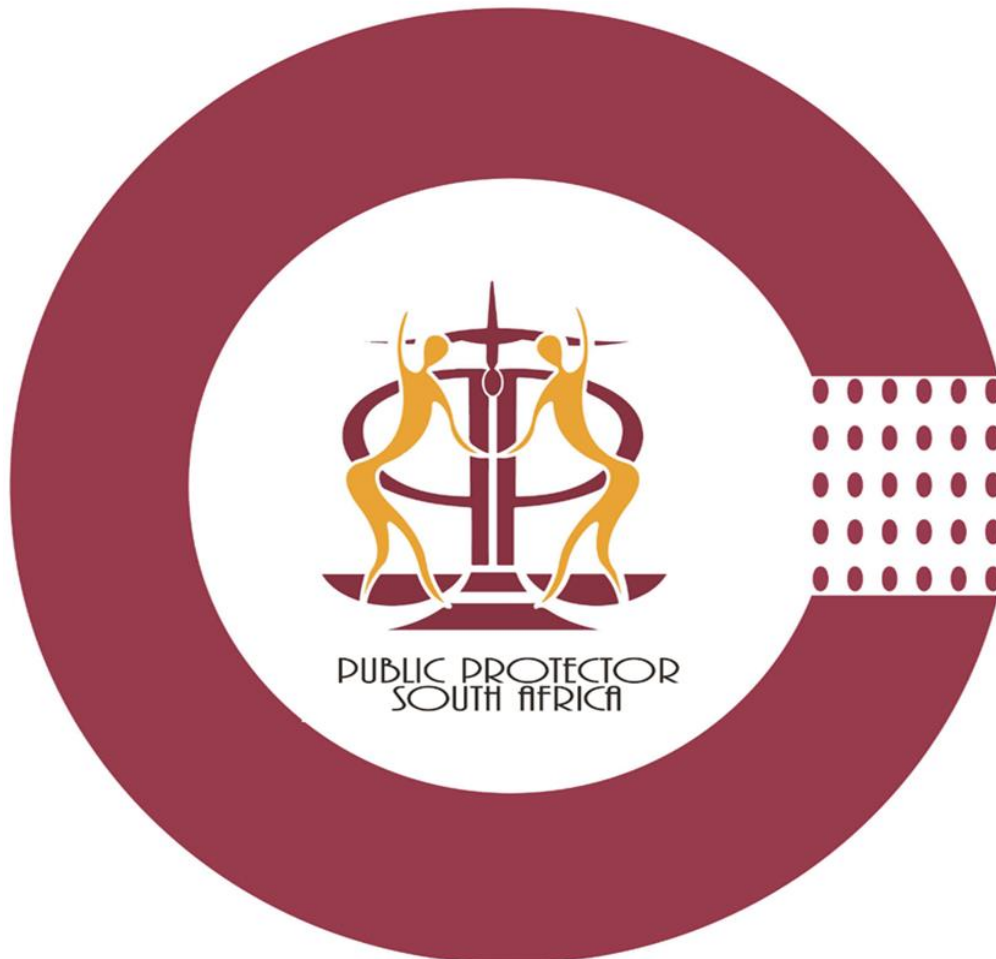


ADVISORY REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1), READ WITH SECTIONS 6(4)(c)(ii), (d)(ii) AND (iii) OF THE PUBLIC PROTECTOR ACT, 1994



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INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT, MALADMINISTRATION AND UNDUE DELAY BY THE FUNCTIONARIES OF THE NATIONAL ARTS COUNCIL IN CONNECTION WITH THE DISBURSEMENT OF FUNDS OF THE PRESIDENTIAL EMPLOYMENT STIMULUS PROGRAMME, VIOLATION OF CONSTITUTIONAL RIGHT TO PRIVACY OF ARTISTS, AS WELL AS CONTRAVENTION OF SECTION 4(10) OF THE NATIONAL ARTS COUNCIL ACT, 1997

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LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYM / ABBREVIATION	DESCRIPTION
ABN	Abahlali Base NAC
ACEO	Acting Chief Executive Officer
AGSA	Auditor General of South Africa
CEO	Chief Executive Officer
CFO	Chief Financial Officer
Constitution	Constitution of the Republic of South Africa, 1996
Counsel	Counsel of the NAC (Accounting Authority)
DSAC	Department of Sport Arts and Culture
EXCO	Executive Committee
GMS	Grant Management System
GN letter	Grant Notification Letter
MOA	Memorandum of Agreement
NAC	National Arts Council (Institution)
NAC Act	National Arts Council Act, 1997
PAJA	Promotion of Administrative Justice Act, 2000
PESP	Presidential Employment Stimulus Programme
PFMA	Public Finance Management Act, 1999
POPIA	Protection of Personal Information Act, 2013
Public Protector Rules	Rules relating to investigations by the Public Protector and Matters Incidental Thereto, 2018, (as amended)
Public Protector	Public Protector South Africa
Public Protector Act	Public Protector Act, 1994
SARS	South African Revenue Services

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution and section 8(1), read with sections 6(4)(c)(ii), (d)(ii) and (iii) of the Public Protector Act.
- 1.2 The report is submitted in terms of section 8(1) read with sections 6(4)(c)(ii), (d)(ii), (iii) and 8(3) of the Public Protector Act, which empower the Public Protector to make known the findings of an investigation, to affected parties (including the Complainant) for such persons to note the outcome of the investigation and the Public Protector's recommendations. A copy of this report is issued to the following persons:
- 1.2.1 Mr Zizi Kodwa, Minister of Sport, Arts and Culture;
- 1.2.2 Dr Cynthia Khumalo, Acting Director-General, Department of Sport, Arts and Culture;
- 1.2.3 Ms Celenhle Dlamini, Chairperson of the NAC Council; and
- 1.2.4 Ms Julie Diphofa, Acting Chief Executive Officer, NAC.
- 1.3 A copy of the report is also provided to Mr Shackelton of Shackelton and Mohapi Attorneys, legal representative of the Complainants.
- 1.4 The report relates to a complaint lodged regarding allegations of improper conduct, maladministration, and undue delay by the National Arts Council (NAC) relating to the disbursement of funds of the Presidential Employment Stimulus Programme (PESP), violation of the constitutional right to privacy of artists and contravention of section 4(10) of the NAC Act.

2. THE COMPLAINT

- 2.1 The Complaint was lodged with the Public Protector by attorneys, Mkhabela Huntley Incorporated, acting on behalf of an interest group, called *Abahlali Base NAC* (the Complainant) on 29 April 2021. The Complainant alleged that:

- 2.1.1 On 06 October 2020, the NAC held a virtual briefing with artists across South Africa to introduce and explain the PESP, a stimulus programme geared towards employment creation and retention of jobs for artists;
- 2.1.2 Subsequently, on 30 October 2020, the NAC published an advertisement on its website inviting applications for the PESP. The disbursing of funds in terms of the PESP was to take place in two streams. Stream One focused on job retention through a wage subsidy and Stream Two focused on projects that could create income opportunities for artists;
- 2.1.3 The closing date for applications for Stream One was indicated as 20 November 2020 and announcement of the outcomes of applications was to be made on 01 December 2020. In respect of Stream Two, the closing date was stated as 27 November 2020 and the outcomes were to be announced in two sessions between 01 and 21 December 2020;
- 2.1.4 The applications were to be made online on an electronic page called the Grant Management System (GMS). Upon applying, the GMS generated a Grant Notification Letter (GN letter) indicating approval of the grant to the applicant. The signing by the applicant of the GN letter constituted a legal agreement to fund an individual or project for the duration of the period January 2021 to March 2021;
- 2.1.5 During December 2020, some artists started receiving GN letters and the first list of approved beneficiaries was announced on the website of the NAC;
- 2.1.6 Following the President's announcement of the adjusted Level 3 Covid-19 restrictions in late December 2020, the approval of applications was paused, including inception of payments;
- 2.1.7 A new NAC was convened on 01 January 2021, with a four (4) year term. At this time, there was a list of approved artists which was announced and

another list of approved artists that was not announced. The new NAC soon after taking office announced the suspension of the Chief Executive Officer (CEO) and Chief Financial Officer (CFO);

- 2.1.8 The entire budget of three hundred million rand (R300 000 000) was then already allocated and subscribed to only six hundred and thirteen (613) successful applicants, leaving seven hundred and sixty-one (761) successful applicants without any allocated funding;
- 2.1.9 The new NAC unilaterally decided to redistribute the funds to accommodate all approved applicants and also the applicants on the unannounced list;
- 2.1.10 Artists who had already received GN letters and contracts were requested to sign new and reduced GN letters. This effectively started the process afresh and rendered the previous GN letters and contracts null and void;
- 2.1.11 The PESP project was intended to be finalised by 31 March 2021. Payments in the amount of twenty eight million rand (R28 000 000) had already been paid for Stream One by 31 March 2021, however, no payments had been made in respect of Stream Two;
- 2.1.12 The NAC GMS exposed the personal details of applicants of PESP on the internet in violation of section 14 of the Constitution which protects the right to privacy;
- 2.1.13 Five (5) members of the NAC were identified as having received benefits from the PESP funding, in contravention of section 4(10) of the NAC Act, which provides that members of the Council shall not be eligible for grants from the NAC during their term of office;

- 2.1.14 Some Council members were linked to organizations that received funding for approved projects as well as companies that are not in the arts, but benefitted from PESP funds;
- 2.1.15 There was a lack of financial transparency within the NAC, as they requested information on eight questions that were posed regarding payment of PESP benefits but were not properly answered. The NAC refused to provide the information as requested and only provided a spreadsheet with names and figures which did not amount to proof of payment of PESP benefits;
- 2.1.16 There was a delay in the payment of benefits to artists and as per the PESP guidelines, payments were to be made in two tranches. Seventy percent (70%) of the approved amount was to be paid out in the first tranche, followed by the balance of thirty percent (30%) in tranche two. Maladministration and the mismanagement of funds by the NAC resulted in the delay of processing payments. At the end of April 2021, when the complaint was lodged, numerous beneficiaries were still waiting for payments in tranche two; and
- 2.1.17 Artists were prejudiced by the conduct of the NAC, as they fell deeper into debt. The delays in creating new job opportunities and to sustain existing jobs through the PESP made them more vulnerable and this was exacerbated by the COVID-19 lockdowns. Some artists waited for five (5) months and more to pay employees and contractors involved in their projects, and to keep their businesses running.

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 of the Republic of South Africa, 1996 (the Constitution) to strengthen constitutional

democracy through investigating and redressing improper conduct in state affairs.

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

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

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) to report on that conduct; and*
- (c) to take appropriate remedial action”.*

3.3 Section 182(2) directs that the Public Protector has the additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.4 The NAC is an organ of state established by the National Arts Council Act, 1997. The NAC is also listed as public entity under schedule 3, Part A of the Public Finance Management Act, 1999 (PFMA) and its conduct therefore amounts to conduct in state affairs. As a result, the Public Protector is satisfied that the complaint falls within her competency to investigate as envisaged in section 182(1)(a) of the Constitution and section 6(5) of the Public Protector Act.

4. ISSUES IDENTIFIED FOR INVESTIGATION

4.1 Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:

- 4.1.1 Whether there were irregular processes and/or undue delay by the NAC in processing applications for the payment of PESP benefits, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration and undue delay in terms of section 6(5)(a) and (b) of the Public Protector Act;
- 4.1.2 Whether certain members of the NAC or companies linked to members of the NAC unduly benefitted from the PESP, in contravention of section 4(10) of the NAC Act, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration in terms of section 6(5)(a) of the Public Protector Act;
- 4.1.3 Whether companies that do not work in the arts or were not entitled to grants, benefited from funds from the PESP by the NAC, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration in terms of section 6(5)(a) of the Public Protector Act; and
- 4.1.4 Whether the NAC violated the constitutional right to privacy of some artists by publishing their personal details on the internet, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration in terms of section 6(5)(a) of the Public Protector Act.

5. THE INVESTIGATION

5.1 The Investigation Process

- 5.1.1 The investigation included an exchange of documents, between the Public Protector and the NAC, analysis of the relevant documentation, consideration and application of the relevant laws, regulatory framework and prescripts.

5.2 Methodology

5.2.1 The investigation is conducted in terms of sections 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

5.2.2 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.

5.3 Approach to the investigation

5.3.1 The investigation was approached using an enquiry process that seeks to determine:

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration, abuse of power or other improper conduct?
- (d) In the event of a violation, what action should be taken?

5.3.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this case, the factual enquiry principally focused on whether the alleged conduct of the NAC was inconsistent with the applicable prescripts.

5.3.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the NAC in the screening, processing, and payment of the PESPs, and managing the personal information of the artists.

5.3.4 The enquiry regarding the remedy seeks to explore options for redressing the consequences of improper conduct and maladministration; what it would take to remedy the wrong or, where appropriate, to place the Complainant as close as possible to where she/he would have been, but for the improper conduct or maladministration.

