REPORT OF THE PUBLIC PROTECTOR 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, 23 OF 1994.

PUBLIC PROTECTOR
SOUTH AFRICA

Report No: 125 of 2019/20
ISBN No: 978-1-928507-85-7

REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION, CORRUPTION, NEPOTISM AND ABUSE OF POWER BY THE NATIONAL ARTS COUNCIL (NAC).

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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 (Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (Public Protector Act).

(ii) This report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into a complaint lodged by Mr Freddy Nyathela on behalf of the South African Roadies Association (the Complainant) on 23 January 2017. The Complainant alleged as follows:

(a) Abuse of power and subversion of due processes by the Chief Executive Officer (CEO) of the National Arts Council (NAC);

(b) Falsification of the South African Roadies Association's (SARA) funding application by the CEO;

(c) Lack of adherence to and compliance with the Promotion of Administrative Justice Act Promotion Act, 3 of 2000 (PAJA) and *Batho Pele* Principles;

(a) Maladministration and Corruption; and

(b) Disregard of the National Arts Council Act, 56 of 1997 (NAC Act); especially the objects of Council.

(iii) I held a meeting with the Complainant on 19 April 2017 in order to get clarification on issues raised by him. Subsequently, the Complainant confirmed that I must investigate the following two issues:

(a) That the CEO of the NAC allegedly falsified the Complainant's application to EXCO for partnership funding without his knowledge and consent; and

(b) That there was impropriety and abuse of the Expired Projects and Surplus Policy (the Policy), which is applicable in the distribution of the surplus funds by the NAC.

(iv) **Based on analysis of the allegations, and by agreement with the Complainant, the following issues were identified to inform and focus this investigation:**

(a) Whether the CEO of the NAC submitted an application to EXCO for partnership funding using the Complainant's name without his consent, and if so, whether such conduct was improper and constitutes maladministration; and

(b) Whether there was impropriety and abuse of the Expired Projects and Surplus Policy, by the NAC in the distribution of the surplus funds resulting in prejudice to the Complainant.

(v) The investigation was conducted through exchange of correspondence, meetings and interviews with the Complainant, the CEO of the NAC, Risk Committee members and current and former Chairpersons of the NAC Board.

(vi) Section 181 (1)(a) of the Constitution establishes the office of the Public Protector as an office intended to strengthen constitutional democracy in the Republic. In terms of Section 182 of the Constitution, the Public Protector has the power to:

(a) The Public Protector has the power, as regulated by national legislation;

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."

(vii) Therefore, the Public Protector Act significantly confers wide powers to me to investigate any alleged maladministration, abuse, improper conduct, act or omission arising within the public administration.

(viii) My investigation is informed by virtue of the provisions of section 181(2) of the Constitution and the Public Protector Act. The Public Protector has jurisdiction in terms of the Constitution, to investigate **any conduct** in state affairs or in the public administration which is alleged or suspected to be improper or to result in impropriety or prejudice.

(ix) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, including the response to the section 7(9) Notice, I make the following findings:

(a) Regarding whether the CEO of the NAC submitted an application to EXCO for partnership funding using the Complainant's name, without his knowledge and consent, and if so, whether such conduct was improper and constitutes maladministration.

(aa) The allegation that the CEO of the NAC submitted an application to EXCO for partnership funding using the Complainant's name without his knowledge and consent, is substantiated.

(bb) The CEO submitted a proposal for the partnership funding to EXCO using the Complainant documents from the rejected application without his knowledge and consent, but. However, this was not a falsified/forged application as alleged by the Complainant.

(cc) The Complainant was not informed by the CEO about the annual partnership proposal since the Policy does not explicitly provide for such an obligation on the part of the CEO once such a need has been identified.

(dd) Although the submission of the proposal to EXCO by the CEO is purportedly permissible in terms of the Policy, this is inconsistent with the provisions of section 33(1) of the Constitution and sections 3(1) and 3(2)(b) of PAJA, which provide for a reasonable and procedurally fair administrative action.

(ee) Notwithstanding the CEO's contention, I find the reasons provided to justify not informing the Complainant who was subjects of the proposal under the annual partnership, such as that they did not want to raise his hopes, when in fact such proposals are presented to EXCO in their name, unacceptable.

(ff) Therefore, the CEO's failure to inform the Complainant before submitting the proposal to EXCO for partnership funding, amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Regarding whether there was impropriety and abuse of the Expired Projects and Surplus Policy, by the NAC in the distribution of the surplus funds resulting in prejudice to the Complainant.

(aa) The allegation that there was impropriety and potential abuse of the Policy by the NAC in the distribution of the surplus funds is substantiated. The fact that the

CEO proceeded to use the Complainant's documents from the rejected application, which she did without his knowledge and consent is improper.

(bb) The fact that the proposal by the CEO is based on the Complainant's rejected application for funding, to which the Complainant is yet to receive a recorded formal response thereto, in which cogent reasons for the rejection are captured by the NAC has resulted in perpetual prejudice to him.

(cc) The implementation of the Policy by the NAC is inconsistent with the Constitution, PAJA and the National Treasury Regulations and therefore procedurally unfair as it does not take into account the rights of the applicant, but affords NAC employees, management or Council wide powers to deal arbitrarily with applications for surplus funds, in particular for annual partnership funding without their knowledge and consent and therefore has the potential of abuse.

(dd) Therefore, the conduct of the CEO and the NAC in the manner in which it is implementing the Policy, amounts to improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(x) The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following:

(a) The Minister of Sports, Arts and Culture:

(aa) To take note of the report in so far as the findings and remedial action contained therein are concerned and as the Executive Authority, assist in ensuring that the remedial action as provided for hereunder is expedited.

(b) The Chairperson of the NAC Board:

(aa) To take note of my findings in this report and, within sixty (60) days of the issuing of this report:

i. Act in accordance with his fiduciary duty of ensuring that the inconsistencies identified in the Policy during my investigation are addressed , by setting in motion a process to amend the Policy and promulgate Standard Operating Procedures on the implementation of Expired Projects and Surplus Funds Policy so as to align it with the relevant legislative framework;

ii. Amend and strengthen the Expired Projects and Surplus Policy in order to close the gaps that exist in it, so as to prevent the NAC staff and other NAC stakeholders from exploiting the Policy contrary to the ethos of fairness, equity, transparency, competition and cost effectiveness as enshrined in the Section 217 of the Constitution of the Republic of South Africa;

iii. Where necessary put in place Standard Operating Procedures to cure the inconsistencies in the implementation of the Policy as revealed by my investigation;

iv. Generally to align the internal NAC Policy toolkit with the relevant legislative framework such as sections 33(1) and 217 of the Constitution, section 51(1)(b)(iii) of the PFMA, sections 3(1) and 3(2)(b)(i) of PAJA, Regulation 16A8 of the National Treasury Regulations as well as Regulation 13(c) of the Public Service Regulations, 2016;

v. Must within thirty (30) days of the issuing of this report, ensure that a letter of apology is issued by the CEO to the Complainant for the manner in which he was treated by the NAC, including the formal letter on the outcome of his 2014 application and cogent reasons for its rejection; and

vi. Must within thirty (30) days of the issuing of this report ensure that the CEO has put in place a "Declaration of Interest register" for all NAC employees relating to the projects they have initiated since 2015 to date, so as to manage any prevalent conflict of interest.

REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION, CORRUPTION, NEPOTISM AND ABUSE OF POWER BY THE NATIONAL ARTS COUNCIL (NAC).

1. INTRODUCTION

1.1. 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, 23 of 1994 (Public Protector Act).

1.2. This report is submitted in terms of section 8 of the Public Protector Act to the following people to note the outcome of this investigation:

1.2.1. The Minister of Sports, Arts and Culture, Mr Nathi Mthethwa, MP;

1.2.2. The Chairperson of the NAC Board, Mr Hartley Ngoato;

1.2.3. The erstwhile Chairperson of the NAC Board, Ms Angie Makwetla;

1.2.4. Chief Executive Officer, Ms Rosemary Mangope; and

1.2.5. The Complainant, Mr Freddy Nyathela.

1.3. This report relates to my investigation into a complaint relating to allegations of maladministration, corruption, nepotism and abuse of power by the National Arts Council (NAC).

