



Escrow Agreement

between

Chattan Escrow (Pty) Ltd

("The Escrow Agent")

Registration number	2003/003327/07		
Physical Address	Unit 12, 1 Melrose Boulevard, Melrose Arch, Johannesburg		
Postal Address	PO Box 1011, Saxonwold, 2132		
Telephone Number	+2711 214-5970	Fax No.	+2786-674-3127
Contact Person	John McPherson	Email	johnm@chattanescrow.co.za
Signature <i>(who warrants that he is duly authorised to sign)</i>			
Name	John McPherson		
Designation	Director	Date	

and

[Owner](Proprietary) Limited

("The Owner")

Registration number			
Physical Address			
Postal Address			
Telephone Number		Fax No.	
Contact Person		Email	
Signature <i>(who warrants that s/he is duly authorised to sign)</i>			
Name			
Designation		Date	

and

.....
("The Beneficiary")

Registration number			
Physical Address			
Postal Address			
Telephone Number		Fax No.	
Contact Person		Email	
Signature <i>(who warrants that s/he is duly authorised to sign)</i>			
Name			
Designation		Date	

This Agreement is subject to the Terms and Conditions attached hereto.

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1. DEFINITIONS

In this Agreement the following expressions bear the meanings assigned to them below and cognate expressions bear corresponding meanings -

- 1.1. **"Agreement"** means this Agreement together with all schedules thereto, as read with the provisions of any Beneficiary Nomination Forms;
- 1.2. **"Acceptable Media"** means Optical Compact Disks and A4 folio paper, if any, unless otherwise agreed with the Escrow Agent in writing and subject to any additional fees which may be payable;
- 1.3. **"Effective Date"** means the date of signature of this agreement by the party signing last;
- 1.4. **"Escrow Package"** means:
 - 1.4.1. a complete copy, in human readable form, of the Source Code; and
 - 1.4.2. complete instructions for compiling and linking any part of the Source Code into executable code for purposes of enabling verification of the completeness of the source code;
- 1.5. **"Intellectual Property Rights"** means any patent, design, copyright, trade secret or other proprietary right;
- 1.6. **"Main Agreement"** means the agreement entered into between the Beneficiary and the Owner in terms of which the Beneficiary is given a conditional license to use the Source Code of the Software;
- 1.7. **"Modifications"** means any modifications, revisions, updates, improvements, enhancements, new releases corrections, or programming changes to the Software which the Beneficiary is entitled to use;
- 1.8. **"Release Event"** means any event set out in **Schedule 1** hereto
- 1.9. **"Software"** means the software named in **Schedule 3**, including any Modifications thereto;
- 1.10. **"Source Code"** means the form of the latest version of the Software which the Beneficiary is entitled to use which has been written by the programmers of the Software and comprising the listings of the various instructions and statements that the program contains in plain English or any programming language and:
 - 1.10.1. the programmer's individual comments in plain English juxtaposed with the listings of code amplifying and describing the design and the steps taken by the programmer to implement the function of the program;
 - 1.10.2. the program's supporting documentation in plain English; to the extent that same exist.
- 1.11. **"Sufficient Proof"** means an original court order or certified copy thereof which evidences the occurrence of a Release Event.

2. RECITALS

- 2.1. The Owner owns the Intellectual Property Rights in the Software and has granted the Beneficiary a conditional right to use the Source Code of such Software.
- 2.2. The Source Code constitutes confidential and proprietary information of the Owner.
- 2.3. The Owner has agreed to deposit the Escrow Package with the Escrow Agent, subject to the terms and conditions of this agreement.

