

WebGuide – Website Terms of Use & Privacy Policy

your guide to the implementation of the Website Terms of Use & Privacy Policy



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The Website Terms and Conditions (also referred to as Terms of Use) is a binding agreement between the Website owner and the User and enforceable in a court of law. Herewith a brief summary of the applicable law

Electronic Communications and Transactions Act 25 of 2002

Section 11:

- (1) Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message;
- 2) Information is not without legal force and effect merely on the grounds that it is not contained in the data message purporting to give rise to such legal force and effect, but is merely referred to in such data message;
- 3) Information incorporated into an agreement and that is not in the public domain is regarded as having been incorporated into a data message if such information is
 - a) referred to in a way in which a **reasonable person** would have **noticed the reference** thereto and incorporation thereof; and
 - b) accessible in a form in which it may be **read, stored and retrieved by the other party**, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.

[own **bold**]

The ECT Act, is further relevant where an organization allows electronic transactions¹ to be executed via the organisation's Website. The following sections are relevant:

1. Chapter VII – Consumer Protection:
2. Section 42 – [Scope of Application](#)
3. Section 43 – [Information to be provided](#);
4. Section 44 – [Cooling of period](#);
5. Section 45 – [Unsolicited goods, services or communications](#);
6. Section 46 – [Performance](#)

¹ means a transaction of either a commercial or non-commercial nature, and includes the provision of information and e-government services;

Copyright Act 1978

Establish authorship and ownership in content and material that form part of the Website. Establish Copyright under the applicable categories as addressed under the Copyright Act 1978, such as literary works, computer programs etc.

Regulation of Interception of Communications Act 70 of 2002, section 5 and section 6.

The general rule:-

No person has the right to intentionally² intercept or attempt to intercept or authorize or procure any other person to intercept at any place in the Republic any communications (direct and indirect³ communications) in the course of its occurrence or transmission.

Under the Act there are exceptions to the general rule, with the following 3 exceptions applicable to ecommunications, which includes communications via a website, between 2 or more parties: -

1. By a person that is part of the communication (**section 4**);
2. With prior written consent from a party to the communication (**section 5**); and
3. In connection with carrying on of a business if that person (**section 6**)

Judgments in the ticket cases

In all the 'ticket' cases it was established that the position (on the front of the ticket, or at the entrance of the parking lot) of the Reference to the Terms and Conditions of Services is extremely important. This will determine the validity or enforceability of the Terms and Conditions applicable to the services utilized by the customer, e.g. parking lot, train services etc.

A Website's Terms of Use is seen as a browse wrap agreement, even if it is available through a hyperlink to another page – Section 11(3)(a) applicable

² **Interception** means aural or other acquisition of contents of any communication through the use of any means, including an interception device (this include email filtering and blocking technologies), so as to make some or all of the contents of a communication available to a person other than the sender or recipient or intended recipient of that communication and includes, monitoring by means of a monitoring device, viewing, examination or inspection of the content of any indirect communications and diversion of any indirect communication from its intended destination to any other destination.

³ **indirect communication** as applied above, which means the transfer of information, including a message or any part of a message whether in the form of speech, music, or other sounds, data, text, visual images, whether animated or not, signals or radio frequency spectrum.

“TRANSLATE THEORY INTO PRACTICE”

How to apply the applicable law and ensure that the Website Terms and Conditions / Terms of Use are valid and enforceable?

1. The Terms of Use must be available as a **hyperlink from every page** of the website;
2. The hyperlink must be titled in such a way that the reasonable User will know that by clicking on the hyperlink he/she will be transferred to the terms and conditions that govern the website, therefore our recommendation would be to use the words “*terms and conditions*” “*terms of use*” or “*Legal Terms*” or “*Legal Stuff*”;
3. The hyperlink must be **reasonably visible**, preferably at the top of the website;
4. The hyperlink must link to the actual terms and conditions document;
5. Website users should be able to **download**, **save** and **print** the terms and conditions (see ECT Act, section 11(3) above).
6. The Terms and Conditions / Terms of Use constitutes a **binding agreement**. An organization will have to retain such agreement for purposes of evidence. Terms and Conditions may change over time and by neglecting to retain each version and the period that such version was presented on the website will place an organization in a position where, for example a User may rely on certain Terms and Conditions / Terms of Use as per the day the User utilised the Website, but the organisation is not able to refer to those specific Terms and Conditions applicable on that day; therefore **Retention** of website Terms and Conditions is important. All version of the website Terms and Conditions have to be retained in a reliable manner to ensure that reference to same could be made during a dispute with the user.

