
REPORT NUMBER: 92 of 2019/20

Allegations of improper conduct and maladministration against the Northern Cape Department of Sport, Arts and Culture and the Northern Cape Arts and Culture Council

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION RELATING TO THE MISAPPROPRIATION OF PUBLIC FUNDS BY THE NORTHERN CAPE DEPARTMENT OF SPORT, ARTS AND CULTURE AND THE NORTHERN CAPE ARTS AND CULTURE COUNCIL
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Executive Summary

(i) This is my report 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).

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper conduct and maladministration relating to the misappropriation of public funds by the Northern Cape Department of Sport, Arts and Culture (Department) and the Northern Cape Arts and Culture Council (NCACC).

(iii) The complaint was lodged anonymously at the Kimberley office of the Public Protector South Africa, on 13 March 2017.

(iv) In the main, the Complainant alleged that in December 2016, the Department requested the NCACC to pay R1 million directly to the Traffic and Events Management Company (Traffic Events) towards the organizing of the Umsobomvu Youth Tourism and Cultural Festival (the Festival) in December 2016. The Festival did not take place and the money was not recovered from Traffic Events. This conduct of the Department and the NCACC was improper, constitutes maladministration and resulted in the misappropriation of public funds.

(v) Based on the analysis of the complaint and information obtained during preliminary enquiries, the following issues were identified to inform and focus the investigation:

   (a) Whether the Department requested the NCACC to make a payment of R1,6 million to Traffic Events to organise the Festival in December 2016 that never took place; and if so
(b) Whether the conduct of the Department was improper, constitutes maladministration and resulted in the misappropriation of public funds.

(c) Whether the NCACC made a payment of R1 million to Traffic Events in December 2016 to organise the Festival that never took place, and if so;

(d) Whether the conduct of the NCACC was improper, constitutes maladministration and resulted in the misappropriation of public funds.

(vi) The investigation was conducted in terms of section 182(1) of the Constitution, and sections 6 and 7 of the Public Protector Act. It included correspondence with the Department and the NCACC, meetings with senior officials of the Department and the NCACC, analysis of documents obtained during the investigation and the application of the relevant laws and other prescripts.

(vii) Having considered the evidence and information obtained during the investigation, I now make the following findings:

(a) Regarding whether the Department requested the NCACC to make a payment of R1,6 million to Traffic Events to organise the Festival in December 2016 that never took place

(aa) The allegation that the Department requested the NCACC to make a payment of R1,6 million directly to Traffic Events to organise the Festival that never took place is substantiated.

(bb) The evidence and information obtained during the investigation confirmed that the Department requested the NCACC to make a direct payment of R1,6 million to Traffic Events on 13 December 2016 to organise the Festival, on the basis that the NCACC would be refunded. It is not disputed that the Festival was never held.
(b) Regarding whether the conduct of the Department was improper, constitutes maladministration and resulted in the misappropriation of public funds.

(aa) The allegation that the conduct of the Department was improper, constitutes maladministration and resulted in the misappropriation of public funds, is substantiated.

(bb) In approving the request for the direct payment to the NCACC, the HOD did not act in the best interests of the NCACC and the Department in terms of the expending of resources, as is required of an accounting officer by the PFMA.

(cc) As the accounting officer of the Department that is expected to support and assist the NCACC to enable it to perform its functions, the HOD should have acted with care and diligence to prevent fruitless and wasteful expenditure. The HOD was fully aware that the Department had no role to play in the exercising of its mandate by the NCACC, yet she approved a request to the NCACC to make a direct payment of R1.6 million to Traffic Events, on the basis of reimbursement.

(dd) The conduct of the HOD eventually led to an amount of R1 million of public funds paid for a service that was not rendered, which resulted in fruitless and wasteful expenditure.

(ee) The conduct of the HOD further did not amount to the proper use of state property, as contemplated by the Public Service Act.

(ff) The conduct of the Department accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and
maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

(c) Regarding whether the NCACC made a payment of R1 million to Traffic Events in December 2016 to organise the Festival that never took place

(aa) The allegation that the NCACC made a payment of R1 million to Traffic Events in December 2016 to organise an event that never took place, is substantiated.

(bb) It appears from the evidence obtained during the investigation that the NCACC paid an amount of R1 million into the bank account of Traffic Events on 24 December 2016.

(cc) The payment was made in terms of a Memorandum of Agreement (MOA) between the NCACC and Traffic Events in terms of which the NCACC would fund the Festival.

(dd) The NCACC, as the accounting authority in terms of section 49 of the PFMA, authorised the payment of R1 million to Traffic Events.

(ee) The Festival was not held to date.

(ff) The R1 million paid to Traffic Events was not recovered by the NCACC as provided for by the MOA.
(d) Regarding whether the conduct of the NCACC was improper, constitutes maladministration and resulted in the misappropriation of public funds.

(aa) The allegation that the conduct of the NCACC was improper, constitutes maladministration and resulted in the misappropriation of public funds, is substantiated.

(bb) By acceding to the request of the Department to make a direct payment to Traffic Events for organising the Festival, the NCACC did not act in accordance with its responsibilities in terms of the PFMA and the NCACC Act.

(cc) The NCACC did not act with fidelity, honesty, integrity and in the best interests of the entity, as contemplated by section 50 of the PFMA.

(dd) It made no attempt to take effective and appropriate steps to prevent fruitless and wasteful expenditure and the misappropriation of public funds and to recover the amount that was lost.

(ee) The conduct of the NCACC accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

(viii) The appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, is the following:

(a) The Northern Cape MEC for Sport, Arts and Culture:
(aa) To take appropriate action against the HOD, Ms R Palm, in terms of the Public Finance Management Act, 1999 (PFMA) and the Public Service Act, 1994 for her improper conduct in requesting the NCACC to make a direct payment of R1.6 million to Traffic Events to organise the Festival that was never held, within 60 (sixty) days from the date of receiving my report.

(bb) To take appropriate action in terms of the Northern Cape Arts and Culture Council Act, 2013 and the PFMA against the NCACC as the accounting authority for its improper conduct in making a payment of R1 million to Traffic Events to organise the Festival that was never held, failing to cancel the Memorandum of Agreement and to recover the money, within 60 (sixty) days from the date of receiving my report.

(cc) To take appropriate steps to ensure that the NCACC recovers the amount of R1 million plus interest from Traffic Events, within 60 (sixty) days from the date of receiving my report.

(dd) To take appropriate steps to report the fruitless and wasteful expenditure to the Provincial Treasury within 60 (sixty) days form the date of receiving my report.

(ee) To liaise with the South African Police Service on the progress made with the criminal investigation of this matter, within 30 (thirty) days from the date of receiving my report.

(b) This report is referred to the National Head of the Directorate: Priority Crime Investigation of the South African Police Service to investigate whether any crime was committed and if so, to take the appropriate action.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION RELATING TO THE MISAPPROPRIATION OF PUBLIC FUNDS BY THE NORTHERN CAPE DEPARTMENT OF SPORT, ARTS AND CULTURE AND THE NORTHERN CAPE ARTS AND CULTURE COUNCIL

1. INTRODUCTION

1.1 This is my report as the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa (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 sections 8(1) and 8(3) of the Public Protector Act to:

1.2.1 Ms Berenice Sinexve, the Member of the Northern Cape Provincial Executive Council responsible for Sport, Arts and Culture (MEC).

