

**PART B****TERMS AND CONDITIONS APPLICABLE TO ALL SALE AND HIRE OF EQUIPMENT AND SERVICES FROM KIT FORMWORK AND SCAFFOLDING (PTY) LIMITED.**

(Read with Part A, C, D and E)

Name of Customer

ID / Registration No. of Customer

**DEFINITIONS & INTERPRETATION**

1. Unless otherwise stated, or determined by the context, the following words will have the meanings set out below, and cognate expressions will have a related meaning:
- 1.1. **"Agreement"** means the Trade Account Application Form (PART A) signed and completed by the Customer, the terms and conditions (PART B) set out herein, the Arbitration Agreement (Part C), the Suretyship (Part D) and Cession (Part E), including all annexures and schedules hereto, all accepted Quotations and the Contracts concluded by or between the Customer and KIT from time to time whereby the Customer hire and / or purchase Equipment and / or Services from KIT.
- 1.2. **"Customer"** means the person or business as fully described in the Trade Account Application Form (PART A) which preceded the granting of the general and open Trade Account governed by this Agreement.
- 1.3. **"Customer Requirements"** means those requirements provided by the Customer as set out in a technical proposal and / or Quotation.
- 1.4. **"Delivery"** means the date on which the Customer or its appointed agent collects Equipment from KIT's premises, or the Equipment is delivered by KIT or its appointed agent. **"Delivered"** will have a corresponding meaning.
- 1.5. **"Equipment"** means all plant, machinery, equipment and / or components which KIT agrees to sell or hire to the Customer.
- 1.6. **"Hire Period"** means the date of Delivery of hired Equipment to the date on which the hired Equipment is returned to KIT's premises.
- 1.7. **"KIT"** means Kit Formwork and Scaffolding (Pty) Limited (previously RMD Kwikform South Africa (Pty) Ltd) with registration number: 2006 / 025981 / 07.
- 1.8. **"Quotation"** means any quotation provided to the Customer from time to time in respect of Services
- and / or the sale and / or hire of Equipment to the Customer.
- 1.9. **"Hire Charges"** means the amount payable by the Customer to KIT in respect of Equipment hired from KIT. Hire Charges are calculated and charged per day, quoted for per week and invoiced for monthly on the last calendar day of the month.
- 1.10. **"Purchase Price"** means the amount at which the Customer purchase Equipment and / or Services from KIT.
- 1.11. **"Price"** means both the Hire Charges and the Purchase Price, or either of them as the context may indicate.
- 1.12. **"Replacement Costs"** means the cost of replacing lost, stolen or irreparably damaged Equipment, the cost of which will be determined by KIT's prevailing sales price list at which Equipment is sold to customers / businesses at the relevant time less 20% (twenty percent).
- 1.13. **"RSA"** means the Republic of South Africa.
- 1.14. **"Services"** means any services which KIT may provide to the Customer from time to time on request by the Customer, which services include but are not limited to temporary works designs, site inspections, stock takes, consulting services, preassembly of Equipment and transportation of Equipment.
- 1.15. **"Site"** means the address and / or portion of land where certain construction activities will occur in which the Equipment and / or Services hereby hired and / or purchased from KIT is required in execution of such construction activities.
2. Headings are included for convenience purposes only and will not affect the construction of these terms and conditions.
3. This Agreement applies to both the hire and sale of Equipment between KIT and the Customer and is applicable to any Services which KIT may render to or on behalf of the Customer from time to time.

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4. Reference to a natural person includes a juristic or artificial person and *vice versa* and one gender will include the other gender.
5. Words importing the singular will include the plural and *vice versa*.
6. The use of the word "include" or any derivative thereof, followed by any specific example, must not be construed as limiting the meaning of the general wording preceding such word and the *eiusdem generis* rule will not be applied in the interpretation of such general wording or such specific example.
7. 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 must be given to it as if it were a substantive provision in the body of the Agreement.
8. "Days" will mean calendar days, and "Business Days" will mean any day other than a Saturday, Sunday or official public holiday, and will exclude the first day and include the last day.
9. Reference made to the Customer will include its assigns and successors-in-title. Where appropriate, it will also include the Customers appointed sub-contractors, service providers, employees, agents and representatives.
10. Where the word "Equipment" is preceded by the word "hire" or a word of similar import, it refers specifically to Equipment hired from KIT and where it is preceded by the word "sale", "purchase" or "sold" or a word of similar import, it refers specifically to Equipment that was purchased from KIT.
11. Where reference is made to "premises", it means such branch of KIT from which the Equipment is to be collected from or returned to, as may be designated by KIT from time to time.

