

SUPPLY AND MARKETING AGREEMENT

between

XXX PROPRIETARY LIMITED

and

YYY PROPRIETARY LIMITED

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1 PARTIES

1.1 The Parties to this Agreement are –

1.1.1 XXX Proprietary Limited; and

1.1.2 YYY Proprietary Limited;

1.2 The Parties agree as set out below.

2 INTERPRETATION

2.1 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 —

2.1.1 "**AFSA**" means the Arbitration Foundation of Southern Africa;

2.1.2 "**Agreement**" means the supply and marketing agreement contained in this document, including all annexures (if any) hereto;

2.1.3 "**Companies Act**" means the Companies Act, No 71 of 2008;

2.1.4 "**Condition Precedent**" means the suspensive condition contained in clause **Error! Reference source not found.**;

2.1.5 "**Delivery Schedule**" means the delivery schedule of the fruit as communicated by YYY to XXX

2.1.6 "**Department**" means the South African Department of Agriculture;

2.1.7 "**Effective Date**" means the first business days after fulfilment of the Condition Precedent has been fulfilled;

2.1.8

2.1.9 "**Foreign Market**" means any country in the world other than a country falling within the Local Market;

2.1.10 "**Local Market**" means the Republic of South Africa;

2.1.11 "**Pack House**" means the packing facilities of YYY at, or such other pack house that YYY may designate in its sole discretion;

2.1.12 "**Parties**" means XXX and YYY as the context may require;

- 2.1.13 "PPECB" means the Perishable Products Export Control Board which is an independent service provider of quality certification and cold chain management services for producers and exporters of perishable food products;
- 2.1.14 "Prime Rate" means the publicly quoted basic rate of interest, compounded monthly in arrears and calculated on a 365 day year irrespective of whether or not the year is a leap year, from time to time published by The Standard Bank of South Africa Limited as being its prime overdraft rate, as certified by any representative of that bank whose appointment and designation it will not be necessary to prove;
- 2.1.15 YYY means YYY Fruits South Africa (Proprietary) Limited, registration number, a limited liability private company duly incorporated in the Republic of South Africa;
- 2.1.16 "Signature Date" means the date of signature of this Agreement by the party signing last;
- 2.1.17 "Spot Rate" means the mid-market applicable US\$/ZAR or EURO/ZAR rate on the Reuters ZAR screen at 11:00 a.m. South African time, on the relevant date, as certified by any manager of The Standard Bank of South Africa Limited whose appointment it shall not be necessary to prove;
- 2.1.18 XXXX means XXX (Proprietary) Limited, registration number1962/001488/07, a limited liability company duly incorporated in the Republic of South Africa
- 2.1.19
- 2.1.20 "VAT" means value-added tax payable in terms of the Value-Added Tax Act 89 of 1991, as amended;
- 2.2 In this Agreement —
- 2.2.1 clause headings and the heading of this Agreement are for convenience only and are not to be used in its interpretation;
- 2.2.2 an expression which denotes —
- 2.2.2.1 any gender includes the other genders;
- 2.2.2.2 a natural person includes a juristic person and *vice versa*;
- 2.2.2.3 the singular includes the plural and *vice versa*;
- 2.2.2.4 a Party includes a reference to that Party's successors in title and assigns allowed at law; and
- 2.2.2.5 a reference to a consecutive series of two or more clauses is deemed to be inclusive of both the first and last-mentioned clauses.

