

# **SERVICE DELIVERY AGREEMENT**

between

**SALDANHA BAY MUNICIPALITY**

**and**

**SWARTLAND MUNICIPALITY**

**and**

**BERGRIVIER MUNICIPALITY**

and

**WEST COAST DISTRICT MUNICIPALITY**



**MALLINICKS**

Tel +27 21 410 2200  
Fax +27 21 410 9000  
Email [information@mallinicks.co.za](mailto:information@mallinicks.co.za)  
Docex 34 Cape Town  
3<sup>rd</sup> Floor Granger Bay Court  
Beach Road, V&A Waterfront  
Cape Town 8001 South Africa  
PO Box 3667 Cape Town 8000  
South Africa

[www.mallinicks.co.za](http://www.mallinicks.co.za)

## TABLE OF CONTENTS

1.	<b>DEFINITION</b> .....	2
2.	<b>RECORDAL</b> .....	5
3.	<b>WARRANTIES</b> .....	6
4.	<b>APPOINTMENT</b> .....	7
5.	<b>FEE</b> .....	7
6.	<b>EXCLUSIVITY</b> .....	7
7.	<b>DURATION</b> .....	8
8.	<b>THE DISTRICT MUNICIPALITY'S OBLIGATIONS</b> .....	8
9.	<b>THE LOCAL MUNICIPALITIES' OBLIGATIONS</b> .....	14
10.	<b>ADMINISTRATIVE FEE</b> .....	15
11.	<b>FREE BASIC SUPPLY OF WATER</b> .....	15
12.	<b>MONITORING COMMITTEE</b> .....	15
13.	<b>MONITORING</b> .....	17
14.	<b>GOOD FAITH AND CO-OPERATION</b> .....	18
15.	<b>AGREEMENT REVIEW</b> .....	18
16.	<b>CONFIDENTIALITY</b> .....	18
17.	<b>CHANGES TO REGULATORY PROVISIONS</b> .....	19
18.	<b>CONTRACT REPRESENTATION</b> .....	19
19.	<b>FORCE MAJEURE EVENTS</b> .....	19
20.	<b>DISPUTE RESOLUTION PROCEDURE</b> .....	20
21.	<b>BREACH BY THE DISTRICT MUNICIPALITY</b> .....	22
22.	<b>BREACH BY ANY OF THE LOCAL MUNICIPALITIES</b> .....	23
23.	<b>EFFECT OF TERMINATION</b> .....	24
24.	<b>CONTINUITY OF SERVICE</b> .....	24
25.	<b>CESSION, DELEGATION AND ASSIGNMENT</b> .....	25
26.	<b>DOMICILIA AND NOTICES</b> .....	25
27.	<b>GENERAL</b> .....	26
28.	<b>COSTS</b> .....	26

## SCHEDULES

**Contract area**

**Services**

**Assets**

**Schedule A**

**Schedule B**

**Schedule C**

1. **DEFINITION**

1.1 In this agreement, unless the context clearly indicates a contrary intention, clause headings are for convenience and must not be used in its interpretation, a natural person includes an artificial person and *vice versa*, the singular includes the plural and *vice versa*, and the following expressions bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

1.1.1 "administrative fee" means the fee referred to in paragraph 10 which the District Municipality may charge in respect of the operating and administrative costs it incurs pursuant to the provision of the services and which will be included in the tariff which it charges the local municipalities;

1.1.2 "agreement" means this agreement and includes the schedules to this agreement;

1.1.3 "Arbitration Act" means the Arbitration Act, Act 42 of 1965;

1.1.4 "Cape Bar Council" means the council which governs advocates in the jurisdictional area of the High Court for the Cape of Good Hope;

1.1.5 "Constitution" means the Constitution of the Republic of South Africa, Act 108 of 1996;

1.1.6 "contract area" means the areas of jurisdiction of the local municipalities, as appears on the map annexed as schedule A;

1.1.7 "contract year" means a 12 (twelve) month period commencing on 1 July of any year and terminating on 30 June of the following year, with "first contract year" meaning the contract year commencing on the effective date, "second contract year" meaning the contract year commencing on 1 July 2007, and so forth;

1.1.8 "customer" means any person to whom bulk water services is supplied within the contract area (including, for clarity, any person to whom the District Municipality supplied bulk water services prior to the effective date);

- 1.1.9 "District Municipality" means the West Coast District Municipality;
- 1.1.10 "effective date" means **1 July 2006**, notwithstanding the date of signature;
- 1.1.11 "*force majeure* event" means the occurrence after the effective date of one of the following events, which has a material adverse effect on the ability of a party ("the affected party") to perform under this agreement:
  - 1.1.11.1 war, civil war, armed conflict or terrorism;
  - 1.1.11.2 lightning, fire, earthquake, flood, storm, drought, cyclone, typhoon or tornado;
  - 1.1.11.3 nuclear, chemical or biological contamination;
  - 1.1.11.4 pressure waves caused by devices traveling at supersonic speeds;
  - 1.1.11.5 any action by a relevant authority (including the introduction or amendment of any regulatory provision which is not a law or regulation of general application), the principal effect of which is directly borne by the affected party and which has a material and adverse effect on the legal capacity or ability of the affected party to perform any of its material obligations under this agreement (excluding an increase in taxes of general application which does not discriminate against the affected party);
  - 1.1.11.6 any action or omission by an organ of state which, if such action or omission had been at the instance of the other party (that is to say not the affected party), would have constituted a material breach of this agreement;
  - 1.1.11.7 a failure by any statutory undertaker, utility company, local authority or other like body, excluding the parties to this agreement to carry out works or provide services;