1.3 Copies of the report are also provided to the following persons to inform them of the outcome of my investigation:

1.3.1. Ms R Palm, the Head of the Northern Cape Department of Sport, Arts and Culture (Department).

1.3.2. Mr Manne Thebe, the Chairperson of the Northern Cape Arts and Culture Council (NCACC).

1.3.3. Lieutenant-General S G Lebeya, the National Head of the Directorate: Priority Crime Investigation of the South African Police Service (DPCI).

1.4 The report relates to an investigation into allegations of improper conduct and maladministration pertaining to the misappropriation of public funds by the Department and the NCACC in December 2016.
2. THE COMPLAINT

2.1 The complaint was lodged anonymously at the Kimberley office of the Public Protector South Africa, on 13 March 2017.

2.2 In the main, the Complainant alleged that:

2.2.1 In December 2016, the Department requested the NCACC to pay R1 million directly to the Traffic and Events Management Company (Traffic Events) towards the organising of the Umsobomvu Youth Tourism and Cultural Festival (Festival). The amount was paid, but the Festival did not take place and the money was not recovered from Traffic Events.

2.2.2 In essence, the Complainant alleged that this conduct of the Department and the NCACC was improper, constitutes maladministration and resulted in the misappropriation of public funds.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional institution, 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) of the Constitution directs that the Public Protector has additional powers and functions prescribed by national 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, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

3.5 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 the 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"\(^2\).

3.6 In the above-mentioned matter of the Economic Freedom Fighters v Speaker of the National Assembly and Others, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:

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\(^1\) [2016]ZACC 11; 2016(3) SA 580(CC) and 2016 (5) BCLR 618 (cc) at para [76].
\(^2\) Supra at para [73].
3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.6.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);

3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints. It is the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (para 69);

3.6.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);

3.6.6 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71);
3.6.7 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (para 71(a));

3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.6.9 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e)).

3.7 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:

3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);

3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (para 82);

3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers ( para 100 and 101):
a) Conduct an investigation;
b) Report on that conduct; and
c) To take remedial action.

3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (para 104);

3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (Para 105);

3.7.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute *prima facie* findings that point to serious misconduct (para 107 and 108); and

3.7.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112).

3.8 The Department and the NCACC are organs of state and their conduct amount to conduct in state affairs, as a result, the matter falls within the ambit of the Public Protector’s mandate.

3.9 The jurisdiction of the Public Protector to investigate this matter was not disputed by 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.

4.2 Approach to the investigation

4.2.1 The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?

4.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong or, where appropriate, to place the complainant as close as possible to where he would have been, but for the improper conduct or maladministration.
4.2.1.5 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 the Department requested the NCACC to make a payment of R1,6 million to Traffic Events to organise the Festival (as it appeared from the initial enquiries made), and whether the NCACC made a payment of R1 million to Traffic Events in December 2016 to organise the Festival, that never took place.

4.2.1.6 The enquiry regarding what should have happened, focuses on the standard that should have been met by the Department and NCACC in its alleged dealings with Traffic Events to prevent improper conduct, maladministration or the misappropriation of public funds.

4.2.1.7 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and/or maladministration were possible and appropriate.

4.3 On analysis of the complaint and the information obtained from preliminary enquiries made, the following issues were considered and investigated:

4.3.1 Whether the Department requested the NCACC to make a payment of R1,6 million to Traffic Events to organise the Festival in December 2016 that never took place; and if so

4.3.2 Whether the conduct of the Department was improper, constitutes maladministration and resulted in the misappropriation of public funds.

4.3.3 Whether the NCACC made a payment of R1 million to Traffic Events in December 2016 to organise the Festival that never took place, and if so;
4.3.4 Whether the conduct of the NCACC was improper, constitutes maladministration and resulted in the misappropriation of public funds.

4.4 Key sources of information

4.4.1 Documents

4.4.1.1. A Copy of a Memorandum from the Directorate: Cultural Affairs of the Department to the Head of the Provincial Treasury, Acting Head of the Department and the Chief Financial Officer, dated 8 July 2016.

4.4.1.2. A copy of a Memorandum to the Executive Council for the hosting of 2016/17 Umsobomvu Tourism and Cultural Festival in December 2016, dated 25 November 2016.

4.4.1.3. A copy of a Memorandum from the Directorate: Cultural Affairs of the Department to the Chairperson of the NCACC, dated 07 December 2016.

4.4.1.4. A copy of a Memorandum from the Directorate: Cultural Affairs of the Department to the Chairperson of the NCACC, dated 13 December 2016.

4.4.1.5. A copy of a Memorandum of Agreement between the NCACC and Traffic Events, signed on 14 December 2016.

4.4.1.6. A copy of the Minutes of the NCACC Board meeting held in Kuruman from 28-29 November 2016
4.4.1.7. A copy of an internal Memorandum from Mr H Niewenhuisen: the Deputy Director Public Procurement to Mr F Borman, Acting Deputy Director: Legal Services and Labour Relations of the Department, dated 20 June 2018.

4.4.1.8. A copy of Minutes of a meeting of the NCACC, held on 24 and 25 February 2017.
4.4.1.9. A copy of a letter from the Chairperson of the NCACC addressed to the HOD of the Department, dated 14 February 2018.

4.4.2 Meetings held

4.4.2.1 Meetings were held with senior officials of the NCACC on 19 October 2017, 28 November 2018, 11 July 2019 and 11 September 2019.

4.4.2.2 Meetings were held with senior officials of the Department on 04 June 2018 and 09 September 2019.

4.4.3 Legislation and other prescripts


4.4.3.2 The Public Protector Act No 23 of 1994.

4.4.3.3 The Northern Cape Arts and Culture Council Act No 8 of 2013 (NCACC Act).

4.4.3.4 The Public Finance Management Act No 1 of 1999. (PFMA).

4.4.3.5 The Public Service Act No 103 of 1994. (Public Service Act).

4.4.3.6 The Treasury Regulations made in terms of the PFMA.
4.4.4 Jurisprudence considered

4.4.4.1 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).

4.4.4.2 President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP).

4.4.5 Notices issued in terms of section 7(9)(a) of the Public Protector Act

4.4.5.1 Notice issued in terms of section 7(9)(a) of the Public Protector Act to Ms R Palm, the Head of the Department (HOD), dated 20 June 2019.

4.4.5.2 Response to the section 7(9)(a) Notice from the HOD, dated 28 June 2019.

4.4.5.3 Notice issued in terms of section 7(9)(a) of the Public Protector Act to Mr M Thebe, the Chairperson of the NCACC on, 22 August 2019.

4.4.5.4 Response to the section 7(9)(a) Notice from Mr M Thebe, the Chairperson of the NCACC dated 28 August 2019.

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

5.1 Regarding whether the Department requested the NCACC to make a payment of R1,6 million to Traffic Events to organise the Festival in December 2016 that never took place
Common Cause issue or facts not in dispute

5.1.1. It is common cause that in July 2016, the Senior Manager Cultural Affairs of the Department, Mr P Modise, made a submission in the form of a Memorandum to the Acting HOD, the Chief Financial Officer (CFO), and the Head of the Provincial Treasury, seeking approval for the hosting of commemorative national and historic events to be held during the second and third quarters of the 2016/17 financial year.

