



**Head Office:**

Cape Earthmoving Sales CC  
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**CES TERMS & CONDITIONS:**

**A. INTERPRETATION AND PRELIMINARY:**

- A.1. The following terms shall have the meanings assigned to them hereunder and cognate expressions shall have corresponding meanings, namely –
- A.1.1. “Agreement” shall mean this agreement incorporating the terms and conditions relating to the Demonstration, sale, rental and service of the Equipment and incorporates by reference the Quotation and/or Schedule(s) concluded in respect of the Equipment;
- A.1.2. A “Service” shall mean a service of the Equipment, defined and prescribed by the Original Equipment Manufacturer;
- A.1.3. “Company” shall mean **CAPE EARTHMOVING SALES CC (“CES”)**;
- A.1.5. “Customer” shall mean the customer identified and named in the Quotation and/or Schedule(s);
- A.1.6. “Days” shall mean ordinary days and includes, Saturdays, Sundays and Public holidays (in the Republic of South Africa);
- A.1.7. “Equipment” shall mean the equipment identified in the Quotation and/or Schedule(s), forming the subject matter of this Agreement in accordance with the terms of this Agreement and includes any services, accessories, spares and parts relating to the Equipment;
- A.1.8. “Parties” shall mean both the Company and the Customer and “Party” shall mean either the Company or the Customer as required in the context;
- A.1.9. “Amount” shall mean the agreed amount for the service, rental, or sale of the Equipment as recorded in the Quotation and/or Schedule(s). The prices quoted for equipment are for *ex indent*, but subject to prior sales. The equipment quoted are subject to variations in the rates of exchange, which are link to the US-dollar, surcharges, duties, shipping rates, and supplier's increases;
- A.1.10. “Period” shall mean the duration of the contract for the Equipment stipulated in the Quotation and/or Schedule(s), commencing on the date of delivery of the Equipment to the Customer;
- A.1.12 “Schedule” shall mean any and all Quotation and/or Schedule(s), executed between the Parties which, inter alia, identify the Equipment and such Quotation and/or Schedule(s) will be subject to the terms and conditions of this Agreement.

The following conditions will apply:

**1. MAINTENANCE;**

- 1.1. The Customer will endeavour to maintain the Equipment in good working order, for the duration of the Period by carrying out preventative maintenance in terms of the lubrication chart and instructions manual supplied by the manufacturer of the Equipment.
- 1.2. The Customer at its own cost and expense shall be responsible for the daily preventative maintenance of the Equipment during its operation including but not limited to the following:-
- 1.2.1. Routine checks on the Equipment at the beginning of each shift according to the instructions manual supplied by the manufacturer of the Equipment e.g. greasing.
- 1.2.2. To ensure that at all times the Equipment has the necessary supply of fuel, oil, hydraulic fluids and water;
- 1.2.3. To check the oil level in the crankcase and water in the cooling system and to check the air pressure of pneumatic tyres on a weekly basis;
- 1.2.4. With regards to electrical equipment to check (s) electrolyte level and (b) that there is no water or other fluid spillage on the battery or water or fluid leaks from the battery.
- 1.3. The Customer shall be responsible for the following general preventative maintenance:
- 1.3.1. Timeous replacement of tyres, forks and batteries;
- 1.3.2. In respect of battery powered Equipment, to maintain the battery and charger and maintain the correct level of battery water before a full recharging cycle;
- 1.3.3. operate the Equipment within its rated lifting capacity;
- 1.3.4. to only permit properly trained employees / operators to use and operate the Equipment which employees / operators shall have a valid and unendorsed operators / driver's license; and,
- 1.3.5. Not permit any person other than a duly authorized Company employee or nominee from repairing or making adjustments to the Equipment.
- 1.3.6 In relation to the Equipment, under no circumstances will the Company be responsible for:-
- \* Costs of fuel and/or consumables which includes but is not limited to engine oil, hydraulic oils, and diff oils.
  - \* Wear parts which include but are not limited to tyres, forks, batteries, chargers, electrical components.
  - \* the provision of insurance for the equipment.
  - \* The provision of driver training.
  - \* Repairs arising from accident, incorrect or negligent operator usage.
  - \* Load Test (unless agreed by the Company in writing that the cost will be for the account of the Company).

**2. SERVICING & REPAIRS;**

- 2.1. Equipment Services prescribed by the Original Equipment Manufacturer will be carried out by the Company during the Company's normal business hours. In exceptional circumstances where the Services cannot be carried out by the Company during its normal business hours due to the Customers business operations, the Company will endeavour to carry out such Service and routine maintenance at a time suitable to the Customer. Additional costs will not exceed more than 50% if out of normal operating hours.



