
"Allegations of Failure or Undue Delay by the Department of Arts and Culture (DAC) to implement the Settlement Agreement signed in terms of section 6(4)(a) and (b) of the Public Protector Act, between South African Roadies Association (SARA) and Department of Arts and Culture (DAC)"

REPORT ON AN INVESTIGATION INTO AN ALLEGED FAILURE OR UNDUE DELAY BY THE DEPARTMENT OF ARTS AND CULTURE TO IMPLEMENT THE SETTLEMENT AGREEMENT SIGNED IN TERMS OF SECTION 6(4) (a) and (b) OF THE PUBLIC PROTECTOR ACT 23 OF 1994.
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Executive Summary

(i) This is a report of the Public Protector issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act, 1994. This report relates to an investigation into the alleged failure or undue delay by the Department of Arts and Culture (DAC) to implement the Settlement Agreement signed in terms of section 7(4) (a) and (b) of the Public Protector Act 23 of 1994. The complaint was lodged with the Public Protector by South African Roadies Association (SARA) following the lack of implementation by DAC of the Settlement Agreement signed on 01 April 2014.

(ii) The Complainant is SARA duly represented by its president, Mr Freddie Nyathela.

(iii) In the main, the complaint was that the DAC failed or unduly delayed to implement the Settlement Agreement signed between DAC and SARA in terms of section 7(4) (a) and (b) of the Public Protector Act 23 of 1994 on 01 April 2014.

(iv) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the Department improperly failed or unduly delayed in implementing the Settlement Agreement signed between SARA and DAC on 01 April 2014.

(b) Whether the Department improperly failed to fund or render financial assistance to SARA on the following issues despite SARA being fully compliant with DAC funding policies:

(i) Assistance to SARA by DAC to strengthen its international relations.

(ii) SARA’s request to DAC for funding of its operational and administrative costs.
(c) Whether the Department unduly funded operational and administrative costs of the three (3) orchestras namely Cape Town Philharmonic Orchestra, Cape Town Jazz Orchestra and KwaZulu Natal Philharmonic Orchestra and unfairly discriminated against SARA.

(d) Whether the Department improperly failed to acknowledge receipt and respond to correspondences from SARA?

(e) Whether the Complainant was prejudiced by the conduct of the Department in the circumstances.

(v) The investigation was conducted in terms of section 182 of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, 1994, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level. In order to resolve the matter amicably the matter was resolved through Alternative Dispute Resolution (ADR).

(vi) Key laws and policies taken into account to determine if there had been maladministration by the Department and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the Department or its officials when processing this complaint. Those are the following:

a. Section 2(1) (a) and (b) of Culture Promotions Act 35 of 1983 which provides amongst other things that the Minister may in order to foster culture in the Republic, acquire, develop and maintain movable and immovable property,
award bursaries and make grants for the undertaking of study tours to foreign countries, subsidise or finance a chair in a university, an association, a programme or a project in any other country having as its object the making known of the culture of the Republic.

b. Section 2 of Cultural Institutions Act 119 of 1998 which provides for the payment of subsidies to declared institutions by the Minister of Arts and Culture.

c. Section 9 and 10 of the Skills Development Act 97 of 1998 which provides for the establishment of Sector Education and Training Authorities (SETA) and its functions, which involves the allocation of grants in the prescribed manner to employers, education and training providers and workers.

d. DAC's Infrastructure Policy (drafted in April 2016) which provides for the funding criteria of non DAC institutions.


f. Section 9(3) of the Constitution which provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

g. Section 25 and 26 of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which places the duty and responsibility on the state and its officials to promote equality in the spheres of their operation.
h. Section 2 of Broad Based Black Economic Empowerment of 2003 which provides for the promotion of economic transformation in order to enable a meaningful participation of black people in the economy and achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises.

(vii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Whether the Department improperly failed or unduly delayed in implementing the Settlement Agreement signed between SARA and DAC on 01 April 2014;

(aa) The allegation that the Department improperly failed or unduly delayed to implement the settlement agreement is substantiated.

(bb) The Department of Arts and Culture failed to implement a Settlement Agreement entered into between SARA and it, dated 01 April 2014 which was facilitated by the Deputy Public Protector, Advocate KS Malunga.

(cc) DAC’s failure to implement the Settlement Agreement was in violation of Clause 4.1.9 of the Settlement Agreement which provides that DAC shall submit to the Public Protector a detailed implementation plan with regard to the intervention of the IDT and other bodies and its proposal regarding assisting with the removal of health, safety and security risks uncovered at SARA House by close of business on Tuesday 15 April 2014.

(dd) DAC’s failure in this regard constitutes improper conduct and maladministration as contemplated in Section 182(1)(a) of the Constitution of the Republic of South Africa and in section 6 (4) (a) (v) of the Public Protector Act 23 of 1994.
(b) Whether the Department improperly failed to fund or render financial assistance to SARA on the following issues despite SARA being fully compliant with DAC’s funding policies:

(l) Assistance to SARA by DAC to strengthen its international relations;

(aa) The allegation that the Department improperly failed to render its support to SARA of the international interactions is not substantiated.

(bb) Indications in terms of available evidence are that DAC has fulfilled its obligations and full support of international interactions proposals over a cycle of three years has been provided to SARA. According to SARA’S comprehensive financial statement for the year ending on 31 December 2015, an accumulated fund of R4, 686,487 is reflected. A contract has also been concluded and funds transferred in accordance with the contract.

(cc) The Public Protector accordingly could not find any improper conduct, undue delay or maladministration on the part of the Department in relation to the funding and assistance to SARA to strengthen its international relations.

(ii) SARA’s request to DAC for funding of its operational and administrative costs.
(aa) The allegation that the Department improperly failed to fund operational and administrative costs of SARA while other similar organisation were granted the same support is substantiated.