5.1.2. According to the Memorandum, the Festival was planned for December 2016 with a budget of R600-000.00 and the Department would co-host it with the Umsobomvu Municipality in Norwalspont. Funds for the Festival would be sourced from the Special Programmes sub-programme of the Department’s budget.

5.1.3. The Memorandum was approved by the then Acting HOD, Ms Ruth Palm, on 11 July 2016. The Head of Provincial Treasury, Mr HV Gumbo, did not sign the Memorandum.

5.1.4. The HOD submitted a Memorandum to the former MEC for Sport, Arts and Culture on 25 November 2016, seeking support and approval for a three year partnership programme, commencing with the 2016 Umsobomvu Tourism and Cultural Initiative.

5.1.5. Paragraph 8 of the Memorandum stated that the Department would be co-funding all events related to the 2016 Umsobomvu Cultural Celebrations in the amount of R600 000 and the Northern Cape Department of Economic Development and Tourism in the amount of R1 million. The Memorandum further stated that the NCACC would act as custodian for the project, managing all procurement and artists. The Memorandum was approved by the MEC on 25 November 2016.
5.1.6. According to the Minutes of the NCACC Board meeting held in Kuruman from 28-29 November 2016, the Board resolved that possible funding for the above mentioned programme would be further discussed on 12 December 2016 at the Warrenton Cultural Resort, due to unavailability of accompanying documentation from the Department.

5.1.7. On 28 November 2016, Mr Bonakele Jacobs, the then Senior Manager: Cultural Affairs of the Department made a presentation to the NCACC Board Meeting held in Kuruman, requesting financial assistance to host the Festival.

5.1.8. It is not in dispute that the HOD requested the NCACC, in a Memorandum dated 13 December 2016, to process the transfer of R1.6 million to Traffic Events. The Department undertook to transfer back to the NCACC R600 000.00 in the next transfer payment and that the R1 million would be included in the next trench i.e. new financial year 2017/2018. The purpose of the transfer was stated as: “for the hosting of the Umsobomvu Youth Tourism and Cultural Festival to take place in Novalsport”.

5.1.9. On 10 October 2016, the Department advertised a tender to procure the services of events management entities to organise and manage the commemoration of national days and for the hosting of departmental events for three years. The tender was only awarded on 31 March 2017.

**Issues in dispute**

5.1.10. The Complainant contended that the Department’s request to the NCACC to pay an amount directly to Traffic Events to organise the Festival that was never held, was improper, constitutes maladministration and resulted in the misappropriation of public funds.
5.1.11. According to the records of the Department, it made two separate requests to NCACC for assistance in the holding of the Festival.

5.1.12. In the first Memorandum, dated 07 December 2016 addressed by Mr Jacobs to the Chairperson of the NCACC, Mr Manne Thebe, under the heading: "Request to process R600 000.00 payment to Majorkings PTY LTD -for the Umsobomvu Youth Tourism and Cultural Festival", the NCACC was requested to assist the Department in processing payment of R600 000.00 to Majorkings PTY LTD.

5.1.13. According to the response of the Chairperson of the NCACC to the section 7(9) Notice, dated 28 August 2019, the NCACC Board held its third quarterly meeting for the 2016/2017 financial year in Kuruman in November 2016. He stated that:

"At this meeting the Department of Sport, Arts and Culture (DSAC) represented by Mr Bonakele Jacobs, the then Senior Manager for Cultural Affairs, did a project funding proposal. The project proposal sought to request an amount of R600 000.00 to host an event entitled Umsobomvu Youth and Cultural Tourism Festival at Norvalspong. The proposal did not receive approval from the Board”.

5.1.14. The Department’s second request was in the form of a Memorandum from the HOD to the Chairperson of the NCACC, dated 13 December 2016 under the heading: “Request to process R1.6 million payment to Traffic Events- for the Umsobomvu Youth Tourism and Cultural Festival- Novalspong”.

5.1.15. The Memorandum was compiled by Mr Jacobs.

5.1.16. In this Memorandum, the HOD requested the NCACC to assist in the processing of payment of an amount of R1.6 million directly to Traffic Events for organizing the Festival.
5.1.17. Paragraph 2.1 of the Memorandum stated that:

“As detailed to you in my presentation to the NCACC Board on 29 November 2016 at Da Vinci Guest House Kuruman, I did emphasise the critical importance of this event in my request for your approval from NCACC Board of Trustees.”

5.1.18. According to the Memorandum, the Department would transfer R600 000 of the amount back to the NCACC and the balance of R1 million would be included in the next trench payment for the 2017/2018 financial year.

5.1.19. In her response to the section 7(9) Notice, dated 28 June 2019, the HOD stated that the request to the NCACC to make the payment to Traffic Events was based on a presentation made by then Director for Arts and Culture, Mr Bonakele Jacobs, to the NCACC regarding the Festival.

5.1.20. According to the response of the Chairperson of the NCACC to the section 7(9) Notice, dated 28 August 2019, the Department appointed Traffic Events to organise and manage the Festival that was to be held on 31 December 2016. Traffic Events was then introduced to the NCACC management, Mr Phillips Speek, the then Acting Chief Executive Officer and the Chief Financial Officer, Mr Zahid Cader by Mr Bonakele Jacobs, during December 2016.

5.1.21. The Chairperson of the NCACC further stated that the Department requested the NCACC to transfer amount of R1,6 million directly to Traffic Events for holding of the Festival in December 2016. He indicated that:

“In terms of the memorandum that was handed to Mr Speek, Mr Cader queried with Mr Jacobs to confirm if DSAC followed supply chain management prescripts with the appointment of this service provider. Mr Jacobs indicated that the DSAC did as such and it is an events organising company that the DSAC utilises”.
5.1.22. The HOD denied in her response to the section 7(9) Notice that the Department procured the services of Traffic Events. According to her, “the Department only made the request to the NCACC and the Board had to approve the request to the NCACC, they were not instructed nor forced to accept this proposal”.

5.1.23. In an internal Memorandum from the Deputy Director: Public Procurement of the Department to the Acting Deputy Director: Legal Services and Labour Relations, dated 20 June 2018, it was stated that the services of Traffic Events for the organising of events in December 2016 were not procured through the Department’s Supply Chain Management Unit.

5.1.24. The Chief Financial Officer of the NCACC stated during the investigation, at a meeting held on 28 November 2018, that the NCACC did not procure the services of Traffic Events for the Festival. According to him, the NCACC only entered into a Memorandum of Agreement (MOA) with Traffic Events on 14 December 2016 for internal audit purposes and to provide a paper trail for the payment made to Traffic Events. This was done after the NCACC was requested by the Department to transfer R1,6 million to Traffic Events directly.

5.1.25. On 14 December 2016, the NCACC and Traffic Events signed a MOA in terms of which the NCACC undertook to set aside a total of R1,6 million for the 2016/2017 financial year towards the implementation of the Festival.

5.1.26. On 24 December 2016 the NCACC transferred an amount of R1 million directly to Traffic Events as per the Department’s request of 13 December 2016, referred to above. This was confirmed during the investigation by Mr Speek, who was the Acting Chief Executive Officer at the time.

