MBM VALKYRIE ADVISORY (PTY) LTD

INDEPENDENT LEGAL, GOVERNANCE & COMPLIANCE ADVISORY

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The contract instrument library

What each instrument must contain under South African law, and what goes wrong when it is done badly.

We do not sell "contract drafting". We draft specific instruments, and the value is in knowing what each one has to contain, which statute sits behind it, and what goes wrong when it is done badly. This library is published so that you can judge the knowledge before you buy it. It is general guidance and not legal advice on your facts.

Contents

01 · Commercial and services contracts

The agreements a trading business signs most often — and the ones most often signed on the other side's paper without anybody reading the schedules.

Master Services Agreement / Service Level Agreement

Governs a continuing supply of services where the detail changes but the relationship does not — the frame under which schedules, statements of work and purchase orders sit.

MUST CONTAIN

Services defined by output rather than activity; service levels with a stated measurement method and who measures; the change-control procedure; fees, escalation and the invoicing trigger; acceptance criteria and the consequence of rejection; term, renewal and exit assistance; limitation and exclusion of liability; a POPIA operator annexure wherever personal information moves; and an order-of-precedence clause ranking the agreement, the schedules and any purchase order.

WHAT TO LOOK OUT FOR

A service level with no measurement clause is decoration — it cannot be enforced, only argued about. An unqualified indemnity given by a small supplier is usually uninsurable and therefore worthless to the client and fatal to the supplier. And where the schedules were written by the commercial team after the lawyers left, the precedence clause decides the dispute — read it and check it says what you think it says.

Consultancy or professional services agreement

Engages a professional for a defined piece of work, as distinct from a continuing supply or an employment relationship.

MUST CONTAIN

Scope and deliverables; the fee basis — fixed, capped or rate — and what is expressly out of scope; client dependencies without which time stops running; intellectual property, separating what the client owns from the templates the adviser keeps; confidentiality; professional indemnity cover and the liability cap; and an express statement of the nature of the service.

WHAT TO LOOK OUT FOR

For an advisory business the most important clause is the one saying what the service is not — not legal representation, no reserved legal work, and the client remains responsible for its own statutory decisions. Second: "out of scope" must be written as a procedure — quoted and approved in writing before it starts — not as a sentence of intent, or scope creep is free.

Non-disclosure agreement — mutual or one-way

Protects information exchanged while two parties work out whether to do business, and afterwards.

MUST CONTAIN

A definition of confidential information that includes the fact of the discussions themselves; the permitted purpose; permitted recipients and their back-to-back obligations; the standard carve-outs — already known, independently developed, public through no breach, compelled by law or a regulator; a return-or-destroy obligation with an exception for backups and records the recipient must keep by law; the duration after termination; and remedies.

WHAT TO LOOK OUT FOR

An NDA with no permitted-purpose clause protects less than people think: it restrains disclosure but not use. A perpetual confidentiality period is often unenforceable and almost always unnecessary — three to five years from the last disclosure is the commercial norm, longer only for genuine trade secrets. And an NDA is not a POPIA operator agreement; where personal information will be exchanged it does not do that job.

Memorandum of understanding or heads of agreement

Records what two parties have agreed in principle, and what they have not, before the full agreement is negotiated.

MUST CONTAIN

Above all, an unambiguous statement of which clauses bind and which do not. Then the objective, the intended structure, exclusivity if any, cost allocation, confidentiality, the conditions precedent to a full agreement, and a long-stop date.

> WHAT TO LOOK OUT FOR
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> This is the most expensive routine error in South African commercial practice: an MOU the parties treat as non-binding while its language makes it a contract. If the document records agreement on the essential terms and there is an intention to be bound, calling it an MOU does not save anyone. Either say expressly that the document creates no binding obligations save for clauses X, Y and Z — or accept that it is the deal.

Public-sector supply and procurement contracts

Formalises an award made through a bid or quotation process by an organ of state, on terms the procurement framework already constrains.

