OTTO KRAUSE INCORPORATED

NEW BUSINESS VENTURE: CLIENT INFORMATION QUESTIONNAIRE

Information required for the registration of your business entity and for the preparation of a shareholders agreement and the related documents of your new venture

Client name	
File / matter reference	
Attorney dealing	
Date completed and returned	

HOW TO COMPLETE THIS QUESTIONNAIRE

This questionnaire may be completed on your computer. Click into any shaded block and type your answer. The block will expand as you type. It is not necessary to print the document or to complete it by hand. When you have finished, save the document and e-mail it back to this office.

Please do not be concerned if you cannot answer everything. Many of the questions concern matters which you may not yet have considered, and that is entirely to be expected at this stage. Where you are unsure of an answer, simply leave the block blank. We shall go through the questionnaire once we receive it and contact you about anything which still needs to be resolved.

You are welcome to contact our offices directly at any stage should you experience any difficulty with any of the questions, or should you simply wish to discuss something before committing it to writing. We would far rather take a telephone call than have you guess at an answer.

It is not necessary to attach any supporting documentation at this stage. A list of the documents we shall eventually require appears at the end of this questionnaire, and those documents may be forwarded to us once you have completed the questionnaire.

Everything you disclose in this questionnaire is protected by legal professional privilege and will be treated in strict confidence.

BEFORE YOU BEGIN

Starting a business of your own is an exciting undertaking, and we are glad that you have chosen to involve us in it at the outset. Our purpose in this questionnaire is to obtain from you the information we require in order to put the legal foundation of your venture properly in place before you begin trading.

That timing is the single most important piece of advice we can give you. Make certain that your documents are all in place before you start your new venture, and not afterwards. It is far simpler, far quicker and very much less expensive to record at the beginning what everyone has agreed to, than it is to unravel a misunderstanding two years later when the business has become valuable and the parties no longer see matters in the same way. Most of the disputes between business partners which come across our desks would never have arisen had the correct documents been signed at the start.

Those documents begin with the registration of the entity through which you intend to trade, whether that be a company, a partnership, a trust or something else. If you decide to make use of a company, and there is to be more than one shareholder, you will in addition need a properly drawn shareholders agreement. That agreement is what regulates the relationship between the owners of the business — how decisions are taken, how profits are shared, what happens if one of you wishes to leave, becomes ill or dies, and how a disagreement is to be resolved. A company can be registered without one, but we would not advise it.

Depending upon your circumstances there may be further documents to attend to, among them employment contracts, a lease of your premises, standard terms of business, confidentiality agreements, loan agreements and the policies required of you under the Protection of Personal Information Act. This questionnaire will help us to identify which of these your venture requires.

Please remember that you are welcome to contact our offices directly at any stage. If a question is unclear, or if you are unsure how to answer it, leave the block blank and we shall raise it with you if it turns out to be necessary. Nothing in this questionnaire is a test, and there is no question which is not worth asking us about.

THE DIFFERENCE BETWEEN A SHAREHOLDER AND A DIRECTOR

These two words are often used as though they mean the same thing, and they do not. The distinction matters a great deal, and it is worth understanding before you answer the questions which follow.

A shareholder owns the company. The shares held by a shareholder represent that person’s stake in the business and, ordinarily, an entitlement to share in the profits by way of dividends when the directors declare them, and to vote at meetings of shareholders on the matters reserved to shareholders by the Companies Act and by the memorandum of incorporation. A shareholder does not, however, manage the business simply by virtue of holding shares, and is generally not personally liable for the debts of the company.

A director manages the company. Directors are appointed to the board and are responsible for the direction and the day-to-day stewardship of the business. A director owes the company the fiduciary duties set out in section 76 of the Companies Act — to act in good faith, for a proper purpose and in the best interests of the company — together with a duty of reasonable care and skill. A director who does not observe those duties can, in the circumstances described in section 77 of the Act, be held personally liable for loss suffered by the company. A director need not hold a single share.