POSSIBLE PROBLEMS

1. Website Terms and Conditions / Terms of Use is placed on the website in a format that is easily changeable / amendable by any 3rd party;
2. Website Terms and Conditions / terms of Use is placed at the bottom of the website, that may not even appear on the screen of the User when opening up the website

Solution(s) / Additional Controls

1. Convert website Terms and Conditions / Terms of Use into either pdf. Format or protected HTML format where the User is not allowed to copy, paste and change.
2. As mentioned above, always place the hyperlink to the terms and conditions at the top of the website pages, and not just on the homepage, but each and every page to avoid a User that deep link into the website not to notice the Terms and Conditions.
3. An organization can further at the top of the website, under a separate tab called "Legal" or "Legal Stuff" add all the relevant legal documentation that a user may want to get access to, including but not limited to: Terms of Use, Terms of Services (including Return & Cancellation Policy, Delivery Policy) Privacy Policy, Promotion of Access to Information Manual (PAI Manual), eMail Legal Notice etc.

STEP BY STEP

STEP 1

Approval from organisation's management / board of directors or other suitable person responsible for the website Terms and Conditions / Terms of Use.

STEP 2

Publish the Terms and Conditions / Terms of Use on a separate page of website in a format that enables downloading, printing and saving but not changing the document (e.g. encrypted PDF or protected HTML). See example in [Annexure A](#) and [Annexure B](#).

If required, De Klerk & van Gend Attorneys will provide the necessary conversion services from word. Doc to pdf. format on request – please email it&ip@dkvg.co.za, attach the file and request conversion.

STEP 3

Provide a hyperlink to the Terms and Conditions / Terms of Use available from the top of the website (each page). See examples in [Annexure C](#).

STEP 4

Where the Website Terms and Conditions / Terms of Use make reference to the Privacy Policy, ensure the hyperlink is working in the Website Terms and Conditions / Terms of Use.

STEP 5

Where there is a separate **Privacy Policy**, ensure that this Policy is visible to the user prior to submission of any personal information to the organization. The Privacy Policy should be reflected as a hyperlink prior to submission of personal information, subsequent to wording such as: “*I agree to the Privacy Policy*” or “*I understand the Privacy Policy*” or “*Our Privacy Policy apply to the above information*” or “*Our Privacy Policy apply*”. See Annexure D for recommendations.

[FOR MORE INFORMATION ON THE MANAGEMENT PERSONAL INFORMATION FOR PURPOSES OF DIRECT MARKETING – KINDLY CONTACT GERRIE VAN GALEN]

