



SWART

from ip to ipo

Draft – For discussion purposes

Terms of auction and sale

1. Definitions

1.1. In this Agreement the following definitions, as capitalised, shall have the meanings assigned to them:-

1.1.1. "**Agreement**" means the agreement embodied in this document.

1.1.2. "**Auction**" means the Cape Wine Auction event, which is hosted by the Trust.

1.1.3. "**Auctioneer**" means the Trust's nominated auctioneer at the Auction.

1.1.4. "**Bid**" means an offer made by a Bidder to purchase a Lot.

1.1.5. "**Bidder**" means the Trust's counterparty to this Agreement, namely any person or entity that wants to Bid at the Auction.

1.1.6. "**Business Day**" means any day which is not a Saturday, Sunday or official public holiday in the Republic of South Africa.

1.1.7. "**Buyer's Premium**" means a premium added to the sale price of a Lot by agreement with the Bidder.

1.1.8. "**Catalogue**" means a catalogue setting out the details of the Lots to be sold at the Auction, which may include the terms and conditions associated with the purchase of such lot.

1.1.9. "**Lot**" means a lot of goods and/or services offered up for auction at the Auction.

1.1.10. "**Parties**" means the Trust and the Bidder and "**Party**" refers to any one of them as the context may indicate.

1.1.11. "**Prime Rate**" means the publicly-quoted prime overdraft rate charged by Absa Bank Limited from time to time, calculated daily and

compounded monthly, and in the event of a dispute arising between the Parties as to the aforesaid rate of interest, a certificate issued by any branch manager of the said bank confirming the rate shall be evidence of such rate until proven otherwise (i.e. *prima facie* proof).

1.1.12. "**Purchase Price**" means the price finally accepted by the Auctioneer in respect of a Lot, plus the Buyer's Premium, the Recoverable Expenses and value-added tax on all of the aforesaid to the extent the latter is applicable.

1.1.13. "**Purchaser**" means in relation to a Lot, the Bidder whose Bid is ultimately accepted by the Auctioneer.

1.1.14. "**Recoverable Expenses**" means the Auctioneer's commission, packing, handling and freight charges, as well as insurance costs, if any.

1.1.15. "**Reserve Price**" means in relation to a Lot, the confidential reserve price which is the minimum price payable for that Lot to be sold at the Auction.

1.1.16. "**Seller**" means the seller of any Lot.

1.1.17. "**Signature Date**" means the date of signature by the last Party in time to do so.

1.1.18. "**Trust**" means the Cape Wine Auction Trust, a trust duly incorporated in terms of the laws of the Republic of South Africa under registration number IT000532/2014.

2. Auction

2.1. The terms and conditions set out in this Agreement govern the Bidder's participation at the Auction.

2.2. If the Bidder does not accept the terms and conditions of this Agreement in full, the Bidder may not participate in the Auction.

2.3. **The Bidder's attention is drawn to the terms in bold, as such terms could limit the Bidder's**

D Swart & Associates Incorporated t/a Swart Attorneys (Reg. No. 2003/021176/21)

D9 Octo Place, 5 Elektron Road, Techno Park, Stellenbosch | P.O. Box 12266, Die Boord, 7613, Docex 22, Stellenbosch

Office: +27 21 880 5160 | Facsimile: +27 21 880 2807

Director: Dérick Swart Attorneys: Stuart Gardiner | Liézal Mostert | Renéé Olmstead | Steven Stuart-Steer

Financial manager: Nadia Truter

rights or place obligations on it that should be noted.