#### CONDITIONS OF TRADING

12. Each Quotation, upon acceptance thereof, will be deemed a separate contract of sale and / or hire of Equipment or Services, as the case may be, and will be governed by these terms and conditions solely and exclusively (hereinafter referred to as a "**Contract**").
13. Instruction received from the Customer for Delivery of Equipment, or acceptance of Delivery of Equipment noted in a Quotation will constitute acceptance of the Quotation and the Price(s) stipulated therein.
14. Quotations are valid for 14 (fourteen) days from date of Quotation.
15. KIT may withdraw any Quotation at any stage prior to written acceptance thereof.
16. Hire Charges will commence on the date of Delivery.
17. The Customer will be and remain liable for Hire Charges until such time that the hired Equipment has been returned to the premises of KIT, unless otherwise agreed in writing and signed by a duly authorized representative of both parties.
18. The Customer is required to hire the Equipment for a **minimum period of 4 (four) weeks**, which the Customer hereby acknowledge and accept.

#### COLLECTION AND DELIVERY

19. On placement of any order, the Customer must inform KIT if the Customer will collect the Equipment from KIT's premises or if KIT must deliver the Equipment.
20. Delivery and collection are subject to availability of Equipment and in the event of Delivery by KIT, subject to availability of transport and Delivery will not be done as a matter of urgency.
21. Terms Applicable to **collection** of Equipment by the Customer or its agent: -
  - 21.1. KIT will notify the Customer when the Equipment, or any portion thereof, is ready for Collection.
  - 21.2. The Customer must arrange for the Equipment to be collected within 5 (five) days from date of notice, unless otherwise agreed between the parties in writing.
  - 21.3. If the Customer fails to collect the Equipment, such failure will be deemed a repudiation of the Contract and KIT will forthwith return the Equipment to stock and the Customer will be liable to KIT for a handling fee of 10% based on the Contract value.
22. Terms Applicable to **Delivery** of Equipment by KIT or its agent: -
  - 22.1. KIT will inform the Customer in advance of the anticipated date of delivery.
  - 22.2. The Customer must arrange for and provide labour and / or employ suitably qualified persons and equipment to unload the Equipment immediately upon arrival. KIT will allow 30 minutes of standing time for unloading to commence, whereafter, a standing fee of R1,000 (one thousand rand) per hour, or part thereof, will be charged to the Customer for any delay in unloading Equipment.
  - 22.3. The employee(s) of KIT and / or the transport company used by KIT will not be responsible for or assist with the unloading of any Equipment.
  - 22.4. Should the Customer fail to provide labour and / or equipment to and commence to unload the Equipment within a reasonable period upon arrival

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(which will not exceed 3 hours), the consignment will be returned to the premises of KIT the same day, and the Customer will be liable for all wasted costs and transport costs associated therewith in addition to the standing fee. The Customer will also be liable for any subsequent transport charges.

- 22.5. KIT may deliver the Equipment in portions of any size and in any order and the Customer will be obliged to take Delivery.
23. The onus is on the Customer to confirm that the quantity of any consignment of Equipment recorded in a delivery note was Delivered. A delivery note signed by the Customer or any of its employees will be conclusive evidence of the Equipment and quantity of Equipment Delivered to and received by the Customer on the date of Delivery and no dispute on the quantity of Equipment will be entertained afterwards.
24. If it is alleged, at the time of Delivery, that the quantity of Equipment presented for Delivered does not accord with and / or is less than the quantity of Equipment stated on the Delivery Note, then:
- 24.1. The Customer must immediately inform KIT of such discrepancy. KIT will then dispatch a representative / employee to investigate the alleged shortfall and to reach agreement on the quantity of Equipment presented for Delivery.
- 24.2. Despite this, the Customer will not be entitled to object or refuse to take or accept Delivery of the Equipment by reason of such shortfall; and
- 24.3. The Customer will nonetheless be and remain liable for the *pro rata* Price as reduced by the agreed shortfall noted on the Delivery Note and signed by a duly authorized representative of KIT.
25. KIT will have no liability to the Customer by reason of any shortfall in the Delivery of Equipment and KIT may at its sole discretion either:
- 25.1. Make good the shortfall by one or more deliveries; or
- 25.2. Unilaterally reduce the Price by the same proportion as the shortage bears to the Contract quantity.
26. If, at the time of Delivery, it is found that the quantity of Equipment presented for Delivered is more than the quantity stated on the Delivery Note, provided that the quantity of Equipment Delivered does not exceed the total quantity of Equipment ordered by the Customer as per the Quotation, then the Customer will not be entitled to object to or refuse to take collection or accept delivery of the Equipment by reason of such surplus and the Customer will nonetheless be liable for the *pro rata* Price as determined by the surplus noted on the Delivery Note.
27. All risk in and to the Equipment, whether this be loss, damage, destruction, theft or otherwise, will pass to the Customer immediately upon the Equipment leaving KIT's premises, and will include but not be limited to the risk associated with the transport of the Equipment regardless of whether the transport is done by KIT, the Customer or a third party.
28. KIT will endeavour to make Equipment available for collection or delivery on such date as may be required by the Customer or as may be advised of by KIT, however, should the date of collection or delivery of Equipment be delayed, prevented or interfered with due to *Force Majeure* or any unforeseen circumstances and / or circumstances beyond KIT's control, the date for collection and delivery will be extended and KIT will not be responsible for any damages which the Customer may suffer as a result thereof, nor will the Customer be entitled to terminate the Contract by reason thereof.
29. If the Customer rejects Delivery of Equipment for any reason other than the circumstances described in Clause 24, 25 and 26 above, the Customer must notify KIT in writing forthwith but not later than 2 (two) business days after date of Delivery of such rejection and specify its reasons for such rejection. The Customer must set aside the Equipment complained about for a representative of KIT to examine the Equipment and if any are found not to conform to the Customer's Requirements, KIT may at its sole discretion:
- 29.1. replace, at its own expense, the Equipment found not to be in accordance with the Customer's Requirements; or
- 29.2. Reduce the Price by an amount equivalent to that proportion of the Price payable in respect of the Equipment found not to conform to the Customer's Requirements,
- however, the Customer will nonetheless still be liable to pay the Price for all Equipment which conforms to the Customer's Requirements or were found to conform to the Customer's Requirements following examination thereof from date of Delivery.
- DELIVERY OF GOODS CROSS BORDER**
30. Delivery of Equipment cross border will be subject to a written Export Agreement being entered into and signed by and between the parties.
31. Notwithstanding above, these terms and conditions will be and remain applicable to the sale and hire of Equipment Delivered cross border.