(bb) In terms of the DAC’s Implementation of an Agreement Settlement Report, dated 2016-10-14 to the Public Protector, DAC indicated that it would not grant funding in this regard given the prevailing rules and statutes in the Public Service. The Department has in fact acknowledged that there has been some inconsistency in the approach with regard to the funding provided to a number of stakeholders. There is no policy informing the funding model in this regard and as a result other organisations have been receiving this kind of funding (for operations) while others such as SARA have been excluded from this support. The absence of a policy document regulating this grant and the discretionary mandate derived from Culture Promotions Act of 1983 result in some inconsistencies in the approach to funding these type of costs.

(cc) The Public Protector accordingly finds that there is no proper alignment on this funding model and that the exercise of such discretion has been unfairly exercised in the case of SARA.

(dd) The Public Protector also could not find the evidence of the proper application of Section 2 of Broad Based Black Economic Empowerment of 2003 which provides for the promotion of economic transformation in order to enable meaningful participation of black people in the economy and achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises in this regard.

(ee) The conduct of DAC in this regard was improper and constitutes maladministration as contemplated in section 182(1)(a) of the Constitution of
the Republic of South Africa and in section 6(4)(a)(v) of the Public Protector Act 23 of 1994.

(c) Whether the Department unduly funded operational and administrative costs of the three (3) orchestras namely (Cape Town Philharmonic Orchestra, Cape Town Jazz Orchestra and KwaZulu Natal Philharmonic Orchestra) and unfairly discriminated against SARA.

(aa) The allegation that the Department improperly funded operational and administrative costs of three (3) orchestras while on the other side failing and denying SARA similar funding is substantiated.

(bb) In terms of the available evidence the funding of the three (3) designated orchestras is a legacy of decision taken after a White Paper on Arts, Culture and Heritage of 1996. The direct funding to orchestras was documented in the 2003 Estimates of National Expenditure published by National Treasury and approved by Parliament.

(cc) However, Public Protector finds that the White Paper on Arts, Culture and Heritage of 1996, unfairly discriminates against SARA in that it makes specific provision for funding of both operational and administrative costs to orchestras whilst SARA is only funded for administrative costs.

(dd) The Public Protector accordingly finds improper conduct and maladministration as contemplated in terms of section 182(1)(a) of the Constitution of the Republic of South Africa and in section 6(4)(a)(v) of the Public Protector Act 23 of 1994 on the part of the Department in relation to funding of the three named orchestras, in as far as such provision makes specific arrangement to benefit certain institutions while excluding others who
are still within the same set up of promotion of culture and social cohesion in South Africa.

(d) Whether the Department improperly failed to acknowledge receipt and respond to correspondences from SARA.

(aa) The allegation that the Department improperly failed to acknowledge receipt and respond to correspondences from SARA is not substantiated.

(bb) In terms of the available evidence, the Department has notably been more responsive to SARA's voluminous communications. There is constant update and reports from DAC to SARA, Office of the Public Protector and to the Parliamentary Portfolio Committee on Arts and Culture about this case on a regular basis. The Office of the Public Protector has also been conveying regular feedback to SARA from DAC about this matter through emails, meetings and telephone calls.

(cc) The Public Protector accordingly could not find any improper conduct on the part of the Department in relation to acknowledging receipt and responding to correspondences from SARA.

(e) Whether the Complainant was prejudiced by the conduct of the Department in the circumstances.

(aa) Based on the above findings the Public Protector finds that the Complainant (SARA) was prejudiced by the conduct of the Department (DAC) with regard to Paragraph (a) of the above, which is renovate SARA House in terms of the Settlement Agreement. Had the Department acted properly, SARA would have been able to conduct its business of training the South African youth in Live
Events and Technical Skills Production in an environment and in a building that is not exposed to safety, health, occupational and security risks.

(bb) The Public Protector also finds that SARA and its learners were prejudiced by the conduct of the Department (DAC) with regard to Paragraph (b) (ii) of the above, which is to deny SARA the funding for operational and administrative costs. Had the Department acted properly, SARA would have enabled SARA to set up satellite training centres in all nine provinces in the country, maintain its facilities, devices, equipment, components and to service other related operational resources required for its training needs.

(cc) The Public Protector further finds that SARA was prejudiced by the conduct of the Department (DAC) with regard to Paragraph (c) of the above by unfairly discriminating against SARA while orchestras are funded for both operational and administrative costs on an annual basis (by way of a ring fenced budget) through special arrangements as provided for in the White Paper on Arts, Culture and Heritage of 1996.

(i) The appropriate remedial actions that the Public Protector is taking in the light of the above evidence and findings as contemplated in section 182(1)(c) of the Constitution are the following:

(aa) The Settlement Agreement concluded between SARA and DAC, in accordance with section 6(4) (a) and (b) of the Public Protector Act, 1994 (Act No. 23 of 1994, constitutes remedial action of the Public Protector.

With Regard to the Renovation of SARA House:

(bb) The Director-General of Department of Arts and Culture (DAC)
a) DAC must provide funding for the renovation of SARA House in the amount of R15 000 000.00 (Fifteen million rand) as per Settlement Agreement.

b) The grant amount of R15 000 000.00, as allocated to SARA for renovation is a huge amount which cannot be transferred to a private entity, considering that SARA does not have capacity to implement the renovation of this magnitude.

c) In order to ensure that Public Funds are spent appropriately and for the purpose it is intended for, DAC must appoint Development Bank of Southern Africa (DBSA), as a Government infrastructure implementing agent, to implement and manage the renovation at SARA house.

d) The funding of R15 000 000.00 (Fifteen Million Rand) allocated by DAC for renovations of SARA House must paid directly to the Development Bank of Southern Africa (DBSA) within thirty (30) days of signing of the implementation agreement between DAC and DBSA.

e) Development Bank of Southern Africa must be paid 10% of the grant amount by DAC, being the management fees for management of the renovations at SARA House.

