

# **SETTLEMENT AGREEMENT**

entered into by and between

**GIBB (PTY) LTD**

and

**GLADAFRICA CONSULTING ENGINEERS (PTY) LTD**

## **1. DEFINITIONS AND INTERPRETATION**

- 1.1. In this Agreement:
  - 1.1.1. clause headings are for convenience only and are not to be used in its interpretation;
  - 1.1.2. an expression which denotes:
    - 1.1.2.1. any gender includes the other genders;
    - 1.1.2.2. a natural person includes a juristic person and *vice versa*; and
    - 1.1.2.3. the singular includes the plural and *vice versa*.
- 1.2. In this Agreement, unless the context indicates a contrary intention, the following words and expressions bear the meanings assigned to them and cognate expressions bear corresponding meanings:
  - 1.2.1. **"Agreement"** means this settlement agreement;
  - 1.2.2. **"Application"** shall mean the Urgent Application launched by Gibb in the High Court of South Africa, Gauteng Local Division, Johannesburg, against GladAfrica and PRASA in respect of the Project, under case number 2021/35870;
  - 1.2.3. **"Authorisation(s)"** means any authorisation, consent, registration, filing, agreement, notarisation, certificate, licence, approval, resolution, permit and/or authority or any exemption from any of the aforesaid, by, with or from any Authority, in connection with the performance of the Agreement, and includes any present or future notice, directive, requirement, instruction, request, order, regulation, condition of or limitation in any Authorisation;
  - 1.2.4. **"Authority"** means any government or governmental, administrative, regulatory, supervisory, fiscal or judicial authority, body, court, department, commission, tribunal, registry or any

state owned or controlled authority which principally performs governmental functions;

- 1.2.5. **“Contract”** shall mean the Consultancy Agreement concluded between GladAfrica and PRASA on 28 April 2021, under contract number HO/PT/DM/140/12/2018 in respect of the Project;
- 1.2.6. **“Contracting Parties’** shall mean GladAfrica and PRASA;
- 1.2.7. **“Detailed Design”** means the designs carried out by GladAfrica in terms of the Contract, covering the whole of the scope of detailed design works to be carried out for the design of the Springfield Rolling Stock Depot and Durban Yard – KZN Region, as more fully set out in annexure A to the Contract (scope of services);
- 1.2.8. **“Effective Date”** means the Signature Date;
- 1.2.9. **“Gibb”** means Gibb (Pty) Ltd, a private company duly registered and incorporated as such under the laws of the Republic of South Africa, with registration number 1992/007139/07;
- 1.2.10. **“GladAfrica”** means GladAfrica Consulting Engineers (Pty) Ltd, a private company duly registered and incorporated as such under the laws of the Republic of South Africa, with registration number 2007/024973/07;
- 1.2.11. **GladAfrica Documents”** means all of the reports, data, maps, diagrams, drawings, specifications, plans, statistics, calculations, databases, software applications, support registrations and any other materials of any nature whatsoever obtained, compiled or prepared by GladAfrica during its performance of the Contract including but not limited to all documents, drawings and other items of any nature whatsoever comprising the Detailed Design as attended to or prepared by GladAfrica or its subcontractors, affiliates or the like, in terms of the Contract;
- 1.2.12. **“Interim Order’** means the order handed down by the Honourable Acting Judge S D J Wilson on 26 August 2021 in respect of the Application insofar as it relates to the RFP;

- 1.2.13. **"Parties"** shall mean Gibb, GladAfrica and PRASA; and **"Party"** means either one of them as the context requires;
- 1.2.14. **"PRASA"** means the Passenger Rail Agency of South Africa, a public entity established in terms of the Legal Succession to the South African Transport Services Act, 9 of 1989;
- 1.2.15. **"Project"** means the appointment of a multi-disciplinary company to render professional engineering services (Stages 3 to 6) for the upgrade of the Springfield Rolling Stock Depot and Durban Yard;
- 1.2.16. **"RFP"** shall mean Tender Number HO/PT/DM/140/12/2018 as issued by PRASA on 30 November 2018 in respect of the Project; and
- 1.2.17. **"Signature Date"** means the date of signature of this Agreement by the Party last signing.
- 1.3. Any substantive provision, conferring rights or imposing obligations on a Party and appearing in any of the definitions in this clause 1 or elsewhere in this Agreement, shall be given effect to as if it were a substantive provision in the body of the Agreement.
- 1.4. Words and expressions defined in any clause shall, unless the application of any such word or expression is specifically limited to that clause, bear the meaning assigned to such word or expression throughout this Agreement.
- 1.5. Unless specifically otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a business day, the next succeeding business day.
- 1.6. Where figures are referred to in numerals and in words, and there is any conflict between the two, the words shall prevail, unless the context indicates a contrary intention.