2. THE COMPLAINT

2.1. The complaint was lodged on 23 January 2017 by Mr Freddy Nyathela on behalf of the South African Roadies Association (SARA) (the Complainant) with a specific request for me to investigate allegations relating to maladministration, corruption, nepotism and abuse of power by the NAC.

2.2. The Complainant alleged as follows:

2.2.1 That there was abuse of power and subversion of due processes by the Chief Executive Officer (CEO) of the National Arts Council (NAC);

2.2.2 That there was falsification of the SARA's funding application by the CEO;

2.2.3 That there was lack of adherence to and compliance with the Promotion of Administrative Justice Act Promotion Act, 3 of 2000 (PAJA) and *Batho Pele* Principles; and

2.2.4 That there was Maladministration and Corruption and that there was disregard of the National Arts Council Act, 56 of 1997 (NAC Act); especially the objects of Council by the NAC in implementing the Expired Projects and Surplus Funds Policy (the Policy).

2.3. **Based on analysis of the allegations, and by agreement with the Complainant, the following issues were identified to inform and focus this investigation:**

2.3.1 Whether the CEO of the NAC submitted a falsified application to EXCO for partnership funding using the Complainant's name without his consent, and if so, whether such conduct was improper and constitutes maladministration; and

2.3.2 Whether there was impropriety and abuse of the Expired Projects and Surplus Policy by the NAC in the distribution of the surplus funds resulting in prejudice to the Complainant.

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 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 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 or any other appropriate alternative dispute resolution mechanism.

3.5. In the constitutional court, in the matter of ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016),*** Chief Justice Mogoeng stated the following with own emphasis, when confirming the powers of the Public Protector:

3.5.1. The remedial action taken by the Public Protector has a binding effect, *"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" (para 73);*

3.5.2. Complaints are lodged with the Public Protector **to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles** (para 65);

3.5.3. 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);

3.5.4. Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as 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);

3.5.5. 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) ;

3.5.6. 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);

3.5.7. 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);

3.5.8. 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(c));

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

3.5.10. "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));

3.6. The NAC is an organ of state and their conduct amounts to conduct in state affairs, as a result the complaint falls within the ambit of the Public Protector's mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

3.7. The Public Protector's powers and jurisdiction to investigate and take appropriate remedial action was not disputed by the NAC.

3.8. My investigation is informed by the provisions of section 181(2) of the Constitution and the Public Protector Act. The Public Protector has jurisdiction in terms of the Constitution, to investigate **any conduct** in state affairs or in the public administration which is alleged or suspected to be improper or to result in impropriety or prejudice.

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. Like every Public Protector investigation, 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 maladministration or improper conduct?

4.2.2. In the event of improper conduct or maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where he would have been but for the maladministration or improper conduct?

4.2.3. 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 the roles played by the NAC when they considered the Complainant's application for funding.

4.2.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the officials of the NAC.

4.2.5. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration or impropriety. Where the Complainant has suffered prejudice, the idea is to place him as close as possible to where he would have been had the institution concerned complied with the regulatory framework setting the applicable standards for good administration.

4.3. **The Key Sources of information**

4.3.1. **Documents**

4.3.1.1. A copy of a submission to the NAC EXCO dated 9 March 2015 from Rosie Katz (Manager in the CEO's office) to EXCO;

4.3.1.2. Disciplinary Procedure Policy 2016/3 approved on 30 August 2016;

4.3.1.3. A copy of a Letter dated 21 August 2015 from National Treasury to NAC;

4.3.1.4. Email dated 21 May 2014 from Julie Diphofa to the Complainant;

4.3.1.5. Email dated 22 March 2015 from the CEO to the Complainant;

4.3.1.6. Email dated 18 March 2015 from Connie Thabede to the Complainant;

4.3.1.7. Expired Project and Surplus Policy GR003/4/2015 approved on 22 May 2015;

4.3.1.8. A copy of the Complainant's application to NAC dated 30 July 2014;

4.3.1.9. A copy of a letter from the NAC to the Complainant dated 5 December 2014;

4.3.1.10. A copy of the minutes of a meeting held between the NAC and the Complainant held on 24 February 2015;

4.3.1.11. A copy of the EXCO minutes of the meeting held on 9 and 10 March 2015;

4.3.1.12. A copy of the minutes of a special meeting held on 19 March 2015; and

4.3.1.13. A copy of the EXCO minutes of the meeting held on 30 and 31 March 2015.

4.4. **Interviews and meetings conducted:**

4.4.1. Interviews with the Chairperson of the Board, Mr Hartley Ngoato on 6 May 2019;

4.4.2. Interviews with the CEO of the NAC, Ms Rosemary Mangope on 6 May 2019;

4.4.3. Interviews with the Former Chairperson of the Board, Ms Angelina Makwetla on 11 June 2019;

4.4.4. Interviews with the Manager of Arts and Culture, Ms Julie Diphofa on 30 January 2019;

4.4.5. Interviews with the Risk Committee members on 30 January 2019; and

4.4.6. Interviews with the Complainant dated 19 April 2017.

4.5. **Correspondence sent and received**

4.5.1. A letter from the NAC Chairperson to the Public Protector dated 08 August 2017;

4.5.2. A letter from the Public Protector to the NAC dated 17 July 2017;

4.5.3. Email dated 25 October 2019 from the CEO to the Public Protector;

4.5.4. Email dated 07 November 2019 from the CEO to the Public Protector; and

4.5.5. Email dated 24 October 2019 from the Public Protector to the CEO.

4.6. **A Response to the notice in terms of section 7(9)(a) of the Public Protector Act, 23 of1994 from:**

4.6.1. Response from Ms Rosemary Mangope, the CEO of the NAC dated 15 November 2019.

4.7. **Legislation and other prescripts.**

4.7.1. The Constitution of the Republic of South Africa, 1996 (The Constitution);
4.7.2. The Public Protector Act, 23 of 1994 (Public Protector Act);
4.7.3. The National Arts Council Act, 56 of 1997 (Act);
4.7.4. Public Finance Management Act, 1 of 1999 (PFMA);
4.7.5. Promotion of Administrative Justice Act 3 of 2000 (PAJA);
4.7.6. Public Service Regulations of 2016 (Regulations);
4.7.7. Treasury Instruction Note 3 of 2015/2016; and
4.7.8. Regulation 16A8 of the National Treasury Regulations.

4.8. **Case law**

4.8.1. ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*** (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

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 Regarding whether the CEO of the NAC submitted an application to EXCO for partnership funding using the Complainant's name without his consent, and if so, whether such conduct was improper and constitutes maladministration.

Common cause issues

5.1.1. It is not in dispute that the Complainant submitted an application for funding on 30 July 2014 to the NAC, requesting funding for staging and lighting equipment at a cost of R920 734.62, which was declined.

5.1.2. It is also not disputed that the CEO submitted a proposal to EXCO for R350 000 for annual partnership funding using the Complainant's name on 9 March 2015.

5.1.3. The issue for my determination was whether the CEO failed to inform the Complainant of the said partnership application, and whether she falsified the Complainant's application to EXCO.

Issues in dispute

5.1.4. According to the NAC's response to my office the Complainant's first application of 30 July 2014 was declined by the NAC in a letter to him dated 5 December 2014, with the following reasons:

5.1.5. That the application did not contain the following documents:

5.1.5.1. Three reference letters;

5.1.5.2. Copies of identity documents of the board members;

5.1.5.3. Audited Financial Statements;

5.1.5.4. Curriculum vitae of office bearers;

5.1.5.5. Three months' bank statements; and

5.1.5.6. Tax clearance certificate.

5.1.6. Subsequent to the rejection of the application, the CEO then submitted a proposal to EXCO for annual partnership on 9 March 2015 in the name of the Complainant, requesting EXCO to support training and development programmes for the youth.

