
REPORT NO 20 OF 2018/2019

"Allegations of maladministration relating to Pikitup's Supply Chain Management Processes, Recruitment and Selection Policies and Misconduct arising from theft of Pikitup's cellular telephones"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND VIOLATION OF PIKITUP SUPPLY CHAIN MANAGEMENT PROCESSES AND PROCEDURES IN CONNECTION WITH THE AWARDING AND SUBSEQUENT EXTENSION OF CONTRACT PU298/2012 TO AQUA TRANSPORT AND PLANT HIRE; THE IRREGULAR PROCUREMENT OF OFFICE SPACE TO RELOCATE PIKITUP HEAD OFFICE; APPOINTMENT OF CONSULTANTS; APPOINTMENT, REMOVAL AND REPLACEMENT OF EMPLOYEES IN VIOLATION OF PIKITUP RECRUITMENT AND SELECTION POLICIES AND PAYROLL AND MISCONDUCT ARISING FROM THEFT OF PIKITUP CELLULAR TELEPHONES
Executive Summary

(i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution) and section 8(2A)(a) of the Public Protector Act 1994 (Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration and corruption pertaining to the award and subsequent extension of a contract, PU 298/2012, to Aqua Transport and Plant Hire (Aqua); the irregular appointment of officials, friends, former colleagues and relatives and remunerating them on higher salary scales; removal of employees from critical positions and replacement with Indian employees; irregular appointment of consultants without following procurement processes; irregular procurement of office space for the Pikitup Head Office; and misconduct arising from theft of Pikitup cellular telephones.

(iii) The complaints were received from Mr Philip Richardson (the first Complainant) on 30 August 2013 and the South African Municipal Workers Union (SAMWU), (the second Complainant) on 11 March 2016.

(iv) The first Complainant alleged that:

(a) A well-known Pikitup's service provider, Aqua, has frequently attracted the attention of the media over the last 12 months;

(b) The contract awarded to Aqua by Pikitup was observed as being "under investigation," but was progressing normally with payments being made to the service provider;
(c) Since public funds were involved, it appeared that both Pikitup and Aqua considered themselves totally above the constructs of due process and believed they could act with impunity as the said contracts were progressing normally despite objections so widely reported in the media; and

(d) An article authored by Anna Cox titled “Pikitup boss pays R228k to dispute reports” issued in IOL news on 19 June 2013 at 11:26 am stated the following:

“On 11 June 2013, The Star wrote that Ms Amanda Nair controversially awarded a multimillion-rand tender to a firm implicated in alleged fraud - an allegation contained in the forensic investigation commissioned by the public utility. In both instances, Nair and Senior Management of Pikitup refused to answer queries from The Star;

The Star revealed that Ms Nair had awarded the contract to Aqua even though the City of Joburg's Bid Adjudication Committee had questioned her decision because of a forensic investigation by Ernst & Young which had implicated the company in alleged wrongdoing;

Pikitup paid almost R6 million rand for Ernst & Young to investigate companies providing services to it. It was recommended that Aqua be charged criminally for fraud because of alleged irregular activities, including suspected tender collusion;

In Tuesday’s advert, Nair said the committee recommended that Aqua be given the contract despite the fact that the committee met in January and refused to recommend that Aqua be granted the contract. She also said there was fully compliance with the tender process. Ms Nair stated that:

She deemed it appropriate to ensure full probity throughout the Yellow Plant tender process, and to this end, a firm of forensic auditors was appointed to
conduct a full due diligence of every step. The final assessment was that the process was fair, open and transparent.

She also requested a peer review of external auditors prior to approving the recommendation of the Bid Adjudication Committee (BAC) to conduct a review as she anticipated that the process and award may well be placed under scrutiny. They arrived at the same conclusions as the forensic auditors."

(v) In the second complaint, SAMWU alleged the following:

(a) Ms Amanda Nair, Pikitup’s former Managing Director (Ms Nair), extended the contract of Aqua and added R40 million despite a decision by the previous Board not to extend it;

(b) Ms Nair irregularly appointed friends and former colleagues without subjecting them to an interview process and improperly offered them higher salary scales than the normal remuneration scales as prescribed by the Pikitup Remuneration Policy;

(c) The friends and former colleagues appointed improperly and offered higher salary scales were:

(1) Mr Mthembeni Ncanana;
(2) Ms Phumla Mokele;
(3) Mr Kelvin Ngwenya;
(4) Ms Kathija Docrat;
(5) Ms Michelle Alexander;
(6) Mr Ike Sampson;
(7) Mr Gerhard Boysen;
(8) Mr Donovan Denyssen; and
(9) Ms Aneesha David.
(d) Mr Kelvin Ngwenya who is the son of Ms Nair's domestic worker and resided at her house came in with a group of interns and was the only one appointed permanently without following the proper recruitment process. The interns at Pikitup were compensated approximately R2000.00 per month, but Mr Ngwenya was paid R9 500.00 per month;

(e) Mr Gerhard Boysen was recommended to Pikitup by a former General Manager: Fleet, Mr James Hunter, without an interview and was appointed as the Acting General Manager: Fleet;

(f) There are salary discrepancies amongst employees of Pikitup as all officials related to Ms Nair were remunerated on higher salary scale levels. In demonstrating the levels of the salary discrepancies, SAMWU further stated that:

(aa) In October 2011, Mr Ike Sampson was absorbed with a salary of R3 000.00 per month. Later in 2012, he became Ms Nair's Executive Driver/Messenger and his salary was adjusted to R15 000.00 per month. At the time of lodging the complaint, Mr Sampson was earning R16 951.13 per month;

(bb) In May 2015, Mr Donovan Denyssen was re-appointed as the General Manager: Infrastructure at a salary of R2 400 000.00 per annum;

(cc) The salary of Mr Mthembeni Ncanana, the General Manager: Partnership, was increased from R760 000.00 to R1 105 033.00 per annum during 01 March 2013 and 01 December 2014; and

(dd) In April 2015, Ms Aneesa David was appointed as the General Manager: Fleet at a salary of R1 300 000.00 per annum.
Ms Nair removed black employees from critical positions and replaced them with Indian employees. The officials who were removed and replaced were:

(aa) Ms Lindiwe Hleza, the Chief Financial Officer (CFO), was replaced with Mr Suren Maharaj;

(bb) Dr Wayne Letoaba, who was an Occupational Medical Specialist was replaced with Mr Ismael Dawood;

(cc) Ms Edith Ndlovu, Personal Assistant to Ms Nair was replaced with Ms Sarah Pillay;

(dd) Ms Susan Lehola, the Acting General Manager: Supply Chain Management, was replaced with Ms Priya Lutchman;

(ee) Ms Abigail Muguto, General Manager: Bulk, was replaced with Mr Dan Moodley;

(ff) Mr Ika Magasa, the Chief Operating Officer (COO), was replaced with Ms Aneesa David; and

(gg) Ms Matsepo Kekana, a Project Manager, was also replaced. However, the name of the person who replaced her was not provided by the Complainant.

(h) Ms Aneesa David was promoted to the level of the COO without completing her probation as the General Manager: Fleet.

(i) During April 2014, Mr Denyssen resigned from Pikitup after he was charged with misconduct for theft of Pikitup cellular telephones which he unofficially issued to Ms Nair and her family members. In June 2015, Ms Nair and Mr Denyssen were arrested by the Hillbrow South African Police Service (SAPS) detectives for theft of Pikitup cellular telephones as per CAS 1308/04/2014 and
were detained at the Hillbrow SAPS. Pikitup paid her bail and for her legal representation. No disciplinary action was taken against Ms Nair.

(j) All consultants appointed during Ms Nair’s management were not appointed through a proper Supply Chain Management process and were loaded on the SAP system as Pikitup’s employees. The consultants received benefits like normal employees and were further provided with tools of trade at the expense of Pikitup; and

(k) Pikitup irregularly procured office buildings to accommodate Pikitup Head Office.

(vi) Based on analysis of the complaint, the following issues were identified to inform the focus of the investigation:

(aa) Whether Pikitup improperly awarded and subsequently extended the contract for the supply, operation and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as ad hoc rentals as and when required of the service provider (Yellow Plant project) to Aqua despite the findings of Ernst & Young, Gobodo Forensic and Investigative Accounting and National Treasury investigations;

(bb) Whether Ms Nair irregularly appointed her friends, former colleagues and relatives and improperly offered them higher salary scale levels;

(cc) Whether Ms Nair irregularly removed black employees from critical positions and replaced them with Indian employees;

(dd) Whether Pikitup improperly failed to investigate the alleged theft of Pikitup cellular telephones which resulted in Ms Nair and Mr Denyssen being arrested
by the Hillbrow SAPS, bail paid and legal representation provided by Pikitup for both of them;

(ee) Whether Ms Nair irregularly appointed consultants namely: Doris Dondur; Joenne Murphy; and Rene Kenosi without following proper Supply Chain Management processes; and

(ff) Whether the procurement process followed by Pikitup in the acquisition of its office space to relocate Pikitup Head Office was improper and in contravention of applicable legal prescripts.