OTHER ASSOCIATED DELIVERABLES

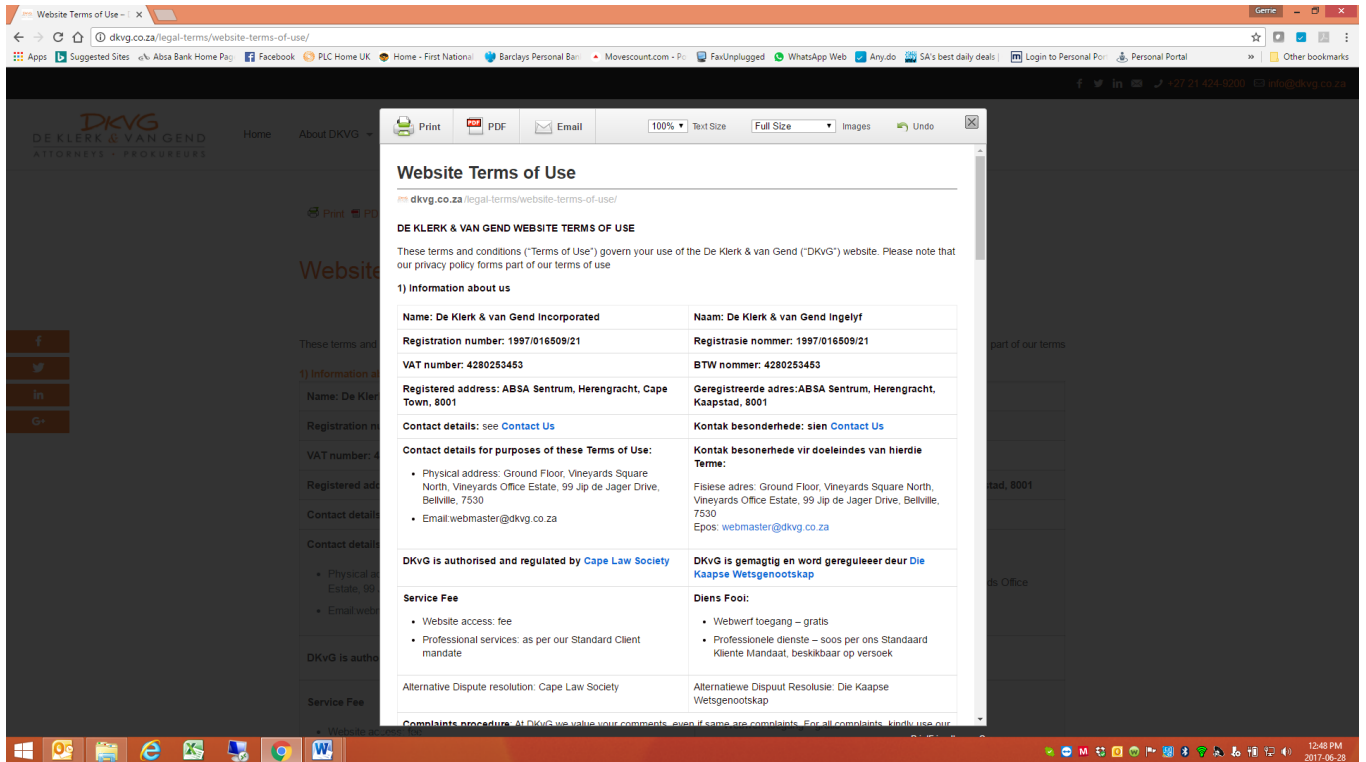
It is imperative in any organisation to ensure that the various Policies and Notices are interrelated. No policy can stand in isolation and careful consideration should be given to the implementation of new Policies and Notices or changes / amendments to existing Policies and / or Notices and the effect of same on other existing policies. In light of the aforesaid a list of other deliverables under the heading of 'eCommerce / eCommunications', that may be applicable to your organisation:

Deliverables
• Privacy Statements / Policy • Terms of Use • Terms of Supply/Services • Linking Agreements • Website Design & Development Agreement • Website Hosting Agreement • Website Linking Agreement • P3P (Preferred Privacy Platform) • Meta tag optimisation • eCommunication Policy; • eMail Legal Notice • Records Management Policy; • Incident Response Policy • Interception and Monitoring Policy (based on latest Interception legislation); • eCommunications with investors and shareholders; • Digital Certificates, Practice Statements and Policy • IT Security Policy • Electronic Signatures • eCommerce guidelines • CPA guidelines • Cloud Service Provider guidelines