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**DRAWINGS & LIMITATION OF LIABILITY**

32. Services rendered and drawings done from time to time on the Customers request will be subject to the following conditions:
- 32.1. The Price, if any, for such Services and drawings will be as specified in a Quotation.
- 32.2. Use of the drawings by the Customer will constitute acceptance of the Price stated in any Quotation.
- 32.3. Drawings are based on the information supplied by and received from the Customer; accordingly, it is the Customer's responsibility to ensure that the design, dimensions, heights, spans and applied loads shown on drawings are in accordance with the Site requirements and fully satisfies the Customer's Requirements.
- 32.4. If it is found by the Customer that drawings do not meet the Site requirements or satisfy the Customer's Requirements, then the Customer must immediately, but not later than 3 (three) days after the date of receipt of the drawings, inform KIT thereof in writing, which notification must give details of and in which respect the drawings do not comply:
- 32.4.1. If the error lies with KIT, then KIT will remedy the drawing within 14 (fourteen) days free of charge. KIT will not be liable to the Customer or any other person for any penalty or damage which the Customer may suffer as a result hereof.
- 32.4.2. If the error is because of incorrect information received from or supplied by the Customer, then KIT will remedy the drawing within 14 (fourteen) days and the Customer will be liable for any charges applicable in doing so.
- 32.5. Where drawings are marked "NOT CHECKED FOR ERECTION", KIT will not be liable for any loss or damage of whatsoever nature, regardless of whether such loss or damage was foreseen, direct, indirect, foreseeable, known or otherwise, should the Customer proceed to use the drawings.
33. KIT will exercise reasonable skill and care to ensure that the Equipment and any drawings, designs, measurements, specifications, heights, spans and applied loads provided by KIT satisfies the Customer's Requirement.
34. Notwithstanding above or anything to the contrary, KIT will not be liable for any direct, indirect or consequential damages, losses, which include but is not limited to loss of profits, loss of business, loss of production, loss of goodwill or any delay which the Customer may suffer pursuant to the terms and conditions hereof, or any subsequent

Contract entered between the parties resulting from among others, but is not limited to, the following:

- 34.1. Equipment failure caused by fair wear and tear, willful damage, negligence, abnormal working conditions, failure to follow KIT's instructions (whether oral or in writing), misuse or alteration or repair of the Equipment without KIT's prior written approval;
- 34.2. Use of drawings marked "NOT CHECKED FOR ERECTION";
- 34.3. Incorrect or defective designs, measurements, dimensions, specifications, heights, spans or applied loads contained drawings arising out of or in connection with any inaccurate, incomplete, conflicting or ambiguous information, drawing, design or specification received from or supplied by the Customer and used by KIT as the basis for providing a technical proposal or drawing;
- 34.4. Use of Equipment and other load bearing items which were not adequately supported or braced at all stages of use thereof.
- 34.5. Defective or failure of parts, materials or equipment supplied by a third party; or
- 34.6. Using the Equipment for any purpose other than for which they were expressly designed or intended, unless it is attributable to the gross negligence of KIT or its employees.
35. KIT will not be responsible to inspect or certify the erected Equipment.
36. The copyright, design and intellectual property rights of any design or drawing prepared by KIT for the Customer will be and remain the sole and exclusive property of KIT.
37. Notwithstanding above, KIT's maximum aggregate liability arising from or in connection with the use of any drawing provided, whether for gross negligence or breach of contract or any other cause, will be limited to R25,000.00. The Customer agrees and warrants that it will insure against or personally bear any losses for which KIT has excluded or limited liability by virtue of this Agreement and KIT will have no further liability to the Customer or any third party.

**PAYMENT AND INVOICING**

38. The Prices quoted are exclusive of Value Added Tax ("VAT"), statutory taxes, levies, and imposts. VAT (or such replacement tax) will be charged at the rate prevailing on the date of the invoice and KIT reserve its right to include such other statutory taxes, levies and / or imposts that may come into being in future, which amount the Customer will be liable for.

