

COMMERCIAL LEASE DISPUTE RULES

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THE TRIBUNAL FOR COMMERCIAL PROPERTY

Arbitration Rules – Version 0.3 16.02.2016

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SECTION I: INTRODUCTORY RULES

SCOPE OF APPLICATION AND INTERPRETATION

Introduction

- 1.
- 1.1 The purpose of these Rules is to give effect to the procedure and process of the arbitration and to allow for expedited resolution of disputes and are not aimed to create obstructions to the process of justice and should be interpreted and/or applied with these traits as primary objective and purpose. These Rules do not detract from any provision in the Agreement or Deeds of Suretyship and should be read with provisions relating and referring to these Rules in the Agreement and Deeds of Suretyship.
- 1.2 In the event of any direct and insurmountable conflict between these Rules and the Agreement or Deeds of Suretyship, the terms and conditions contained in the Agreement or Deed of Suretyship, shall prevail however at all times subject to the purpose and/or aims referred in 1.1 above.
- 1.3 The provisions of the Act, 42 of 1965 (“the Act”), are applicable to these Rules, save and insofar as the parties expressly provide otherwise in the arbitration clause and these Rules, and it shall be accepted, that insofar as any of the provisions of the arbitration clause and/or the Rules deviate from the provisions of the Act that the parties have waived any rights accorded in the Act, in that regard.

Definitions

In these Rules:

- 2.
- 2.1 “*Agreement*” means the written lease agreement entered into between the parties containing a referral to arbitration as provided for in these Rules.

- 2.2 “*Arbitrator*” refers to an Arbitrator/s duly appointed in accordance with these Rules by the Chairman.
- 2.3 “*Case Manager*” refers to the person appointed by the Chairman to perform the functions conferred upon him/her by the Chairman and/or under these Rules.
- 2.4 “*Chairman*” refers to the Director and Chairman of Hailo Trading being Honourable Judge W J Van der Merwe, his nominee or his successor.
- 2.5 “*Claim Advisory*” means the form containing information required by the Tribunal to be submitted to the Tribunal by the Claimant as provided for in these Rules.
- 2.6 “*Claimant*” means the party instituting a claim in accordance with these Rules.
- 2.7 “*Contact details*” shall include physical address, electronic mail address, other electronic contact details (if applicable), land line and cellular phone numbers and facsimile number.
- 2.8 “*Costs*” mean costs as defined in Rule 35 hereinafter
- 2.9 “*Day*” means any day, excluding Saturdays, Sundays or any Public Holiday.
- 2.10 “*Deed(s) of Suretyship*” means a written Deed of Suretyship containing a referral to arbitration as provided for in the Rules.
- 2.11 “*Default Awards*” means an Arbitration award in which a Defendant has failed to deliver a statement of defence to a Claimant’s Statement of Case or the Claimant failed to file a Statement of Defence to a Statement of Counterclaim.
- 2.12 “*Defendant*” means the party defending a claim instituted in accordance with these Rules.
- 2.13 “*Dispute*” means any dispute as defined and recorded in the arbitration clause to the Agreement and the arbitration clause in the Deed of Suretyship.
- 2.14 “*Hailo Trading (Pty) Ltd*” means a company duly registered in accordance with the laws of the Republic of South Africa with registration number 2004/178911/07.

- 2.15 “*Landlord*” means a party to the Agreement referred to as a landlord and/or lessor.
- 2.16 “*Lease Premises*” means the premises or lease premises as described in any agreement or document including the Agreement and any Deed of Suretyship.
- 2.17 “*Notice of Claim*” shall mean a document produced and issued by the Tribunal as recorded in these Rules.
- 2.18 “*Regional Case Manager*” refers to the person appointed by the Chairman to perform the functions conferred upon him/her by the Chairman and/or under these Rules.
- 2.19 “*Rules*” mean these Commercial Lease Dispute Rules.
- 2.20 “*Surety*” means a person/s or entity/ies referred to as such in the Deed of Suretyship.
- 2.21 “*Tenant*” means a party/ies referred to as such in the Agreement.
- 2.22 “*Tribunal*” refers to the Tribunal for Commercial Property.
- 2.23 Words importing:
- 2.23.1 any one gender automatically includes reference to the other gender;
- 2.23.2 the singular include the plural and *vice versa*; and
- 2.23.3 natural persons includes juristic person and *vice versa*;
- 2.23.4 the headings are for purposes of convenience and reference only and shall not be used in the interpretation of nor modify nor amplify the terms of these Rules nor any sub-Rule hereunder;
- 2.23.5 if any provision in these Rules are contained as part of the definitions and such provision is a substantive provision imposing rights or obligations on any party to the arbitration, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in these Rules;
- 2.23.6 all references to fees, expenses and rates are VAT exclusive, unless otherwise stated;

2.23.7 should any provision or portion of these Rules be regarded as or found to be unenforceable, unlawful, void or in contravention of any legislation, such Rule or sub-Rule or portion thereof shall be severable and the remaining provisions of these Rules or Sub-Rules shall remain of full force and effect.

2.23.8 the use of the word "including" followed by a specific example/s shall not be construed as limiting the meaning of the general wording preceding it and the *eiusdem generis* rule shall not be applied in the interpretation of such general wording or such specific example/s;

Notice and Calculation of Periods of Time

3.

- 3.1 A notice shall include a notification or communication which may be hand delivered, forwarded by electronic mail and/or facsimile as directed in detail herein below.
- 3.2 A notice is for the purposes of these Rules received by the recipient:
- 3.2.1 if it is physically delivered to the intended recipient;
 - 3.2.2 if it is delivered at the chosen *domicilium citandi et executandi*, place of business or habitual residence of the intended recipient;
 - 3.2.3 if forwarded by electronic mail to the electronic mail address of the intended recipient;
 - 3.2.4 if forwarded to the facsimile number of the intended recipient; or
 - 3.2.5 if delivered as directed by the Arbitrator to the intended recipient.
- 3.3 If, after reasonable efforts, delivery cannot be effected in accordance with Rule 3.2, a notice is deemed to have been received by the intended recipient if it is sent by registered post, or sent by electronic mail to the last known electronic mail address, or any other means that provides a record of delivery or, of attempted delivery.
- 3.4 A notice transmitted by electronic mail or means is deemed to have been received on the day it is sent. Any other means of notice shall be deemed to have been received on the day it is delivered.