(vii) Key laws and policies taken into account to determine if there had been maladministration by Pikitup were:

(a) Section 217 of the Constitution which provides that state organs must ensure a fair, equitable, transparent, competitive and cost-effective public procurement system;

(b) The Pikitup Supply Chain Management Policy (SCM Policy) and the Delegation of Authority; Pikitup Recruitment and Selection Policy as well as the Pikitup Payroll Policy;

(c) The SCM Policy also roots itself in Treasury Regulations regulating the SCM. It further outlines the steps to be taken in pursuit of the procurement of goods and services within Pikitup covering Demand Management, Contract Administration, Material Management, Disposal Management, Procurement Strategy and Acquisition Management. Also regulated are permissible deviations, which include urgency and single source providers. The SCM Policy also deals with management of conflict of interest; and
(d) The investigation was also guided by the Pikitup Human Resources policies to the extent that some allegations involved the appointment and remuneration of employees. In this regard, the Municipal Finance Management Act, 2003 (MFMA) setting a standard for the conduct of Municipal officials was relied on.

(viii) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

(1) Regarding whether Pikitup improperly awarded and subsequently extended the contract for the supply, operations and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as *ad hoc* rentals as and when required of the service provider (Yellow Plant project) to Aqua despite the findings of Ernst & Young, Gobodo Forensic & Investigative Accounting and National Treasury Investigations:

(a) The allegation that Pikitup improperly awarded and subsequently extended the contract for the supply, operations and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as *ad hoc* rentals as and when required of the service provider (Yellow Plant project) to Aqua in despite the findings of Ernst & Young, Gobodo Forensic & Investigative Accounting and National Treasury investigations is substantiated.

(b) Pikitup failed to comply with Regulation 3 of the Preferential Procurement Regulations, 2011 which requires that an organ of state must, prior to extending tender invitations, accurately estimate the costs for the provision of the required services.

(c) Although in terms of the Municipal Supply Chain Regulations, MFMA Circular No. 62, a contract may be varied by no more than 15% of the original value of
the contract, in this case the variation was less than 15%. However, the extension of the Aqua contract on its own was not appropriate in the sense that the alleged conduct of Aqua and Midmar regarding their engagement in collusive tendering was referred to the Competition Tribunal by the Competition Commission.

(dd) By overlooking the fact that Aqua and Midmar had been referred to the Competition Tribunal by the Competition Commission, the conduct of Pikitup was therefore also at odds with section 195(1) of the Constitution, which provides that the "public administration must be governed by the democratic values and principles enshrined in the Constitution, including a high standard of professional ethics which must be promoted and maintained; efficient, economic and effective use of resources which must be promoted as well as a public administration which must be accountable."

(ee) Pikitup therefore improperly awarded and subsequently extended the contract for the supply, operations and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as ad hoc rentals as and when required of the service provider (Yellow Plant project) to Aqua despite the findings of Ernst & Young, Gobodo Forensic & Investigative Accounting and National Treasury investigations.

(ff) Accordingly, the conduct of Pikitup in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
(2) Regarding whether Ms Nair improperly appointed her friends and former colleagues as well as relatives without putting them through interview processes and offered them higher salary scale levels than the normal remuneration of other Pikitup officials:

With regard to the appointment of Ms Aneesa David:

(aa) The allegation that the appointment of Ms David was irregular is substantiated.

(bb) Ms David's Curriculum Vitae (CV) for the position of General Manager: Fleet was received after the closing date which was 27 February 2015.

(cc) Ms Nair irregularly approved the inclusion of Ms David in the list of candidates to be interviewed even though her application was received after the closing date and such was in contravention of the provisions of section 7.3.2.11 of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005.

(dd) Ms David did not meet the minimum requirements for the position of General Manager: Fleet and Ms Nair irregularly appointed her in contravention of the Municipal Systems Act Regulations, specifically Regulation 8 on Appointment and Conditions of Employment of Senior Managers 2014.

(ee) Similarly, remunerating Ms David beyond the salary limits within the salary bracket of the position was in direct contravention of section 94(2)(a) of the MFMA by Pikitup.

(ff) Accordingly, the conduct of Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.
Appointment of Mr Gerhardus Booysen

(aa) The allegation regarding the irregular and improper appointment of Mr Booysen is substantiated.

(bb) Ms Nair irregularly and improperly appointed Mr Booysen in the position of Manager: Fleet, which Pikitup did not advertise, thereby flouting section 7.2 of Pikitup Recruitment and Selection Policy No CS_HR/2013_005 which deals with advertisement. This policy does not provide for exceptions to the requirement of advertisement and this was neither a headhunting nor secondment exercise.

(cc) The Fleet personnel of Pikitup interviewed Mr Booysen for the position of General Manager: Fleet, the requirements of which he did not meet and Ms Nair improperly accepted his inclusion while, as the Pikitup's accounting officer, she ought to have known that such was not in line with Pikitup's Recruitment and Selection Policy and thereby prejudicing those that met the requirements.

(dd) Accordingly, the conduct of Pikitup and Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

Appointment of Mr Donovan Denyssen

(aa) The allegation that the appointment of Mr Denyssen by Ms Nair as someone associated with her is substantiated.

(bb) Pikitup and Ms Nair in particular improperly and irregularly appointed Mr Denyssen and offered him a contract of employment as an Independent
Contractor without following proper SCM processes and in contravention of the MFMA: Regulation 35(2) of the Municipal Supply Chain Management Regulations and Chapter 5 of the Supply Chain Management: a Guide for Accounting Officers of Municipalities and Municipal Entities 2005.

(cc) Ms Nair re-appointed Mr Denyssen to the position of General Manager: Enterprise Infrastructure while knowing that his contract as Pikitup’s Independent Contractor was terminated.

(dd) Pikitup and Ms Nair re-appointed Mr Denyssen in the position of General Manager: Enterprise Infrastructure while being aware that that he did not meet the requirements for the position as he was not in possession of a degree in Computer Science or equivalent degree as required by the post.

(ee) Pikitup and Ms Nair violated Regulation 35(2) of the Municipal Supply Chain Management Regulations and Chapter 5 of the Supply Chain Management: A Guide for Accounting Officers of Municipalities and Municipal Entities 2005. Section 9.8.4 of Pikitup, Recruitment and Selection Policy No CS_HR/2013_005 of Pikitup provides that an employee whose services were terminated as the result of misconduct in terms of section 17(2)(e) of the Public Service Act 1994 or in terms of Labour Relations Act, 1995 may not be re-employed. Regulation 8 of Municipal Finance Systems Act: on Appointment and Conditions of Employment Senior Managers 2014, provides that “no person may be appointed as a senior manager on a permanent basis or on probation to any post on the approved staff establishment of a Municipality provided, that he/she possesses the relevant competency, qualifications, experience and knowledge.”

(ff) Accordingly, the conduct of Pikitup and Ms Nair in particular, in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or
unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

Appointment of Mr Kelvin Ngwenya

(aa) The allegation that Pikitup irregularly and improperly appointed Mr Ngwenya, Ms Nair’s associate, friend or relative is substantiated.

(bb) Ms Nair’s conduct was improper when she unduly influenced Mr Thekiso to consider Mr Ngwenya for an internship or some job training (without Mr Ngwenya applying) which subsequently resulted in a temporary employment contract for Mr Ngwenya while she knew or reasonably ought to have known that such was against the Pikitup Recruitment and Selection Policy and as well as section 94 of the MFMA.

(cc) By appointing Mr Ngwenya without following the Pikitup Recruitment and Selection Policy, Ms Nair was in direct contravention of section 94(2)(a) of the MFMA.

(dd) Accordingly, the conduct of Pikitup and Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

Appointment of Mr Mthembeni Ncanana

(aa) The allegation relating to the irregular and improper appointment of Mr Ncanana is substantiated.

(bb) Pikitup irregularly appointed Mr Ncanana knowing that his application was submitted to Pin Point One, Pikitup’s recruitment agent, after the closing date
and approved his appointment in contravention of the Pikitup Recruitment and Selection Policy.

(cc) Mr Ncanana was improperly offered the job and the salary package by Pikitup or Pin Point One before the conclusion of the selection process. This is clear from his request for the salary review which is dated 25 January 2013 (shortly after the interviews were conducted) and the job offer was officially made to him on 04 February 2013.

(dd) On 22 May 2013, Ms Nair improperly approved the revised salary offer to Mr Ncanana of R950 000.00 after Mr Ncanana accepted an offer of R760 000.00 for the position of General Manager: Human Resources graded at Level E1 in which the respective minimum and maximum salary at the time was from R730 512.31 to R1 027 024.17 and Mr Ncañana had already assumed employment at Pikitup on 01 March 2013.

(ee) Such conduct was clearly at odds with section 9.2 of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005 which requires that no offer of employment, verbal or otherwise may be made before the conclusion of the recruitment process.

(ff) Accordingly, the conduct of Pikitup and Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

The appointment of Ms Phumla Mokèle and salary offered to her

(aa) The allegation regarding the irregular and improper appointment of Ms Phumla Mokele is substantiated.
(bb) Ms Mokele was irregularly and improperly appointed to the position of HR Manager by Pikitup despite her not having the necessary educational qualifications as well as the required managerial experience.

(cc) Ms Mokele only had a National Diploma in Human Resources Management and not a Bachelor’s degree as required by the job advertisement. Ms Mokele did not have the five years of managerial experience in Human Resources as all the positions she occupied previously were junior and not managerial positions and the same was confirmed by Land Bank, her previous employer.

(dd) Ms Mokele intentionally and unlawfully misrepresented facts in her CV by stating that she held a position of a Human Resources specialist/manager at Land Bank when she did not.