MUST CONTAIN

The bid documents, the SBD forms and the successful bid incorporated by reference and ranked in the precedence clause; scope mirroring the specification exactly; PFMA or MFMA payment terms — thirty days from a valid invoice; performance security where required; penalties for late delivery; restrictions on cession and subcontracting; and termination for convenience.

> WHAT TO LOOK OUT FOR
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> The contract cannot improve on the bid. Anything promised in the technical proposal is a contractual obligation whether or not it is repeated in the signed agreement — so the proposal must be written as though it were the contract, because it is. Watch too for the entity's standard general conditions of contract sitting behind the signature page, which is usually where the liability regime lives and is usually the part nobody read.

Distribution, agency and reseller agreements

Puts someone else between you and the customer — and decides whose customer it is when the relationship ends.

MUST CONTAIN

Territory and whether it is exclusive; whether the intermediary sells in its own name or yours; minimum purchase or performance targets and the consequence of missing them; pricing and discount authority; trade-mark licence and the limits on its use; stock, returns and warranty handling; and post-termination rights to the customer list and to residual commission.

> WHAT TO LOOK OUT FOR
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> Exclusivity, minimum resale prices and territorial restrictions engage the Competition Act — a minimum-resale-price term is a prohibited practice outright, and recommended prices must be marked as recommended and non-binding. Separately, an "agent" who concludes contracts in your name binds you; the difference between an agency and a distributorship is not a label, it is who owns the sale.

Standard terms of trade and website terms

Sets the terms on which you sell to everybody, without negotiating each one.

MUST CONTAIN

Incorporation — how and when the customer is taken to have agreed; ordering and acceptance; price, payment and interest; delivery and risk; returns; limitation of liability drafted to survive section 48 and 49 of the Consumer Protection Act; the section 43 disclosures the Electronic Communications and Transactions Act requires for electronic transactions; the cooling-off position; and a privacy notice that satisfies POPIA at the point of collection.

WHAT TO LOOK OUT FOR

A limitation or indemnity in consumer terms must be drawn to the consumer's attention in the manner section 49 prescribes, and agreement must be affirmatively signalled — a clause buried in a document nobody opened does not bind. Terms that apply to "orders placed from today" but were changed unilaterally last month bind nobody either: version and date the terms, and keep the superseded versions.

02 · Company, shareholder and founding instruments

The documents that decide who controls the entity, who is paid first, and what happens when the founders stop agreeing.

Memorandum of Incorporation

The company's constitutional document — what the Companies Act allows the founders to change, and what it does not.

MUST CONTAIN

The alterable provisions the company actually wants changed, rather than the CIPC standard form reproduced; share classes, authorised shares and the board's authority over unissued shares; director appointment, rotation and removal; quorum and voting at board and shareholder level; the matters reserved to a special resolution; pre-emptive rights on issue and on transfer; and, for a non-profit company, the objects and the non-distribution provisions in Schedule 1 of the Companies Act.

WHAT TO LOOK OUT FOR

Most South African companies run on a standard-form MOI nobody has read, which means the Act's default position governs matters the founders believe they have agreed differently. And under section 15(7), any provision of a shareholders' agreement inconsistent with the Act or the MOI is void — so where the two disagree, the shareholders' agreement loses. They must be drafted together, in that order.

Shareholders' agreement

Governs the relationship between the owners — funding, control, deadlock and exit.

MUST CONTAIN

Shareholding and the funding obligation, including the consequence of failing to follow money; board composition and appointment rights; matters reserved at shareholder level; pre-emptive rights, tag-along and drag-along; deadlock resolution; good-leaver and bad-leaver provisions with the valuation mechanism; restraint and non-solicitation; dividend policy; and exit.