With regard to the funding of operational and administrative costs of SARA:

(cc) The Minister of Department of Arts and Culture (DAC)
a) The Minister must amend the White Paper on Arts, Culture and Heritage of 1996, within three (3) months of this report to ensure that SARA is not unfairly discriminated against when it comes to the allocation of operational and administrative costs.

b) DAC must further ensure that within three (3) months of receipt of this report, a written policy informing this type of funding is developed for future and put in place to align the criteria that should be followed in this funding model. The Public Protector issues this remedial action against the backdrop of inconsistencies in DAC's approach towards funding of administrative and operational costs. This should help this funding model to be more coherent and consistent in its approach.
REPORT ON AN INVESTIGATION INTO ALLEGED FAILURE/OR UNDUE DELAY BY THE DEPARTMENT OF ARTS AND CULTURE TO IMPLEMENT THE SETTLEMENT AGREEMENT SIGNED IN TERMS OF SECTION 6(4) (a) AND (b) OF THE PUBLIC PROTECTOR ACT 23 OF 1994.

1. INTRODUCTION

1.1. This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation:

1.2.1. The Honourable Minister of the Department of Arts and Culture;

1.2.2. The Acting Director General of the Department of Arts and Culture and

1.2.3. A copy of the report is also provided to South African Roadies Association, the Complainant.

1.3. The report relates to an investigation into the alleged failure or undue delay by the Department of Arts and Culture (DAC) to implement the Settlement Agreement signed on 01 April 2014 between DAC and SARA under the auspices of Public Protector, South Africa.
2. THE COMPLAINT

2.1 The Complainant is South African Roadies Association (SARA) duly represented by its president Mr Freddie Nyathela.

2.2 In the main, the complaint was that the DAC failed or unduly delayed to implement the Settlement Agreement signed between DAC and SARA in terms of section 6(4) (a) and (b) of the Public Protector Act 23 of 1994 on 01 April 2014.

2.3 The clauses of the said Settlement Agreement may be summarised in the following numeric order as agreed by the parties thereto:

2.4 "That SARA shall submit its request for funding of its projects to DAC in the form of a proposal and with requisite supporting documentation. The DAC shall consider such request based on the departmental policies, prescripts and budget allowable. Should SARA request for funding be successful, the DAC shall consider funding for a three (3) year functional cycle based on the principles of Mzansi Golden Economy (MGE). The parties shall upon successful application by SARA, enter into a Memorandum of Understanding regulating the funding relationship. DAC agrees that it shall take no longer than thirty (30) days to consider and respond to SARA'S aforementioned proposal.

2.5 The parties agree that the Department shall in keeping with its existing agreement with the Industrial Development Trust facilitate a process to evaluate the needs of SARA in regard to the structural renovation of SARA house. DAC shall request IDT to do an assessment of SARA House with a view of establishing the cost related to the renovation of SARA House.

2.6 The DAC shall consistent with clause 4.1.9 below immediately consider and intervene to remedy the health, safe and security risks uncovered at SARA house.
2.7 That SARA and DAC shall deploy and see to it that sufficient personnel, oversight and resources are set aside by DAC to see to it that this Agreement is adequately supported in order to implement the objectives hereunder including respective obligations, warranties and representations respectively.

2.8 That SARA shall continue to seek funding from other prospective Funding Agencies.

2.9 That DAC and SARA commit to a continuous and a harmonious relationship in ensuring that SARA’s vision and mission as a training organisation servicing the technical and production sectors is enhanced, facilitated and supported.

2.10 That in good faith and to the best of its ability, the DAC shall, facilitate SARA’s application for funding of renovating its building to other Funding Agencies. Such facilitation shall be to the extent possible by the DAC and shall be for a period not longer than one (1) year.

2.11 That the parties may, notwithstanding any other rights in law, take the matters arising from any breach and not remedied 14 days after written notification by one party to the other concerning the breach, to the PPSA or any other forum of their respective choices.

2.12 The DAC shall submit to PPSA a detailed implementation plan in regard to the intervention of it and other bodies and its proposal regarding assisting with the removal of health, safety and security risks uncovered at SARA House by close of business on Tuesday 15 April 2014.

2.13 That the parties accept and acknowledge that, notwithstanding anything to the contrary contained herein, the PPSA may at any time for any breach hereunder exercise its right in terms of section 6(4) (c) (ii) which provides that the Public Protector is competent at any time prior to, during or after an investigation, if he or
Protector is competent at any time prior to, during or after an investigation, if he or she deems it advisable to make appropriate recommendations he or she deems expedient under circumstances to the affected body or authority”.

2.14 SARA alleged that the DAC failed to implement the Settlement Agreement as outlined above.

2.15 SARA alleged further in the subsequent meeting with the Public Protector (held on 18 January 2017) that the DAC failed without proper cause or reason to fund or render assistance to SARA on the following issues despite it being fully compliant with funding policies:

a) Assistance to SARA by DAC to strengthen its international relations.

b) SARA’s request to DAC for funding of its operational and administrative costs. SARA alleges that other institutions such as ifa Lethu Foundation have received funding for their operations and that such is confirmed in the minutes of the meeting held on 02 June 2015. There is also an allegation by SARA that three (3) orchestras namely (Cape Town Philharmonic Orchestra, Cape Town Jazz Orchestra and KwaZulu Natal Philharmonic Orchestra) are receiving funding for operational and administrative costs while SARA is being deliberately excluded and unfairly discriminated against by senior officials at DAC.

c) Lack of acknowledgements and responses by DAC to correspondences from SARA.
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1) (a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action."

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public
Protector has a binding effect.¹ The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.

3.5 The DAC is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate. The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3. The complaint was initially classified as an Early Resolution matter capable of resolution by way of a conciliation process or mediation in line with section 6(4)(b) of

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para 76.
the Public Protector Act, 1994. However, after several attempts to conciliate the matter, it was escalated into an investigation.

4.2. Approach to the investigation

4.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

a) What happened?

b) What should have happened?

c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

d) In the event of maladministration, what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Department acted improperly or unduly delayed in implementing the settlement agreement signed by it and SARA under the auspices of the Office of the Public Protector.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department or organ of state to prevent maladministration and prejudice.
4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3. On analysis of the complaint, the following were issues considered and investigated:

4.3.1 Whether the Department improperly failed or unduly delayed to implement the Settlement Agreement signed between SARA and DAC on 01 April 2014?