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39. Payment must be made upfront and prior to collection or delivery of Equipment unless the Customer has a trading account with KIT.
40. Payment must be made in South African currency and by Electronic Fund Transfer ("EFT") into KIT's bank account reflected on its Quotation or as may be communicated to the Customer in writing from time to time. Unless the Customer has a trading account, Equipment will only be made available for Delivery after payment cleared into KIT's nominated banking account. In case of EFT payments allow 5 (five) days for funds to clear. Please Note: Cheque payments are not accepted.
41. **IMPORTANT NOTICE:** If a change of banking account is communicated to the Customer (regardless of whether the person communicating is known or unknown to the Customer or the communication purports to come from KIT), the onus is on the Customer to contact KIT and follow up with senior management of KIT to confirm the legitimacy of such banking change. KIT will not accept any responsibility or liability for payments made into the wrong banking account.
42. Payment terms applicable to and invoicing of Customers with a trading account:
- 42.1. Equipment hired from KIT during any month will be invoiced for on the last calendar day of that month and will be continued to be invoiced for on the last calendar day of every month thereafter until the date the Equipment is returned to KIT in accordance with these terms and conditions.
- 42.2. Equipment purchased by and sold to the Customer during any month may be invoiced in the sole discretion of KIT either on the last calendar day of the month (together with hired Equipment) in which the Equipment was Delivered or immediately upon the Equipment being Delivered.
- 42.3. **Payment must be made strictly within 30 (thirty) days from date of statement.** If the payment date falls on a Saturday, Sunday, or a Public Holiday, then payment must be made on the first business day thereafter.
43. All payments must be made without deduction or set-off and must be made free of bank charges.
44. It is specifically agreed that the Customer may not withhold payment in part or entirely due to an alleged shortfall in delivery or collection, defect in quality or failure of Equipment or drawings / designs to conform to the Customer's Requirements, breach of these terms and conditions, invoice disputes or for any other reason. The Customer may lodge a disagreement with KIT as provided for herein, and if it is then found upon finalisation of the disagreement that the Customer would have been entitled to a remission of any amount, KIT will forthwith credit the Customer's account with such amount and issue the Customer with a credit note. If, and only if, the Customer has closed its trade account with KIT, returned all Equipment and paid all amounts owed to KIT will any amount be refunded to the Customer (without interest or penalty) within 14 (fourteen) days from date of resolution of such disagreement.
45. The Customer expressly acknowledges and accepts that KIT may unilaterally and without consultation revise the Price if costs of materials, labour or transport increase. The revised Price will be determined in the sole discretion of KIT and KIT must inform the Customer of such Price increase at least 2 (two) weeks prior to the date on which the revised Price will become effective.
46. KIT may appropriate any payment made by or on behalf of, or received from or on behalf of the Customer, or received from any of the Customer's debtors to any invoice of the Customer arising from or in connection with this Agreement or otherwise.

#### DEFAULT AND INTEREST

47. No fees, charges or interest will be levied against the Customer pursuant to the granting of this trading account.
48. Notwithstanding above, if the Customer fail, refuse or neglect to make payment of any amount payable to KIT by the due date, then:
- 48.1. All amounts owing to KIT at that time will immediately and without notice become due and payable to KIT, notwithstanding that any applicable payment term or period in respect of any amount owing at that time have not yet expired and that such amount would not otherwise be due or payable; and
- 48.2. KIT will be entitled, but not obliged, to charge interest on the overdue amount(s) at a rate of **2% (two percent) per month**, compounded monthly in arrears, from date of default to date of payment.

#### PROPERTY, OWNERSHIP AND RISK

49. With regards to ownership of hired Equipment:
- 49.1. Such Equipment will always remain the sole and exclusive property of KIT.
- 49.2. The Customer will have no rights to the hired Equipment other than fair and reasonable use thereof as the hirer and will hold the Equipment as Bailee on behalf of KIT.
- 49.3. The Customer must not do or permit or cause to be done any matter or thing whereby the rights of KIT in respect of such Equipment are or may be affected negatively.
- 49.4. The Customer must take all reasonable steps prior to commencement of its project to inform its clients, contractors, agents, representatives, and creditors

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that the Equipment is owned by and belongs to KIT. In addition, the Customer must arrange (at the Customers Cost) with the main contractor, developer, and / or owner of the Site:

49.4.1. to include the aforesaid fact on all signage which the main contractor, developer and owner may erect at or near the Site; *alternatively*

49.4.2. for the Customer to erect its own signage at or near the Site indicating that the formwork and scaffoldings is owned and supplied by KIT.

50. Upon request, the Customer must provide KIT with acceptable proof that clause 49.4 above has been fully and properly complied with.

51. Notwithstanding Delivery of Equipment sold to the Customer, Ownership thereof will remain vested in KIT until such time that the full Purchase Price has been paid. Until Ownership of such Equipment passes to the Customer in accordance herewith, the Customer must hold such Equipment as Bailee for KIT and must store them separately from any similar Equipment supplied by KIT or any other person in such a way that they remain identifiable as KIT's property.