3. OWNER'S WARRANTIES & OBLIGATIONS

- 3.1. **Owner warranties.** The Owner warrants to and in favour of the Beneficiary and the Escrow Agent that:
 - 3.1.1. it is the legal and beneficial owner of the Software, including, without limitation, all Intellectual Property Rights in and to the Source Code;
 - 3.1.2. the Source Code delivered under clause 3.2 shall contain all information in human-readable form and on suitable media to enable a reasonably skilled programmer or analyst to understand, maintain and correct the Software without the assistance of any other person;
 - 3.1.3. possession of the Escrow Package by the Escrow Agent shall not constitute an infringement of any intellectual property right of the Owner or any third party.
- 3.2. **Owner's obligations.** The Owner shall:

- 3.2.1. deliver a current copy of the Escrow Package on Acceptable Media to the Escrow Agent within 7 (seven) days of the Effective Date, provided that the Escrow Agent shall notify the Beneficiary in writing should this not be done;
- 3.2.2. deliver all Modifications to the Software to the Escrow Agent on Acceptable Media within 14 (fourteen) days of the date of first release thereof;
- 3.2.3. deliver to the Escrow Agent a replacement copy of the Escrow Package on Acceptable Media within 14 (fourteen) days of receipt of written notice from the Escrow Agent calling upon it to do so.

provided that the Owner acknowledges that it shall bear all risk of delivery (including the mode of delivery) of the Escrow Package to the Escrow Agent, irrespective of whether the Escrow Agent provides facilities for, amongst others, the electronic submission of the Escrow Package. Subject to the remaining provisions of this Agreement risk in and liability for the Escrow Package shall only pass to the Escrow Agent upon written confirmation of delivery by the Escrow Agent.

4. ESCROW AGENT'S OBLIGATIONS

- 4.1. **Undertakings to the Owner.** The Escrow Agent hereby undertakes to the Owner:-
 - 4.1.1. to maintain complete written records of all materials deposited by the Owner pursuant to this agreement. During the term of this agreement, the Owner may, at reasonable times during normal business hours and upon reasonable notice to the Escrow Agent, inspect the records of the Escrow Agent maintained pursuant to this agreement, the facilities of the Escrow Agent and the physical condition of the Escrow Package;
 - 4.1.2. not to assign, transfer, sell, lease, rent, charge or otherwise deal in or encumber the Escrow Package;
 - 4.1.3. not to use the Escrow Package for its own purposes or on behalf of any other party nor to disclose, test or release the Escrow Package except in accordance with the provisions of this agreement and without derogating from the foregoing to take all such reasonable steps as shall from time to time be necessary to protect the confidential information and Intellectual Property Rights of the Owner in the Escrow Package and to ensure the compliance with the provisions of this clause 4 by its employees;
 - 4.1.4. to hold the Escrow Package in a safe and secure environment and with the same degree of care it uses to protect its own proprietary information;
 - 4.1.5. within 14 (fourteen) days of becoming aware thereof, to notify the Owner in writing of any loss, damage or destruction of the Escrow Package held by the Escrow Agent.
 - 4.2. **Latest version.** The Escrow Agent shall only be obliged to hold the latest version of the Software supplied by the Owner from time to time. Should the Beneficiary require previous versions of the Software to be held, it shall address a written request to the Escrow Agent who shall retain such previous versions. Such versions shall be treated as separate deposits, to be held by the Escrow Agent in accordance with this Agreement and subject to additional fees on the same basis as set out in Schedule 2.
- ## 5. VALIDATION
- 5.1. **No obligation to validate.** The Escrow Agent shall have no obligation to any person, firm, company or entity whatsoever to determine the existence, relevance, completeness, accuracy, effectiveness or any other aspect of the Escrow Package deposited with it by the Owner from time to time.
 - 5.2. **Validation by Beneficiary.** The Beneficiary may, from time to time and at its cost, in conjunction with the Owner, at a time and place agreed by the Beneficiary, carry out such tests as it deems necessary to validate the Escrow Package, including, without limitation, compiling the Source Code to object code to determine the version and accuracy of each Escrow Package delivered by the Owner to the Escrow Agent in terms of clause 3.2.
- ## 6. RELEASE EVENTS
- 6.1. **Sufficient Proof.** If the Beneficiary submits Sufficient Proof of the occurrence of a Beneficiary Release Event to the Escrow Agent, the Escrow Agent may, without further enquiry, proceed in terms of clause 6.7.
 - 6.2. **Alternative Process.** Should Sufficient Proof of a Release Event not exist and should the Beneficiary believe that a Release Event has



occurred, or is notified of the occurrence of a Release Event, it may by written notice to the Escrow Agent request a copy of the Escrow Package to be delivered to it, subject to the further provisions of this clause 6.

