



iSMS Terms and Conditions

1. Interpretation

The headings of the clauses in these terms and conditions are for the purpose of convenience and reference only and shall not be used in the interpretation of, nor modify nor amplify these terms and conditions nor any clause hereof. Unless a contrary intention clearly appears –

- 1.1 words importing -
 - 1.1.1 any one gender includes the other two genders;
 - 1.1.2 the singular include the plural and vice versa; and
 - 1.1.3 natural persons include created entities (corporate or unincorporated) and the state and vice versa;
- 1.2 the following terms shall have the meanings assigned to them hereunder and cognate expressions shall have corresponding meanings, namely –
 - 1.2.1 "access charge" means a monthly subscription charge for permitting the Subscriber continued access to the services.
 - 1.2.2 "terms and conditions" means the iBurst SMS Terms and Conditions and the Subscriber Standard Terms and Conditions, all schedules and addenda hereto from time to time;
 - 1.2.3 "charges" means sms charges as may be varied by iBurst from time to time.
 - 1.2.4 "subscription charge" means the charge payable by the Subscriber to iBurst for enabling the Subscriber to access data services in accordance with these terms and conditions.
 - 1.2.5 "subscription date" means the date on which iBurst activates the service and allows the Subscriber to access data services via the iBurst website.
 - 1.2.6 "data services" means short message service (SMS)
 - 1.2.7 "dispatch request" means a request, written or electronic, by the Subscriber to iBurst, containing full details of the data to be disseminated and the complete list of nominated persons and their relevant details in order for iBurst to perform the services;
 - 1.2.8 "equipment" means the Subscriber's terminal equipment as stated and described in the Subscriber Standard Terms and Conditions.
 - 1.2.9 "iBurst" means iBurst (Proprietary) Limited, a private company duly registered in terms of the Companies Act of the Republic of South Africa under registration number: 2004/029951/07;
 - 1.2.10 "schedule of charges" means iBurst's schedule of charges for the services, as published from time to time;
 - 1.2.11 "the Subscriber" means the Subscriber as detailed in the VAS subscriber application form or the online application process;
 - 1.2.12 "online application process" the process to be followed by the Subscriber on subscription on the website that will enable the Subscriber to have access to the VAS and which shall be deemed to form part of these terms and conditions;
 - 1.2.13 "VAS subscriber application form" means the VAS subscriber application form attached hereto and which shall be deemed to form part of these terms and conditions;
 - 1.2.14 "the services" means the provisions of a wireless mobile data telecommunication service utilising technology that enables the Subscriber to utilize data services by means of the system utilising technology that enables iBurst to disseminate data as produced and supplied to iBurst by the Subscriber from time to time, via SMS, together with such additional and ancillary services as may be made available by iBurst from time to time;
 - 1.2.15 "system" means the wireless mobile data telecommunication system operated by Wireless Business Solutions (Pty) Ltd "WBS" through which certain of the services are made available by iBurst to the Subscriber and all other network infrastructure including the world wide web, entry and delivery points of the multi protocol gateway (MPG);
 - 1.2.16 "tariff plan" means the prices that will be available on the iBurst website from time to time.
 - 1.2.17 "uptime service level" means the time that the services provided under these terms and conditions are active and able to pass traffic.
 - 1.2.18 "VAS" means value added services
 - 1.2.19 "VAT" means value added tax in accordance with the provisions of the Value Added Tax Act 89 of 1991.
 - 1.2.20 "voucher charge" means a charge payable by the Subscriber to iBurst for a predetermined amount of data services.
 - 1.2.21 "WBS" means Wireless Business Solutions (Pty) Ltd registration number 1996/13739/07.
- 1.3 when any number of days is prescribed in these terms and conditions, same shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a Saturday, Sunday or public holiday, in which case the last day shall be the next succeeding day which is not a Saturday, Sunday or public holiday;
- 1.4 expressions defined in these terms and conditions shall bear the same meanings in schedules or annexure to these terms and conditions which do not themselves contain their own definitions;
- 1.5 the rule of construction that these terms and conditions shall be interpreted against the party responsible for the drafting or preparation thereof, shall not apply.