**CUSTOMER'S OBLIGATIONS**

52. During the Hire Period, the Customer: -

52.1. Must insure the hired Equipment, and keep it insured with an insurance company of good repute against loss or damage from all risk (including theft and third party risks) for the full Replacement Cost of the Equipment during the Hire Period. Where additional Equipment is hired from time to time, the Customer is obliged to increase the insurance cover to insure the additional Equipment.

52.1.1. The Customer will be responsible for all premiums in connection with such insurance and must make payment thereof on the due date.

52.1.2. The Customer must notify the insurer that the Equipment is owned by KIT and accordingly its interest in and / or payment under such insurance policy must be ceded to KIT.

52.1.3. KIT may from time to time request the Customer to provide proof of such insurance cover and confirmation from the Insurer that the insurance premiums are paid timeously and paid up to date. Where required, the Customer will be obliged to provide such information to KIT within 10 (ten) days from date of written request.

52.1.4. If the Customer fails to insure the Equipment as required, or fails to provide the confirmation of insurance as obliged, then KIT will be entitled (but not obliged), in its sole discretion, to insure the Equipment, pay the premiums and recover the premiums from the Customer. Such insurance premiums will be payable immediately upon demand. The Customer will be obliged to fully reimburse KIT for any insurance premium paid by KIT where the Customer a.) failed to provide KIT with timeous confirmation of insurance, or b.) insured the Equipment for a lesser amount than required or acceptable by KIT.

52.1.5. The Customer must immediately notify KIT any event occurring which is or may be a risk that is covered by the Customer's (or KIT's) insurance.

52.1.6. The Customer hereby indemnify KIT against all loss or damage to the Equipment not recovered or recoverable under an insurance policy, regardless of whether the insurance policy was taken out by the Customer or KIT.

52.2. Must not use or allow the Equipment to be used in a manner that is prohibited by or contrary to the terms and conditions of such insurance policy.

52.3. may not sell or otherwise dispose of the Equipment.

52.4. Must keep the Equipment free from attachment, liens, or any other form of encumbrance.

52.5. May not alter or modify the Equipment.

52.6. Must not use the Equipment for any purpose other than which it was expressly manufactured for and must not use it contrary to any directions which KIT may give regarding the use and / or limitations of the Equipment at any point during the Hire Period.

52.7. Must keep the Equipment on Site and may not remove the Equipment from Site without prior written consent of KIT.

52.8. May not part with possession of the Equipment or any part thereof or otherwise deal therewith except as for contemplated and provided for in this Agreement.

**BREACH AND TERMINATION**

53. The Customer acknowledges that each provision of the Agreement is of utmost importance and must at all times be fully and properly observed. Failure to comply with any obligation herein contained will be deemed a material breach of the Agreement.

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54. Notwithstanding above, and without affecting the generality thereof, if the Customer:
- 54.1. fail, refuse or neglect to make full or timeous payment of any amount that is or become due and payable in terms of this Agreement and the Customer fails to remedy its breach within 7 (seven) days of having been requested in writing to remedy such breach;
  - 54.2. breach or otherwise be in default of its obligations under or in terms of this Agreement and remain in default or fails to remedy such breach within 7 (seven) days of having been requested in writing to remedy such breach;
  - 54.3. fails to:
    - 54.3.1. satisfy any judgement obtained against the Customer within 20 (ten) days after it being entered against the Customer; or
    - 54.3.2. to initiate legal proceedings to rescind, set-aside, appeal or review any judgment entered against the Customer within 20 (twenty) days after judgment being entered against the Customer;
  - 54.4. applied for or is placed under business rescue or in liquidation, whether provisional or final;
  - 54.5. has any property seized or attached by legal process;
  - 54.6. compromise or attempt to compromise on any of its liabilities with its creditors;
  - 54.7. fail to settle any of its accounts with its suppliers or creditors on or before its due date;
  - 54.8. default or threaten to default in the performance of its obligations generally, or cease or threaten to cease to carry on business or be deemed to be unable to pay its debts in terms of the Companies Act 71 of 2008 (as amended or may be replaced from time to time);
  - 54.9. commit any act or omission which would, in the case of an individual, be an act of insolvency in terms of section 8 of the Insolvency Act of 1936 (as amended or may be replaced from time to time);
  - 54.10. owners, directors, members, trustees or shareholders is convicted of any criminal offence;
  - 54.11. being a partnership, changes its membership without prior written approval of KIT or is terminated or dissolved;
  - 54.12. being a company or close corporation, control of the Customer by shareholders or members who are shareholders or members at the date of this Agreement is sold or transferred to a third party without the prior written approval of KIT first being had and obtained;
  - 54.13. being a natural person, is sequestrated, dies, becomes of unsound mind or unfit;
  - 54.14. advises, or by any other means makes known, the Customer's intention to sell or otherwise dispose of its business without having first obtained the written consent of KIT;
  - 54.15. use the Equipment in such a way that, in the discretion of KIT, has a detrimental effect on or is likely to have a detrimental effect on the Equipment and/or reputation and/or goodwill of KIT;
  - 54.16. operates its business in such a way which KIT in its discretion and on reasonable grounds believe to detrimentally affect or imperil, or is likely to detrimentally affect or imperil its interest in and to the Equipment and / or ability to recover payment in respect of any amount payable to KIT under or arising from this Agreement;
  - 54.17. in the discretion of KIT, has no real prospects of or *bona fide* intention of complying with or carrying out its obligations arising from or in connection with the Agreement;
  - 54.18. fail, neglect, or refuse, whether willfully, negligently, or otherwise, to comply with any of its obligations arising from or in connection with this Agreement on more than 2 (two) occasions during a rolling 12-month period; and / or
  - 54.19. is exposed to Site conditions which has deteriorated to such an extent, as determined in the discretion of KIT and on reasonable grounds, which unreasonably increases the risk of loss or damage to the Equipment,
- then KIT will be entitled to, but not obliged, in addition to any right which it may have or remedies which may be available to KIT in law, to:
- a. claim payment with or without interest;
  - b. cancel this Agreement and / or any Contract arising from or in connection with this Agreement forthwith with or without claiming damages;
  - c. claim specific performance with or without claiming damages;
  - d. claim such damages as it may have suffered *in lieu* of specific performance, together with all amounts owing under or in terms of this Agreement or any Contract, whether or not such amount is due for payment; and / or