6.3. **Form of notice.** The notice contemplated in clause 6.2 shall be a sworn declaration by a duly authorised officer of the Beneficiary and shall stipulate:-

6.3.1. the facts and circumstances of the Release Event alleged;

6.3.2. that in such officer's opinion, the Beneficiary is entitled to release of the Source Code; and

have attached thereto all relevant supporting documentation in the Beneficiary's possession.

6.4. **Submission to Owner.** Within 7 (seven) days of receiving such a notice, the Escrow Agent shall submit a copy of the Beneficiary's sworn declaration to the Owner, at its domicilium address (which shall include fax supported by a fax confirmation slip), who shall have 7 (seven) days to show cause, by way of sworn statement setting out all relevant facts and circumstances and attaching all relevant documentation in the Owner's possession, why the Escrow Package should not be released.

6.5. **Owner denies Beneficiary Release Event.** If the Owner denies the occurrence of a Release Event in terms of clause 6.4, the Escrow Agent shall not release the Escrow Package and shall forthwith submit a copy of the Owner's written notice to the Beneficiary.

6.6. **Parties to endeavour to reach agreement.** Each of the Owner and the Beneficiary hereby agrees to use its best endeavours to reach agreement upon whether or not a Release Event has taken place within 7 (seven) days of the date of receipt by the Beneficiary of the Owner's notice referred to in clause 6.5 above failing which the matter shall be settled in accordance with clause 7 below.

6.7. **Escrow Agent to release.** If:-

6.7.1. the Beneficiary provides Sufficient Proof; or

6.7.2. the Owner acknowledges the occurrence of a Release Event, or fails to respond timeously to a notice contemplated in clause 6.4; or

6.7.3. it is determined in terms of clause 7 or agreed that a Release Event has occurred,

then the Escrow Agent is hereby authorised to release the Escrow Package to the Beneficiary.

7. ARBITRATION

7.1. **Arbitration.** Any dispute which may arise at any time between the parties, or any of them, relating to any matter arising out of this agreement or the interpretation thereof, shall be finally resolved in accordance with the Rules of the Arbitration Foundation of Southern Africa by an arbitrator or arbitrators appointed by the Foundation, or its successors in title, provided that should AFSA or a successor not be in existence at any time, any appointment required to be made by AFSA shall be made by the Chairman of the Johannesburg Bar Council.

7.2. **Escrow Agent indemnified.** The Owner and the Beneficiary hereby jointly and severally indemnify the Escrow Agent against any and all costs incurred by the Escrow Agent in participating in any such arbitration or dispute resolution process, to the extent that the Escrow Agent is not the source of the dispute.

8. EFFECT OF RELEASE

8.1. **Copies.** The Owner hereby grants the Escrow Agent the right to make copies of the Escrow Package as reasonably required for the Escrow Agent to carry out its duties under this agreement, and shall provide the Escrow Agent with instructions, including necessary software, required to make any such copies.

8.2. **No violation.** The Owner acknowledges and agrees that the Escrow Agent's release of the Escrow Package to the Beneficiary pursuant to the terms of this agreement or any arbitration award or court order, and the Beneficiary's subsequent use of the Escrow Package, shall not per se constitute a violation or infringement of the Owner's Intellectual Property Rights.

9. FEES

As consideration for the provision of the escrow services contemplated in this agreement, the Beneficiary shall pay the fees set out in **Schedule 2** hereto, on the terms and conditions set out therein.

10. INSURANCE

10.1. **Insurance.** The Escrow Agent hereby warrants that it shall, during the currency of this Agreement, maintain general Professional Indemnity Insurance cover with a limit of indemnity of no less than R1,000,000 (One Million Rand) in the aggregate for all claims arising in respect of the Escrow Agent's business activities.