5.1.27. It was further established that the Festival was never held. Mr Bonakele Jacobs, the Chief Director: Corporate Service of the Department confirmed this during the investigation.
5.1.28. The NCACC further confirmed during the investigation that the R1 million that was paid to Traffic Events was not recovered to date.

5.1.29. The HOD stated in her response to the section 7(9) notice that she had not transferred the R1.6 million to the NCACC as the event was not held and no expenditure reports submitted.

5.1.30. No evidence could be found from the documents obtained during the investigation that the Department procured the services of Traffic Events prior to the payment of R1 million made to it by the NCACC at the request of the Department in December 2016.

Application of relevant law

5.1.31. In terms of section 38(1)(b) and (c) of the PFMA, the accounting officer for a department is responsible for the effective, efficient, economical and transparent use of the resources of the department and must take effective and appropriate steps to prevent unauthorized, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct.

5.1.32. Section 38(2) provides that an accounting officer may not commit a department to any liability for which money has not been appropriated.

5.1.33. Section 7(3)(b) of the Public Service Act, 1994 provides that the head of a department is responsible for the efficient management and administration of his or her department, including the effective utilization and training of staff, the maintenance of discipline, the promotion of sound labour relations and the proper use of State property, and he or she shall perform the functions that may be described.

5.1.34. The member of the Executive Council of the provincial government responsible for the relevant portfolio must, in terms of section 16A of the Public Service Act,
take appropriate disciplinary steps against the head of the department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder.

**Conclusion**

5.1.35. The evidence and information obtained during the investigation confirmed that the Department requested the NCACC to make a direct payment of R1,6 million to Traffic Events on 13 December 2016 to organise the Festival, on the basis that the NCACC would be refunded.

5.1.36. In terms of the relevant provisions of the PFMA and the Public Service Act, the HOD is responsible for the transparent, effective and efficient use of the resources of the Department.

5.1.37. It is not in dispute that the Festival was never held.

5.2 **Regarding whether the conduct of the Department was improper, constitutes maladministration and resulted in the misappropriation of public funds.**

**Common cause or undisputed facts**

5.2.1 It is not in dispute that the Department requested the NCACC on 13 December 2016 to make a direct payment of R1,6 million to Traffic Events for the organising of the Festival. The Department undertook to transfer an amount of R600 000 in the next transfer payment that it was making to the NCACC and that R1 million would be included in the next trench for the 2017/18 financial year.

5.2.2 It is common cause that the NCACC receives the funding appropriated to it by the Provincial Government through transfer payments made by the Department.
Issues in dispute

5.2.3 On 13 December 2016, the HOD addressed a Memorandum to the Chairperson of the NCACC under the heading: "Request to process R1.6 million payment to Traffic Events- for the Umsobomvu Youth Tourism and Cultural Festival- Novalspont".

5.2.4 The Memorandum was compiled by Mr Jacobs.

5.2.5 Paragraph 2.1 of the Memorandum stated that:

"As detailed to you in my presentation to the NCACC Board on 29 November 2016 at Da Vinci Guest House Kuruman, I did emphasise the critical importance of this event in my request for your approval from NCACC Board of Trustees."

5.2.6 The Memorandum requested the NCACC to make a payment directly to Traffic Events, as follows:

"The Department request that you duly heed and process our request by transferring R1 600 000 on time to Traffic Events the event organizing company. The Department undertakes to transfer the amount of R 600 000 back in the next transfer and the R1 000 000 will be included in the next trench (new financial year 2017/18). Therefore the amounts of the bi-annual transfer will be adjusted to include the transfer amount of R1 600 000. Please process the payment to this account."

5.2.7 According to the HOD’s response to the section 7(9) notice, dated 28 June 2019, the NCACC resolved to enter into an agreement with Traffic Events to organise the Festival based on a presentation that was made to the Council on 29 November 2016 by Mr Bonakele Jacobs, the then Director; Arts and Culture of the Department. She stated in this regard that:
“Based on this presentation the NCACC accepted the proposal of Traffic Events to do the Festival and concluded a Memorandum of Agreement with them. In terms of that MOA the NCACC paid R1 million to the Traffic Events to hold the Festival and once they had received the expenditure reports the remaining R600 000 would be paid to Traffic Events by the Council. In terms of the Administrative obligation underwritten by the MOA and the statutory obligations of the Act the NCACC failed to establish and confirm that the Festival took place and obtain the relevant expenditure reports. This is why the Department has to date not paid the full R1,6 million to the NCACC as they had not complied with their administrative and statutory duties.”

5.2.8 The HOD further indicated that the Department had no involvement in the MOA between the NCACC and that the transfer of the funds to Traffic Events was approved by the NCACC.

5.2.9 She also contended that the MOA entered into with Traffic Events to organise the Festival did not constitute the procurement of goods and services, but funding of a proposal made by Traffic Events to the NCACC, in terms of section 5 the NCACC Act, 2013. She stated in this regard that:

“The process to call for proposals to be funded is a national practice in the sector from a national perspective.

The then Department of Arts and Culture which has in excess of 20 or more nationally classified entities operating in that sphere gets allocations as transfers and in return provide support to the Arts and Culture sector through a call for funding process in support of developing the sector, similar to the operations of the National Lotteries Commission, which allocates funding to the various structures and charities and not necessarily procuring services or goods.
It would be appreciated if a differentiation could be made between procurement of goods and services from a call for funding through the submission of applications in a particular sector. Practically that function resides with the relevant entity and not the DSAC (Department) whatsoever.” (emphasis added)

5.2.10 She further indicated that the NCACC was supposed to have provided the Department with an expenditure report in respect of the festival and the amount that was spent. To date, this report has not been submitted and no reasons provided as to why not.

5.2.11 Further, that as the Department was not part of the MOA with Traffic Events, it could not recover the amount paid to it. That was the responsibility of the NCACC. On 24 and 25 February 2017, the NCACC resolved that the Chairperson of NCACC would urgently take up the matter with Traffic Events, but to date the amount has not been recovered.

5.2.12 The HOD described the process through which the arts and culture sector supports its beneficiaries, as based on the following:

“(a) **Call for Funding Proposals:** Arts and Culture Practitioners and Activists including CBO’s, NGO’s and companies submit such to the Board (NCACC), followed by presentations that must be made to the Board by all applicants before concluding on the recipients.

(b) **Submission of proposals via DSAC** (the Department) **to the Board:** this process is normally a referral process through which DSAC as the custodian of Arts and Culture will indicate through its cluster/legislative process and approval by EXCO for the approval of the event not funding. Despite the approval of the event by EXCO the NCACC remains the final decision maker to approve or disapprove funding, or the acceptance and rejection of any proposals received. Such is further referred to the Board for consideration
and approval. This is done mostly in terms of section 31(2)(a) which states that the Adjustment Budget of a Province may only provide for the appropriation of funds that have become available to the Province. The referral of Traffic Events to the NCACC by DSAC had gone the full circle in terms of the processes mentioned above. Hence the awarding/approval of their proposal was tabled and done by the Board”.

5.2.13 She further indicated that the matter of the payment of the R 1 million is currently the subject of a criminal investigation by the South African Police Service. This was confirmed during the investigation.