- 2.3 Any reference in this Agreement to —
- 2.3.1 "**business hours**" shall be construed as being the hours between 08h30 and 17h00 on any business day. Any reference to time shall be based upon South African Standard Time;
- 2.3.2 "**days**" shall be construed as calendar days unless qualified by the word "business", in which instance a "business day" will be any day other than a Saturday, Sunday or public holiday as gazetted by the government of the Republic of South Africa from time to time;
- 2.3.3 "**laws**" means all constitutions; statutes; regulations; by-laws; codes; ordinances; decrees; rules; judicial, arbitral, administrative, ministerial, departmental or regulatory judgements, orders, decisions, rulings, or awards; policies; voluntary restraints; guidelines; directives; compliance notices; abatement notices; agreements with, requirements of, or instructions by any Government Body; and the common law, and "**law**" shall have a similar meaning and
- 2.3.4 "**person**" means any person, company, close corporation, trust, partnership or other entity having separate legal personality.
- 2.4 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.
- 2.5 Any substantive provision, conferring rights or imposing obligations on a Party and appearing in any of the definitions in this clause 2 or elsewhere in this Agreement, shall be given effect to as if it were a substantive provision in the body of this Agreement.
- 2.6 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.
- 2.7 Unless otherwise provided, defined terms appearing in this Agreement in title case shall be given their meaning as defined, while the same terms appearing in lower case shall be interpreted in accordance with their plain English meaning.
- 2.8 A reference to any statutory enactment shall be construed as a reference to that enactment as at the Signature Date and as amended or substituted from time to time.
- 2.9 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.

- 2.10 Except to the extent that any provision of this Agreement expressly provides otherwise, if the only day or the last day for the exercise of any right, performance of any obligation or taking (or procuring the taking of) any action in terms of any provision of this Agreement falls on a day which is not a business day, such right shall be capable of being exercised, or such obligation performed or action taken on the immediately succeeding business day.
- 2.11 The rule of construction that this Agreement shall be interpreted against the Party responsible for the drafting of this Agreement, shall not apply.
- 2.12 No provision of this Agreement shall (unless otherwise stipulated) constitute a stipulation for the benefit of any person (*stipulatio alteri*) who is not a Party to this Agreement.
- 2.13 In this Agreement the words "**clause**" or "**clauses**" and "**annexure**" or "**annexures**" refer to clauses of and annexures to this Agreement.

3 INTRODUCTION

- 3.1 YYY operates a fresh fruit marketing, distribution and sales business and provides marketing, distribution, sales services and transportation services to producers of fresh fruit products in the Foreign Market.
- 3.2 XXX wishes to appoint YYY as its exclusive agent for the marketing, distribution and sale in the Foreign Market of such portion of the Citrus products as determined by YYY in the Foreign Market and YYY is willing to accept such appointments.
- 3.3 XXX is prepared to undertake that it will exclusively supply to YYY.
- 3.4 The Parties would like to conclude their agreement upon the terms and conditions of this document.

4 APPOINTMENT AND SUPPLY

- 4.1 XXX hereby appoints YYY as its sole and exclusive agent for the marketing, distribution and sale of such portion of the Citrus products as determined by YYY in the Foreign Market, subject to the terms and conditions hereof.
- 4.2 XXX undertakes that it will exclusively supply the Citrus products to YYY as provided herein.
- 4.3 The packing of the Citrus products as well as the marketing, distribution and sale of such portion of the Citrus products for the Local Market, is subject to and undertaken in terms of the existing applicable agreement between XXX and YYY.

5 RIGHTS GRANTED

XXX grants YYY the exclusive right to market, distribute and sell the Citrus products in Foreign Market for the duration of this Agreement and also to enter into such agreements and on such

terms and conditions as YYYdeems necessary with third parties, on behalf of XXX and as its duly authorised agent, to effect the marketing, distribution and sale of the Citrus products.

6 **MINIMUM RETURNS**

- 6.1 YYYshall be obliged to deliver returns to XXX over 3 year periods, averaged, which are at least 90% of the annual market average over the same 3 years, averaged, achieved by other exporters from South Africa, for the Citrus product variety, with comparable quality, fruit size and timing of the harvest in the surrounding area of production relative to that of XXX (the "**Minimum Return**").
- 6.2 If the returns achieved by YYYin any 3-year period of production is below the Minimum Return, XXX must give YYYwritten notice thereof in which event YYYshall have the right to make a payment to XXX to top up the 3 year return to the Minimum Return level and to thereby retain the right of exclusivity. Such payment shall be made by YYYby not later than 31 December of the year following the 3-year period in which the returns in questions were generated. If no such payment is made by the due date thereof, XXX shall have the right to appoint another authorised exporter of ZZZ, to export the Citrus product and it shall no longer be obliged to supply the Citrus product exclusively to YYY.