1.1.11.8 an unreasonable and unnecessary delay by a relevant authority in providing any consents;

1.1.11.9 any lawful or unlawful strike, lockout, go-slow, or other dispute generally affecting the water industry or a significant sector of it;

save where such event occurs directly or indirectly as a result of any willful action or default of the affected party;

1.1.12 "Government Notice" means Government Gazette No 25076 dated 13 June 2003 (Notice number 825);

1.1.13 "local municipalities" means :

1.1.13.1 Swartland Municipality;

1.1.13.2 Bergrivier Municipality; and

1.1.13.3 Saldanha Bay Municipality;

all of which are Category B municipalities established in terms of the Structures Act;

1.1.14 "MFMA" means the Local Government: Municipal Finance Management Act, Act 56 of 2003;

1.1.15 "Monitoring Committee" means the committee contemplated in clause 12;

1.1.16 "organized labour" means the trade union which enjoys the membership of the majority of employees employed by the parties;

1.1.17 "parties" means the parties to this agreement;

1.1.18 "regulatory provisions" means collectively all laws, regulations and the like, as amended from time to time, which affect or apply to the services including, without limiting the generality of the foregoing, the reporting obligations in terms of the MFMA;

1.1.19 "services" means the services set out in Schedule B;

1.1.20 "Structures Act" means the Local Government: Municipal Structures Act, Act 117 of 1998;

1.1.21 "Systems Act" means the Local Government: Municipal Systems Act, Act 32 of 2000;

1.1.22 "tariff" means the tariff charged by the District Municipality in respect of the services which it delivers to the local municipalities;

1.1.23 "tariff policy" means the policy of the respective local municipalities which it adopts in terms of section 74 of the Systems Act.

1.2 When any number of days is prescribed in this agreement, they must 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 will be the next succeeding day which is not a Saturday, Sunday or public holiday.

1.3 Where figures are referred to in numerals and in words, if there is any conflict between the two, the words will prevail.

1.4 Expressions defined in this agreement bear the same meanings in schedules or annexures to this agreement which do not themselves contain their own definitions.

1.5 This agreement will be binding on and enforced by the estates, executors, administrators, trustees, assignees, liquidators and successors in law of the parties as fully and effectually as if they have signed this agreement in the first instance and reference to any party will include such party's estate, executors, administrators, trustees, assignees, liquidators and successors in law, as the case may be.

1.6 Any reference to an enactment is to that enactment as the date of signature of this agreement and as amended or re-enacted from time to time.

## 2. **RECORDAL**

2.1 The Constitution allocates water and sanitation services limited to the potable water supply systems and domestic waste-water and sewage disposal systems as a functional area of local government competence. The

Structures Act allocates this function to the district municipalities in terms of section 84(1)(b) and 84(1)(d). Acting in terms of Section 84(3) of the Structures Act, the Minister of Provincial and Local Government has published the Government Notice in terms of which he authorized the local municipalities to perform the functions and exercise the powers mentioned in sections 84(1)(b) and 84(1)(d) of the Structures Act.

- 2.2 Accordingly, the local municipalities may exercise the rights and are bound by the obligations applicable in respect of local government powers and functions and municipal services under the Constitution, the MFMA, the Systems Act and the Structures Act in respect of the powers and functions mentioned in sections 84(1)(b) and 84(1)(d) of the Structures Act.
- 2.3 The local municipalities have followed the procedures set out in Chapter 8 of the Systems Act and have decided to appoint the District Municipality as the service provider in respect of the services. The local municipalities have also completed the community consultation and information dissemination process required in terms of section 80(2) of the Systems Act. Further, the parties have completed the procedures and complied with the requirements of section 33 of the MFMA and the District Municipality has completed the feasibility study as required by section 80(3) of the Systems Act.
- 2.4 Accordingly, the local municipalities have agreed to appoint the District Municipality as the service provider in respect of the services and the District Municipality has agreed to accept such appointment.
- 2.5 The parties have reached agreement on the terms and conditions of the appointment and wish to record those terms and condition in writing, as they hereby do.

### 3. **WARRANTIES**

- 3.1 As this agreement imposes financial obligations that extend beyond three years in respect of all the parties, each party warrants that, as at the date of signature, it has complied with the provisions of section 33 of the MFMA, read together with section 21A of the Systems Act.



3.2 District Municipality further warrants that, as at the date of signature, it has completed a feasibility study as required in terms of section 80(3) of the Systems Act.

