

## LEGAL OPINION

**TO: PHILIP SWANEPOEL LEGAL PRACTITIONERS**  
**ATTENTION: MR PHILIP SWANEPOEL**  
**DATE: 8 APRIL 2021**  
**RE: RIGHTS OF CONSULTING ENGINEERS IN RESPECT OF  
CONSULTING FEES CHARGED FOR TRAVELLING TIME,  
STANDING TIME & LOAD-BEARING BRICKWORK**

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### LEGAL QUESTION

1. The question is whether consulting engineers (professional engineers and incorporated engineers) are entitled, in terms of legislation, to charge the Ministry of Works and Transport consulting fees in respect of: (i) travelling time and/or standing time; and (ii) load-bearing brickwork.

### BACKGROUND

2. Consulting engineers historically charged - and were paid - consulting fees for travelling time and standing time as well as certain fees on load-bearing brickwork.
3. On 25 November 2019 the Ministry of Works and Transport (hereinafter referred to as “the MWT”), by way of the Executive Director, issued a Directive<sup>1</sup> essentially informing all consulting engineers contracted by the MWT that, pending further notice, no claims for “*waiting/standing and/or reserve time*” will be accepted and paid

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<sup>1</sup> Consultants Directive No. MWT 01.2019/2020 date stamped 25 November 2019

for by the MWT. A copy of said Directive is attached hereto for instructing counsel's ease of reference.

4. During or about this time (November 2019) consultants were further informed that the MWT will also not accept and consider claims for fees in respect of load-bearing brickwork.
5. On 20 October 2020 the Association of Consulting Engineers of Namibia (ACEN) addressed a letter to the Executive Director of the MTW requesting clarification of the Ministry's apparent refusal to accept fees charged on load-bearing brickwork. A copy of said letter is also annexed hereto for ease of reference.
6. From the content of my brief it seems that ACEN did not receive the courtesy of a reply to their letter dated 20 October 2020 from the MWT.

#### **APPLICABLE LEGISLATION**

7. The engineering profession in Namibia is regulated by the Engineering Profession Act, Act 18 of 1986 (the Act).
8. Section 7 of the Act provides as follows:

*"7(3) The Minister may, on recommendation of the council, by regulation –*

*(a) prescribe the tariff of consulting fees according to which a professional engineer or incorporated engineer, as the case may be, may calculate the amount chargeable by him in respect of the rendering by him of professional consulting services; and*

*(b) prescribe the kinds of work in connection with projects, undertakings or services of an engineering nature which shall be reserved for professional engineers.*

*(4) Before any regulation is made under subsection (3), a notice setting forth the contemplated determination shall be published by the Minister in the*

*Government Gazette together with a notice intimating that it is being considered to make such determination under this section within a stated period, but not less than four weeks as from the date of said publication, and inviting interested persons to submit any objections to or representations concerning the contemplated determination: Provided that if the Minister thereafter determines on any alteration in the determination published as aforesaid, as a result of any objections or representations submitted in respect thereof, it shall not be necessary to publish such alteration before finally making the regulation under this section.*

- (5) *Regulations made under subsection (3)(b) may provide for the exclusion therefrom of work done under specified circumstances or for specified purposes or by or for specified persons or classes of persons or within or outside specified areas or classes of areas.”*

[own underlining]

9. Section 22 of the Act further provides:

“22. *The Minister may, after consultation with the council, make regulations not inconsistent with this Act –*

(a) *concerning matters which are in terms of this Act required or permitted to be prescribed by regulation;*

(b) ...

(h) *generally concerning all matters that it deems necessary or expedient to prescribe by regulation in order to achieve the objectives of this Act.”*

10. Since the promulgation of the Act during 1987 the following regulations on the tariffs of consulting fees were published by Government Notice by the legislature: 1993 - GN24/1993; 1998 - GN14/1998; 2002 - GN157/2002; 2006 - GN49/2006; 2006 – GN199/2006; 2007 - GN205/2007; 2008 - GN265/2008; 2010 - GN 42/2010; 2012 - GN 206/2012 and 2013GN239/2013.

11. It appears that only the 1993 regulation (GN24/1993) actually provides a list of specific services that may be charged for.
12. In terms of the 1993 regulations regarding the tariff of consulting fees for professional engineers or incorporated engineers regulation 3.2.3 and 3.3.5 provides –

*“3.2.3 COSTS OF THE ENGINEERING WORKS*

*3.2.3.1 For the purpose of calculating the total fee referred to in these regulations, the cost of the engineering works, or any part thereof, shall be the cost of the works designed, specified or administered by the professional engineer or incorporated engineer, and shall include –*

*3.2.3.1.1 ...*

*3.2.3.1.6 all concrete, reinforcing steel, structural steelwork, timber, aluminum and any other structural material shown on the engineer’s drawings and for which he is responsible;*

*3.2.3.1.7 ...*

*3.2.3.1.8 brickwork designed and detailed by the professional engineer or incorporated engineer and for which he or she is responsible;”*

[own underlining]

AND

*“3.3.5 TRAVELLING TIME*

*An amount, at the rate provided for in regulation 3.3.4, may be charged for*

*time spent by the professional engineer or incorporated engineer and members of his or her staff in travelling during normal working hours, with a maximum of eight hours per day, provided that if the professional engineer's or incorporated engineer's fees are calculated on a percentage of the value of the works, and the journey to and from the engineer's place of practice does not exceed 50km, the professional engineer or incorporated engineer and members of his or her staff shall not be reimbursed for time spent in travelling, but all travelling further than 50 km shall be subject to a time charge as provided for in regulation 3.3.4."*

### **TRAVELLING TIME**

13. The Merriam-Webster dictionary defines "travelling time" as "*a usually specified period of time spent in travelling at work or from the entrance of a business establishment to the place where work is actually done for which compensation may be demanded or paid*"

### **OPINION**

14. The words used in the legislation in question is unambiguous and plain and should be given its ordinary meaning. I therefore consider it unnecessary, for purposes of this opinion, to provide consultant with an exposition on the law of interpretation of legislation.
15. From the above definition of travelling time and the actual wording of the regulations quoted above I have no doubt whatsoever that the regulations as published in Government Notice 24/1993 provides for both travelling time and/or waiting time and fees on load-bearing brickwork to be charged.
16. Professional and incorporated engineers are entitled, by law, to charge the MWT consulting fees on both travelling and/or waiting time and designed and detailed brickwork.
17. The purported decision taken and/or directive issued by the MWT cannot be classified as a regulation in terms of section 7(3) of the Act of 1986 as there was,

firstly, no recommendation made to the Minister by the Engineering Council of Namibia and secondly, no official regulations published by the Minister in the *Government Gazette* as prescribed by the Act.

18. Moreover, interested parties and industry role-players were not afforded any opportunity whatsoever to submit objections or make representations concerning the unilateral and arbitrary imposed rule and/or directive.
19. I pause to emphasize the fact that section 7(4) of the Act is peremptory in that it states that “*a notice setting forth the contemplated determination shall be published by the Minister in the Gazette ...*”.
20. I am of the opinion that the unilateral decision of the MWT disallowing travelling and/or waiting fees and fees on brickwork is of no force and effect and is *ultra vires* the powers of the Executive Director.

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a series of vertical, wavy lines that resemble the letters 'J', 'B', and 'S'.

**AJB SMALL**