7 **DELIVERY**

YYYshall only accept delivery of the Citrus products, in accordance with the Delivery Schedule and after it has been approved by the PPECB, at the Pack House once packing has been completed, and which, in relation to each pallet, shall be deemed to commence as and when a forklift makes contact with such pallet at the premises of the Pack House immediately prior to commencing loading thereof onto the transportation designated for dispatch thereof to such places as YYYmay have determined.

8 **OWNERSHIP/RISK**

- 8.1 Ownership as well as risk in the Citrus products shall pass to YYYwhen they are delivered in port to YYYby the Pack House.
- 8.2 The Citrus products shall be sold and delivered by YYYto third parties as purchasers thereof. YYYwill not be liable for any loss or damage suffered by XXX unless it is proven that the loss was caused by the deliberate or grossly negligent conduct of YYYor its employees which resulted in the Citrus products not being sold to third parties. Notwithstanding anything to the contrary contained herein, it is agreed that YYYshall not be liable for consequential damages suffered by XXX.

9 **INSURANCE**

- 9.1 YYYundertakes to insure the Citrus products on behalf of XXX after delivery (as provided in clause 6) has taken place, as standard comprehensive marine insurance, which

insurance cover shall be valid until delivery of the Citrus products in the country of destination to the recipient thereof.

- 9.2 The cost of the abovementioned insurances shall be for XXX's account.
- 9.3 The insurance policies referred to in this clause 9 are available for inspection at the offices of YYY and for purposes of this Agreement XXX is deemed to have read same.
- 9.4 XXX herewith cedes and assigns to YYY all its legal rights and title to sue any third Party on behalf of XXX in respect of any claim which may arise in respect of the sale of the Citrus products. If YYY acting on such authority XXX shall pay to YYY all reasonable legal costs incurred by YYY in pursuing or defending such claims. Nothing in this clause however obliges YYY to pursue or defend any such claim.

10 INDEMNITY

XXX hereby indemnifies YYY from and against any claims, costs, damages or expenses, suffered or incurred by YYY because of the packaging and/or chemical treatment of the Citrus products and/or chemical residues of whatsoever nature found in or on the Citrus products and/or in or on the packaging thereof as well as any other illnesses, fungi, latent and/or other defects in or relating to the Citrus products or any defect in the Citrus products resulting in the placing under quarantine of any part thereof the operation thereof, suffered by YYY.

11 SPECIFICATIONS AND PROTOCOL

- 11.1 The terms of the quality specifications, packing, handling and branding protocol of YYY is incorporated herein by reference. A copy of the prevailing protocol is available on request by XXX. YYY shall be entitled to make reasonable amendments to the quality specifications, packing, handling and branding protocol should YYY determine that it is necessary to comply with the requirements of prevailing markets for which the Citrus products are designated, alternatively to set new benchmarks in the industry. Any substantial amendments to the quality specifications, packing, handling and branding protocol will be communicated in writing to XXX.
- 11.2 YYY is not obliged to take delivery of Products that do not comply with the aforesaid specifications and protocol.
- 11.3 YYY is entitled to enter the premises of XXX at any time during normal agricultural business hours to inspect the Production of Products and the compliance with the quality specifications. XXX hereby consents to such inspections.

12 DEMURRAGE AND DEAD FREIGHT

- 12.1 YYY will use the most recent schedule with volume/quantity estimates provided by XXX three weeks prior to the date of sailing of each vessel for the purposes of making freight bookings.
- 12.2 If the volume delivered by XXX is different from the volume used for the freight booking as in clause 12.1, then YYY shall use its best endeavours to minimise any demurrage and/or dead freight costs.
- 12.3 If demurrage and/or dead freight costs are incurred notwithstanding the provisions of clause 12.2, XXX shall be responsible for any such demurrage and/or dead freight costs.
- 12.4 Notwithstanding the provisions of clause 12.3, it is recorded that YYY shall attempt to contract with the carrier of the Citrus products or such other entity responsible for transporting the Citrus products ("carrier") to oblige the carrier to assume responsibility for demurrage and/or dead freight costs arising from certain circumstances such as Acts of God or natural disasters.