- 3.5 The Notice of Claim and Statement of Claim **may not be** transmitted by electronic mail or facsimile to the Defendant, but must be hand delivered at any of the physical addresses stipulated hereinabove while obtaining proof of delivery to the satisfaction of the Arbitrator.
- 3.6 For the purpose of calculating any period of time under these Rules, such period shall begin to run on the next day after the notice is received by the intended recipient, as set out hereinabove. If the last day of such period is an official holiday or a non-business day, the period is extended until the first business day which follows. Official public holidays, occurring during the running of the period of time are excluded in calculating the period.
- 3.7 If the Claimant has elected an electronic mail address for delivery, the Statement of Defence, and any subsequent pleading, notice, correspondence or document may be served by the Defendant by dispatching the Statement of Defence, pleading, notice, correspondence or document to the chosen electronic mail address of the Claimant and *vice versa*.
- 3.8 Any subsequent pleading, notice, correspondence or document may be served or forwarded to the electronic mail address of the intended recipient, unless otherwise directed by the Arbitrator.

Notice of Claim

4.

- 4.1 It is the aim of the Tribunal to facilitate matters on a *“paperless and electronic basis”* unless otherwise directed by the Tribunal in general and/or Arbitrator in the case of any specific matter and for this purpose:
- 4.1.1 Once a Claimant wishes to initiate arbitration proceedings against a Defendant, the Claimant will access the website of the Tribunal at the address: www.tribunalcp.co.za or send an email to disputes@tribunalcp.co.za;
- 4.1.2 The Claimant shall follow the directions and prompts on the website under the icon *“Submit your Claim”* and shall specifically complete the Claim Advisory Form in full and submit same electronically to the Tribunal, alternatively complete and return the Claim Advisory Form sent to the Claimant by email;

- 4.1.3 The Tribunal will thereafter communicate with the Claimant and the Defendant alternatively the Claimant in order to obtain payment of the Arbitrator's initial fee, the calculated facilitation fee and any other applicable costs and expenses;
- 4.1.4 Once full payment of the fees and costs has been made by electronic funds transfer ("EFT"), the Tribunal shall issue to the Claimant a Notice of Claim containing the following:
- 4.1.4.1 the matter number;
 - 4.1.4.2 the details of the Claimant and the Defendant as furnished in the Claim Advisory Form;
 - 4.1.4.3 if an Arbitrator has already been appointed the identity and details of the Arbitrator;
- 4.2 The Claimant shall cause to be delivered in accordance with Rule 3.5 above to the Defendant, the Notice of Claim accompanied by a Statement of Claim, witness statements (factual and expert) and all supporting documentation, as set out hereinafter.
- 4.3 The arbitration proceedings shall commence on the date on which the documents referred to in Rule 4.2 is received by the Defendant. This provision shall not derogate from a party's right to contend for an earlier date with respect to the interruption of any applicable time bar such as prescription;
- 4.4 The Notice of Claim, Statement of Claim, all subsequent pleadings, notices, reports and other documents filed by any of the parties shall be electronically scanned in PDF[®] format and simultaneous with delivery to the other party, be filed on the website under the prompt and icon "Manage my Claim" using the matter number and other security directives applicable alternatively if so directed by the Tribunal, send by electronic mail using the matter number, the electronically scanned PDF[®] formatted documents to disputes@tribunalcp.co.za.
- 4.5 It shall be the obligation of the party submitting documents ("the sender") to ensure that any document scanned shall be in a legible and accessible format. In the event of the recipient being unable to read or electronically access such documents, the recipient shall immediately notify the the other party/ies, the Arbitrator, the Tribunal and the Case manager thereof. The sender shall immediately replace such documents with a "hard copy" to be delivered to the recipient. The sender or recipient not complying with the

aforegoing, in the strictest sense, shall carry the consequences thereof, including but not limited to a cost award (final or interim), in the discretion of the Arbitrator.

- 4.6 Failure to comply with the provisions of Rule 4.4 and 4.5 will not affect the validity of the arbitration process, cause a delay or be grounds for a request for postponement by any party. Provided that the Arbitrator is satisfied that the pleading, notice or document has been properly brought to the attention of all other parties to the arbitration, such notice shall be sufficient and may not cause a delay in any of the time periods, or cause an extension of the time for finalisation of the arbitration.

Statement of Claim

5.

5.1 The Statement of Claim shall include the following particulars:

- 5.1.1 the names, description, addresses and contact details of all parties to the arbitration; and
- 5.1.2 a clear and concise statement of the material facts, in chronological order, on which the Claimant relies, which statement must be sufficiently particular to enable the Defendant or any opposing party to answer to the Statement of Claim; and
- 5.1.3 a clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable the Defendant or any opposing party to answer to the Statement of Claim; and
- 5.1.4 the relief sought; and
- 5.1.5 and be accompanied by a schedule listing the documents and copies of the documents, which documents are material and relevant to the claim

and witness statement(s) (factual and expert) and copies of the listed documents shall be annexed to the schedule; and

5.1.6 proof of delivery of the Notice of Claim, Statement of Claim and related documents; and

5.1.7 the election by the Claimant of an address, either physical or electronic, where any Statement of Defence or other documents shall be received.

5.2 Without limiting the objective and purpose of these Rules, the Statement of Claim shall be signed by the Claimant or its legal representative.

5.3 Save with leave from the Arbitrator, the Claimant shall not be entitled to adduce the evidence of a witness in respect of whom a witness statement has not been furnished to the Defendant and/or all other parties to the Arbitration, as recorded herein.

5.4 The Claimant will be responsible for all pagination of **all** documents filed by it including but not limited to a Statement of Defence to a Counter Claim to be paginated as “C” (reflecting Claimant) starting from page “1” and thereafter consequentially numbered.

Statement of Defence

6.