2. Duration

These terms and conditions shall commence to be in operation on the subscription date unless terminated in accordance with clause 7 or clause 8 hereof.

3. Provision of the Services

- 3.1 iBurst undertakes to provide the services subscribed to by the Subscriber upon these terms and conditions at an uptime service level of 98% during any calendar month of subscription.
- 3.2 The Subscriber acknowledges that the system is not operated by iBurst and that, save as provided in this agreement, iBurst has no obligations whatsoever in respect of the equipment and/or the system. The Subscriber further acknowledges and accepts that the availability and/or quality of the services may be affected by factors including, but not limited to, network unavailability and other factors beyond the control of iBurst.
- 3.3 Pursuant to these terms and conditions and whilst iBurst will take all reasonable steps to ensure that the services are provided in accordance with these terms and conditions, iBurst cannot and does not guarantee that the services will be provided at all times and iBurst will not be liable for any direct or indirect loss or damage that may be sustained by the Subscriber as a result of any faults or interruptions in the services.
- 3.4 iBurst shall be entitled from time to time to issue such reasonable instructions as it may deem to be necessary in respect of the use of the services or to be in the interests of safety, quality of service or of other Subscribers and the Subscriber shall be bound by all such instructions which shall be deemed to form part of these terms and conditions.
- 3.5 The services are provided on the basis that the Subscriber –
 - 3.5.1 will not utilise the service, or allow others to do so, for any improper, immoral, or unlawful purpose; and
 - 3.5.2 will not act or omit to act, or allow others to do so, in any way likely to damage, disrupt or interfere with the system or to injure or damage any person or property or to cause the quality of the services to be impaired or interrupted in any manner whatsoever;
- 3.6 iBurst will only perform data services upon receipt of a dispatch request from the Subscriber.

4. Charges

- 4.1 By its signature to the VAS subscriber application form or completing the online application process which is viewable on the iBurst website, the Subscriber acknowledges that it is aware of and has agreed to all the terms of the tariff plan inserted in the application form or which is viewable on the iBurst website, including the charges under the tariff plan which shall be payable to iBurst as follows –
 - 4.1.1 the subscription charge and the voucher charge on the subscription date;
 - 4.1.2 access charges on or before the first day of each month following the subscription date;
 - 4.1.3 the timing, format and details of invoices shall be in the sole discretion of iBurst.
- 4.2 Each charge, unless otherwise stated in the schedule of charges, is exclusive of value added tax which shall be borne and paid by the Subscriber together with the charge in question.
- 4.3 The access charge is a charge for permitting the Subscriber continued access to the services and the Subscriber will only have access to the services if he/she has purchased vouchers as indicated in the VAS subscriber application form.
- 4.4 Upon receipt of a dispatch request by iBurst from the Subscriber, the services will be dispatched and cannot be revoked. The Subscriber will immediately become liable for all associated charges for the services upon receipt of such dispatch request by iBurst.
- 4.5 iBurst shall be entitled, in its sole and absolute discretion and by means of written notice to the Subscriber, to vary the charges from time to time. Notwithstanding the date of any such notice, any variation in the charges arising from an increase in respect of the delivery of the services shall take effect as from the date upon which iBurst becomes liable for such increased charges.
- 4.6 iBurst shall be entitled, in its sole and absolute discretion to determine the charges limit and or to vary the charges limit from time to time.

5. Limitation of Liability

- 5.1 iBurst shall not be liable to the Subscriber for any loss, injury or damage of any nature whatsoever, including loss of profit or any other special damages, or indirect or consequential losses or damages which the Subscriber or any other person may suffer, whether as a result of any breach of these terms and conditions by iBurst, dealers or agents of iBurst or their respective employees, or whether caused directly or indirectly by the use of the equipment and or the use of the services, including, but not limited to accidental distribution or incorrect distribution of information.
- 5.2 Any known or unknown risk attached to the use of the equipment and/or the services and the connection thereof to the system shall be deemed to have passed to the Subscriber on the subscription date.