(ee) Pikitup improperly and irregularly disregarded its own post requirements of the Human Resources position as contained in the advertisement and irregularly appointed Ms Mokele under the pretext of complying with the requirements of the Employment Equity Act. Employment equity should not have been misconstrued as implying that unqualified candidates for positions should be appointed. Equity relates to the group of the society that has been historically disadvantaged and not unqualified candidates for jobs.

(ff) Accordingly, the conduct of Ms Mokele and the Pikitup’s former Managing Director who approved the appointment at the time, Mr Nkosi, amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Appointment of Mr Ike Sampson

(aa) The allegation that the appointment of Mr Ike Sampson was improper and irregular is substantiated.
(bb) Mr Sampson was improperly and irregularly recruited in the post of Executive Driver/Messenger of Ms Nair without the position being advertised and without him being subjected to an interview process as required in terms of section 7.2.1 of the Pikitup Recruitment and Selection Policy which provides that vacant positions can be advertised internally and can run concurrently with external advertisements.

(cc) Mr Sampson's appointment was also in violation of section 7.2.5 of the same policy which provides that all administrative, junior and middle management positions up to operations manager must be advertised internally through the Pikitup website. Pikitup failed to show that the above legal provisions were complied with in the appointment process of Mr Sampson.

(dd) Accordingly, the conduct of Pikitup, specifically that of Ms Nair in particular, in the circumstances, amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

Appointment of Ms Kathija Docrat

(aa) The allegation that the appointment of Ms Kathija Docrat was irregular is substantiated.

(bb) The post on which Ms Docrat was appointed, was never advertised in accordance with the directives of the Pikitup Recruitment and Selection Policy. Section 7.2.1 of Pikitup Recruitment and Selection Policy provides that vacant positions can be advertised internally and can run concurrently with external advertisements.
Section 7.2.5 of the same policy which provides that all administrative, junior and middle management positions up to operations manager must be advertised internally was also violated and contravened by Pikitup in these circumstances. There was also no budget provision confirmed by the Line Management for this position and Pikitup failed to show that policies were complied with in the appointment of Ms Docrat. There is no evidence that such position was on the organisational structure of Pikitup except an indication that since the departure of Ms Sharon Mould, the marketing and events unit was left ineffective.

Pikitup, specifically Ms Nair, failed to act in line with the dictates of section 94(1)(b) of MFMA which require of her to act with honesty, integrity and fidelity in managing the financial affairs of the municipal entity by appointing Ms Docrat in violation of Pikitup Recruitment and Selection Policy.

Accordingly, the conduct of Pikitup and specifically that of Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of power in terms of section 6(4)(a)(ii) of the Public Protector Act.

Appointment of Ms Michelle Alexander

The allegation that the appointment of Ms Michelle Alexander was improper and irregular is substantiated.

When Ms Nair was advised in a memorandum that Ms Alexander's contract expired on 30 November 2015, she irregularly and improperly concluded a contract of temporary employment with Ms Alexander for a period of six months, commencing on 01 December 2015 to 30 May 2016 on a salary of R40 000.00 per month payable in arrears to assist in the Communication and
Stakeholder Management due to a high workload experienced by the unit, without such post being advertised and selection processes being conducted.

(cc) Such conduct by Ms Nair was improper and clearly in contravention of section 7.2.1 of the Pikitup Recruitment and Selection Policy which provides that vacant positions can be advertised internally and can run concurrently with external advertisements. Section 7.2.5 of the same policy provides that all administrative, junior and middle management positions up to operations manager must be advertised internally through the Pikitup website. External advertisements can be used additionally at the discretion of the Executive responsible for a particular Department.

(dd) Pikitup also failed to indicate whether there was a budget for this post in order to reconcile such appointment with the requirements of section 94(1)(b) of MFMA which demand of accounting officers to act with honesty, integrity and fidelity in managing the financial affairs of the entity.

(ee) Accordingly, the conduct of Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

(3) Regarding whether Ms Nair irregularly removed black employees from critical positions and replaced them with Indian employees:

**Removal of Ms Lindiwe Hleza and replacement with Mr Suren Maharaj**

(aa) The allegation that Ms Hleza was removed from the position of the CFO by Ms Nair because she was black and replaced by Mr Maharaj who is an Indian is not substantiated.
(bb) Evidence at my disposal shows that Ms Hleza was in fact offered the position of the CFO by Pikitup on the basis of equity despite not being number one during the interviews, but she voluntarily declined the position and left Pikitup to join the Ekurhuleni Municipality.

(cc) Accordingly, the conduct of Ms Nair in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Removal of Dr Wayne Letoaba and replacement with Mr Ismael Dawood

(aa) The allegation that Dr Wayne Letoaba was removed from the position of an Occupational Medical Specialist by Ms Nair because he was black and replaced by Dr Ismael Dawood who is an Indian is not substantiated.

(bb) Evidence in my possession indicates that Dr Letoaba resigned from the position of Occupational Medical Specialist on 03 April 2014 and Dr Dawood was recruited through a recruitment process and his appointment was made by Mr Maharaj in his capacity as the Acting Managing Director.

(cc) The conduct of Ms Nair in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Removal of Ms Susan Lehola, Acting General Manager: Supply Chain Management and replacement with Ms Priya Lutchman

(aa) The allegation that Ms Lehola was removed from the position of General Manager: Supply Chain Management and replaced with Ms Priya Lutchman is not substantiated.
(bb) Evidence obtained by my office shows that Ms Lehola was acting in the position of General Manager: Supply Chain Management for which she later applied, but was unsuccessful. Ms Lutchman was laterally transferred to the position of General Manager: Supply Chain Management on 04 March 2015. There is no evidence which indicates that Ms Lehola was removed because she is black.

(cc) Accordingly, the conduct of Ms Nair in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Removal of Ms Abigail Muguto, General Manager: Commercial Operations Bulk and her replacement with Mr Dan Moodley

(aa) The allegation that Ms Abigail Muguto, General Manager: Commercial Operations Bulk was replaced with Mr Dan Moodley is not substantiated

(bb) Evidence at my disposal shows that Ms Muguto was not removed, but her contract had expired and the position was advertised accordingly. Mr Moodley became the successful candidate, following an open recruitment process.

(cc) Accordingly, the conduct of the Pikitup and Ms Nair in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Removal of Ms Edith Ndlovu and replacement with Ms Pillay

(aa) The allegation that Ms Ndlovu was removed and replaced by Ms Pillay from the position of a Personal Assistant to the Managing Director because she is black, is not substantiated.
(bb) Evidence in my possession shows that in 2011, Ms Ndlovu was appointed to a senior position of a Supervisor within Pikitup and in 2015, she was again appointed as Operations Manager, a position senior than that of a Supervisor within Pikitup.

(cc) When the position of Personal Assistant to the Managing Director became vacant as a result of Ms Ndlovu’s appointment/promotion as Supervisor, Ms Pillay was recruited and appointed in 2013.

(dd) It is clear from the evidence above that Ms Ndlovu was never removed by anybody at Pikitup. On the contrary, she was promoted and as a result, her position as a Personal Assistant became vacant and was occupied by Ms Pillay.

(ee) Accordingly, the conduct of Ms Nair in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(4) Regarding whether Pikitup improperly failed to investigate the alleged theft of Pikitup cellular telephones which resulted in Ms Nair and Mr Denyssen being arrested by the Hillbrow South African Police Service, bail paid and legal representation provided to them:

(aa) The allegation that Pikitup improperly failed to investigate the alleged theft of Pikitup cellular telephones which resulted in Ms Nair and Mr Denyssen being arrested by the Hillbrow SAPS, bail paid and legal representation provided to them by Pikitup is substantiated.

(bb) Pikitup failed to adhere to its own section 3 of Cellular Telephone Policy Number: 003 which was approved by the Chairperson of the Board on 21
November 2013. It provides that the policy covers employees of Pikitup as well as fixed term employees.

(cc) The issuing of official cellular telephones to Ms Nair’s family was against the above policy in the sense that such telephones were issued to family members of Ms Nair who are not employees of Pikitup and were not regarded as a work tool to be used in order to execute the business of Pikitup.

(dd) Evidence indicated that the Board of Pikitup interfered with the administration of justice by unduly taking a resolution which sought to cause the withdrawal of the criminal proceedings against Ms Nair and Mr Denyssen from the court roll. I view such conduct by the Board as a breach of its fiduciary duty.

(ee) Pikitup improperly failed to institute disciplinary proceedings against Ms Nair and Mr Denyssen regarding the theft of cellular telephones as well as to recover the legal costs that were incurred by Pikitup as result of their arrest in connection with the theft of cellular telephones.

(ff) Accordingly, the conduct of Pikitup, specifically that of the Board in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

(5) Regarding whether Pikitup irregularly appointed consultants namely: Doris Dondur, Joenne Murphy, and Rene Kenosi without following proper Supply Chain Management processes:

(aa) The allegation that Pikitup irregularly appointed the above mentioned consultants without following proper SCM processes is substantiated.
(bb) The MFMA: Regulation 35(2) of the Municipal Supply Chain Management Regulations which deals with appointments of consultants provides that a contract for the provision of consultancy services to a municipal entity must be procured through competitive bids if the value of the contract exceeds R200 000.00 (VAT included) or if the duration period of the contract exceeds one year.

(cc) The evidence has revealed that Pikitup did not comply with Regulation 35(2) of the Municipal Supply Chain Management Regulations in the sense that the consultants were not procured through competitive bids since the value of their contracts exceeded R200 000.00 (VAT included). There was also no indication of a proper and approved deviation process from the normal procurement processes in this instance from Pikitup which could have otherwise justified the non-compliance with the applicable legal prescripts.