3. Sale of Lots at Auction

- 3.1. At the Auction, the Auctioneer acts as the agent of the Trust and shall auction the Lots.
- 3.2. Only Bidders that have registered in accordance with the prevailing requirements of the Trust shall be permitted to Bid on a Lot.
- 3.3. Neither the Auctioneer nor the Trust shall directly or indirectly Bid on a Lot.
- 3.4. A Bid may be retracted by a Bidder any time before it is accepted by the Auctioneer by the fall of the hammer or in another customary manner, provided that such retraction is clearly and unequivocally brought to the attention of the Auctioneer.
- 3.5. Where a Reserve Price applies, the Auctioneer shall inform Bidders of the fact (without disclosing the amount of the Reserve Price) immediately before the Lot is put to auction and the Auctioneer shall not sell the Lot unless the Reserve Price is met.
- 3.6. Lots are sold by the highest Bid (subject to a Bid equal or greater to the Reserve Price being made, if applicable), whether the Bid be equal to the real value of the Lot or not.
- 3.7. Upon the Auctioneer accepting a Bidder's offer in the aforesaid manner, a contract of sale shall become binding between the Seller and the Purchaser in respect of the Lot. Such contract of sale shall be in accordance with the terms of this Agreement and any other terms and conditions pertaining to the Lot, as may be communicated in the Catalogue or otherwise.
- 3.8. The risk in and to Lots shall pass to the Purchaser immediately upon the Auctioneer accepting its Bid in respect of that Lot.

4. Lots

- 4.1. The Auctioneer may withdraw or split up a Lot at any time before a final Bid is accepted in respect thereof.
- 4.2. It is the responsibility of the Bidder to appraise itself of the terms and conditions that may be applicable to a Lot, as set out in the Catalogue or otherwise communicated.

- 4.3. In the event that a Lot that has been sold to the Bidder is unavailable for delivery, the Trust shall endeavour to find a replacement that is acceptable to the Bidder, failing which the Trust shall be entitled to unilaterally rescind the sale of the Lot and refund the Bidder any amounts paid, should the Bidder so demand in writing.
- 4.4. **All Lots sold at the Auction are as between the Trust and the Bidder sold on a voetstoets ("as is") basis and the Trust makes no representation or warranty in respect thereof. Without limiting the foregoing, the statements made by or on behalf of the Trust or Auctioneer in respect of Lots are mere statements of opinion and the Bidder agrees to examine and appraise itself of the Lot without reliance on the foregoing statements of opinion.**

5. Catalogue

- 5.1. The Trust reserves the right to withdraw any Lot at any time prior to the sale of that Lot without prior notice.
- 5.2. The Trust reserves the right to amend the Catalogue at any time prior to the sale of a Lot, provided that the Auctioneer shall announce such amendments prior to the Lot being auctioned.

6. Absentee Bids

- 6.1. A person (hereafter "**Bidding Agent**") may apply to the Trust in the prescribed manner to Bid on behalf of another person (i.e. "**Bidder**") not in attendance at the Auction (hereafter "**Absentee Bid**").
- 6.2. The Bidding Agent shall be jointly and severally liable with the Bidder (i.e. the principal) to the Trust for compliance with the terms of this Agreement and specifically to honour the Bid.
- 6.3. Notwithstanding the provisions of clause 6.1, the Trust and Auctioneer reserve the right to reject any Absentee Bid in their sole discretion.
- 6.4. In the event that someone purports to represent another without having sought and obtained the approval set out in clause 6.1, such person shall be personally liable for compliance with the terms of this Agreement and specifically to honour the Bid.

7. Telephone Bids

- 7.1. Provided that advance notice of such bid has been provided to the Trust in writing at least 24 (twenty-four) hours before the Auction and the Bidder has agreed to this Agreement to the satisfaction of the Trust, a Bid by way of telephone (hereafter "**Telephone Bid**") shall be allowed at the Auction.
- 7.2. Each Telephone Bid shall be subject to the availability of a fully functional and operative telecommunication line and the person so bidding accepting the terms and conditions of this Agreement and being registered in accordance with the prevailing requirements of the Trust.
- 7.3. **Any Bidder wishing to Bid by way of Telephone Bid consents to the Trust recording such Telephone Bid.**
- 7.4. Notwithstanding the provisions of this clause 7, the Trust and Auctioneer reserve the right to reject any Telephone Bid in their sole discretion.