6. Disclaimers

- 6.1 The Subscriber hereby indemnifies and holds iBurst harmless against any claim, damages, expenses and/or costs of any nature whatsoever, incurred by iBurst arising from or in connection with these terms and conditions or iBurst's failure to perform its responsibilities in terms of these terms and conditions.
- 6.2 The Subscriber specifically accepts and acknowledges that iBurst acts merely as a distributor of the data services and the Subscriber accepts all liability arising from any claims, inter alia claims relating to:

- 6.2.1 any intellectual property infringement contained in the information including copyright infringement (whether digital or otherwise), trade mark infringement, infringement of trade secrets and/or databases;
- 6.2.2 the distribution of any defamatory, discriminatory or obscene material, whether unacceptable or illegal; the distribution of any sexually explicit messages, spam, images, cartoons or jokes, whether unacceptable or illegal; the distribution of offensive, disruptive, harmful or insulting material; the distribution of computer viruses; the distribution and/or disclosure of private information; and the Subscriber's breach of contract to a third party.
- 6.2.3 non-compliance with any legislation and/or regulations, issued from time to time.
- 6.3 iBurst shall be entitled in its sole and absolute discretion to terminate the provision of the services at any time and without notice to the Subscriber, should it reasonably be required to do so.
- 6.4 The Subscriber is solely responsible for the accuracy and content of all data submitted to iBurst and to ensure that dispatch requests are received by iBurst.
- 6.5 iBurst will take reasonable actions to ensure the integrity and confidentiality of the Subscriber's information furnished to iBurst.
- 6.6 The Subscriber shall abide by the code of conduct of the Wireless Application Service Provider's Association (WASPA) which can be found on WASPA's website www.waspa.org.za. Should a Subscriber fail to abide by this Code of Conduct, iBurst shall not be liable for such failure.

7. Termination and Suspension of Services

- 7.1 iBurst may at any time suspend the services, in whole or in part without notice to the Subscriber and without incurring any liability whatsoever –
 - 7.1.1 should iBurst be unable to provide the services, in whole or in part through no fault of its own; or
 - 7.1.2 should an agreement from which iBurst derives its rights to provide the services, be suspended, cancelled or terminated; or
 - 7.1.3 should such suspension be necessary in order to facilitate any modification, maintenance or remedial works in respect of the system; or
 - 7.1.4 should the Subscriber fail to comply with any provisions of these terms and conditions; or
 - 7.1.5 should the Subscriber use equipment that infringes or is alleged to infringe the intellectual property rights of any third party.
- 7.2 The Subscriber may terminate the services by giving iBurst 30 days written notice of its intention to terminate.

8. Breach

- 8.1 If the Subscriber commits a breach of any of the terms and conditions hereof and remains in default for a period of (7) seven days after delivery to the Subscriber of a written notice ("notice of breach") from iBurst calling for such breach to be remedied, iBurst shall be entitled forthwith and without further notice to the Subscriber to either terminate the Agreement or claim specific performance of all of the Subscriber's obligations, including the immediate payment of all sums of money payable by the Subscriber, whether or not then due, in either event without prejudice to iBurst's right to claim such damages as it may have suffered by reason of such breach or failure.
- 8.2 Without prejudice to the provisions of clause 8.1 above, iBurst may forthwith terminate the services at any time by giving Subscriber written notice of such termination if (i) the Subscriber fails to make payment of any charges on or before the due date for payment thereof; and/or (ii) in the event that the Subscriber is sequestered, liquidated or placed under judicial management, irrespective of whether any of the aforesaid are provisional or final; or voluntary or compulsory.
- 8.3 Any termination pursuant to the preceding provisions of this clause shall be without prejudice to any claim iBurst may have against the Subscriber in respect of any prior breach of these terms and conditions by the Subscriber.
- 8.4 Without derogating from any other rights or remedies available to iBurst in terms of these terms and conditions or at law, in the event of the services being cancelled by the Subscriber (for whatsoever reason) or in the event of iBurst electing to terminate the services pursuant to any breach by the Subscriber which entitles iBurst to cancel:
 - 8.4.1 the Subscriber shall be liable to iBurst and hereby agrees to pay on demand, the full charges payable to iBurst in law.