- 1.7. No provision herein shall be construed against or interpreted to the disadvantage of a Party by reason of such Party having or being deemed to have structured, drafted or introduced such provision.
- 1.8. The words “**include**” and “**including**” mean “**include without limitation**” and “**including without limitation**”. The use of the words “**include**” and “**including**” followed by a specific example or examples shall not be construed as limiting the meaning of the general wording preceding it.
- 1.9. Any reference in this Agreement to “**this Agreement**” or any other agreement or document shall be construed as a reference to this Agreement or, as the case may be, such other agreement or document, as amended, varied, novated or supplemented from time to time.

## 2. **RECORDAL**

- 2.1. During July 2021 Gibb launched the Application, in which it sought to interdict the Contracting Parties, pending the final determination of a review application, from taking any steps to implement the RFP.
- 2.2. The Application was opposed by the Contracting Parties.
- 2.3. On 26 August 2021 the Honourable Acting Judge S D J Wilson handed down the Interim Order, in terms of which the Contracting Parties were interdicted and restrained, pending the final determination of a review application, from taking any steps to implement PRASA’s decision to award the Project to GladAfrica.
- 2.4. The Parties are desirous of settling the Application insofar as it relates to the Project, Contract and RFP, and granting certain undertakings to each other.

## 3. **SETTLEMENT**

- 3.1. The Parties acknowledge and agree that GladAfrica is entitled to payment in respect of services rendered in terms of the Contract prior to the Signature Date of this Agreement.
- 3.2. In full and final settlement of any and all claims of whatsoever nature which may exist between GladAfrica and PRASA as at the Signature Date and directly or indirectly related to the Contract, PRASA shall effect payment in full, without deduction or set off of any nature whatsoever, into a bank account nominated by GladAfrica in writing.
  - 3.2.1. GladAfrica will submit a statement of account of invoices for work done up to the date of suspension of the project, which will be paid by PRASA on submission of the invoice;
  - 3.2.2. GladAfrica will submit a certificate of the Legal costs incurred from the date of Gibb's original court application to date, which will be paid by PRASA on submission of the invoice;
- 3.3. This Agreement is subject to the full payment for services rendered being received by GladAfrica in terms of Clause 3.

#### 4. **WITHDRAWAL AND CESSION**

- 4.1. Within 5 (five) days of the Signature Date, Gibb shall deliver to each of the Contracting Parties a signed notice of withdrawal in respect of the Application, insofar as it relates to the Project and the RFP and shall thereafter file same at the High Court of South Africa, Gauteng Local Division, Johannesburg.
- 4.2. With effect from the date on which the notice of withdrawal in respect of the Application, as provided for in clause 4.1 above, has been delivered and filed at Court ("**the Cession Date**"):
  - 4.2.1. GladAfrica cedes, assigns, makes over and transfers to Gibb all of its right, title and interest in and to the Contract; and
  - 4.2.2. all warranties and representations given to PRASA by GladAfrica in terms of the Contract shall be deemed to have been given by Gibb.