8. Disputes as to Bids

- 8.1. The Auctioneer, acting as expert and not as arbitrator, shall be entitled to summarily rule in his or her sole and unfettered discretion on any dispute or uncertainty pertaining to any Bids during the continuance of the Auction.
- 8.2. Without limiting the immediately preceding clause, the Auctioneer shall be entitled to accept a different Bid as the winning Bid, resubmit a Lot to auction and/or divide a Lot into smaller lots for Auction.

9. Payment and delivery

- 9.1. The Purchase Price becomes payable immediately by a Bidder upon the Auctioneer accepting its Bid and shall be paid in full no later than 14 (fourteen) days after receipt by the Bidder of an invoice issued by the Trust.
- 9.2. Ownership of all Lots are reserved to the Trust and/or Seller until paid for in full by the Purchaser.
- 9.3. The Purchaser shall make payment by credit card or electronic funds transfer into the following bank account of the Trust:

Name of account: The Cape Wine Auction Trust

Name of bank: Nedbank

Branch code: 198 765

Account number: 114 896 4762

Swift code: NEDSZAJJ

- 9.4. Payment shall be deemed to have been made when the Trust's aforesaid nominated bank account is credited with the funds.

10. Breach

- 10.1. In the event that the Bidder breaches any of the terms of this Agreement and fails to remedy such breach within 7 (seven) days written notice by or on behalf of the Trust, the Trust shall be entitled without prejudice to any other rights or remedies which the Trust may have in law or otherwise (including the right to claim damages) to sue for the immediate specific performance of any obligations under this Agreement or to cancel this Agreement, which cancellation shall take effect on the giving of the notice of cancellation.
- 10.2. **The Purchaser of a Lot hereby grants a lien and pledge over any Lots purchased by the Bidder as covering security for its due compliance with the terms of this Agreement.**
- 10.3. Any amounts that are overdue by the Bidder shall attract interest at the Prime Rate plus 8 (eight) percent, calculated daily and capitalised monthly. If the foregoing rate exceed the maximum permitted by applicable law, then such maximum shall apply.

11. Limitation of liability

- 11.1. **While care is taken in the preparation of the Catalogue, the Trust, Auctioneer and their executives, staff and agents shall not be liable for any claim, cost, expense, damage, injury or other adverse consequence (hereafter collectively "Adverse Consequences") arising from the Catalogue not being accurate.** Without limiting the foregoing, the Trust shall not be liable for any inaccuracy in the description of the Lots in respect of the origin, rarity, age, genuineness, quantity, aging potential, present and future quality or condition.
- 11.2. **To the maximum extent permitted by applicable law, the Trust, Auctioneer and their executives, staff and agents shall not be liable to the Bidder for any Adverse Consequences whatsoever, inclusive of any direct or indirect, consequential, punitive or special damages.**

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11.3. **To the maximum extent permitted by applicable law, the Trust, Auctioneer and their executives, staff and agents shall not be liable to the Bidder or its principal (should the Bidder act on behalf of a principal) for any errors, omissions or any other Adverse Consequences whatsoever arising from any Absentee Bid or Telephone Bid.**

12. Indemnity

12.1. **The Bidder agrees to indemnify the Trust, Auctioneer and their executives, staff and agents against any Adverse Consequences that may arise from the Bidder's participation in the Auction, the determination of any disputes by the Auctioneer or breach of the terms of this Agreement.**

13. Notices and address for services

13.1. The Parties choose as their address for service and/or receipt of notices (i.e. *domicilia citandi et executandi*) for all purposes under this Agreement, whether in respect of court process, notices or other documents or communications of whatsoever nature, the addresses set forth in this Agreement, provided that any notice or communication required or permitted to be given in terms of this Agreement shall be valid and effective only if in writing and delivered to the relevant Party's physical address or email address (hereafter each a "**Notice Address**").