9. General

- 9.1 The rights and obligations of the Subscriber in terms of these terms and conditions may not be ceded or delegated to any third party. The rights and obligations of iBurst in terms of the Agreement may be ceded and delegated by it to any other party on written notice to the Subscriber.
- 9.2 iBurst may change the terms and conditions of this agreement as a result of changes in taxes, laws, regulations, the terms and conditions of the licence issued to WBS, the terms and conditions of any agreement between WBS and iBurst, any agreement between iBurst and a third party or any circumstances or events similar to the foregoing. iBurst shall notify the Subscriber of any changes as contemplated herein in writing.
- 9.3 The Subscriber shall provide proof of consent to send messages to their recipients should iBurst require the Subscriber to do so.

10. Consent/Authority

- 10.1 The Subscriber consents to iBurst using Subscriber's information supplied by the Subscriber for the purposes of informing Subscribers of the iBurst's services which may interest the Subscriber from time to time.
- 10.2 The Subscriber hereby consents/authorises iBurst at any time, without notice to the Subscriber to obtain information about the Subscriber's profile from any authorised and registered credit reference agency in the Republic of South Africa.
- 10.3 The Subscriber consents/authorises iBurst to provide regular reports in respect of Subscriber's payment conduct to any authorised and registered credit reference agency in the Republic of South Africa.
- 10.4 The Subscriber consents/authorises receiving marketing, promotional updates and client satisfaction surveys from iBurst.

11. Domicilium Citandi Et Executandi

The parties choose as their *domicilia citandi et executandi* for all purposes under this agreement, whether in respect of court process, notices or other documents or communications of whatsoever nature (including the exercise of any option), the addresses as stated in the Subscriber Application form.

12. Miscellaneous Matters

- 12.1 These terms and conditions contain all the express provisions agreed on by the parties with regard to the subject matter of hereof and the parties waive the right to rely on any alleged express provision not contained in these terms and conditions.
- 12.2 No representations: Neither party may rely on any representation which allegedly induced that party to enter into the Agreement, unless the representation is recorded in the Agreement.

- 12.3 Variation, cancellation and waiver: No contract varying, adding to, deleting from or cancelling the Agreement, and no waiver of any rights under the Agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties.
- 12.4 Indulgences: If either party at any time breaches any of that party's obligations under the Agreement, the other party ("the aggrieved party"):
 - 12.4.1 May at any time after that breach exercise any right that became exercisable directly or indirectly as a result of the breach, unless the aggrieved party has expressly elected in writing of a clear and unambiguous conduct, amounting to more than mere delay, not to exercise the right (if the aggrieved party is willing to relinquish that right, the aggrieved party will on request do so in writing). In particular, acceptance of late performance shall for a reasonable period after performance be provisional only, and the aggrieved party may still exercise that right during that period..
 - 12.4.2 Shall not be stopped (i.e. prevented) from exercising the aggrieved party's rights arising out of the breach, despite the fact that the aggrieved party may have elected or agreed on one or more previous occasions not to exercise the rights arising out of any similar breach or breaches.
- 12.5 Applicable Law: The Agreement shall be interpreted and implemented in accordance with the laws of the Republic of South Africa.

13. Quality of Service

iBurst does not guarantee the quality of the services.

14. Acknowledgements

The Subscriber acknowledges having read and accepted the terms and conditions of the Acceptable Use Policy on the iBurst website as well as the terms and conditions as set out herein. By activating the Service, the Subscriber acknowledges that he/she has read and understood, and agrees to these terms and conditions. The Subscriber also agrees that he/she is entering into a legally binding agreement with iBurst upon accepting these terms and conditions. These terms and conditions should be read in conjunction with the Standard Subscriber Terms and Conditions.

15. Termination

Without prejudice to any other rights at law or set out in the Agreement, iBurst may terminate the Agreement upon written notice to the Subscriber in the event that the Licence is revoked, terminated or amended for any reason whatsoever.

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