- 4.3. This cession agreement is subject to PRASA consenting, in terms of clause 39.1 and 39.2 of the Agreement, to the complete cession and delegation of all of GladAfrica's rights and obligations in terms of the Contract to Gibb.
- 4.4. Gibb hereby accepts the cession, assignment, makeover and transfer provided for in clause 4.2, subject to the remaining provisions of this Agreement.
- 4.5. Gibb warrants that it shall assume and comply with all obligations of GladAfrica in terms of the Contract arising and this Agreement after the Cession Date in all respects and indemnifies GladAfrica against any claims, losses or damages of whatsoever nature and howsoever arising in respect of the Contract and caused by any act or omission on the part of Gibb.
- 4.6. With effect from the Cession Date, Gibb shall be entitled to exercise all the rights, powers and privileges attaching to the Contract.
- 4.7. Gibb warrants that:
  - 4.7.1. the whole of the Contract is capable of cession and assignment as provided for in this Agreement;
  - 4.7.2. any and all consents, authorisations or the like as may be required to lawfully give effect to such cession and assignment have been received; and
  - 4.7.3. they have the full power and authority to enter into this Agreement and to perform the obligations contemplated herein and that this Agreement will, when executed, constitute binding obligations on them in accordance with its terms.
- 4.8. If the cession and assignment of the whole of the Contract from GladAfrica to Gibb is, for any reason whatsoever, found to be invalid or unenforceable:
  - 4.8.1. the Contract shall be deemed to have been terminated by GladAfrica and Gibb on the Cession Date, by mutual written and signed agreement;
  - 4.8.2. save as provided for in clause 3.1 above, GladAfrica and Gibb each waive any and all claims which may exist between them directly

or indirectly relating to the conclusion and implementation of the Contract;

4.8.3. GladAfrica shall not be liable to either PRASA or Gibb in respect of any claim for any loss, liability or costs of any nature whatsoever arising therefrom.

4.9. It is recorded and agreed that this Agreement is concluded between the Parties without any admission of guilt or liability whatsoever and is the full and final settlement between Gibb and GladAfrica.

## 5. DETAILED DESIGN AND OTHER DOCUMENTS

5.1. Gibb shall not publish any articles or provide any comment to any member of the media or any other third party whatsoever regarding GladAfrica's performance in terms of the Contract or any of the GladAfrica Documents and shall not disclose any such information or any of the GladAfrica Documents to any third party whatsoever, unless legally required to do so or prior written consent has been received from GladAfrica.

5.2. In its performance of its obligations in terms of the Contract, Gibb shall not rely on, consider, make reference to or utilise any of the GladAfrica Documents.

5.3. each indemnifies and holds GladAfrica harmless against any and all claims, demand, proceedings, losses, liabilities, damage, costs (including, without limitation, legal costs) and/or expenses that one or both of them may suffer or incur arising from one or both of their use or reliance on the GladAfrica Documents in any manner whatsoever, regardless of whether or not GladAfrica has consented thereto, in writing or otherwise.

## 6. BREACH

6.1. Should any Party commit a breach of this Agreement and/or fail to comply with any of the provisions contained herein (the "**Defaulting Party**"), then any other Party (the "**Aggrieved Party**") shall be entitled to give the Defaulting Party 10 (ten) days' notice in writing to remedy such and/or failure.



- 6.2. If the Defaulting Party fails to comply with the aforesaid notice, the Aggrieved Party shall forthwith be entitled, but not obliged, without prejudice to any other rights or remedies which the Aggrieved Party may have in law or herein contained, including the right to claim damages, to claim immediate performance of any outstanding obligation in terms hereof, but shall not be entitled to cancel this Agreement.
- 6.3. The Parties acknowledge and agree that this Agreement may only be cancelled by agreement between the Parties, reduced to writing and signed by each of the Parties.

## 7. NOTICES AND DOMICILIA

- 7.1. Each Party chooses the address set out opposite their name below as their *domicilium citandi et executandi* at which all notices, legal processes and other communications must be delivered for the purposes of this Agreement:

7.1.1. GladAfrica:

Physical Address: GladAfrica House, Hertford Office Park, Block G, 90 Bekker Road, Midrand, 1686

Email Address: Gladafrica@gladafrica.com

Attention: Mr K Lebese

7.1.2. Gibb:

Physical Address: 3<sup>rd</sup> Floor, Building 4, 19 Ninth Street, Houghton Estate, Rosebank, 2196

Email Address:

Attention: Mr R Vries

- 7.2. The Parties may, on written notice to the others, change the address nominated by it in terms of clause 7.1 above to any other physical address (not a Post Office Box or similar) or email address, provided that such change shall only be deemed to be effective on the 7<sup>th</sup> (Seventh) day after the last of the Parties has received such notice in accordance with the provisions of this clause 7.
- 7.3. Any notice given in terms of this Agreement shall be in writing and shall:
- 7.3.1. if delivered by hand or electronic mail, be deemed to have been duly received by the addressee on the date of delivery, unless delivered after 17h00 or on a day other than a business day, in which event it shall be deemed to have been duly received by the addressee on the first business day following the date of delivery; and
- 7.3.2. if delivered by recognised international courier service, be deemed to have been duly received by the addressee on the first business day following the date of such delivery by the courier service concerned.
- 7.4. Notwithstanding anything to the contrary contained in this Agreement, a written notice or communication actually received by a Party shall be an adequate written notice or communication to such Party notwithstanding that it was not sent to or delivered at such Party's chosen *domicilium citandi et executandi*.

