agreement is terminated and the Applicant wishes to enter into a new agreement, the Applicant will be charged such amounts as would be applicable to a new agreement.
- 12.4 In the event of the premature termination of this agreement by the Applicant, other than in terms of breach, the Applicant shall be held liable for the remainder of monthly fees due in one instalment for the rest of the initial term or any renewal period as per this agreement due.
- 13. INTERPRETATION**
- 13.1 The clause headings in this Agreement have been inserted for convenience only and will not be taken into consideration in the interpretation of this Agreement.
- 13.2 Any reference in this Agreement to the singular includes the plural and vice versa.
- 13.2 Any reference in this Agreement to natural persons includes legal persons and references to any gender include references to the other genders and vice versa.
- 14. VALIDITY**
- If any provision of this Agreement is found or held to be invalid or unenforceable, the validity and enforceability of all the other provisions of this Agreement will not be affected thereby.
- 15. CONFIDENTIALITY**
- 15.1 The Parties shall hold in confidence all Confidential Information received from each other and not divulge the Confidential Information to any person, including any of its employees, save for employees directly involved with the execution of this Agreement.
- 15.2 The Parties shall prevent disclosure of the Confidential Information, except as may be required by law.
- 15.3 Within six (6) months after the termination of this Agreement, for whatever reason, the recipient of Confidential Information shall return same or at the discretion of the original owner thereof, destroy such Confidential Information, and shall not retain copies, samples or excerpts thereof.
- 15.4 It is recorded that the following information will, for the purpose of this Agreement, not be considered to be Confidential Information:
- 15.4.1 information known to either of the Parties prior to the date that it was received from the other party; or
- 15.4.2 information known to the public or generally available to the public prior to the date that it was disclosed by either of the Parties to the other; or
- 15.4.3 information which becomes known to the public or becomes generally available to the public subsequent to the date that it was disclosed by either of the Parties to the other, through no act or failure to act on the part of the recipient of such information; or
- 15.4.4 information which either of the Parties, in writing, authorises the other to disclose.
- 16. RELATIONSHIP**
- This Agreement does not constitute either of the Parties an agent or legal representative of the other for any purposes whatsoever and neither of the Parties shall be entitled to act on behalf of, or to represent the other unless duly authorised thereto in writing.
- 17. RESTRAINT OF TRADE**
- Neither of the Parties shall, at any stage after the commencement of this Agreement, and for a period of two (2) years after this Agreement has terminated, make any offers of employment to any staff member, who is or has been employed by the other and has been involved in the execution of this Agreement. The aforementioned restraint shall not be applicable in the event where the prior written approval to make such an offer has been obtained from the party who is or has been the employer of such staff member. For the purposes of this clause "staff member" shall include but not be limited to permanent employees, part-time employees and independent contractors.
- 18. FORCE MAJEURE**
- 18.1 Neither of the Parties shall be liable for a failure to perform any of its obligations insofar as it proves:
- 18.1.1 that the failure was due to an impediment beyond its control;
- 18.1.2 that it could not reasonably be expected to have taken the impediment and its effects upon the party's ability to perform into account at the time of the conclusion of this Agreement; and
- 18.1.3 that it could not reasonably have avoided or overcome the impediment or at least its effects.
- 18.2 An impediment, as aforesaid, may result from events such as the following, this enumeration not being exhaustive:
- 18.2.1 war, whether declared or not, civil war, civil violence, riots and revolutions, acts of sabotage;
- 18.2.2 natural disasters such as violent storms, cyclones, earthquakes, tidal waves, floods, destruction by lightning;
- 18.2.3 explosions, fires, destruction of machines, factories and any kind of installations;
- 18.2.4 boycotts, strikes and lock-outs of all kinds, go-slows, occupation of factories and premises and work stoppages;
- 18.2.5 acts of authority, whether lawful or unlawful, apart from acts from which the party seeking relief has assumed the risk by virtue of any other provisions of this Agreement.
- 18.3 For the purposes of this clause "impediment" does not include lack of authorisations, licences, permits or approvals necessary for the performance of this Agreement and to be issued by the appropriate public authority.
- 18.4 Relief from liability for non-performance by reason of the provisions of this clause shall commence on the date upon which the party seeking relief gives Notice of the impediment relied upon and shall terminate upon the date upon which such impediment ceases to exist; provided that if such impediment continues for a period of more than sixty (60) days either of the Parties shall be entitled to terminate this Agreement.
- 19. ASSIGNMENT, CESSION AND DELEGATION**
- The Applicant shall not be able to assign, cede, delegate or transfer any rights, obligations, share or interest acquired in terms of this Agreement, in whole or in part, to any other party or person without the prior written consent of the Service Provider, which consent shall not unreasonably be withheld or delayed. The said mentioned provision does not apply with regards to the Service Provider who retains such rights of assignment, cession and delegation without the consent of permission of the Applicant.