5.1.7. The purpose thereof was to address historical imbalances, to give the historically disadvantaged groups such help and resources required and to give them greater access to arts, with the financial implications for one (1) year amounting to R350 000.00.

5.1.8. The said proposal for funding was submitted to EXCO internally by the CEO in the name of the Complainant, but without the Complainant's knowledge and consent as there was no formal communication between the NAC and him regarding the submission.

5.1.9. The Complainant disputes the procedure which was followed by the CEO with regard to the application for funding that involved the submission to EXCO dated 9 March 2015, wherein she proposed an amount of R350 000.00 to be allocated for funding a partnership project with the Complainant under the Policy.

5.1.10. The Complainant maintained that he did not have knowledge and/or was not informed of the proposal submitted by the CEO to EXCO on 9 March 2015.

5.1.11. However, the said proposal for annual partnership funding amounting to R350 000 submitted by the CEO in the name of the Complainant to EXCO on 9 March 2015 was not for staging and lighting equipment as indicated above, but for funding to support training and development programmes for the youth in the name of the Complainant.

5.1.12. According to the CEO, the purpose thereof was to address historical imbalances and to give historical disadvantaged group such help and resources required for greater access to arts, with the financial implications for one (1) year.

5.1.13. The evidence at my disposal indicates that the annual partnership proposal made by the CEO to EXCO in the name of the Complainant would have emanated from a meeting that was held on 24 February 2015, between the Complainant and Ms Makwetla, the CEO and the Manager of Arts and Culture, Ms Julie Diphofa (Ms Diphofa).

5.1.14. However, from the minutes of the meeting of 24 February 2015 referred to above, it confirms that the reason for the meeting with the Complainant was regarding his disapproved application submitted for staging and lighting equipment which the CEO of the NAC mentioned that it was not supported by the NAC for reasons advanced in its letter dated 5 December 2014 to the Complainant.

5.1.15. According to the CEO, during the meeting held on 24 February 2015, she addressed the issue relating to the reasons provided to the Complainant when declining his application. She indicated that the letter sent to the Complainant should not have mentioned that the application was incomplete by citing documents missing from the application.

5.1.16. That the disclaimer should have indicated that the NAC no longer supports capital/infrastructure applications. However, despite this being the primary reason for the rejection of the application, as it was based on the NAC Policy, it was not formally communicated to the Complainant as required by PAJA.

5.1.17. During an interview held on 19 April 2017, the Complainant submitted to me that the NAC made an undertaking to correct the mistake made relating to the reasons contained in the letter of response to his application by stating true reasons for the decline, but they had failed to get back to him.

5.1.18. However, the minutes of the said meeting, do not indicate that the NAC had made an undertaking to correct the letter submitted to the Complainant. It only indicates that the letter should have reflected the reasons for NAC's inability to provide funding of capital/infrastructure to the Complainant.

5.1.19. Further that it should have also been mentioned in the said letter, that the application was for capital/infrastructure equipment, which the NAC was unable to support due to limited funding or resources.

5.1.20. The NAC submitted evidence to me on 22 May 2019 as proof that it had long taken a decision not to provide funding for capital/infrastructure in this regard in a document titled: *"Criteria for Funding"*, which shows that capital/ infrastructure funding is excluded by the NAC.

5.1.21. Following EXCO meetings held on 9 and 10 March 2015, respectively, EXCO had resolved that special projects be discussed first by the Chairpersons of the Advisory Panel.

5.1.22. In a letter dated 18 March 2015 to the Complainant, Ms Connie Thabede (Ms Thabede), the Assistant to the CEO requested the Complainant to submit an electronic version of a document titled: "*Live Event Technical and Production conference*" which was the Complainant's application that was initially declined.

5.1.23. The Complainant stated that he was astonished when Ms Thabede requested the aforesaid documentation on 18 March 2015 on behalf of the CEO.

5.1.24. On 19 March 2015, a special meeting was held by the NAC Advisory Panel during which the proposal submitted by the CEO due for consideration by EXCO was first not recommended by the NAC Advisory Panel.

5.1.25. According to the minutes of this meeting, the NAC Advisory Panel discussed that the Complainant could be an institutional risk and that a full due diligence of the organisation is required as the Complainant's organisation did not meet the requirement when they previously submitted their application for flagship funding. It was further stated that there was no sufficient funding to support their scope. The following recommendations were then made:

(a) "*That a mechanism needs to be put in place to enable the NAC to be responsible to applications/ proposals as the NAC is continually interfacing with people in the sector, and various requests arise.*

(b) *The NAC needs to consider how to allow for flexibility.*"

5.1.26. On 22 March 2015, the CEO provided the Complainant with the reasons for requesting the aforesaid application, and mentioned that it was for convenience of inclusion in her request for support of the proposal for annual partnership funding in her presentation to the EXCO.

5.1.27. The submission of a proposal for special projects from the CEO's office was submitted by the CEO to EXCO on 24 March 2015.

5.1.28. During the meetings held by EXCO on 30 and 31 March 2015, the above proposal was presented to it and the discussion was held as indicated below:

> **South African Roadies Association: The CEO informed the meeting that the NAC received an email from the SA Roadies Association which itemised what was presented on the day. The email indicated how much had been allocated to whom. It was clear that there was quite a huge breach of confidentiality in the NAC. The information was leaked ahead of time on the deliberations that had happened at panel level. The SA Roadies application was declined due to governance issues.**
> ***Resolution:*** **Council resolved that an investigation be started in order to establish how the information was leaked.**

5.1.29. During an interview with the CEO on 6 April 2019, she conceded that she did not inform the Complainant regarding the proposal which she had prepared and submitted to EXCO for consideration.

5.1.30. She stated that had the Complainant been informed of the proposal for annual partnership funding, it would have raised legitimate expectation on the part of the Complainant. Further, this process is intended to be an initiation from the CEO's office and not an application brought by the Complainant.

5.1.31. In her explanation to me during the interview held on 6 April 2019, the CEO indicated that according to the NAC legal prescripts and policy, she is allowed to submit a proposal if she has identified a gap and/or would like to enter into a partnership agreement with any institution.

5.1.32. Although the CEO stated that when she submits a self-initiated proposal, such proposals should follow the normal approval process and the institution in whose name a proposal is made, need not be informed regarding such CEO-initiated proposal as this may raise false hope for them. Based on this, the Complainant was not formally informed of the submission made by the CEO to EXCO.

5.1.33. However, this is an affront to a transparent and procedurally fair process through which all applicants must be treated in line with the Constitution and PAJA. Furthermore, nowhere in the NAC Policy is it spelt out that an institution in whose name a proposal is made, need not be informed thereof.

5.1.34. It was further stated that EXCO declined the CEO's proposal on the basis that the Complainant was not providing rare skills and the CEO was advised to invite everyone to apply under the Policy in an open and competitive process. This was also one of the several varied reasons provided by the NAC through the Advisory Panel and EXCO, respectively, during their consideration of the proposal by the CEO. It was however, never acted upon until the Complainant raised his complaint with the Public Protector.

5.1.35. During my interview with Ms Diphofa on 30 January 2019, she stated that the distribution of the surplus funds under the flagship projects by the NAC is processed through the CEO's office, and this information was given to the Complainant through a communication on 21 May 2015.

5.1.36. She explained that, in an e-mail dated 21 May 2015, she had informed the Complainant what the flagship projects were all about. She indicated to him that:

"Flagship projects are usually projects that make an impact on the sector in a big way. They are usually unique projects that stand out (carry our flag) in a way that we can say we are proud of."

5.1.36 It is disconcerting that in two (2) separate meetings convened by the NAC to deal with the CEO's proposal to EXCO using the name of the Complainant, both EXCO and the Advisory Panel could not conceal their irritation and/or loathe of the Complainant, if their recorded remarks above, are to be deciphered.

5.1.37 Interestingly, these meetings were dealing with the proposal by the CEO which the Complainant was oblivious to, but still added to the prejudice he was subjected to by the NAC in that he was still castigated, in absentia.