WHAT TO LOOK OUT FOR

The valuation formula is where these agreements fail. "Fair value as determined by the auditor", with no methodology, produces a dispute at precisely the moment relations have broken down. Specify the method, the valuer, who appoints them if the parties cannot agree, and whether minority and marketability discounts apply. And settle the MOI consistency point above before a word of the agreement is drafted.

Non-profit constitution and NPC founding documents

Creates a legal person that exists for its objects rather than for its members, in the form two regulators will accept.

MUST CONTAIN

For registration under the Nonprofit Organisations Act: the name; the objects; that the organisation exists in its own right, separate from its members; that income and property are not distributable to members except as reasonable compensation for services; the powers of the governing body; meeting and quorum rules; financial and record-keeping obligations; the amendment procedure; and a dissolution clause transferring remaining assets to a body with similar objects.

WHAT TO LOOK OUT FOR

An organisation that also wants public benefit organisation approval and section 18A donor-deduction status from SARS needs specific additional clauses — and retrofitting them later means amending the constitution and going back to two regulators. Build for PBO approval at the outset even if the application comes later. Watch also for a governing body of three consisting of the founder, the founder's spouse and the founder's accountant: SARS requires three unconnected persons.

Trust deed

Separates ownership from benefit — and only works if the formalities are exact.

MUST CONTAIN

Identification of the founder, the trustees and the beneficiaries; the trust object; the trustees' powers and their limits; an independent trustee where the trust holds assets for others; decision-making and quorum; the distribution discretion; amendment and termination; and the security or exemption position under the Trust Property Control Act.

WHAT TO LOOK OUT FOR

Trustees may not act before the Master has issued letters of authority under section 6 — acts before that date are void, not voidable, and that catches a great many transactions. Beneficial-ownership information must now be lodged with the Master and kept current. The Regulation of Trusts Bill published in August 2026 would add annual returns, financial statements and personal administrative penalties on trustees, so any deed drafted now should anticipate that regime rather than be amended into it later.

Subscription and investment agreement

Brings new money into the company on terms that survive the next round.

MUST CONTAIN

The subscription amount, the instrument and the resulting cap table; conditions precedent and the completion mechanics; warranties by the company and by the founders, with a disclosure schedule and limitation; use of proceeds; information and reporting rights; board and observer appointment; anti-dilution; liquidation preference; and the founders' vesting and restraint.

WHAT TO LOOK OUT FOR

A subscription cannot issue shares the MOI does not authorise, and the board's authority to issue under section 38 must exist before completion — a round that closes on unauthorised shares has to be unwound. Watch also for a liquidation preference described in the term sheet but not carried into the MOI share terms: preferences live in the MOI, not in the agreement.

Joint venture, consortium and teaming agreement

Lets two businesses pursue one opportunity without merging.

MUST CONTAIN

The purpose and its boundary; whether the vehicle is incorporated or contractual; contributions and who owns what is contributed; governance and deadlock; profit and loss sharing; liability as between the parties and towards the client; exclusivity for the opportunity; intellectual property created jointly; and unwind on failure to win the bid.

> WHAT TO LOOK OUT FOR
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> An unincorporated joint venture can be a partnership in law whatever it is called, which means joint and several liability to third parties — say expressly whether that is intended. And where the parties are actual or potential competitors, information sharing and bid coordination must be checked against the Competition Act before the first meeting, not after the award.

03 · Employment and workplace instruments

Where the label on the document decides nothing, and the reality of the relationship decides everything.

Contract of employment

Records the terms on which a person is employed, in the form the Basic Conditions of Employment Act requires.

MUST CONTAIN

The written particulars required by section 29 of the Basic Conditions of Employment Act; remuneration and permissible deductions; hours, overtime and whether the earnings threshold applies; leave in all its forms; probation with a fair procedure attached; incorporation of the disciplinary code and policies by reference; confidentiality and intellectual-property assignment; restraint where it is justified; and termination on notice periods that treat the Act as a floor.