(dd) Pikitup therefore failed, as indicated above, to comply with the relevant legal prescripts regulating the manner in which the services of the consultants or service providers should be procured.

(ee) Pikitup contravened section 105(1)(c) of the MFMA which places an obligation on all officials of a municipal entity exercising financial management responsibilities to take all reasonable steps within the officials’ areas of responsibility to ensure that any irregular expenditure, fruitless and wasteful expenditure and other losses are prevented.

(ff) As a result, the appointment of the consultants contrary to the Municipal Supply Chain Management Regulations and section 217 of the Constitution has resulted in the Pikitup incurring an irregular expenditure.

(gg) The exercise of the power or the performance of that function in this regard was not in good faith, as envisaged in section 176(1) of the MFMA and was also
deliberate and/or negligent unlawful action, as envisaged in section 176(2) of
the MFMA. This is because Ms Nair, as the accounting officer, was aware or
should have been aware of the process to be followed and she decided not to
follow that process without any justification.

(hh) Accordingly, the conduct of Pikitup in the circumstances amounts to improper
conduct in terms of section 182(1)(a) of the Constitution and maladministration
as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(6) Regarding whether the procurement process followed by Pikitup in the
acquisition of its office space to relocate Pikitup Head Office was
improper and in contravention of applicable legal prescripts:

(aa) The allegation that the procurement process followed by Pikitup in the
acquisition of its office space to relocate Pikitup Head Office was improper and
in contravention of applicable legal prescripts is substantiated.

(bb) Pikitup improperly followed and relied on clause 14.1 of its SCM Policy (version
2/2023) to procure its Head Office building.

(cc) Failure by Mr Maharaj to indicate any of the prescribed reasons for deviation in
the memorandum and failure by Pikitup to record and report same to the Board
and to the meeting of the Council amounts to a contravention of the MFMA
SCM sub-regulations 36(1) and (2).

(dd) Accordingly, the conduct of Pikitup in the circumstances amounts to improper
conduct in terms of section 182(1)(a) of the Constitution and maladministration
as envisaged in section 6(4)(a)(i) of the Public Protector Act.
The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is that:

The Chairperson of the Pikitup Board must:

(a) Within 60 working days of the issuing of this report, ensure that disciplinary steps are taken against all implicated officials of Pikitup who together with Ms Nair flouted, subverted or violated the MFMA and the Pikitup’s SCM Policy in this matter;

(b) Within 60 working days of the issuing of this report, ensure that disciplinary steps are taken against all implicated officials of Pikitup who together with Ms Nair flouted, subverted or violated the Pikitup’s Recruitment and Selection Policy in this matter;

(c) Within 60 working days of the issuing of this report, ensure that all irregular employment appointments identified in this report are reviewed and properly processed in line with the Pikitup’s Recruitment and Selection Policy;

(d) Within 60 working days of the issuing of this report, ensure that all the contracts with the service providers or consultants irregularly procured are cancelled;

(e) Within 60 working days of the issuing of this report, ensure that criminal action is instituted (in accordance with section 173(2) of the MFMA) against all current and/or former employees of Pikitup implicated in this report who have committed an act of financial misconduct;

(f) Within 90 working days of the final report, ensure, through a civil litigation claim and in line with section 176(2) of the MFMA, recovery of unauthorised, irregular or fruitless and wasteful expenditure by Ms Nair and/or any other official in their
personal capacity for all the financial misconduct identified in this report. An actual amount is to be determined by the Board following a thorough verification of financial losses emanating from the procurement and misconduct identified in this report;

(g) Within 60 working days of the issuing of this report, ensure that all the relevant Pikitup staff receive regular training on the Pikitup’s SCM Policy as well as the Recruitment and Selection Policy; and

(h) Within 30 working days of the issuing of this report, the Pikitup’s Board of Directors must implement the following recommendations from the National Treasury:

(aa) The Board should ensure that regular Supply Chain Management training is provided to all Pikitup staff involved in procurement to ensure consistent and appropriate application of Supply Chain Management prescripts.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND VIOLATION OF PIKITUP SUPPLY CHAIN MANAGEMENT PROCESSES AND PROCEDURES IN CONNECTION WITH THE AWARDING AND SUBSEQUENT EXTENSION OF CONTRACT PU298/2012 TO AQUA TRANSPORT AND PLANT HIRE; THE IRREGULAR PROCUREMENT OF OFFICE SPACE TO RELOCATE PIKITUP HEAD OFFICE; APPOINTMENT OF CONSULTANTS; APPOINTMENT, REMOVAL & REPLACEMENT OF EMPLOYEES IN VIOLATION OF PIKITUP RECRUITMENT AND SELECTION AND PAYROLL POLICY AND MISCONDUCT ARISING FROM THEFT OF PIKITUP CELLULAR TELEPHONES

1. INTRODUCTION

1.1 This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published in terms of section 8(2A)(a) of the Public Protector Act, 1994 (Public Protector Act).

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

1.2.1 The Chairperson of the Pikitup Board, Mr Bheki Shongwe;

1.2.2 The Managing Director of Pikitup, Mr Lungile Dlamini;

1.2.3 Councillor (Cllr) Herman Mashaba, Executive Mayor of the City of Johannesburg Metropolitan Municipality;

1.2.4 Cllr Vasco da Gama, Speaker of the City of Johannesburg Metropolitan Municipality;
1.2.5 Ms Amanda Nair, the former Pikitup Managing Director; and

1.2.6 To all other officials implicated herein.

1.3 The report is also circulated to:

1.3.1 The City Manager of Johannesburg Metropolitan Municipality, Dr Ndivhoniswa Lukhwareni;

1.3.2 The Auditor General of the Republic of South Africa, Mr Thembekile Kimi Makwetu;

1.3.3 The Acting Chief Procurement Officer of the National Treasury, Mr Willie Mathebula; and

1.3.4 The first and second Complainants.

1.4 Pikitup Johannesburg (SOC) Limited (Pikitup) is a municipal entity wholly owned by the City of Johannesburg (the City) and is the official integrated waste management service provider to the City. Pikitup employs more than 4500 people, using more than 200 trucks to provide refuse collection services to the City’s private and business residents.

1.5 Pikitup is responsible for keeping the City clean, and preserving an attractive and hygienic environment for all residents and visitors alike. It has 12 waste management depots strategically located throughout the City, 44 garden refuse sites, and 4 active landfill sites.
2. THE COMPLAINT

2.1. The complaints investigated were received from Mr Philip Richardson on 30 August 2013 and the South Africa Municipal Workers Union (SAMWU), (the Complainants) on 11 March 2016.

2.2. In the first complaint, Mr Phillip Richardson (the first Complainant) alleged that:

2.2.1. A well-known Pikitup service provider, Aqua Transport and Plant Hire (Aqua), has frequently attracted the attention of the media over 12 months;

2.2.2. The contract awarded to Aqua by Pikitup was observed as being 'under investigation,' but was progressing normally with payments being made to the service provider;

2.2.3. Since public funds were involved, it appeared that both Pikitup and Aqua considered themselves totally above the constructs of due process and believed they could act with impunity as the said contracts were progressing normally despite objections so widely reported in the media; and

2.2.4. An article authored by Anna Cox titled "Pikitup boss pays R228k to dispute reports" issued in IOL news on 19 June 2013 at 11:26 am stated the following:

"On 11 June 2013, The Star wrote that Ms Amanda Nair controversially awarded a multimillion-rand tender to a firm implicated in alleged fraud - an allegation contained in the forensic investigation commissioned by the public utility. In both instances, Nair and Senior Management of Pikitup refused to answer queries from The Star;"
The Star revealed that Ms Nair had awarded the contract to Aqua even though the City of Joburg's Bid Adjudication Committee had questioned her decision because of a forensic investigation by Ernst & Young (E&Y) which had implicated the company in alleged wrongdoing;

Pikitup paid almost R6 million rand for E&Y to investigate companies providing services to it. It was recommended that Aqua be charged criminally for fraud because of alleged irregular activities, including suspected tender collusion;

In Tuesday’s advert, Nair said the committee recommended that Aqua be given the contract despite the fact that the committee met in January and refused to recommend that Aqua be granted the contract. She also said there was fully compliance with the tender process. Ms Nair stated that:

She deemed it appropriate to ensure full probity throughout the Yellow Plant tender process, and to this end, a firm of forensic auditors was appointed to conduct a full due diligence of every step. The final assessment was that the process was fair, open and transparent.

She also requested a peer review of external auditors prior to approving the recommendation of the Bid Adjudication Committee (BAC) to conduct a review as she anticipated that the process and award may well be placed under scrutiny. They arrived at the same conclusions as the forensic auditors."