Within 15 (fifteen) days of receipt of the Statement of Claim, the Defendant shall deliver to the Claimant a Statement of Defence which shall include:

6.1 The full name and contact details, including an electronic mail address, if applicable, of each Defendant; and/or

6.2 The Statement of Defence containing the following:

6.2.1 a clear and concise statement of the material facts, in chronological order, on which the Defendant relies, which statement must be sufficiently particular to enable the Claimant or any other party to answer to the Statement of Defence; and

6.2.2 a clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable the Claimant or any other opposing party to answer to the Statement of Defence; and

6.2.3 the relief sought; and

6.2.4 and be accompanied by a schedule listing the documents and copies of the documents, which documents are material and relevant to the defence and witness statement(s) (factual or expert) and copies of the listed documents shall be annexed to the schedule; and

6.2.5 the election by the Defendant of an address, either physical or electronic, where documents shall be received.

6.3 Without limiting the objective and purpose of these Rules, the Statement of Defence shall be signed by the Defendant or the Defendant's legal representatives.

6.4 Save with leave from the Arbitrator, the Defendant shall not be entitled to adduce the evidence of a witness in respect of whom a witness statement has not been furnished to the Claimant and/or all other parties to the Arbitration, as recorded herein.

6.5 The Defendant will be responsible for all pagination of **all** documents filed by it including but not limited to a Statement of Counter Claim, paginated as "D" (reflecting Defendant) starting with page "1" and thereafter consequentially numbered.

Statement of Counterclaim

7.

If the Defendant serves a Statement of Counterclaim:

7.1 such Statement of Counterclaim shall comply with the same requirements as set out in Rules 5.1.2, 5.1.3, 5.1.4, 5.2 5.3 and 5.4 *supra*;

7.2 the Claimant shall file a Statement of Defence complying with the requirements of Rule 6.2.1, 6.2.2, 6.2.3, 6.2.4, 6.3 and 6.4 *supra* within 15 (fifteen) days after receipt of the Statement of Counterclaim.

Time Barred

8.

8.1 Should the Claimant or Defendant fail to serve a Statement of Defence within the time period stipulated in these Rules, and remain in default to file the Statement of Defence for a period of 3 (three) days after receiving a Notice of Bar from the opposing party, the Claimant or Defendant shall be barred from filing the Statement of Defence, and the arbitration will proceed as provided for hereinafter.

8.2 The Arbitrator may, on good cause shown, uplift the bar, and thereby extend the period for the filing of the Statement of Defence. An application by the Claimant or Defendant to the Arbitrator for the uplifting of the bar shall be made within 5 (five) days after the Claimant or Defendant became time barred to file the Statement of Defence, which application shall be made by way of a Notice of Application, supported by an affidavit setting out the reasons for the failure to have filed the Statement of Defence timeously.

Subsequent pleadings

9.

Any Statement of Replication or subsequent pleading thereafter shall be filed by the party wishing to do so, within 5 (five) days after receipt of the previous pleading. The Arbitrator may, in its sole and exclusive discretion, having regard to the need for a speedy resolution of the disputes between the parties, permit the filing of a subsequent pleading outside the period of 5 (five) days.

Expedited Arbitration

10

The Arbitrator shall be entitled to, at the request of any of the Parties to the Arbitration, to abbreviate or curtail any time period laid down in the Rules, and to conduct the arbitration on an expedited basis, which discretion the Arbitrator shall be entitled to exercise after affording the Parties an opportunity to make representations, either in writing or orally in this regard. The ruling or award made by the Arbitrator in this regard shall be final and binding on the Parties. In exercising the discretion the Arbitrator shall however comply with the requirement that the arbitration shall be conducted in a just

and fair manner to all Parties concerned included but not limited to what is recorded in Rule 1.1 hereinabove.

Representation

11.

Each party may be represented by legal representatives being an admitted attorney and/or advocate. The names, details and addresses of such persons must be communicated to the Arbitrator, all parties, the Tribunal and/or Case manager.

SECTION II: APPOINTMENT OF ARBITRATOR

Appointment of Arbitrator and Venue of Arbitration

12.

- 12.1 Upon or after issuing of the Notice of Claim, alternatively after receipt of the Statement of Claim and the accompanying documents referred to hereinabove, an Arbitrator shall be appointed by either the Tribunal and/or the Chairman, whose decision shall be final and binding on the parties.
- 12.2 Arbitrations shall be heard at venues situated in Johannesburg, Pretoria, Cape Town and Durban.
- 12.3 All arbitrations shall be heard at such venues as determined by the Arbitrator or the Tribunal whose decision shall be final and binding on the parties.
- 12.4 The Tribunal shall appoint and provide an instruction or brief to the Arbitrator. However and if so required by the Rules of the Society of which the Arbitrator is a member, a firm or incorporated company of attorneys shall provide an instruction or brief to the Arbitrator.

Replacement of Arbitrator

13.

Where an Arbitrator has to be replaced during the course of any arbitration proceedings, due to death, illness, or unavailability a substitute Arbitrator shall be appointed by the Chairman, within 5 (five) days from the date of death or withdrawal of the previous Arbitrator. The Chairman may also make an election in the replacement of an Arbitrator in these events which election shall be final and binding on the parties.

Repetition of Hearing in the Event of the Replacement of the Arbitrator

14.

If an Arbitrator is replaced, the proceedings shall resume at the stage where the Arbitrator who was replaced, ceased to perform his/her functions, unless the Chairman after consultation with the parties, decides otherwise. Should any party fail and/or refuse to consult with the Chairman, the Chairman shall direct how the proceedings shall continue. This direction or decision shall be given within 5 (five) days from the date of substitution, which direction or decision shall be final and binding on the parties.

Exclusion of Liability

15.

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the Chairman, the Arbitrator, the Tribunal, Hailo Trading (Pty) Ltd and all their directors and employees or any person appointed by the Arbitrator, based on any act or omission in connection with or relating to the arbitration.

SECTION III: ARBITRAL PROCEEDINGS

General Provisions

16.