4.3.2 Whether the Department improperly failed to fund or render financial assistance to SARA on the following issues despite SARA being fully compliant with DAC funding policies:

(i) Assistance to SARA by DAC to strengthen its international relations.
(ii) SARA’S request to DAC for funding of its operational and administrative costs.

4.3.3 Whether the Department unduly funded operational and administrative costs of the three (3) orchestras namely (Cape Town Philharmonic Orchestra, Cape Town Jazz Orchestra and KwaZulu Natal Philharmonic Orchestra) and unfairly discriminated against SARA?

4.3.4 Whether the Department improperly failed to acknowledge receipt and respond to correspondences from SARA?

4.3.5 Whether the Complainant was prejudiced by the conduct of the Department in the circumstances?
4.4 The key sources of information

4.4.1 Documents

4.4.1.1 A copy of the Complainant’s claim documents.
4.4.1.2 DAC Audit Outcome 2013/14
4.4.1.3 DAC Audit Outcome 2014/15
4.4.1.4 Enyokeni Forensic Investigation Report
4.4.1.5 DAC Infrastructure Policy 2016
4.4.1.6 2003/04 ENE Vote 14: Arts and Culture
4.4.1.7 2006/07 ENE Vote 14: Arts and Culture
4.4.1.8 Northern Cape Theatre Infrastructure grant
4.4.1.9 Ifa Lethu Grant 2008/09/11/12/13/14/15 and 2016
4.4.1.10 Steve Biko Centre Infrastructure grant
4.4.1.11 Liliesleaf Museum infrastructure grant
4.4.1.12 Dakawa Community Arts Centre infrastructure grant
4.4.1.13 Morris Isaacson Community Arts Centre infrastructure grant
4.4.1.14 KwaZulu Natal Philharmonic Orchestra Contract and Report
4.4.1.15 Cape Town Philharmonic Orchestra Contract and Report
4.4.1.16 Cape Town Jazz Orchestra contract and report
4.4.1.17 SARA grant letter and contract: Live Events Technical Production Conference 3 year grant (LETPC)
4.4.1.18 SARA report and financial statements: International Interactions 2014/15/16
4.4.1.19 SARA Administration and Operational funding proposal
4.4.1.20 ENE guidelines for 2009/10
4.4.1.21 List of Accredited Technical Production Training Providers, CATHSSETA
4.4.1.22 ADR sessions as recorded
4.4.1.23 Interviews and meetings conducted with the complainant (SARA).
4.4.2 Correspondence sent and received

4.4.2.1 A copy of a progress update letter from Mr Vusithemba Ndima, Acting Director-General of the Department of Arts and Culture addressed to Deputy Public Protector, Advocate KS Malunga, [dated 2016-10-14]

4.4.2.2 A submission of a progress report and update letter from Mr Vusithemba Ndima, Acting Director-General of the Department of Arts and Culture addressed to Public Protector, Advocate Busisiwe Mkhwebane, dated 2017-02-07.

4.4.3 Legislation and other prescripts

4.4.3.1 The Constitution of the Republic of South Africa, 1996;
4.4.3.2 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000;
4.4.3.3 Promotion of Administrative Justice Act 3 of 2000 (PAJA);
4.4.3.4 Culture Promotions Act 35 of 1983
4.4.3.5 Cultural Institutions Act 119 of 1998
4.4.3.6 Broad Based Black Economic Empowerment Act 53 of 2003
4.4.3.7 Settlement Agreement concluded between SARA and DAC on 01 April 2014 in terms of the Public Protector Act 23 of 1994.
4.4.3.8 White Paper on Arts, Culture and Heritage of 1996

4.4.4 Case Law and Legal sources/authors.

4.4.4.1 (The Law of Contract, Christie, 5th ed. – page 192;
4.4.4.2 Lowrey v Steedman 1914 AD 532 at 543;
4.4.4.3 Sealed Africa (Pty) Ltd v Kelly & Another 2006 (3) SA 65 (W) at para [15] per Epstein AJ) and
4.4.4.4 Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

5 THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Whether the Department (DAC) improperly failed or unduly delayed to implement the settlement agreement concluded with SARA on 01 April 2014.

Common cause issues

5.1.1 On 01 April 2014, the DAC and SARA signed a Settlement Agreement under the auspices of section 6(4) (a) and (b) of the Public Protector Act, 23 of 1994.

5.1.2 In terms of clause 4.1.3 of the Settlement Agreement, the DAC undertook to consider, intervene and remedy the health, safety and security risks uncovered at the SARA House.

5.1.3 Furthermore, in terms of clause 4.1.9 of the Settlement Agreement, the DAC agreed to submit to PPSA a detailed implementation plan in regards to the implementation of the Settlement Agreement by the IDT and its proposal regarding assistance with the removal of health, safety and security risks uncovered at SARA House by the close of business on Tuesday, 15 April 2014.

5.1.4 Clause 4.1.3 of the Settlement Agreement has not yet been complied with by DAC.

Issues in dispute
5.1.5 In response to the allegation that the DAC improperly failed to implement the Settlement Agreement, DAC submitted as follows: that in the light of the current substantial audit queries highlighted in the 2013/14 and 2014/2015 financial year’s annual reports of DAC pointing out significant maladministration of projects by third parties such as IDT, whether it would have still been appropriate to appoint IDT in these circumstances. Further, the DAC’s relationship with IDT was terminated in December 2016 due to such audit queries and maladministration of infrastructure development projects by IDT.

5.1.6 The audit issues emerged in June and July 2014, well after the conclusion of the Settlement Agreement with SARA. As a result, DAC has been concerned with utilizing a third party to complete renovation projects, largely because of these audit queries and findings.

5.1.7 In essence DAC submitted that it could not implement the Settlement Agreement in the light of the reasons advanced above.

5.1.8 The Complainant (SARA) on the other hand insists that DAC must implement the Settlement Agreement as it is, because it is a legal binding document. SARA does not want to accept a direct grant/subsidy from DAC and to take responsibility for renovation of its own property.