5.2.14 In concluding her response to the section 7(9) notice, the HOD re-emphasised that the Department had not transferred the R1.6 million to the NCACC, as the Festival was not held and expenditure reports not submitted.

5.2.15 The Chairperson of the NCACC stated in his response to the section 7(9) notice that the NCACC received an instruction from the Department to pay Traffic Events that was appointed as a service provider by the Department to organise the Festival and that the NCACC would be reimbursed.

Application of the relevant law

5.2.16 The NCACC was established by virtue of the provisions of the NCACC Act.

5.2.17 Section 2 of the Act provides that the NCACC is a juristic person.

5.2.18 The objects of the NCACC are determined by section 3 and include, to:

(a) Encourage and provide opportunities for persons to practice the arts;
(b) Develop and promote the arts and encourage excellence in performance and expression in art works and forms; and
(c) Provide financing for facilities where art and cultural activities may be practiced.

5.2.19 The powers and functions of the NCACC are provided for in section 5 of the NCACC Act, in terms of which the NCACC may, inter alia, give financial support, advice and information to persons, organisations and institutions that may approach it for that purpose and enter into agreements with persons, organisations or institutions, with the written consent of the Member of the Executive Council responsible for arts and culture in the Province.

5.2.20 There is no indication in the MOA between the NCACC and Traffic Events that the MEC for Sport, Arts and Culture consented to the NCACC entering into the agreement with Traffic Events.

5.2.21 Finance and Procurement are regulated in Chapter IV of the NCACC Act. Section 17 provides that the NCACC is financed from, inter alia, money appropriated by the Provincial Legislature.

5.2.22 Section 17(3) of the NCACC Act provides as follows:

“The prescripts incumbent on a provincial public entity, contained in the Public Finance Management Act, 1999 (Act No 1 of 1999) and the Treasury Regulations apply to the Council”.

5.2.23 Section 19 of the NCACC Act provides that the moneys appropriated by the Provincial Legislature must be utilized exclusively for the achievements of its objects and in accordance with the provisions of the Act.

5.2.24 The NCACC is in terms of section 18 of the NCACC Act accountable to the Provincial Legislature through to the MEC for Sport, Arts and Culture for the
performance of its functions and compliance with the relevant laws, including the PFMA.

5.2.25 Section 49 of the Public Finance Management Act, 1999 (PFMA) provides that every public entity must have an authority which must be accountable for the purposes of this Act. If the public entity has a board or other controlling body, that board or controlling body is the accounting authority for that entity.

5.2.26 The NCACC Act does not provide for the establishment of a Board and the NCACC is accordingly the accounting authority.

5.2.27 The fiduciary duties of accounting authorities are set out in section 50 of the PFMA. It provides *inter alia*, that the accounting authority must act with fidelity, honesty, integrity and in the best interests of the public entity in managing its financial affairs.

5.2.28 Section 51(1)(b) of the PFMA provides that the accounting authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure and expenditure not complying with the operational policies of the public entity.

5.2.29 "Fruitless and wasteful expenditure” is defined by section 1 of the PFMA as “expenditure which was made in vain and would have been avoided had reasonable care been exercised".

5.2.30 In terms of section 38(1)(b) and (c) of the PFMA, the accounting officer for a department is responsible for the effective, efficient, economical and transparent use of the resources of the department and must take effective and appropriate steps to prevent unauthorized, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct.
5.2.31 Section 38(2) provides that an accounting officer may not commit a department to any liability for which money has not been appropriated.

5.2.32 Section 7(3)(b) of the Public Service Act, 1994 provides that the head of a department is responsible for the efficient management and administration of his or her department, including the effective utilization and training of staff, the maintenance of discipline, the promotion of sound labour relations and the proper use of State property, and he or she shall perform the functions that may be prescribed.

5.2.33 The member of the Executive Council of the provincial government responsible for the relevant portfolio must, in terms of section 16A of the Public Service Act, take appropriate disciplinary steps against the head of the department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder.

Conclusion

5.2.34 The NCACC is an entity that is regulated by the PFMA in the same manner as other provincial public entities. It is responsible and accountable for the performance of its functions and expenditure in terms of the NCACC Act and the PFMA.

5.2.35 The Department supports the NCACC by means of transfer payments of the funds appropriated to it.

5.2.36 It is clear from the provisions of the NCACC Act that the Department has no role to play in the decisions of the NCACC on proposals for funding to consider and the amounts to be allocated. That decision lies with the Council.
5.2.37 The HOD's response during the investigation that the Department was merely involved in a proposal to the NCACC by Traffic Events to organize the Festival, is not supported by the evidence obtained during the investigation.

5.2.38 It is unambiguous from the contents of the Memorandum of 13 December 2016 that the HOD requested the NCACC to make a direct payment of R1.6 million to Traffic Events to organize the festival on the basis that it would be reimbursed. It was not part of a proposal.

5.2.39 The NCACC indicated that it was under the impression that the R1.6 million would be paid to a service provider of the Department.

5.2.40 As the custodian department of the NCACC, the Department should assist and support the NCACC in the performance of its functions and the spending of the public funds appropriated to it.

5.2.41 The Department's request to the NCACC to make a direct payment to Traffic Events to organize the Festival was not in line with the provisions of the NCACC Act. Proposals for financial support in terms of section 5 are clearly to be submitted by persons, organizations and institutions. The Act does not provide for a situation where the Department could request the NCACC to make a direct payment to a particular entity, under the auspices of financial support.

5.2.42 No indication could be found that the Department conducted any due diligence investigation before it made the request to the NCACC and committed itself to reimburse the NCACC with the amount of R1.6 million.

5.2.43 According to the HOD, the responsibility and accountability for the funding of Traffic Events was left entirely up to the NCACC, despite the request of the Department.
5.2.44 In making the request for the direct payment to the NCACC, the HOD did not act in the best interests of the NCACC and the Department in terms of the expending of resources, as is required of an accounting officer by the PFMA. The NCACC should have been allowed to consider the proposal for funding without any interference, or what was perceived as an instruction, by the Department.

5.2.45 The request of the Department approved by the HOD, that the NCACC should make a direct payment to Traffic Events eventually led to an amount of R1 million of public funds paid for a service that was not rendered, and which resulted in fruitless and wasteful expenditure. It would have been avoided, was it not for the Department’s request.

5.2.46 The conduct of the HOD further did not amount in the proper use of state property, as contemplated by the Public Service Act.

5.2.47 The conduct of the Department was therefore improper, constitutes maladministration and resulted in the misappropriation of public funds.

5.3 **Regarding whether the NCACC made a payment of R1 million to Traffic Events in December 2016 to organise the Festival that never took place**

*Common cause or facts not in dispute*

5.3.1 It is not in dispute that the HOD requested the NCACC, in a Memorandum dated 13 December 2016, to process the transfer of R1.6 million directly to Traffic Events. The Department undertook to transfer back to the NCACC R600 000.00 in the next transfer and that the R1 million would be included in the next trench i.e. new financial year 2017/2018.