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- e. claim for the immediate return of the Equipment.

**RETURN OF EQUIPMENT, DAMAGES AND REPLACEMENT COSTS**

- 55. On termination of this Agreement or any Contract, or at the end of any Contract, the Customer must forthwith return the Equipment to KIT's premises.
- 56. The Equipment must be cleaned and returned in the condition it was received by the Customer, only fair wear and tear excepted.
- 57. Where Equipment is collected by KIT or a third party from Site, a receipt of the Equipment received for transportation will be provided to the person handing over the Equipment to KIT. The receipt will contain a brief description of the quantity of Equipment received and collected. The person handing over the goods will be required to sign the receipt, who will be deemed to have the authority to do so upon penning his signature. If no person is willing to sign the receipt, a copy of the receipt will be emailed to the Customer within 3 (three) business days from date of collection.
- 58. Upon return of the any consignment of Equipment to KIT's premises, KIT will prepare a return note whereon the following will be noted:
  - 58.1. Details of Equipment and quantity thereof returned and received by KIT; and
  - 58.2. The condition in which each item of Equipment is received. KIT will assess the nature and extent of any damage to the Equipment and indicate on the return note whether it is dirty, damaged but can be repaired or damaged beyond repair.
- 59. Upon the return of any consignment of Equipment to KIT's premises, during the unloading of Equipment and while preparing the return note, the Customer is entitled to and it is advisable to have a representative present. If a representative is present, his signature on the return note will be confirmation of the accuracy of the content of the return note.
- 60. If no representative of the Customer is present at the time of unloading the Equipment, the Customer acknowledges that it does so at its own risk and hereby abandons, renounces and waives any entitlement to dispute the accuracy of the return note in as far as it pertains to the list of Equipment and quantity thereof returned and received by KIT. The return note will be final and emailed to the Customer.

- 61. KIT will process a Quotation wherein KIT will set out the following:
  - 61.1. Cost to clean dirty Equipment.
  - 61.2. Cost to repair damaged Equipment.
  - 61.3. Replacement Cost of Equipment which were damaged beyond repair.
  - 61.4. Replacement Cost of Equipment Delivered but not returned to KIT,

and furnish the Customer with a copy of such Quotation via email within 10 (ten) business days from date of return.
- 62. Equipment identified as dirty or damaged, whether it can be repaired or not, and regardless of whether the Customer had a representative present during unloading or not, will be set aside and be kept aside for a period of 2 (two) business days from date of Quotation to allow the Customer to inspect the Equipment if it wishes to object to the content of the Quotation.
  - 62.1. Unless objection is received by the Customer within 3 (three) business days from expiration of the inspection period, the Customer will be deemed to have accepted and be bound by the Quotation as to the extent and nature of the damages reflected on such Quotation.
  - 62.2. If objection is made, it must be in writing and must specify the entries or items on the Quotation to which it objects and must provide reasons for each objection and, where possible, be supported by documentary and / or photo evidence.
  - 62.3. Any entry or item not objected to within the period allowed will be deemed to have been accepted by the Customer and will be final and binding.
- 63. In the event of Equipment being lost or, in the sole discretion of KIT, being damaged beyond repair, the Customer will be obliged to pay to KIT, on demand, the full Replacement Costs of such Equipment, which costs will be determined on the date on which the Equipment are returned, or where applicable, on the date on which KIT determines that the Equipment is lost.
- 64. The Customer acknowledges that the letting of Equipment constitutes a major part of KIT's business and the Replacement Costs represents the genuine and agreed pre-estimate of damages suffered by KIT as a result of loss or destruction (damage beyond repair) of Equipment or the Customer's failure and / or refusal to return the Equipment when so required.
- 65. Against payment of the amount referred to in clause 61, 62, 63 and / or 64 respectively, the Customer will be entitled to transfer of ownership and may collect the Equipment from

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KIT's premises which were damaged beyond repair. Should the Customer fail, refuse or neglect to make payment within 10 (ten) business days of having been given the Quotation, KIT will be entitled to but not obliged, which the Customer hereby accepts and consents to, to sell the Equipment at such a price determined in the sole discretion of KIT and to credit the Customer's account with the net proceeds derived from such sale. If the sale proceeds are insufficient to settle the full amount owing to KIT, the Customer will remain liable for payment of such shortfall.