16.1 Subject to these Rules, the Arbitrator may conduct the arbitration in such manner, subject to the provisions of these Rules, as he or she considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the

proceedings each party is given a reasonable opportunity of presenting its case. The Arbitrator in exercising his or her discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense to the parties and to provide an expedient, efficient and fair process for resolving the dispute.

- 16.2 Within 5 (five) days of the filing of the Statement of Defence by Defendant or Claimant, alternatively any earlier date as requested by the party or parties, the Arbitrator shall convene a meeting and shall notify the parties of the time and venue of such meeting. The Arbitrator may direct that the meeting be conducted through means of telecommunication that may not require the physical presence of the parties. The Arbitrator, after inviting the parties to express their views, shall establish in his/her sole discretion the timetable for the arbitration, at all times with the aim that the arbitration shall be finalised not later than 12 (twelve) weeks after the appointment of the Arbitrator.
- 16.3 The aforementioned 12 (twelve) week period does not include the making of the final award/s by the Arbitrator, which award, shall be made, as provided for hereinafter, within 10 (ten) days after finalisation of the arbitration.
- 16.4 Should any of the above time periods be exceeded, it will not affect the validity of the arbitration proceedings or the award of the Arbitrator.
- 16.5 On the date of hearing of the arbitration, the Arbitrator shall hear the matter and:
- 16.5.1 if so requested by any party, the Arbitrator shall receive the evidence of witnesses, and if applicable, expert witnesses; and
 - 16.5.2 oral argument.
- 16.6 In the absence of a request by any of the parties to receive evidence, the Arbitrator shall decide whether to receive oral evidence, or whether the proceedings shall be conducted on the basis of the documents as submitted and/or other documentation to be placed before the Arbitrator, or documentation called for and received by the Arbitrator and/or the receiving of argument oral or otherwise.
- 16.7 All communications to the Arbitrator by one party shall be communicated by that party to all other parties in accordance with the method of communication chosen by the respective parties (together with proof of delivery and/or transmission in all instances), or as directed by the Arbitrator, and shall be electronically scanned in PDF[®], send under the matter number indicating the parties and document type to disputes@tribunalcp.co.za.



16.8 The Arbitrator may, at the request of any party, allow one or more third persons or entities to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, or enters into the Arbitration Agreement as provided for in the Rules. The Arbitrator shall give all parties, including the person or persons to be joined, the opportunity to be heard.

16.9 The Arbitrator may make a single award or several awards in respect of all parties so involved in the arbitration.

16.10 The aim of these Rules is that the joinder of any further party or entity may not cause such a delay that the Arbitration will not be finalised within 12 (twelve) weeks from the date of appointment of the Arbitrator.

Language

17.

17.1 All pleadings and witness statements filed by the parties shall be filed in English.

17.2 The aim is that all Arbitration proceedings be conducted in the English language. Should any party at any hearing request an interpreter, such interpreter may be provided as allowed for and/or directed by the Arbitrator at the cost of the party requesting same.

17.3 The Arbitrator may order that any documents annexed to the Statement of Claim or Statement of Defence, and any supplementary documents and all other documents or exhibits submitted in the course of the proceedings, delivered in their original language (other than English), shall be accompanied by a translation into English.

Amendments to the pleadings

18.

18.1 A party wishing to amend any pleading filed in the arbitration, will do so in accordance to the provisions set out hereinafter.

18.2 An amendment to any pleading:



- 18.2.1 shall be given by way of notice by the party wishing to effect the amendment, setting out the full particulars of the proposed amendment;
- 18.2.2 the notice shall be accompanied by any further documentation needed in order to sustain the proposed amended pleading as recorded hereinabove, and shall also be supported by a Witness Statement, if applicable as provided for hereinabove;
- 18.2.3 shall allow a period of 5 (five) days to the other party to lodge an objection, containing the reasons for the objection against the proposed amendment; and
- 18.2.4 if an objection is lodged against the proposed amendment, the Arbitrator shall make an interim award regarding the amendment within 5 (five) days thereafter, after having granted the parties an opportunity to make representations, either in writing or orally, entirely within the discretion of the Arbitrator, which interim award shall be final and binding on the parties.
- 18.3 Should the amendment have the effect that the amount of the claim is increased from the amount originally claimed, and/or any additional relief is claimed, the party/ies shall be liable to pay an additional fee on the amount of the increase or additional relief, in accordance to the fees payable as determined by the Tribunal.
- 18.4 An Amended Claim Advisory form shall be submitted by the Claimant to the Tribunal electronically, or if so directed by electronic mail, setting out the amount by which the claim will be increased, alternatively the nature of the additional relief claimed.
- 18.5 The tribunal will thereafter communicate with the parties, alternatively the Claimant to obtain payment of the additional fees and charges payable. The decision of the Tribunal in this regard shall be final.
- 18.6 Once full payment of the fees and charges have been received, which payment shall be made by electronic funds transfer (“EFT”), the Tribunal shall issue an Amended Notice of Claim, containing the following:
- 18.6.1 The matter number;

18.6.2 Notice to the Arbitrator that all amounts in respect of the proposed amendment have been paid and that he/she may proceed with the arbitration in relation to such amended claim.;

19.7 Acceptance of an Amended Claim Advisory Form, payment in respect thereof and/or the issue of an Amended Notice of Claim by the Tribunal shall be no indication that the Arbitrator will allow any amendment or that any party will be successful in relation thereto.

Extension of Periods of Time

19.

The periods of time laid down in the Rules may be extended by the Arbitrator, upon request by any of the parties, and then for such period as deemed appropriate by the Arbitrator, having reference to Rule 1.1 above, provided that such extension shall be for a maximum period of 20 (twenty) days in total, provided that such extension may not result therein that the arbitration is not finalised within the period of 12 weeks from date of appointment of the Arbitrator.

Interim Awards

20.