13 OBLIGATIONS OF YYY

- 13.1 YYY undertakes to furnish XXX with reports in respect of market trends as regular as practically possible.
- 13.2 YYY will make all arrangements for cooling and logistical handling, after delivery of the Citrus products to YYY has taken place, to place the Citrus products in the Foreign Market.
- 13.3 YYY will take all steps reasonably necessary to limit the period between delivery of the Citrus products to YYY and shipment of the Citrus products to the Foreign Market and in this regard YYY undertakes to effect shipment of the Citrus products within the periods as stipulated by the Department's protocol.
- 13.4 YYY will provide all other services and take all steps reasonably necessary, to sell, promote and distribute the Citrus products within a reasonable period, being 14 days after arrival of the Citrus products in the country of destination, except if agreed otherwise with XXX.

14 DUMPING OF PRODUCTS

If all or some of the Citrus products are not accepted by any overseas authority and/or the Citrus products are for whatever reason not sold, YYY shall be entitled to have such Products dumped/destroyed as prescribed by the relevant authorities of the overseas destination. The cost of the aforesaid dumping shall be for XXX's account if it results from latent defects to the Citrus products, and/or because of chemical treatment and/or residues of agricultural, chemical or other substances in or on the Citrus products as applied by or on behalf of XXX prior to delivery of the Citrus products to YYY. The cost of the dumping shall however be for YYY's

account if it results from negligence of any party in the trade chain after delivery to YYYhas taken place.

15 **COST AND COMMISSION**

- 15.1 All costs and disbursements, including any statutory charges and taxes, if applicable, without exception, incurred in respect of the Citrus products prior to delivery thereof to YYYhas taken place at the Pack House, shall be for the account of XXX and paid directly by XXX to the service provider concerned, unless otherwise agreed to in writing. If for any reason whatsoever YYYincurs on behalf of XXX any of the aforementioned costs and disbursements, YYYshall be entitled to deduct any such costs and disbursements together with the expenses mentioned in clause 15.2 below, from all proceeds of the Citrus products which is due to XXX in terms of this Agreement.
- 15.2 From the time of delivery of the Citrus products to YYY, all costs payable to third parties will be paid by YYYon behalf of XXX. YYYis entitled to deduct its total expenditure from all proceeds of the Citrus products which is due to XXX in terms of this Agreement.
- 15.3 YYYis entitled to retain 6% of the Free On Board ("**FOB**") value of the Citrus products sold in the Foreign Market as remuneration for the services which YYYrenders in terms of this Agreement to XXX, provided that if any other export agent shall have a claim for remuneration or commission in respect of the same Products in question, the total percentage payable to Thudana shall be reduced proportionately, with the intent that if there are for example, third parties which have such claims which amount to a total of 6%, YYYshall have no claim for remuneration in respect of the same Products in question. The aforesaid remuneration will be converted to South African currency at the Spot Rate on the date of vessel departure for Products loaded on a specific vessel and payment to XXX shall be due 10 business days after the date on which YYYreceives in its South African bank account the proceeds of the Citrus products sold.
- 15.4 YYYundertakes to pay to XXX in respect of Products destined for Foreign Markets, an advance of R45.00 per carton, and which amount may be adjusted from time to time by YYY, dependent on market prospects. This advance is not a firm or minimum guaranteed price. The amount advanced to XXX in terms hereof shall be paid in South African currency and shall be paid within 7 days after date of departure from the last South African port, of the vessel transporting the Citrus products.
- 15.5 XXX hereby cedes, transfers and makes over to YYYin security all its right, title and interest in and to the following—
- 15.5.1 its entitlement to all proceeds of the Citrus products which is due to XXX in terms of this Agreement;