In a small company the same people are usually both the shareholders and the directors, and that is perfectly ordinary. The point to hold on to is that they are wearing two different hats. Your rights as an owner come from your shares, from the memorandum of incorporation and from the shareholders agreement. Your duties as a manager come from the Companies Act and from the common law, and they are owed to the company itself rather than to your fellow shareholders. Much of what a shareholders agreement does is to make clear which decisions belong to the boardroom and which belong to the owners.

THE FORMS REQUIRED TO REGISTER A COMPANY

A company is registered with the Companies and Intellectual Property Commission, and the Commission requires that its own prescribed forms be used. These are known as the CoR forms. The principal ones are the following:

Form	What it does
CoR 9.1	Application to reserve the name you wish the company to use. A name is not compulsory — a company may trade under its registration number — but most clients prefer a name.
CoR 14.1	The Notice of Incorporation. This is the form which brings the company into existence and records its particulars, its registered office and its financial year end.
CoR 14.1 Annexure A	The particulars of the initial directors of the company.
CoR 15.1A	The short standard form memorandum of incorporation for a private company, which is suitable for most straightforward ventures.
CoR 15.1E	A customised memorandum of incorporation, used where the standard form does not accommodate what you require — for example different classes of shares, restrictions on the transfer of shares or special quorum and voting arrangements.
CoR 14.3	The registration certificate. This is issued by the Commission once the company has been registered, and is your proof of incorporation.

You do not need to obtain or complete any of these forms yourself. Once you have returned this questionnaire to us we shall populate and complete the forms on your behalf, prepare the memorandum of incorporation, arrange for the necessary signatures and supporting documents, and attend to the lodgement of everything with the Commission and to the registration of the company. We shall report to you once the registration certificate has been issued.

THE PRINCIPAL STEPS IN ESTABLISHING YOUR VENTURE

Not every venture requires every one of these steps, and the order sometimes varies. The outline below is intended to give you a general sense of what lies ahead.

Consultation and instructions. We meet with you, discuss what you intend to do and obtain from you the information recorded in this questionnaire. We advise you on the structure best suited to your venture and on the likely cost and timing.

Choosing the right entity. We advise you on whether to trade through a private company, a partnership, a trust, a sole proprietorship or some other structure, having regard to liability, tax, the number of participants and your plans for the business.

Reserving the name. Where you wish the company to carry a name, an application to reserve it is lodged with the Commission. It is prudent to give us several alternatives, since names are frequently refused for similarity to an existing name.

Preparing the incorporation documents. We complete the CoR forms, prepare the memorandum of incorporation and obtain the certified identity documents and consents required from each of the proposed directors and incorporators.

Lodgement and registration. The documents are lodged with the Commission. Upon registration the company comes into existence as a separate legal person, a registration number is allocated and the registration certificate is issued.

The company's registers. A company must keep a securities register recording who holds its shares, and must file the particulars of its beneficial owners with the Commission. We open and maintain these registers for you and issue the share certificates.

The shareholders agreement. Where there is more than one owner, we prepare the shareholders agreement recording what has been agreed between you concerning control, funding, profits, restraint and what is to happen when one of you leaves the business.

Tax and statutory registrations. The company is registered for income tax on incorporation and a public officer must be appointed. Depending upon your circumstances, registration for value-added tax, employees' tax, unemployment insurance and compensation for occupational injuries may also be required.

Banking, contracts and compliance. A bank account is opened in the name of the company, and we prepare the further documents which your venture requires — employment contracts, a lease, standard terms of business, confidentiality agreements and the policies required under the Protection of Personal Information Act.

Ongoing compliance. A company must lodge an annual return with the Commission each year, keep proper accounting records, prepare annual financial statements and keep its registers up to date. We can attend to this for you on a continuing basis.

PART A: YOUR PARTICULARS

These are the particulars of the person giving us instructions. The particulars of the other participants in the venture are dealt with in Parts E and F.