5.3.2 The purpose of the transfer was stated as: "for the hosting of the Msobomvu Youth Tourism and Cultural Festival to take place in Norvalsport".
5.3.3 On 14 December 2016, the NCACC and Traffic Events signed a Memorandum of Agreement (MOA). The Preamble to the MOA read as follows:

"1.1 Whereas the parties have identified the growth and development of Cultural Tourism as a key priority in the Umsobomvu Municipality;

1.2 Whereas the Traffic Events & Entertainment CC has committed itself to ensuring that all Youth Enterprises involved in Cultural Tourism benefit from the growth and development of this sector;

1.3 Whereas the Northern Cape Arts and Culture Council has committed funds to assist in implementing the Umsobomvu Youth Tourism and Cultural Festival".

5.3.4 In terms of the MOA, the NCACC undertook to set aside a total amount of R1 600 000.00 in the 2016/2017 financial year towards the implementation of the Festival. The NCACC also undertook to transfer R1 000 000.00 to Traffic Events by 15 December 2016 and the remaining R600 000.00 as soon as the first expenditure report in respect of the Festival was submitted to the NCACC, which should have been done by 31 January 2017.

5.3.5 According to Addendum A to the MOA, the total cost of the Festival was submitted by Traffic Events as R1 592 580. It was to be held at the Gariep Dam on 31 December 2016.

5.3.6 Paragraph 3 of the MOA provided that in the event of breach of any term, condition or undertaking contained in the Agreement, and a failure to remedy such breach within a period of fourteen (14) days, the aggrieved party could, inter alia, cancel the agreement and remedy the breach of the other party, and recover all costs incurred as a result of such remedy.
5.3.7 There is no indication in the MOA that the MEC for Sport, Arts and Culture consented to the NCACC entering into the agreement.

5.3.8 On 24 December 2016, the NCACC transferred an amount of R1 million directly to Traffic Events. This was confirmed during the investigation by Mr Speek, who was the Acting Chief Executive Officer of the NCACC at the time and a copy of the bank statement of the NCACC that was obtained.

**Issues in dispute**

5.3.9 According to the HOD's response to the section 7(9) Notice, the NCACC resolved to enter into an agreement with Traffic Events to organise the Festival based on a presentation that was made to the Council on 29 November 2016 by Mr Bonakele Jacobs, the then Director; Arts and Culture of the Department.

5.3.10 The HOD further indicated that the Department had no involvement in the MOA between the NCACC and Traffic Events and that the transfer of the funds to Traffic Events was approved by the NCACC.

5.3.11 She also contended that the MOA entered into with Traffic Events to organise the Festival did not constitute the procurement of goods and services, but funding of a proposal made by Traffic Events to the NCACC, in terms of section 5 the NCACC Act. This contention was made despite the fact that the Department requested the NCACC to make a direct payment of R1.6 million to Traffic Events.

5.3.12 The HOD denied that the services of Traffic Events were procured by the Supply Chain Management Unit of the Department. She stated that “the Department only made the request to the NCACC and the Board (Council) had to approve the request to the NCACC and the Board had to approve the request, they were not instructed nor forced to accept this proposal".
5.3.13 She further indicated that the NCACC was supposed to have provided the Department with an expenditure report in respect of the festival and the amount that was spent. To date, this report has not been submitted and no reasons provided as to why not.

5.3.14 Further, that as the Department was not part of the MOA with Traffic Events, it could not recover the amount paid to it. That was the responsibility of the NCACC. On 24 and 25 February 2017, the NCACC resolved that the Chairperson of NCACC would urgently take up the matter with Traffic Events, but to date the amount has not been recovered.

5.3.15 During the investigation, Mr Cader, the Chief Financial Officer of the NCACC stated that the NCACC did not appoint Traffic Events for the December 2016 Festival, but that it was the Department that did so. Mr Cader further indicated that NCACC only entered into a MOA with Traffic Events on 14 December 2016 for internal audit purposes i.e. to provide paper trail for payment to Traffic Events.

5.3.16 Mr Cader further stated that the total budget for transfer payments to be made from the Department to the NCACC for the 2016/2017 financial year was R1,5 million. He further stated that the R1 million paid to Traffic Events was sourced from the NCACC cash reserves:

"NCACC never received any proposal for funding directly from Traffic Events. If a proposal for funding was sent by Traffic Events, NCACC would not have approved it as the amount would have exceeded their total budget for transfer payment"

5.3.17 According to the Minutes of a Meeting of the NCACC held on 24 and 25 February 2017, the matter of the Festival was discussed. The following was recorded:
“Event took place in December 2016. Report still outstanding. It was reported that a print out of the funding was leaked by an NCACC official to the CCIFSA, the leaked report went viral on social media and now the matter has become very serious as its being currently investigated by the HAWKS. Names of Board members were also raised mentioned in the allegations”.

5.3.18 The resolution taken at the meeting in this regard was:

“Chairperson to take the matter seriously”.

5.3.19 During the investigation, the Chief Director: Corporate Services of the Department, Mr Bonakele Jacobs, confirmed that the Festival that was planned for 31 December 2016, did not take place.

5.3.20 No evidence could be found during the investigation that the amount of R1 million paid to Traffic Events was recovered or that any attempt was made in his regard.

Application of relevant law

5.3.21 The NCACC was established by virtue of the provisions of the NCACC Act.

5.3.22 Section 2 of the Act provides that the NCACC is a juristic person.

5.3.23 The objects of the NCACC are determined by section 3 and include, to:

5.3.23.1 Encourage and provide opportunities for persons to practice the arts;

5.3.23.2 Develop and promote the arts and encourage excellence in performance and expression in art works and forms; and

5.3.23.3 Provide financing for facilities where art and cultural activities may be practiced.
5.3.24 The powers and functions of the NCACC are provided for in section 5 of the NCACC Act, in terms of which the NCACC may, *inter alia*, give financial support, advice and information to persons, organisations and institutions that may approach it for that purpose and enter into agreements with persons, organisations or institutions, with the written consent of the Member of the Executive Council responsible for arts and culture in the Province.

5.3.25 Finance and Procurement are regulated in Chapter IV of the NCACC Act. Section 17 provides that the NCACC is financed from, *inter alia*, money appropriated by the Provincial Legislature.

5.3.26 Section 17(3) of the NCACC Act provides as follows:

> "The prescripts incumbent on a provincial public entity, contained in the Public Finance Management Act, 1999 (Act No 1 of 1999) and the Treasury Regulations apply to the Council".

5.3.27 The NCACC is, in terms of section 17(1) financed from *inter alia* money appropriated by the Provincial Legislature for the Council.

5.3.28 Section 19 of the NCACC Act provides that the moneys appropriated by the Provincial Legislature must be utilized exclusively for the achievements of its objects and in accordance with the provisions of the Act.

5.3.29 The NCACC is in terms of section 18 of the NCACC Act accountable to the Provincial Legislature through the MEC for Sport, Arts and Culture for the performance of its functions and compliance with the relevant laws, including the PFMA.

5.3.30 Section 49 of the Public Finance Management Act, 1999 (PFMA) provides that every public entity must have an authority which must be accountable for the
purposes of this Act. If the public entity has a board or other controlling body, that board or controlling body is the accounting authority for that entity.

5.3.31 The NCACC Act does not provide for the establishment of a Board and the NCACC is accordingly the accounting authority.