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2.2. The provisions in this clause 2.1 relating to the Service and the interval of such Service, serve as a general guideline and the Company may in its sole discretion carry out the contemplated Services or other maintenance work as it deems necessary and appropriate after having regard to inter alia, recommendations from the manufacturer of the Equipment and/or the working conditions of the Equipment.

2.3. The optional service plan schedule relate only to the servicing of the equipment by the Company, and not breakages not covered by the manufacturer's warranty.

2.4. The Customer shall maintain a detailed logbook recording precise hours of usage of the Equipment and the dates of previous Services. In the event that the Customer fails to do so, the Company shall be entitled to deduce from the average of the metered hours of the Equipment while in the possession of the Customer, its charges for Services or maintenance and the onus of disproving such charges shall rest on the Customer. In the event the Customer exceeds the allowed hours, as per the contract, the excess hour rate will apply to the additional over the contracted hours.

2.5. With regard to Critical Repairs, the Company will use its best endeavours to ensure that Critical Repairs to the Equipment are undertaken at the soonest possible opportunity having regard to the nature of the repairs and the availability of a technician and/or parts. Repairs to the Equipment which are not regarded as Critical Repairs will be undertaken during a time which is mutually convenient to both Parties.

2.6. Where repairs are required to the Equipment thereby resulting in downtime of the Equipment, the Customer shall not be entitled to a pro-rata reduction in the Service Amount and the Customer shall remain liable for all rental and/or service schedule payments in the event that a machine breaks down.

2.7. The cost of replacement of parts in respect of the Equipment and which is not covered by the warranty shall be for the account of the Customer.

2.8. The Customer is responsible to inspect the Equipment immediately after any Service and/or repairs carried out by the Company and shall notify the Company in writing of any defects in the Equipment within 48 (forty eight) working hours of completion of any Service and / or repairs, failing which the Service and/or repairs shall be deemed to have been properly effected by the Company.

**4. WARRANTIES**

4.1. The units are supplied with limited warranty conditions, provided by the manufacturer, for a period of twelve (12) months or 2000 hours as per original hour meter, whichever occurs first, from date of delivery. C.E.S will either repair or replace any part that is defective in material or workmanship under normal use, provided the Company servicing the Equipment as per the instructions manual supplied by the manufacturer of the Equipment. The warranty is subject to the customer adhering to the standard operation manuals and maintenance schedules as set out by the manufacturer (Supplied with the equipment). Items replaced due to normal wear and tear are not included in the warranty.

4.2 Warranty Exclusions: The warrantee will be expressly exclusive of the following: Electric parts, Wear & Tear parts like Tires, Forks, Chains, Seats, Seals, and Battery etc. Consumable parts like, lubricants, filters etc. Accidents, Negligence, damage or wilful damage.

4.3. The Company shall not be obliged to furnish the Customer with replacement Equipment whilst the Equipment is being serviced and/or repaired unless specifically agreed to in writing, by a duly authorized manager of the Company.

4.4. In the event that the Company does furnish the Customer with replacement Equipment, the provisions of this Agreement will apply to such replacement Equipment and will bind the Customer as if the replacement Equipment was the Equipment as defined in this Agreement, mutatis mutandis.

4.5. The Customer may not rely on representation or warranty of any nature whatsoever made by the Company, which allegedly induced the Customer to enter into this Agreement, unless the representation is recorded in writing in this Agreement.

4.6. In particular, but without limiting the generality hereof, the Customer acknowledges that the Company makes no representation or warranty in regard to the suitability of the Equipment for the Customer's purpose other than the technical capability of the Equipment.

**5. DELIVERY OF EQUIPMENT:**

5.1. Due to supply and demand of the Equipment and in some cases the importation thereof, the Company cannot guarantee the delivery of the Equipment on a delivery date proposed by the Company, although the Company will use reasonable endeavours to procure delivery of the Equipment on such proposed date and any delay not caused by the Company nor within the control of the Company, or which is unavoidable for whatever reason, shall in no way whatsoever entitle the Customer to withhold, defer or set-off either in whole or in part the Sale and/or Rental Amount nor shall the Customer be entitled to terminate this Agreement or to institute a claim for damages.

5.2. The Customer agrees to take delivery of the Equipment should the delivery of the Equipment occurs sooner than the proposed delivery date.

5.3. Unless agreed otherwise between the Parties, the Customer shall be liable for the cost of delivery of the Equipment.