Full names and surname (as per identity document)	
Identity number (or passport number and nationality)	
Date of birth	
Residential address	
Postal address (if different)	
Cellphone number	
Alternative telephone number	
E-mail address	
Income tax reference number	
Are you giving these instructions on your own behalf only, or also on behalf of the other participants?	
Preferred language (English / Afrikaans / other)	
Are you presently a director, member or trustee of any other entity? If so, give particulars	
Have you ever been sequestrated, placed under debt review, or been a director of a company which was liquidated or placed in business rescue?	

PART B: THE PROPOSED BUSINESS

Describe, in your own words, what the business will do	
Industry or sector	
Proposed trading name (this may differ from the registered name of the company)	
On what date do you intend to commence trading?	
Has any trading already taken place? If so, in whose name and since when?	
Will you trade from home, from leased premises or from premises you own?	

If leased, has a lease been signed or negotiated? Give particulars of the landlord and the term	
In which provinces or countries will the business operate?	
Do you have a written business plan or financial projections?	
What turnover do you anticipate in the first twelve months?	
How many employees do you expect to engage in the first year?	
Does the business require any licence, permit, accreditation or sector registration (for example liquor, financial services, health, transport, security, construction or environmental)?	
Will the business hold or create any intellectual property (a trade mark, logo, domain name, design, software or recipe)? Give particulars	
Is any existing business, or the assets of any existing business, to be transferred into the new entity? If so, give particulars	
Are there any black economic empowerment requirements applicable to your intended customers or sector?	

PART C: THE ENTITY AND ITS NAME

If you are not sure which entity is appropriate, leave this Part blank. Advising you on the correct structure is part of our task, and we shall discuss it with you.

Indicate the type of entity you have in mind, if you have formed a view:

Type of entity	Mark with an X
Private company ((Pty) Ltd)	
Personal liability company (Incorporated)	
Non-profit company (NPC)	
Public company (Ltd)	
Sole proprietorship (trading in your own name)	
Partnership	
Business trust	
Co-operative	
External company (a branch of a foreign company)	
I am not sure — please advise me	

Have you already reserved a name with the Commission? If so, give the reservation number and date	
Proposed name — first choice	
Proposed name — second choice	
Proposed name — third choice	
Proposed name — fourth choice	
If none of the names is available, are you content that the company be registered under its registration number and trade under a trading name?	
Is the new entity to be a subsidiary of, or held by, any existing company, trust or person? Give particulars of the intended structure	
What financial year end do you require? (The last day of February is the most common, but any month end may be chosen)	
Do you require the standard form memorandum of incorporation, or do you anticipate that special provisions will be needed?	
Are there any particular provisions you wish to see in the memorandum of incorporation (different classes of shares, restrictions on the transfer of shares, special quorum or voting requirements, or a ring-fenced provision)?	

PART D: REGISTERED OFFICE AND CONTACT DETAILS

The registered office must be a physical address within the Republic. It is the address at which legal process is served upon the company, and it need not be the address from which the business trades.

Registered office — physical address	
Postal address of the company	
Business telephone number	
Business e-mail address	
Website and domain name (if any)	
Who is to be the principal contact person for the company's dealings with the Commission and with this firm?	

PART E: THE SHAREHOLDERS OR OWNERS

Complete this Part in respect of every person or entity who is to hold an interest in the business, including yourself.

Full names or name of entity	Identity or registration number	E-mail address	Contact number	Percentage of the business to be held

Name	Residential or registered address	Nationality

Will any shareholder hold shares on behalf of another person, whether as a nominee, trustee or otherwise? Give particulars	
If any shareholder is a company, trust or close corporation, who are the natural persons who ultimately own or control it? (The Companies Act requires the beneficial owners of a company to be recorded and filed with the Commission)	
State the marital status of each individual shareholder and, where married, whether in community of property or out of community of property. (A spouse married in community of property must consent to certain transactions, and this affects the drafting of the agreement)	
Is any proposed shareholder a foreign national or resident outside South Africa? Give particulars, as exchange control considerations may arise	
Is any proposed shareholder an unrehabilitated insolvent, under debt review, or subject to any court order affecting his or her capacity to contract?	
How did the participants come to know one another, and have any of you been in business together before?	