20.1 The Arbitrator may, at the request of a party, grant an interim award.

20.2 An interim award is any temporary award by which, at any time prior to the granting of the final award by which the dispute is decided, the Arbitrator makes an award, including but not limited, to:

20.2.1 maintain or restore the *status quo* pending determination of the dispute;

20.2.2 take a step, or refrain from taking a step that would prevent harm or prejudice to the parties to the Arbitration proceedings and/or the arbitration proceedings itself;

20.2.3 preserve assets out of which an award may be satisfied;

- 20.2.4 grant an interim award, similar to the provisions of Section 31 and/or 32 of the Magistrate's Court Act, 32 of 1944.
- 20.2.5 urgently obtaining an inventory of all goods at the Lease Premises for the purpose of securing the Landlord's hypothec over such goods and the granting of an interim award relating to the attachment (i.e., an Order that such goods may not be removed from the Lease Premises);
- 20.2.6 an interim award for the removal of any goods from the Lease Premises by the Sheriff of the Court, after the interim award has been made an Order of Court.
- 20.2.7 to evict any party or person occupying the lease premises and/or claiming occupation of the Lease Premises under or through any other party;
- 20.2.8 preserve any evidence that may be relevant and material to the resolution of the dispute;
- 20.2.9 provide security for in respect of any claim, lien and/or costs;
- 20.2.10 make an interim cost award, which costs the Arbitrator may fix or determine which may include an award that such costs shall be payable immediately;
- 20.2.11 order or interdict any party from taking steps, or refraining from taking such steps, which is likely to cause current or imminent harm to any of the parties to the arbitration proceedings;
- 20.2.12 make any interim award as contemplated in Section 21 of the Act.
- 20.2.13 an interim award in respect of any the dispute/disputes.
- 20.3 Any party requesting an interim award shall satisfy the arbitrator to grant such interim award.
- 20.4 The Arbitrator may modify, suspend or terminate an interim award it has granted, upon application of any of the parties.

- 20.5 The Arbitrator may out of own accord or upon application require the party requesting an interim award to provide security in connection therewith.
- 20.6 Any party in whose favour an interim award has been made shall disclose any material change in the circumstances of the basis on which the interim award was requested or granted, or the Arbitrator may out of own accord and/or upon application, require of any party in whose favour the interim award has been made to disclose whether any material change in the circumstances occurred.
- 20.7 The party requesting an interim award may be liable for any costs and damages caused by the award to any party if the Arbitrator later determines that, in the circumstances then prevailing, the award should not have been granted. The Arbitrator may award such costs and damages at any point during the proceedings, as provided for in these Rules.
- 20.8 Notwithstanding any provision contained in these Rules, any interim award is binding on the parties, and the party against whom the interim award has been made, shall immediately give effect to the interim award, failing which the party in whose favour the interim award has been made, may approach a Court of law to have the interim award made an Order of Court and it is the aim of these Rules that the Court may be approached on an urgent basis.
- 20.9 Any party in whose favour an interim award has been made shall be entitled to immediately approach a Court of law to have the interim award made an order of Court. It is not necessary that the party in whose favour the award is made must await the outcome of the final award or any other award that may be made by the Arbitrator.

Expert Evidence

21.

- 21.1 The Arbitrator or the parties to the arbitration shall be entitled, if applicable in the matter, to adduce the evidence of an expert witness, on issues on which expert evidence is required.
- 21.2 If a party intends to adduce the evidence of an expert witness, such party shall furnish a summary, containing the expert's qualifications, his/her opinion and the full reasons therefore. As an exception to what is stated in Rule 5 and 6 should the Expert Witness Statement not be annexed to the relevant pleading filed by the party wishing to adduce

the expert witness evidence, as referred to hereinabove, such party shall, not later than 10 (ten) days before the arbitration is heard file such a summary. This Rule does not derogate from the obligation to annex a summary of an expert witness to the Statement of Claim or Statement of Defence as referred hereinabove, provided that the Arbitrator may dispose with the requirement in his/her sole discretion alternatively make any other he/she deems fit under the circumstances.

- 21.3 Experts appointed by the parties shall conduct a meeting not later than 5 (five) days before the hearing to curtail or limit the disputes between them and file a minute of such meeting with the Arbitrator and furnish a copy thereof to all parties.

Hearings

22.

- 22.1 The Arbitrator shall proceed with the arbitration within the shortest time as practicable in the circumstances.
- 22.2 The Arbitrator shall give the parties notice of the date, time and place of the hearing.
- 22.3 The Arbitrator shall act in an inquisitorial manner and shall therefore conduct the hearing in accordance to the principles relating to an inquisitorial hearing, which authority of the Arbitrator shall include, but not be limited to:
- 22.3.1 pose questions to any witness or witnesses called by any of the parties;
 - 22.3.2 cause a witness or witnesses to be present and adduce evidence in the hearing;
 - 22.3.3 cause any party or person, who has a document and/or item and/or thing including any document in electronic format, in his/her possession and/or under his/her control, to present and adduce that document and/or item and/or thing at the hearing;
 - 22.3.4 adduce the evidence of any expert witness;
 - 22.3.5 to establish from any of the parties in the arbitration whether certain facts are admitted and should a party refuse to admit a specific allegation or

fact, and the Arbitrator should find that fact or allegation to be proved, to grant a cost order on a punitive scale against the party not willing to make the admission.

- 22.4 Hearings shall be held in camera unless the parties agree otherwise. However, the Chairman or his nominee, and/or the Case manager and/or any director and/or employee of the Tribunal shall be entitled but not obliged to attend any hearing.
- 22.5 The Arbitrator may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, who is a party and/or a representative of a party to the arbitration shall not be asked to retire.
- 22.6 The Arbitrator in his/her sole discretion and/or upon application may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing, such as teleconferencing and/or videoconferencing and/or Skype®.
- 22.7 Any subpoena to secure the attendance of any witness and/or any document and/or item and/or thing to be produced by such witness, shall be caused to be issued and served in accordance to the provisions of the Act by such party seeking the attendance as aforesaid and/or if applicable by the Arbitrator.

Sequence of presentation

23.