2.3. SAMWU, (the second Complainant), also alleged the following:

2.3.1. Ms Amanda Nair, Pikitup’s former Managing Director (Ms Nair), extended the contract of Aqua and increased it by R40 million despite a decision by the previous Board not to extend it;
2.3.2. Ms Nair irregularly appointed friends and former colleagues without subjecting them to an interview process and improperly offered them higher salary scales than the normal remuneration scales as prescribed by the Pikitup Remuneration Policy;

2.3.3. The friends and former colleagues allegedly appointed improperly and offered higher salary scales were:

2.2.3.1 Mr Mthembeni Ncanana;

2.2.3.2 Ms Phumla Mokele;

2.2.3.3 Mr Kelvin Ngwenya;

2.2.3.4 Ms Kathija Docrat;

2.2.3.5 Ms Michelle Alexander;

2.2.3.6 Mr Ike Sampson;

2.2.3.7 Mr Gerhard Booysen;

2.2.3.8 Mr Donovan Denyssen;

2.2.3.9 Ms Aneesa David; and

2.2.3.10 Ms Priya Lutchman.

2.3.4. Mr Kelvin Ngwenya who is the son of Ms Nair’s domestic worker and resided at her house came in with a group of interns and was the only one appointed permanently without following proper recruitment processes. The interns at
Pikitup were compensated approximately R2000.00 per month, but Mr Ngwenya was paid R9 500.00 per month;

2.3.5. Ms Priya Lutchman was moved from the General Manager: Cost and Management Accounting position and placed as a General Manager: Supply Chain Management;

2.3.6. Mr Gerhard Booysen was recommended to Pikitup by a former General Manager: Fleet, Mr James Hunter, without an interview and was appointed as the Acting General Manager: Fleet;

2.3.7. There are salary discrepancies amongst employees of Pikitup as all the officials that are related to Ms Nair were remunerated on higher salary scale levels. In demonstrating the levels of the salary discrepancies, SAMWU further stated that:

2.3.7.1. In October 2011, Mr Ike Sampson was absorbed with a salary of R3000.00 per month. Later in 2012, Mr Sampson became Ms Nair’s Executive Driver/Messenger and his salary was adjusted to R15 000.00 per month. At the time of lodging the complaint, Mr Sampson was earning R16 951.13 per month;

2.3.7.2. In May 2015, Mr Donovan Denyssen was re-appointed as the General Manager: Infrastructure at a salary of R2 400 000.00 per annum;

2.3.7.3. The salary of Mr Mthembeni Ncanana, the General Manager: Partnership was increased from R760 000.00 to R1 105 033.00 per annum during 01 March 2013 and 01 December 2014;

2.3.7.4. In April 2015, Ms Aneesa David was appointed as the General Manager: Fleet at a salary of R1 300 000.00 per annum;
2.3.8. Ms Nair removed black employees from critical positions and replaced them with Indian employees. The officials who were removed and replaced were:

2.3.8.1. Ms Lindiwe Hleza, the Chief Financial Officer (CFO), was replaced with Ms Suren Maharaj;

2.3.8.2. Dr Wayne Letoaba, the Occupational Medical Specialist, was replaced with Mr Ismael Dawood;

2.3.8.3. Ms Edith Ndlovu, Personal Assistant to Ms Nair, was replaced with Ms Sarah Pillay;

2.3.8.4. Ms Susan Lehola, the Acting General Manager: Supply Chain Management, was replaced with Ms Priya Lutchman;

2.3.8.5. Ms Abigail Muguto, the General Manager: Bulk, was replaced with Mr Dan Moodley;

2.3.8.6. Mr Ika Magasa, the Chief Operating Officer (COO), was replaced with Ms Aneesa David; and

2.3.8.7. Ms Matsepo Kekana, the Project Manager, was also replaced, but the name of the person who replaced her was not provided by the Complainant.

2.3.9. Ms David was promoted to the level of the COO without completing her probation as the General Manager: Fleet;

2.3.10. During April 2014, Mr Denyssen resigned from Pikitup after he was charged with misconduct for theft of Pikitup cellular telephones which he unofficially issued to Ms Nair and her family members. In June 2015, Ms Nair and Mr
DenysSEN were arrested by the Hillbrow SAPS detectives for theft of Pikitup cellular telephones as per CAS 1308/04/2014 and were detained at Hillbrow SAPS. Pikitup paid for her bail and legal representation. No disciplinary action was taken against Ms Nair while Pikitup funds were used to pay for her bail and legal representation; and

2.3.11. All consultants appointed during Ms Nair’s tenure were not appointed through proper Supply Chain Management processes and were loaded on the SAP system as Pikitup employees. The consultants received benefits like normal employees and were further provided with tools of trade at the expense of Pikitup.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 Mandate of the Public Protector

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

3.1.2 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”.

3.1.3 Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.1.4 The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purpose of an investigation.

3.1.5 In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.

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

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at paragraph [76].
3.1.7 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. (paragraph 67);

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

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

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

3.1.11 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made; (paragraph 71);

3.1.12 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the
exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence; (paragraph 71(a));

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

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

3.1.15 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017), the Court held as follows:

3.1.16 "The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective; (paragraphs 85 and 152 of the judgment)

3.1.17 There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4) (c) (ii) of the Public Protector Act; (paragraphs 91 and 92 of the judgment)

3.1.18 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers; (paragraphs 100 and 101 of the judgment):

3.1.18.1 Conduct an investigation;
3.1.18.2 Report on that conduct; and

3.1.18.3 To take remedial action.

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

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

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

3.1.22 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action. (paragraph 112 of the judgment)

3.1.23 Pikitup is a municipal entity wholly owned by the City which is its sole shareholder, responsible for Integrated Waste Management regulated by the Local Government: Municipal Finance Management Act, 56 of 2003 (the MFMA) and the Local Government: Municipal Systems Act 32 of 2000 and the complaints lodged against it relate to maladministration, improper conduct in state affairs and abuse or unjustifiable exercise of the power by person performing public function. As a result of the above, this matter falls within the Public Protector’s jurisdiction.

3.1.24 The jurisdiction of the Public Protector was not disputed by any of the parties.
4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act recognises the Public Protector's authority to investigate and report her/his findings regarding any complaint lodged.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?
4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. In the Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA), the Supreme Court of Appeal (SCA) made it clear that it is the Public Protector’s duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the government institutions that were under investigation to prevent maladministration and prejudice. In this case, key reliance was placed on the institutions’ comprehensive Supply Chain Management Policies in addition to national laws, policies and guidelines.

4.2.4 The Public Protector’s own institutional touchstones, being principles from previous reports, are always, and were also taken into account.

4.2.5 The enquiry regarding remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.2.6 In the case of conduct failure as was the case in the complaints investigated, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.
4.2.7 The substantive scope of the investigation focused on compliance with the law and prescripts regarding the complaint and allegations.

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

4.3.1 Whether Pikitup improperly awarded and subsequently extended the contract for the supply, operation and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as ad hoc rentals as and when required of the service provider (Yellow Plant project) to Aqua despite the findings of Ernst & Young, Gobodo Forensic & Investigative Accounting and National Treasury investigations

4.3.2 Whether Ms Amanda Nair irregularly appointed her friends, former colleagues and relatives and improperly offered them higher salary scale levels

4.3.3 Whether Ms Amanda Nair irregularly removed black employees from critical positions and replaced them with Indian employees

4.3.4 Whether Pikitup improperly failed to investigate the alleged theft of Pikitup cellular telephones which resulted in Ms Amanda Nair and Mr Denyssen being arrested by Hillbrow South African Police Service, with bail paid and legal representation provided to both of them by Pikitup.

4.3.5 Whether Ms Amanda Nair irregularly appointed Service Providers/Consultants without following proper Supply Chain Management processes of Pikitup.

4.3.6 Whether the procurement process followed by Pikitup in the acquisition of its office space to relocate Pikitup Head Office was improper and in contravention of the applicable legal prescripts.
4.4 Key Sources of information

4.4.1 Correspondence exchanged

Correspondence exchanged between my office and Pikitup Chairperson/s and officials:

4.4.1.1 A copy of a letter dated 30 May 2014 from my office addressed to Dr Nomonde Mabuya, the former Chairperson of the Pikitup Board of Directors regarding investigations and requesting information.

4.4.1.2 A copy of a letter dated 23 July 2014 from my office addressed to Dr Mabuya regarding investigations and requesting information.

4.4.1.3 A copy of a letter dated 24 July 2014 from Dr Mabuya addressed to my office undertaking that Pikitup will provide its responses and supporting documents.

4.4.1.4 A copy of a letter dated 25 August 2014 from Dr Mabuya addressed to my office providing a response and supporting documents.

4.4.1.5 An email dated 26 August 2014 from my investigation team addressed to Mr Francois Dekker, Pikitup Company Secretary, acknowledging receipt of Pikitup's responses and supporting documents.

4.4.1.6 A copy of a letter dated 20 November 2014 from my office addressed to Dr Mabuya requesting further information on responses provided on 26 August 2014.
4.4.1.7 A copy of a letter dated 12 November 2014 from Dr Mabuya addressed to my office responding to a further request letter dated 20 November 2014.

4.4.1.8 An email dated 12 December 2014 from my office addressed to Mr Dekker acknowledging receipt of Pikitup’s responses and supporting documents.

4.4.1.9 A copy of a letter dated 02 December 2015 from Adv Kevin Sifiso Malunga, the Deputy Public Protector, addressed to Dr Patricia Hanekom, Chairperson of the Pikitup Board of Directors regarding the investigation and requesting submission of documents.

4.4.1.10 Various emails dated 04 December 2015 from Mr Dekker to my office regarding an invitation to Pikitup’s Board meeting on 07 December 2015 as well as providing a partial response to a letter dated 02 December 2015.

4.4.1.11 Tender Index and Checklist confirmation of documents dated 18 December 2015 provided by Mr David Muhadi, Pikitup SCM official and received by my investigation team.

4.4.1.12 An email dated 15 March 2016 from my office addressed to Mr Dekker requesting details of Pikitup Board members and officials to be interviewed by the Deputy Public Protector.