PART F: THE DIRECTORS

A private company requires at least one director. A director need not be a shareholder, and a shareholder need not be a director.

Full names and surname	Identity or passport number	Date of birth	Nationality	E-mail address

Name	Residential address	Contact number

Who is to be the chairperson of the board, if any?	
Who is to be responsible for the day-to-day management of the business, and in what capacity?	
Who is to be appointed as the public officer of the company for purposes of the South African Revenue Service?	
Is any proposed director disqualified from acting as such — for example an unrehabilitated insolvent, a person removed from an office of trust on the grounds of misconduct involving dishonesty, a person convicted of theft, fraud, forgery, perjury or a similar offence, or a person declared delinquent by a court?	
Does any proposed director hold a directorship in a competing business?	
Do you wish any shareholder to have the right to appoint or remove a particular director?	

PART G: AUDITORS, ACCOUNTANTS AND COMPANY SECRETARY

Have you appointed an auditor or accounting officer? If so, give the name of the firm, the individual dealing with the matter, the telephone number and the e-mail address	
If not, do you require us to recommend one?	
Who will attend to the bookkeeping and the monthly accounts?	
Do you anticipate that the company will require an audit, or an independent review? (This depends upon the company's public interest score and upon whether it holds assets in a fiduciary capacity)	
Is a company secretary to be appointed? If so, give the particulars	
With which bank do you wish to open the company's account?	
Who is to be authorised to operate the bank account, and will signatures be required jointly or singly?	
Do you have an insurance broker or financial adviser whom we should liaise with?	

PART H: SHARE CAPITAL AND SHAREHOLDING

If you are unfamiliar with these concepts, leave the technical questions blank. We shall explain them to you and propose a structure.

How many shares is the company to be authorised to issue? (In the absence of instructions we ordinarily authorise 1 000 ordinary shares of no par value)	
Are all the shares to carry the same rights, or are different classes required (for example voting and non-voting shares, or preference shares)?	
If different classes are required, describe the rights which each class is to carry	

Set out how the shares are to be issued:

Shareholder	Number of shares	Percentage	What is being given in exchange (cash, assets, services, loan account)

Is any shareholder to receive shares in exchange for something other than money — for example equipment, intellectual property, a customer base or work already done? Give full particulars and the value attributed	
Is any shareholder's interest to be earned over time, or made conditional upon remaining in the business or achieving a target?	
Are any shares to be pledged, ceded or encumbered in favour of a lender or any other person?	
Do you intend to bring in further investors at a later stage?	

PART I: FUNDING AND CAPITAL CONTRIBUTIONS

What capital is required to establish the business, and what will it be spent on?	

How is the business to be funded (own funds, shareholder loans, bank finance, an outside investor, a grant)?	
What amount is each participant contributing, and in what form?	
Are the contributions to be treated as share capital or as loans to the company?	
If loans, are they to bear interest, and on what terms are they to be repaid?	
If further funds are required in future, is every shareholder to be obliged to contribute in proportion to his or her shareholding?	
What is to happen if a shareholder is unable or unwilling to contribute further funds — should the shareholding be diluted, or should the contribution be treated as a loan?	
Is any bank finance or overdraft to be applied for, and will personal suretyships be required from the shareholders?	
If suretyships are required, are all the shareholders to sign, and in what proportions are they to bear the risk between themselves?	

⚖ PART J: GOVERNANCE AND DECISION-MAKING

This Part and the three which follow provide the material for your shareholders agreement. They concern how you and your fellow owners will work together. Give us your thinking even if it is not yet settled.

How are ordinary business decisions to be taken — by the managing director alone, by the board by majority, or by all of you together?	
How often should the board meet, and what should constitute a quorum?	
Is the chairperson to have a casting vote in the event of an equality of votes?	