- 23.1 The Claimant shall first present its case by:
- 23.1.1 making an opening statement, if so elected by the Claimant; and
 - 23.1.2 adducing its evidence, if applicable.
- 23.2 If evidence is adduced by the Claimant, the Defendant and any other party shall have the right to cross examine any witness called by the Claimant.
- 23.3 After the Defendant has cross examined the Claimant's witnesses, the Arbitrator shall be entitled to pose such questions as may be deemed appropriate by the Arbitrator. Provided that this sub-Rule does not preclude the Arbitrator from posing questions whilst the witness is examined or cross examined.

- 23.4 The Claimant shall thereafter be entitled to re-examine the witness.
- 23.5 The Defendant shall thereafter present its case by:
- 23.5.1 making an opening statement, if so elected by the Defendant; and
 - 23.5.2 adducing its evidence, if applicable.
- 23.6 If evidence is adduced by the Defendant, the Claimant and any other party shall have the right to cross examine any witness called by the Defendant.
- 23.7 The Arbitrator shall thereafter be entitled to pose such questions to the witnesses of the Defendant as deemed appropriate. Provided that this sub-Rule does not preclude the Arbitrator from posing questions whilst the witness is examined or cross examined.
- 23.8 The Defendant shall thereafter be entitled to re-examine the witness.
- 23.9 In the event of any further person or entity being a party to the arbitration such entity or person shall thereafter present its case by:
- 23.9.1 making an opening statement, if so elected by the party; and
 - 23.9.2 adducing its evidence, if applicable.
- 23.10 If such other party/ies adduce evidence, the Claimant and Defendant shall be entitled to cross examine such witnesses.
- 23.11 Thereafter the Arbitrator shall be entitled to pose such questions to the witnesses of any further party as deemed appropriate. Provided that this sub-Rule does not preclude the Arbitrator from posing questions whilst the witness is examined or cross examined.
- 23.12 The other or further party/ies shall thereafter be entitled to re-examine the witness.
- 23.13 After all the parties have presented their cases the Arbitrator shall be entitled to call such witnesses and/or obtain such further documentation, as deemed appropriate by the Arbitrator in his sole discretion.

Experts appointed by the Arbitrator

24.

- 24.1 In addition to the power of the Arbitrator to procure the evidence of any witness, the Arbitrator may appoint one or more independent experts with or without consultation with the parties, to report to him or her, in writing, on specific issues to be determined by the Arbitrator. A copy of the expert's terms of reference, established by the Arbitrator, shall be communicated to the parties.
- 24.2 The expert shall, before accepting the appointment, submit to the Arbitrator and to the parties a description of his or her qualifications. Within the time ordered by the Arbitrator, the parties shall inform the Arbitrator whether they have any objections as to the expert's qualifications, impartiality or independence. The Arbitrator shall decide promptly whether to uphold any such objections which decision shall be final and binding.
- 24.3 The parties shall give the expert any relevant information or produce for his or her inspection or allow access to any relevant documents and/or goods and/or place that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the Arbitrator for decision.
- 24.4 Upon receipt of the expert's report, the Arbitrator shall deliver a copy of the report to the parties, who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.
- 24.5 At the request of any party, made within 10 (ten) days after receiving the report, the expert shall adduce evidence at a hearing where the parties shall have the opportunity to be present and to cross examine the expert. At this hearing, any party may present the evidence of an expert witness/es to testify on any points or issues raised in the expert report procured by the Arbitrator. Before doing so such party shall comply with the requirements relating to the delivery of a summary of the expert evidence to be adduced as set out in Rule 21 and elsewhere herein.

Inspections by Arbitrator

25.

- 25.1 If the Arbitrator finds it necessary out of own accord and/or upon application by any of the party/ies requests the Arbitrator to conduct an inspection the Arbitrator shall notify the parties of the date, time and place of the inspection, and all parties to the Arbitration should they so wish shall be entitled to be present at the inspection. After conducting the inspection the Arbitrator shall prepare a written report, recording the findings made by the Arbitrator during the inspection, and shall forward the report to all parties to the arbitration whether they were present at the inspection or not.
- 25.2 The parties shall be afforded an opportunity of 5 (five) days after receiving the written report of the Arbitrator to comment on the content of the report. Any party commenting on the report shall do so in writing and forward such written comment to the Arbitrator and all other parties to the arbitration.
- 25.3 The findings made by the Arbitrator as recorded in the written report and any comments by any of the parties on the written report, shall be taken into account by the Arbitrator for purposes of making an award in the arbitration.

Onus

26.

- 26.1 Due to the inquisitorial nature of the arbitration proceedings, and save to what is stated herein below the parties do not have a burden of proof in accordance to the applicable principles relating to civil proceedings in a Court of law.
- 26.2 Further due to the inquisitorial nature of the arbitration proceedings the Arbitrator is called upon to determine the disputes in accordance to the principles of fairness and natural justice.
- 26.3 If after exhausting all of the powers accorded to the Arbitrator, the Arbitrator is of the view that he or she cannot make an award in favour of the any of the parties, and in that event only:

26.3.1 The Arbitrator shall make an award equivalent to one of absolution of the instance against the Claimant, if the Claimant “would have had the burden of proof in accordance to the principles applicable to civil litigation in a court of law”;

26.3.2 An award against the Defendant if the Defendant bore the onus of proof to establish a special defence, defence on the merits or counterclaim if the Defendant “would have had the burden of proof in accordance to the principles applicable to civil litigation in a court of law”.

26.4 The foregoing shall apply *mutatis mutandis* to any further party in context.

Hearing: General

27.

27.1 Save as expressly provided for in these Rules the procedures of the civil Court system do not form part of these Rules.

27.2 The Arbitrator in his/her sole discretion shall decide any issues raised by any of the parties relating to procedural and interlocutory matters.

27.3 The Arbitrator shall furthermore be clothed with the same powers as accorded to a Judge of the High Court of the Republic of South Africa.

The Arbitrator shall determine the admissibility, relevance, materiality and the weight of any evidence.

Default Awards

28.

28.1 If, within the period of time determined by the Rules or by the Arbitrator:

28.1.1 the Defendant has failed to serve on the Claimant, any other party and file with the Arbitrator its Statement of Defence, the Arbitrator shall rule that the proceedings shall continue in the absence of the Defendant, however, such ruling shall not mean that the Defendant has admitted the allegations made by the Claimant in the Statement of Claim, but the Arbitrator may, if the claim is for a liquidated amount of money, grant a default award in favour of the Claimant without the Claimant having to prove the allegations made in the Statement of Claim.