5.3.32 The fiduciary duties of accounting authorities are set out in section 50 of the PFMA. It provides inter alia, that the accounting authority must act with fidelity, honesty, integrity and in the best interests of the public entity in managing its financial affairs.

5.3.33 Section 51(1)(b) of the PFMA provides that the accounting authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure and expenditure not complying with the operational policies of the public entity.

5.3.34 "Fruitless and wasteful expenditure" is defined by section 1 of the PFMA as "expenditure which was made in vain and would have been avoided had reasonable care been exercised".

5.3.35 Section 83 of the PFMA provides that the accounting authority of a public entity commits an act of financial misconduct if that accounting authority willfully or negligently fails to comply with a requirement of sections 50 to 55, or makes or permits an irregular expenditure or a fruitless and wasteful expenditure. If the accounting authority is a board or other body consisting of members, every member is individually and severally liable for any financial misconduct of the accounting authority.

5.3.36 Regulation 33.1.3 of the Treasury Regulations made in terms of the PFMA provides that:
"If an accounting authority or any of its members is alleged to have committed financial misconduct, the relevant executive authority must initiate an investigation into the matter and if the allegations are confirmed must ensure that appropriate disciplinary proceedings are initiated immediately."

Conclusion

5.3.37  It appears from the evidence obtained during the investigation that the NCACC paid an amount of R1 million into the bank account of Traffic Events on 24 December 2016.

5.3.38  The payment was made in terms of the MOA to fund the Festival.

5.3.39  The NCACC, as the accounting authority in terms of section 49 of the PFMA, authorised the payment of R1 million to Traffic Events.

5.3.40  The Festival was not held to date.

5.3.41  The R1 million paid to Traffic Events was not recovered by the NCACC as provided for by the MOA.

5.3.42  No actual costs/expenditure reports were presented by Traffic Events to the NCACC or the Department.

5.3.43  There is no indication in the MOA between the NCACC and Traffic Events that the MEC consented to the NCACC entering into the agreement with Traffic Events.
5.4 Regarding whether the conduct of the NCACC was improper, constitutes maladministration and resulted in the misappropriation of public funds.

Common cause or facts not in dispute

5.4.1 It is common cause that the NCACC, as the accounting authority in terms of section 49 of the PFMA, authorised the payment of R1 million to Traffic Events, which was made on 24 December 2016.

5.4.2 The Festival in respect of which the payment was made, was not held. No actual costs/expenditure reports were presented by Traffic Events to the NCACC.

5.4.3 The NCACC failed to cancel the MOA in terms of paragraph 3 thereof and to recover the money paid to Traffic Events.

Issues in dispute

5.4.4 In his response to the section 7(9) notice, Mr Thebe, the Chairperson of the NCACC confirmed that Mr B Jacobs of the Department made a proposal for funding to the Board at its third quarterly meeting held in November 2016. The proposal was to request an amount of R600 000 to host the Festival. It was not approved by the NCACC.

5.4.5 According to the Chairperson of the NCACC, the Department then appointed Traffic Events to organise the Festival to be held on 31 December 2016. The NCACC was requested by the Department to transfer an amount of R1,6 million directly to Traffic Events to organise the Festival.

5.4.6 The Chief Financial Officer of the NCACC indicated that the funding of the Festival did not form part of the NCACC’s original approved budget. According to
the Chief Financial Officer, the services of Traffic Events were procured by the Department.

5.4.7 He requested certain compliance documents from Traffic Events before the NCACC entered into the MOA with Traffic Events, as there was a guarantee of the NCACC being reimbursed by the Department.

5.4.8 During January 2017 it came to the attention of the NCACC that the Festival was not held. He further stated that:

"This has led to Traffic Events not complying with the conditions as set out in the MOA, in relation to the submission of a post project report to the NCACC and DSAC (Department). As this was an instruction from the DSAC and a DSAC appointed service provider, the NCACC requested reimbursement on various occasions from the DSAC during the 2017/18 financial year. The NCACC did not receive any response in this regard which was not expected as the R1 600 000.00 request letter from the DSAC did not indicate that a close out report was needed for reimbursement."

5.4.9 As indicated above, the HOD denied during the investigation that the Department procured the services of Traffic Events to organise the Festival.

5.4.10 No evidence could be found that the Department procured the services of Traffic Events to organise the Festival. It was also denied by the HOD.

Application of the relevant law

5.4.11 The NCACC was established by virtue of the provisions of the NCACC Act.

5.4.12 Section 2 of the Act provides that the NCACC is a juristic person.
5.4.13 The objects of the NCACC are determined by section 3 and include, to:

5.4.13.1 Encourage and provide opportunities for persons to practice the arts;

5.4.13.2 Develop and promote the arts and encourage excellence in performance and expression in art works and forms; and

5.4.13.3 Provide financing for facilities where art and cultural activities may be practiced.

5.4.14 The powers and functions of the NCACC are provided for in section 5 of the NCACC Act, in terms of which the NCACC may, inter alia, give financial support, advice and information to persons, organisations and institutions that may approach it for that purpose and enter into agreements with persons, organisations or institutions, with the written consent of the Member of the Executive Council responsible for Sport Arts and Culture in the Province.

5.4.15 Finance and Procurement are regulated in Chapter IV of the NCACC Act. Section 17 provides that the NCACC is financed from, inter alia, money appropriated by the Provincial Legislature.

5.4.16 Section 17(3) of the NCACC Act provides as follows:

"The prescripts incumbent on a provincial public entity, contained in the Public Finance Management Act, 1999 (Act No 1 of 1999) and the Treasury Regulations apply to the Council."

5.4.17 Section 19 of the NCACC Act provides that the moneys appropriated by the Provincial Legislature must be utilized exclusively for the achievements of its objects and in accordance with the provisions of the Act.
5.4.18 The NCACC is in terms of section 18 of the NCACC Act accountable to the Provincial Legislature through the MEC for Sport, Arts and Culture for the performance of its functions and compliance with the relevant laws, including the PFMA.

5.4.19 Section 49 of the Public Finance Management Act, 1999 (PFMA) provides that every public entity must have an authority which must be accountable for the purposes of this Act. If the public entity has a board or other controlling body, that board or controlling body is the accounting authority for that entity. The NCACC Act does not provide for the establishment of a Board and the NCACC is accordingly the accounting authority.

5.4.20 The fiduciary duties of accounting authorities are set out in section 50 of the PFMA. It provides *inter alia*, that the accounting authority must act with fidelity, honesty, integrity and in the best interests of the public entity in managing its financial affairs.

5.4.21 Section 51(1)(b) of the PFMA provides that the accounting authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure and expenditure not complying with the operational policies of the public entity.

5.4.22 "*Fruitless and wasteful expenditure*" is defined by section 1 of the PFMA as "*expenditure which was made in vain and would have been avoided had reasonable care been exercised*."

5.4.23 Section 83 of the PFMA provides that the accounting authority of a public entity commits an act of financial misconduct if that accounting authority willfully or negligently fails to comply with a requirement of sections 50 to 55, or makes or permits an irregular expenditure or a fruitless and wasteful expenditure. If the accounting authority is a board or other body consisting of members, every
member is individually and severally liable for any financial misconduct of the accounting authority.