4. **APPOINTMENT**

4.1 The local municipalities hereby appoint the District Municipality, which hereby accepts such appointment, to provide the services to the local municipalities on the terms contained in this agreement.

4.2 Although the District Municipality will provide the services "on behalf of" the local municipalities, the latter remain the service authorities in respect of the services for their respective jurisdictional areas.

5. **FEE**

5.1 In exchange for the services to be provided by the District Municipality, the local municipalities will pay to the District Municipality -

5.2 a tariff as determined from time to time by the local municipalities after having consulted with the District Municipality as contemplated in paragraph 9.3 below; and

5.3 an administrative fee of 10% of the operational costs and which shall be included in the tariff.

6. **EXCLUSIVITY**

6.1 The local municipalities may neither themselves provide nor appoint another third party service provider to provide any new service which is similar to the services while this agreement is in force unless -

6.1.1 the provision of such services extracts water from a source other than the Misverstand or Voëlvlei dams; and

6.1.2 the relevant municipality has obtained the prior concurrence, which concurrence shall not be unreasonably withheld, of the District Municipality and the remainder of the local municipalities at the Monitoring Committee.

6.2 This agreement does not preclude the District Municipality from providing the same services or similar services to other municipalities provided that the District Municipality:

6.2.1 before concluding an agreement in terms of which it provides the services for any other local or district municipality, obtains the prior written consent from the local municipalities, which consent will not be unreasonably withheld;

6.2.2 provides the service in a manner which does not negatively impact on the provisions of this agreement and/or prevent or detract from the District Municipality's ability to fulfill its obligations in terms of this agreement;

6.2.3 shall not enter into any agreement whereby it provides bulk water services by extracting water from the Misverstand and Voëlvlei dams;

6.2.4 complies with all legislative requirements prior to entering such agreement.

6.3 It is recorded that the District Municipality currently provides water services to the town of Gouda which falls within the Drakenstein Municipality. The District Municipality may continue with such arrangement provided that it does not negatively impact upon the fulfillment of its obligations in terms of this agreement or upon the tariff it charges the local municipalities.

## 7. **DURATION**

7.1 This agreement commences on the effective date and will terminate at the end of 10 (ten) years, or earlier if it is terminated by one of the parties on the grounds of breach in accordance with the provisions of clause 21 or clause 22;

## 8. **THE DISTRICT MUNICIPALITY'S OBLIGATIONS**

### 8.1 **General obligations relating to the services**

The District Municipality must, in carrying out its obligations under this agreement –

- 8.1.1 comply with the regulatory provisions;
- 8.1.2 comply with national policy in respect of bulk water supply;
- 8.1.3 not do anything to prejudice the local municipalities' compliance with their constitutional and statutory obligations in respect of the services;
- 8.1.4 develop a multi-year service delivery and budget implementation plan, having regard to the local municipalities integrated development plans, the annual revision thereof, and in accordance with the priorities approved by the Monitoring Committee;
- 8.1.5 consider recommendations from the local municipalities on the District Municipality's service delivery plan, high level budget, key objectives, performance indicators and targets;
- 8.1.6 manage its capital infrastructure to comply with growth requirements;
- 8.1.7 carry out operational planning and management in respect of the services and must report thereon to the Monitoring Committee on an annual basis;
- 8.1.8 annually present its proposed budget, appropriations budget and present any proposed amendment of an approved budget in respect of the services to the Monitoring Committee for discussion and approval by the members of the Monitoring Committee. ;
- 8.1.9 promptly communicate with the local municipalities in the event of any interruption in the provision of services and provide adequate written notice of any anticipated interruption of the services;
- 8.1.10 invoice, on a monthly basis, each of the members of the local municipalities separately for only its own usage of the services; and
- 8.1.11 comply with all relevant industry norms and standards.

**8.2 Quality of supply and service**

8.2.1 The parties record that the obligations on the District Municipality –

8.2.1.1 to deliver the services to particular standards of supply and service; and

8.2.1.2 to report on the extent of its compliance with those standards,

are comprehensively regulated by the "Regulations relating to compulsory standards and measures to conserve water" which were made under section 9(1) and 73(1)(j) of the Water Services Act, 1997 in Government Notice number 509 of 8 June 2001, as amended from time to time.

8.2.2 Accordingly, the District Municipality must –

8.2.2.1 without derogating from the provisions of clause 8.1, comply with the standards of supply and service, including reporting obligations relating to those standards; and

8.2.2.2 provide the local municipalities with a report in relation to those standards on a 3 monthly basis, or at such other intervals as may be agreed by the parties in writing.

**8.3 Annual tariff adjustments**

8.3.1 The District Municipality must consult with the local municipalities at the Monitoring Committee in order to reach consensus on the annual adjustments to the tariff. In the event that no consensus is reached on the new tariff, the last agreed upon tariff shall be of force and effect subject to the following:

8.3.1.1 The District Municipality may immediately increase the tariff, but only to the extent that there is an increase in the price at which it receives the water from the Provincial Water Services Authority, and the Local

Municipalities shall be liable for the tariff so increased;  
and

8.3.1.2 Once consensus is reached between the parties, the increase in the tariff shall be of retrospective effect from the date of the beginning of the new financial year.