28.1.2 should the Claimant fail to serve on the Defendant and any other party to the arbitration, and file with the Arbitrator, its Statement of Defence to the Counterclaim, the provisions of Rule 28.1.1 shall find application, *mutatis mutandis*.

28.2 If a party, duly notified under these Rules, fails to appear at a hearing, the Arbitrator may proceed with the arbitration in the absence of such party.

28.3 If a party is ordered by the Arbitrator to produce documents, exhibits or other evidence, fails to do so within the directed period of time, the Arbitrator may make the award on the evidence before him or her, without such documents, exhibits or evidence.

Closure of Hearings

29.

29.1 When all parties to the arbitration have closed their cases, each party shall have the right to present oral argument to the Arbitrator on the evidence adduced, during which argument submissions shall be made to the Arbitrator regarding the award to be made, which argument shall be adduced in the same sequence of the evidence that was adduced. Notwithstanding the foregoing the Arbitrator may elect in consultation with the parties to received arguments in the form of written Heads of Argument.

29.2 In exceptional circumstances, either upon application of any party, or on its own accord, the Arbitrator may reopen the hearing before the award is made.

SECTION IV: THE AWARD AND FINDINGS

Form and Effect of the Award

30.

- 30.1 The Arbitrator may make separate awards on different issues at different times.
- 30.2 All findings, determinations and awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.
- 30.3 The Arbitrator shall state the reasons upon which the award is based, unless the parties have agreed in writing that no reasons are to be given.
- 30.4 An award shall be signed by the Arbitrator and it shall contain the date on which the award was made and indicate the place of arbitration.
- 30.5 Unless the parties otherwise agree in writing, the Arbitrator shall make his/her award/s as soon as practicable, but in any event within 10 (ten) days after the closure of the hearing/interim hearing.
- 30.6 Unless the parties consent in writing to the contrary, the parties undertake to keep confidential all awards in the arbitration, together with all evidence and documents in the proceedings and all other documents produced by any party in the proceedings not otherwise in the public domain – save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in *bona fide* legal proceedings before a court or other judicial authority.
- 30.7 The signed award shall be delivered by the Arbitrator to the parties and the Tribunal.
- 30.8 The party in whose favour an award is made shall be entitled to immediately approach a Court of law to have the award made an order of Court and it shall not be necessary for such party to await any outstanding award, such as but not limited to, an award on the issue of costs.
- 30.9 The parties to the Arbitration may waive the provision contained in sub-Rule 30.6 only insofar as it pertains to the Arbitration interim of final award and reasons therefore, which waiver shall be in writing.
- 30.10 Due to the private nature of the arbitration the Tribunal shall not be obliged to keep any records of any documents filed or submitted to it after the arbitration award has been made.

Applicable Law and Principles

31.

The applicable law will be the law of the Republic of South Africa and if applicable, the Arbitrator may *inter alia* take into account any trades, customs, norms and/or standards of trade applicable to the agreement and the dispute/s.

Settlement

32.

32.1 If, before the award is made, the parties agree on a settlement of the dispute, the parties shall immediately notify the Arbitrator and the Tribunal in writing, the Arbitrator shall thereafter either issue an award for the termination of the arbitration proceedings or, if requested by the parties and accepted by the Arbitrator, record the settlement in the form of an award on the agreed terms.

32.2 The Arbitrator shall only be entitled to make an award recording the terms of a settlement if such settlement has been reduced to writing and has been signed by or on behalf of all the parties thereto.

32.3 The Arbitrator is not obliged to give reasons for these awards.

Correction of an Award

33.

33.1 Within 5 (five) days after the receipt of an award, a party, with notice to the other parties, may request the Arbitrator to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the Arbitrator determines that the request is justified, he/she shall make the correction within 10 (ten) days of receipt of the request.

33.2 The Arbitrator may within 5 (five) days after the delivery of the award make such corrections on his/her own initiative.

- 33.3 Such corrections shall be in writing, signed by the Arbitrator and shall form part of the award. Such correction to the award shall be delivered by the Arbitrator to the parties and the Tribunal.

Additional Award

- 34.
- 34.1 Within 5 (five) days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the Arbitrator to make an award or an additional award as to claims presented in the arbitration proceedings but not decided by the Arbitrator.

Definition of Costs

- 35.
- 35.1 The term “costs” includes, but is not limited to:
- 35.1.1 the fees of the Arbitrator;
 - 35.1.2 the reasonable travel and other expenses incurred by the Arbitrator;
 - 35.1.3 the fees and disbursements incurred by the legal representatives of the parties to the arbitration on the scale as between attorney and own client;
 - 35.1.4 the reasonable costs and/or expenses to be paid to any witness (expert or otherwise) attending the arbitration; the reasonable costs of expert advice, evidence and of other assistance required by the Arbitrator;
 - 35.1.5 if applicable the fees and disbursements of the firm or incorporated company of attorneys referred to in sub-Rule 12.4 herein above;
 - 35.1.6 if applicable the fees and disbursements of a cost consultant appointed by the Arbitrator or the Tribunal;
 - 35.1.7 any fees and expenses of the Tribunal;

including what is recorded elsewhere in these Rules and/or allowed by the Arbitrator.

Allocation of costs

36.