Application of the relevant law

5.1.38 Section 33(1) of the Constitution provides that "*Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".*

5.1.37. Section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) defines an administrative action as any decision taken or any failure to take a decision, by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation.

5.1.38. PAJA defines a **decision** as a decision of an administrative nature made, **proposed to be made, or required to be made**, as the case maybe, under an empowering provision.

5.1.39. Section 3(1) of t (PAJA) provides that "*Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair".*

5.1.40. Section 3(2)(b) of PAJA provides that *"In order to give effect to the right to procedurally fair administrative action, an administrator, subject to sub- section (4), must give a person referred to in subsection (1) –*

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5."

5.1.41. Section 6(3) of the NAC Act permits the council to initiate projects which it considers necessary in the pursuit of its objects, provided that such projects are undertaken in partnership with existing organisations or institutions which have the capacity to undertake such projects.

5.1.42. In terms of Paragraph 9, sub-paragraphs 9.3 and 9.4 of the Policy, the scope of the application of the surplus funds is as follows:

9.3 "The funds may be utilised to support projects and programmes that are designed to transform and grow the sector. These programmes may be identified by the Staff, Panels, and Council and/or by means of an open call for applications, however, internal approval processes should be followed as specified in the Grant Awarding Manual".

> *9.4 "It may also be applied in a situation where Management or Council wishes to develop or strengthen its relationship or partnership with a particular organisation within the sector in pursuance of its objectives"...*

5.1.43. The evidence discussed above indicates that the CEO submitted a proposal to EXCO for annual partnership funding on 9 March 2015 using documents from the Complainant's rejected application without the Complainant's consent and knowledge.

5.1.44. The annual partnership proposal submitted by the CEO to EXCO on 9 March 2015 in the name of the Complainant would have been in line with the powers and responsibilities of the CEO, as provided for by sub-paragraph 9.3 as well as sub-paragraph 9.4 of the Policy which empower NAC management and Council to initiate projects which it considers necessary in the pursuit of its objects.

5.1.45. However, the problem with the CEO.s proposal was that she had used the Complainant's documents from a rejected application despite having not yet formally communicated the rejection, as well as having not notified him of the proposal to EXCO.

5.1.46. It has been confirmed by the evidence and the facts that the CEO did not falsify the Complainant's application when she submitted a proposal for annual partnership funding to EXCO, but instead utilised the documents from the Complainant's rejected application for staging and lighting equipment.

5.1.47. During my meeting with the CEO on 6 April 2019, she indicated that she was trying to assist the Complainant through the proposal for annual partnership funding to EXCO. Although this might seem to have been with good intentions, the Complainant was nevertheless, not informed by the CEO about such possible annual partnership proposal with the NAC.

5.1.48. Immediately after the rejection of the Complainant's first application for funding, the NAC should have informed him of the annual partnership proposal which was submitted by the CEO to EXCO, to enable him to give consent on whether he wished to participate in the partnership project or not.

5.1.49. The fact that the CEO did not inform the Complainant about possible annual partnership application with him, rendered the process suspicious and unfair to the Complainant. This also lent credence to the belief that the NAC is abusing the Policy through the manner in which they were effecting its implementation.

5.1.50. I therefore conclude that the implementation of the Policy by the NAC is inconsistent and procedurally unfair as it does not take into account the rights of the applicant but affords NAC employees, management or Council wide powers to deal arbitrarily with applications for surplus funds, in particular for annual partnership funding without his/her knowledge and consent and therefore has the potential of abuse.

Conclusion

5.1.51. Based on the foregoing, the above process followed by the NAC in dealing with the annual partnership proposal by the CEO without the Complainant's knowledge and consent, is inconsistent with the provisions of sections 33(1) of the Constitution and sections 3(1) and 3(2)(b) of PAJA, which provide for a reasonable and procedurally fair administrative action.

Response to the section 7(9) notice from the CEO of the NAC dated 15 November 2019 dealing with the issue above

5.1.52. Section 7(9) of the Public Protector Act provides that *"if it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances".*

5.1.53. The response provided by the CEO of the NAC regarding the section 7(9) notice is considered herein. I have however, not dealt with each and every aspect raised in the response but that should not be construed as an admission of any kind of the averments contained therein.

At paragraph 1 – 13 of the response

5.1.53.1. In its response to my section 7(9) Notice dated 21 October 2019, which was issued to the NAC on 24 October 2019, the CEO pointed out that the Notice appeared to insinuate that she made a submission to EXCO improperly and for the purpose of receiving funds for her own personal benefits.

5.1.53.2. She further highlighted that the findings of facts that are made in my reports have a potential of damaging consequences on those that are named. Further that the Notice accuses some members of the NAC, condemns others, and has the potential to ruin reputation or careers. That my report may lead to judicial proceedings and expose members of the NAC to criminal or civil actions.

5.1.53.3. Due to the aforesaid consequences the NAC urged the Public Protector to conduct its duties diligently with clear and with proper exposition of the facts and the law.

5.1.53.4. The CEO referred to Section 5(1)(a) of the NAC Act provides that *"the members of the council shall be persons who have special knowledge or experience in the arts or, in the case of other persons referred to in section 4(1) who have specialist skills, who are not directly related to the arts but would be beneficial to the council"*.

5.1.53.5. Section 6 of the NAC Act further provides that the functions of the Council which include determining which field of the arts should have preference for the purposes of support, investigate and determine the need for support of any person, organisation or institution, enter into agreements with any person, organisation or institution upon conditions as may be agreed upon (generally do everything which is necessary to achieve its objects).

5.1.53.6. Section 6(3) of the NAC Act permits the Council to initiate projects which it considers necessary in the pursuit of its objects, provided that such projects are undertaken in partnership with existing organisations or institutions which have the capacity to undertake such projects.

5.1.53.7. The CEO submitted that the Policy exists to enable the NAC to perform its legislated mandate of initiating projects it considers necessary in pursuit of its objects.

5.1.53.8. Further that it is only when the NAC contracts with a party that procurement related prescripts apply. Prior to that, the NAC is performing its mandated duty of identifying and supporting culture through the arts.

5.1.53.9. Lastly, the Policy is the one that provides a guideline to the institution on how the exercise of its powers to initiate programmes/projects should be undertaken.

5.1.53.10. I do not disagree with the CEO's explanation and clarification on what the NAC Act and Policy provide for, and how the NAC complies therewith in their dealings with stakeholders. However, it is the arbitrary manner through which the NAC implements the Policy that I find unacceptable.

At paragraph 14 – 20 of the response

5.1.53.11. The CEO stated that the issue under investigation which relates to *"whether the CEO failed to inform the Complainant of the partnership application"* implies that, firstly, there existed an obligation to inform the Complainant of a submission to EXCO and, secondly, that the submission was a partnership application for funding.

5.1.53.12. She indicated that on 9 March 2015, she made a submission to EXCO of the NAC to consider proposed flagship projects that the NAC could pursue, with a copy annexed thereto.

5.1.53.13. She stated that the purpose of the proposal was to obtain a decision from EXCO on whether the NAC would pursue discussions with potential entities that fall within the ambit of its mandate for the purpose of forming partnership to pursue projects.

5.1.53.14. Furthermore, that the submission was in line with the Policy. The Policy serves as a framework for identifying organisations and individuals that have not reported and accounted for funds within a specific time, claimed funds or withdrew funds for various reasons. The funds available as a result of expired projects, shall be approved by Council for project funding and other NAC strategic activities.

5.1.53.15. She stated that the submission made to EXCO is therefore an internal process that preceded the forming of any partnership with individuals or organisations. Furthermore, that in order to communicate an intention for the NAC to form a partnership with an organisation, the NAC would first need to take a decision to do so.

5.1.53.16. She argued that notifying the organisation prior to the NAC (EXCO) having taken a decision to do so would have been irresponsible and premature on their part. Moreover, she would have had no mandate to approach organisations which include the Complainant as there is no obligation for her to inform external organisation of her intentions and obtain their consent, prior to making a proposal to EXCO when she wishes to initiate partnerships or flagship projects with individuals or organisations.