10.2. **Proof.** The Escrow Agent shall upon written request from any other Party ("the Requesting Party"), provide the Requesting Party with reasonable proof of such insurance, payment of required premiums, and where applicable proof of renewals.

11. LIMITATION OF LIABILITY

11.1. **Reliance.** The Escrow Agent may act in reliance on any written notice, instruction or request furnished to the Escrow Agent hereunder which is reasonably believed by the Escrow Agent to be genuine and to have been signed or presented by a person apparently authorised to act on behalf of the parties. All employees of the Owner and the Beneficiary are conclusively deemed to have such authority.

11.2. **Good faith.** The Escrow Agent shall not be liable for any action taken by it in good faith and believed to be authorised or permitted under this agreement.

11.3. **Limitation of liability.** The Escrow Agent's total liability for any claim arising out of this Agreement and any services provided pursuant thereto, shall, subject to clause 11.4 below, be limited to the actual amount paid out to the Escrow Agent by the insurer under such policy in respect of the specific claim.

11.4. **Qualification.** The limitation of liability detailed in clause 11.3 above shall not apply where any claim under any insurance policy is repudiated due to any failure by the Escrow Agent to comply with any terms of such insurance policy, or due to the fact that the Escrow Agent has exceeded its limit of indemnity, provided that the Escrow Agent's aggregate liability for all claims arising out of this Agreement, or the provision of the services, in respect of which the Escrow Agent is not indemnified under any insurance policy as contemplated in clause 11.3, shall be limited to an amount equal to twice the fees which have actually been paid to the Escrow Agent pursuant to this Agreement during the then current 12 (twelve) month period of this Agreement.

11.5. **Third Parties.** Save to the extent expressly agreed to otherwise by the Escrow Agent in writing, the Escrow Agent shall not in any way be liable to the Beneficiary or the Owner or any cessionary or third party claiming through or on behalf of them for any loss or damage arising out of, or from, any latent or patent defect in the Escrow Package or any aspect thereof.

11.6. **Consequential loss.** The Escrow Agent shall not be liable for any special, contingent, incidental or consequential damages of whatsoever nature and howsoever arising.

12. TERM AND TERMINATION

12.1. **Term.** This Agreement shall commence on the Effective Date and continue thereafter until the last day of February 2008, whereafter it shall automatically be renewed for further periods of one year, unless the Owner and the Beneficiary jointly notify the Escrow Agent of their intention to terminate no less than 60 (sixty) days prior to the end of the then current term.

12.2. **Breach.** Should:

12.2.1. the Beneficiary breach this Agreement and fail to remedy such breach within 30 (thirty) days of receipt of written notice from the Escrow Agent calling upon the Beneficiary to remedy such breach, the Escrow Agent may terminate this Agreement forthwith on written notice to the Beneficiary, copied to the Owner;

12.2.2. the Escrow Agent become aware of a breach of this Agreement by the Owner, the Escrow Agent shall notify both the Beneficiary and the Owner of such breach in writing.

12.3. **Effect of termination.** The Escrow Agent shall notify the Owner and Beneficiary of termination of this Agreement. The Owner shall collect the Escrow Package from the Escrow Agent within 30 (thirty) days of receiving written notice calling upon it to do so, failing which the Escrow Agent may destroy the Escrow Package without liability to the Owner or Beneficiary, unless it receives written notice from the Beneficiary within such time stating that this Agreement has not terminated and the reasons therefore. Such written notice shall be in the form contemplated in clause 6.3.



13. LIEN

The parties hereby acknowledge that the Escrow Agent shall acquire a lien over the Escrow Package and it shall not be obliged to release such package unless and until all fees in respect of this Agreement have been paid.