4.4.1.13 An email dated 15 March 2016 from Mr Dekker addressed to my office providing details of Pikitup Board members and officials identified to be interviewed.

4.4.1.14 A copy of a letter dated 30 March 2016 from the Deputy Public Protector addressed to Dr Hanekom regarding an investigation on a complaint received from SAMWU and requesting submission of documents.
4.4.1.15 A copy of a letter dated 30 March 2016 from the Deputy Public Protector addressed to Dr Hanekom and all members of the Pikitup Board to avail themselves for an interview scheduled for 03 May 2016 at 10H00.

4.4.1.16 A copy of a letter dated 30 March 2016 from the Deputy Public Protector addressed to Mr David Muhadi, the Sourcing Specialist: SCM Department requesting Mr Muhadi to avail himself for an interview to be held on 03 May 2016.

4.4.1.17 A copy of a letter dated 30 March 2016 from the Deputy Public Protector addressed to Ms Christa Venter requesting her to avail herself for an interview to be held on 03 May 2016 at 14H00.

4.4.1.18 A copy of a letter dated 30 March 2016 from the Deputy Public Protector addressed to Cllr Matsidiso Mfikoe requesting her to avail herself for an interview to be held on 03 May 2016 at 15H00.

4.4.1.19 A copy of a letter dated 30 March 2016 from the Deputy Public Protector addressed to Mr Suren Maharaj, the Chief Financial Officer, requesting him to avail himself for an interview to be held on 04 May 2016 at 10H00.

4.4.1.20 A copy of a letter dated 30 March 2016 from the Deputy Public Protector addressed to Mr Jonathan Thekiso, the Executive Director: Corporate Services requesting him to avail himself to an interview to be held on 04 May 2016 at 11H00.

4.4.1.21 A copy of the letter dated 30 March 2016 from the Deputy Public Protector addressed to Ms Nair requesting her to avail herself for an interview to be held on 04 May 2016 at 12H00.
4.4.1.22 An email dated 14 April 2016 from Dr Hanekom addressed to the Deputy Public Protector regarding the investigation.

4.4.1.23 A copy of a letter dated 05 May 2016 from my office addressed to Mr Thekiso regarding provision of information relating to all salary scales of the Managing Director, Executive Directors, General Managers and Managers from the date of employment which will reflect all statutory increases and any other increases.

4.4.1.24 A copy of a letter dated 05 May 2016 from my office addressed to Mr Maharaj requesting a detailed response into the allegation of the irregular procurement of a building to accommodate Pikitup Head Office and supporting information and documents as well as information relating to the payment of bail and legal representation for Ms Nair and Mr Denyssen.

4.4.1.25 An email dated 09 May 2015 from Mr Thekiso providing documents relating to the appointment of a General Manager: Fleet and Manager: Fleet Operations.

4.4.1.26 A copy of a letter dated 02 June 2016 from the Deputy Public Protector addressed to Ms David requesting her to avail herself for an interview to be held on 13 June 2016 at 10H00.

4.4.1.27 A copy of a letter dated 02 June 2016 from the Deputy Public Protector addressed to Mr Donavan Denyssen, GM: Enterprise Infrastructure requesting him to avail himself for an interview to be held on 13 June 2016 at 12H30.

4.4.1.28 A copy of a letter dated 02 June 2016 from the Deputy Public Protector addressed to Mr Mthembeni Ncanana, General Manager: Human Resource
4.4.1.29 A copy of a letter dated 02 June 2016 from the Deputy Public Protector addressed to Mr Kelvin Ngwenya, Payroll Administrator, requesting him to avail himself for an interview to be held on 14 June 2016 at 10H00.

4.4.1.30 A copy of a letter dated 02 June 2016 from the Deputy Public Protector addressed to Dr Mabuya requesting her to avail herself for an interview to be held on 14 June 2016 at 12H30.

4.4.1.31 A copy of a letter dated 02 June 2016 from the Deputy Public Protector addressed to Ms Phumla Mokele, Manager: Human Resource Services requesting her to avail herself for an interview to be held on Wednesday, 15 June 2016 at 10H00.

4.4.1.32 A copy of a letter dated 02 June 2016 from the Deputy Public Protector addressed to Mr Gerhardus Boysen, Manager: Fleet & Operations requesting him to avail himself for an interview to be held on 15 June 2016 at 12H30.

4.4.1.33 A copy of a letter dated 02 June 2016 from the Deputy Public Protector addressed to Mr Mzukisi Tshem, Acting: Chief Operations Officer requesting him to avail himself for an interview to be held on 15 June 2016 at 15H30.

Correspondence exchanged between my office and National Treasury:

4.4.1.34 A copy of a letter dated 28 January 2015 from my investigation team addressed to Mr S Tshitangano, the Chief Director: Governance, Monitoring and Compliance regarding National Treasury Report on verification of compliance with statutory and regulatory requirements during the bidding
process in respect of contract PU298/2012 and in particular to a deviation on a recommendation that Pikitup should set aside the said award and contract to Aqua Transport and Plant Hire.

4.4.1.35 A copy of a letter dated 12 February 2015 from Mr Tshitangano addressed to my office regarding discussions with Pikitup on the challenges to implement the recommendation to set aside the award and proposed steps to be undertaken by Pikitup.

Correspondence exchanged between my office and Aqua Transport & Plant Hire:

4.4.1.36 A copy of a letter dated 30 March 2016 from the Deputy Public Protector addressed to Mr Donavan Naicker, Director: Aqua Transport & Plant Hire requesting him to avail himself for an interview to be held on 04 May 2016 at 14H00.

4.4.1.37 A copy of a letter dated 05 May 2016 from my office addressed to Mr Naicker requesting him to provide all records of invoices presented to Pikitup in respect of the contract PU298/2012, all records of paid and unpaid including invoices, all email correspondence, letters sent and received between Aqua and Pikitup before, during and after the award of the contract, all email correspondence, letters sent and received during and after the Pikitup strike action, and all invoices presented by Aqua for the services rendered during the strike action.
Correspondence exchanged between the Public Protector and Land Bank:

4.4.1.38 A copy of a letter dated 23 May 2016 addressed to Ms Mpule Dlamini, Executive Manager: Human Resources regarding confirmation of Ms Phumla Mokele’s employment history with Land Bank.


4.4.1.40 A copy of a letter dated 25 May 2016 from Ms Dlamini, providing the employment history of Ms Phumla Mokele.

4.4.2 Documents provided and received

Documents relating to the award and subsequent extension of contract number PU298/2012 to Aqua Transport and Plant Hire:

4.4.2.1 A copy of a letter dated 26 July 2012 from Mr Lawrence Boya, Pikitup Acting Managing Director to Mr Vuyo Mlokoti, the City’s Group Executive Director requesting guidance regarding the procurement of the yellow plant.

4.4.2.2 A copy of a letter dated 31 July 2012 from Mr Vuyo Mlokoti, City of Johannesburg Group Executive Director to Mr Boya, Pikitup Acting Managing Director advising Pikitup to proceed and initiate its own procurement process.

4.4.2.3 A copy of an Internal Memorandum dated 27 August 2012 requesting permission to Mr Boya to approve and appoint officials to serve on the Bid
Specification and Evaluation Committees for the Landfill Plant, Illegal Dumping and Garden sites project.

4.4.2.4 A copy of an appointment letter to serve on Bid Specification and Evaluation Committees approved by Mr Boya dated 27 August 2012 and received by David Muhadi on 19 September 2012.

4.4.2.5 A copy of an appointment letter to serve on Bid Specification and Evaluation Committees approved by Mr Boya dated 27 August 2012 and received by Mr Emmanuel Khomela on 19 September 2012.

4.4.2.6 A copy of an appointment letter to serve on Bid Specification and Evaluation Committees approved by Mr Boya dated 27 August 2012 and received by Mr Desmond Manneson on 19 September 2012.

4.4.2.7 A copy of an appointment letter to serve on Bid Specification and Evaluation Committees approved by Mr Boya, Acting Managing Director dated 27 August 2012 and received by Mr Ben Mochadibane on 19 September 2012.

4.4.2.8 A copy of an appointment letter to serve on Bid Specification and Evaluation Committees approved by Mr Boya dated 27 August 2012 and received by Mr Mzikusi Tshem on 19 September 2012.

4.4.2.9 A copy of an appointment letter to serve on Bid Specification and Evaluation Committees approved by Mr Boya dated 27 August 2012 and received by Mr Peter Hlubi on 19 September 2012.

4.4.2.10 A copy of an appointment letter to serve on Bid Specification and Evaluation Committees approved by Mr Boya dated 27 August 2012 and received by Mr Simphiwe Madlanga on 19 September 2012.
4.4.2.11 A copy of an appointment letter to serve on Bid Specification and Evaluation Committees approved by Mr Boya dated 27 August 2012 and received by Mr Patrick Galloway on 19 September 2012.

4.4.2.12 A copy of an Internal Memorandum dated 21 September 2012 requesting permission from Mr Boya to approve and appoint officials to serve on the Bid Specification and Evaluation Committees for the Landfill Plant, Illegal Dumping and Garden sites project

4.4.2.13 A copy of an appointment letter to serve on Bid Specification and Evaluation Committees approved by Mr Boya dated 21 September and signed by Mr Gert van Wyk on 25 September 2012.

4.4.2.14 A copy of an appointment letter to serve on Bid Specification and Evaluation Committees approved by Mr Boya dated 21 September and signed by Mr Steen Maoseu on 16 November 2012.