5.4 Key sources of information

5.4.1 Documents and correspondence

5.4.1.1 Letter from Director-General DSAC, including documents: Legal Opinion from Van Zyl Ebrahim Cook Attorneys¹, NAC v The National Arts Festival Judgement,² Mazars Forensic Report on PESP,³ Theatre and Dance Alliance Report on NAC's mismanagement of PESP,⁴ NAC Councils minutes of meetings⁵ dated 16 March 2021;

5.4.1.2 Letter of Complaint from Mkhabela Huntley Attorneys to the Public Protector, dated 29 April 2021;

5.4.1.3 Letter from the Public Protector to the Director-General DSAC, dated 19 May 2021;

5.4.1.4 Letter from the Public Protector to Minister Sport, Arts and Culture, dated 19 May 2021;

5.4.1.5 Letter from the Public Protector to Acting Chairperson of the NAC Council, dated 19 May 2021;

1 Legal opinion from Van Zyl Ebrahim Cook Attorneys, dated 18 February 2021

2 In the High Court of Pretoria South Africa (Gauteng Division, Johannesburg), case number 14206/2021

3 Mazars Forensic Report, dated 17 September 2021

4 Theatre and Dance Alliance Report on the NAC's mismanagement of the PESP, dated June 2021

5 NAC Council Minutes of Meetings dated 29 January 2021, 27 February 2021, 30 November 2020, 26 November 2020, 06 December 2020, 11 December 2020, 18 December 2020, 19 December 2020, 30 December 2020, 3 February 2021, 4 February 2021, 5 February 2021, 8 February 2021, 11 February 2021, 16 February 2021, 17 February 2021, 18 February 2021, 19 February 2021, 21 February 2021, 26 February 2021, 28 February 2021, 14 March 2021, 15 March 2021, 23 March 2021, 28 March 2021 and 30 March 2021

- 5.4.1.6 Letter from Minister Sport, Arts and Council to the Public Protector, dated 04 June 2021;
- 5.4.1.7 Letter from the Acting CEO NAC to the Public Protector, dated 25 June 2021;
- 5.4.1.8 Letter from the Director-General DSAC to the Public Protector, dated 01 July 2021;
- 5.4.1.9 Letter from Mkhabela Huntley Attorneys to the Public Protector, dated 11 August 2021;
- 5.4.1.10 Email from Public Protector's Investigation Team (Investigation Team) to Mkhabela Huntley Attorneys, dated 16 August 2021;
- 5.4.1.11 Letter from Mkhabela Huntley Attorneys to the Public Protector, dated 09 September 2021;
- 5.4.1.12 Letter from the Investigation Team to Acting CEO NAC, dated 13 September 2021;
- 5.4.1.13 Letter from NAC to the Public Protector, dated 08 October 2021;
- 5.4.1.14 Letter from NAC to the Public Protector, dated 14 October 2021;
- 5.4.1.15 E-mail from Investigation Team to NAC, dated 14 October 2021;
- 5.4.1.16 Letter from NAC to the Public Protector, dated 18 October 2021;
- 5.4.1.17 E-mail from the Investigation Team to NAC, dated 21 October 2021;
- 5.4.1.18 E-mail from the Investigation Team to NAC, dated 26 October 2021;
- 5.4.1.19 E-mail from Mkhabela Huntley Attorneys to the Public Protector, dated 08 November 2021;

- 5.4.1.20 E-mail from the Investigation Team to NAC, dated 24 November 2021;
- 5.4.1.21 E-mail from the Investigation Team to NAC, dated 25 November 2021;
- 5.4.1.22 E-mail from NAC to the Investigation Team, dated 17 December 2021;
- 5.4.1.23 E-mail from NAC to the Investigation Team, dated 13 January 2022;
- 5.4.1.24 E-mail from the Public Protector’s Investigation Team to NAC, dated 14 January 2022;
- 5.4.1.25 E-mail from NAC to the Investigation Team, including documents such as PESP Proposal, NAC Advert, Memorandum of Agreement, ⁶ PESP Plan, PESP Guidelines and Letter of concern from Mr Theo Lawrence,⁷, dated 25 January 2022;
- 5.4.1.26 Email from Mr Shackelton, attorney for the Complainant, dated 15 June 2023;
- 5.4.1.27 Letter from Acting CEO NAC to the Public Protector’s Investigation Team dated 30 June 2023; and
- 5.4.1.28 Email from Acting CEO NAC to the Investigation Team dated 10 August 2023.
- 5.4.2 **Legislation and other prescripts**
- 5.4.2.1 The Constitution of the Republic of South Africa, 1996;
- 5.4.2.2 National Arts Council Act, 1997;

⁶ Memorandum of agreement dated 3 November 2020

⁷ Letter of concern from Mr Theo Lawrence dated 21 January 2021

5.4.2.3 The Promotion of Administrative Justice Act, 2000;

5.4.2.4 Public Finance Management Act, 1999;

5.4.2.5 Public Protector Act, 1994 and

5.4.2.6 Protection of Personal Information Act, 2013

5.4.3 **Case Law**

5.4.3.1 *The National Arts Festival Grahamstown NPC V NAC in the Gauteng High Court in Johannesburg, Case Number 14206/2021; and*

5.4.3.2 *Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others (1000/2019 and 31514/2018 and 33401/2018) [2020] ZASCA 111.*

5.4.4 **Notices issued in terms of section 7(9) of the Public Protector Act**

5.4.4.1 On 07 June 2023 a notice in terms of section 7(9)(a) of the Public Protector Act, read with Rule 42(1) and 41(1) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018* (Public Protector Rules), as amended, was sent to Mr Zizi Kodwa, the Minister of DSAC; Dr Cynthia Khumalo, the Acting Director-General, DSAC; Ms Julie Diphofa, the Acting Chief Executive Officer (Ms Diphofa), NAC; Ms Celenhle Dlamini, the Chairperson of the NAC Council (Ms Dlamini) and Mr Wendel Bloem of Mkhabela Huntley Attorney Inc, legal representatives acting on behalf of the Complainants, affording them an opportunity to provide representations to the Public Protector's intention to conclude the investigation.

5.4.5 Responses to Notices issued in terms of section 7(9)(a) of the Public Protector Act

5.4.5.1 On 15 June 2023, Mr Shackelton the Complainant's attorney sent an e-mail to the Investigation Team advising that the Complainants will not be providing a response to the notice in terms of section 7(9)(a) of the Public Protector Act, read with Rule 42(1) and 41(1) of the Public Protector Rules.

5.4.5.2 On 30 June 2023, a letter was received from Ms Diphofa indicating that the contents of the notice in terms of section 7(9)(a) of the Public Protector Act, read with Rule 42(1) and 41(1) of the Public Protector Rules were duly accepted and that the NAC had already begun to implement the recommendations in order to comply with the Public Finance Management Act.

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

6.1 Whether there were irregular processes and/or undue delay by the NAC in processing applications for the payment of PESP benefits, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration and undue delay in terms of section 6(5)(a) and (b) of the Public Protector Act

Common cause

6.1.1 On 16 October 2020, President Ramaphosa announced the PESP to the public and it was widely reported on various media platforms.

6.1.2 On 26 October 2020, Mr Vusumuzi Mkhize, Director-General of the Department of Sport, Arts and Culture (DSAC), informed Ms Rosemary

Mangope, the erstwhile Chief Executive Officer (CEO) of the NAC that an allocation of three hundred million rand (R300 000 000) was made available to the NAC for the implementation of the PESP.

6.1.3 National Treasury stipulated that all PESP projects should be completed by 31 March 2021.

6.1.4 The nature of the PESP was described on the website of the NAC as follows:

“The Presidential Employment Stimulus Programme (PESP) is geared towards employment creation and retention initiatives for artists, creatives, heritage sector workers and cultural workers. This includes (but is not limited to) support to innovation in digitisation efforts for content creation and the dissemination and development of e-commerce systems.”

6.1.5 On 30 October 2020, the NAC published an advertisement on its website, inviting applications for the PESP. On 02 November 2020, a Memorandum of Agreement (MOA) was signed by the DSAC and the NAC, appointing the NAC as the Implementing Agent and agreeing on a conceptual framework and process maps to be utilised in implementing the PESP. The MOA included a PESP Proposal Plan with a process flow that stipulated the obligation of the NAC to meet the required timelines for the project. The success of the PESP was to be measured against NAC’s strict adherence to these timelines.

6.1.6 The closing date for applications for Stream One was indicated as 20 November 2020 and the announcement of the outcomes was to be made on 01 December 2020. In respect of Stream Two, the closing date was

stated as 27 November 2020 and the outcomes were to be announced in two sessions, from 01 to 21 December 2020.

- 6.1.7 The projects were to be concluded by 31 March 2021, giving applicants five (5) months to apply, to plan, initiate, implement, and report to the NAC on their projects. The applications were to be made online on an electronic page, GMS. Receipt of the applications was acknowledged by way of an automated NAC's Notification Letter. Thereafter, a GN letter served to confirm that an application was successful and that an applicant was awarded a PESP grant to a specified value, subject to certain further information being supplied to the NAC.
- 6.1.8 The signing of the GN letter by the applicant constituted a legal agreement to fund an individual or a project for the duration of the period January 2021 to March 2021.

Issue in dispute

- 6.1.9 The issue for determination by the Public Protector is whether due processes were followed in processing applications for PESP benefits and whether payments were made within the stipulated timeframes.

The Complainant's version

- 6.1.10 The Complainant contended that the NAC failed to implement the PESP properly by not complying with correct processes, failed to discharge its obligations within stipulated timelines and incorrectly allocated benefits due to beneficiaries.

Response from Ms Diphofa, the Acting Chief Executive Officer

- 6.1.11 The Investigation Team raised the allegations with the NAC on 19 May 2021 and Ms Diphofa responded in a letter dated 25 June 2021 stating

that:

- 6.1.11.1 The NAC received approximately two thousand four hundred and eighty-six (2486) applications for both Stream 1 and Stream 2 grants. Of these applications, one thousand three hundred and seventy-four (1374) beneficiaries were approved to receive grant funding and one thousand one hundred and twelve (1112) were rejected. Of the 1374 approved beneficiaries, funding was only allocated to six hundred and thirteen (613), leaving seven hundred and sixty-one (761) approved beneficiaries without any funding;
- 6.1.11.2 When the new NAC took over on 01 January 2021, they became aware that the decisions of the former NAC Council in terms of the approval of the granting of funds were not properly quantified, recorded and kept within the financial limits. They resolved to reconsider the approval of the amounts already allocated to the 613 approved beneficiaries, to ensure a fair, just and equitable distribution of the available funds between all approved beneficiaries; and
- 6.1.11.3 Stream 1 applications were approved on 19 December 2020 and the announcements were published on 22 December 2020. Stream 2 applications were finally approved on 29 January 2021 and announced on 24 February 2021. The NAC also communicated directly with the affected parties, informing them of the amended calculated amounts based on the adjusted guiding figures. Several press releases and media statements were issued by the NAC to communicate progress to the applicants. The CEO, Ms Rosemary Mangope and Chief Financial Officer (CFO), Mr Clifton Changfoot, were subsequently suspended for irregularities identified in the management of this project.

Response from Ms Rosie Katz, Acting Senior Project Manager: PESP (Ms Katz)

6.1.12 On 17 December 2021, Ms Katz responded to correspondence sent to the NAC on 19 May 2021 by providing information to the Investigation Team reflecting the number of applicants that were paid more funding than they applied for as shown in the table below:

STREAM 1 ORGANISATIONS

Project Number	Project Name	Organisation Name
3420901	IMAD Youth Community Music Schools Institute	IMAD
3430301	Organisational Support Covid-19	Phototool
3436401	Thiba Tlala	Lentswe Performing Arts
3527601	Open call!	BAT CENTER TRUST
3581201	Handevat Music Project - wage subsidy	Handevat Music Project
3657801	Access Music Project	Arkwork for Art NPC
3742701	Lentswe La Setjhaba Newspaper	Letlama Foundation
3457401	8 Colours of the Rainbow	Soul Truth Music
3734701	Candle 2 Success	Light of Nation Youth Projects

STREAM 1 INDIVIDUALS

Project Number	Project Name	Individual Name
3713001	Love Triangle	Lefu Lekoala
3709001	Palo ya buka	Nomsa A De Wee
3540401	Crack Empire World	Priensly Sekabe
3667101	Isibani Project	Qubeka Makhanya

6.1.13 Ms Katz conceded that an unspecified number of applicants were paid in both streams before 21 February 2021, based on the original guiding figure of sixteen thousand six hundred rand (R16 600) in Stream 1 and twenty five thousand rand (R25 000) in Stream 2.