8.3.2 The tariff shall be set and adjusted after taking into account the tariff policy of the respective local municipalities and the costs related to the provision of the service by the District Municipality.

8.3.3 The District Municipality is authorized to collect tariffs from end-users to which it supplies water services directly. The money collected may be retained by the District Municipality and it need not pay such amount over to the relevant local municipalities. For the avoidance of doubt, the money which is retained by the District Municipality must be accrued to the District Municipality's ring-fenced account in respect of the services.

8.3.4 The parties shall seek to achieve parity in all charges to the various user categories in that the same tariff will be charged to the same user categories across the jurisdictional areas of the local municipalities, irrespective of which of the parties supply such users. The achievement of such parity may be effected by the phasing in of the increases or decreases of the tariff, as the case may be, over a period of time.

#### 8.4 **Other developments**

8.4.1 It is recorded that the District Municipality may be required by the local municipalities to outlay capital expenditure for the provision or upgrading of the services and/or infra-structural installation in respect of new developments, provided that reasonable notice is given by the local municipalities of the intended new development. Such developments may include –

8.4.1.1 the establishment of any township;

- 8.4.1.2 the amendment of any town planning scheme;
- 8.4.1.3 the provision of water services directly to end-users who fall outside of the local municipalities' reticulation system; and
- 8.4.1.4 any property development which may affect the services to be rendered by the District Municipality.

## 8.5 **Reporting**

Without derogating from the provisions of clause 8.1.1, the District Municipality must:

- 8.5.1 comply with the reporting requirements contained in the regulatory provisions.
- 8.5.2 supply the local municipalities with information reasonably required by the local municipalities in order to meet their social development obligations (for example information on spending by consumers or the services within particular areas, general spending and consumption patterns, water services plan, integrated development plan reports, information detailed in paragraph 13.2 below and so forth.)
- 8.5.3 report on the proposed budgets and provide financial reports timeously (i.e. a period which may be fixed by the Monitoring Committee) so that the local municipalities are able to timeously meet their deadlines that are fixed in terms of the MFMA in respect of the passing of their respect budgets.

## 8.6 **Assets and Liabilities**

- 8.6.1 It is recorded that the transference of the various movable and immovable assets, including the infrastructure such as pipelines and pumps, which are required for the delivery of the services are regulated by the Government Notice. These assets are listed in Schedule C. The Government Notice transfers the assets and liabilities to the local municipalities in Items 3(2) and 3(3) thereof

read with the section 12 Notices which established the local municipalities.

- 8.6.2 It is recorded however, that the distribution of the assets between the local municipalities shall not be effected for the duration of this agreement. Upon the expiry or termination of this agreement, whichever event occurs first, the assets will temporarily vest in the District Municipality until the parties, via the Monitoring Committee, either transfer the assets to the new service provider or an entity established by the relevant municipalities, provided that all regulatory and legislative provisions are complied with. The principle that shall be applied in the distribution or consolidation of the assets under one entity is that the assets shall be under the management and control of the service provider.
- 8.6.3 The District Municipality shall maintain and upgrade the assets and the infrastructure (including, but not limited to, buildings, roads, reservoirs, dams, movable and immovable equipment, pipelines vehicles, pumps etc) as and when required, or earlier if the parties agree that it is desirable, in order to ensure an efficient, uninterrupted and high-quality delivery of the services, provided that any maintenance or upgrading must be preceded by reasonable written notice to the local municipalities of the intended activities which will have an effect on service delivery. The costs in respect of such maintenance and upgrading shall be derived from the tariff charged by the District Municipality.
- 8.6.4 At all times, the District Municipality shall ensure that it has procured the appropriate insurance in respect of all assets listed in Schedule C. The District Municipality may not alienate or encumber the assets in any manner without the prior written consent of the other parties, which it shall seek to gain via the Monitoring Committee.

**8.7 Employees**

- 8.7.1 The District Municipality shall at all times ensure that it is appropriately staffed in order to ensure that it fulfills its obligations in terms of this agreement.
- 8.7.2 The District Municipality may not amend its micro-organisational structure without prior consultation with the local municipalities , via the forum of the Monitoring Committee.
- 8.7.3 It is recorded that the employees of the District Municipality who form part of the micro-organisational structure in respect of the services, have been transferred by the Government Notice to the local municipalities. However, the contractual relationships have continued between such employees and the District Municipality, and hence it is recorded that such employees are currently in the employ of the District Municipality. For the duration of this agreement they shall remain so employed. Upon the termination of this agreement such employees shall be transferred to the relevant service provider as contemplated in paragraph 8.6.2 above.