- 15.5.2 its entitlement to all proceeds credited to Customer Foreign Currency accounts held by YYY on behalf of XXX at a South African bank;
- 15.5.3 its entitlement to claims against insurers in terms of insurance contracts concluded by YYY on its behalf in terms of this Agreement, and
- YYY hereby accepts the said cession.
- 15.6 The cession referred to in clause 15.5 is a cession in securitatem debiti and shall always be limited to the amount of the advance referred to in clause 15.4.
- 15.7 XXX undertakes and warrants that it has not ceded and will not cede, except to the extent referred to in clause 15.5, its right to the proceeds of the Citrus products which is due to XXX in terms of this Agreement, and the proceeds and claims referred to in clauses 15.5.2 and 15.5.3 to any third party. If XXX is in breach of this undertaking and warranty and should any cession of the aforesaid rights be granted by XXX, then this cession shall be applicable to all XXX's reversionary rights in respect of the rights ceded by XXX.
- 15.8 XXX herewith irrevocable authorises YYY, in its capacity as cessionary, to collect from the purchasers of the Citrus products and/or any bank account to which payments made by such purchasers in respect of the Citrus products may have been made and/or the institutions referred to in clauses 15.5.2 and 15.5.3, an amount up to the amount of the advance referred to in clause 15.4 in its own name.
- 15.9 XXX further consents to YYY ceding its right, title and interest obtained as cessionary in terms of clauses 15.5 and 15.7 to any third party as an out and out cession.
- 15.10 If the final proceeds of the Citrus products payable to XXX in terms of this Agreement being less than the advance, the difference between the actual amount payable to XXX and the advance will be recoverable from XXX. YYY may elect to recover the sum by set-off against any other moneys owing or to be owing to YYY by XXX at any present or future date. If such sums not being settled by set-off or should YYY so elect, the sum shall be payable by XXX to YYY on demand.
- 15.11 YYY will effect final payment of the balance due for Products sold in the Foreign Market within 70 days after receipt of funds from the Purchaser of the Citrus products, unless the Parties agree to hold over the Citrus products until a later stage to obtain a better market price. YYY shall however be entitled to deduct from the payment of the aforesaid balance payment, interest on the advance referred to in clause 15.4, such interest to be calculated at the Prime Rate from date of payment of the advance to date of payment of the said balance.

16 YYYCITRUS BRAND

Insofar as XXX uses a YYY-owned brand in terms of the packing, handling and branding protocol, YYY will procure that YYY grants to XXX for the duration of this Agreement the right to use such brand, thereby enabling XXX to fulfil its obligations in terms of this Agreement. The cost of the right to use the brand is included in the commission stipulated in clause 15. For purposes of this clause YYY-owned brand shall mean any trademark, design, emblem, logo or brand name owned by YYY or which YYY is authorised to use. The use of such YYY brand may only be for marketing, distributing and/or selling XXX's Products by YYY.

17 SPRAYING

XXX shall furnish to YYY, on demand, a full written history of spray and pesticide applications when so requested.

18 TRANSPARENCY

XXX shall have access to all YYY' records relating to the Citrus products

19 TERM/ DURATION

Subject to the early termination of this Agreement pursuant to the provisions of clauses 6.2 and/or 23 below, this Agreement shall commence on the Effective Date and shall remain in force indefinitely.

20 FORCE MAJEURE

20.1 In this Agreement, without in any way limiting the scope thereof, the expression "**force majeure**" includes but is not limited to the application of any statute, regulation or order of a government or any other authoritative power, labour disturbances, disputes and disruptions, strikes, lock-outs, riot, explosion, war, incursion, inability to obtain materials, equipment, supplies, power, fuel or labour, intervention by civil or military authority or any force of nature or any natural disaster.