5.1.9 The Department on the other hand contends that SARA should take responsibility of its property renovation and source the service provider using 10% of the total grant. The DAC further contends that this is in line with their newly approved Infrastructure Development Policy. DAC has also indicated that they are doing the same practice with other non-state or non-DAC institutions whereby an infrastructure grant/subsidy is transferred directly to a funded institution from DAC without DAC having to take responsibility of appointing the service provider for the non-state institution.
5.1.10 The Department submitted copies of examples of contracts where a direct grant or subsidy had been made directly to non-state institutions as well as a copy of its own Infrastructure Development Policy. Copies of the Audit Committee findings (2013/14 and 2014/2015) and queries in this regard were also provided by the Department.

5.1.11 It then follows that in the light of the above evidence and submissions by the Department, the Settlement Agreement signed well before such audit and forensic investigation outcomes, should have long been implemented. The signing of the Settlement Agreement predates all the queries raised in DAC’s submissions. The newly approved Infrastructure Development Policy of DAC cannot also apply retrospectively to invalidate this Settlement Agreement which is already in place. Such would unfairly prejudice the Complainant.

Application of the relevant law

5.1.12 Section 6(4)(a) and (b) of the Public Protector Act 23 of 1994 provides amongst other things that the Public Protector shall be competent to investigate on his or her own initiative or on receipt of a complaint any alleged maladministration, abuse of power, omission, improper conduct or dishonest act in connection with the affairs of the government at any level and to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation.

5.1.13 The issue of whether there was any improper failure or undue delay by the DAC to implement the Settlement Agreement signed by it and SARA on 01 April 2014 is regulated by the clauses of the Settlement Agreement itself signed in terms of above cited relevant section of the Public Protector Act.

5.1.14 Clause 4.1.3 of the Settlement Agreement provides that DAC shall consistent with clause 4.1.9 below immediately consider and intervene to remedy the health, safe and security risks uncovered at SARA house.
5.1.15 Clause 4.1.9 of the Settlement Agreement provides that DAC shall submit to PPSA a detailed implementation plan in regard to the intervention of the IDT and other bodies and its proposal regarding assisting with the removal of health, safety and security risks uncovered at SARA House by close of business on Tuesday 15 April 2014.

5.1.16 The DAC was in terms of the above cited clauses of the Settlement Agreement obliged to perform through IDT or other bodies (third parties/service providers) renovations at SARA House to remove health, safety and security risks uncovered at SARA House.

5.1.17 The conduct of DAC in the circumstances contravened clause 4.1.9 of the Settlement Agreement by failing to appoint IDT or other service providers to renovate SARA House in order to remove the health, safety and security risks uncovered at SARA House. Instead, DAC has submitted the following extrinsic and factual evidence which falls outside the terms of the Settlement Agreement in order to justify its failure and undue delay to appoint IDT or any other service provider on behalf of SARA in order to renovate SARA House:

a) Previous audit queries against DAC related to this kind of projects.
b) Outcomes of forensic investigation report related to this projects.
c) Termination of DAC’s relationship with IDT.
d) Approval of the New Infrastructure Development Policy of DAC and
e) Maladministration of similar projects by third parties appointed by the DAC.

5.1.19 It follows therefore that the interpretation of the terms of a written agreement is a question of law and not of fact. The basic rule regarding interpretation of a written agreement is that no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence. (The Law of Contract, Christie, 5th ed. – page 192; Lowrey v
Steedman 1914 AD 532 Act 543; Sealed Africa (Pty) Ltd v Kelly & Another 2006 (3) SA 65 (W) at para [15] per Epstein AJ.”

5.1.20 It further follows that the complainant’s allegation in this regard is substantiated and that DAC was obligated in terms of clause 4.1.9 to implement the Settlement Agreement.

Conclusion

5.1.21 The DAC improperly failed to implement the Settlement as signed by it and SARA on 01 April 2014 at the Offices of the Public Protector, South Africa, and that constituted an improper conduct and maladministration as contemplated in terms of section 182(1)(a) of the Constitution of the Republic of South Africa and in section 6 (4) (a) (v) of the Public Protector Act 23 of 1994 on the part of the Department.

5.2 Whether the Department improperly failed to fund or render financial assistance to SARA on the following issues despite SARA being fully compliant with DAC funding policies:

(i) SARA’S request to DAC for funding of its operational and administrative costs.

Common cause issues

5.2.1 SARA applied to DAC for funding of its operational and administrative costs.

5.2.2 DAC failed to fund SARA on such costs and indicated that it would not grant funding in this regard given the prevailing rules and statutes in the Public Service.

5.2.3 The Department (DAC) has in fact acknowledged that there has been some inconsistencies in their approach with regard to the funding provided to a number of stakeholders. There is no policy informing the funding model in this regard and as a
result, other organisations have been receiving this kind of funding (for operations) while others such as SARA have been excluded from this support. The absence of the policy document regulating this grant and the discretionary mandate derived from Culture Promotions Act of 1983 result in some inconsistencies in the approach to funding these type of costs.

issues in dispute

5.2.4 It was disputed and argued by DAC that it would not grant funding to SARA in this regard given the prevailing rules and statutes in the Public Service.

5.2.5 DAC was given an opportunity to provide the Public Protector with copies of such rules and statutes which provided them with guidance when addressing issues for the granting of operational and administrative costs as applicable in the Public Service according to their submission. DAC failed to supply the Public Protector with such rules and statutes they referred to in their report dated 2016-10-14.

application of the relevant law

5.2.6 Section 2(1)(a) and (b) of Culture Promotions Act of 1983 provides for this discretion which the Minister may exercise to subsidize or finance provision of services by any person in order to foster educational and cultural relations but it does not lay down the specific criteria to be followed in granting this financial aid. It provides as follows:

"Minister or any Departmental official delegated by him may in order to foster culture in the Republic make grant, award, subsidize or finance an association, programme or project having its object the making known of the culture of the Republic of South Africa".
5.2.7 It is clear that the application of the ministerial discretion in this regard did not help to foster educational and cultural relations as it is part of SARA’s objects and purpose.

