

## LEGAL OPINION

**TO: THEUNISSEN, LOUW & PARTNERS**  
**ATTENTION: MR PETRUS STRAUSS**  
**DATE: 27 MARCH 2023**  
**RE: RIGHTS OF CONSULTING ENGINEERS IN RESPECT OF CERTAIN ISSUES RAISED BY THE ASSOCIATION OF CONSULTING ENGINEERS OF NAMIBIA (ACEN)**

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### INTRODUCTION:

1. My instructions are to opine on the following specific issues raised by the Association of Consulting Engineers of Namibia (ACEN):
  - 1.1 What the position of consulting engineers (professional engineers and incorporated engineers) are in respect of fees charged to the Ministry of Works and Transport (hereinafter referred to as “the MWT”) specifically for “travelling time”;
  - 1.2 The legality and enforceability of the MWT’s various Directives with specific reference to the information and documentation required by the Department of Works to be attached to the invoices of consulting engineers when same is submitted; and
  - 1.3 ACEN members’ concern in respect of the MWT’s demand / insistence that consultants submit DWG copies of drawings and design files in so-called soft format.

**A. TRAVELLING TIME**

2. I previously provided consultant (during April 2021) with a legal opinion on the rights of consulting engineers in respect of fees charged for travelling time, standing time and load-bearing brickwork. A copy of said opinion is attached under cover hereof for easy reference.
3. In terms of the afore-mentioned opinion I advised that the decision of the MWT to disallow or limit travelling time and/or waiting time fees is of no force and effect and is *ultra vires* the powers of the Executive Director because -
  - 3.1 the regulations as published (Government Notice 24/1993) specifically provides for both travelling time and/or waiting time to be charged;
  - 3.2 the Directive issued by the MWT cannot be classified as a regulation in terms of section 7(3) of the Engineering Profession Act, Act 18 of 1986 (hereinafter referred to as "the Act") 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; and
  - 3.3 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.

**B. LEGALITY AND ENFORCEMENT OF MWT DIRECTIVES**

4. A Directive issued by the MWT is not in itself law and for that reason enforceable *per se*.
5. Any Directive that purports to affect the existing rights of consulting engineers, such rights being pertinently provided for and/or stipulated in the Act (or regulations promulgated under the Act), can in my opinion only be of legal force if it is published by the Minister in the Government Gazette on recommendation of the Engineering

Council of Namibia as per sections section 7 and/or 22 of the Act.

6. In terms of its letter dated 2 June 2022 and addressed to ACEN the MWT (in making reference to a previous Directive (NO. 01/2020/2021)) stated the following under subparagraph 4.4.6 thereof –

*“Item 6 as per said Directive is herewith quoted, for your convenience and as a response to our most recent request for documents to be submitted together with fee invoices:*

- *“One original plus three copies*
- *Copy the appointment letter/award letter/contract*
- *Copy of revised appointment letter (if any)*
- *Copy of financial proposal approved by the Public Entity*
- *Copy of the previous paid Fee Invoice*
- *Copy of proof/appropriate disbursements*
- *Copy of the approved travelling time*
- *Practical Completion certificate (for claims at the end of supervision stage)*
- *Completion certificate (for final claims)*
- *Final Account summary page for the QSs signed by all Parties (for final stage)*
- *Proof of submission of As-built Drawings in hard and soft copies (DWG, PDF)*  
*(Architects and Engineers only)*
- *Copy of the extract from the Bills and Quantities for the work*
- *Proof of approval of drawings and BOQ for work done*
- *Copy of the latest Payment Certificate and Cost Report for the projects on site*
- *Copy of MWT authorization letter for additional/supplementary services*
- *Copy of relevant time sheets from the office*
- *Proper Calculations of professional fees and disbursements*
- *Each discipline should only claim fees and disbursements based on their actual work done*
- *Proof of submission of soft copies of drawings, estimates and BOQ in DWG, WINQS, PDF and EXCEL*
- *Soft copy of every fee account shall be mailed to the Chief of the respective discipline*
- *Copy of attendance register of the site visit(s)*
- *Consultant shall claim travel time for only one person per discipline, unless written prior approval was granted by MWT*
- *Maximum travelling time per day shall remain at 8 hours until further notice”*

[own underlining]

7. Sub-paragraph 4.4.7 further states –

*“The above Directive from the Ministry is crystal clear about documents required “to enable the Ministry to check bidding documents, BOQ, drawings, fee claims etc.”, yet your Association still requires this Ministry to issue a list of documents required for submission with fee invoices. It is prudent that your Association informs this Ministry what exactly it is that is not understood by your members in this regard.”*

8. Consultant’s argument is that most of the information (documentation) requested by the Department of Works to be attached to a consultant’s fee invoice are documents issued by the MWT itself and the Ministry should in any case have the documentation readily available.