**6. DEFECTS:**

6.1. The Customer shall inspect the Equipment upon delivery to the Customer and shall notify the Company in writing of any defects in the Equipment within 48 (forty eight) working hours of delivery, failing which the Equipment will be deemed to have been received free from defects and in good working order.

6.2. Should the Equipment be damaged or break down during the Period (As stipulated in A.1.10), the Customer is required to immediately inform the Company in writing of such damage or breakdown.

6.3. Upon return of the Equipment to the Company, the Company shall examine the Equipment and record any defect or damage present in the Equipment, fair wear and tear excluded. The Customer undertakes to reimburse the Company for the cost of rectifying any defect to or damage to the Equipment.

**7. OWNERSHIP AND RISK:**

7.1. All risk including the risk of destruction, theft or loss of the Equipment shall pass to the Customer on delivery or collection of the Equipment to the Customer or the Customer's nominee, whichever is the earlier date.



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7.2. The Customer hereby cedes to the Company all existing and future rights in respect of such insurance and the Customer shall ensure that the interest of the Company is noted on such insurance policy and will provide proof thereof on the Company's request.

7.3. Should the Customer fail to insure the Equipment, adequately insure the Equipment or should the Customer fail to provide the Company with proof of insurance in place in respect of the Equipment, the Company is entitled but not obliged to arrange its own insurance in respect of the Equipment in which event the Customer shall reimburse the Company with the costs of such insurance on demand.

7.4. The Customer's failure or inability to insure the Equipment shall not excuse the Customer from liability in the event that the Equipment is stolen and/or damaged while in the Customers possession.

7.5. In the case of a rental agreement, the Customer acknowledges that the Company is the lawful owner of the Equipment and that ownership of the Equipment shall remain vested in the Company throughout the duration of the Rental Period.

**8. RENTAL AND PAYMENT TERMS:**

8.1. Rental; for the duration of the Rental Period, the Customer shall pay the Rental Amount monthly and in advance. The Customer undertakes to make the payment, unconditionally, without deduction or sett-off on the due date and not withstanding any dispute the Customer may have with the Rental Amount, or a portion thereof.

8.4. The Customer agrees that any dispute arising in terms of this Agreement shall not effect of cause or be treated as a waiver of the Customers obligation to continue making payment of the agreed Amount.

8.5. Failure to pay the Rental Amount within 10 (ten) days from date that the Rental Amount is due shall constitute a material breach of this Agreement, and, without prejudice to any other right the Company may have, shall entitle the Company to immediately cancel this Agreement without any notice to the Customer.

8.6. Rentals might be subject to finance approval, in which case will be governed by the credit provider.

8.7. All equipment remains the property of the Company until all the last payment has been made.

**9. ENCUMBERANCES:**

9.1. Under no circumstances shall the Customer allow or permit the Equipment to be encumbered or alienated in any way whatsoever.

**10. LIMITATION OF LIABILITY:**

10.1. Under no circumstances will the Company be liable to the Customer for consequential, indirect, delictual, special or similar damages whatsoever.

10.2. The Company shall not be liable for any loss, damage, injury, or death arising from the failure of the Customer to have the Equipment properly maintained and / or timeously Serviced.

**11. BREACH:**

11.1. Without prejudice to any other remedies which a Party not in default (the "Non-Defaulting Party") may otherwise have in terms of this Agreement or in law, the Non-Defaulting Party shall be entitled to terminate this Agreement without notice to the other Party in default (the "Defaulting Party"),

11.2. In the event of any default contemplated in terms of this Agreement and where the Non-Defaulting Party is the Company, the Company may without further notice to the Customer:

11.2.1 Collect the Equipment without notice;

11.2.2 Claim arrear amount; and/or

11.2.3 Claim damages sustained by the Company.

11.3. Subject to provisions of this Agreement, should the Customer be in breach of its obligations and fail to return the Equipment on termination hereof, then, in addition, and without prejudice to any other claim that the Company may have against the Customer pursuant thereto, the Customer shall be liable to continue paying the Amount to the Company as if the Agreement had not been so terminated.

11.4. The Company shall not be obliged to comply with its obligations hereunder in any respect whatsoever for so long as the Customer is in arrears in any amount whatsoever in respect of any cause whatsoever or fails to comply with any other obligations to the Company, whether arising out of this Agreement or otherwise.

11.5. The Customer hereby indemnifies the Company against any and all damage of whatsoever nature, howsoever and by whomsoever caused in relation to the removal of the Equipment and without derogating from the generality of the a foregoing, the removal of the Equipment from the premises of the Customer or any other premises where the Equipment may be found.