4.4.2.15 A copy of a Request to Initiate a Tender with a draft copy of specification, scope of work, special conditions and evaluation criteria dated 05 September 2012 and received by the SCM on 14 September 2012 including availability of budget approved on 04 December 2012.

4.4.2.16 Copies of the agenda of the Bid Specification Committee (BSC), attendance register and an undertaking of confidentiality and impartiality dated 18 September 2012.

4.4.2.17 Copies of the minutes of the Bid Specification Committee held on 19 September 2012 signed on 20 September 2012 by Mr David Muhadi as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 19 September 2012.
4.4.2.18 Copies of the minutes of the Bid Specification Committee held on 20 September 2012 signed by Mr Muhadi on 20 September 2012 as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 19 September 2012.

4.4.2.19 Copies of the minutes of the Bid Specification Committee held on 25 September 2012 signed by Mr Muhadi on 26 September 2012 as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 25 September 2012.

4.4.2.20 Copies of the minutes of the Bid Specification Committee held on 26 September 2012 signed by Ms Tinyiko Maluleke on 27 September 2012 as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 26 September 2012.

4.4.2.21 Copies of the minutes of the Bid Specification Committee held on 02 October 2012 signed by Ms Maluleke on 02 October 2012 as the Chairperson, approval of specification, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 02 October 2012.

4.4.2.22 Copies of the minutes of the Bid Specification Committee held on 04 October 2012 signed by Ms Maluleke on 08 October 2012 as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 04 October 2012.
4.4.2.23 Copies of the minutes of the Bid Specification Committee held on 08 October 2012 signed by Mr Muhadi on 08 October 2012 as the Chairperson, approval of specification, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 08 October 2012.

4.4.2.24 A draft copy of the bid specification.

4.4.2.25 A copy of the invitation to prospective Bidders in respect of the provision of plant, equipment and machinery, maintenance and operation for Pikitup landfill and garden sites and illegal dumping sites and (ad hoc rental as and when required) for 3 years approved by Mr Boya on 19 September 2012.

4.4.2.26 A request for quotation to appoint an agency to advertise the tender and quotations placed on the Pikitup noticeboard and Pikitup website with a closing date on 19 September 2012.

4.4.2.27 A copy of the tax invoice dated 17 October 2012 to the amount of R52 354.60.

4.4.2.28 Copies of the advertisement placed in the Sowetan and City Press newspapers on 12 October 2012; Sunday Times newspaper on 14 October 2012 and The Star newspaper on 15 October 2012, including proof of the website advertisement.

4.4.2.29 A copy of the tender buying list containing the names of the company, contact person, contact number, bid number, date and signature.

4.4.2.30 A copy of bid document number PU298/2012.
4.4.2.31 Copies of the attendance register for the briefing session held on 19 October 2012, price schedule addendum forwarded to the bidders and proof of an email dated 24 October 2012, questions received prior to the closing date of the tender.

4.4.2.32 Attendance register of the meeting held on 05 November 2012 to discuss questions and response to questions circulated to bidders.

4.4.2.33 Copies of the tender opening register with a list of 14 bids received from bidders dated 12 November 2012 as well as attendance register and an undertaking of confidentiality and impartiality and declaration of interest.

4.4.2.34 Copies of bids received from Dikala Leka Zenzelani JV, Interwaste Environmental Solutions, Rajavic Projects & Trading, Rantoa Service Provider, Casalinga t/a Waste Rite, Midmar Plant Hire, X-Moor t/a Crossmoor Transport, Mbitha and Bankuna JV, Aqua Transport & Plant Hire, Tranacon Construction, Boitumelo, Mphephethwa, Barleda 232 cc and Metsana/Moreteng JV.

4.4.2.35 Copies of the agenda of the Bid Evaluation Committee (BEC), its minutes of 13 November 2012 signed by Ms Maluleke on 13 November 2012 as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 13 November 2012.

4.4.2.36 Copies of the agenda of the BEC, its minutes held on 16 November 2012 signed by Ms Maluleke on 16 November 2012 as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 16 November 2012.
4.4.2.37 Copies of the agenda of the BEC, its minutes of 20 November 2012 dated 16 November 2012 signed by Mr Muhadi as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 20 November 2012.

4.4.2.38 Copies of the agenda of the BEC, its minutes of 21 November 2012 dated 16 November 2012 signed by Mr David Muhadi as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 21 November 2012.

4.4.2.39 Copies of the minutes of the BEC held on 03 December 2012 dated 03 December 2012 signed by Ms Maluleke as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 03 December 2012.

4.4.2.40 Copies of the agenda of the BEC, its minutes held on 05 December 2012 and dated 05 December 2012, signed by Ms Maluleke as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 05 December 2012.

4.4.2.41 Copies of the minutes of the BEC held on 12 December 2012 dated 13 December 2012, signed by Ms Maluleke as the Chairperson.

4.4.2.42 Copies of the pre-compliance checklist of bidders, the BEC members’ functionality evaluation score sheets, the site inspection attendance register and comments.
4.4.2.43 The National Treasury Restriction verification list, reference check letters, Pikitup and the City’s verification of shareholders.

4.4.2.44 Copies of emails dated 27 November 2012 to 03 December 2012 between Mr Muhadi, Ms Lindiwe Hleza and Ms Mahlatsi Ramashala.

4.4.2.45 Copies of emails dated 27 November, 01 and 04 December 2012 from Ms Ramashala, Ms Hleza and Peter Wilgenbus addressed to Mr Muhadi and Ms Hleza relating to an opinion on financial statements.

4.4.2.46 Copies of emails dated 11 December 2012 from Mr Basil Chinasamy to Ms Ramashala and a response dated 12 December 2012 providing an opinion on the suspension of the Bid Evaluation Committee members.

4.4.2.47 A copy of the BEC report dated 11 December 2012.

4.4.2.48 A copy of an email dated 12 December 2012 from Mr Muhadi addressed to Mr Chinasamy forwarding the BEC report.

4.4.2.49 A copy of the budget confirmation from Finance dated 20 December 2012 prior to the awarding of the tender.

4.4.2.50 A copy of the email dated 20 December 2012 from Mr Chinasamy addressed to Ms Ramashala regarding the BEE scorecard of Crossmoor.

4.4.2.51 A copy of the email dated 21 December 2012 from Ms Ramashala providing an opinion on the BBBEE scorecard of Crossmoor.

4.4.2.52 A copy of the Internal Memorandum dated 21 December 2012 from Mr Chinasamy addressed to Ms Nair.
4.4.2.53 Minutes of the Peer Review meeting held on 22 December 2012.

4.4.2.54 An email dated 24 December 2012 from Mr Chinasamy addressed to Mr Galloway, Mr Magasa, Ms Venter, Mr Tshem and Mr Taljaard regarding scaling down the scope of work in line with the available budget.

4.4.2.55 An email dated 27 December 2012 from Mr Tshem addressed to Mr Galloway regarding the scaling down the scope of work in line with the available budget.

4.4.2.56 A copy of the agenda of the Bid Adjudication Committee (BAC) scheduled on 27 December 2012.

4.4.2.57 An email dated 28 December 2012 from Ms Ramashala addressed to Mr Chinasamy regarding the exclusion of Close Corporations based on failure to submit annual financial audited statements.

4.4.2.58 An email dated 03 January 2013 from Mr Chinasamy addressed to Ms Ramashala regarding the audited statements.

4.4.2.59 An email dated 07 January 2013 from Ms Ramashala addressed to Mr Chinasamy regarding audited statements.

4.4.2.60 An email dated 07 January 2013 from Mr Tshem to Ms Maluleke regarding possible operational risks on reduction of scope.

4.4.2.61 A draft report by Gobodo Forensic and Investigative Accounting (GFIA) dated 07 January 2013 on the Procurement Review in respect of the award of tender PU298/2012.
4.4.2.62 Minutes of the BAC meeting held on 08 January 2013 signed by Mr Magasa on 06 February 2013 as the Chairperson, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 08 January 2013.

4.4.2.63 An email dated 15 January 2013 from Ms Venter addressed to Ms Maluleke regarding reduction of scope.

4.4.2.64 An unsigned memorandum dated 15 January 2013 from Supply Chain Management providing feedback to the BAC regarding issues raised during its meeting held on 08 January 2013.

4.4.2.65 A sworn statement dated 15 January 2013 from Mr Deon Wilson, the Divisional Director at GFIA regarding collusive tendering.

4.4.2.66 An email dated 16 January 2013 from Ms Venter regarding the scope reduction.

4.4.2.67 Unsigned minutes of the BAC held on 17 January 2013 and chaired by Ms Hleza, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 17 January 2013.

4.4.2.68 A BAC report dated 18 January 2013.

4.4.2.69 A copy of the letter dated 30 October 2012 from Joe da Silva, Ernst & Young addressed to Ms Nair.

4.4.2.70 A report from the Ernst & Young in respect of an investigation into alleged irregular award of contracts to identified suppliers.
4.4.2.71 A report dated 29 January 2013 providing the BAC with information relating to the Ernst & Young report.

4.4.2.72 A copy of the revised budget schedule.

4.4.2.73 An unsigned memorandum dated 31 January 2013 from Mr Tshem to the Supply Chain Management and the Managing Director regarding the impact of the scope reduction.