The Public Protector also could not find evidence of the proper application of Section 2 of Broad Based Black Economic Empowerment Act 53 of 2003 which provides for the promotion of economic transformation in order to enable a meaningful participation of black people in the economy and achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises in this regard. SARA appears to be both the black and only entity within the space of Live Events and Technical Skills Production in the, that advances the making of known of the culture in the country.

Conclusion

5.2.8 It then follows that there is no proper alignment on this funding model and that the exercise of such discretion has been unfairly exercised against SARA.

(ii) Whether the Department unduly funded operational and administrative costs of the three (3) Orchestras namely Cape Town Philharmonic Orchestra, Cape Town Jazz Orchestra and Kwa-Zulu Natal Philharmonic Orchestra and unfairly discriminated against SARA.

Common cause issues
5.2.9 The Department of Arts and Culture did not fund SARA for its administrative and operational costs.

5.2.10 All three (3) Orchestras namely Cape Town Philharmonic Orchestra, Cape Town Jazz Orchestra and Kwa-Zulu Natal Philharmonic Orchestra are annually funded by the DAC for their operational and administrative costs.

Issues in dispute

5.2.11 It is disputed by SARA that, it is being unfairly discriminated when it comes to funding of its operational as well as administrative costs while on the other hand orchestras are being funded for the same costs by the Department (DAC) on an annual basis on a specifically arranged ring-fenced budget, without even applying for such funding.

5.2.12 The SARA's application for operational funding was not granted as DAC contends that provision is made only for subsidies to declared cultural institutions. However it is argued by the complainant that SARA is part of the cultural set up in the country but it is not recognised by DAC as such one cultural institution. It is further argued by the complainant that the three named orchestras are also privately owned and are not DAC entities.

Application of the relevant law

5.2.13 In terms of the available evidence the funding of the three (3) designated orchestras is a legacy of decision taken after a White Paper of 1996 (White Paper on Arts, Culture and Heritage of 1996).

5.2.14 The direct funding to orchestras was documented in the 2003/04 Estimates of National Expenditure published by National Treasury and approved by Parliament.
5.2.15 The White Paper of 1996 essentially unbundled Performing Arts Centres (PAC's) and transformed them into playhouses which are funded annually through National Arts Council, which makes provision for programming activities and support for administrative support overheads for the designated national orchestras.

5.2.16 According to the arrangements of this 1996 White Paper on Arts and Culture, orchestras enjoy a maximum threshold of 15% of the total grant for administration costs while institutions like SARA has a maximum threshold of 10 % for administration costs only, in other instances where financial support is granted, such as support for international interactions.

Conclusion

5.3.5 The Public Protector accordingly finds improper conduct on the part of the Department in relation to the funding of the three named orchestras for both operational and administrative costs while SARA is unfairly discriminated against.

5.3 Whether the Department improperly failed to acknowledge receipt and respond to correspondences from SARA.

Common cause issues

5.4.1 SARA has alleged that the Department has failed to acknowledge as well as respond to its correspondences and communication.

Issues in dispute
5.4.2 DAC disputed that it failed to respond to SARA’s correspondences. DAC submitted that it has been more responsive to SARA’s voluminous communication.

5.4.3 The evidence obtained by Public Protector indicates that DAC fairly responded to voluminous correspondences from SARA. The Public Protector has also conveyed constant updates to SARA from DAC while conducting this investigation.

Application of the relevant law

5.4.4 In terms of section 195(e) of the Constitution Public Service must be governed by democratic values and principles which includes that people’s needs must be responded to and that the public must be encouraged to participate in policy-making. This principle applies in every sphere of government, organs of state and public enterprises.

Conclusion

5.4.4 The Public Protector accordingly could not find any improper conduct on the part of the Department in relation to acknowledging receipt and responding to correspondences from SARA.

5.4 Whether the Complainant was prejudiced by the conduct of the Department in the circumstances.

Common cause issues

5.4.9 On 01 April 2014, the DAC and SARA signed a Settlement Agreement under the auspices of section 6(4)(a) and (b) of the Public Protector Act, 1994 and never implemented the settlement agreement.
5.4.10 In terms of clause 4.1.3 of the Settlement Agreement, the DAC undertook to consider, intervene and remedy the health, safety and security risks uncovered at the SARA House but failed to implement such an undertaking.

5.4.11 SARA applied to DAC for funding of its operational and administrative costs and never received funding.

Issues in dispute

5.4.12 The DAC’s dispute is that in the light of the current substantial audit queries highlighted in the 2013/14 and 2014/2015 financial year’s annual reports of DAC pointing out significant maladministration of projects by third parties such as IDT, whether it would have still been appropriate to appoint IDT in these circumstances. Further, the DAC’s relationship with IDT was terminated in December 2016 due to such audit queries and maladministration of infrastructure development projects by IDT. The audit issues emerged in June and July 2014, well after the conclusion of the Settlement Agreement with SARA. As a result, DAC has been concerned with utilizing a third party to complete renovation projects, largely because of these audit queries and findings.

5.4.13 The Complainant (SARA) insists that DAC must implement the Settlement Agreement as it is because it is a legal binding document. SARA does not want to accept a direct grant/subsidy from DAC and to take responsibility for renovation of its own property.

5.4.14 The Department on the other hand contends that SARA should take responsibility of its property renovation and source the service provider using 10% of the total grant. The DAC further contends that this is in line with their newly approved Infrastructure Development Policy. DAC has also indicated that they are doing the same practice
with other non-state or non-DAC institutions whereby an infrastructure grant/subsidy is transferred directly to a funded institution from DAC without DAC having to take responsibility of appointing the service provider for the non-state institution.

5.4.15 The Department submitted copies of examples of contracts where a direct grant or subsidy had been made directly to non-state institutions as well as a copy of its own Infrastructure Development Policy. Copies of the Audit Committee findings (2013/14 and 2014/2015) and queries in this regard were also provided by the Department.

5.4.16 The complainant argues further that the Department improperly failed to fund operational and administrative costs of SARA while other similar organisations were granted the same support.