11.6. The Customer shall pay maximum interest at the rate of prime plus 4 (four) percent on all amounts owing to the Company by the Customer which have not been paid on due date, reckoned from the due date until the date of payment. Such interest shall be payable on demand.

11.7. The Customers failure to comply with any provision of this agreement entitles the Company to cancel the Agreement immediately without notice to the Customer.

**12. DISPUTE RESOLUTION:**

12.1. If the Parties are unable to resolve any dispute arising from this Agreement by means of joint co-operation or discussion within 7 (seven) Days after a dispute arises or such extended time period as the Parties may in writing allow, then such a dispute shall be submitted to the most senior executives of the Parties who shall endeavour to resolve this dispute within 5 (five) Days after it has been referred to them.

12.2. Should the dispute not be resolved in the aforesaid manner, then it shall be resolved by way of notice of arbitration in accordance with the provisions of 13 below.



**FORKLIFT**

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**13. ARBITRATION:**

- 13.1. Any dispute referred to arbitration pursuant to clause 12.2 shall be determined by arbitration in terms of this clause.
- 13.2. This clause shall not preclude any Party from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator.
- 13.3. The arbitration shall be held:
  - 13.3.1. at Cape Town in the Republic of South Africa.
  - 13.3.2. with only the legal or other representatives of the Parties to the dispute present thereat;
  - 13.3.3. mutatis mutandis in accordance with the provisions of the Supreme Court Act, No 59 of 1959, the rules made in terms of that Act and the practice of the division of the Western Cape High Court;
  - 13.3.4. Otherwise in terms of the Arbitration Act, No 42 of 1965, it being the intention that the arbitration shall be held and completed as soon as possible.
- 13.4. The arbitrator shall be, if the matter in dispute is principally:
  - 13.4.1. A legal matter, a practising advocate or attorney of Cape Town of at least 10 (ten) years standing;
  - 13.4.2. An accounting matter, a practising chartered accountant of Cape Town of at least 10 (ten) years standing; or
  - 13.4.3. Any other matter, an independent person, agreed upon between the Parties to the dispute.
- 13.5. Should the Parties to the dispute fail to agree whether the dispute is principally a legal, accounting or other matter within 7 (seven) Days after the arbitration was demanded, the matter shall be deemed to be a legal matter.
- 13.7. The decision of the arbitrator shall be final and binding on the Parties to the dispute and may be made an order of court.
- 13.8. Each party will bear their own costs of arbitration.

**14. CESSION AND DELEGATION:**

- 14.1. The Customer shall not cede its rights or delegate its obligations under this Agreement to any other person without the prior written consent of the Company, which consent shall not be unreasonably withheld.
- 14.2. The Customer agrees that the Company may at any time cede its rights and delegates its obligations to any person without the prior written consent of the Customer.

**15. NOTICES AND LEGAL PROCESS:**

- 15.1. Each Party chooses as its address for all purposes under this Agreement (“chosen address”), whether for serving any court process or documents, giving any notice, or making any other communications of whatsoever nature and for any other purpose arising from this Agreement (“notice”), the respective business addresses recorded in the Schedule.
- 15.2. Any notice required or permitted under this Agreement shall be valid and effective only if in writing.
- 15.3. Notwithstanding anything to the contrary herein, a written notice actually received by a party, including a notice sent by e-mail, shall be an adequate notice to it, notwithstanding that it was not sent or delivered to its chosen address.

**16. SEVERABILITY:**

Any provision in this Agreement which is or may become illegal, invalid or unenforceable in any jurisdiction affected by this Agreement shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability and shall be treated as if it had never been written (pro non scripto) and severed from the balance of this Agreement, without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of such provision in any other jurisdiction.

**17. GOVERNING LAW AND SUBMISSION TO JURISDICTION:**

This Agreement shall be governed in all respects by and shall be interpreted in accordance with the laws of South Africa and, the Parties hereby consent and submit to the non-exclusive jurisdiction of Western Cape High Court for all purposes of an in connection with this Agreement.

**18. GENERAL:**

- 18.1 The Customer agrees that no indulgence whatsoever by the Company will affect the terms of this Agreement or any of the rights of the Company and such indulgence shall not constitute a waiver by the Company in respect of any of its rights herein.
- 18.2 The Customer hereby consents to the storage and use by the Company of the personal information provided to the Company for establishing its credit rating, and for the disclosure of such personal information to credit information control companies such as a credit bureau.

FOR: THE CUSTOMER

FOR: THE COMPANY

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

Who warrants that he / she is duly authorised

DATE: \_\_\_\_\_

WITNESS: \_\_\_\_\_