> WHAT TO LOOK OUT FOR
>
> A probation clause reserving a right to dismiss “at the end of probation” is unenforceable — probationary dismissal still requires evaluation, counselling and a fair process under Schedule 8 of the Labour Relations Act. And an IP clause is needed even though work created in the course of employment usually vests in the employer, because the exceptions — work created outside duties, pre-existing IP, moral rights — are exactly where the argument happens.

Fixed-term contract

Employs someone for a defined period or task — lawfully, which is narrower than most employers think.

MUST CONTAIN

The justifiable reason for the fixed term, stated on the face of the contract; an objectively ascertainable end date or event; and equal-treatment provisions for employees below the earnings threshold.

> WHAT TO LOOK OUT FOR
>
> Section 198B of the Labour Relations Act. For employees earning below the Minister’s earnings threshold, a fixed term longer than three months is lawful only on one of the listed justifications; without one the employee is deemed to be employed indefinitely, and an expectation of renewal becomes a dismissal at the CCMA. Confirm the current threshold before drafting — it is adjusted annually.

Independent contractor agreement

Buys a result from someone who is in business for themselves — or fails to, and creates an employee.

MUST CONTAIN

The deliverable and the contractor's control over the manner of performance; own tools, own hours, a right to substitute; no integration into the client's organisation; own tax and statutory obligations; indemnity; and termination for breach rather than a notice of dismissal.

WHAT TO LOOK OUT FOR

The label decides nothing. Section 200A of the Labour Relations Act creates a presumption of employment where any one of seven factors is present — control over hours, being part of the organisation, economic dependence, tools provided, working for a single client — for people below the earnings threshold, and the CCMA looks at the reality rather than the heading. Where a relationship walks like employment, the correct advice is to say so, not to draft harder.

Restraint of trade

Protects a legitimate business interest after someone leaves — no more widely than that interest requires.

MUST CONTAIN

The protectable interest identified specifically — customer connections, confidential information, trade secrets, not "the business"; a defined area, period and scope of prohibited activity, each no wider than that interest requires; separate non-solicitation of clients and of staff; and severability drafted so that an unreasonable limb can fall away without taking the clause with it.

WHAT TO LOOK OUT FOR

In South African law a restraint is presumed valid and the burden of showing it unreasonable rests on the employee — the opposite of what most people assume. That makes over-drafting tempting and self-defeating: a court that finds the restraint unreasonable may strike it rather than rewrite it. Two years with a real geographic limit, tied to a named protectable interest, is worth more than five years and "the Republic".

Settlement and separation agreement

Ends the employment relationship and the dispute at the same time, finally.

MUST CONTAIN

Full and final settlement in unambiguous terms; the payment, its tax treatment and its timing; withdrawal of any pending CCMA or Labour Court proceedings; the reference and announcement wording agreed in advance; confidentiality and non-disparagement; return of property; and the obligations that survive.

WHAT TO LOOK OUT FOR

Whether the payment is a severance benefit, a restraint payment or an ex gratia amount changes its tax treatment entirely, and getting it wrong creates a liability after the ink is dry — settle the tax directive position before signature, not after. And where the agreement is to be made an arbitration award under section 142A of the Labour Relations Act, say so expressly; enforcement is otherwise a fresh contractual claim.

Disciplinary code, grievance procedure and whistleblowing policy

The three documents an employer is judged on when a dismissal is tested.

MUST CONTAIN

A code aligned to Schedule 8 of the Labour Relations Act with graduated sanctions, the procedure, the right to representation and an appeal; a grievance procedure with timelines; and a protected-disclosure channel meeting the Protected Disclosures Act — who receives a disclosure, how the discloser's identity is protected, and the occupational-detriment protections.

> WHAT TO LOOK OUT FOR
>
> A code that reads as a rigid tariff of sanctions removes the discretion the employer needs, and is then used against the employer at the CCMA — keep it a guide. And a whistleblowing policy that routes disclosures to line management defeats itself: the channel must bypass the people most likely to be the subject of a disclosure, which is a governance design question before it is a drafting one.