Which decisions should require the consent of all the shareholders, rather than a simple majority? Mark those which apply:

Decision	Mark with an X
Incurring borrowings or expenditure above an agreed amount	
Issuing further shares or admitting a new shareholder	

Decision	Mark with an X
Declaring a dividend	
Selling or acquiring a business, or any material asset	
Changing the nature of the business	
Appointing or removing a director	
Fixing or changing the remuneration of a shareholder or director	
Giving surety or security for the obligations of another person	
Instituting or settling litigation above an agreed amount	
Amending the memorandum of incorporation	
Winding up the company	

If an agreed threshold amount is to apply to any of the above, what should it be?	
How should a deadlock between the owners be broken? (Options include a casting vote, referral to an independent expert, mediation, or a mechanism under which one party offers to buy the other out at a stated price and the other may elect either to sell or to buy at that price)	
What is to be your policy on profits — are they to be distributed as dividends, retained in the business, or divided according to some agreed formula?	
What financial information is each shareholder entitled to receive, and how often?	

PART K: TRANSFER OF SHARES AND LEAVING THE BUSINESS

These are the provisions which clients most often regret not having agreed at the outset. Please give them thought, even though the events they deal with may seem remote today.

If a shareholder wishes to sell, should the other shareholders have the right to buy those shares first, before they may be offered to an outsider?	
Should a shareholder be prevented from selling at all for an initial period? If so, for how long?	
If a buyer offers to purchase the whole business, should a majority be able to compel a reluctant minority to sell as well?	
Conversely, should a minority be entitled to insist on selling on the same terms as the majority?	

On which of the following events should a shareholder be obliged to offer up his or her shares? Mark those which apply:

Event	Mark with an X
Death	
Permanent disability or incapacity	
Insolvency or sequestration	
Resignation from employment with the company	
Retirement	
A material breach of the shareholders agreement	
Dismissal for misconduct	
Divorce, where the shares may fall into an accrual or joint estate	

How should the price of the shares be determined in those circumstances — by the auditors, by an independent valuer, by an agreed formula such as a multiple of profit, or at net asset value?	
Should the price differ depending upon the reason for the departure? (It is common to distinguish between a shareholder who leaves in good faith and one who leaves in breach of the agreement)	
Over what period should the purchase price be payable, and should interest run?	
On the death of a shareholder, should the shares pass to the heirs, or should	

the survivors be obliged to purchase them from the estate?	
Do you wish us to prepare a buy-and-sell agreement funded by life insurance, so that the funds are available to purchase the shares of a shareholder who dies?	
Has any participant made a will, and does any existing will deal with the shares?	

PART L: RESTRAINT, CONFIDENTIALITY AND INTELLECTUAL PROPERTY

Should each shareholder be restrained from competing with the business while a shareholder and for a period thereafter? If so, for how long?	
Over what geographical area should the restraint apply?	
What activities should the restraint cover?	
Should a departing shareholder be prevented from soliciting the employees of the business, or its customers and suppliers?	
Is any participant presently subject to a restraint of trade in favour of a current or former employer? If so, give particulars, as this may affect what the new business is able to do	
Who is to own the intellectual property created in the course of the business — the company, or the individual who creates it?	
Is any participant bringing existing intellectual property into the business? Is it to be transferred to the company, or merely licensed to it?	
Do you require a trade mark to be registered, or a domain name to be secured?	
Does the business require confidentiality agreements for use with employees, contractors or prospective customers?	

PART M: DISPUTE RESOLUTION

Should a dispute between the shareholders first be referred to mediation before any other step is taken?	

Should disputes be determined by arbitration rather than by the courts? (Arbitration is private and usually quicker, but the parties bear the cost of the arbitrator)	
If arbitration is preferred, do you have any preference as to the rules to be applied or the identity of the arbitrator?	
Should a dispute concerning the valuation of shares be referred to an independent expert whose determination is final?	