**9. THE LOCAL MUNICIPALITIES' OBLIGATIONS**

- 9.1 The local municipalities must, in carrying out their obligations under this agreement, comply with the regulatory provisions and not do anything, nor require the District Municipality to do anything, which will prejudice the District Municipality's ability to comply with –
  - 9.1.1 the regulatory provisions;
  - 9.1.2 national policy in respect of the water supply; and
  - 9.1.3 all relevant industry norms and standards.
- 9.2 The local municipalities must, as soon as is reasonably possible after the effective date, consider –



9.2.1 the need to repeal any existing by-law, or provision of any existing by-law, regulating the services; and

9.2.2 the need to adopt a standard draft by-law.

9.3 The local municipalities shall pay to the District Municipality the tariff thereon charged on a monthly basis, within 30 (thirty) days of the date upon which the District Municipality issues the invoice in respect of such tariff. Should the local municipalities fail to make timeous payment, the District Municipality may charge interest on such outstanding payments at one percent above the prime lending rate. The members of the local municipalities will be liable to pay only for their own usage of the services, and the local municipalities shall not be jointly and severally liable for each other's tariff charged.

9.4 The relevant member of the local municipalities shall give reasonable written notice to the District Municipality of any expected activity within the jurisdictional area of that member that would require the District Municipality to perform any act such as upgrading or maintenance etcetera.

10. **ADMINISTRATIVE FEE**

10.1 The local municipalities agree that, for the duration of this agreement, the total annual administrative fee which the District Municipality is entitled to charge in respect of the provision of the services will be an amount equivalent to 10 (ten) percent of the operational costs which the District Municipality incurs in providing the services and such fee shall be included in the tariff charged.

11. **FREE BASIC SUPPLY OF WATER**

11.1 The free basic supply of water will exclusively apply in respect of the supply of water for home use only. The free basic supply of water shall not extend to industrial users, commercial users and municipalities.

12. **MONITORING COMMITTEE**

12.1 It is recorded that the parties have previously entered into a service delivery agreement in respect of the services. The previous service delivery agreement was necessitated by the authorization in the Government Notice.

In terms of the previous service delivery agreement a Monitoring Committee was established consisting of the Executive Mayors and Municipal Managers of each of the parties.

12.2 The parties hereby dissolve the previous Monitoring Committee and establish a new Monitoring Committee which consists of the Executive Mayor and Municipal Manager of each of the parties. In the event of any Executive Mayor or Municipal Manager not being able to attend a meeting of the Monitoring Committee, a representative of the relevant party may be sent to the meeting, however, such representative shall not have the right to cast any votes or have any decision-making powers at that meeting. Organized labour shall be granted the right to send two representatives to attend and participate in the deliberations of the Monitoring Committee but shall not have the right to cast any votes or decision-making powers. Organised labour shall thus enjoy observer status.

12.3 The powers and functions of the Monitoring Committee are :-

12.3.1 to co-ordinate integrated development planning in respect of the services;

12.3.2 to monitor the performance of the District Municipality in respect of service levels;

12.3.3 to monitor the implementation of this agreement;

12.3.4 to provide a forum for the local municipalities to interact with the District Municipality;

12.3.5 to accept delivery, on behalf of the local municipalities, of reports which the District Municipality is required to produce in terms of this agreement;

12.3.6 to consider and make recommendations to the District Municipality on the District Municipality's high level budget and key performance indicators and targets;

12.3.7 in consultation with the District Municipality, to handle, manage and make recommendations to the parties in respect of any matter related to the services which is not dealt with by this agreement;

12.3.8 to ensure that the expenses incurred by the District Municipality in respect of the services do not exceed the amount allocated therefore in the District Municipality's annual budget;

12.3.9 to formulate a written document that records the rules and procedures, which will be binding on itself, regulating the manner in which it carries out its powers and functions;

and no provision of this agreement must be interpreted to mean that any of the parties is delegating, or in any other manner assigning, its constitutional and legislative obligations, powers and functions to the Monitoring Committee.

### 13. MONITORING

13.1 It is recorded that the local municipalities have rights and duties in respect of the monitoring of the District Municipality's delivery of the services.

13.2 The local municipalities will accordingly undertake independent monitoring of the District Municipality's performance under this agreement. To this end, the District Municipality shall, in order to allow the local municipalities to meet their obligations in terms of section 81(1)(b) of the Systems Act, –

13.2.1 maintain a full and accurate set of records as may be agreed between the parties from time to time, but which shall contain at least the following information:

13.2.1.1 the activities of the administrative unit responsible for the services;

13.2.1.2 monthly business expenses incurred in respect of the services and a comparison of such expenses with the budget for the year in which such expenses took place;

13.2.1.3 any changes in staff complement or staff gradings.

13.2.2 through the mechanisms provided by the Monitoring Committee and upon reasonable notice from any of the local municipalities, permit such local municipality and its duly authorized representatives to inspect and make copies of its books, reports,

records, contracts, data, procedures, event logs, transaction logs, correspondence, documents and the like relating to the provision of the services.

- 13.3 The district municipality shall keep the above records and information in an appropriate format so that it reflects the above information in respect of the local municipalities separately where practically possible and so that it reflects the information in a consolidated form.