9. If one has regard to the prevailing instances of corruption and dishonesty in our society one must accept that the MWT is surely entitled to regulate the procedure when it comes to the supporting documentation required from consultants when fee invoices are submitted.

10. That said, the complete list of supporting documentation required by the MWT as referred to in paragraph 6 above is however, in my view, excessive, unnecessary and arduous – especially those items I have, from my limited knowledge of the profession, underlined. If one accepts that the Ministry already has most of the requested documentation in their possession and on their records I consider it unreasonable for the Ministry to expect the delivery of such documentation with every fee invoice submitted.

11. From a reading of the various correspondence exchanged between the MWT and ACEN in this regard it seems that there is no solution yet regarding the issue of the list of supporting documents required to be submitted with every fee invoice.

12. It appears that ACEN’s repeated engagements with the MWT in this respect does not bear the desired result and the issues remain unresolved.

13. In a last ditch effort to amicably resolve the issue ACEN can attempt to engage the Engineering Council of Namibia in terms of section 7(1)(m) and (n) and/or section 22(h) of the Act for their assistance to possibly mediate between the parties. I have doubts however whether this approach will work.
14. If ACEN is serious and wants to put the proverbial foot down, the only legal remedy available is, in my view, the judicial review of the ministry's decision. This will obviously involve legal action and its associated costs. It will also be time consuming. If this course of action is considered I advise that a further and detailed consultation first be held.

### **C. DWG COPIES OF DRAWINGS AND DESIGN FILES IN SOFT COPY**

15. Copyright applies also to works (including drawings and designs) created in the engineering context. It exists automatically and does not need to be specially registered. Although a copyright notice is sometimes attached/applied to a work, this does not impart copyright to the work *per se*.
16. As the word copyright suggests, **copyright** serves to prevent the **copying** of original work.
17. I will not, in this opinion, elaborate further on the ins and outs of copyright law save to say that copyright infringement can be difficult to prove.
18. What is clear is that the MWT demands that consultants submit DWG copies of drawings and design files to them in soft copy.
19. In terms of their letter of 2 June 2022 (referred to in paragraph 6 above) the MWT persists with this demand and states the following with reference to their earlier 'REMINDER CIRCULAR TO ALL CONSULTANTS NO. 01/2020/2021' –

#### **“4.4.3 ETHICS**

##### *Item 2 Ethics ...*

*“- This Ministry has noted ...*

- *Some Consulting Firms are refusing to submit all project information in requested formats (DWG, WINQS, EXCEL, PDF) when requested by MWT. This is of great concern and we request your professional cooperation.*
- *All data, factual information, drawings, design and documents prepared by the consultant and paid for by the Government of the Republic of Namibia becomes property of the Ministry of Works and Transport.*
- *The Consultant agreed that copyright of all data, factual information, drawings, designs, engineer's manual, final accounts and documents prepared by the Consultant and paid for by the Government of the Republic of Namibia shall be ceded to the Ministry of Works and Transport in requested formats."*

20. As mentioned above, a Directive issued by the MWT is not in itself law and therefore enforceable.
21. Having considered the provisions of the Act, the regulations under the Act, available Government Gazettes and other legislation I cannot find anything that would suggest and/or support the Ministry's contention that "*data, factual information, drawings, design and documents prepared by the Consultant*" would be the property of the Government of the Republic of Namibia.
22. From the copy of the standard 'CLIENT/CONSULTANT AGREEMENT' supplied there is also nothing to suggest that there is any agreement that the copyright of data, factual information, drawings, designs, etc. as prepared by a consultant and paid for by the Government of the Republic of Namibia shall be ceded to the MWT.

## **CONCLUSION**

23. In light of the above I am of the opinion that the delivery of the requested drawings and design files in hard copy is sufficient.
24. I was unable, after a diligent search, to find any regulation published in the Government Gazette to contradict my opinion above. If there is any regulation specifically regulating the copyright of engineers working for the Government that

consultant knows of I will appreciate to be supplied with a copy thereof as such a regulation might influence my opinion above.

25. Should consultant wish to discuss any aspect of this opinion, please do not hesitate to contact me.

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a series of vertical, wavy lines.

**AJB SMALL**

**NAMLEX CHAMBERS**