5.1.53.17. I have noted the preceding explanation by the CEO and have to say that this is a clear indication of the arbitrary implementation of the Policy by the NAC which flies in the face of a fair administrative process, and is therefore problematic.

<u>At paragraph 21 – 30 of the response</u>

5.1.53.18. She further argued that I pursued an investigation premised on the flawed assumption that there exists an obligation for her to communicate with external parties prior to her obtaining approval from EXCO to pursue projects appears to be an irrational assumption.

5.1.53.19. She reiterated that the submission was not a partnership application, but a proposal to EXCO to pursue discussions with potential organisations for the purpose of forming partnerships and the allocation of funding was merely an

indication for the purposes of establishing what budget requirements would apply to any such partnership, if it is pursued.

5.1.53.20. She stated that any deliberations and decision by EXCO based on her submissions would not result in monies being paid to the Complainant, but would however enable discussions to commence with the Complainant's organisation on that basis. Also that these would form part of a separate process, which will include formulating the agreement that would govern such partnership.

5.1.53.21. She referred to paragraph 5 of my Notice wherein it addressed what I labelled as *"common cause issues",* however, rebutting such. She specifically referred to paragraph 5.1.3, stating that it incorrectly refers to her proposed flagship project submission to EXCO as an application as well as that the application is in the Complainant's name.

5.1.53.22. She said that the submission was neither a partnership application nor was it made in the name of the Complainant. That the Complainant was mentioned in the application as a potential partnership that she had earmarked and which she sought a decision from Council to pursue.

5.1.53.23. She submitted that although the funds were emanating from the surplus funds, an indication of the cost implications was required in her submission and that the amount served only to give EXCO an indication of the financial implications of pursuing a partnership of this nature. However, this does not mean that the entire amount would be utilised for such a project or that it would necessarily be paid out once the approval to pursue the project was given by EXCO.

5.1.53.24. I have noted the CEO's explanation about not being obliged to communicate with external parties prior to her obtaining approval from EXCO for the purpose

of forming partnerships which I find disingenuous, especially in the case of the Complainant whose rejected application's documents were used in the proposal to EXCO. This clearly serves to confirm arbitrariness on the part of the CEO.

At paragraph 31 – 35 of the response

5.1.53.25. The CEO submitted that the Notice seems to characterise the internal submission she made to EXCO, alternatively the refusal by EXCO to accept her proposal, as administrative action. She indicated that, she was advised that this is legally incorrect for the following reasons:

(a) *"The Complainant made no application to the NAC or to EXCO for partnership funding; and*

(b) *The Complainant is/was entitled to, alternately had no right to such partnership funding and no legitimate expectation had been created for the Complainant to believe that the NAC intended to create a partnership with them."*

5.1.53.26. Further that she was advised that both acts by herself and that of the NAC did not materially and adversely affect the rights or legitimate expectations of the Complainant.

5.1.53.27. She referred me to paragraph 5.1.29 of my Notice wherein it stated that the reason such proposal are made without informing the parties, is to prevent a situation where a legitimate expectation is created and the NAC opts not to pursue the project.

5.1.53.28. She submitted that this is an internal function within the scope of her duties and the Policy. She argued that the Complainant's consent was not required for the purposes of her submission. However, the Complainant would be in a position to accept or refuse a proposal for partnership had EXCO accepted her proposal and taken a decision to extend an invitation to form such a relationship with him.

5.1.53.29. She indicated that paragraph 5.1.43 of my Notice records that "... *the Complainant was not informed about the possible annual partnership proposal with the NAC* ...." confirming that this is an accurate reflection of what transpired herein.

5.1.53.30. I wish to agree with CEO's explanation with regards to the proposal to EXCO as being an internal process and therefore not an administrative action. However, the proposal was based on the Complainant's rejected application which therefore had all the hallmarks of an administrative action, whilst having not being dealt with accordingly as the Complainant was not provided with cogent reasons for its rejection and possible appeal process, if he so wished.

<u>At paragraph 36 – 42 of the response</u>

5.1.53.31. In reference to my findings that the Policy is not without risk of abuse by the NAC, because EXCO could approve such annual funding without the Complainant's knowledge and consent, the CEO argued that the process followed by the NAC in dealing with the annual partnership applications without the Complainant's knowledge and consent, is not inconsistent with the provisions of section 33(1) of the Constitution and 3(1) and 3(2)(b)(i) of PAJA, which provides for a fair administrative action, the CEO's contention is that these findings are misguided.

5.1.53.32. Should her proposal for an annual partnership with the Complainant be accepted by EXCO, then the next step in the process would have been for the NAC to formulate a proposal in this regard, alternatively, solicit one with terms of reference/specifications. The Complainant would be a part of that process.

5.1.53.33. Her contention is that the risk of abuse of funding being approved without the Complainant's knowledge and consent is, as a result, unfounded and furthermore a misunderstanding of the specific process that was underway, one that, in fact ended with a decision to go on public tender.

5.1.53.34. She stated in her response that the Public Protector criticised the NAC for opting for a competitive process in this regard.

5.1.53.35. She further submitted that the alleged non-compliance with the requirement of the Constitution and PAJA, arises from the abovementioned flawed assumption that there exists an obligation for her to inform external organisation of her intentions and obtain their consent, prior to making a proposal to EXCO when she wishes to initiate partnerships or flagship projects with individuals or organisations.

5.1.53.36. She indicated that the above conclusion would be putting the proverbial cart before the horse. She stated that, she must first obtain EXCO permission to approach the organisation with a proposal, either directly, in instances where the skills set or services of that organisation is so rare that it is otherwise not available anywhere else, alternatively by way of public tender which in this case was proposed. Further that such public tender would have still allowed the Complainant to make a submission of an application to partner with the NAC.

Conclusion

5.1.53.37. I have taken note of the CEO's above submission and I still do not find comfort and confidence in how the NAC goes about implementing the Policy, which should be in a transparent and procedurally fair manner for the benefit of all its stakeholders as well as in compliance with the Constitution, PAJA and the PFMA.

5.1.53.38. Therefore, I find it completely distasteful that an application that has been turned today, later the same institution that has turned it down, finds it valuable or worthy to again consider, albeit in a different category, worse still without the applicant's knowledge and consent.

5.1.53.39. The arbitrariness in implementing the Policy is therefore inconsistent with the provisions of section 33(1) of the Constitution and sections 3(1) and 3(2)(b) of PAJA, which provide for a reasonable and procedurally fair administrative action.

5.2. **Regarding whether there was impropriety and abuse of the Expired Projects and Surplus Policy, by the NAC in the distribution of the surplus funds resulting in prejudice to the Complainant.**

Common cause issues

5.2.1. It is not in dispute that the NAC declined the Complainant's first application for funding for staging and lighting equipment at a cost of R920 734.62 on 30 July 2014.

5.2.2. It also not in dispute that on 9 March 2015 the CEO of the NAC then submitted a proposal to EXCO for annual partnership in the name of the Complainant, requesting EXCO to support training and development programmes for the youth.

5.2.3. The purpose thereof was to address historical imbalances, to give the historically disadvantaged groups such help and resources required and to give them greater access to arts, with the financial implications for one (1) year amounting to R350 000.00.

5.2.4. The issue for my determination was whether or not there was impropriety and abuse by the NAC in the implementation of the Policy to distribute surplus funds which may have resulted in prejudice to the Complainant.

5.2.5. The evidence at my disposal relating to the Complainant's application dated 30 July 2014, confirms that he had submitted an application for staging and lighting equipment amounting to R920 734.62 which was declined.

5.2.6. However, evidence at my disposal prior to the submission of a proposal for annual partnership funding by the CEO on 9 March 2015, the NAC had not provided the Complainant with a letter of response stating cogent reasons for the decline of his first application.