**14. GOOD FAITH AND CO-OPERATION**

The parties undertake –

- 14.1 to consult with each other from time to time in regard to any assistance or advice which any party may require in connection with fulfilling its obligations under this agreement;
- 14.2 promptly to provide each other with any information and documentation required in connection with their obligations under this agreement or in terms of any laws; and
- 14.3 generally to exercise good faith and to co-operate in their dealing with each other.

**15. AGREEMENT REVIEW**

- 15.1 The parties will annually meet and review the performance by the District Municipality of its obligations under this agreement having regard to, *inter alia*, the key performance indicators which the parties may establish on an annual basis.

**16. CONFIDENTIALITY**

- 16.1 It is recorded that each party may have access to confidential information and trade secrets of the other in relation to the matters regulated under this agreement. The parties hereby unconditionally undertake in favour of each other that each of them will not at any time divulge or disclose to any person, or permit to be divulged or disclosed to any person, or make use in any way whatsoever (other than directly in connection with the fulfilment of the

respective contractual rights and obligations set out in this agreement or as may be required by law) of any confidential information or trade secrets relating to the affairs, business or method of carrying on business of either of the parties, without the consent of the party concerned. A breach of the confidentiality undertaking will in all circumstances be regarded as material. Should the condition precedent not be fulfilled, each of the parties undertakes forthwith to return to the other party any document, whether in printed or electronic form or otherwise, provided to such party for the purposes of this agreement, it being the intention that such information will remain the exclusive property of the disclosing party.

**17. CHANGES TO REGULATORY PROVISIONS**

17.1 In the event that any of the regulatory provisions are amended in such a way that the amended provisions are inconsistent with the terms of this agreement, then the relevant terms of this agreement will be deemed, in so far as possible, to be amended accordingly.

**18. CONTRACT REPRESENTATION**

18.1 The parties will each appoint a representative for the purposes of this agreement. The parties' representatives will be responsible for communicating requests, decisions and instructions arising out of this agreement or out of the provision of the services between the parties.

18.2 The identity of the parties' representatives will be agreed in writing at the time of signature of this agreement. Any change which either party wishes to make with regard to its representative must be communicated in writing to the other party.

**19. FORCE MAJEURE EVENTS**

19.1 Subject to the remaining provisions of this clause 19, neither party will be responsible to the other for its failure to perform or for any delay in performing any obligation under this agreement to the extent that such failure or delay is caused by a *force majeure* event.

19.2 Immediately on the occurrence of a *force majeure* event, the affected party will give notice thereof to the other party.

19.3 If the *force majeure* event is of such a nature that it will result in impossibility of performance of an obligation material to this agreement and such impossibility is likely to endure for a period of at least 12 (twelve) months, then the unaffected party will be entitled to terminate this agreement on notice to the affected party, but will not be entitled to recover any damages which it suffers as a result of such termination.

19.4 If the *force majeure* event is of such a nature that it will not result in impossibility of performance of an obligation material to this agreement, but will delay the performance thereof, the affected party will be entitled to such extension of time for the performance of the obligation as is reasonable in the circumstances, taking into account the interests of both parties; provided that if such *force majeure* event persists for a period longer than 12 (twelve) months, then the unaffected party will be entitled to terminate this agreement on notice to the affected party, but will not be entitled to recover any damages which it suffers as a result of such termination.

## 20. **DISPUTE RESOLUTION PROCEDURE**

20.1 All disputes arising in relation to this agreement will be resolved in accordance with this clause 20. A party will be entitled to declare a dispute by written notice to the other party.

### 20.2 **Mediation**

20.2.1 All disputes will in the first instance be referred for consideration and resolution to mediation, and in appropriate circumstances, it shall be referred to urgent mediation in which case the parties shall expend their best endeavours in order to have the dispute mediated urgently.

20.2.2 If the parties cannot agree on the mediator, then the mediator will be selected by the president of the Cape Bar Council.

20.2.3 The costs of mediation will be borne by the disputing parties equally.

**20.3 Arbitration**

20.3.1 If the mediator fails to resolve the dispute within 7 (seven) business days of his or her appointment, then either party may refer the dispute to arbitration.

20.3.2 The arbitration will be conducted in accordance with the provisions of the Arbitration Act, provided that –

20.3.2.1 a single arbitrator will be appointed by agreement between the parties and will be a practicing advocate or attorney of not less than 10 (ten) years standing;

20.3.2.2 if the parties cannot agree on the arbitrator within 7 (seven) business days of the dispute having been referred to arbitration, then the arbitrator will be appointed by the president for the time being of the Cape Bar Council;

20.3.2.3 the arbitration proceedings will take place in Cape Town at a venue and time to be determined by the arbitrator;

20.3.2.4 the arbitration proceedings will be held informally and in a summary manner with a view to it being completed as soon as possible;

20.3.2.5 the decision of the arbitrator will be final and binding;

20.3.2.6 the cost of the arbitration proceedings will be borne by the parties as decided by the arbitrator.