14. NOTICES AND DOMICILIUM

- 14.1. **Addresses.** The parties hereto select as their respective domicilia citandi et executandi the physical addresses set out on the cover page hereof for the purposes of giving or sending any notice provided for or required hereunder, or such other address as may be substituted by notice given as herein required.
- 14.2. **Delivery.** Any notice addressed to a party at its physical or postal address shall be sent by prepaid registered post, or delivered by hand, or sent by telefax.
- 14.3. **Deemed delivery.** Any notice shall be deemed to have been given -
- 14.3.1. if posted by prepaid registered post, 7 (seven) days after the date of posting thereof,
- 14.3.2. if hand delivered, on the day of delivery,
- 14.3.3. if sent by telefax, on the date and time of sending of such telefax, as evidenced by a fax confirmation printout, provided that should such fax be sent outside normal business hours, being from 08h00 to 17h00 (Central African Time), Monday to Friday (excluding public holidays), such fax notice shall be deemed to be given 1 hour after the commencement of the ensuing business day;
- 14.4. **Use of email.** The parties record that whilst they may correspond via email during the currency of this Agreement for operational reasons, no formal notice required in terms of this Agreement, nor any amendment or variation to this Agreement may be given or concluded via email.

15. INDEMNIFICATION OF THE ESCROW AGENT

Except for intentional or grossly negligent acts or omissions on the part of the Escrow Agent, the Owner and the Beneficiary hereby jointly and severally indemnify and hold harmless the Escrow Agent and its directors, agents and employees from any and all claims, demands, liability, and any costs and expenses related thereto, including attorney's fees, incurred by the Escrow Agent directly or indirectly arising from or relating to the Source Code, Escrow Package, Software and/or the Escrow Agent's proper performance of its duties under this agreement, provided that where any such liability arises out of a breach of a third party's intellectual property rights related to the Escrow Package itself, the Owner shall be solely liable to indemnify the Escrow Agent, unless such claim arises out of the Beneficiary's misuse of the Escrow Package subsequent to the release thereof by the Escrow Agent.

16. INTERPRETATION

This Agreement shall be subject to the following rules of interpretation.

- 16.1. **Headings.** Headings and sub-headings are inserted for information purposes only and shall not be used in the interpretation of this Agreement.
- 16.2. **References.** Unless otherwise stated, references to clauses, sub-clauses, schedules or paragraphs are to be construed as references to clauses, sub-clauses, schedules or paragraphs of this Agreement. References in Schedules to clauses shall, unless expressly provided otherwise, be deemed to be a reference to clauses in such Schedule.
- 16.3. **Enactments.** References to any enactment shall be deemed to include references to such enactment as re-enacted, amended or extended from time to time.
- 16.4. References to persons. References to:-
- 16.4.1. persons shall include companies, corporations and partnerships;
- 16.4.2. any party shall, where relevant, be deemed to be references to, or to include, as appropriate, their respective successors or permitted assigns;
- 16.4.3. the singular shall include the plural and vice versa;
- 16.4.4. any one gender shall include a reference to all other genders.

- 16.5. **Survival of terms.** The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.
- 16.6. **Substantive provisions.** If any provision in a definition is a substantive provision conferring rights or imposing duties on any party, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in this Agreement.
- 16.7. **Calculation of days.** When any number of days is prescribed in this Agreement, 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.
- 16.8. **Definitions apply in Schedules.** Expressions defined in clause 1 shall bear the same meanings in the Schedules to this Agreement. Where any term is defined within the context of any particular clause in this Agreement, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that the term has not been defined in clause 1.
- 16.9. **Neutral construction.** The rule of construction that the Agreement shall be interpreted against the party responsible for the drafting or preparation of the Agreement, shall not apply.
- 16.10. **The term "including".** The words "include", "includes", and "including" means "include without limitation", "includes without limitation", and "including without limitation". The use of the word "including" followed by a specific examples shall not be construed as limiting the meaning of the general wording preceding it.
- 16.11. **Common meaning.** Terms other than those defined within the Agreement will be given their plain English meaning, and those terms, acronyms, and phrases known in the information technology industry will be interpreted in accordance with their generally accepted meanings.