5.2.7. According to the evidence, various reasons were advanced for the decline such as the fact that he did not provide the relevant requisite documents and/or the fact that the NAC no longer funded capital projects, just to name a few. However, this was not articulated in the decline letter dated 5 December 2014.

5.2.8. The evidence at my disposal indicates that the partnership application made by the CEO to EXCO in the name of the Complainant would have emanated from a

meeting that was held on 24 February 2015, between the Complainant and Ms Makwetla, the CEO and the Manager of Arts and Culture, Ms Julie Diphofa (Ms Diphofa).

5.2.9. However, from the minutes of the meeting of 24 February 2015 referred to above, it confirms that the reason for the meeting with the Complainant was regarding his declined application submitted for staging and lighting equipment which the CEO of the NAC mentioned that it was not supported by the NAC for reasons advanced in its letter dated 5 December 2014 to the Complainant, which reasons it has now been revealed were accepted by NAC not to be the actual and even the specific reasons, thus needed to be augmented by a subsequent letter to the Complainant encapsulating cogent reasons.

5.2.10. According to the CEO, during the meeting held on 24 February 2015, she addressed the issue relating to the reasons provided to the Complainant when declining his application. She indicated that the letter sent to the Complainant should not have mentioned that the application was incomplete by citing documents missing from the application.

5.2.11. That the disclaimer should have indicated that the NAC no longer supports capital/infrastructure applications. However, despite this now seemingly being the primary reason for the rejection of the application, as it was based on the NAC Policy, it was not accordingly communicated to the Complainant in line with PAJA.

5.2.12. During an interview held on 19 April 2017, the Complainant submitted to me that the NAC made an undertaking to correct the mistake made relating to the reasons contained in the letter of response of his application by stating true reasons for the decline, but they failed to get back to him.

5.2.13. Further that it should have also been mentioned in the said letter, that the application was for capital/infrastructure equipment which the NAC was unable to support due to limited funding or resources.

5.2.14. Therefore, the letter to the Complainant fell far short of the requirements of PAJA, in that not only did it fail to present cogent reasons for the rejection of his application, but did not offer him an opportunity to appeal the NAC's decision.

5.2.15. I have noted that it was only when the Complainant engaged the NAC later about his application that he was offered various reasons as alluded to above which had not been formalised in writing.

5.2.16. It has also come to my attention that the Department of Arts and Culture (the Department) commissioned Business Innovation Group (Pty) Ltd (BIG) to conduct an investigation into allegations of misconduct by senior management of the NAC as a result of their failure to award a grant to the Complainant.

5.2.17. Consequently, on 6 October 2016 BIG issued an investigation report relating to the investigation with the following findings and conclusion:

"16.6 *The Expired Project and Surplus Policy- approved by the Audit and Risk Committee (EXCO) appears not to be in line with Treasury Regulations and PFMA. Further this policy appears to be unfair and uncompetitive."*

17.6 Treasury Regulation 6.4.1 states that savings on transfer payments may be rolled over to a subsequent year, but only if it is rolled over for the purpose originally voted for.

17.7 Treasury Regulation 6.4.2 states that request for rollovers must be submitted to the relevant treasury on or before the last working day of May each year, in a format determined by the National Treasury".

5.2.18. The Complainant in his complaint still argued that the implementation of the Policy by the NAC was in breach of section 51(1)(b)(iii), section 38 (1) (a) (iii) of the PFMA, the NAC Act and National Treasury Regulations Instruction Note 3 of 2015/2016, as confirmed in the findings and conclusion of the BIG investigation report as reflected above.

5.2.19. Although a much wider and independent investigation was conducted by my office in this regard, it did not fall far from the BIG Report's findings as confirmed by the facts and evidence canvassed in this report.

5.2.20. In its initial response to me dated 17 July 2017, the NAC provided that it had complied with all the legal prescripts when it considered the Complainant's application for funding under the Policy and denied any wrongdoing by the CEO or the NAC. This was again reiterated by the CEO during my meeting with her on 6 April 2019.

5.2.21. In its subsequent response to me dated 10 September 2019, the NAC provided me with the National Treasury's approval to retain accumulated surplus funds at the end of the 2014/15 financial year which was captured in a letter dated 21 August 2015. In terms of this letter, the National Treasury confirmed receipt of the aforesaid application on 10 June 2015.

5.2.22. The National Treasury granted the NAC's application to retain the accumulated surplus funds at the end of 2014/15 financial year. The approval was in terms of section 53(3) of the PFMA. The NAC was therefore disbursing with accrued

surplus funds for the 2014/14 F/Y when the Complainant's application was dealt with.

Application of the relevant law

5.2.23. Section 217 of the Constitution is the basis upon which all procurement practices within the public sector are developed. The Constitution demands that when an organ of state contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

5.2.24. Section 3(1) of t (PAJA) provides that *"Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair".*

5.2.25. Section 3(2)(b) of PAJA provides that *"In order to give effect to the right to procedurally fair administrative action, an administrator, subject to sub- section (4), must give a person referred to in subsection (1) –*

(vi) adequate notice of the nature and purpose of the proposed administrative action;

(vii) reasonable opportunity to make representations;

(viii) a clear statement of the administrative action;

(ix) adequate notice of any right of review or internal appeal, where applicable; and

(x) adequate notice of the right to request reasons in terms of section 5."

5.2.26. Section 13(1) and (2) of the NAC Act provides that the Council shall appoint a full time Chief Executive Officer for the Council. The Chief Executive Officer shall be responsible for the management of the affairs of the Council and shall report on those affairs to the Council as often as maybe required by the Council.

5.2.27. Section 14(1) of the NAC Act provides that in addition to the other functions entrusted to the Chief Executive Officer by or under this Act, he or she shall be the Accounting Officer charged with the responsibility of accounting for all moneys received and the utilisation thereof and be responsible for the property of the Council.

5.2.28. Section 51(1)(a)(iii) of the PFMA provides that *"The accounting authority for a public entity,— must ensure that public entity has and maintains an appropriate … provisioning system which is fair, equitable, transparent, competitive…".*

5.2.29. Regulation 13(c) of the Public Service Regulations of 2016 provides that an employee shall not conduct business with any organ of state or be a director of a public or private company conducting business.

5.2.30. Section 6A of the NAC Act provides as follows:

A. *"Subject to subsection (3) and in order to achieve its objects, the Council may:*

investigate and determine which field of the arts should have preference for the purpose of support thereof;

(c) investigate and determine the need for support of any person, organisation or institution;

…

(p) generally, do everything which is necessary to achieve its objectives".

5.2.31. In terms of Paragraph 9 of the Policy, the scope of the application of the surplus funds is as follows:

9.1 "Surplus funds may be applied to attain the NAC objective however provided that the process does not transgress any legislation and policies that regulate the operations of the NAC;

9.2 ...;

9.3 The funds may be utilised to support projects and programmes that are designed to transform and grow the sector. These programmes may be identified by the Staff, Panels, and Council and/or by means of an open call for applications, however, internal approval processes should be followed as specified in the Grant Awarding Manual.

9.4 It may also be applied in a situation where Management or Council wishes to develop or strengthen its relationship or partnership with a particular organisation within the sector in pursuance of its objectives;

9.5 It may also be utilised to support projects that do not fall within the seven arts discipline which are supported by the NAC; provided that the project has a potential or ability to as contribute towards the growth of the sector and

Council and Management can directly make decisions with regard to the utilisation of surplus fund only if that allocation relates to project operational activities".

5.2.31 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A8 which reads as follows:

"16A8 Compliance with ethical standards

16A8.1 All officials and other role players in a supply chain management system must comply with the highest ethical standards in order to promote –

(a) mutual trust and respect; and
(b) an environment where business can be conducted with integrity and in a fair and reasonable manner.

16A8.2 The National Treasury's Code of Conduct for Supply Chain Management Practitioners must be adhered to by all officials and other role players involved in supply chain management.