## 8. **SUPPORT**

- 8.1. The Parties undertake at all times to do all such things, perform all such actions and take all such steps and to procure the doing of all such things, the performance of all such actions and the taking of all such steps as may be open to them and necessary for or incidental to the putting into effect or maintenance of the terms, conditions and/or import of this Agreement.
- 8.2. The Parties shall at all times during the continuance of this Agreement observe the principles of good faith towards one another in the performance of their obligations in accordance with the terms of this Agreement. This

implies that they shall, at all times during the continuance of this Agreement:

- 8.2.1. act reasonably, honestly and in good faith;
- 8.2.2. perform their obligations arising from this Agreement diligently and with reasonable care; and
- 8.2.3. make full disclosure to each other of any matter that may affect the execution of this Agreement.

## 9. **CONFIDENTIALITY**

9.1. In respect of this Agreement, no Party:

- 9.1.1. shall, without the express prior written consent of the other Parties, issue or make any public announcement or statement, or disclose, release or make available, any information regarding this Agreement, details of the negotiation of the terms and conditions set out herein, or its implementation to any third party, save to advise third parties of the withdrawal of the Application (with no details as to the terms and conditions set out herein);
- 9.1.2. has, at any time prior to the Signature Date, issued or made any public announcement or statement or disclosed, released or made available any information regarding this Agreement, details regarding the negotiation of the terms and conditions set out herein or its implementation to any third party, save to its third party advisors advising in relation to the Application but only on a need to know basis; and
- 9.1.3. once the other Parties have approved any such announcement, statement, disclosure or release of information in writing, the approving Parties shall automatically be entitled to issue or make the same announcement or statement or release the information in question in the same approved format.

9.2. The provisions of this clause 9 shall not apply to a public announcement or release of information which a Party is required to make in order to comply

with a statutory obligation or the requirements of a competent governmental authority or if such Party is required to disclose any such information in its annual financial statements, in which event a copy of the announcement or statement shall, prior to publication or release be furnished to the other Parties for their approval, which shall not be unreasonably withheld or delayed.

## 10. **DISPUTE RESOLUTION**

10.1. If a dispute of any nature whatsoever arises between the parties in connection with or arising out of this Agreement (the "**Dispute**"), then any Party may, by the giving of written notice to the others, cause the Dispute to be referred to a meeting of the respective Chief Executive Officers of the Parties. Such meeting shall be held within 15 (Fifteen) Business Days following the giving of written notice.

10.2. If the Dispute has not been resolved within 30 (Thirty) days after the date of the notice provided for in clause 10.1 above, then any Party may refer such dispute to arbitration by delivery of a notice to the other Parties of its intention to do so ("**the Arbitration Notice**"), in which event:

10.2.1. the arbitration shall be conducted in English and the place and seat of the arbitration shall be Johannesburg, South Africa;

10.2.2. the arbitration shall be conducted by an arbitration tribunal consisting of 3 (three) arbitrators ("**the Tribunal**"). Subject to clause 10.2.3 below each Party shall appoint one arbitrator. If a Party fails to appoint its arbitrator within a period of 10 (Ten) Business Days after receipt of an Arbitration Notice, such arbitrator shall, subject to clause 10.2.3 below, be appointed by the secretariat of the Arbitration Foundation of Southern Africa;

10.2.3. only persons with the appropriate commercial technical or legal experience shall be appointed as arbitrators. No arbitrator shall be a present or former employee or agent of, or consultant or counsel to any Party or its affiliates;

10.2.4. the Parties and the Tribunal will keep confidential and not use for any collateral or other purpose not related to the resolution of the

dispute the subject matter of the arbitration and all information (whether given orally, in writing or otherwise) produced for, or arising in relation to the arbitration including any award arising out of it, except insofar as is necessary to implement and enforce any award or otherwise as required by law;

10.2.5. The Tribunal's award shall be final and binding upon the Parties and to the fullest extent permitted by Law the Parties waive their right to appeal or to similar recourse to a court of law. The Parties undertake to carry out without delay the provisions of any arbitration award or decision and each agrees that any such award or decision may be enforced by any Court or tribunal having jurisdiction.