17. GENERAL

- 17.1. **Whole Agreement.** This agreement constitutes the entire agreement between the parties in respect of the subject matter hereof and neither party shall be bound by any undertakings, representations, warranties or promises not recorded in this agreement.
- 17.2. **No Variation.** No variation or consensual cancellation of this agreement and no addition to this agreement shall be of any force or effect unless reduced to writing and signed by the parties or their duly authorised representatives.
- 17.3. **Waiver.** No waiver of any of the terms and conditions of this agreement will be binding or effectual for any purpose unless expressed in writing and signed by the party hereto giving the same, and any such waiver will be effective only in the specific instance and for the purpose given. No failure or delay on the part of either party hereto in exercising any right, power or privilege hereunder will operate as a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.
- 17.4. **Severability.** Should any of the terms and conditions of this agreement be held to be invalid, unlawful or unenforceable, such terms and conditions will be severable from the remaining terms and conditions which will continue to be valid and enforceable.
- 17.5. **Applicable Law.** This agreement will be governed by and construed in accordance with the law of the Republic of South Africa and all disputes, actions and other matters relating thereto will be determined in accordance with such law.
- 17.6. **Jurisdiction.** Subject to clause 7, the parties hereto hereby consent and submit to the jurisdiction of such High Court of South Africa, or division thereof, which has its seat in Johannesburg, in any dispute arising from or in connection with this agreement.
- 17.7. **Survival.** Notwithstanding termination of this agreement, any clause which, from the context, contemplates ongoing rights and obligations of the parties, shall survive such termination and continue to be of full force and effect.



Schedule 1 -Release Events

For the purposes of this agreement a Release Event shall arise where the Owner:-

1. enters into any composition or arrangement with its creditors, or be wound-up, whether compulsory or voluntarily (other than for the purposes of solvent reconstruction or amalgamation), or has a judicial manager validly appointed over all or any part of its assets or its undertaking, or is the subject of an administration order and such action results in the Owner being unable to provide Modifications or maintenance to the Software under the Main Agreement or a Maintenance Agreement; or
2. transfers or attempts to transfer title to the Software without the transferee having previously agreed in writing in a form agreed by the Beneficiary (such agreement not to be unreasonably withheld) to be bound by the terms of the Main Agreement, a Maintenance Agreement, and this agreement; or
3. dispose of a material portion of its assets;
4. undergoes a change in control;
5. ceases to trade; or
6. transfers or attempt to transfers title or any other rights in respect of the Vendor Software to a competitor of the Beneficiary;
or
7. breaches this Agreement and the Beneficiary terminates the Main Agreement as a result thereof;

then the Beneficiary shall be entitled to the delivery of the Escrow Package in terms of this Agreement.



Schedule 2 - Fees & Payment

The following fees shall be payable by the Beneficiary for the Escrow services provided by the Escrow Agent in terms of this agreement:

Description	Terms	Fee
Initiation Fee	Payable upon signature of the Agreement	R3,250
Annual Fee	Initially prorated for the period from the date of signature to the next 1 March, thereafter payable annually in advance on 1 March each year.	R4,550
Update Fee	Per update after the first update in a year.	R600
Storage Fee	Per annum, per 1000cm ³ if the source code media exceeds 1000cm ³	R600
Release Fee	Where the Escrow Package is released to a Beneficiary (per Beneficiary).	R6,000
Inspections	Hourly rate, subject to a minimum of 1 (one) hour	R900
Consulting Fees	Should additional input be required (per hour)	R800

- ♣ All amounts exclude VAT and reflect the prices up to 28 February 2010.
- ♣ Prices are subject to annual review on 1 March each year and will be increased to reflect any increases in the Consumer Price Index and the costs of storage.
- ♣ The Escrow Agent will submit a valid tax or other invoice to the Beneficiary for all amounts due in terms of this Agreement from time to time, which invoice shall be payable by the Beneficiary within 30 (thirty) days of receipt thereof by the Beneficiary.
- ♣ The Escrow Agent may withhold any Source Code, documentation or other property of the parties from either or both parties until it has been paid in full for any and all amounts outstanding in respect hereof, whether owed by the Owner or the Beneficiary.



Schedule 3 - Software

Name	Version