20.4 This clause 20 does not preclude either party from –

20.4.1 obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator; or

20.4.2 having the decision of the arbitrator made an order of court;

21. **BREACH BY THE DISTRICT MUNICIPALITY**

21.1 The following events will, save for in the circumstances contemplated in clause 19, each constitute an event of breach by the District Municipality:

21.1.1 a material breach of any of its obligations under this agreement;

21.1.2 the District Municipality ceasing to carry on the service.

21.2 Any of the local municipalities may, on the occurrence of any event of breach by the District Municipality or within a reasonable time after the local municipality becomes aware of the breach and while the breach subsists –

21.2.1 in the case of an event of breach referred to in clauses 21.1.2, terminate this agreement in its entirety by notice in writing;

21.2.2 in the case of an event of breach referred to in clause 21.1.1, serve a notice of breach on the District Municipality at its option either to remedy the breach within 3 (three) months of receipt of the notice; or to put forward within 30 (thirty) days of receipt of the notice of breach a reasonable programme for remedying the breach, which will specify in reasonable detail the manner in which and the latest date by which the breach will be remedied; provided that the District Municipality will be obliged, within 15 (fifteen) days of receipt of the notice of breach, to notify the local municipalities that it intends putting forward a programme in terms of this clause.

21.3 In the event that the District Municipality puts forward the programme in accordance with clause 21.2.2, the local municipalities will have 15 (fifteen) days from receipt thereof within which to notify the District Municipality that it does not accept the programme, failing which the local municipalities will be deemed to have accepted the programme. If the local municipalities notify the District Municipality that they do not accept the programme as being reasonable, the parties will endeavour within the following 5 (five) days to agree any necessary amendments to the programme. Should the parties be unable to reach agreement on the programme:



- 21.3.1 any of the affected members of the local municipality may refer the dispute for resolution in accordance with the provisions of clause 20, or
- 21.3.2 any of the affected members of the local municipalities may terminate the agreement upon 10 (ten) days written notice to each of the other parties, provided that such termination shall not affect the validity of the agreement between the District Municipality and the remaining local municipalities that choose not to terminate the agreement; or
- 21.3.3 where appropriate, the relevant member of the local municipalities may take remedial steps as it considers necessary and then account to the District Municipality for the reasonable costs involved in taking such steps, and

in the event of any of the above without affecting its claim to damages.

22. **BREACH BY ANY OF THE LOCAL MUNICIPALITIES**

- 22.1 An event of breach by any of the local municipalities will occur if such local municipality commits a material breach of any of its obligations under this agreement.
- 22.2 The District Municipality may, on the occurrence of any event of breach by the local municipalities or within a reasonable time after the District Municipality becomes aware of the breach and while the breach subsists, serve notice on the local municipalities of the breach.
- 22.3 If the local municipalities have not remedied the breach within 3 (three) months of receipt of the notice, the District Municipality may –
  - 22.3.1 serve a further notice on the local municipalities terminating this agreement;
  - 22.3.2 where appropriate, take remedial steps as it considers necessary and then account to the local municipalities for the reasonable costs involved in taking such steps,
  - 22.3.3 in either event without affecting its claim to damages.

**23. EFFECT OF TERMINATION**

23.1 The parties will continue to perform their obligations under this agreement notwithstanding the giving of any notice of breach or notice of termination until the termination of the agreement becomes effective.

23.2 For a reasonable period both before and after termination of this agreement for any reason, the District Municipality will co-operate fully with the local municipalities and any successor service provider with whom the local municipalities intend to contract in the place of the District Municipality in relation to the services in order to achieve a smooth transfer of the rights and obligations to such successor service provider.

23.3 On termination of this agreement for any reason, the District Municipality will, if any of the local municipalities so requires, continue to provide the services in respect of such local municipality and will do so –

23.3.1 at the risk and for the benefit of such local municipality;

23.3.2 until such local municipality has come to satisfactory arrangements for the continued provision of the services; provided that the District Municipality will be entitled to terminate its provision of the services on notice to such local municipality once 12 (twelve) months have elapsed since termination of this agreement;

23.3.3 in consideration for a fee to be agreed between the District Municipality and such local municipality at the time.

23.4 Upon termination, the parties shall comply with the provisions of 8.6.4.

23.5 The provisions of paragraphs 16 ("Confidentiality") and 23 ("Effect of termination") will survive the termination of this agreement.

**24. CONTINUITY OF SERVICE**

24.1 Without prejudice to their other rights under this agreement, any of the local municipalities may, if the District Municipality is, for any reason, unable to continue performing its functions under this agreement (including, but not limited to, circumstances contemplated in paragraph 19.4), appoint another

service provider to provide the services or itself provide the services in order to ensure continuity of the services.

- 24.2 The District Municipality will grant the relevant local municipality or its service provider all rights (including access and use rights) in respect of the relevant assets, infrastructure and the services necessary in order to implement clause 24.1.