Legal Opinion sourced by NAC

- 6.1.14 According to the evidence submitted to the Investigation Team by the NAC, the new Council met with legal counsel on 17 February 2021, to obtain an opinion on their proposal to change the contracts and reduce the total amounts of those individuals and organisations that had already signed such contracts based on the original guiding figures. The legal opinion by attorneys, Van Zyl Ebrahim Cook Incorporated, dated 18 February 2021, stated *inter alia*, that:
- 6.1.14.1 The administrative action of the NAC did not comply with legal prescripts and was not lawful, reasonable, or procedurally fair. The NAC excluded applications that were submitted on time. The total project budget for the PESP grants was allocated to the successful applications, without taking the excluded applications into consideration. Should the NAC fail to rectify this, its inaction would have an adverse effect on the excluded applicants and would have direct external legal effects. Some successful applicants were allocated higher PESP grants than they had requested, which resulted in the PESP grants being depleted;
- 6.1.14.2 The NAC's administrative action was biased towards successful applicants and was procedurally unfair because relevant considerations were not taken into account, thus exposing the action to judicial review;
- 6.1.14.3 The legal opinion recommended two options. Both options involved approaching the affected successful applicants to explain the invalidity of some of the PESP grants and how the situation would be rectified. Option one, involved requesting the successful applicants to accept termination of the GN letters and agreements. Alternatively, option two was that the NAC should unilaterally proceed without the consent of the affected successful applicants to rectify the situation by distributing the PESP grants in a lawful, reasonable and procedurally fair manner. However, the NAC was warned that in respect of option two, it would face the risk of judicial review

proceedings being instituted and interdicts being sought against it by successful applicants; and

- 6.1.14.4 If the applicants refused to capitulate, it would be obliged to approach a court to declare the PESP awards invalid and have them set aside.

Minutes of Special Council Meeting received from the NAC

- 6.1.15 The new Council held a Special Council Meeting on 21 February 2021. A summary of the status of PESP funding was provided to the Council as follows:

- (a) Total PESP budget excluding the administration fee: R285 million
- (b) Total amount approved: R545,3 million
- (c) Total cash paid out: R24,4 million
- (d) Unpaid amount to approved beneficiaries: R520,9 million
- (e) Budget available in cash: R260,5 million
- (f) Second tranche of 30%: R10,4 million
- (g) Remaining funds (minus second tranche payments): R250 million⁸

- 6.1.16 The Council in this meeting approved the new financial guiding figure to accommodate the 761 successful and approved applicants who were left out, as there were no more PESP funds available. The adjusted guiding figure was seven thousand one hundred and fifty five rand (R7 155.00) and ten thousand two hundred and twenty two rands (R10 222.00) in respect of both Streams respectively, instead of the original guiding figures of R16 600.00 for Stream 1 and R25 000.00 in respect of Stream 2 as determined by National Treasury⁹. The guiding figure for Stream 2 was again amended later to ten thousand eight hundred and ninety five rands (R10, 895.00).¹⁰

⁸ Minutes of the Special Council Meeting held on 21 February 2021.

⁹ Minutes of the Special Council Meeting held on 21 February 2021.

¹⁰ Minutes of the Special Council Meeting held on 26 February 2021.

Additional information provided by the NAC

- 6.1.17 With its responses to the allegations, the NAC provided the following information to the Investigation Team, indicating that:
- 6.1.17.1 On 21 January 2021, Mr Theo Lawrence, a Panel member of the NAC's PESP Review Process, submitted a letter to the then CEO titled "*Urgent concerns arising from the PESP review process*". The following issues were raised:
- (a) The NAC, including its Project Management Team, was not able to rise to the challenges and respond appropriately, timeously and efficiently. The NAC's CEO confirmed on 15 December 2020, that the Guiding Figure could not be applied uniformly; and
 - (b) There were multiple compliance issues, including tax compliance issues, non-South African citizenship, which should have led to an automatic disqualification before review by any Panel. During the adjudication review process and Panel meetings, numerous concerns about the abovementioned challenges were raised but were dismissed with the response that it would be sorted out at the contract stage.
- 6.1.17.2 On 03 March 2021, artists led by Ms Sibongile Mngoma began an occupation of the NAC offices in an effort to get the NAC to pay beneficiaries what they were originally promised in terms of the first guiding figures and on 14 March 2021, the NAC met with the Complainants;
- 6.1.17.3 On 05 March 2021, the NAC issued a press release stating that all beneficiaries should upon receipt of the new or updated GN letters, sign and return same in order for new contracts to be issued;
- 6.1.17.4 On 12 March 2021, the NAC published a list of beneficiaries of PESP

Funding. For Stream 1, there were three hundred and forty eight (348) individual and organisational beneficiaries who were allocated a total of twenty seven million five hundred and ninety two thousand three hundred and five rand (R27 592 355.00);

6.1.17.5 For Stream 2, three hundred and sixty eight (368) individuals were allocated a total of forty seven million one hundred and fifty three thousand six hundred and eleven rands (R47 153 611.00) and two hundred and three million two hundred and ninety thousand six hundred and forty three rands and sixty one cents (R203 290 643.61) which was divided among five hundred and sixty six (566) organisations. Funding that was available for the undersubscribed Stream 1 was shifted to Stream 2;

6.1.17.6 Collectively, there were one thousand two hundred and eighty two (1282) beneficiaries with a total allocation of two hundred and seventy eight million thirty six thousand six hundred and nine rands and sixty one cents (R278 036 609.61). The NAC's five percent (5 %) administration fee of fifteen million rands (R15 million), would take the total to two hundred and ninety three million thirty six thousand six hundred and nine rands and sixty one cents (R293 036 609.61);

6.1.17.7 A total of eighty five (85) applicants received funding for both Streams 1 and 2, fifteen (15) applicants received funding for two projects in Stream 2, and four (4) applicants were successful in receiving funding for 1 project in Stream 1 and 2 projects in Stream 2. One (1) applicant received funding for two projects in Stream 1 and one project in Stream 2;

6.1.17.8 The NAC emphasised that the completion of the program largely depended on the ability of the approved applicants to submit the required information and return the contracts as a matter of urgency, to avoid further delays; and

6.1.17.9 On 30 March 2021 a Special Council Meeting was held, where it was decided that applicants would only be awarded funding for one project per stream. The applicants would be awarded funding for the project with the highest amount.

Response from former Minister Mthethwa

6.1.18 On 19 May 2021, an allegations letter was sent to the former Minister of Sport, Arts and Culture, Mr EN Mthethwa MP (Mr Mthethwa). He responded on 04 June 2021, indicating that:

6.1.18.1 He had also received the letter from Mr Theo Lawrence, as referred to above. Thereafter, he convened a meeting with the NAC on 16 February 2021 and was briefed on how the Council was dealing with the allegations raised. The outcome of the meeting was that the NAC was to provide him with an implementation plan on addressing the issues concerned, covering the following areas:

- (a) How the NAC was to expedite the process of payments;
- (b) How the NAC was going to deal with the 761 applications that were reportedly left out of the process;
- (c) To put in place a Communication Plan ensuring that there are regular updates to the industry on the progress of the PESP;
- (d) To seek an urgent legal opinion on how to deal with the challenges faced by the NAC including the over subscription of applications; and
- (e) To deal with allegations of mismanagement and gross negligence which emerged as the process unfolded;

6.1.18.2 Several briefing and update meetings took place between the DSAC and the Management of the NAC and the Council to monitor the implementation of the plan, during February and March 2021. In these meetings, it became clear that there were serious flaws, which continued to emerge as the process unfolded, including over-commitment of funds and that some

beneficiaries were granted/paid more than what they applied for; and

- 6.1.18.3 Upon reduction of the grant amounts, several applicants took legal action against the NAC and some artists occupied the offices of the NAC in protest. He met with the protesting artists on 19 March 2021, but could not convince them to vacate the NAC offices.

National Arts Festival Judgement

- 6.1.19 The National Arts Festival (the applicant) instituted legal action against the NAC in the Gauteng High Court in Johannesburg, under Case Number 14206/2021, seeking to enforce the terms of the Grant Agreement (GA) concluded on 28 January 2021. The issue for determination by the court was whether the NAC was entitled to unilaterally terminate the contract it had concluded with the applicant and alter the amount of funds it had received under the PESP contract.

- 6.1.20 On 21 June 2021, Judge Colin Lamont ruled in favour of the applicant for the balance of the promised eight million rand (R8 000 000) that had originally been awarded to the festival as part of the PESP. In paragraph 46 of his judgment, Justice Lamont ruled *inter alia*, that:

“The conduct of the first respondent (NAC) in unilaterally reducing the contractual amount at a point at which the time for payment of the first amount of funding had passed, and a mere two weeks before the project completion date is accordingly unlawful and irrational.”

- 6.1.21 The court further held that the NAC would need to pay the remainder of the promised R8 000 000 to the applicant immediately. Costs of both the hearing at the end of March 2021 and that on 31 May 2021, were awarded in favour of the applicant, including the costs of two counsels.

- 6.1.22 The NAC subsequently applied for leave to appeal, which was refused by the High Court. It then filed an application for special leave to appeal to the Supreme Court of Appeal, which was also refused.

The Mazars Forensic Investigation Report

- 6.1.23 Mazars Forensic Services (Pty) Ltd (Mazars Forensic Services) was instructed by the Chairperson of the NAC Council, Ms Dlamini, in June 2021, to conduct a forensic audit on behalf of the NAC regarding the PESP.

- 6.1.24 The scope of the Mazars Forensic Services investigation entailed amongst other things the following:

- (a) To determine if there were any irregularities or inconsistencies in the management, adjudication and approval of the PESP applications received from the sector;
- (b) To determine if there is any culpability with regard to those entrusted with PESP applications and administration process;
- (c) To determine if there has been any gross negligence, misconduct or dereliction of duty in respect of the CEO tasked with management of the PESP process;
- (d) To determine if there has been any gross negligence, misconduct or dereliction of duty in respect of the CFO tasked with management of the PESP process;
- (e) To determine if there has been any gross negligence, misconduct or dereliction of duty in respect of the Previous Council tasked with management of the PESP process;
- (f) To determine if there has been any gross negligence, misconduct or

dereliction of duty in respect of any NAC staff/Management/Panel Member/ Council tasked with management of the PESP process; and

(g) To perform a reconciliation on PESP related funds, confirming cash on hand.

6.1.25 The Mazars Forensic Services investigation report concluded that there were irregularities or inconsistencies in the management and adjudication of the PESP. In its wide ranging adverse findings¹¹ related to implementation of the PESP, the report implicated a number of NAC officials in maladministration, mismanagement and financial misconduct in violation of the PFMA. The report recommended specific corrective actions to be implemented by NAC¹², which included consulting with its legal representatives, taking appropriate corrective action against persons that failed to manage and execute activities within their area of responsibility, and cited instances where there was failure to ensure that systems of internal control and financial management were carried out.

Response from the NAC on the implementation of the recommendations by Mazars Forensic Services investigation report

6.1.26 On 14 January 2022, the Public Protector wrote to the NAC to establish the status of the recommendations of the forensic report and to provide details of actions taken. Ms Katz responded to the Public Protector on 25 January 2022, stating that:

6.1.26.1 In late November 2021, the NAC started disciplinary processes in line with the recommendations contained in the report. The Initiator and Presiding Officers were appointed in October / November 2021;

6.1.26.2 The first sitting with the top two suspended officials took place in December

¹¹ As captured from page 61 of the Mazars Forensic Services investigation report.

¹² As captured from page 70 of the Mazars Forensic Services investigation report

2021. The second sitting of the disciplinary action was scheduled from 07 February 2022 to 11 February 2022, with the CEO and later for the CFO; and

- 6.1.26.3 Ms Diphofa was delegated to draw up charges for other staff members implicated in the forensic report. The NAC was in the process of implementing the recommendations as set out in the forensic report, with a view to correct inconsistencies, improper conduct, and maladministration with the PESP as identified in the forensic report.
- 6.1.27 On 08 December 2022, the Investigation Team wrote a follow up letter to the NAC to request an update on the status of implementation of the recommendations in the forensic report and to provide details of corrective actions taken by the NAC. On even date, a response was received from Ms Diphofa informing the Public Protector that:
- 6.1.27.1 The NAC was implementing the recommendations of the report;
- 6.1.27.2 The PESP was almost completed but not fully closed off as there were some transactions that were still in process, including legal agreements that were in the process of implementation;
- 6.1.27.3 The close-out report was to be submitted to Council for approval once all transactions were concluded. After the process was closed-off, the report would be submitted to the DSAC; and
- 6.1.27.4 The NAC Council concluded the disciplinary matters relating to the former CEO and CFO. The CFO was dismissed and there was an agreement entered into between the former CEO and the NAC. Two Council members who were implicated were also charged, however, they resigned. The contract of the former project Manager expired before the forensic report was released, hence no action could be taken.

6.1.28 On 09 March 2023 Ms Diphofa sent a further response to the Public Protector, advising that:

6.1.28.1 The Auditor General of South Africa (AGSA) raised queries on the PESP funding and declared irregular expenditure of approximately ten million rands (R10 000 000) since many of the applications which were submitted for panel review were not fully compliant;

6.1.28.2 The close-out report was complete, however, there were a few outstanding issues on reporting by some beneficiaries that were being reviewed by the internal auditors of the NAC.