20.2 If the achievement of any objective or the performance of any obligation by YYY in terms of this Agreement is inhibited or impeded or prevented by force majeure which is beyond the control of YYY, YYY shall be relieved of any duty to achieve that objective or perform that obligation to the extent that, and for as long as, such hindrance or impediment makes the achievement of that objective or performance of that obligation impossible, provided that YYY inhibited or impeded or prevented shall always be obliged to do its utmost to avoid or to overcome such hindrance or impediment and—

20.2.1 shall immediately advise the other Party in writing of the force majeure which has resulted in the hindrance or impediment; and

- 20.2.2 shall pursue the achievement of the objective in question and the performance of the obligation in question as soon as such hindrance or impediment can be avoided or overcome.
- 20.3 If an objective must be achieved or an obligation performed within a limited time in terms of this Agreement, then that time limit shall be extended for the time that force majeure renders such performance or achievement impossible in terms of 20.2.
- 20.4 XXX shall not be entitled to—
- 20.4.1 claim any loss, damages or costs from YYY which is caused by the resultant delay or caused by the failure of YYY, because such force majeure, comply with its obligations; and
- 20.4.2 benefit in any way from any such delay at the expense of YYY.

21 GENERAL WARRANTIES

- 21.1 Each of the Parties hereby warrants to and in favour of the others that –
- 21.1.1 it has the legal capacity and has taken all necessary corporate action required to empower and authorise it to enter into this Agreement;
- 21.1.2 this Agreement constitutes an agreement valid and binding on it and enforceable against it in accordance with its terms;
- 21.1.3 the execution of this Agreement and the performance of its obligations hereunder does not and shall not –
- 21.1.3.1 contravene any law or regulation to which that Party is subject;
- 21.1.3.2 contravene any provision of that Party's constitutional documents; or
- 21.1.3.3 conflict with or constitute a breach of any of the provisions of any other agreement, obligation, restriction or undertaking which is binding on it; and
- 21.1.4 to the best of its knowledge and belief, it is not aware of the existence of any fact or circumstance that may impair its ability to comply with all of its obligations in terms of this Agreement;
- 21.1.5 it is entering into this Agreement as principal (and not as agent or in any other capacity);
- 21.1.6 the natural person who signs and executes this Agreement on its behalf is validly and duly authorised to do so;
- 21.1.7 no other party is acting as a fiduciary for it; and

- 21.1.8 it is not relying upon any statement or representation by or on behalf of any other Party, except those expressly set forth in this Agreement.
- 21.2 Each of the representations and warranties given by the Parties in terms of clause 21.1 shall –
- 21.2.1 be a separate warranty and will in no way be limited or restricted by inference from the terms of any other warranty or by any other words in this Agreement;
- 21.2.2 continue and remain in force notwithstanding the completion of any or all the transactions contemplated in this Agreement; and
- 21.2.3 *prima facie* be deemed to be material and to be a material representation inducing the other Parties to enter into this Agreement.

22 PUBLICITY

- 22.1 Subject to clause 22.3, each Party undertakes to keep confidential and not to disclose to any third party, save as may be required in law (including by the rules of any recognised securities exchange, where applicable) or permitted in terms of this Agreement, the nature, content or existence of this Agreement and all information given by a Party to the other Parties (or any of them) pursuant to this Agreement.
- 22.2 No announcements of any nature whatsoever will be made by or on behalf of a Party relating to this Agreement without the prior written consent of the other Parties, save for any announcement or other statement required to be made in terms of the provisions of any law or by the rules of any recognised securities exchange, in which event the Party obliged to make such statement will first consult with the other Parties to enable the Parties in good faith to attempt to agree the content of such announcement, which (unless agreed) must go no further than is required in terms of such law or rules. This will not apply to a Party wishing to respond to any of the other Parties which has made an announcement of some nature in breach of this clause 22.
- 22.3 This clause 22 shall not apply to any disclosure made by a Party to its professional advisors or consultants, if they have agreed to the same confidentiality undertakings, or to any judicial or arbitral tribunal or officer, in connection with any matter relating to this Agreement or arising out of it.