04 · Data, property, finance and security instruments

The instruments where a formality, a threshold or a statute decides the outcome before the commercial terms are reached.

Operator (data processing) agreement — POPIA section 21

The written contract POPIA requires wherever one organisation processes personal information on another's behalf.

MUST CONTAIN

A written contract is mandatory. It must record that the operator processes personal information only with the knowledge and authorisation of the responsible party and only on its documented instructions; the confidentiality obligation; the security safeguards required by section 19; the obligation to notify immediately where there are reasonable grounds to believe personal information has been accessed by an unauthorised person; sub-operator approval; cross-border transfer limits under section 72; assistance with data-subject requests; and return or deletion at the end.

> WHAT TO LOOK OUT FOR
>
> Almost every organisation has operators it has never identified — the payroll bureau, the cloud host, the marketing agency, the shredding company, the IT support firm. The gap is rarely the clause; it is the register of who the operators are, so start there. And "notify without undue delay" is a weaker standard than the Act's "immediately" — do not accept the softer wording off a supplier's paper.

Commercial lease

Gives a business the right to occupy premises, on terms that are rarely as standard as they look.

MUST CONTAIN

The parties, the premises described precisely and the permitted use; term, renewal and escalation; deposit; who carries rates, utilities, insurance and maintenance; alterations and reinstatement; assignment and subletting; breach, remedy periods and cancellation; and the landlord's tacit hypothec position.

> WHAT TO LOOK OUT FOR
>
> A lease of land for more than ten years that is not registered against the title deed binds a successor in title for ten years only. Where the tenant is a natural person or a juristic person below the Consumer Protection Act threshold, the CPA applies and limits cancellation penalties and notice — a clause forfeiting the full remaining rental will not survive. And "reinstatement to original condition" without an agreed schedule of condition at the start is an argument waiting at the end of the term.

Loan agreement, including director and shareholder loans

Lends money on terms that are enforceable — which two statutes can quietly prevent.

MUST CONTAIN

The capital and the drawdown mechanism; interest and how it is calculated; the repayment schedule; events of default and acceleration; security; subordination where a solvency test depends on it; and the certificate-of-indebtedness clause.

> **WHAT TO LOOK OUT FOR**
>
> Two traps. The National Credit Act can apply to a loan to a small juristic person, and an unregistered credit provider's agreement is unlawful and void — check the borrower's asset value and turnover against the threshold, and whether the loan is a large agreement, before assuming exemption. Separately, a loan by a company to a director or a person related to a director requires the board resolution and the notice regime in section 45 of the Companies Act, failing which the resolution is void and the directors are personally liable.

Suretyship, guarantee and cession

Puts somebody else's assets behind the obligation — and is void if the formalities are missed.

MUST CONTAIN

For a suretyship, the identity of the surety, the creditor, the principal debtor and the nature and amount of the debt, in writing and signed by or on behalf of the surety — section 6 of the General Law Amendment Act 50 of 1956, without which it is void — plus renunciation of the benefits of excussion and division if that is intended. For a cession, the claim identified, whether it is out and out or in securitatem debiti, and notice to the debtor.

> **WHAT TO LOOK OUT FOR**
>
> The formalities are absolute, and the most common defect is a suretyship signed without the principal debtor identified in the document itself. A guarantee, unlike a suretyship, can be an independent primary obligation — which of the two the parties intended changes everything about enforcement, and the heading on the page does not decide it.

Sale of a business or of assets

Transfers a going concern — and, by operation of law, the people who work in it.

MUST CONTAIN

What is sold and what is expressly excluded; the purchase price, payment mechanism and any earn-out; warranties and their limitation; the effective date and the passing of risk; employees; contracts to be ceded and the consents required; restraint; and the conditions precedent.