**OFFER TO PURCHASE EQUIPMENT**

- 66. Notwithstanding anything to the contrary, and without derogating from the terms and condition of this Agreement, if the Customer fail, neglect or refuse to return Equipment when obliged to do so in terms of this Agreement and remain in default of such obligation for a period of 7 (seven) days from date of written notice demanding the return of the Equipment, then such failure, neglect and / or refusal will be deemed an offer by the Customer to purchase the Equipment from KIT at Replacement Costs ("**Sale Price**").
- 67. The offer will be open for acceptance by KIT at any stage prior to the Customer returning the Equipment.
- 68. KIT may accept such offer by delivering a quotation to the Customer advising it of the Sale Price and demanding payment.
- 69. The Sale Price is payable immediately, in full, unless otherwise agreed in writing.
- 70. Ownership in and to the Equipment will remain vested in KIT until such time that the Sale Price is paid in full.

**FORCED SALE TRANSACTIONS**

- 71. If the Customer advise KIT within 3 (three) months from date of Delivery that all or certain hired Equipment has been lost or stolen and fail or neglect to hire supplementary Equipment to replace such lost or stolen Equipment for the remainder of its project, then that will be deemed a forced sale transaction initiated or caused by the Customer to purchase the Equipment from KIT. The purchase price for the Equipment subject to the forced sale transaction will be the **Replacement Cost plus 50%** ("Forced Sale Price").
- 72. Payment of the Forced Sale Price must be made immediately upon presentation of a Quotation or invoice from KIT indicating the Force Sale Price.
- 73. Notwithstanding above, the Customer will remain liable to KIT for all Hire Charges in respect of such lost or stolen Equipment until such time that the Customer has paid the Forced Sale Price in full.

**DISPUTE RESOLUTION & ARBITRATION**

- 74. All disputes arising out of or relating to this Agreement or any Contract, including disputes regarding the payment of any amount owing, payable or arising from this Agreement, the validity, meaning or interpretation of any of the provisions of this Agreement, or the termination or cancellation of any sale and / or hire Contract, or the return of Equipment must first be resolved or attempted to be resolved between the parties through *bona fide* negotiations within 5 (five) days of receipt of written notice advising the other party of the dispute.
- 75. If, at the end of the 5 (five) day period, negotiations failed or either party failed, refused or neglected to attend *bona fide* negotiations, then KIT will be entitled to, but not obliged, to refer such dispute (whether raised by KIT or the Customer) arising out of or relating to this Agreement, including disputes regarding the payment of any amount owing, payable or arising from this Agreement, the validity, meaning or interpretation of any of the provisions of this Agreement, or the termination or cancellation of any sale and / or hire Contract, or the return of Equipment, or enforcement of the offer to purchase for resolution by way or arbitration.
- 76. If KIT elects to proceed by way of arbitration, the Customer will be bound by such election and arbitration will proceed in accordance with the provisions of the Arbitration Agreement marked as PART C.

**FORCE MAJEURE**

- 77. The Customer will not be excused from payment of any amount due or owing to KIT in terms hereof on account of an *Force Majeure* event, which will include but not be limited to the following events or happenings:
  - 77.1. Act of God, which include but is not limited to actual, potential or threatened, fires, earthquakes, virus outbreaks or plagues, hailstorms, rainstorms, floods, infestations or any other natural disaster.
  - 77.2. Act of War, which includes but is not limited to actual or threatened hostilities, rebellions, revolutions, insurrections, military or usurped power, civil war or unrest or threats of terrorism.
  - 77.3. Civil Unrest, which includes but is not limited to Riots, commotions, strikes, go slows, lockouts or employee disorder.
  - 77.4. Declaration of a state of disaster or state of emergency or embargo or restrictions imposed on a country and / or its residents by Government or such other authority entitled thereto.