23 BREACH

- 23.1 If a Party ("**Defaulting Party**") commits any breach of this Agreement and fails to remedy such breach within 10 business days ("**Notice Period**") of receipt of written notice requiring the breach to be remedied, then the Party giving the notice ("**Aggrieved Party**") will be entitled, at its option –

- 23.1.1 to claim immediate specific performance of any of the Defaulting Party's obligations under this Agreement, with or without claiming damages, if such obligation has fallen due for performance, and to require the Defaulting Party to provide security to the satisfaction of the Aggrieved Party for the Defaulting Party's obligations; or
- 23.1.2 to cancel this Agreement, with or without claiming damages, in which case written notice of the cancellation shall be given to the Defaulting Party, and the cancellation shall take effect on the giving of the notice. None of the Parties shall be entitled to cancel this Agreement unless the breach is a material breach. A breach will be deemed to be a material breach if —
- 23.1.2.1 it is capable of being remedied, but is not so remedied within the Notice Period; or
- 23.1.2.2 it is incapable of being remedied or is not remedied within the Notice Period, and payment in money will compensate for such breach but such payment is not made within the Notice Period.
- 23.2 The Parties agree that any costs awarded will be recoverable on an attorney-and-own-client scale unless the Court specifically determines that such scale shall not apply, in which event the costs will be recoverable in accordance with the High Court tariff, determined on an attorney-and-client scale.
- 23.3 The Aggrieved Party's remedies in terms of this clause 23 are without prejudice to any other remedies to which the Aggrieved Party may be entitled in law.

24 **DISPUTE RESOLUTION**

- 24.1 If there being any dispute or difference between the Parties arising out of this Agreement (including but not limited to any dispute or difference as to the validity or otherwise of this Agreement, or as to the enforceability of this Agreement), the said dispute or difference shall on written demand by any Party be submitted to arbitration in Port Elizabeth in accordance with the AFSA rules, which arbitration shall be administered by AFSA.
- 24.2 Should AFSA, as an institution, not be operating at that time or not be accepting requests for arbitration for any reason, or should AFSA refuse to accept the particular request for arbitration for whatever reason, then the arbitration shall be conducted in accordance with the AFSA rules for commercial arbitration (as last applied by AFSA) before an arbitrator appointed by agreement between the Parties to the dispute or failing agreement within 10 business days of the demand for arbitration, then any party to the dispute shall be entitled to forthwith call upon the chairperson of the Port Elizabeth Bar Council to nominate the arbitrator, provided that the person so nominated shall be an advocate of not less than 20 years' standing as such. The person so nominated shall be the duly appointed arbitrator in respect of the dispute. If the attorneys of the Parties to the dispute failing to agree on any matter relating to the administration of the arbitration, such matter shall be referred to

and decided by the arbitrator whose decision shall be final and binding on the Parties to the dispute.

- 24.3 Any party to the arbitration may appeal the decision of the arbitrator or arbitrators in terms of the AFSA rules for commercial arbitration.
- 24.4 Nothing herein contained shall be deemed to prevent or prohibit a party to the arbitration from applying to the appropriate court for urgent relief or for judgment in relation to a liquidated claim.
- 24.5 Any arbitration in terms of this clause 24 (including any appeal proceedings) shall be conducted *in camera* and the Parties shall treat as confidential details of the dispute submitted to arbitration, the conduct of the arbitration proceedings and the outcome of the arbitration.
- 24.6 This clause 24 will continue to be binding on the Parties notwithstanding any termination or cancellation of this Agreement.
- 24.7 The Parties declare that it is their intention that this clause 24 will regulate the way they will resolve any dispute or difference regarding the validity or otherwise of this Agreement, although one of the Parties may dispute the validity or enforceability of this Agreement.
- 24.8 The Parties agree that the written demand by a party to the dispute in terms of clause 24.1 that the dispute or difference be submitted to arbitration, is to be deemed to be a legal process for interrupting extinctive prescription in terms of the Prescription Act, 1969.

25 NOTICES AND DOMICILIA

- 25.1 The Parties select as their respective *domicilia citandi et executandi* the following physical addresses, and for the purposes of giving or sending any notice provided for or required under this Agreement, the said physical addresses as well as the following email addresses —

provided that a Party may change its *domicilium* to another physical address in the Republic of South Africa (provided that such physical address is not a post office box or *poste restante*), or may change its address for the purposes of notices to any other physical address or email address by written notice to the other Party to that effect. Such change of address will be effective 5 business days after receipt of the notice of the change.