Applicable legal framework

The Constitution of the Republic of South Africa, 1996

6.1.29 Section 2 of the Constitution provides that, *“The Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”*.

6.1.30 Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

6.1.31 Section 195(1)(a) of the Constitution requires that a high standard of professional ethics must be promoted and maintained in public administration. Section 195(1)(d) states that services must be provided impartially, fairly, equitably and without bias. Section 195(1)(f) provides that public administration must be accountable. The above principles apply in terms of section 195(2)(b) to all organs of state.

The Promotion of Administrative Justice Act, 2000

6.1.32 Section 3(1) of The Promotion of Administrative Justice Act, 2000 (PAJA), provides that administrative action which materially and adversely affects

the rights or legitimate expectations of any person, must be procedurally fair.

Public Finance Management Act, 1999

6.1.33 Section 50(1)(b) and (d) of the PFMA provides that the accounting authority for a public entity must, *inter alia* act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity and seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.

6.1.34 Section 51(1)(b)(ii) of the PFMA requires an accounting authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.

The National Arts Council Act, 1997

6.1.35 Further, section 6(1)(j) of the NAC Act states that one of the functions of the NAC is to “*make grants to any person, organisation or institution in order to provide facilities to support the development and promotion of the arts.*”

6.1.36 Section 14(1) of the NAC Act, stipulates that the Chief Executive Officer (CEO) shall be the accounting officer, charged with the responsibility of accounting for all money and the utilisation thereof.

Memorandum of agreement between NAC and DSAC

6.1.37 As indicated above, on 02 November 2020, the NAC and the DSAC entered into an MOA, for the implementation of the PESP.

- 6.1.38 The Director-General of the DSAC, Mr Mkhize represented the Department in the signing of the MOA and the CEO Ms Mangope represented the NAC.
- 6.1.39 Clause 1 of the MOA states that the DSAC wished in line with its mandate, to fund the “Beneficiary” (NAC) and that the NAC accepted the funding subject to the terms and conditions of the MOA.
- 6.1.40 The MOA stipulates that the agreement would commence on 29 October 2020 and would remain in force until 30 June 2021.
- 6.1.41 In terms of clause 4, the DSAC agreed to provide financial support to the NAC in the sum of R 300 000 000.00 during the 2020/2021 Financial Year and that a project management/administration fee of a maximum of 5% could be levied on the total allocation.
- 6.1.42 Clause 6(1) of the MOA provides, *inter alia*, that the NAC agreed to ensure effective, efficient and transparent financial control systems throughout the duration of the agreement.
- 6.1.43 Clauses 6.2 and 6.3 provided that the NAC agreed to utilise the allocation provided by the DSAC exclusively and solely for the purposes of the “project”. The “project” is defined in clause 2 of the MOA as “the effective and efficient implementation of objective 2 of the Presidential Employment Stimulus Programme as stated in the Beneficiary’s funding proposal attached hereto as Annexure C.”
- 6.1.44 Annexure C to the MOA is a Memorandum from the CEO of the NAC to the DSAC Technical Task Team, dated 26 October 2020 under the heading: “NATIONAL ARTS COUNCIL MANAGEMENT OF A PORTION OF THE PRESIDENTIAL EMPLOYMENT STIMULUS PROGRAMME”.
- 6.1.45 The Memorandum stated that final clarity on the allocation of funds to the NAC for the project was received on 06 October 2020. It confirmed that

R300 million was allocated to the NAC. R100 million was allocated for job retention which is described as “*support for employment retention in cultural and creative institutions and organisations through open calls for proposals...*” R200 million was allocated to the NAC for “*Open Call*” which is described as “*Arts and Culture practitioners supported in the arts and culture sector through targeted open call opportunities to create and/or produce work in the cultural and creative industries by the NAC and NFV.*”

- 6.1.46 The *NAC PESP STREAMS AND GUIDELINES* are referred to in paragraph 4 of the Memorandum (annexure to the MOA) and distinguished between Stream 1: Job Retention and Stream 2: Projects. It stated that the National Treasury proposed to the NAC to create approximately seven thousand (7000) job opportunities in Stream 1. However, the NAC was of the view that six thousand rand (R 6000.00) would be more manageable with the amount available, which would have translated into an average wage subsidy of sixteen thousand rand (R16 600) over three months, concluding on 31 March 2021.
- 6.1.47 As far as Stream 2 is concerned, the Memorandum stated that the National Treasury had proposed to the NAC to create approximately ten thousand (10 000) opportunities. However, the NAC was of the view that eight thousand (8000) might be more manageable with the amount of money available which would have made an average opportunity cost of around twenty five thousand rands (R25 000) over three months, concluding on 31 March 2021.
- 6.1.48 The PESP plan which was an addendum to the Memorandum contained a process flow with specific timelines, indicating that the adjudication of the applications would commence on 17 November 2020 and be finalised on 30 November 2020. The contracting process was scheduled for the period 01 to 11 December 2020. The payment of successful applicants in Stream 1 was scheduled for 07 to 23 December 2020 and Stream 2.1 (the first tranche) for the same period. Payment for stream 2.2 was scheduled for

04 to 15 January 2021. The final payments for stream 2.1 and 2.2 (tranche 2) was scheduled for 12 to 26 March 2021. The submission of a close out report to the DSAC was targeted for 30 April 2021.

Analysis

- 6.1.49 In terms of the evidence and information gathered by the Investigation Team, the Public Protector acknowledges the High Court Judgment in the case of National Arts Festival,¹³ the Legal Opinion from Van Zyl Ebrahim Cook Incorporated sourced by NAC on this issue, the AGSA audit findings and the Mazars Forensic Report. In this regard, the Public Protector does not intend to duplicate the investigation or engage in a parallel processes, with the potentiality for conflicting decisions.¹⁴
- 6.1.50 The approval or non-approval to award PESP funds by the NAC constituted administrative action that had to adhere to the constitutional imperative stated in section 33 of the Constitution. The decisions by the NAC had to be made (and had to be seen to be made) impartially. The NAC and its staff were accordingly obliged to comply with the constitutional imperatives of section 195 in the entire PESP process. Administrative action is usually considered to be unfair if the decision-making body makes a decision (alternatively fails to make a decision) that adversely affects someone without prior consultation. Secondly, the decision-making process must be free from any real or apparent partiality, bias or prejudice.
- 6.1.51 According to section 14(1) of the NAC Act, the CEO of the NAC was responsible in the first instance for the allocation of the funds provided to beneficiaries in terms of the PESP. It was expected of the NAC and its CEO to allocate grants in terms of the PESP with fidelity, honesty and integrity and in the best interest of the NAC and those that it has to support

¹³ Gauteng High Court, Johannesburg (case no 14206/2021).

¹⁴ *Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others* (1000/2019 and 31514/2018 and 33401/2018) [2020] ZASCA 111 (29 September 2020) at para 25.

in terms of the NAC Act.

- 6.1.52 The evidence before the Public Protector reveals that shortly after the new NAC Council took office in January 2021, it became aware of the irregularities in the awarding of the PESP grants and the over commitment of the budget.
- 6.1.53 The CEO of the NAC was provided with a detailed document setting out the irregularities and improprieties with the implementation of the programme by the members of Panel on 21 January 2021, but no decisive action was taken except that the NAC decided to change the criteria of the previous NAC in respect of the awarding of the PESP grants.
- 6.1.54 On 18 February 2021, the NAC obtained a legal opinion on the allocation of the grants, the changing of the criteria and the imposition of an upper limit on the maximum the PESP grant that could be awarded to applicants.
- 6.1.55 The legal opinion identified a number of irregularities, including the exclusion of applications received before the two closing dates, the allocation of the budget taking the excluded applications into consideration, the fact that some applicants were allocated a higher grant than requested and the new introduction of an upper limit on the maximum that could be awarded, after successful applicants already received their grants, when earlier this limitation did not apply.
- 6.1.56 The legal opinion concluded that the conduct of the NAC did not comply with the requirements of lawfulness, being reasonableness and procedural fairness. The NAC was advised to consider two possible options of resolving the matter in involving the successful applicants and obtaining their agreement that the amounts allocated be changed, failing which the NAC had to take the matter on judicial review for the setting aside of their decisions and for a just and equitable order, in respect of the consequences of the unlawful administrative action.

- 6.1.57 The reaction to the NAC's announcement of the changing of the criteria resulted in resistance by the affected parties who insisted that they should be paid what was promised to them. Some of the affected parties successfully took the matter to court while another group of artists staged a sit-in at the offices of the NAC. The court found that the conduct of the NAC in unilaterally reducing the contractual amount a mere two weeks before the project completion date, was unlawful and irrational.
- 6.1.58 However, despite this, the NAC did not follow the advice of the legal opinion to take its decisions on judicial review, rather, it unilaterally continued to implement the grants in terms of its amended criteria.
- 6.1.59 The evidence further shows that the NAC commissioned Mazars Forensic Services to conduct a forensic investigation into the PESP grant by NAC. The Mazars Forensic Investigation Report was released in September 2021. The findings highlighted and flagged financial mismanagement, process irregularities and a lack of adequate oversight in implementation of the PESP.

Conclusion

- 6.1.60 The Public Protector concludes on the strength of the available evidence that there were irregularities in processing applications for the payment of PESP benefits by the NAC and this was confirmed by the courts, Mazars Forensic Services, the AGSA and a legal opinion that sourced in-house by the NAC.
- 6.1.61 The irregularities in the process of the granting of PESP funds resulted in undue delay in the payment of funds to qualifying, deserving and approved parties.
- 6.2 Whether certain members of the NAC or companies linked to members of the NAC unduly benefitted from the PESP, in**

contravention of section 4(10) of the NAC Act, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration in terms of section 6(5)(a) of the Public Protector Act

Common cause

- 6.2.1 Mr Mthethwa, in his capacity as the former Minister of Sport, Arts and Culture appointed new members to the Council in November 2020. Their term of office commenced on 01 January 2021.

Issue in dispute

- 6.2.2 The issue for determination by the Public Protector is whether members of the Council or companies linked to members of the Council unduly benefited from PESP funds, in contravention of the NAC Act.

Version of the Complainants

- 6.2.3 The Complainants contended that five members of the NAC Council (as well as some senior individuals in senior management) benefited from the PESP funding, namely: Ms Kim Matthews, Mr Bongani Tembe, Mr Siphosithole, Ms Madre Loubser and Ms Nise Malange. Section 4(10) of the NAC Act provides that members of the NAC shall not be eligible for grants from the Council during their term of office.

Response obtained from Mr Mthethwa, the erstwhile Minister of Sport, Arts and Culture

- 6.2.4 On 04 June 2021, Mr Mthethwa responded to the allegations as follows:
- 6.2.4.1 He was unaware that when the new Council members were recommended for appointment, some of them and/or their organisations had applied for

the PESP funding. The PESP call for applications was opened on 30 October 2020 and closed on 27 November 2020 therefore, none of them knew beforehand that they were going to be appointed as Council members of the NAC;

6.2.4.2 There was no immediate expectation that members were to disclose their interests in relation to the PESP funding, however Council members voluntarily disclosed that they were applicants to the PESP funding;

6.2.4.3 Only one member who was the Chairperson of the Council (unspecified) did not disclose that he was an applicant of the PESP grant. The NAC then decided to recommend his removal in terms of section 4(7) of the NAC Act. He was afforded an opportunity to give an account of his version of events, which was not satisfactory and was thereafter relieved of his duties as Council member and Chairperson of the NAC;

6.2.4.4 The former Minister in his response also provided a list of Council members and/or their organisations that benefitted or stood to benefit from the PESP funding as follows:

Council Members	Stream	Project	Organisation	Amount
Dr Sipho Sithole	2	Giya' m Afrika	AfroCentric Talent Agency	R1 089 500
Ms Kim Matthews	1	Skills dev. project	Durban Music School	R414 010
Ms Kim Matthews	2	Ignite a flame	Durban Music School	R174 320
Ms Nise Malange	1	Open Call	Bat Centre	R151 780
Ms Nise	2	BAT 2021	Bat Centre	R435 800

Malange		Project Plan		
Ms Madre Loubser	2	Monteverdi Vespers	Cape Town Opera	R500 000

- 6.2.4.5 The appointment letters of the members contain the condition that the members must "resign from any engagement that might constitute a conflict of interest" when they assume office as members of the Council.

Version of the DSAC

Response obtained from Mr Mkhize, the Director-General: DSAC

- 6.2.5 On 19 May 2021, the Public Protector raised the allegation with Mr Mkhize, the DG of DSAC. In his response dated 01 July 2021, Mr Mkhize stated that when the Complainants raised this issue during the sit-in that they staged at the offices of the NAC in March 2021, the DSAC requested a legal opinion from the Office of the Chief State Law Adviser who responded on 16 March 2021 advising the DSAC that:

- 6.2.5.1 A conflict of interest is described as a situation in which an individual may profit personally from decisions made in his or her official capacity. In this instance, members received benefits from the PESP before they assumed their duties on 01 January 2021. The members were thus not in a position to influence the decision to award PESP benefits, nor could they have participated in the decision making process to award PESP benefits, hence there was no conflict of interest; and

- 6.2.5.2 As there did not appear to be any conflict of interest when members received funding from the PESP, they were as such not obliged to resign from the projects that they initiated with the funds received from the PESP.

Version of the NAC

- 6.2.6 In her undated response to the Investigation Team, received on 08 October 2021, Ms Katz stated that certain members of the NAC were affiliated with organisations who successfully applied to receive benefits in terms of the PESP. Save for Ms Loubser, who was also a member of the previous Council, these applications were submitted and adjudicated upon before any of these persons were appointed to and assumed office on the NAC Council. Ms Loubser is an employee of the Cape Town Opera and always had, where required, declared her affiliation with this organisation so as to avoid any potential conflict of interest arising.

Applicable legal framework

The National Arts Council Act, 1997

- 6.2.7 The NAC Act provides for the appointment, dismissal and conduct of members of the NAC Council.
- 6.2.8 Section 4(7) of the NAC Act provides that a member of the Council may at any time be removed from office by the Council, if there is sufficient reason for doing so, subject to the approval of the Minister.
- 6.2.9 Section 4(10) of the NAC Act states that Members of the Council shall not be eligible to receive grants from the Council during their term of office.
- 6.2.10 In terms of section 8(5) of the NAC Act:

“A member of the Council shall not vote or in any manner participate in the proceedings at any meeting of the Council nor be present at the venue where such a meeting is held, if, in relation to any matter before the Council, he or she has any interest which precludes him or her from performing his or her functions.”

6.2.11 Regulation 9.1 of the Regulations of the National Arts Council (Government Notice R. 1298 of 01 November 1999 published in Government Gazette No. 20591) regulates the recusal from a meeting by a member of the Council who has a conflict of interest as follows:

6.2.11.1 Should a Council member or a member of an advisory panel have a direct interest in any application for funding which would lead to financial gain for him or her personally or for his or her organisation, he or she has to recuse himself or herself from voting when the allocation is made.

Analysis

6.2.12 According to the evidence presented by Mr Mthethwa, an unspecified Chairperson of the Council failed to disclose that he was an applicant of the PESP. Mr Mthethwa stated that this was the only instance that warranted the removal of a member of Council. According to him, this member was subsequently relieved of his position as Chairperson of the NAC Council after he failed to give a satisfactory explanation when given the opportunity to do so.

6.2.13 The evidence at the disposal of the Public Protector reveals that four persons namely, Dr Siphosithole, Ms Kim Matthews, Ms Nise Malange and Ms Madre Loubser of the NAC received benefits from the PESP prior to assuming office as NAC Council members in January 2021. As far as Ms Loubser is concerned, who was also a member of the former NAC, the evidence indicates that she disclosed her involvement when her application was discussed and recused herself as required by Regulation 9.1 of the NAC Regulations.

6.2.14 In terms of the legal opinion furnished to DSAC by the Office of the Chief State Law Adviser, it was confirmed that the members who received benefits from the PESP, did so prior to occupying or assuming office, and thus did not amount to a conflict of interest.

- 6.2.15 Evidence before the Public Protector, which is a record of the minutes of seatings dated 30 November 2020, 26 November 2020, 06 December 2020, 11 December 2020, 19 December 2020, 30 December 2020, 29 January 2021, 03 February 2021, 04 February 2021, 05 February 2021, 08 February 2021, 11 February 2021, 16 February 2021, 17 February 2021, 18 February 2021, 19 February 2021, 21 February 2021, 24 February 2021, 26 February 2021, 27 February 2021, 14 March 2021, 15 March 2021, 23 March 2021, 28 March 2021 and 30 March 2021 further indicates that save for the Chairperson of the NAC Council, members who received a benefit from the PESP did not participate in any proceedings related thereto.

Conclusion

- 6.2.16 From the strength of the evidence gathered during the investigation, the Public Protector concludes that members of the NAC Council or companies linked to them did not unduly benefit from PESP funds in contravention of section 4(10) of the NAC Act or any other provision of the NAC Act or the NAC Regulations.

6.3 Whether companies that do not work in the arts or were not entitled to grants, benefited from funds from the PESP by the NAC, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration in terms of section 6(5)(a) of the Public Protector Act

Common cause

- 6.3.1 The PESP programme aimed to assist in job retention and to fund individuals, organisations and projects that would create the necessary infrastructure and thereby enable work opportunities for artists, creatives, heritage and cultural workers across the country.

Issue in dispute

6.3.2 The issue for determination by the Public Protector is whether any PESP funds were awarded to companies that do not work in the arts industry or were not entitled to receive such grants.

Complainants' version

6.3.3 The Complainants contended that several companies that do not work in the arts industry received benefits from the PESP. It was also alleged that several companies that were not entitled to benefits, were paid by the NAC. Companies alleged not to be in the arts industry, but which benefited from the PESP were stated as follows:

6.3.3.1 FNF Pty Ltd;

6.3.3.2 Talingwane Solutions;

6.3.3.3 Mbhofholowo General Trading;

6.3.3.4 Eagles and Butterflies Corporation;

6.3.3.5 State Mineral Trader; and

6.3.3.6 House of Indiza Tea.

6.3.4 The Complainants further provided the Investigation Team with a following list of beneficiaries that allegedly benefited unduly from the PESP:

6.3.4.1 Robben Island Museum;

6.3.4.2 Multi Minds Investments holding (Pty) Ltd;

6.3.4.3 S Foundation;

6.3.4.4 Indigenous Foods SA (IndZA);

6.3.4.5 Malengs Holdings;

6.3.4.6 Damilos MP (Pty) Ltd;

6.3.4.7 Wisdom Mobile Marketing Services;

6.3.4.8 Londa Designs and Enterprise;

6.3.4.9 Lino Communications and Management; and

6.3.4.10 BuhleBuyeza Support group.

Version of the NAC

6.3.5 A response to the allegations was received from Ms Katz on 08 October 2021, indicating that:

6.3.5.1 The criteria for eligibility for funding from the PESP was set out in a Memorandum from the CEO of the NAC to the DSAC Technical Task Team on 26 October 2020;

6.3.5.2 All applications which were submitted were required to include a background and history of the relevant organisation, as well as the organization’s objectives, which outline the nature of work and/or the service that the organisation provides. This information was considered during the review process;

6.3.5.3 Ms Katz further furnished the Public Protector with a list of various organisations that were alleged by the Complainants not to be in the arts industry but benefited from the PESP. In her list Ms Katz indicated the relevant background and history of such organisations as well as the nature of the relevant projects as per table below:

COMPANY	BACKGROUND/HISTORY/OBJECTIVES
FNF Pty Ltd	We are unable to locate a beneficiary with this company name.
Talingwane Solutions	<p><i>Since our inception in 2005, we have been a leader in events management in Gauteng. We have managed thousands of successful business network events, conferences, corporate breakaways, product launches, gala dinners and trade shows. Our team comprises highly skilled professionals with extensive backgrounds in all phases of corporate event management.</i></p> <p><i>Talingwane Solutions was founded in 2005 as a small live entertainment supplier and has since grown into a one-stop event solution. Initially trained as jazz musician, Humbulani (owner) soon realised his passion for event management. Under his leadership as managing director, Talingwane Solutions today employs an extensive number of part-time staff members, as well as consultants and partners. We are continually striving for excellence, growth and perfection."</i></p>

COMPANY	BACKGROUND/HISTORY/OBJECTIVES
<p>Mbhofhlowo General Trading</p>	<p><i>“Mbhofhlowo is a company owned by a young women who is dedicated in creating Visual Art opportunities and markets for the Limpopo Visual Artists. The company noted that many artists have their Visual Artworks but they lack market to sell and exhibit. The company then started the exhibition platforms that take place in the mall and also online. The company other aim is to create a long term employment for the Limpopo Visual Artists. We aim to be the biggest Visual Arts Market in Limpopo. The company saw an opportunity during lockdown to create online visual arts market for the Limpopo artists which attracted many viewers and assist the Visual Artists who Participated to sell their Artwork nationally.”</i></p> <p><i>The Limpopo Visual Arts Online and Physical exhibition will be expected to be hosted through social media platform and in Mall with those featured poets who will perform in between.</i></p> <ul style="list-style-type: none"> • <i>The Online and physical Exhibition will take place for three months starting in January 2020.</i> • <i>Limpopo Visual Arts Online and physical Exhibition work of more than 30 visual artists per online session to accommodate more artworks.”</i>
<p>Eagles and Butterflies Corporation</p>	<p><i>“We have been working in the sector for 1 good 16 years and 6 years within the Eagles and Butterflies Corporation Our organisation has delivered various arts projects as follows:</i></p> <ul style="list-style-type: none"> • <i>2004 - Unisa little Theatre, Pretoria, Gauteng</i> • <i>2009 - Unisa Thutong, Pretoria, Sunnyside, Gauteng</i> • <i>2010 - Voortrekker, Military base, Pretoria, Gauteng</i> • <i>2012 - Unisa ZK Matthews main Hall, Pretoria, Gauteng</i> • <i>2012 - The Blue Bull, Sunnyside, Canon Worship Centre- Gauteng</i> • <i>2013 - Canon Worship Centre, Sunnyside, Gauteng</i> • <i>2014 - Higher Grace Auditorium, PTA Central, Gauteng</i> • <i>2014 - 27th December 2014 – Makhado, Limpopo – Department of Arts and Culture</i> • <i>2016 - December Gospel Music Festivals 2016 hosted 5 events in various Location</i> <p><i>* 2017 - Market research for South African Musical products”</i></p>
<p>State Mineral Trader</p>	<p><i>“The business model is Jewelry Virtual/Retail Outlet</i></p> <ul style="list-style-type: none"> • <i>We are manufacturer and supplier of beadworks & pearls and traditional jewelry pieces that defines and interpret different African cultures.</i> • <i>Beadworks and traditional jewel pieces are designed and manufactured in such a way that, they infused with minerals of high value such as pure gold and real gem stones & diamonds.</i> • <i>At Mineral Trader Group, we need to enlighten African people that gold and diamonds are from here in Africa for Africans. History has written that our kings and queens had such special high value gold jewelry art items like in Mapumungwe in Limpopo which are highly publicized.</i> • <i>We strive to educate our people that African beaded jewelry is not just a sentimental piece of jewelry but is an investment as it is a piece of asset that increase in value every month and can be used as surety to loan against anything of value.”</i>

COMPANY	BACKGROUND/HISTORY/OBJECTIVES
House of Indiza Tea	<p><i>“Organisation Objectives: To preserve indigenous knowledge. Our knowledge, Our Heritage. To promote use of indigenous herbal medicines To create economical farming projects in rural communities. To commercialize indigenous knowledge To make available alternative ancient medicinal plants”</i></p> <p><i>This project is aimed at preserving indigenous knowledge regarding food and its preparation from those who are still practicing these methods. Researchers and historians will contribute by elaborating on the importance of indigenous knowledge preservation.”</i></p>

6.3.6 On 18 October 2021, Ms Katz sent further correspondence to the Public Protector providing evidence that the organisations/entities did not unduly benefit from the PESP and this is presented below:

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
1.	Robben Island Museum	Not applicable - Stream 1 project -based on opportunities- not project	<p>Robben Island Museum (RIM) humbly applies for point 4 (assistance) and point 5 (sustainability) of the NAC stimulus programme to avoid the possibility of job cuts or retrenchments. RIM has not been able to operate for nearly six (6) months of the 2020 year and even though limited operations have returned, visitor numbers are low as the majority of RIM tourists were foreigners (over 70%). This has placed extreme pressures on the organisation. Thus RIM requires financial assistance in the form a wage subsidy to retain employees already on RIM's payroll or on contract.</p> <p>Robben island Museum is responsible for managing, maintaining, developing and marketing Robben as a National Heritage and World Heritage Site in terms of the National Heritage Resources Act of 1999 and the National World Heritage Act of 1999. The Museum was established by the Department of Arts and Culture in 1997 and is governed by a Council appointed by the Minister of the Department of Arts and Culture with duties prescribed in the Cultural Institutions Act.</p> <p>Robben Island Museum was declared a Marine Protected Area (MPA) in 2019 in terms of National Environmental Management: Protected Areas Act of 2003. RIM employs+- 270 persons of which 70% is African, 25% is Coloured, 4% is White and 1% is Indian. There is also one (1) person employed that is disabled. The male-female split is currently 58%:42% ratio</p>
2.	Multi Minds Investments Holding	Africa Converse in Songs Chapter 1	<p>Recording a 10 song album by integrating new talent and recording artists. Defining arts and culture industries value chain by utilizing township and rural designers for artists wardrobe and deco pieces from rural women and township businesses.</p> <p>Music will influence videography while deco will showcase the role of rural crafts as the tool to influence production companies to consider rural and township business for procurement.</p> <p>Project is structure in this manner: Three lead vocalists (new entrants) with collaboration with recording artists like Ntokozo Mbambo for a deliberate empowerment and support.</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			<p>Merging of integrating videography (visuals) with music i.e. original music composition for a specific scene or film.</p> <p>Africa converse in songs chapter 1 is also a project that works hand in hand with Africa Converse -The document. Every Wednesday, Friday and Sundays there are rehearsals taking place in our premises, rehearsals consisting of a children's choir also:</p> <p>1 Artistic Merit</p> <p>Africa Converse addresses two artistic disciplines, i.e. Music and Film while it has aligned both disciplines with creative entrepreneurial flair.</p> <p>2 Creativity</p> <p>Creative Writing, Music Production and Film Making (Documentary)</p> <p>3 Innovation</p> <p>The initiative is linked with the ICT Sector (Telecommunication Industry to be precisely) the aim is to utilized the 4IR as part and parcel of distributing content and aligning South African artists with innovative ways of content production and integrating work with other African artists.</p> <p>4 Economic Spin Off</p> <p>Africa Converse in Songs Chapter 1 will contribute to the GDP as the album has been aligned with local artists such as Ntokozo Mbambo, Nqubeko Mbatha, Bheki Nqoko, Ghanaian poet Nana Asaase, DRC vocals Wyller Mirindi. While Africa Converse. The Documentary had been developed to link Music, Film, role of tourism, politics and entrepreneurship.</p> <p>5 Ambition</p> <p>To create direct employment with proper sustainability for</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			<p>155 unemployed graduates within the arts and culture industries.</p> <p>6 New Technologies-</p> <p>Through our strategic alignment with Vodacom South Africa we aim to utilize the power of technology and telecommunication to advance the distribution of both film and music content, while we intend to approach our strategic partner Hirsch's and Samsung to support artists with efficient devices and reliable network, considering our initiative focuses in rural areas and townships.</p> <p>7 Market Access</p> <p>Through our strategic partnerships with retailers such as Boxer Superstores and Spar Group creative ways to reach all forms and types of markets, from the young to the senior citizenship, our products could be easily accessible through the shelves of our strategic partners, as part of promotional packages even for their products. e.g. Buy a TV at Hirsch's and get a DVD and CD of Africa Converse The Documentary and Africa Converse in Songs. While we also use the new ways of music distribution such You Tube, and other digital stores.</p> <p>8 Sustainability</p> <p>Africa Converse is an annual event that is structured as The Forum, Content Production for a Documentary and Music that is used as entertainment during the forum and used as sound effect to the documentary. This fund would assist the initiative in making sure a seed is planted to the right beneficiaries in rural areas and townships.</p> <p>9 Legacy</p> <p>The legacy for this initiative consists of empowering the unemployed youth, unemployed graduates and women entrepreneurs, by utilizing creative arts and entrepreneurship to create employment, improve their livelihood, socio- economic status, skills development for</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			both creativity and business acumen.
3.	Foundation	Lonaka Lo Kae Festival (Embracing who we are)	<p>Lonaka Lo Kae Theatre Festival is an event that aims to embrace and revive the existing works of indigenous theatre productions from across the North-West Province. Through awards to celebrate and reward excellence to these production's right of passage into mainstream theatrical shows that focuses on restoring the cultural identity of our people and promoting cultural diversity through theatre.</p> <p>The Festival aims to provide a platform for cultural exchange amongst artists, avenues for theatre makers to showcase their indigenous concepts with pride. The event desires to revive the indigenous instruments such as koriana, marimba, lesiba, jembe drum, mbira etc.</p> <p>The festival is divided into two (2) parts which are the theatrical performances and the awards ceremony. The primary objective of the awards is to honor, commemorate and recognize excellent and prominent theatre makers who will be participating in the festival and to promote participation and artistic excellence towards the development of theatre practitioners and indigenous content.</p> <p>The festival comprises of vibrant and captivating program that consists of theatrical performances, arts dialogues, artistic skills and development workshops. The intention of this unique event is to revive the spirit of indigenous theatre and improving the standard of theatre in our province by bringing four (4) mainstream shows that have been recognized nationally with their indigenous content to uplift and elevates the status of the theatre in the North-West. Furthermore, the six (6) productions from the North-West will be assigned mentors that have been recognized nationally, that have won awards and have been promoting indigenous content through their projects to assist them reach the level of national mainstream theatre.</p> <p>The festival is themed EMBRACING WHO WE ARE, the aim being to restore pride in who we are as Africans, create stories narrated by us, defined by us and that celebrates us.</p> <p>The festival intents to invite four (4) national artistic/festival</p>

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			<p>directors to be adjudicators, strategically as a showcase to them for these productions to have exit point as well as the sustainability. The mission is for them to scout any production in the festival and produce them in their festivals or theatre institutions, and a networking platform for the artists to peach their concepts.</p> <p>Goals and ambitions of the festival: -</p> <p>To ensure economic spin offs and benefits for relative industries such as: retail supermarkets, fast food outlets Service type of business, caterers, car guards and marshals and security companies.</p> <p>To deliver a distinctive festival, unique in a landscape of South-African theatre festival.</p> <p>To provide opportunities for creative exchange between artists, stakeholders and audience. To contribute towards reduction of unemployment amongst theatre practitioners.</p> <p>To contribute to the economic development and job creation for the benefit of Ngaka Modiri Molema (our district) as a hub for entertainment and tourism destination. To attract arts and cultural partnerships, local and foreign investors in our province. To create awareness and opportunities for local tourism. Mentorship of local artists in the form of workshops, workplace training as part of skills transfer. All these will be part of every element of the project.</p> <p>Each and every guest production that will be participating in the project will be expected to have on board a minimum of 3 people under their own mentorship program. To profile, document and preserve North-West art/theatre for generation to come (legacy)</p> <p>The inclusion of Videography, Photography, Social Media and Virtual element of the festival, is the inclusion of new technologies aimed at achieving the three main aspects, which are:</p> <ol style="list-style-type: none"> 1. Audience Development that also talks to indirect economic spin offs for the Project, the organization,

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			<p>relative industries and the Province at large.</p> <p>2. Compliance in terms of COVID 19 protocols. Direct economic spin offs for the Project as well as the Organization.</p>
4.	Indigenous Foods SA (Indi2A foods)	Not applicable Stream 1 project - based on opportunities - not project	<p>-Objectives of the organisation are:</p> <p>To preserve indigenous knowledge. Our knowledge, Our Heritage.</p> <p>To promote use of indigenous herbal medicines</p> <p>To create economical farming projects in rural communities.</p> <p>To commercialize indigenous knowledge</p> <p>To make available alternative ancient medicinal plants.</p> <p>We have seen a shift to digitise all our work and platforms. We will therefore like to reskill our work force on digital marketing, digital logistics, stock management to afford us an integration in our operations. Also to equip our rural harvesters with basic knowledge of food handling, hygienic, good manufacturing practices and intro on hazard analysis critical control points. We have more than 50 harvesters in 4 provinces. They harvest the following plants for us to make tea.</p>
5.	Malengs Holdings	2020 Hybrid Mpumalanga Fashion & Craft Show	<p>ARTISTIC MERIT</p> <p>A thrilling, contemporary, state of the art fashion presentation including a panel discussion, workshop, exhibition and fashion show celebrating Mpumalanga designers and crafters will take place in Mbombela 10 Mpumalanga Designers including 6 Top SA Designers will show their latest collections to the media, celebrities, VIP's, and Buyers.</p> <p>This will be preceded by an exhibition, exhibiting the best of Mpumalanga Craft works which will include- jewelry Design, Millinery, Shoe and Handbag Design as well as Craft and Textiles. On the first day we will have a panel discussion with 5 top experts (such as Nicola Cooper} in the fashion industry to discuss topics such as:</p> <p>Trends Identity</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			<p>Make-up & Hair Skills & Education in fashion Market access, sustainability and funding. The purpose of the panel discussion is to equip designers with crucial expert information for their businesses.</p> <p>CREATIVITY CRAFTER</p> <p>For the success of the collaboration between the crafters and the designers, teamwork will be important. The paired designer and crafter will have meetings through phone calls, WhatsApp & video calling discussing the range, theme and accessories for their collection. There is also an income benefit to be achieved by bringing the designer and crafter together. After the show, the ranges will continue to be marketed and sold through the participating designers' retail networkers. There is also a huge PR advantage the crafter in that there will be a good brand association since most designers command a huge brand awareness.</p> <p>DESIGNERS</p> <p>For the success of the show, we will provide the necessary time frame for a sustainable product development cycle to be established and also give the diverse role players sufficient leeway to iron out logistical and other practical issues to ensure successful collaboration. A proper detailed brief will be given to each designer on how many garments to create together with the crafters. Each designer and crafter will be given a budget to aid them in producing the range.</p> <p>MODELS</p> <p>The idea is to take some of the fun of those runways and putting them on the internet for everyone to see and to market the products of the designers & crafters. Models together with the stylist and her team will work in overdrive to make the HYBRID show as thrilling as the live shows. A choreographer will give the girls tricks for how to walk. Zoom calls will be conducted with the models to workout the looks. Casting and music for the show will also be sent for rehearsals.</p>

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			<p>PANEL DISCUSSION</p> <p>The panel discussion will also be hybrid. Only the designers and crafters participating will be invited for a sit down but for the rest of the interested, a live stream will be conducted on social media platforms.</p> <p>INNOVATION</p> <p>The show and panel discussion will be hybrid combination of both a digital and live fashion experience that will allow us to navigate the complexities of trading and doing business effectively while simultaneously being highly mindful of the safety aspects associated with the pandemic.</p> <p>ECONOMIC SPIN OFF</p> <p>The Mpumalanga Craft and Design sector will benefit a lot in that they will be getting financial support in this terrible time of Covid-19. Every year, the show supports or creates over 100 direct jobs/ beneficiaries including local suppliers. Everyone will get paid e.g. designers, crafters, models, curator, production team, ushers, panelists etc.</p> <p>AMBITION</p> <p>We are ambitious in growing the show this year to a bigger and better show.</p> <p>NEW TECHNOLOGIES & AUDIENCE DEVELOPMENT</p> <p>Social media has become a part of our daily lives. And this provides opportunities for communication in a targeted way. For this particular event we intend to build a coordinated plan crafted with the intent of diversifying our social media presence particularly on Facebook, twitter and YouTube. We will demonstrate the ability to generate awareness by engaging an audience through these social media channels in conjunction with other elements. This means, we will create social media platforms specific to the event. Our plan is to engage the social media audience by creating awareness and hype for the local</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			<p>people to join the live show. We will post interactive content as often as possible making use of Facebook's geotagging service, which allows us to choose a specific demographic and a specific region on posts to ensure the maximum reach. And of course most people are stimulated by visuals, hence our graphic design and animations segment will ensure that posts made have an eye catching factor, yet remaining true to the cause. The following platforms will be used for streaming the show live: Facebook & YouTube</p> <p>MARKET ACCESS</p> <p>Last year we heard more than 400 live guests for the show. Because of Covid-19 the show will be an invite only where we will be allowing our crafters and designers to show their latest collections to the media, influencers, celebrities, VIP's, corporates and Buyers. That will ensure a quality market access with relevant guest who can afford and be willing to spend money on our creatives. We will also be using our guest database to invite some of our loyal fashion lovers to the event.</p> <p>SUSTAINABILITY</p> <p>There is also an income benefit to be achieved by bringing the designer and crafter together. After the show, the ranges will continue to be marketed and sold through the participating designers' retail networkers. We will also feature the works of crafters on our website, www.handicrafts.co.za where they will continue to sell their products.</p> <p>LEGACY</p> <p>Our show is an annual show and has been running for the past 4 years. If we get the funding, it will allow us to continue with our legacy as this is the only big and only show in Mpumalanga that focuses on crafters and designers.</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
6.	Damilos MP	Abadala Cultural Living Heritage Events	<p>Damilos MP (PTY) Ltd would like to propose a project called "Abadala Cultural Living Heritage Events", to be rolled out in OR Tambo District in the province of the Eastern Cape. Living heritage plays an important role in promoting cultural diversity, social cohesion, and economic development. Traditional and cultural performances, traditional craftsmanship, skills and knowledge, and indigenous knowledge systems, all form part of our living heritage.</p> <p>Three prominent traditional music and cultural dance groups will form part of the cast that will be delivering a variety of indigenous cultural and traditional performances, displaying our living heritage. The cast will consist of the three traditional youth groups with a crew of traditional and cultural coaches (who will mostly be the elderly), administrators and management personnel. All these artists, including all related art practitioners will be employed by the project and given a salary for a period of three months. The theme and the look and feel of the entire event will be completely traditional, where all performers and the event's live audience will be wearing their traditional Xhosa outfits.</p> <p>The event itself will celebrate the existence of the local people behind the traditional craftsmanship, people who are instrumental in the development of traditional music instruments, traditional household utensils, traditional clothing wear, decorative art, and traditional jewelry. Each of these people, during the event intervals, will be given an opportunity to explain how they developed their craft, its use and where it can be purchased. This will ensure that the skill behind this craftsmanship does not die or disappear, as this was one of the concerns of the 2003 UNESCO Convention.</p> <p>The main concern was the skills and knowledge involved in craftsmanship rather than the craft products themselves. This will be another way of preserving, conserving and marketing or promoting our living heritage. This will also accommodate cultural practitioners who will be covering our oral history and social cultural practices, highlighting the fact that in every community there are living human treasures who possess a high degree of knowledge, skills and history, pertaining to different aspects of our diverse living heritage.</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			<p>Our primary audience will be the elderly people who will be converging to three different event venues on different dates, in Tsolo, Umtata and Qumbu, all within the district of O.R. Tambo. Our secondary audience will be the youth that we will be able to reach through social media platforms. We will be able to broadcast all three of our events on Facebook Live. This intervention will assist on making sure that the youth/young are able to participate and learn different aspects of our living heritage, preserving it for generations to come, also living a heritage legacy. We are mindful of the fact that our live audience will be elderly who are the most vulnerable towards the Corona virus.</p> <p>This is one of the reasons why we will even put more necessary resources to ensure adherence to the COVID-19 regulations. We will do this in conjunction with the local department of health practitioners on site in all our events. We will make sure that social distancing is maintained, and that everyone attending these events is wearing a mask.</p> <p>Hand sanitization and temperature monitoring will be adhered to as per COVID-19 government regulations</p>
7.	Wisdom Mobile Marketing Services	Covid-19 Awareness & Streaming Entertainment	<p>In light of the unfortunate situation, we and ourselves in as a country, not only are we under lockdown, but we've had to adopt being innovative in finding ways to survive financially in the entertainment space while we observe the restrictions imposed by Our Government.</p> <p>The rapid growth of live streaming is driving a large increase in Internet traffic and our aim is to Educate, communicate and create awareness around Covid19 using different mechanisms to reach as many of our communities as possible. Following the statement that was released by Minister Nathi Mthethwa on the 29th of March 2020 regarding his departmental initiative to come up with various strategic project to address the sport, arts and culture sectors.</p> <p>We have decided to put together this proposal as part of how we believe we can participate, and in return help the department achieve their aim of ensuring that the livelihoods of artists and sportmen are not affected much by this crisis. This proposal entails a 5-pillar approach embedded on the notion of</p>

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			<p>education, awareness and social empowerment.</p> <p>We have recently brought on board the following big brands under our company: Dr Winnie Mashaba, Mthandeni IgcoKama Elisha Manqele, Mr Sello Maake kaNcube, Ihashi Elimhlophe, a Published and established Author, Motivational Speaker and a Ufe Coach, her name is Palesa Brown and she published a book titled: Saved by Faith. We are currently working on her audible book as well.</p> <p>TSHEGOFATSO: Gospel music INGA: Afro Pop musician who also plays 3 instruments TYLO: Our in-house producer and a DJ who specializes with Afro House</p> <p>We wish to address the current problem by customizing our offering to speak directly to the below issues:</p> <p>EDUCATION: We believe that people need to be more educated and made aware of this disease using different mediums of communication. It's important that people get the messaging in Vernacular so that it's simplified for their consumption regardless of their level of education or lack of for that matter. We believe that the Maskandi and Gospel genres are one of the most popular and liked by people of different age and different market segments. These are generally well listened genres by families alike. During the lockdown period we have to customize our edutainment and entertainment to appeal to a family set up as people are having to learn to enjoy each other's company and our content will be very appealing to this structure.</p> <p>We must not be too technical in our thinking during this period as such thinking also likely underestimates the popularity of short-form edutainment and entertainment, even if it's consumed from your couch. Phones aren't suddenly going to be going away during coronavirus quarantines (we must not forget to clean them on a regular basis for germs.) our solutions are extremely cost effective and packed full of interactive features that are included absolutely free: Sure, millions of us have seen social media messaging and news reports about the importance of hand washing and social distancing. But there are no doubt millions more who've missed these attempts at</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			<p>education or maybe haven't been convinced it's that big of a deal.</p> <p>Covid19 Educational Awareness By various artists:</p> <p>INFORMATION: The necessary information will be communicated primary through digital platforms, using different artists especially within the Maskandi and the gospel genres due to the current social distancing and lockdown.</p> <p>EMPLOYMENT:</p> <p>We will be creating indirect unemployment" for artists as they have currently lost their ability to generate income due to the current restriction and regulations announced by the President. The aim is to ensure that artist and everyone who is part of this even get royalties from this project as we plan on giving the content to Vodacom TV and Soweto TV as well.</p> <p>EMPOWERMENT: We will empower the community by ensuring that we use upcoming poets, motivational speakers and traditional dance group from various communities in KZN and Gauteng.</p>
8.	Londa Designs and Enterprise	Mafikeng Design Exhibition	<p>The project will exhibit a range of art works and household designs from various artists of the North West Province. The event will be preceded by workshops where young up and upcoming/established designers will discuss issues such as product development, creativity/innovation, product value add and market access. The theme of the exhibition will be "Right Product, Right Positioning in the Design Space".</p> <p>It is Proposed that the exhibition will be hosted on the 05 to 07 March 2021 in Mafikeng, Northwest Province.</p> <p>Mafikeng Design Exhibition will be spread over a period of 3 days comprising of workshops, exhibitions, fashion shows and various music showcases.</p> <p>The target is primarily for young designers and women within the design sector.</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			<p>An exhibition stand and space partitions will be erected for plus or minus 50 designers and artists.</p> <p>The project concept will have workshops that will target unemployed youth in the area that can be skilled in a skill they can use to make a living and also employ other youth.</p> <p>Design practitioners will be utilized to run the workshops and impart knowledge.</p> <p>The master class will accommodate young designers, within the context of the Theme Right Product, Right Positioning in the design Space•</p> <p>The programme and capacity building will also provide a storyline that will celebrate the narrative of the Batswana people of the Northwest Province. Inspiration for the products manufactured will take from the culture.</p> <p>Key learning will ensure that designers know which design spaces to operate in and ensure they place the right product in the relevant space.</p> <p>The Master Class will comprise various components as the following: Business plan writing Deciding on a niche market Range building Costing Sourcing fabric suitable for products Marketing Distribution Pricing of products Positioning Marketing and PR The scope of beneficiaries: The Master Class will comprise SO artists from the regions. The exhibition will have 40 exhibitors Also to identify disabled artists who will benefit from the program Meetings with regions to select participants Master Class runs for S days Post event support for designers Monitoring and evaluation of progress</p> <p>Project Implementation plan:</p> <p>Main Project Activity Period Place (Proposed venue) Outcomes</p> <p>Booking of venues 25 November 2020 Mafikeng Venue</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			<p>confirmed</p> <p>2 Booking Fashion designers 02 Dec 2020 Mafikeng Performing artists confirmed</p> <p>Booking of Craft exhibitors 04 January 2021 Mafikeng Exhibitors confirmed</p> <p>Appointment of service providers 01 February 2021 Mafikeng Service providers appointed</p> <p>Installation of the exhibition 01 March 2021 Mafikeng Installation of the exhibition finalized</p> <p>Exhibition unveiled 02 March 2021 Mafikeng Exhibition opened to the public</p> <p>Hosting of storytelling 02 March 2021, Mafikeng Story telling hosted</p> <p>Setting up for the main event 03 March 2021 Mafikeng Exhibition</p> <p>Dry run 04 March 2021 Mafikeng Dry run completed</p> <p>The main event of Mafikeng Design exhibition OS -07 March 2021 Mafikeng Mafikeng Design Exhibition hosted</p> <p>Project close down 08 March 2021, Mafikeng Project close down</p> <p>COVID-19 Mitigation plans:</p> <p>Londa designs will ensure that COVID-19 protocols are adhered to and they are not limited to:</p> <ol style="list-style-type: none"> 1. Hiring of safety officers 2. Observation of social distancing 3. Gathering will be specified limited number as specified in the COVID-19 guidelines 4. Sanitizing stations will be installed at multiple stations 5. Temperature screening and scanning to be done at all entry points

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			6. Ensure that face masks/ shields are worn at all times in the event venue
9.	Linmo Communications and Management	South African Afro Music Awards	<p>Linmo Communications and Management has promoted and hosted a number of projects that include joyous celebration, in His Presence, Night of the Legends, Homecoming, and Stylish Connections. These events have been hosted in different areas, namely: Cape Town (Good Hope Centre), Durban (City Hall), Port Elizabeth (Nangoza Jebe), Bloemfontein (Pacofs), East London (Orent Theatre), and Johannesburg (Birchwood Hotel). Some artists that we have promoted include Caiphus Semanya, Letta Mbulu, the late Hugh Masikela, the late Ray Phiri and Stimela, just to name a few. We have hosted the South African Music Awards where a number of artists were honored including Yvonne Chakachaka, Caiphus Semanya and Letta Mbulu, the late Robbie Malinga and the list goes on.</p> <p>The South African Afro Music Awards: a celebration of Afro music and the recognition of excellence in the genre. This will see a number of musicians gathering in the mother city.</p> <p>The work we do requires that responsibilities are shared and delegated to various parties.</p> <p>We have employed people in the production and technical sector, logistics, communication and marketing. We work with about 50 people of which 90% are black/African. 60% of the team will be female. Non are disabled</p>
10.	BuhleBuyeza Support Group	BuhleBuyeza Support Group	<p>1. Artistic Merit: All product produced by the NPO have both artistic and commercial merit. The products are highly sought-after by the international market; as well as the domestic market for decorating their households and to use them for displays in their shops or places of entertainment.</p> <p>2. This NPO believes that creativity is at the center of its success. The people are taught the art of creating something of value from nothing. Buhlebuyeza Support Group believes that teaching people the skill of creating art and crafts has</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			<p>great potential to unlock entrepreneurial opportunities for the women and youth of Free State.</p> <p>3. The approach has always been that of treating arts and crafts like business. It is common logic that innovation in business can drive long term opportunities. Buhlebuyeza Support Group has partnered with Environmental Friendly Groups in the Free State and embarked on the programme of using plastic bottles and recycled materials to create arts. This is one way of embracing innovation in the sector.</p> <p>4. The economic spin off derived from these programmes is that the people that are taught arts and crafts will in turn use arts and crafts to make a living in their households. They also in turn teach other people the same skill. The local municipality has embraced these programmes as a way of poverty alleviation.</p> <p>5. It is the Ambition of this NPO to spread its reach to the entire province of Free State by means of an Arts and Crafts College. The NPO plans to form formidable partnerships with the Basotho Village in QwaQwa in order to find leverage and gain competitive advantages over other producers. Partnering with this institution will give this NPO exposure and better reach to the domestics and international tourist market.</p> <p>6. The New Technologies involve use of computer based graphic designs to create new shapes and models of arts and crafts. In the past the crafters have used bare-hands to cut and trim. The modern way of cutting fabric and also cutting cow-hides is by use of specialized equipment.</p> <p>7. Audience Development will come as a result of aggressive marketing campaigns using exhibitions, shows, displays in the most strategic centers of the province. The NPO has also relied on the guidance provided by the local municipality and other key stakeholders. The NPO hopes to</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
		<p>Not applicable - Stream 1 project - based on opportunities - not project</p>	<p>advertise on radio and on newspaper.</p> <p>8. Market Access will be achieved by partnering with marketing agencies in the province located in Parys and Clarens. The Basotho Village shall also provide market access effectively.</p> <p>9. Sustainability shall be achieved by selling the products to the open market or tourists and curio shops in the province and also outside the province.</p> <p>10. Buhlebuyeza Support Group aims to leave the most memorable legacy in the province of Free State. The past events and programmes organized by this NPO have had an unforgettable impact on the development of the informal economy in the area. That is the legacy this NPO aims to create and impress in the minds and hearts of the people of Free State</p> <p>Creating arts from Beadworks</p> <p>The second activity will be crafting traditional attire from cow-hides making items that are worn by men when they perform traditional African dances. The project will also make sandals for men out of cow-hides for the purpose of selling to the general public and the tourists. The jobs will entail creation of arts and crafts for purposes of selling to the tourism market. Artists will also be required to sell own arts and crafts or perform own art in identified events for revenue.</p> <p>By so doing artist will gain platforms for nurturing own skills and thereby pass on the skill to local schools and colleges.</p> <p>Innovation will be encouraged and promoted by introducing the graphic design element into the works of arts. TVET College students will be recruited to provide graphic design services and to lead the artists in designing basic art concepts on the computer before they really produce.</p>

	COMPANY	PROJECT NAME	PROJECT/APPLICATION INFORMATION
			<p>The sector will benefit from the project discovering new talent and preservation of heritage; as well as arts and crafts. The project will sustain itself through sales and marketing of artwork and crafts</p> <p>BuhleBuyeza Support Group has been involved in arts and crafts for more than 12 years. The NPO brings with vast knowledge of arts that shall benefit rural communities. It also brings with it project management skills and community development skills. Staff will be employed to oversee creation of crafts and also working on community development programmes such as teaching un-employed youth and women to create own arts and crafts</p>

6.3.7 On 10 August 2023, Ms Diphofa sent further correspondence to the Public Protector and indicated that the NAC was mandated to support practitioners active in the heritage sector and considered heritage-based projects as well. Ms Diphofa stated that applications were reviewed by an advisory panel for merit and recommended to the NAC Council for approval. She further indicated that the Risk Compliance Officer of the NAC conducted verification of entities against tax compliance through the South African Revenue Services (SARS). Ms Diphofa clarified that if the NAC found that an entity was non-compliant with SARS, payment was withheld, until the entity became compliant.