PART N: EMPLOYMENT, REMUNERATION AND DIVIDENDS

Which of the participants will work in the business, and in what role?	
Will any participant work part-time, or retain other employment?	
What remuneration is each working participant to receive, and from when?	
Is remuneration to be reviewed annually, and by whom is it to be determined?	
Are the participants to be remunerated equally, irrespective of shareholding or hours worked?	
Do you require employment contracts to be prepared for the participants, and for other employees?	
What benefits are contemplated (medical aid, retirement funding, motor vehicle, cellphone, travel allowance)?	
Is any participant to receive a share of profits over and above salary?	

PART O: TAX AND STATUTORY REGISTRATIONS

If you are uncertain about any of these, leave them blank. We shall advise you which registrations your business requires.

Registration	Required?	Already done?
Income tax (registered automatically upon incorporation)		
Appointment of a public officer		

Registration	Required?	Already done?
Value-added tax (compulsory above the prescribed turnover threshold, voluntary below it)		
Employees’ tax (PAYE)		
Skills development levy		
Unemployment insurance fund		
Compensation for occupational injuries and diseases (COIDA)		
Customs and excise / importer’s and exporter’s code		
Black economic empowerment affidavit or certificate		
Sector-specific licence or accreditation		

What turnover do you anticipate in the first twelve months, for purposes of the value-added tax threshold?	
Will the business process the personal information of customers or employees? (If so, the Protection of Personal Information Act applies and an information officer must be registered)	
Is the business subject to the Financial Intelligence Centre Act as an accountable institution?	

PART P: THE DOCUMENTS YOUR VENTURE MAY REQUIRE

Mark those documents which you would like us to prepare. If you are unsure whether you need something, mark it with a question mark and we shall advise you.

Document	Mark with an X
Registration of the company and the memorandum of incorporation	
Shareholders agreement	
Share certificates and securities register	
Buy-and-sell agreement	
Loan agreements in respect of shareholder loans	
Deeds of suretyship	
Employment contracts	
Independent contractor or consultancy agreements	
Restraint of trade agreements	
Confidentiality or non-disclosure agreements	
Standard terms and conditions of business	
Supplier or distribution agreements	
Lease of business premises	
Protection of Personal Information Act policies and manual	
Trade mark registration	
Wills and estate planning for the participants	
Partnership agreement (if a partnership is used)	
Trust deed (if a trust is used)	

Is there any deadline by which the registration or the documents must be completed (a tender, a contract, a funding application or a lease)?	
Do you require an estimate of our fees before we proceed?	

PART Q: ANY OTHER INFORMATION

Please set out anything else you consider relevant, any concern you may have about the venture or about your fellow participants, or any question you would like us to address when we report to you. If there is something you would prefer to raise with us by telephone rather than in writing, simply say so here and we shall call you.

PART R: DECLARATION BY THE CLIENT

I, the undersigned, confirm that the information furnished in this questionnaire is true and correct to the best of my knowledge and belief. I understand that it will be used to prepare the documents lodged with the Companies and Intellectual Property Commission and the agreements to be concluded between the participants in this venture. I undertake to inform my attorneys forthwith should any of the information change or should I become aware that any of it is incorrect or incomplete.

Full names	
Signature (you may type your name here and sign the printed copy at our offices, or attach a scanned signature)	
Place	
Date	

ANNEXURE: DOCUMENTS TO BE FORWARDED IN DUE COURSE

It is not necessary to provide these documents together with this questionnaire. They may be forwarded once the questionnaire has been returned.

Document	Available? (Yes / No / Will obtain)
Certified copy of the identity document of every proposed director	
Certified copy of the identity document of every proposed shareholder	
Proof of the residential address of every director and shareholder	
Income tax reference numbers of the participants	
Proof of address for the registered office (a lease or a municipal account)	
Name reservation confirmation, if already obtained	
Registration documents of any existing entity to be used or restructured	
Trust deed and letters of authority, where a trust is to hold shares	
Business plan and financial projections, if any	
Draft or signed lease of the business premises	
Particulars of any existing trade mark, domain name or intellectual property	
Any agreement already signed between the participants	
Any restraint of trade to which a participant is presently subject	
Bank account details of the company, once opened	