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**GENERAL**

78. **JURISDICTION.** The Customer hereby consent to the jurisdiction of the Magistrates Court in terms of section 45 of the Magistrates Court Act, 34 of 1944 having jurisdiction of the Customer by virtue of section 28 of the Act. The Customer accept that KIT is entitled, in its sole discretion, to proceed with legal action in any competent court or may elect to resolve any dispute by way of arbitration in accordance with PART C (Arbitration Agreement) attached hereto.
79. **GOVERNING LAW.** The Agreement will be governed in terms of the laws of the Republic of South Africa.
80. **CERTIFICATE.** A certificate signed by any manager or director of KIT that purports to certify the applicable rate of interest, if any, and the amount owing by the Customer or any such other fact relating to this Agreement or any Contract arising from or in connection with this Agreement, will be accepted as sufficient proof of the Customers indebtedness to KIT for purposes of obtaining judgment, including provisional sentence and summary judgment, proof of claims against insolvent estates and deceased estates or otherwise. If the Customer and / or its Trustee or Liquidator dispute the accuracy of such certificate, the onus will be on the Customer and / or its Trustee or Liquidator to prove the contrary. It will not be necessary to prove in such certificate the appointment, capacity or authority of the person signing such certificate.
81. **LEGAL COSTS.** The Customer will be liable to KIT for all costs incurred in connection with or arising from the enforcement of this Agreement or any Contract, which costs will include collection costs, counsel fees and legal costs on an attorney and own client scale.
82. **WHOLE AGREEMENT.** This Agreement comprises the entire agreement between KIT and the Customer, and KIT will not be bound by any undertaking, representation or warranty not expressly recorded herein.
83. **NON-VARIATION.** No addition to or variation of these terms and conditions or that of any Quotation or Contract will be binding or of any force or effect unless it is reduced to writing and signed by a director of KIT. It is hereby understood that no conduct on the part of KIT will constitute acceptance of any term put forward by the Customer unless it is reduced to writing and signed by a director of KIT.
84. **SURETY.** Where it is required that suretyship be signed for and on behalf of the Customer, the validity or enforceability of any such suretyship given will not be affected by reason of any person, director, shareholder, member, trustee or owner of the Customer not having also signed a suretyship.
85. **SETTLEMENTS AND COMPROMISES.** The parties accept and agree that no settlement or compromise between the parties will be binding or of any force or effect unless the terms thereof have been reduced to writing and recorded in one document, which must be signed by both parties in black ink.
86. **WAIVER.** No indulgence, relaxation, latitude or extension of time which KIT may allow or permit the Customer in terms hereof or otherwise will constitute a waiver, abandonment or novation of KIT's rights or the Customers liability or obligation towards KIT under or arising from this Agreement or any Contract. The parties agree that any waiver, abandonment or novation of any right, liability and / or obligation by either party must be express and reduced to writing and signed by that party.
87. **OWNERSHIP.** This suretyship will remain the property of KIT, even after termination hereof, and KIT will be under no obligation to destroy, relinquish possession of or return this suretyship to the Surety(ies) or any person.
88. **SEVERABILITY.** All terms and conditions contained in this Agreement, notwithstanding the manner in which they are grouped together or grammatically linked, are separate and severable from each other. If any such term or condition is or becomes unenforceable for any reason whatsoever, that term and / or condition is severable from and will not affect the validity of any other term or condition in this Agreement.
89. **RENUNCIATION AND PRESCRIPTION.** The Customer hereby renounce and waive the right to apply set-off and its right to rely on the defense of prescription.
90. **REPRESENTATION.** The persons signing this Agreement, if acting on behalf of a legal person or represented by another person, hereby warrants and represents that he is duly authorised to enter into and sign this Agreement on behalf of such legal person or person he represents herein.
91. **MARRIED IN COMMUNITY.** If the Customer (being a natural person) is married in community of property, the Customer may be required to obtain his/their spouse(s) consent in accordance with section 15 of the Matrimonial Property Act, 88 of 1984 prior to signing this Agreement. Accordingly, it will be the duty of the Customer to disclose this fact to KIT and to deliver to KIT the written spousal consent, duly signed by such spouse(s) and attested to by 2 (two) competent witnesses, in respect of hereof. The Customer hereby indemnify KIT against and / or in respect of any direct, indirect or consequential loss which KIT may suffer as a result of a breach by the Customer of the duty imposed in terms of this clause.

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**SIGNED** at \_\_\_\_\_ on this the \_\_\_\_ day of \_\_\_\_\_ 20\_\_.

The Customer, if a natural person, by signing hereto, confirm as follows:

- 1.) I am **NOT** married / married **out** of community of property / Divorce / Widowed.
- 2.) I am married **in** community of property and my spouse has consented hereto.

AS WITNESSES: -

Witness Signature
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Full Name	<input type="text"/>
ID No.	<input type="text"/>
Mobile	<input type="text"/>

\_\_\_\_\_  
For and on behalf of **the Customer**

Full Name	<input type="text"/>
ID No.	<input type="text"/>
Capacity	<input type="text"/>

**SIGNED** at \_\_\_\_\_ on this the \_\_\_\_ day of \_\_\_\_\_ 20\_\_.

AS WITNESSES: -

Witness Signature
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Full Name	<input type="text"/>
ID No.	<input type="text"/>
Mobile	<input type="text"/>

\_\_\_\_\_  
For and on behalf of **KIT Formwork and Scaffolding (Pty) Limited**

Full Name	<input type="text"/>
ID No.	<input type="text"/>
Capacity	<input type="text"/>

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Customer Initial
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