arts & culture
Department:
Arts and Culture
REPUBLIC OF SOUTH AFRICA

Mrs X Tom
Chairperson
Portfolio Committee on Arts and Culture
PO Box 15
Parliament
CAPE TOWN
8000

Email: amtiye@parliament.gov.za

Dear Mrs Tom

RE: DAC/SARA SETTLEMENT AGREEMENT: LEGAL OPINION: DAC SUPPORT FOR THE RENOVATION AT SARA HOUS

Ongoing correspondence with regard to the implementation of the settlement agreement between SARA and the DAC refer.

As indicated in my previous correspondence on 3 June 2016 in response to the request for information from the Portfolio Committee the DAC has sourced a legal opinion through the State Attorneys. A copy of the document is attached. It would be appreciated if the Portfolio Committee could deliberate on this matter and provide feedback and advice to the DAC to inform the next steps, and of course, further engagements with SARA.

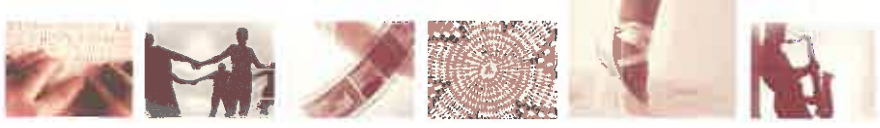
Further to the request for a report on progress with regard to the Settlement Agreement, I regret to inform the Committee that there has been no progress as Mr Nyathela has not agreed to accept the terms of the DAC's offer with regard to the renovation of SARA House which, as you know, is the primary area of dispute presently.

Warm regards

VUSITHEMBA NDIMA

ACTING DIRECTOR-GENERAL

DATE: 10/08/2016



TO:
THE STATE ATTORNEY
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AND TO:
DEPARTMENT OF ARTS & CULTURE
Email: collenh@dac.gov.za
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In the matter between:

THE SOUTH AFRICAN ROADIES ASSOCIATION SARA

and

NATIONAL DEPARTMENT OF ARTS AND CULTURE DAC

OPINION

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1. An opinion is sought on the validity of the DAC's undertaking to fund renovations to Sara House and the legal standing of the settlement agreement facilitated by the Public Protector and concluded between the DAC and the SARA.

2. On 1 April 2014, SARA and the DAC entered into a written settlement agreement in terms of section 6(4)(d) of the Public Protector Act, 1994 signed by the then Director-General of the DAC, S Xaba, the President of SARA, Mr Freddie Nyathela, and Advocate KS Malunga, the Deputy Public Protector of South Africa. Section 6(4)(d) of the Public Protector Act provides for settlement of disputes by way of negotiation under the authority and guidance of the Public Protector.

("the agreement")

3. In order to critically evaluate the import of obligations flowing from the agreement, it is necessary to traverse both public law issues as well as private law consequences flowing from the agreement, bearing in mind that DAC falls under the Ministry of Arts and Culture which, in turn, is within the realm of public administration as contemplated in section 195 of the Constitution of the Republic of South Africa.

4. In the context of private law where the parties have decided that a contract should be recorded in writing, their decision will be respected, and the resulting document or documents will be accepted as the sole evidence of the terms of the contract. The integration rule, as it is commonly referred to, prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered (**Johnston v Leal** 1980 (3) SA 927 (A) at 943B).

5. Interpretation of the terms of a written agreement is a question of law and not of fact. The basic rule regarding interpretation of a written agreement is that no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence **(The Law of Contract, Christie, 5th** ed. – page 192; **Lowrey v Steedman** 1914 AD 532 Act 543; **Sealed Africa (Pty) Ltd v Kelly & Another** 2006 (3) SA 65 (W) at para [15] per Epstein AJ).[1]

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1. In an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract. **(Worman v Hughes** 1948 (3) SA 495 (A) at 505);

2. The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties **(Sassoon Confirming & Acceptance Co (Pty) Ltd v Barclays National Bank Ltd** 1974 (1) SA 641 (A) 646B).