Applicable legal framework

6.3.8 The PESP document dated 26 October 2020, stipulates amongst other things that an organization is a group of people intentionally organized to accomplish an overall common goal. Applications from formally registered organisations / groups and institutions were acceptable.

6.3.9 The examples of types of projects that would qualify were provided in paragraph 5.2 the PESP as follows:

- (a) Market access opportunities, exhibitions, performances, shows, events, festivals that are Covid-19 restrictions compliant;
- (b) Community outreach and arts activation projects;
- (c) Technical arts and culture training at all levels;
- (d) Creation of new works/products across all disciplines including writing, design, fashion, photography, visual arts, composition, theater, music and entertainment etc;
- (e) Heritage Projects that include women, youth, education, indigenous knowledge, research etc; and
- (f) Other activities that can demonstrate the creation of work opportunities and economic stimulus.

6.3.10 Paragraph 5.4 of the PESP Plan stipulated the categories of projects not funded through the PESP namely:

- (a) Architecture;
- (b) Competitions;
- (c) General conferences;
- (d) Interior design;
- (e) Music arrangements of other persons' work without permission;
- (f) Vanity press; and
- (g) Applications from individuals working for government departments and entities.

Analysis

6.3.11 In terms of the evidence obtained by the Public Protector, in particular the background information and history relating to each organisation's profile, it is evident that the organisations that received funding from the NAC were indeed involved in projects that are related to the arts industry and were in line with the requirements set out in the PESP Plan.

- 6.3.12 Further evidence before the Public Protector indicated that entities were verified internally by the NAC's Compliance and Risk Officer, and thereafter a tax compliance verification with SARS was conducted before payment was effected.

Conclusion

- 6.3.13 From the strength of the evidence before the Public Protector, the organisations/entities that the Complainants alleged not to be in the arts industry, but benefited from the PESP, it is clear from their historical background, and internal verification conducted by the NAC's Compliance and Risk Officer that they do form part of the arts industry.
- 6.3.14 Further, evidence before the Public Protector indicates that the organisations/entities that the Complainants alleged to have unduly benefited from the PESP, fall within the categories listed in paragraph 5.2 of the PESP Plan. They were organisations/entities that were eligible for receiving funds from the PESP according to paragraph 5.4 of the PESP Plan.
- 6.3.15 Based on the information at the disposal of the Public Protector, it is concluded that the allegation that the companies specified by the Complainants were not entitled to receive PESP funds as they were not part of the arts industry is not supported by evidence.
- 6.4 Whether the NAC violated the constitutional right to privacy of some artists by publishing their personal details on the internet, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration in terms of section 6(5)(a) of the Public Protector Act**

Common cause

- 6.4.1 The NAC invited Applicants who wanted to apply for benefits from the PESP, to register and complete an online application form using the link: <https://nac.praxigms.co.za>.
- 6.4.2 The link directed applicants to a page called the “*Grant Management System (GMS)*”. Applicants registered on the page and applied for PESP benefits. They could also track progress of their applications on the page.

Issue in dispute

- 6.4.3 The issue for Public Protector’s determination is whether the NAC unlawfully published personal details of the artists on the internet.

The Complainants’ version

- 6.4.4 The Complainants contended that the NAC exposed their personal details (submitted in their applications) on the Google Internet search platform, making their details public and available by simply searching for the name of an individual. This violated their constitutional right to privacy as contemplated in section 14 of the Constitution.

The NAC’s response

- 6.4.5 Ms Diphofa responded to the Public Protector on 25 June 2021, and refuted this allegation stating the following:
- 6.4.5.1 The GMS system is only accessible with the use of a unique username and password. Every application that was received was automatically allocated a

unique application reference number. No personal information pertaining to any applicant was published or would be accessible by accessing the NAC website; and

6.4.5.2 The attorney representing the Complainants Mr Bloem from Mkhabela Huntley Attorneys Inc was requested on 26 October 2021 to submit additional information or further particulars to assist in investigating this allegation, but he was unable to do so and replied through an e-mail to the Public Protector Investigation Team on 8 November 2021. The Complainants did not persist with this complaint when the response of the NAC was made available to them and the matter was accordingly not taken further.

6.4.6 A random search on 26 October 2021 conducted on Google during the investigation, using the name of an individual Complainants did not yield the alleged results.

Applicable legal framework

6.4.7 Section 14 of the Constitution provides that everyone has the right to privacy.

6.4.8 Section 7(2) of the Constitution states that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

6.4.9 Protection of Personal Information (POPIA) Act, 2013 seeks to promote the protection of personal information processed by public and private bodies; to introduce certain conditions so as to establish minimum requirements for the processing of personal information; to provide for the establishment of an Information Regulator to exercise certain powers and to perform certain duties and functions in terms of this Act and the Promotion of Access to Information Act, 2000; to provide for the issuing of codes of conduct; to provide for the rights of

persons regarding unsolicited electronic communications and automated decision making and to regulate the flow of personal information across the borders of the Republic.¹⁵

- 6.4.10 Section 2(a) of the POPIA indicates that its purpose is to give effect to the constitutional right to privacy by safeguarding personal information when processed by a responsible party (public or private body), subject to justifiable limitations.

Analysis

- 6.4.11 According to the information presented to the Public Protector, there is neither evidence which supports the allegation that NAC breached the secrecy provisions of the either the Constitution or POPIA, nor any evidence furnished to suggest that the NAC exposed the personal information of applicants to be accessed by the public on Google or the internet.
- 6.4.12 Further evidence before the Public Protector indicates that the NAC's website only published the names of individuals and entities that received payment from the PESP, without disclosing their personal details.

Conclusion

- 6.4.13 From the strength of the evidence gathered during the investigation the Public Protector concludes that the NAC did not expose personal information of the applicants in violation of the Constitution and POPIA.

¹⁵ The preamble of the POPIA.

7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard that the NAC should have complied with and the impact thereof on good administration, the Public Protector makes the following findings against the NAC:

7.1 **Whether there were irregular processes and/or undue delay by the NAC in processing applications for the payment of PESP benefits, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration and undue delay in terms of section 6(5)(a) and (b) of the Public Protector Act**

7.1.1 The allegation that there were irregular processes and undue delay by the NAC in processing applications for the payment of PESP benefits is **substantiated**.

7.1.1.1 The Public Protector has noted and further acknowledges that this matter was ventilated in a court of law, was also the subject of an investigation by Mazars Forensic Services, was further audited by AGSA and that in all respects it was found that the processing of applications for the payment of PESP benefits by the NAC was unlawful.

7.1.1.2 Evidence at the disposal of the Public Protector reveals that the former and current members of the NAC Council were made aware of the irregularities and improprieties with the implementation of the programme as from December 2020. By early February 2021, the NAC obtained a legal opinion, which identified several irregularities and improprieties and concluded that the conduct of the NAC in relation to the PESP was unlawful, unreasonable and procedurally unfair.

- 7.1.1.3 It has been further revealed by evidence that there were two practical options to possibly address the shortcomings of the NAC's conduct that were proposed by the attorneys of the NAC, in terms of the legal opinion, failing which it was advised that the decisions of the NAC be taken on judicial review to have the grants already paid set aside for a just and equitable decision in respect of the consequences of the NAC's conduct.
- 7.1.1.4 However, the NAC did not follow this advice and did not approach the Court for appropriate relief but continued with the implementation of the amended criteria when processing applications for grants from the PESP. A number of the beneficiaries to the programme resisted and objected to the conduct of the NAC and those that approached the court were successful in their court application brought against the NAC.
- 7.1.1.5 Based on the above it is concluded that the conduct of the functionaries of the NAC was at variance with the standard expected of them in terms of section 195 (1)(a), (d) and (f) of the Constitution and section 50(1)(b) and (d) and section 51(1)(b)(ii) of the PFMA, as it was not in the best interest of the beneficiaries of the grants and did not display utmost care, fidelity and transparency on the part of the NAC and was not in the NAC's best interests. The conduct of the NAC's functionaries was also not in line with the commitment made in the MOA in respect of dealing with the implementation of the PESP effectively and essentially.
- 7.1.1.6 In the circumstances, the Public Protector finds that the conduct of the NAC and its functionaries amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration and undue delay in terms of section 6(5)(a) and (b) of the Public Protector Act.

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- 7.2 Whether certain members of the NAC or companies linked to members of the NAC unduly benefitted from the PESP, in contravention of section 4(10) of the NAC Act, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration in terms of section 6(5)(a) of the Public Protector Act**
- 7.2.1 The allegation that certain members of the NAC or companies linked to members of the NAC unduly benefitted from the PESP, in contravention of section 4(10) of the NAC Act, is **not substantiated**.
- 7.2.1.1 On the strength of the evidence obtained during the investigation it is evident that four (4) members of the current NAC received benefits from the PESP, prior to them assuming their duties as members of the current NAC.
- 7.2.1.2 It is further revealed by evidence that Ms Loubser, who was also a member of the former NAC, disclosed her involvement when her application was discussed and recused herself as required by Regulation 9.1 of the NAC Regulations.
- 7.2.1.3 In terms of the legal opinion furnished to DSAC by the Office of the Chief State Law Adviser, it was confirmed that the members who received benefits from the PESP, did so prior to occupying or assuming office, and thus this did not amount to a conflict of interest.
- 7.2.1.4 In the circumstances the Public Protector finds that the conduct of the members of the NAC does not amount to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as well improper or unlawful enrichment in terms of section 6(5)(a) and (c) of the Public Protector Act.
- 7.3 Whether companies that do not work in the arts or were not entitled to grants, benefited from funds from the PESP by the NAC, and if so, whether**

such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration in terms of section 6(5)(a) of the Public Protector Act

7.3.1 The allegation that companies that do not work in the arts or were not entitled to grants were awarded funds from the PESP by the NAC, is **not substantiated**.

7.3.1.1 On the strength of the evidence placed before the Public Protector by the NAC, relating to the background information and history relating to each organisation's profile, and internal verification conducted by the NAC's Compliance and Risk Officer it is evident that the organisations/entities that were considered for grants from the PESP funding qualified in terms of the NAC criteria, as set out in the PESP Plan.

7.3.1.2 In the circumstances the Public Protector finds that the conduct of the NAC in this regard does not amount to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

7.4 Whether the NAC violated the constitutional right to privacy of some artists by publishing their personal details on the internet, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and/or constitutes maladministration in terms of section 6(5)(a) of the Public Protector Act

7.4.1 The allegation that the NAC violated the constitutional right to privacy of some artists by publishing their personal details on the internet, is **not substantiated**.

7.4.1.1 On the strength of the evidence placed before the Public Protector it is apparent that all that was published on the NAC's website were the names of individuals

and entities that received payment from the PESP, without disclosing their personal details in violation of the Constitution or POPIA. The GMS system was also only accessible using a unique username and password allocated automatically on application.

- 7.4.1.2 In the circumstances the Public Protector finds that, the conduct of the NAC does not amount to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

8. RECOMMENDATIONS

The Public Protector has completed the investigation on this matter and noted that the NAC has already begun the process of taking corrective action/steps following the receipt of the Court judgment, Legal Opinion, Mazars Forensic Investigation Report and AGSA's audit outcomes. Based on this observation, the Public Protector recommends in terms of section 6(4)(c)(ii), (d)(ii) and (iii) of the Public Protector Act, the following:

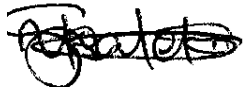
Chairperson of the NAC

- 8.1 Finalise the implementation of the recommendations as set out in Mazars Forensic Investigation Report and take appropriate corrective action against the identified wrongdoers where there was an indication of misconduct, and where they failed to take appropriate steps to prevent any irregular expenditure and fruitless and wasteful expenditure within their area of responsibility as contemplated by section 51(1)(b)(ii) of the PFMA;
- 8.2 Take appropriate steps to ensure that future *Grant Funding Projects* are implemented in line with adequate and proper systems of internal control and

financial management and are properly monitored by project managers as contemplated in sections 51(1)(a) and 57(a)(b) and (c) of the PFMA.

9. MONITORING

9.1 The CEO of the NAC, to report to the Public Protector on the implementation of the recommendations within one hundred and twenty days (120) days from the date of this report.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA
DATE: 29 SEPTEMBER 2023

Assisted by: Mr Vusumuzi Xolani Dlamini
Acting Executive Manager: Investigations Branch