See other Focus Areas under: www.dkvg.co.za

ANNEXURE A

WEBSITE TERMS AND CONDITIONS IN PROTECTED PDF FORMAT



ANNEXURE B

WEBSITE TERMS AND CONDITIONS IN PROTECTED HTML FORMAT

Print or download options

Website Terms of Use

Print PDF

Website Terms of Use

DE KLERK & VAN GEND WEBSITE TERMS OF USE

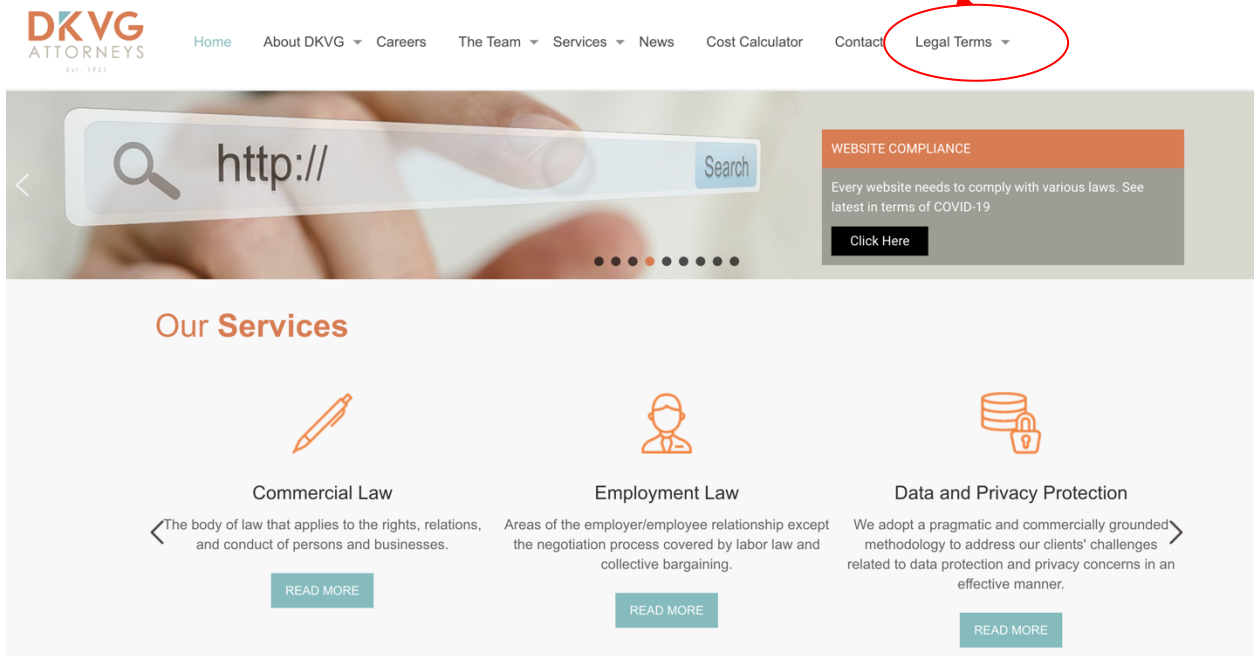
These terms and conditions ("Terms of Use") govern your use of the De Klerk & van Gend ("DKvG") website. Please note that our privacy policy forms part of our terms of use

1) Information about us

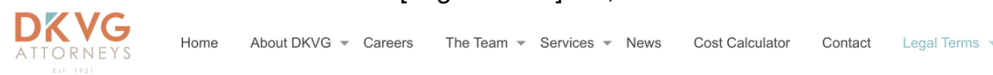
Name: De Klerk & van Gend Incorporated	Naam: De Klerk & van Gend Ingelyf
Registration number: 1997/016509/21	Registrasie nommer: 1997/016509/21
VAT number: 4280253453	BTW nommer: 4280253453
Registered address: ABSA Sentrum, Herengracht, Cape Town, 8001	Geregistreerde adres: ABSA Sentrum, Herengracht, Kaapstad, 8001
Contact details: see Contact Us	Kontak besonderhede: sien Contact Us
Contact details for purposes of these Terms of Use: - Physical address: Ground Floor, Vineyards Square North, Vineyards Office Estate, 99 Jip de Jager Drive, Bellville, 7530 - Email: webmaster@dkvg.co.za	Kontak besonderhede vir doeleindes van hierdie Terme: - Fisiese adres: Ground Floor, Vineyards Square North, Vineyards Office Estate, 99 Jip de Jager Drive, Bellville, 7530 - Epos: webmaster@dkvg.co.za
DKvG is authorised and regulated by Cape Law Society	DKvG is gemagtig en word gereguleer deur Die Kaapse Wetsgenootskap
Service Fee Website access: fee	Diens Fooi: Webwerf toegang – gratis