10.3. Nothing in this clause 10 shall preclude a Party from seeking urgent interdictory relief. To this end, the Parties agree to the non-exclusive jurisdiction of the High Court of South Africa (Gauteng Division, Johannesburg).

10.4. This clause 10 constitutes an irrevocable consent by the Parties to any proceedings in terms hereof and none of the Parties shall be entitled to withdraw from the provisions of this clause 10 or claim at any such proceedings that it is not bound by this clause 10.

10.5. The provisions of this clause 10 are severable from the rest of this Agreement and shall remain in effect even if this Agreement is terminated for any reason whatsoever.

## **11. RELATIONSHIP BETWEEN THE PARTIES**

11.1. Nothing contained in or inferred from this Agreement shall constitute or be deemed to constitute a partnership, quasi-partnership, sub-contractor or relationship of agency between any of the Parties hereto.

## **12. COSTS**

12.1. On application by the parties, Prasa shall bear all legal costs incurred by all parties from the court application by Gibb in July 2021 up to finalisation of this Settlement Agreement.

### 13. GENERAL

- 13.1. This Agreement constitutes the sole record of Agreement between the Parties with regard to the subject matter hereof. No Party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein.
- 13.2. No addition to, variation of, or agreed cancellation of this Agreement or this clause and no waiver of any right arising from this Agreement, shall be of any force and effect unless reduced to writing and signed by or on behalf of the Parties or their duly authorised representatives.
- 13.3. No relaxation or indulgence which any Party may grant to any other shall constitute a waiver of the rights of that Party and shall not preclude that Party from exercising any rights which may have arisen in the past or which might arise in the future.
- 13.4. No suspension of a right to enforce any terms of this Agreement and no *pactum de non petendo* shall be of any force or effect unless in writing and signed by the Parties.
- 13.5. Any provision of this Agreement which contemplates performance or observance subsequent to any termination or expiration of this Agreement shall survive any termination or expiration of this Agreement and continue in full force and effect.
- 13.6. All provisions of this Agreement are, notwithstanding the manner in which they have been grouped together or linked grammatically, severable from each other. Any provision of this Agreement, which is or becomes unenforceable, whether due to voidness, invalidity, illegality, unlawfulness or for any other reason whatsoever, shall, only to the extent that it is so unenforceable, be treated as *pro non scripto* and the remaining provisions of this Agreement shall remain of full force and effect. The Parties declare that it is their intention that this Agreement would be executed without such unenforceable provision if they were aware of such unenforceability at the time of execution hereof.

13.7. Each Party warrants to the others that it has the power, authority and legal right to sign and perform in terms of this Agreement and that this Agreement as been suly authorised by all necessary actions of its directors and/or executive committee and constitutes valid and binding obligations on it in accordance with the terms of this Agreement.

14. **INDEPENDENT ADVICE**

Each of the Parties acknowledges that they have been free to secure independent legal and other advice as to the nature and effect of all the provisions of this Agreement and that they have either taken such independent legal and other advice or dispensed with the necessity of doing so. Further, each of the Parties acknowledge that all of the provisions of this Agreement and the restrictions herein contained are fair and reasonable in all the circumstances and are part of the overall intention of the Parties in connection with this Agreement.

15. **SIGNATURE**

15.1. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same Agreement as at the date of signature of the Party last signing one of the counterparts.

15.2. The persons signing this Agreement in a representative capacity warrant their authority to do so.

15.3. The Parties record that it is not a requirement for this Agreement to be valid and enforceable that a Party shall initial the pages of this Agreement and/or have its signature of this Agreement verified by a witness.

Signed at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_ 2022

For and on behalf of:

**GIBB (PTY) LTD**

\_\_\_\_\_

Signature

Name of Signatory:

Designation of Signatory:

Signed at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_ 2022

For and on behalf of:

**GLADAFRICA                      CONSULTING  
ENGINEERS (PTY) LTD**

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Signature

Name of Signatory:

Designation of Signatory: