

TERMS AND CONDITIONS OF CHERRY IRRIGATION (PTY) LTD

I/We, _____ the undersigned
and herein representing _____ with registration number:
_____ and he/she being duly authorised thereto
(hereinafter referred to as "customer") do hereby accept and agree to these terms and conditions (hereinafter referred to as "Ts & Cs") in respect of all goods and services purchased from and/or supplied by Cherry Irrigation (Pty) Ltd (hereinafter the "company") to the customer (hereinafter referred to as the "parties" when referenced jointly and the "party" when referring to either individually).

1. DEFINITIONS

- 1.1 In this agreement, unless clearly inconsistent with or otherwise indicated by the context:
- 1.1.1 any reference to the singular includes the plural and *vice versa*, any reference to natural persons includes legal persons (corporate or unincorporated) and *vice versa* and any reference to a gender includes the other gender;
 - 1.1.2 headings and the use of bold typeface are to be ignored;
 - 1.1.3 a reference to a recital, clause, sub-clause, paragraph, sub-paragraph, schedule or appendix is, unless indicated to the contrary, a reference to a recital, clause, sub-clause, paragraph, sub-paragraph, schedule or appendix of this agreement;
 - 1.1.4 where any term is defined within the context of any particular clause or sub-clause, the term so defined shall, unless it appears clearly from such clause or sub-clause that such term has limited application to the relevant clause or sub-clause only, bear the meaning ascribed to it for all purposes in terms of this agreement;
 - 1.1.5 in the interpretation of this agreement, the *contra proferentum* rule of interpretation shall not apply (this agreement being the product of negotiations between the parties), nor shall this agreement be construed in favour of or against any party by reason of the extent to which any party or its professional advisors participated in the preparation of this agreement;
 - 1.1.6 the use of the words "include", "including" and "in particular" in this agreement followed by a specific example or examples shall not be construed or interpreted as limiting the meaning of the general wording preceding it and the *eiusdem generis* rule shall not be applied in the interpretation

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of such general wording and/or such specific example or examples and the words "other" or "otherwise" shall not be construed *eiusdem generis* with any preceding words where a wider construction is possible.

- 1.2 "Agreement" or "terms and conditions" or "Ts & Cs" means this document and any updates thereto, being the agreement between the parties together with all appendices or annexures hereto, including the quotation(s).
- 1.3 "Company" means Cherry Irrigation (Pty) Ltd with registration number: 2017/455240/07, a private company duly incorporated in terms of the laws of the Republic of South Africa.
- 1.4 "Customer" means any natural person or juristic person including, without limitation, a company or firm transacting or otherwise entering into an agreement with the company regardless of whether these Ts & Cs or any quotation was signed by the customer, or not.
- 1.5 "Completion date" shall mean the date when the works are completed, handed over and the certificate of practical completion issued by the company.
- 1.6 "Delivery" shall mean when the customer takes possession of the goods or it leaves the company's possession or the completion date as context indicates.
- 1.7 "Deposit" means the amount payable as outlined in the quotation or these Ts & Cs.
- 1.8 "Design" means any drawing and/or quotation which contains the intellectual property of an irrigation system, the goods or any part thereof sketched by the designer.
- 1.9 "Designer" means the person designing the irrigation system as outlined in clause 13 hereunder.
- 1.10 "Effective date" means the date on which the last party in time signs the Ts & Cs or the date of delivery or date on which deposit is paid, whichever occurs first.
- 1.11 "Geological impediment" means and shall include natural and man-made impediments including the presence of rocks, unsuitable ground conditions, cables, municipal services or anything encountered under the surface which will affect company's ability to deliver or install any goods or render related services or which will increase the cost thereof.
- 1.12 "Goods" means an irrigation system and any irrigation equipment sold, supplied, manufactured or designed by the company.
- 1.13 "Price" means the full price or amount in money payable by the customer to the company in exchange for the goods or services in terms of this agreement.
- 1.14 "Quotation" means the price quotation or cost estimate for the goods and/or services as set out in these Ts & Cs.

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- 1.15 “Services” means the services rendered by the company to conduct works, install, repair, service, maintain or upgrade any of the goods.
- 1.16 “Technical manager” means the person who will on behalf of the company manage and oversee the installation of any goods including the technical aspects in relation thereto.
- 1.17 “Variation” means any amendment to the original specification of the design.

2. ACCEPTANCE

- 2.1 The customer by transacting with the company acknowledges that all business shall be conducted based on these Ts & Cs, to the exclusion of any terms and conditions which the customer may seek to impose, save where company expressly accepts and agrees in writing to be bound by any such other terms and conditions or any other terms to the exclusion of these Ts & Cs.
- 2.2 The customer further hereby acknowledges and agrees that by paying the deposit or making a payment in terms of a quotation to the company, that such payment constitutes its full and unconditional acceptance and agreement to the contents of this agreement at which time the agreement between the parties becomes effective and legally binding. Further, that the goods and services hereunder are expressly supplied and alternatively delivered, as the case may be, under the Ts & Cs herein contained.

3. QUOTATIONS AND ORDERS

- 3.1 The customer shall be deemed to have accepted the quotation issued by company on the earlier of:
- 3.1.1 the signing the quotation
 - 3.1.2 payment of the deposit
 - 3.1.3 instructing company to proceed with the work and/or delivery of the goods listed in the quotation, regardless of whether the quotation was signed by the customer or not.
- 3.2 All quotations are valid for a period of 30 (thirty) days from date of issue.
- 3.3 The validity of any price contained in a quotation is subject to the availability of the goods. In the event of any increase in the cost price of the goods, including an increase due to currency fluctuations, the company may revoke and change the quotation at any time.
- 3.4 A quotation may be revoked at any time where new information becomes available post- rendition of the initial quotation.
- 3.5 Quotations are issued on the assumption that no geological impediment exists and are subject to adjustments for additional costs, materials and time resulting from the presence of geological impediment.

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- 3.6 Notwithstanding anything to the contrary contained herein, where the quotation states that any items are subject to final measurement:
- 3.6.1 The price shall be an estimate only.
 - 3.6.2 The price shall be finally determined by the company on completion of the works and based on actual quantities and measurement.
 - 3.6.3 Unless the company has made a manifest error in measuring or quantifying the quantity, the determination of the quantity by the company shall be final.
 - 3.6.4 The company shall reflect the final quantities and price calculated on the company's then current pricing in an additional invoice.

4. VARIATION

- 4.1 The customer shall be responsible for the redesign of any variation of the initial instruction by the customer at an hourly rate as set out in the quotation.
- 4.2 Should any geological impediment be discovered after work has commenced, the company reserves its right to vary or amend the quotation and delivery date, which shall not constitute breach nor a variation of the terms of this agreement.
- 4.3 The company reserves the right to, in its sole discretion, refuse affecting any variations requested by the customer that do not conform as set out in this agreement. An acceptable variation(s) in terms of this agreement, regardless of the nature thereof shall be communicated to the company in writing to either the company's designer or technical manager.
- 4.4 Where variation is possible the company shall confirm this and adjust the delivery date and price.
- 4.5 Any accepted variation(s) shall be recorded and annexed to this agreement and form part of this agreement as if it were included herein.

5. PAYMENT AND DELIVERY

- 5.1 Subject to 7.4 below, all invoices are payable on presentation.
- 5.2 All payments to the company shall be made by the customer into the bank account nominated (in writing) by the company from time to time. The company will not change its bank account other than by written notice, which shall be signed by a director of the company.
- 5.3 All payments shall be without deduction or set-off of any nature whatsoever. The customer shall not be entitled to withhold all or any part of a payment by virtue of any dissatisfaction, alleged claim or dispute.

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- 5.4 Unless the quotation states otherwise, payment of the price shall be affected as follows:
- 5.4.1 60 % deposit on acceptance of the quotation
 - 5.4.2 25% once installation commences
 - 5.4.3 10% on completion of installation
 - 5.4.4 The balance of 5% together with any variations, price adjustments as a result of either final measurement, fluctuation, availability or penalty within a period of thirty (30) days of rendition of invoice.
- 5.5 At training as outlined in 8.10, if applicable, or on the completion date the company shall issue a certificate of practical completion. Any defects shall be pointed out to the company within 7 (seven) days of the completion date. Defects will be tended to within 30 days of receipt and thereafter the invoice rendered in terms of 7.4.4 above.
- 5.6 The company may suspend or withhold delivery of any goods or services including the works if the customer is at any time in breach of any obligation towards the company, including but not limited to the obligation to make payment of any amount.

6. DELIVERY

- 6.1 The delivery and completion dates as stated in the quotation are estimates only, these are not binding on the company and are subject to: availability of stock, adverse weather conditions, geological impediments, strikes and any other cause not within the company's direct control.
- 6.2 In the case where work has commenced but is interrupted due to any adverse weather conditions, the customer shall be liable for 70% of the costs that would have been incurred had the work not been delayed or interrupted.
- 6.3 Where any of the goods are not available, the company in its sole discretion for any reason whatsoever shall be entitled to substitute any goods with that of at least the same specification.
- 6.4 Any obligation for the company to deliver any goods is subject to the company having been able to procure and receive the goods.
- 6.5 There shall be no obligation on the company to effect delivery of goods in a piecemeal fashion and the company shall only be required to arrange delivery to the customer once all goods are available for delivery.
- 6.6 A third party may be engaged, by the company at its discretion, for the transport and delivery of goods purchased by the customer.
- 6.7 The customer shall accept delivery at any reasonable time during business hours.

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- 6.8 The customer shall confirm that the quantity of the material delivered corresponds to the quantities on the bill of quantities or delivery note. The customer's signature on any delivery note shall constitute confirmation of a correct delivery.
- 6.9 Any delivery note or bill of quantities (copy or original) signed by the customer and any certificate issued by the company and signed by a member or director of the company, shall be prima facie proof that delivery was made to the customer.
- 6.10 As soon as reasonably possible following the completion date the company shall provide the customer or customer's nominated person(s) with a two (2) day period of training. Should further training be required the company shall supply such at its prevailing hourly tariff as may be applicable from time to time.

7. RETURNED GOODS

- 7.1 The customer agrees that there is no obligation on the company to accept the return of any goods.
- 7.2 Should the company in its sole discretion agree to the return of goods, it shall levy a handling fee of no more than 15%.
- 7.3 Where the company agrees to accept a return, any goods so returned as aforesaid will not be accepted unless they are returned with the packaging in good condition, unopened, unused and together with all components delivered with the goods.

8. INTEREST AND PENALTIES

- 8.1 The customer shall be liable to pay interest on any overdue amount at the rate of 3% above the prime overdraft rate quoted by First National Bank of South Africa Limited.
- 8.2 Such rate shall be proven by a certificate signed by a manager of First National Bank of South Africa Limited, Grabouw branch, and shall be sufficient proof of such fact for the purposes of judgement, including provisional sentence and summary judgement, proof of claims against insolvent and deceased estates or otherwise. If the customer disputes the correctness of such certificate, the customer shall bear the onus of proving the contrary. It shall not be necessary to prove in such a certificate the appointment or capacity of the person signing such certificate.
- 8.3 Interest shall be payable on demand.

9. THE CUSTOMER'S OBLIGATIONS

- 9.1 The customer shall in good faith give its full co-operation so as to allow the company to perform under this agreement and therefore shall, without limitation do or cause to be done as follows:
- 9.1.1 Ensure access to the premises where the company is required to affect any delivery or installation of the goods.
 - 9.1.2 Procure any licenses or permissions or consents from municipality, Department of Water Affairs, Irrigation Board or Water Users Association, relevant statutory authority required to use a borehole, stored water or to install or use any irrigation system or other goods.
 - 9.1.3 Where any prior compliance is required on the part of the customer, the company shall not be obliged to perform in terms of this agreement pending completion of such compliance.
 - 9.1.4 Notwithstanding anything to the contrary herein contained, where any act or omission of the customer results in any cost increase or loss to the company, including but not limited to payment of additional wages, holding costs, standing costs, re-establishment costs, penalties or payments to sub-contractors, then the company shall be entitled to invoice and recover from the customer, without prior notice, all such costs, increases and/or losses.
 - 9.1.5 Procure adequate supplies of water and electricity as well as bear the costs of any water or electricity used or consumed during installation or testing the goods so installed or supplied by the company.
 - 9.1.6 Clearly point out all geological impediments.
 - 9.1.7 Trenching and earthworks.
 - 9.1.8 Ensure that all agents of and service providers, contractors and/or subcontractors employed by the customer complete their activities such as not to cause delays to company or damage to any goods or works installed by company.
 - 9.1.9 Bear the costs of repair or replace any goods damaged by it or any agent or contractor of the customer.
 - 9.1.10 Provide the company's workers/labourers with reasonable accommodation which is neat, tidy and includes cooking facilities, showers and toilet facilities . Should the customer in the company's sole discretion not provide adequate accommodation the company shall make the necessary arrangements and the customer shall bear the costs without prior notice.
 - 9.1.11 Supply all the required unskilled workers/labour as required.

10. THE COMPANY'S OBLIGATIONS

- 10.1 The company shall against payment (either as included in the quotation or if not against additional charge):
- 10.1.1 Provide skilled and semi-skilled workers/labour for the work as required.
 - 10.1.2 Provide skips for the removal of all waste.
 - 10.1.3 Arrange for safe storage or container for goods being delivered to customer. Notwithstanding the customer hereby indemnifies the company for any loss, theft or damage to goods delivered if not secured safely.
 - 10.1.4 Where there is an insufficient or unreliable power source to provide a generator.

11. MISCELLANEOUS

- 11.1 The customer warrants that it has pointed out to the company the presence and location of all geological impediments, if any. Where these or any of these have not been pointed out, the company shall assume none are present.
- 11.2 The customer warrants that the information furnished by it to the company prior to the company preparing the quotation or executing its obligations to the customer, is both true and correct and acknowledges that such information shall be used and relied upon by the company.
- 11.3 The customer acknowledges that although the company will endeavor to minimise the impact, some of the activities that the company may undertake may cause dust that could damage electronic and electrical equipment and as such closing of windows and covering electronic and electrical equipment is required to reduce the risk of damage.
- 11.4 The inability to see under the ground does mean that there is risk that municipal services, water pipes, electrical and data cables and such items may be encountered or damaged (particularly if they were not pointed out to the company at the time of the company issuing the quotation).
- 11.5 The operation of any irrigation or other system by the company is the responsibility of the customer. The customer is required to operate and maintain the goods and equipment as per the manufacturer's operation manuals and as advised by the company and in compliance with prevailing legislation (including municipal by-laws).

12. WARRANTIES

- 12.1 Subject to clause 19, in respect of any pumps, sprinklers, rain harvesting tanks, storage tanks, electrical components, electrical works and any controllers:
- 12.1.1 The company will assist the customer to facilitate the repair or replacement of any failed goods for repair or replacement in terms of and as the original manufacturer's warranty provides. The company supplies goods with the manufacturer's warranty only and provides no additional warranty in respect thereof.
- 12.2 In respect of any goods, other than those mentioned separately above:
- 12.2.1 The company warrants the goods for a period of 12 months from delivery or installation, whichever is the earlier, if the company was responsible for the design, material and the installation and will at its election repair or replace any goods that fail as a result of any manufacturing or workmanship defect within that time.
- 12.2.2 The company does not warrant any work done where it was not responsible for the design or supply of the material and installation thereof.

13. RELATIONSHIP BETWEEN THE PARTIES

- 13.1 For the avoidance of doubt, the parties record and agree that, pursuant to the implementation of this agreement, the company shall at all times act as an independent contractor and nothing in this agreement shall constitute an employment relationship or an agency or a partnership in any shape or form between the parties.

14. RISK AND OWNERSHIP

- 14.1 All risk in and to the goods, but not ownership, shall pass to the customer on delivery thereof to the customer or the customer's nominated representative.
- 14.2 Ownership of the goods shall not pass to the customer until the purchase price (including interest if any) in respect of the goods has been paid in full. The provisions hereof shall apply notwithstanding the installation of such goods in the customer's premises or accession thereof to any of the customer's goods or that the goods may be incorporated into or form part of other goods or change their essential character. All goods, whether fixed to immovable property or not, shall be deemed to be severable without injury to either property.

15. INTELLECTUAL PROPERTY RIGHTS AND OWNERSHIP

15.1 To the extent that the company utilises any of its property (including, without limitation, its general intellectual property) in connection with the provision of the goods, or performance of services hereunder, such property shall remain the property of the company and the company shall acquire no right, title or interest in such property. Ownership in specially developed intellectual property by the company in relation to any goods or services under this agreement shall pass to company on payment.

16. CONFIDENTIALITY AND DATA PROTECTION

16.1 Each party ("the receiving party") shall treat and hold as secret and confidential any such party's intellectual property and personal information of the other as defined in the Protection of Personal Information Act No. 4 of 2013 as amended which it may receive from the other party ("the disclosing party") or which comes known to it during the course of this agreement.

16.2 The foregoing obligations shall not apply to any information which:-

16.2.1 Is lawfully in the public domain at the time of disclosure to the receiving party.

16.2.2 Subsequently becomes lawfully part of the public domain by publication or otherwise.

16.2.3 Subsequently becomes available to the receiving party from a source other than the disclosing party which is lawfully entitled without any restriction on disclosure to disclose such confidential information to the receiving party.

16.2.4 Is disclosed pursuant to a requirement or request by operation of law, regulation or court order.

16.3 This clause 18 is severable from the rest of this agreement and shall remain valid and binding on the parties notwithstanding any termination of this agreement.

16.4 In performing its obligations under this agreement, the company shall:

16.4.1 Comply with the provisions of the prevailing privacy and data protection legislation governing the collection, use and processing of personal information as defined in the relevant legislation.

16.4.2 Not process personal information for any purpose other than to perform its obligations under this agreement and ensure that such processing will not place the company in breach of any applicable privacy and data protection laws or stated requirements.

16.4.3 Only act on the instructions of the company in collecting, processing and utilising the personal information (and for avoidance of doubt, this agreement shall constitute such instructions).

16.4.4 Not disclose or otherwise make available the personal information to any third party other than authorised staff or sub-contractors who require access to such personal information strictly in

order for the company to carry out its obligations pursuant to this agreement, and ensure that such staff and any other persons that have access to the personal information are bound by appropriate and legally binding confidentiality and non-use obligations in relation to the personal information.

- 16.4.5 Take appropriate, reasonable technical and organisational measures to ensure that the integrity and confidentiality of the personal information in its possession or under its control is secure and that such personal information is protected against accidental loss, destruction, damage, unlawful access or processing.
- 16.4.6 Immediately notify the company in case of possible infringements of the applicable data protection legislation, the terms of this clause or other irregularities by the company, its staff or any other party acting on behalf of the company in relation to the company's personal information.
- 16.4.7 At the company's option, return or destroy the personal information once it is no longer required for the purposes of performing obligations under this agreement or any directly related purpose.
- 16.5 The company acknowledges that the customer may, on reasonable notice, investigate the steps it is taking to comply with any applicable privacy and data protection laws.
- 16.6 The company agrees that breach of this clause shall be regarded as a material breach of the agreement.
- 16.7 The obligations contained in this clause shall endure, even after the termination of this agreement for whatever reason.

17. INDEMNITY

- 17.1 The customer hereby indemnifies and holds the company harmless against any loss, claims, demands, proceedings, damages and expenses of whatsoever nature in respect of loss of or damage to any property of any person or loss of profits or inability to operate arising during the duration of this agreement which the customer may suffer arising out the negligence or wilful conduct of the company.
- 17.2 The customer further hereby indemnifies and holds the company harmless against any claim made by any third party for any loss or damage, whether direct, indirect or consequential and whether claimed under the law of contract, delict or otherwise sustained by such third party, its servants, agents, contractors or any other person engaged or employed by the third party arising from or in connection with any defect, latent or otherwise, out of any negligent act on the part of the company or arising from any unsafe product characteristics, defects, failure or hazard caused by the goods or services.

- 17.3 Without derogating from the above the customer further indemnifies and holds the company harmless specifically from any losses or damages resulting from:
- 17.3.1 Any damage caused by any machinery including damage to trees, paving, damage caused by dust, damage to any services, pipes or cables encountered by the machinery and excavators.
 - 17.3.2 Any damage arising from large subsurface rocks or any other subsurface condition or geological impediment.
 - 17.3.3 Any failure of any goods to operate as specified by the manufacturer or required by the customer or at all, caused by: any failure or defect in any equipment or components or infrastructure or other items supplied by the customer; or arising as a result of insufficient water pressure, inadequate water supply, water quality, problems with the power supply, operator error; or any act or omission or adjustments or changes effected by the customer, failure to service, operate or maintain the goods as specified by the manufacturer, or anything which was not supplied by company.
 - 17.3.4 Any inaccuracy in any yield tests, water quality test or any other study or test obtained or conducted by company.
 - 17.3.5 Any change in irrigation, water quality, quantity or pressure in any municipal supply, borehole, or private supply;
 - 17.3.6 Any delays, costs or damages resulting from adverse weather conditions.
 - 17.3.7 Any consequences arising from the use or consumption of water which is not fit or safe for use or consumption.
- 17.4 Notwithstanding the above, no warranties whether express or implied shall apply, other than those provided in this contract. The company specifically disclaims the implied warranty of merchantability and fitness for a particular purpose. No representation or warranty, including but not limited to statements of capacity, suitability for use or performance made by the company or employees of the company shall be considered to be a warranty by the company. Any such statements made shall not give rise to any liability or whatsoever nature on the part of the company, its employees, subcontractors or subsidiaries., no warranty, guarantee or similar representation whether express, implied or tacit, not set forth in these Ts & Cs shall be binding on company.
- 17.5 All warranties are immediately null and void should any goods be tampered with or should the goods be operated outside the manufacturer's specifications, or due to negligence of the customer, vandalism of the customer or any third party, or from earthworks and excavations, or should any repairs or modifications be made to the goods by any party other than as authorised in writing by the company or where any goods

were operated with any accessory, equipment or part not specifically supplied or approved in writing by the company, or if the goods were not operated or serviced or maintained in accordance with the instructions of the company, or the customer utilises or treats the goods in any manner which in the reasonable opinion of the company has a prejudicial effect on the goods or the warranty applicable to such goods.

- 17.6 Notwithstanding anything to the contrary contained above, in all circumstances the company shall have no liability where any goods fail as a result of abuse, failure to use or service the goods as required by the manufacturer, unauthorised repairs or services by any entity other than the company or the manufacturer, operation contrary to the manufacturer's recommendations and specifications, lightning, electrical surges, fire, floods, insect damage or any circumstances excluded by the manufacturer in any manufacturer's warranty.
- 17.7 Warranties do not apply to any defects or insufficiencies resulting from decrease in water main static pressure, changes to landscaping and/ or layout and changes to plant and/or crop growth.
- 17.8 Goods are manufactured for standard agricultural use and are not intended for use in critical safety systems.
- 17.9 The customer warrants that it has and will have all permissions, consents, licenses and authorities for any goods it instructs the company to supply and in doing so the company will not be breaching any by-law, statute or rights of any third party. The customer shall be solely responsible for ensuring any compliance with all by-laws, statutes and restrictions on having, operating or using any goods supplied or delivered or installed by the company.

18. BREACH

- 18.1 Subject to dispute resolution clause 22 a party (the "aggrieved party") shall, where the other party (the "defaulting party") is in breach of performance of any provision of this agreement or obligation imposed in terms hereof, and should such breach be capable of remedy and remain unremedied by the defaulting party for a period of more than 10 (ten) business days after receipt of a written demand, be entitled to:
- 18.1.1 cancel this agreement; alternatively
- 18.1.2 claim specific performance.
- 18.2 In all events, the aggrieved party shall be entitled to obtain and recover from the defaulting party any damages sustained in consequence of such breach or cancellation.
- 18.3 The following events shall entitle a party to summarily cancel this agreement where the defaulting party is responsible for the occurrence of the event:
- 18.3.1 the liquidation, whether provisional or final, or voluntary or compulsorily, of the defaulting party

- 18.3.2 business rescue proceedings being implemented with respect to the defaulting party, whether at its or any third party's instance
- 18.3.3 the defaulting party committing any act of insolvency as referred to in the Insolvency Act No. 24 of 1936, as amended, read with other applicable legislation
- 18.3.4 the defaulting party seeking to affect a scheme of arrangement, compromise or moratorium with its creditors.

19. DISPUTE RESOLUTION

- 19.1 The parties agree that the terms of this agreement will be performed in the spirit of mutual co-operation, trust and confidence. The parties further agree to use their reasonable endeavours to resolve, through mutual consultation, without involving any third party or parties, any dispute which may arise under, out of, or in connection with or in relation to this agreement. If following such mutual consultation, the dispute still remains unresolved, the matter shall be referred to one (1) representative of each of the parties, who shall negotiate for a period of up to five (5) business days from the date of such referral in an attempt to resolve such dispute. If, following the expiry of such five (5) business day period, the dispute is still unresolved, then, save where otherwise provided in this agreement, the matter shall be referred to arbitration in accordance with the remaining provisions of this clause 21.
- 19.2 This clause 21 is a separate, divisible agreement from the rest of this agreement and shall:
 - 19.2.1 Not be or become void, voidable or unenforceable by reason only of any alleged misrepresentation, mistake, duress, undue influence, impossibility (initial or supervening), illegality, immorality, absence of consensus, lack of authority or other cause relating in substance to the rest of the agreement and not to this clause 21, which issue, the parties agreed, shall be subject to arbitration in terms of this clause 21.
 - 19.2.2 Remain in effect even if the agreement is terminated or is cancelled.
- 19.3 Save in respect of those provisions of this agreement which provide for their own remedies which would be incompatible with arbitration, any dispute arising out of or in connection with this agreement or the subject matter of this agreement including, without limitation, any dispute concerning:
 - 19.3.1 the existence of this agreement apart from this clause 21
 - 19.3.2 the interpretation and effect of this agreement
 - 19.3.3 the parties' respective rights or obligations under this agreement
 - 19.3.4 the rectification of this agreement

- 19.3.5 the breach, termination or cancellation of this agreement or any matter arising out of such breach, termination or cancellation
 - 19.3.6 damages in contract, in delict, compensation for unjust enrichment
 - 19.3.7 any other claim whether or not the rest of this agreement apart from this clause 21 is valid and enforceable
 - 19.3.8 shall be decided by arbitration as set out in this clause 21.
- 19.4 The parties to this dispute shall agree on the arbitrator. If agreement is not reached within five (5) business days after any party to the dispute in writing calls for arbitration, the arbitrator shall be:
- 19.4.1 If the dispute relates primarily to a financial matter, a practicing chartered accountant of at least fifteen (15) years' standing nominated by the chairman for the time being of the South African Institute of Chartered Accountants at the request of either party.
 - 19.4.2 If the dispute relates to any other matter, a practising commercial attorney or advocate of at least fifteen (15) years' standing on the panel of arbitrators of the Arbitration Foundation of Southern Africa (AFSA) or such other institution of similar standing as the parties may agree, nominated at the request of any party to the dispute by the registrar of AFSA or such other institution (if applicable), for the time being. This provision will also apply where the parties are unable to agree on whether the dispute relates to a financial or other matter.
- 19.5 The request to nominate an arbitrator shall be in writing outlining the claim and any counterclaim of which the party to the dispute concerned is aware and, if desired, suggesting suitable nominees for appointment, and a copy shall be furnished to the other parties to the dispute who may, within five (5) business days, submit written comments on the request to the addressor of the request.
- 19.6 The arbitration shall be held in Cape Town and the parties shall endeavour to ensure that it is completed within ninety (90) business days after notice requiring the claim to be referred to arbitration is given.
- 19.7 The proceedings in the arbitration shall as far as practicable take place in private and be kept confidential.
- 19.8 The arbitration shall be governed by the Arbitration Act, No. 42 of 1965 and shall take place in accordance with the commercial arbitration rules of AFSA.
- 19.9 An order or award made by the arbitrator shall be carried into effect and shall be final and binding upon the parties and may be made an order of court of competent jurisdiction.
- 19.10 This clause 21 shall not preclude any party to a dispute from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator or panel of arbitrators, on appeal.

- 19.11 Notice of a dispute or pending arbitration proceedings shall not entitle any party to suspend compliance with any of its obligations in terms of this agreement or any agreement contemplated in this agreement.
- 19.12 The parties agree that a written demand by any party that a dispute be submitted for resolution in terms of this clause 21 is deemed to be a legal process for the purpose of interrupting extinctive prescription in terms of the Prescription Act 68 of 1969.

20. DOMICILIUM

- 20.1 The parties elect the following addresses as their respective *domicilium citandi et executandi*:
- 20.1.1 Company – Worcester Road, Portion 293 of Hopedale Farm, Grabouw, South Africa.
- 20.2.2 Customer _____

- 20.2 Any notice or communication required or permitted to be given in terms of this agreement shall only be valid and effective if it is in writing.
- 20.3 Either of the parties may change its *domicilium citandi et executandi* to another address within the same country, by way of a notice to the other party to this agreement, provided that such a notice is received by the addressee, at least seven (7) calendar days prior to such a change taking effect.

21. NOVATION

- 21.1 No party may cede any or all of that party's rights or delegate any or all of that party's obligations under this agreement without the prior written consent of the other party.

22. FAILURE TO PERFORM

- 22.1 Should either party fail to fulfil its obligations in terms of this agreement as a result of:
- 22.1.1 any act of God, war, strike, lockout or other labour dispute, fire, terrorism, urban terror, flood or legislation
- 22.1.2 any other cause beyond the reasonable control of the party concerned, then, notwithstanding anything to the contrary contained or implied in this agreement, the other party shall not be entitled to terminate this agreement prematurely, nor shall it have any claim for damages in whatsoever nature against the party concerned.

23. SEVERABILITY

23.1 If any part of this agreement is void, illegal, unenforceable, or in conflict with any law of the state or local government over this agreement, the validity of the remaining portions or provisions shall not be affected thereby.

24. WARRANTIES ON CAPACITY

24.1 Each party warrants that:

24.1.1 it has the legal capacity and has taken all necessary corporate action required (where applicable) to empower and authorise it to enter into and implement this agreement on the Ts & Cs herein set out

24.1.2 this agreement constitutes an agreement valid and binding on it and enforceable against it in accordance with its terms.

25. ENTIRE AGREEMENT

25.1 This agreement constitutes the entire agreement between the parties.

25.2 No party shall have any claim or right of action arising from any undertaking, representation or warranty not included in this document.

25.3 No contract varying, adding to, deleting from or cancelling this agreement, and no waiver of any right under this agreement, will be effective unless reduced to writing and signed by or on behalf of the parties.

Signed at _____
on the ____ of _____ 20__

Signed at _____
on the ____ of _____ 20__

For the customer who warrants that he/she is duly authorised:

For the company who warrants that he/she is duly authorised:

Signature: _____

Signature: _____

Name of signatory:

Name of signatory:

Designation of signatory:

Designation of signatory:

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Initial: _____