ANNEXURE C

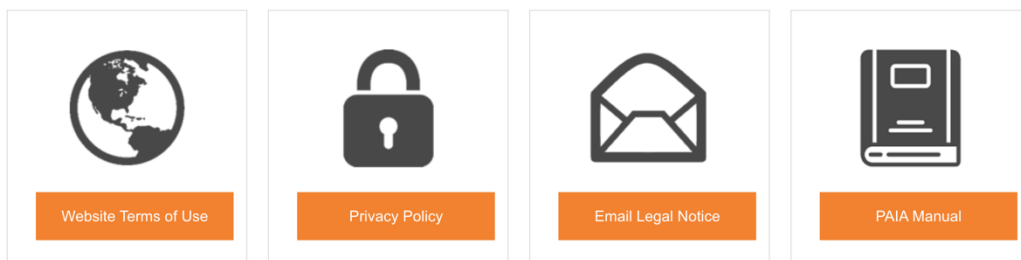
HYPERLINK AT THE TOP OF WEBSITE



Once the user has clicked on the [Legal Terms] tab, the use will see:



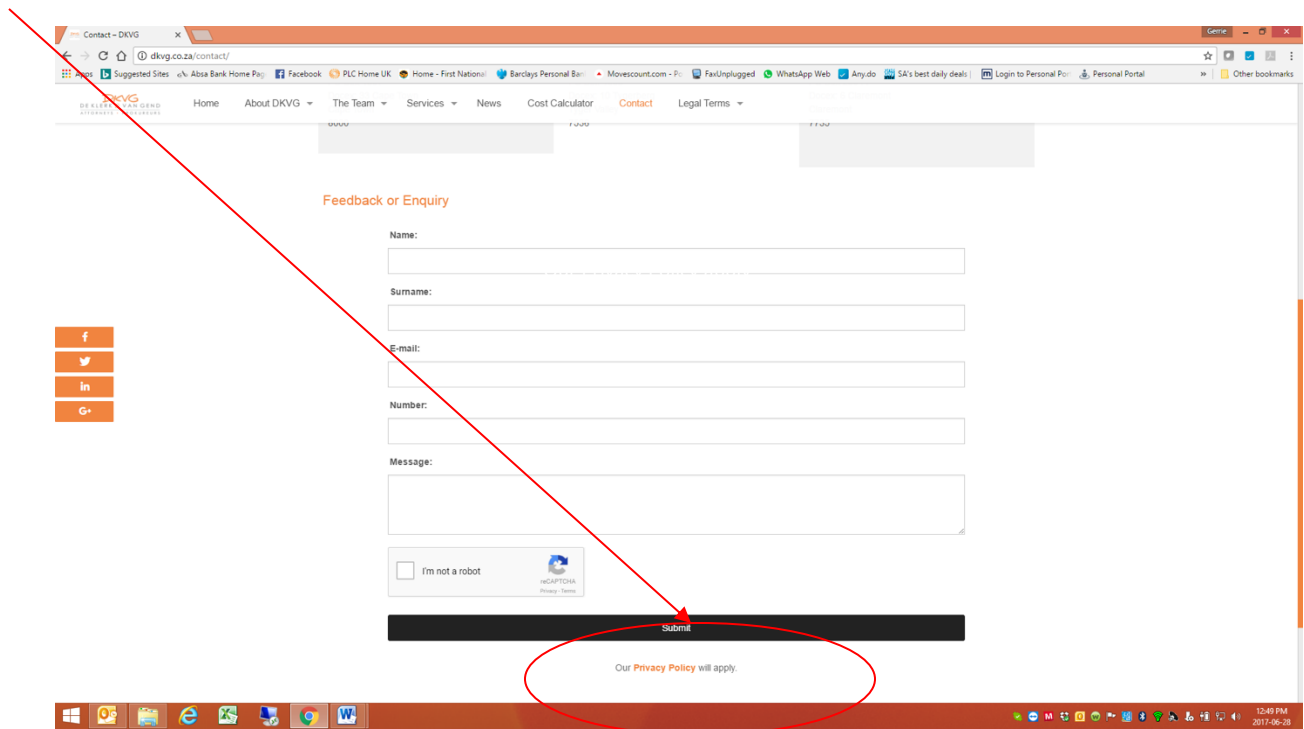
Legal Terms



The above notices and terms are copyright protected, please do not copy them. If you need us to assist you with your own terms and conditions or notices or policies, then contact us on IT&IP@dkvg.co.za

ANNEXURE D

PRIVACY POLICY RECOMMENDED POSITION (for Hyperlink)



- The same principle to apply on each page where the user will need to submit Personal information.
- The Privacy Policy should also be available on the one website page that will contain the Terms of Use