5.4.24 Regulation 33.1.3 of the Treasury Regulations issued in terms of the PFMA provides that:

"If an accounting authority or any of its members is alleged to have committed financial misconduct, the relevant executive authority must initiate an investigation into the matter and if the allegations are confirmed, must ensure that appropriate disciplinary proceedings are initiated immediately."

Conclusion

5.4.25 The NCACC is juristic person that is financed in terms of the provisions of the NCACC Act from, inter alia money appropriated by the Provincial Legislature.

5.4.26 The NCACC is the accounting authority that is accountable for the purposes of the PFMA. It is further accountable in terms of the NCACC Act to the Provincial Legislature through the MEC for Sport, Arts and Culture for the performance of its functions and compliance with the relevant laws, including the PFMA.

5.4.27 Section 19 of the NCACC Act provides that the money appropriated by the Provincial Legislature must be utilised exclusively for the achievements of its objects and in accordance with the provisions of the Act.

5.4.28 No provision is made in the NCACC Act for it to respond to requests of the Department or to make payments on its behalf or to service providers appointed by the Department. The Department has no role to play in the affairs of the NCACC in terms of the Act.
5.4.29 It is clear from the NCACC Act and the PFMA that the NCACC must apply its mind to every request for funding and ensure that the expenditure is considered and approved in terms of the PFMA and in line with objectives as stipulated in the NCACC Act.

5.4.30 By acceding to the request of the Department to make a direct payment to Traffic Events for organising the Festival, the NCACC did not act in accordance with its responsibilities in terms of the PFMA and the NCACC Act.

5.4.31 There is no record of the proposal that was made by Traffic Events, except for a breakdown of the cost to organise the Festival. No evidence could be found that the NCACC conducted a proper due diligence enquiry before an amount of R1 million was paid to Traffic Events on 24 December 2016.

5.4.32 There is also no indication that the MEC consented to the MOA, as required by the NCACC Act.

5.4.33 No evidence could be found that the NCACC attempted to cancel the MOA when Traffic Events failed to organise the Festival or to recover the R1 million that was paid.

5.4.34 The NCACC therefore did not act with fidelity, integrity and in the best interests of the entity, as contemplated by section 50 of the PFMA.

5.4.35 It made no attempt to take effective and appropriate steps to prevent fruitless and wasteful expenditure and the misappropriation of public funds.

5.4.36 The conduct of the NCACC was improper, constitutes maladministration and resulted in the misappropriation of public funds.
6 FINDINGS

6.1 Regarding whether the Department requested the NCACC to make a payment of R1,6 million to Traffic Events to organise the Festival in December 2016 that never took place

6.1.1 The allegation that the Department requested the NCACC to make a payment of R1, 6 million directly to Traffic Events to organise the Festival that never took place, is substantiated.

6.1.2 The evidence and information obtained during the investigation confirmed that the Department requested the NCACC to make a direct payment of R1,6 million to Traffic Events on 13 December 2016 to organise the Festival, on the basis that the NCACC would be refunded. It is not disputed that the Festival was never held.

6.2 Regarding whether the conduct of the Department was improper, constitutes maladministration and resulted in the misappropriation of public funds.

6.2.1 The allegation that the conduct of the Department was improper, constitutes maladministration and resulted in the misappropriation of public funds, is substantiated.

6.2.2 In approving the request for the direct payment to the NCACC, the HOD did not act in the best interests of the NCACC and the Department in terms of the expending of resources, as is required of an accounting officer by the PFMA.

6.2.3 As the accounting officer of the Department that is expected to support and assist the NCACC and is responsible for the making of transfer payments of public funds to the NCACC to enable it to perform its functions, the HOD should have acted
with care and diligence to prevent fruitless and wasteful expenditure. The HOD was fully aware that the Department had no role to play in the exercising of the its mandate by the NCACC, yet she approved a request to the NCACC to make a direct payment of R1,6 million to Traffic Events, on the basis of reimbursement

6.2.4 The conduct of the HOD eventually led to an amount of R1 million of public funds paid for a service that was not rendered, which resulted in fruitless and wasteful expenditure.

6.2.5 The conduct of the HOD further did not amount to the proper use of state property, as contemplated by the Public Service Act.

6.2.6 The conduct of the Department accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

6.3 Regarding whether the NCACC made a payment of R1 million to Traffic Events in December 2016 to organise the Festival that never took place

6.3.1 The allegation that the NCACC made a payment of R1 million to Traffic Events in December 2016 to organise an event that never took place, is substantiated.

6.3.2 It appears from the evidence obtained during the investigation that the NCACC paid an amount of R1 million into the bank account of Traffic Events on 24 December 2016.

6.3.3 The payment was made in terms of the MOA to fund the Festival.

6.3.4 The NCACC, as the accounting authority in terms of section 49 of the PFMA, authorised the payment of R1 million to Traffic Events.
6.3.5 The Festival was not held to date.

6.3.6 The R1 million paid to Traffic Events was not recovered by the NCACC as provided for by the MOA.

6.4 Regarding whether the conduct of the NCACC was improper, constitutes maladministration and resulted in the misappropriation of public funds.

6.4.1 The allegation that the conduct of the NCACC was improper, constitutes maladministration and resulted in the misappropriation of public funds, is substantiated.

6.4.2 By acceding to the request of the Department to make a direct payment to Traffic Events for organising the Festival, the NCACC did not act in accordance with its responsibilities in terms of the PFMA and the NCACC Act.

6.4.3 The NCACC did not act with fidelity, integrity and in the best interests of the entity, as contemplated by section 50 of the PFMA.

6.4.4 It made no attempt to take effective and appropriate steps to prevent fruitless and wasteful expenditure and the misappropriation of public funds and to recover the amount that was lost.

6.4.5 The conduct of the NCACC accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

7 REMEDIAL ACTION

7.1 The appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, is the following:
7.1.1 The MEC for Sport, Arts and Culture:

7.1.1.1 To take appropriate action against the HOD, Ms R Palm, in terms of the PFMA and the Public Service Act for her improper conduct in requesting the NCACC to make a direct payment of R1.6 million to Traffic Events to organise the Festival that was never held, within 60 (sixty) days from the date of receiving my report by the Department.

7.1.1.2 To take appropriate action in terms of the NCACC Act and the PFMA against the NCACC as the accounting authority for its improper conduct in making a payment of R1 million to Traffic Events to organise the Festival that was never held, failing to cancel the MOA and to recover the money, within 60 (sixty) days from the date of receiving my report.

7.1.1.3 To take appropriate steps ensure that the NCACC recovers the amount of R1 million plus interest from Traffic Events, within 60 (sixty) days from the date of my report.

7.1.1.4 To take appropriate steps to report the fruitless and wasteful expenditure to the Provincial Treasury within 60 (sixty) days form the date of receiving my report.

7.1.2 This report is referred to the National Head of the DPCI to investigate whether any crime was committed and if so, to take the appropriate action.
8. MONITORING

8.1 The MEC for Sport, Arts and Culture to submit an implementation plan indicating how the remedial action referred to in paragraph 7.1 is implemented within thirty (30) days from the date of receiving my report.

8.2 The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in my report.

8.3 The National Head of the DPCI to inform me of the status of the criminal investigation within 60 (sixty) days from the date of receiving my report.