- 25.2 All notices to be given in terms of this Agreement will be given in writing and will —
- 25.2.1 be delivered by hand or sent by email;
- 25.2.2 if delivered by hand during business hours, be presumed to have been received on the date of delivery. Any notice delivered after business hours or on a day which is not a

business day will be presumed to have been received on the following business day;
and

25.2.3 if sent by email during business hours, be presumed to have been received on the date of successful transmission of the email. Any email sent after business hours or on a day which is not a business day will be presumed to have been received on the following business day.

25.3 Notwithstanding the above, any notice given in writing, and received by the Party to whom the notice is addressed, will be deemed to have been properly given and received, notwithstanding that such notice has not been given in accordance with this clause 25.

26 **BENEFIT OF THIS AGREEMENT**

This Agreement will also be for the benefit of and be binding upon the successors in title and permitted assigns of the Parties or any of them.

27 **APPLICABLE LAW AND JURISDICTION**

This Agreement will in all respects be governed by and construed under the laws of the Republic of South Africa.

28 **GENERAL**

28.1 **Whole Agreement**

28.1.1 This Agreement constitutes the whole of this Agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated in this Agreement shall be binding on any of the Parties.

28.1.2 This Agreement supersedes and replaces all agreements between the Parties (and other persons, as may be applicable) and undertakings given to or on behalf of the Parties (and other persons, as may be applicable) in relation to the subject matter hereof.

28.2 **Variations to be in Writing**

No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties.

28.3 **No Indulgences**

No latitude, extension of time or other indulgence which may be given or allowed by any Party to the other in respect of the performance of any obligation hereunder, and no delay

or forbearance in the enforcement of any right of any Party arising from this Agreement and no single or partial exercise of any right by any Party under this Agreement, shall in any circumstances be construed to be an implied consent or election by that Party or operate as a waiver or a novation of or otherwise affect any of its rights in terms of or arising from this Agreement or estop or preclude it from enforcing at any time and without notice, strict and punctual compliance with each and every provision or term hereof. Failure or delay on the part of any Party in exercising any right, power or privilege under this Agreement will not constitute or be deemed to be a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

28.4 No Waiver or Suspension of Rights

No waiver, suspension or postponement by any Party of any right arising out of or in connection with this Agreement shall be of any force or effect unless in writing and signed by such Party. Any such waiver, suspension or postponement will be effective only in the specific instance and for the purpose given.

28.5 Provisions Severable

All provisions and the various clauses of this Agreement are, notwithstanding the manner in which they have been grouped together or linked grammatically, severable from each other. Any provision or clause of this Agreement which is or becomes unenforceable in any jurisdiction, whether due to voidness, invalidity, illegality, unlawfulness or for any other reason whatever, shall, in such jurisdiction only and only to the extent that it is so unenforceable, be treated as *pro non scripto* and the remaining provisions and clauses 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.

28.6 Continuing Effectiveness of Certain Provisions

The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.

28.7 No Assignment

Neither this Agreement nor any part, share or interest herein nor any rights or obligations hereunder may be ceded, delegated or assigned by any Party without the prior signed written consent of the other Party, save as otherwise provided herein.

28.8 Exclusion of Electronic Signature

The reference in clauses 28.2, 28.4 and 28.7 to writing signed by a Party shall, notwithstanding anything to the contrary in this Agreement, be read and construed as excluding any form of electronic signature.

29 COSTS

Except as otherwise specifically provided herein, each Party will bear and pay its own legal costs and expenses of and incidental to the negotiation, drafting, preparation and implementation of this Agreement.

30 SIGNATURE

- 30.1 This Agreement is signed by the Parties on the dates and at the places indicated below.
- 30.2 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.
- 30.3 The persons signing this Agreement in a representative capacity warrant their authority to do so.
- 30.4 The Parties record that it is not required 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 2021

For and on behalf of
XXXPROPRIETARY LIMITED

Signature

Name of Signatory

Designation of Signatory

SIGNED at on 2021

For and on behalf of
**YYYFRUITS SOUTH AFRICA
PROPRIETARY LIMITED**

Signature

Name of Signatory

Designation of Signatory