Application of the relevant law

5.4.17 Section 9(3) of the Constitution which provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

5.4.18 Section 25 and 26 of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 places the duty and responsibility on the state and its officials to promote equality in the spheres of their operation.

5.4.19 Section 2 of Broad Based Black Economic Empowerment of 2003 which provides for the promotion of economic transformation in order to enable a meaningful participation of black people in the economy and achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises.
5.4.20 The Public Protector does not find a proper consideration and application of the above legal prescripts by DAC in its dealings with regard to this case and its treatment of SARA. The discrimination against SARA and its exclusion from the ring fenced funding which is afforded to orchestras on an annual basis, could not be sufficiently justified by DAC and as such constitute unfair discrimination and prejudice to SARA and other similar institutions within the cultural set up.

5.4.21 Clause 4.1.3 of the Settlement Agreement provides that DAC shall consistent with clause 4.1.9 below immediately consider and intervene to remedy the health, safe and security risks uncovered at SARA house.

5.4.22 Clause 4.1.9 of the Settlement Agreement provides that DAC shall submit to PPSA a detailed implementation plan in regard to the intervention of the IDT and other bodies and its proposal regarding assisting with the removal of health, safety and security risks uncovered at SARA House by close of business on Tuesday 15 April 2014.

5.4.23 The DAC was in terms of the above cited clauses of the Settlement Agreement obliged to perform through IDT or other bodies (third parties/service providers) renovations at SARA House to remove health, safety and security risks uncovered at SARA House.

5.4.24 The conduct of DAC in the circumstances contravened clause 4.1.9 of the Settlement Agreement by failing to appoint IDT or other service providers to renovate SARA House in order to remove the health, safety and security risks uncovered at SARA House.

Instead, DAC has submitted the following extrinsic and factual evidence which falls outside the terms of the Settlement Agreement in order to justify its failure and undue delay to appoint IDT or any other service provider on behalf of SARA in order
to renovate SARA House:

a) Previous audit queries against DAC related to this kind of projects.
b) Outcomes of forensic investigation report related to this projects.
c) Termination of DAC's relationship with IDT.
d) Approval of the New Infrastructure Development Policy of DAC and
e) Maladministration of similar projects by third parties appointed by the DAC.

5.4.25 Section 2(1) (a) (b) of Culture Promotions Act of 1983 provides for the discretion which the Minister may exercise to subsidize or finance provision of services by any person in order to foster educational and cultural relations but it does not lay down the specific criteria to be followed in granting this financial aid.

5.4.26 It provides as follows: "Minister or any Departmental official delegated by him may in order to foster culture in the Republic make grant, award, subsidize or finance an association, programme or project having its object the making known of the culture of the Republic of South Africa"

5.4.27 There is no policy informing the funding model in this regard and as a result, other organisations have been receiving this kind of funding (for operations) while others such as SARA have been excluded from this support. The absence of the policy document regulating this grant and the discretionary mandate derived from Culture Promotions Act of 1983 result in some inconsistencies in the approach to funding these type of costs.

Conclusion

5.4.28 It follows therefore that the Complainant (SARA) was prejudiced by the conduct of the Department (DAC) with regard to Paragraph (5.1) of the above which is the Department's improper failure and undue delay to implement the Settlement Agreement, with regard to Paragraph 5.2 (i) of the above, which is to deny SARA
the funding for operational and administrative costs and with regard to Paragraph 5.2 (ii) which is to fund both operational and administrative costs of the three (3) Orchestras namely Cape Town Philharmonic Orchestra, Cape Town Jazz Orchestra and Kwa-Zulu Natal Philharmonic Orchestra while SARA is unfairly discriminated against.

6 FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

6.1 Whether the Department improperly failed or unduly delayed to implement the Settlement Agreement signed between SARA and DAC on 01 April 2014.

6.1.1 The allegation that the Department improperly failed or unduly delayed to implement the Settlement Agreement signed between SARA and DAC on 01 April 2014 is substantiated.

6.1.2 The Public Protector accordingly finds that, the issue of whether there was any improper failure or undue delay by the DAC to implement the Settlement Agreement signed between it and SARA on 01 April 2014 is regulated by the clauses of the Settlement Agreement itself.

6.1.3 The Public Protector further finds that, Clause 4.1.3 of the Settlement Agreement provides that DAC shall consistent with Clause 4.1.9 immediately consider and intervene to remedy the health, safe and security risks uncovered at SARA house but improperly failed to do so.

6.1.4 The Public Protector further finds that, the DAC was in terms of the above cited clauses of the Settlement Agreement obliged to perform through IDT or other bodies
(third parties/service providers) renovations at SARA House to remove health, safety and security risks uncovered at SARA House but improperly failed to do so.

6.1.5 The Public Protector accordingly finds that the basic rule regarding interpretation of a written agreement is that no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence.

6.1.6 The Public Protector finally finds that the conduct of DAC in the circumstances contravened clause 4.1.3. and 4.1.9 of the Settlement Agreement by failing to appoint IDT or another service provider to renovate SARA House in order to remove the health, safety and security risks uncovered at SARA House.

6.1.7 Such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(v) of the Public Protector Act 23 of 1994.

6.2 Whether the Department improperly failed to fund or render financial assistance to SARA on the following issues despite SARA being fully compliant with DAC funding policies:

(i) SARA’S request to DAC for funding of its operational and administrative costs.

6.2.1 The allegation that the Department improperly failed to fund operational and administrative costs of SARA while other similar organisation were granted the same support is substantiated.

6.2.2 The Public Protector finds that there is no policy informing the funding model in this regard and as a result, other organisations have been receiving this kind of funding
(for operations) while others such as SARA have been excluded from this support. The absence of the Policy document regulating this grant and the discretionary mandate derived from Culture Promotions Act of 1983 results in some inconsistencies in the approach to funding these types of costs.

6.2.3 The Public Protector also could not find evidence of the proper application of Section 2 of Broad Based Black Economic Empowerment Act 53 of 2003. It provides for the promotion of economic transformation in order to enable a meaningful participation of black people in the economy and achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises. Evidence shows that SARA is one of the emerging black enterprise in the Technical Skills and Production sector in the country.