16A8.3 A supply chain management official or other role player –

(a) must recognise and disclose any conflict of interest that may arise;
(b) must treat all suppliers and potential suppliers equitably;
(c) may not use their position for private gain or to improperly benefit another person;
(d) must ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act;
(e) must be scrupulous in their use of public property; and
(f) must assist accounting officers or accounting authorities in combating corruption and fraud in the supply chain management system.

16A8.4 If a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must –

(a) disclose that interest; and

(b) withdraw from participating in any manner whatsoever in the process relating to that contract.

16A8.5 An official in the supply chain management unit who becomes aware of a breach of or failure to comply with any aspect of the supply chain management system must immediately report the breach or failure to the accounting officer or accounting."

5.2.32 It is of concern that the Policy allows *NAC's employees, Panels and Council* to identify and fund projects that are earmarked to transform and grow the Arts sector. In this regard, without the NAC having in place checks and balances based on the general understanding of established provisioning legal prescripts, the implementation of the Policy is susceptible to manipulation, since some employees could recommend their relatives, families and/or cronies to be funded through the Policy. The employees would be acting in breach of the Public Service Regulations which prohibits public servants from conducting business with government.

5.2.33 The facts and evidence discussed above indicate that the NAC rejected the Complainant's application for funding in respect of staging and lighting equipment amounting to R920 734.62 in 2014. However, the disapproval was not properly communicated to SARA as required by PAJA in that he was never furnished with the actual full reasons for the rejection of his application, and was ultimately

deprived of an opportunity to appeal or review the decision if he would have seen it fit to.

5.2.34 Instead, the NAC through the CEO proceeded and submitted an annual partnership proposal to EXCO without having satisfied the requirements of PAJA with respect to the first application as referred to above. This was done without the knowledge and consent of the Complainant and this was the basis of his discontent.

5.2.35 It is worth noting that Paragraph 9 sub-paragraph 9.1 of the Policy further provides that the process of funding by the NAC should not transgress any legislation and policies that regulates the operations of the NAC.

Conclusion

5.2.36 In light of foregoing, I can conclude that the implementation of the Policy by the NAC is arbitrary and generally not consistent with the spirit of the law. NAC allows the entity and its employees to proceed and initiate proposals for funding on behalf of applicants without their knowledge and consent and this is not in line with the requirements of sections 33(1) and 217 of the Constitution as well as sections 3(1) and 3(2) of PAJA as well as Regulation 16A8 of the National Treasury Regulations, that require any administrative action to be transparent, lawful and procedurally fair.

5.2.37 **Response to my section 7(9) notice from the CEO of the NAC dated 15 November 2019 dealing with the issue above**

At paragraph 43 – 50 of the response

5.2.37.1 In its response to this issue, the CEO confirmed that the use of the surplus funds, was approved by the National Treasury.

5.2.37.2 She further referenced section 217 of the Constitution and indicated that at the stage her partnership proposal was being considered by EXCO, the NAC was neither contracting for any goods nor services. Notwithstanding this, the NAC had not determined a system in which the procurement or contracts of such goods and services would take place.

5.2.37.3 She indicated that the above process would manifest more specifically to the submission involving the Complainant. The decision by EXCO was that the proposal in relation to the Complainant should be placed on open tender.

5.2.37.4 Further that in line with paragraph 5.2.26 of my Notice, this would allow the Complainant a reasonable opportunity to compile and submit an annual partnership application to EXCO based on his discretion and not hers as the CEO.

5.2.37.5 In this regard she further indicated that this election or opportunity to compile and submit an application or proposal was not limited by her submission to EXCO. The Complainant was at liberty to make applications for funding at any time. The refusal, by EXCO relates to a proposal of a project sought by her to have the NAC initiate the partnership with the Complainant.

5.2.37.6 The CEO conceded that paragraph 5.2.27 of the Notice confirms that EXCO had recommended that she should issue an advertisement, inviting everyone to apply under the policy, in line with the requirements of section 33 of the Constitution and section 38(1)(a)(iii) of the PFMA, which would be in accordance with the provisioning system that is transparent and fair.

5.2.37.7 She further argued that my investigation, as a result fails, to consider relevant material facts.

At paragraph 52 – 61 of the response

5.2.37.8 The CEO argued that the complaint relates to the Policy. However, reference is made to purported erroneous payments to Directors or staff members in terms of the Policy.

5.2.37.9 She submitted that paragraph 5.2.10 of my Notice refers to payments to a director that was allegedly employed by the NAC. She submitted that, Firstly:

(a) There has never been an employee of the NAC with the identity number referred to in the Notice; and

(b) The payments referred to, were made under the GAP, and not the Policy.

5.2.37.10 Secondly, she contended that the alleged impropriety relating to one Policy cannot be used to impugn another, she was advised.

5.2.37.11 She submitted that my conclusion that the conduct of the NAC amounts to improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution, constitutes maladministration in terms of section 64(a)(i) of the Public Protector Act is thus unsubstantiated and irrational in that:

(a) The NAC EXCO conducted itself in accordance with an existing Policy and did so bona fide;

(b) The conclusion that the Policy in its current form does not comply with the requirement of section 33 of the Constitution and with the PFMA, fails to take all material facts into consideration; and

(c) The NAC was established to promote, through the arts, the free expression of South African cultures. This includes initiating partnership projects.

5.2.37.12 She further argued that concluding that the Policy is susceptible to manipulation improperly creates the impression that the Policy explicitly allows *"relative, families and/or cronies to be funded on the provisions of the policy* ". Insofar as my office holds this view, such view is as advised, legally and factually incorrect.

5.2.37.13 She stated that in the event employees undertake the above behaviour, they will be disciplined in accordance with the disciplinary procedure of the NAC a copy of which was provided to the Public Protector.

5.2.37.14 She indicated that the above disciplinary process is also supported by paragraph 11.2 of the Policy which provides that if any of the principles outlined in the policy have been compromised or breached disciplinary procedures will be applied.

5.2.37.15 She further pointed that as stated in the Notice, EXCO took a decision to embark on a public participation process before pursuing a project similar to that relating to the one she had proposed with reference to the Complainant.

Such a decision, as reflected in the Notice is in line with section 217 of the Constitution.

5.2.37.16 She further argued that the Notice fails to identify an instance where the Policy specifically excludes and/or attempts to bypass the requirements of the Constitution or the PFMA.

5.2.37.17 In her argument she contended that concluding that the policy is unfair or amounts to maladministration based on the instances referred to in paragraph 5.2.20 of the Notice is thus irrational.

5.2.37.18 She further contended that the finding that the conduct of the NAC amounts to improper conduct or state affairs and maladministration are also unfounded and legally unsubstantiated and irrational.

At paragraph 62 – 69 of the response

5.2.37.19 In her submission, she also indicated that the conclusion that the application of the Policy contravened section 217 of the Constitution, section 38(1)(a)(iii) of the PFMA and Regulation 13(c) of the Public Service Regulation, 2016 are unfounded in that:

(a) The application of a Policy in a manner that is in contravention of section 217 of the Constitution has not been identified; and

(b) The PFMA is applicable to the Policy and specifically mentioned therein. The said contravention of Regulation 13(c) of the Public Service Regulation has not been identified and/or alternatively have been condoned by the Treasury as referred to in paragraph 5.2.7 of the Notice.

5.2.37.20 In her submission, she indicated that the observation highlighted in paragraph 5.2.25 of my Notice ought to have been a further reason for my office to investigate the process that had taken place. Also that the nature of the agreement and how it would be entered into still needed to be considered, deliberated and approved by EXCO.

5.2.37.21 Therefore, determining whether or not the Complainant would have been awarded the contract, had he submitted his own application, would not be applicable or relevant in that:

(a) She was performing her duties in terms of the Policy;

(b) In proposing a project, she was assisting the NAC to consider projects that could assist it to meet its legislated objectives;

(c) The Complainant had not proposed or applied for such an initiative;

(d) The Complainant had no intention of submitting an application for funding of that nature;

(e) The Complainant cannot be prejudiced by a process which he was not a party to;

(f) The Complainant cannot be prejudiced by the outcome of process which he was not a party to; and

(g) When the NAC does put out an invitation for annual partnership submissions, the Complainant will have an opportunity to make a submission.