- 36.1 The Arbitrator shall, as part of the award or thereafter, make an award in respect of the costs.
- 36.2 In exercising his/her discretion, the Arbitrator may take into account such circumstances as he/she considers relevant, including but not limited to the success achieved by each of the parties, and/or the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.
- 36.3 The Arbitrator may forthwith, as part of the award, fix, tax or settle the costs, and shall therefore include in the award, or in a separate award thereafter, an award for the amount of costs to be paid by any party to any other party in the arbitration proceedings on the scale as between attorney and own client. The Arbitrator shall determine the reasonableness of the costs.
- 36.4 If the Arbitrator fix, tax or settle the costs, he/she shall be entitled to employ the services of a cost consultant to assist him/her in determining the amount of such costs. In the event of the Arbitrator employing the services of a cost consultant, the costs thereof shall be costs in the cause subject to the Arbitrator's award as to costs. The election on the identity of any cost consultant shall be at the Arbitrator's sole discretion which if exercised shall be final and binding.
- 36.5 At any time during the arbitration, the Arbitrator may, on application of a party/ies, make an award on costs and if applicable that such cost shall be determined and payable immediately.
- 36.6 The Arbitrator shall, before making an award for costs, afford the parties an opportunity to make submissions to the Arbitrator regarding the award of the costs, and the amount in which it shall be allowed by the Arbitrator.
- 36.7 The Arbitrator and/or cost consultant shall be entitled to obtain such information and/or documents including but not limited to draft Bill of Costs from the parties, as deemed fit by the Arbitrator.

36.8 A party shall give effect to an award made by the Arbitrator on the issue of costs, notwithstanding the fact that it has not been made an order of court. Any party in whose favour an award of costs has been made shall be entitled to have such award made an Order of Court. The award on costs need not be made an Order of Court simultaneously with the award on the merits but the party in whose favour an award is made on costs may do so subsequent to the award on the merits be made an Order of Court.

36.9 The Arbitrator is not obliged to make the award regarding costs simultaneously with the award on the merits (without limiting the enforceability of such award on the merits), but is obliged to do so not later than 30(thirty) days after conclusion of the arbitration.

Interest

37.

Where an award is made in respect of the payment of a sum of money, such sum shall, unless the award otherwise provides, carry interest at the rate as stipulated in the agreement and/or the Deed of Suretyship however if the Lease Agreement and/or Deed of Suretyship is silent then at the rate determined in the Prescribed Rate of Interest Act 55 of 1975 from date of the award.

Fees and Expenses payable by the parties to the Tribunal

38.

38.1 The parties are jointly in equal measure liable for payment of the fees of the Arbitrator, and all expenses incurred in the process of the arbitration.

38.2 The parties shall be liable to pay to the Tribunal a fee as determined by the Tribunal from time to time.

38.3 The Claimant and Defendant shall, upon receipt of an invoice from the Tribunal, each pay one half of the fees and expenses of the Tribunal referred to hereinabove, as well as the anticipated fees of the Arbitrator. The Claimant may elect to pay in full its portion and the Defendant's portion of the fees and expenses referred to hereinabove, and such payment by the Claimant shall form part of the costs in the arbitration.



- 38.4 Only once full payment has been made as provided hereinabove, shall the Tribunal issue a Notice of Claim to the parties.
- 38.5 Should the Defendant fail to pay its one half of the fees and expenses, referred to hereinbefore to the Tribunal, and remain in default for a period of 5 (five) days after receipt of an invoice, the Claimant shall be, if it wants to proceed with the arbitration, be liable to forthwith pay to the Tribunal the other half of the fees and expenses, subject thereto that such portion of the fee and expenses shall form part of the costs in the arbitration proceedings.
- 38.6 Should no Statement of Claim be filed within 30 (thirty) days from the date the Notice of Claim has been issued by the Tribunal, the parties in equal shares, i.e. 10% (ten percent) each alternatively the party who made the full payment of the Arbitration fees and expenses shall forfeit 20% (twenty per centum) of such fees and expenses already paid to the Tribunal, and the Tribunal shall forthwith repay the balance to such party or parties.
- 38.7 If at any time during the arbitration it is anticipated by the Tribunal in its sole discretion that the deposit paid by the party/ies in respect of the Arbitrator's fees and the anticipated expenses to be incurred in the arbitration is not sufficient, the Tribunal in its sole discretion, shall be entitled to require of the party/ies to pay a further deposit and the Arbitration shall not proceed until such time as the further amount has been paid in full. What is stated in terms of any default in 38.5 above will *mutatis mutandis* apply to any party.
- 38.8 In respect of expenses which may be incurred such as the provision of a venue and associated facilities for arbitration, recording and/or transcription facilities, photocopying and the provision of stationery the Tribunal shall determine the availability and cost in relation thereto.

Final account and records

39

- 39.1 Notwithstanding anything contained hereinabove, the award shall not be delivered to the parties until such time as all amounts payable to the Tribunal (including but not limited to the fees payable to the Arbitrator) have been paid in full to the Tribunal.
- 39.2 After a final award has been made (including any award on costs), the Tribunal shall render an account to the parties of the amounts received and return any unexpended balance to the parties in accordance to their *pro rata* payments of such amounts.



Section V: Appeal Procedure

40.

40.1 Where any Agreement provides for the right to take any final award on appeal such appeal:

40.1.1 shall be noted against the award within 15 (fifteen) days after the award was made, failing which such award shall be final;

40.1.2 shall be heard, determined and the award on appeal be made by three appeal arbitrators being senior counsel and/or retired Judges of the High Court of South Africa appointed by the Chairman;

40.1.3 shall be heard as expeditiously as practical under the circumstances (having regard to Rule 1.1) and the Appellant shall file heads of argument dealing with all issues of law and fact at least 20 (twenty) days before the hearing of the appeal and the Respondent must file its heads of arguments at least 10 (ten) days prior to the hearing of the appeal;

40.2 The Appellant shall be responsible for the preparation of a record of appeal and shall:

40.2.1 make such record available to the appeal arbitrators and the other party no later than 30 (thirty) days after the noting of the appeal which record shall contain only that portion of the pleadings and record necessary for the appeal to be adjudicated;

- 40.3 No decision, directive or interim award may be taken on appeal;
- 40.4 All Rules shall mutatis mutandis be applicable to the appeal procedure;
- 40.5 The facilitation fee and the initial Arbitrators fee as set out in the Terms and Conditions must be paid prior to the appointment of the appeal arbitrators;
- 40.6 Any award by the appeal arbitrators shall be final and binding and not subject to any further appeal;
- 40.7 This rule does not create the right to appeal but merely record the procedure should a right to appeal be agreed to in any Agreement.