3. No evidence may be given to alter the plain meaning of an agreement **(Rand Rietfontein Estates Ltd v Cohn** 1937 AD 317 at 326);

4. The document is to be given its grammatical and ordinary meaning, unless this will result in some absurdity or some repugnancy or inconsistency with the rest of the instrument. **(Coopers & Lybrand v Bryant** 1995 3 SA 761 (A) 767E-768E);

5. It was furthermore held in the **Coopers** case, cited above, that regard may be had to background and surrounding circumstances when the language of the document is, on the face of it, ambiguous, save that the court is precluded from taking into account "direct evidence of their own (the parties to the agreement) intentions" (at 767E-768E);

6. However, should a party seek to place a construction on a document that differs from the document's *prima facie* meaning, that party has to plead the circumstances relied on for such construction **(Dorman Long Swan Hunter v Karibib Visserye Ltd** 1984 (2) SA 462 (C) at 476G-H):

> *"Non constat, however, it is necessary to plead a reliance on surrounding circumstances where the meaning of the document is uncertain or ambiguous or where the other party contends that it bears a meaning other than its prima facie meaning, and where the Court is satisfied that there is uncertainty or ambiguity as to the proper construction of the contract."*

Insofar as a party intends to rely upon background circumstances or facts, these facts must be pleaded **(Streek v East London Daily Dispatch (Pty) Ltd** 1980 (1) SA 151 (E) at 156H).

In **KPMG v Securefin Ltd** 2009 (4) SA 399 SCA at paragraph 39, the Court revisited the applicable principles and stated as follows:

*"[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (**Johnson v Leal** 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) **Phipson on Evidence** (16 ed 2005) paras 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (**Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd** 1985 BP 126 (A) ([1985]) ZASCA 132. Fourth, to the extent that evidence may be admissible to contextualise the document (sine 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (**Delmas Milling Co Ltd v Du Plessis** 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is*

6. In this matter, the subject matter under scrutiny is paragraph 4.1.9 of the agreement which provides as follows:

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*artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See: **Van der Westhuizen v Arnold** 2002 (6) SA 453 (SCA) ([2002]) 4 All SA 331) paras 22 and 23, and **Masstores (Pty) Ltd v Roberts Construction (Pty) Ltd and Another** 2008 (6) SA 654 (SCA) para 7)."*

In **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 SCA, Wallis JA recasts the approach to be adopted at paragraphs 18 and 23 as thus:

"18. ..... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the documents as a whole and the circumstances attendant its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a commercial context it is to make a contract for the parties rather than the one they in fact make. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

...

23. Three Australian judges have sought to explain the use of the expression on other grounds. Gleeson CJ in Singh v The Commonwealth said that-

> *'references to intention must not divert attention from the text, for it is through the meaning of the text, understood in the light of background, purpose and object, and surrounding circumstances, that the legislature expresses its intentions, and it is from the text, read in that light, that intention is inferred. The words "intention", "contemplation", "purpose" and "design" are used routinely by courts in relation to the meaning of legislation. They are orthodox and legitimate terms of legal analysis, provided their objectivity is not overlooked.'*

French J described the intention of the legislature as 'an attributed intention based on inferences drawn from the statute itself' and added that it is 'a legitimising and normative term' that 'directs courts to objective criteria of construction which are recognised as legitimate'. In a broad-ranging discussion of the concept, Spigelman CJ concludes that it is acceptable because the interpreter is concerned to ascertain the "objective" will of the legislature or the contracting parties. ..... If interpretation is, as all agree it is, an exercise in ascertaining the meaning of the words used in the statute and is objective in form, it is unrelated to whatever the intention those responsible for the words may have had at the time they selected them. Their purpose is something different from their intention, as is their contemplation of the problems to which the words were addressed."

In giving meaning to the disputed clauses, one must have regard to the context.

"Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at the perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach."

*See: **Bothma-Batho Transport v S Bothma & Seun Transport** 2014 (2) SA 494 SCA at 499G-H para [12]*

"4.1.9 The DAC shall submit to the Public Protector South Africa ("PPSA") a detailed project/implementation plan in regard to the intervention of the IDT and other bodies and its proposal regarding assisting with the removal of the health, safety and security risks uncovered at SARA House by close of business on Tuesday, 15 April 2014".

7. Having regard to the terms of the written agreement, in particular, the background of the matter catalogued in paragraph 2 of the agreement, paragraph 4.1.9, properly construed, requires the DAC to take measures and implement such measures in dealing with the defects of SARA House. DAC's obligations moreover extends to assisting SARA with the deficiencies in the building owned by SARA. DAC does not have the resources nor the expertise to implement such projects other than to make available money to deal therewith; however, such monies must be spent on activities which will enhance the interest of the members of SARA. DAC cannot spend such monies on a capital asset belonging to SARA. To follow this theme, say for instance those in control of SARA subsequently decide to dispose of the asset, namely the business, then DAC would have spent monies on a project not contemplated in its mandate. This would be wrong.

8. In the past, having regard to background facts, the DAC financially assisted SARA, a voluntary association, which has as its objectives the promotion of technical education and training of SARA and the empowering of technicians in all facets of the entertainment industry.

9. SARA has not, to the best of my understanding, taken steps to enforce paragraph 4.1.9 of the agreement. In the event of SARA taking such legal steps, the DAC will have to demonstrate to the court that paragraph 4.1.9 does not oblige the DAC to make available any predetermined amount of monies in dealing with "the removal of the health, safety and security risks uncovered at SARA House" ("the deficiencies"). No particular sum of money is stipulated in paragraph 4.1.9, all that the clause obliges the DAC is to submit its proposal as to how it would assist SARA in dealing with the deficiencies. Thus, for example, its proposals may be limited to a modest sum of money and SARA may or may not agree to the proposal; it matters not.

10. In my view, more importantly, paragraph 4.1.9 does not give to SARA a legal right to recover any predetermined amount of money or value equivalent to such amount from the DAC. This is crucial because the amount of money contemplated to remedy the deficiencies is, as I understand the position, R55m. This is the equivalent amount of money to restore SARA House into a proper workable, habitable and functional building.

11. For purposes of this enquiry, the investigation does not stop at a proper interpretation of the import of paragraph 4.1.9. The DAC is an organ of State and hence public law issues are imbued in evaluating the proper and correct legal approach to the transaction under consideration.

The DAC

12. The aim of the DAC is to contribute to sustainable economic development and enhance job creation by preserving, protecting and developing South African arts, culture and heritage to sustain a socially cohesive and democratic nation. Together with the cultural and creative industries sectors, the DAC is committed to ensure that the arts sector contributes to inclusive economic growth and social cohesion.[2]

13. Section 195 of the Constitution of the Republic of South Africa prescribes that public institutions must be governed professionally, efficiently and the effective use of resources must be promoted. The values of good governance including transparency, accountability and the need to respond to peoples' needs and are part of the basic values stipulated in Chapter 10 of the Constitution governing public administration.

14. Thus, in a critical evaluation of the ambit of paragraph 4.1.9 of the settlement agreement and read in the context of the agreement as a whole, DAC must be accountable for both its private obligations in contract and importantly its obligations to perform its functions in accordance with the values enshrined in section 195 of the Constitution.

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[2] See: www.gov.za/about-sa/arts-culture

Analysis

15. It is not the function of DAC to pay for the building of a third party, in this case SARA. The Cultural Institutions Act, 1998 contemplates the establishment and funding of flagship institutions such as National Cultural History Museum and the South African National Gallery. In such cases, funds are provided by government to acquire the edifice containing the institution and to fund its operations. In contrast, the function of the DAC is to utilise its resources to promote arts, culture and the heritage sector of our country. This must be performed reasonably and rationally related for the objects sought to be achieved. Refurbishing a building belonging to SARA which would amount to restoring the property is not, in my view, reasonably and rationally connected to the objects of the DAC.

16. A proper reading of the agreement as well as the constitutional obligations imposed on DAC, in my view, cannot legally and reasonably justify, effectively speaking, the acquisition of property for a third party beneficiary, which would be limited in receiving funding for its events to facilitate the objects of the DAC.

Conclusion

17. In evaluating paragraph 4.1.9 of the agreement, the terms do not create any obligation for DAC to pay R55m for and on behalf of SARA to acquire a complete overall of its property. DAC must act in good faith in private law and in any event this is its constitutional obligation. That entails in

accordance with the provisions of paragraph 4.1.9 a proposal to assist SARA House to address the deficiencies in SARA House. This must be limited to matters which will promote events within the context of the activities of SARA. In my view, any cost occasioned for addressing the deficiencies falls outside the scope and purpose of DAC's statutory entrenched mandate.

18. Hence, in private law, paragraph 4.1.9 would be difficult to be enforced at the instance of SARA. Properly handled, a court is likely to find that paragraph 4.1.9 does not oblige DAC to spend monies on the property of SARA.

19. In the context of public law obligations, DAC cannot be seen to be funding the acquisition or improvement of immovable property of a third party. This will offend the principle of legality, bearing in mind that DAC's role is to enhance fairly and reasonably events and interest relating to the heritage, culture and arts of the people of South Africa. The funding of restoring immovable property of a private party so that such private party can have an asset is not rationally related to any of the objects of funding events flowing from heritage, culture or art on the part of the members of SARA read together with the objects of the DAC.

20. In my view, it will be wrong to interpret paragraph 4.1.9 of the agreement as justifying capital expenditure on the interest of SARA as formulated in the agreement. Moreover, DAC is not mandated nor does it have the capacity to implement projects and of the nature contemplated in paragraph 4.1.9.

21. In summary then, in law the clause is unenforceable as is contemplated by SARA and, ethically speaking, it will be an affront to the people of the country to fund the kind of project contemplated in the agreement. The then Director-General, Mr Xaba, had no right to enter into the agreement and paragraph 4.1.9 is, in my view, unenforceable.

NAZEER CASSIM SC

Chambers, Sandton
1 July 2016