> **WHAT TO LOOK OUT FOR**
>
> Section 197 of the Labour Relations Act transfers the employees automatically on the transfer of a business as a going concern, with their terms and their service intact, whatever the sale agreement says — the parties can allocate the cost between themselves but cannot displace the transfer. And section 34 of the Insolvency Act requires published notice of the transfer, failing which it is void against creditors for six months. Both are routinely missed in small-business sales.

Franchise agreement

Licenses a business system — under the only chapter of the Consumer Protection Act that applies whatever the size of the franchisee.

MUST CONTAIN

Everything the Consumer Protection Act and its regulations prescribe — the disclosure document delivered at least fourteen days before signature, the prescribed cover-page wording, territory, fees and marketing fund, term and renewal, training and support, and the franchisor's obligations.

> WHAT TO LOOK OUT FOR
>
> The CPA applies to every franchise agreement regardless of the size of the franchisee — the usual threshold does not save the franchisor. A franchisee may cancel within ten business days of signature without cost or penalty, and an agreement missing the prescribed contents is open to challenge for its life. With the Competition Commission's franchising market inquiry under way, this is an area about to be looked at rather than assumed.

Licence agreements — software, content and intellectual property

Grants a right to use something without transferring ownership of it.

MUST CONTAIN

The licensed material identified precisely and by version; whether the licence is exclusive, sole or non-exclusive; territory, field of use, term and sublicensing; the fee or royalty and how it is audited; maintenance and support, if any; warranties of title and non-infringement, and the indemnity; escrow where the licensee's operations depend on the code; and what happens to the licensee's data on termination.

> WHAT TO LOOK OUT FOR
>
> Under the Copyright Act an exclusive licence must be in writing and signed by the licensor, and an assignment of copyright likewise — an exclusive arrangement concluded by email is not exclusive. Watch too for open-source components inside proprietary software: a copyleft licence deep in the dependency tree can oblige disclosure of code the licensor believes it owns outright.

Funding, grant and donor agreements

Brings restricted money into an organisation, with strings that outlive the project.

MUST CONTAIN

The funded purpose and the budget it is tied to; disbursement tranches and the conditions for each; the reporting calendar and the format; permitted variation between budget lines; audit and inspection rights; the treatment of interest earned and of unspent funds; intellectual property in what the grant produces; branding and acknowledgement; anti-bribery, sanctions and safeguarding undertakings; and the consequence of misuse.

> WHAT TO LOOK OUT FOR
>
> Unspent funds and interest are where grant relationships end badly — say now whether they are returned, rolled over or retained. And an organisation holding restricted funds must be able to show them separately in its records: a grant agreement that assumes fund accounting the grantee does not practise creates a reporting failure that looks like a financial one.

Points that apply to every instrument

Signature. Electronic signatures are valid for most contracts under the Electronic Communications and Transactions Act — but not where the law requires signature for suretyships, wills or the alienation of land.

Penalties. Under the Conventional Penalties Act a court may reduce a penalty it considers disproportionate, so a penalty priced as a deterrent rather than as a genuine pre-estimate of loss is at risk.

Prescription. Three years — and an acknowledgement of liability restarts the clock.

Dispute resolution. Name the forum, the rules and the seat, and choose deliberately between mediation-then-arbitration and the courts: arbitration is private and usually faster, litigation is cheaper to start and creates precedent.

Variation. A non-variation clause is enforceable in South African law, which means the WhatsApp message agreeing the change is not the change.

Authority. Check who may sign before, not after: a resolution, a delegation or a written mandate, and for an organ of state the delegation instrument that the enabling Act permits.

> **The only exclusion — reserved work**
>
> The practice does not draft instruments that constitute reserved legal work: conveyancing and any agreement for the alienation of immovable property, documents requiring notarial execution or deeds-registry registration, pleadings, and instruments in the administration of deceased estates. Where a transaction needs one of those elements it is said at the outset, and we help you brief a practising firm for that element.

Company information

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