6.2.4 The Public Protector accordingly finds that the non-application of Broad Based Black Economic Empowerment Act 53 of 2003 amounts to omission and conduct failure in as far as it does not promote economic transformation in order to enable meaningful participation of black people in the economy and achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations such as Technical Skills and Production sector, which skills SARA seeks to promote and advance in the country.

6.2.5 Such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a) (v) of the Public Protector Act 23 of 1994.

(ii) Whether the Department unduly funded operational and administrative costs of the three (3) Orchestras namely Cape Town Philharmonic Orchestra, Cape Town Jazz Orchestra and Kwa-Zulu Natal Philharmonic Orchestra and unfairly discriminated against SARA.
6.2.6 The allegation that the Department improperly funded operational and administrative costs of the three (3) orchestras while on the other side discriminating against SARA on the same funding is substantiated.

6.2.7 The Public Protector finds that the funding of the three (3) designated orchestras is a legacy of decisions taken after a White Paper on Arts, Culture and Heritage of 1996, 2003/04 ENE Vote 14. The direct funding to orchestras was documented in the 2003 and 2006 ENE published by National Treasury and approved by Parliament. The former performing Arts Councils have been restructured. Performing and Production Companies were separated, playhouses were established and increased attention was paid to their effective management.

6.2.8 The Public Protector further finds that in the 2006/07 ENE, the responsibility for the funding of orchestras was shifted to the National Arts Council (NAC) which explains the rapid increase in financial assistance to the council from 2006/07 and the equivalent end of subsidies for the orchestras. Recognising the need for multi-year funding for arts institutions, the NAC introduced the so called 'company funding' for the disciplines within its purview and in an attempt to make the funding system more coherent, the funding for the designated national orchestras was transferred to NAC.

6.2.9 However, the Public Protector finds that the White Paper on Arts, Culture and Heritage of 1996, unfairly discriminates against SARA in that it makes specific provision for funding of both operational and administrative cost to orchestras whilst SARA is only funded for administrative costs.

6.3 Whether the Department improperly failed to acknowledge receipt and respond to correspondences from SARA.

6.3.1 The allegation that the Department improperly failed to acknowledge receipt and respond to correspondences from SARA is not substantiated.
6.3.2 The Public Protector finds that the Department has notably been more responsive to SARA's voluminous communications. There is constant update and reports from DAC to SARA and to the Office of the Public Protector about this case. The Office of the Public Protector has also been conveying regular feedback to SARA from DAC about this matter.

6.3.3 The Public Protector accordingly could not find any improper conduct on the part of the Department in relation to acknowledging receipt and responding to correspondences from SARA.

6.4 Whether the Complainant was prejudiced by the conduct of the Department in the above circumstances.

6.4.1. Based on the above findings the Public Protector finds that the Complainant (SARA) was prejudiced by the conduct of the Department (DAC) with regard to Paragraph 6.1 of the above which is the Department's improper failure and undue delay to implement the Settlement Agreement, with regard to Paragraph 6.2 (i) of the above, which is to deny SARA the funding for operational and administrative costs by the Department and with regard to Paragraph 6.2 (ii) which is to fund both operational and administrative costs of the three (3) Orchestras namely Cape Town Philharmonic Orchestra, Cape Town Jazz Orchestra and Kwa-Zulu Natal Philharmonic Orchestra while SARA is unfairly discriminated against.
7. **REMEDIAL ACTION**

The appropriate remedial actions that the Public Protector is taking in the light of the above evidence and findings as contemplated in section 182(1)(c) of the Constitution are the following:

7.1 The Settlement Agreement concluded between SARA and DAC, in accordance with section 6(4) (a) and (b) of the Public Protector Act, 1994 (Act No. 23 of 1994, constitutes remedial action of the Public Protector.

The Director-General of Department of Arts and Culture (DAC)

7.2 With Regard to the Renovation of SARA House:

7.2.1 DAC must provide funding for the renovation of SARA House in the amount of R15 000 000.00 (Fifteen million rand) as per Settlement Agreement.

7.2.2 The grant amount of R15 000 000.00, as allocated to SARA for renovation is a huge amount which cannot be transferred to a private entity, considering that SARA does not have capacity to implement the renovation of this magnitude.

7.2.3 In order to ensure that Public Funds are spent appropriately and for the purpose it is intended for, DAC must appoint Development Bank of Southern Africa (DBSA), as a Government infrastructure implementing agent, to implement and manage the renovation at SARA house.

7.2.4 The funding of R15 000 000.00 (Fifteen Million Rand) allocated by DAC for renovations of SARA House must paid directly to the Development Bank of Southern Africa (DBSA) within thirty (30) days of signing of the implementation agreement between DAC and DBSA.
7.2.5 Development Bank of Southern Africa must be paid 10% of the grant amount by DAC, being the management fees for management of the renovations at SARA House.

With regard to the funding of operational and administrative costs of SARA:

7.3 The Minister of Department of Arts and Culture (DAC)

7.3.1 The Minister must amend the White Paper on Arts, Culture and Heritage of 1996, within three (3) months of this report to ensure that SARA is not unfairly discriminated against when it comes to the allocation of operational and administrative costs.

7.3.2 DAC must further ensure that within three (3) months of receipt of this report, a written policy informing this type of funding is developed for future and put in place to align the criteria that should be followed in this funding model. The Public Protector issues this remedial action against the backdrop of inconsistencies in DAC’s approach towards funding of administrative and operational costs. This should help this funding model to be more coherent and consistent in its approach.
8. MONITORING

8.1. The Director-General (and the successor in title) of the Department of Arts and Culture must submit an implementation plan to the Public Protector within 30 (thirty) days of receipt of this report on how the remedial action outlined under paragraph 7 above will be implemented.

8.2 Director General of DAC must provide to the Public Protector a quarterly and close-out report on the renovation of SARA House.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR
THE REPUBLIC OF SOUTH AFRICA
DATE: 19 June 2017

Assisted by: Mr Vusumzi Dlamini