25. **CESSION, DELEGATION AND ASSIGNMENT**

- 25.1 Neither party may cede its rights, delegate its duties or assign its rights and duties under this agreement to any third party.

26. **DOMICILIA AND NOTICES**

- 26.1 Each party chooses as *domicilium citandi et executandi* ("domicilium") for the purposes of giving any notice, the payment of any sum, the service of any process and for any other purpose arising from this agreement the following addresses:-

26.1.1 [the local municipalities]: **[insert details of each municipality]**

26.1.2 the District Municipality: **[insert details]**

- 26.2 The parties will be entitled from time to time by written notice to vary their *domicilium* to any other address within South Africa which is not a post office box or *poste restante*.

- 26.3 Any notice required or permitted to be given in terms of this agreement will be valid and effective only if in writing.

- 26.4 Any notice given by one party to the other ("the addressee") which –

26.4.1 is delivered by hand during the normal business hours of the addressee at the addressee's *domicilium* for the time being will be presumed, until the contrary is proved, to have been received by the addressee at the time of delivery;

26.4.2 is posted by prepaid registered post from an address within the Republic of South Africa to the addressee at the addressee's

*domicilium* for the time being, will be presumed, until the contrary is proved, to have been received by the addressee on the 10<sup>th</sup> (tenth) day after the date of posting.

26.5 Notwithstanding anything to the contrary herein contained, a written notice or communication actually received by one party from the other, including by way of facsimile transmission, will be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at the other party's *domicilium*.

27. **GENERAL**

27.1 This document constitutes the sole record of the agreement between the parties in relation to the service delivery agreement.

27.2 Neither party will be bound by any express or implied term, representation, warranty, promise or the like not recorded in this agreement.

27.3 No addition to, amendment of or agreed cancellation of this agreement will be of any force and effect unless in writing and signed by or on behalf of the parties and in compliance with any applicable law.

27.4 No extension of time or indulgence which either party ("the grantor") grants to the other ("the grantee") will constitute a waiver of any of the rights of the grantor. The grantor will not thereby be precluded from exercising any rights against the grantee which may have arisen in the past or which may arise in the future.

27.5 In the event that any of the terms of this agreement are found to be invalid, unlawful or unenforceable, those terms will be severed from the agreement and the remaining provisions will remain of full force and effect. If any invalid term is capable of amendment to render it valid, the parties agree to negotiate an amendment to remove the invalidity.

28. **COSTS**

28.1 The parties will pay their respective costs, including the fees of consultants, attorneys and accountants, in relation to the negotiation, drafting and finalising of this agreement.

SIGNED AT ON THE DAY OF 2006  
AS WITNESSES:

For and on behalf of the **SWARTLAND  
MUNICIPALITY**

1. ....

Per: \_\_\_\_\_

**[insert capacity of signatory]**

2. ....

warranting that he or she is duly authorised thereto

SIGNED AT ON THE DAY OF 2006  
AS WITNESSES:

For and on behalf of the **SALDANHA BAY  
MUNICIPALITY**

1. ....

Per: \_\_\_\_\_

**[insert capacity of signatory]**

2. ....

warranting that he or she is duly authorised thereto

SIGNED AT ON THE DAY OF 2006  
AS WITNESSES:

For and on behalf of the **BERGRIVIER  
MUNICIPALITY**

- 1. ....
- 2. ....

Per: \_\_\_\_\_  
**[insert capacity of signatory]**  
warranting that he or she is duly authorised thereto

SIGNED AT ON THE DAY OF 2006  
AS WITNESSES:

For and on behalf of the **DISTRICT MUNICIPALITY**

- 1. ....
- 2. ....

Per: \_\_\_\_\_  
**[insert capacity of signatory]**  
warranting that he or she is duly authorised thereto

**Schedule A**  
**Contract area**

**Map of District Municipality's area of jurisdiction with highlighted areas of local municipalities**

**Schedule B  
Services**

**The services to be provided by the District Municipality**

(a) The services to be provided by the District Municipality relates to the provision of bulk water which will be provided by using the Swartland and Withoogte water purification works. These works include the following activities:

1. extraction and pumping of raw water from the Voëlville and Misverstand dams;
2. purification of such water; and
3. provision of the purified water to designated points which include:
  - a. Malmesbury, Riebeek Kasteel, Riebeek-Wes, Darling, Yzerfontein, Gouda, Moorreesburg, Koringberg, Vredenberg, Saldanha, Langebaan, Velddrif, Dwarskersberg, St Helena Bay, Paternoster, Langebaanweg and Hopfield;
  - b. Koringberg-, Goudapad-, Langgewens-, Nooitgedacht-, Weltevrede- Cheese Mouse and Karoo schemes; and
  - c. existing rural users.

(b) In order to deliver the service, the District Municipality shall be responsible for the provision and maintenance of the necessary equipment, machinery and infrastructure, and shall be responsible for the necessary upgrading and maintenance of the existing equipment, machinery and infrastructure. The District Municipality, for the same purpose, shall keep in its employ staff with the necessary skills in order to successfully deliver the service and the administration thereof.