13.2. Any Party may by notice in writing to any other change its Notice Address, provided that in respect of its physical address, such address should be in the Republic of South Africa and not a forwarding address. The change shall become effective on the 7th (seventh) Business Day from the deemed receipt of the notice in accordance with clause 13.3.

13.3. Unless the contrary is proved by a recipient, any notice to a Party to a Notice Address on Business Days:

13.3.1. delivered by hand to a responsible person at its physical address shall be deemed to have been received on the day of delivery; or

13.3.2. sent by email shall be deemed to have been received on the date the message left the sender's email system, as may be optionally evidenced by a delivery or read receipt emanating from the recipient's email system.

13.4. In the event a facsimile or email notice to a Party is delivered later than 17h00 in the recipient's time zone, delivery shall be deemed to have taken place on the next Business Day.

13.5. Notwithstanding anything to the contrary, a written notice or communication actually received by a Party's nominated reference or functionary in this Agreement shall be an adequate written notice or communication to it, notwithstanding that it was not sent to or delivered at a Notice Address.

14. Interpretation

14.1. In the event of conflict between the terms of this Agreement and the terms and conditions of a Lot, the terms of this Agreement shall apply to the extent of such conflict.

14.2. Any reference to an enactment is to that enactment as at the Signature Date and as amended or re-enacted from time to time.

14.3. When any number of days is prescribed in this Agreement, it shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a day which is not a Business Day, in which case the last day shall be the following Business Day.

14.4. Where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail.

14.5. The rule of interpretation that the contract shall be interpreted against the Party responsible for the drafting and preparation thereof (the *contra proferentem* rule) shall not apply.

14.6. Unless the context shows otherwise, a clause which includes a specific example or examples shall not be construed as limiting the meaning of the general wording preceding it (i.e. the application of the *eiusdem generis* rule of interpretation is excluded).

14.7. The termination or expiry of this Agreement shall not affect those provisions which expressly provide that they will continue to operate after such termination or expiry, or those provisions which of necessity must continue to have effect after such termination or expiry, even where those clauses do not expressly provide for this.

14.8. In the event that any right or remedy is expressly stated to be available to any of the Parties in

particular circumstances, such right or remedy shall be available without prejudice to or limitation of any other right or remedy that may be available to that Party in such circumstances, unless the contrary is expressly stated.

15.8. **Signature in separate counterparts.** This Agreement may be executed in separate counterparts which, together shall constitute one and the same Agreement as at the Signature Date.

15. General

- 15.1. **Applicable law.** This Agreement shall be governed by and construed and interpreted in accordance with the laws of the Republic of South Africa. Unless and to the extent expressly agreed otherwise in this Agreement, the Parties agree that the High Court of South Africa, Western Cape Division, shall have exclusive jurisdiction to hear any disputes that may arise from this Agreement.
- 15.2. **Independent advice.** Each of the Parties acknowledges that it has been free to secure independent legal advice and that it has either taken such independent legal advice or dispensed with the necessity of doing so at its own risk.
- 15.3. **Whole Agreement.** This Agreement constitutes the whole agreement between the Parties as to the subject matter hereof. None of the Parties shall have any claim or right of action arising from any undertaking, representation or warranty not included in this Agreement.
- 15.4. **Variation.** No addition, change, supersession or cancellation of this Agreement, nor any waiver of any right arising from this Agreement, shall be of any force or effect unless reduced to writing and signed by the Parties with a wet ink signature.
- 15.5. **Relaxation.** No failure or delay on the part of any Party to enforce its rights shall in any circumstances be construed as a consent, election, limitation or waiver of rights by such Party.
- 15.6. **Cost of legal services.** Should any Party instruct attorneys to take any steps to enforce any rights in terms of this Agreement arising from a breach thereof, then the breaching Party shall be liable for all legal and incidental costs, including legal fees on the attorney and own client scale, collection commission and tracing charges.
- 15.7. **Authority to sign.** The person signing this Agreement on behalf of any one of the Parties expressly warrants his or her authority to do so. The signature of witnesses is not a precondition to the validity of this Agreement.

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