5.2.37.22 In conclusion she submitted that for the reasons indicated above, her submission of the partnership proposal with the Complainant and the decision by EXCO not to accept it, does not amount to administrative action and/or alternatively does not amount to administrative action that materially affected the rights or legitimate expectations of the Complainant.

Conclusion

5.2.37.23 I have considered the NAC's submission regarding the fact that at the time the CEO's proposal was being considered by EXCO, the NAC was not contracting for any goods or services. The CEO had not yet determined the process by which the acquisition or contracts of such goods and services would take place. This only took place when EXCO took a decision that the proposal be placed on an open tender.

5.2.37.24 However, the above argument does not extend to the Complainant's initial rejected application as the decision of the NAC at the time was an administrative action and should have been dealt with accordingly through providing reasons for the rejection to the Complainant as well as invite his comments and an opportunity to appeal process in line with PAJA. This should have preceded the submission of the proposal for annual partnership to EXCO by the CEO which essentially became the source of the Complainant's discontent

5.2.37.25 It also worth noting that while dealing with the Complainant's proposal by the CEO for annual partnership to EXCO, the NAC's Advisory Panel recommended in their minutes as follows:

> *"That a mechanism needs to be put in place to enable the NAC to be responsible to applications/ proposals as the NAC is continually interfacing with people in the sector, and various requests arise.*
>
> *The NAC needs to consider how to allow for flexibility."*

5.2.37.26 In view of the above extract from the NAC's Advisory Panel which lends credence to the inconsistencies uncovered by my investigation as well as the BIG investigation, I believe that this is indicative of a need to revisit the manner in which the NAC implements the Policy so as to harmonise it with other national legal prescripts such as the Constitution, PAJA and the PFMA.

5.2.37.27 It is disconcerting that in two (2) separate meetings convened by the NAC to deal with the CEO's proposal to EXCO using the name of the Complainant, both EXCO and the Advisory Panel could not conceal their irritation and/or exasperation with the Complainant, if their recorded remarks above, are to be deciphered.

5.2.37.28 Interestingly, these meetings were dealing with the proposal by the CEO which the Complainant was oblivious to, but still added to the prejudice he was subjected to by the NAC in that he was still castigated, in absentia.

5.2.37.29 How the foregoing should not be construed as a negative perception and attitude towards the Complainant, which not only disadvantages him in his dealings with the NAC, but also besmirches his reputation thereby causing perpetual prejudice to him.

6 FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I hereby make the following findings

6.1 Regarding whether the CEO of the NAC submitted an application to EXCO for partnership funding using the Complainant's name, without his knowledge and consent, and if so, whether such conduct was improper and constitutes maladministration.

6.1.1 The allegation that the CEO of the NAC submitted an application to EXCO for partnership funding using the Complainant's name without his knowledge and consent, is substantiated.

6.1.2 The CEO submitted a proposal for the partnership funding to EXCO using the Complainant's documents from the rejected application without his knowledge and consent. However, this was not a falsified/forged application as alleged by the Complainant.

6.1.3 The Complainant was not informed by the CEO about the annual partnership proposal since the Policy does not explicitly provide for such an obligation on the part of the CEO once such a need has been identified.

6.1.4 Although the submission of the proposal to EXCO by the CEO is purportedly permissible in terms of the Policy, the manner in which this has been practiced in this case is inconsistent with the provisions of section 33(1) of the Constitution and sections 3(1) and 3(2)(b) of PAJA, which provide for a reasonable and procedurally fair administrative action.

6.1.5 Notwithstanding the CEO's contention, I find the reasons provided to justify not informing the Complainant who was subjects of the proposal under the annual partnership, such as that they did not want to raise his hopes, when in fact such proposals are presented to EXCO in their name, unacceptable.

6.1.6 Therefore, the CEO's failure to inform the Complainant before submitting the proposal to EXCO for partnership funding, amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether there was impropriety and abuse of the Expired Projects and Surplus Policy, by the NAC in the distribution of the surplus funds resulting in prejudice to the Complainant.

6.2.1 The allegation that there was impropriety and potential abuse of the Policy by the NAC in the distribution of the surplus funds is substantiated. The fact that the CEO proceeded to use the Complainant's documents from the rejected application, which she did without his knowledge and consent is improper.

6.2.2 The fact that the proposal by the CEO is based on the Complainant's rejected application for funding, to which the Complainant is yet to receive a recorded formal response thereto, in which cogent reasons for the rejection are captured by the NAC has resulted in perpetual prejudice to him.

6.2.3 The implementation of the Policy by the NAC is inconsistent with the Constitution, PAJA and the National Treasury Regulations and therefore procedurally unfair as it does not take into account the rights of the applicant, but affords NAC employees, management or Council wide powers to deal arbitrarily with applications for surplus funds, in particular for annual partnership funding without the Complainant's knowledge and consent and therefore has the potential of abuse.

6.2.4 Therefore, the conduct of the CEO and the NAC in the manner in which it is implementing the Policy amounts to improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7 REMEDIAL ACTION

7.1 In light of the above, the appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following:

7.1.1 The Minister of Sports, Arts and Culture:

7.1.1.1 To take note of the report in so far as the findings and remedial action contained therein are concerned and as the Executive Authority, assist in ensuring that the remedial action as provided for hereunder is expedited.

7.1.2 The Chairperson of the NAC Board:

7.1.2.1 To take note of my findings in this report and, within sixty (60) days of the issuing of this report:

7.1.2.1.1 Act in accordance with his fiduciary duty of ensuring that the inconsistencies identified in the Policy during my investigation are addressed , by setting in motion a process to amend the Policy and promulgate Standard Operating Procedures on the implementation of Expired Projects and Surplus Funds Policy so as to align it with the relevant legislative framework;

7.1.2.1.2 Amend and strengthen the Expired Projects and Surplus Policy in order to close the gaps that exist in it, so as to prevent the NAC staff and other NAC stakeholders from exploiting the Policy contrary to the ethos of fairness, equity, transparency, competition and cost effectiveness as enshrined in the Section 217 of the Constitution of the Republic of South Africa;

7.1.2.1.3 Where necessary put in place Standard Operating Procedures to cure the inconsistencies in the implementation of the Policy as revealed by my investigation;

7.1.2.1.4 Generally to align the internal NAC Policy toolkit with the relevant legislative framework such as sections 33(1) and 217 of the Constitution, section 51(1)(b)(iii) of the PFMA, sections 3(1) and 3(2)(b)(i) of PAJA, Regulation 16A8 of the National Treasury Regulations as well as Regulation 13(c) of the Public Service Regulations, 2016;

7.1.2.1.5 Must within thirty (30) days of the issuing of this report, ensure that a letter of apology is issued by the CEO to the Complainant for the manner in which he was treated by the NAC, including the formal letter on the outcome of his 2014 application and cogent reasons for its rejection; and

7.1.2.1.6 Must within thirty (30) days of the issuing of this report ensure that the CEO has put in place a "Declaration of Interest register" for all NAC employees relating to the projects they have initiated since 2015 to date, so as to manage any prevalent conflict of interest.

8 MONITORING

8.1 The Minister of Sports, Arts and Culture, within thirty **(30)** working days of the issuing of this report, provide the Public Protector with the acknowledgement letter relating to the findings and remedial action referred to in paragraphs 6.1.1 and 7.1.2 of this report.

8.2 The Chairperson of the NAC Board must, within thirty **(30)** working days of the issuing of this Report provide the Public Protector with the Implementation Plan indicating how the remedial action referred to in paragraph 7.1.2. of this Report will be implemented.

8.3 In line with the Constitutional Court judgment in the matter of ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*** [2016] ZACC 11, and in order to ensure the effectiveness of Office of the Public Protector, the remedial actions prescribed in this Report are legally binding.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 15 / 06 / **2020**

Assisted by: *Ms Pfunzo Mhelembe (Senior Investigator)*