4.4.2.74 A memorandum dated 06 February 2013 providing the BAC with feedback of its meeting held on 17 January 2013.

4.4.2.75 An email dated 08 February 2013 from Mr Muhadi addressed to all the bidders regarding the extension of the validity of Tender PU298/2012.

4.4.2.76 An email dated 15 February 2013 from Ms Nair addressed to Mr Chinasamy noting recommendations received from the BAC.

4.4.2.77 Unsigned minutes of the BAC held on 18 February 2013, chaired by Ms Hleza, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest dated 18 February 2013.

4.4.2.78 Copies of the letters from Pikitup dated 27 February 2013 addressed to Aqua Transport Plant Hire, Midmar Plant Hire CC and Crossmoor Transport Plant regarding collusive tendering.

4.4.2.79 Responses from Aqua Transport Plant Hire, Midmar Plant Hire CC and Crossmoor Transport Plant addressed to Pikitup regarding collusive tendering.
4.4.2.80 An email dated 28 February 2013 from Doris Dondur to Mr Chinasamy providing a synopsis and resolutions on the finding of the Ernst & Young report.

4.4.2.81 A memorandum dated 06 March 2013 from Supply Chain Management providing the BAC with issues raised during its meeting held on 25 February 2013.

4.4.2.82 An addendum report to the Final Report dated 07 January 2013 from Gobodo Forensic and Investigative Accounting regarding due diligence in respect of the tender.

4.4.2.83 Minutes of the BAC dated 12 March 2013, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest.

4.4.2.84 Minutes of the BAC dated 13 March 2013, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest.

4.4.2.85 The BAC's report dated 13 March 2013.

4.4.2.86 A report dated 14 March 2013 from the GFIA in respect of the award of the tender.

4.4.2.87 Minutes of the BAC dated 15 March 2013, attendance register and an undertaking of confidentiality and impartiality, agreement to confidentiality of process and declaration of interest.

4.4.2.88 A report dated 14 March 2013 from the GFIA in respect of the award of the tender
4.4.2.89 Report from the GFIA dated 20 March 2013: "Report on findings in respect of noted commonalities between the bid submission of Aqua Transport and Plant Hire; Midmar Plant Hire CC; Crossmoor Transport Plant and Casalinga Investments T/S Waste-Rite."

4.4.2.90 A memorandum dated 22 March 2013 from Supply Chain Management providing the BAC on the outcomes of the GFIA investigation on collusive tendering.

4.4.2.91 Minutes of the BAC dated 22 March 2013, attendance register and undertaking of confidentiality and impartiality, Agreement to confidentiality of process and Declaration of interest.

4.4.2.92 Email dated 23 March 2013 from Ms Nair addressed to Mr Chinasamy regarding letter to the BAC.

4.4.2.93 Email dated 23 March 2013 from Lester Peter, Executive Director: Legal Compliance, Environment and Safety providing an opinion on the conduct of the BAC.

4.4.2.94 Minutes of the BAC dated 22 March 2013, attendance register and undertaking of confidentiality and impartiality, Agreement to confidentiality of process and Declaration of interest.

4.4.2.95 The BAC report dated 25 March 2013.

4.4.2.96 Memorandum from Supply Chain Management dated 25 March 2013 addressed to Ms Nair requesting permission to engage in negotiations with Aqua.
4.4.2.97 Minutes of the negotiation meeting held on 26 March 2013 including attendance register and agreement to confidentiality clause

4.4.2.98 Letter dated 28 March 2013 addressed to Aqua regarding award of the tender to Aqua.

4.4.2.99 Acknowledgement letter from Aqua addressed to Pikitup dated 28 March 2013.

4.4.2.100 Agreement dated 31 March 2013 between Pikitup and Aqua in respect of Tender PU298/2012

4.4.2.101 Report by National Treasury on *Verification of Compliance with Statutory and Regulatory Requirements during the Bidding process in respect of Contract PU298/2012.*

4.4.2.102 Letter from Mr Kenneth Brown, Chief Procurement Officer dated 10 December 2013 addressed to Dr N Mabuya, Chairperson of the Pikitup Board submitting NT report.

4.4.2.103 Letter dated 24 February 2014 addressed to Ms Nair regarding *Intention to institute disciplinary action.*

4.4.2.104 Letter dated 24 February 2014 from Dr Mabuya addressed to National Treasury regarding implementation of the recommendations of the National Treasury.

4.4.2.105 Referral dated 06 March 2013 to the Commission Competition regarding collusive tendering.
4.4.2.106 Notice of suspension and disciplinary charges dated 13 March 2014 from Dr N. Mabuya, Chairperson of the Pikitup Board addressed to Ms Amanda Nair, Managing Director of Pikitup.

4.4.2.107 Letter dated 14 May 2014 from Madlanga & Partners Attorneys addressed to Stephen Hardie Attorneys regarding charges against Ms Nair and the testimonies of witnesses that will be led during the hearing.

4.4.2.108 Transcript of the Disciplinary proceedings.

4.4.2.109 Disciplinary Findings and Recommendations dated 29 January 2015.

4.4.2.110 Letter dated 02 July 2015 from Mr Lutchman addressed to Aqua regarding extension of contract PU298/2012.

4.4.2.111 Referral of Complaint by Commission dated 16 September 2015 Referral to the Competition Tribunal against Aqua & Midmar.

Documents relating to alleged irregular appointment of Ms Nair's friends, former colleagues, and relatives and remunerated at higher salary than other Pikitup employees

4.4.2.112 Internal Memorandum dated 04 December 2012 regarding utilization of Pinpoint to handle recruitment of GM: HRS & GM IR.


4.4.2.114 List of Executive Directors, General Managers and Managing Director with salaries from 2012 to April 2016.
4.4.2.115 Email dated 16 March 2016 from Christo Marais addressed to Ms Nair, Managing Director regarding salary upper limits.

4.4.2.116 Extract from the Pikitup Board minutes of 13 September 2013 and accompanying report containing recommendations approved by the Board.

*Information relating to Ms Aneesa David and as well as Gerhard Booysen appointments and remuneration:*

4.4.2.117 Request to fill position of General Manager: Fleet dated 19 February 2015.

4.4.2.118 Job Profiles of General Manager: Fleet.

4.4.2.119 Advertisement dated 22 February 2015.

4.4.2.120 Response Management Summary Sheet: Consolidated list of CV received.

4.4.2.121 Response Management Summary Sheet: Consolidated list of recommended candidates.

4.4.2.122 Curriculum Vitae of Ms Aneesa David and a copy of certificate in Programme in Financial Management NQF Level 6 from University of South Africa.

4.4.2.123 Curriculum Vitae of Mr Gerhard Booysen.

4.4.2.124 Internal Memorandum date 02 April 2015 from Mr Ika Magasa, Chief Operating Officer addressed to Ms Nair, Managing Director requesting her to give permission for the inclusion of Ms David and Mr Gerhard Booysen.

4.4.2.125 Final score sheet dated 07 April 2015.
4.4.2.126 An Internal Memorandum dated 08 April 2015 from Mr Thekiso addressed to Ms Nair, Managing Director regarding a motivation for the appointments Ms David in the position of General Manager: Fleet as well as Mr Gerhard Booy森 in the position of Manager: Fleet Operations.

4.4.2.127 Contract of employment dated 10 April 2015 entered into between Ms David and Ms Nair.

4.4.2.128 Salary printout reflecting salaries of Ms David from date of employment.

4.4.2.129 Regret Letters addressed to Mr Ngubane, Nyathi and Gerhard Booy森.

4.4.2.130 Offer of Employment dated 09 April 2015 from Jonathan Thekiso, Executive Director: Corporate Services addressed to Mr Booy森 for the position of Manager: Fleet Operations (D2).

4.4.2.131 Request to fill position of Manager: Fleet Operations dated 09 April 2015.

4.4.2.132 Job Profiles of Manager: Fleet Operations.

4.4.2.133 Personal Credential Verification Certificate of Ms David.

4.4.2.134 Unsigned Reference Check Form- Ms David

4.4.2.135 Salary/payslip from previous employer-Ms David.

Information relating to Mr Donavan Desmond Denyssen’s appointment and remuneration:

4.4.2.136 Curriculum Vitae of Mr Denyssen and a copy of a Senior Certificate.
4.4.2.137 Contract of employment dated 14 April 2015 between Mr Denyssen and Pikitup.

4.4.2.138 Salary printout reflecting salaries of Mr Denyssen from date of employment.

4.4.2.139 Legal opinion from BG Bowman Gilfillan dated 25 November 2015 regarding confirmation of Mr Denyssen’s permanent employment with Pikitup.

4.4.2.140 Letter dated 09 December 2015 from Ms Hanekom addressed to Ms Nair regarding the legal opinion pertaining to Mr Denyssen’s probation and remuneration.

4.4.2.141 Letter dated 27 January 2016 from Ms Nair addressed to Ms Musa Jack, Mr Thekiso, Mr Maharaj and Mr Magasa reprimanding them for their involvement in the appointment of Mr Denyssen on 01 May 2015.

4.4.2.142 Report dated 08 February 2016 to the Board in respect of Mr Denyssen and related matters.

**Information relating to Mr Mthembeni Ncanana’s appointment and remuneration:**

4.4.2.143 A copy of the advertisement for the position of a General Manager: Human Resources & Industrial Relations at Level E1 with a closing date 20 October 2012.

4.4.2.144 Curriculum Vitae of Mr Ncanana.

4.4.2.145 Copies of Senior Certificate with effect from December 1994; Bachelor of Administration (Industrial Psychology and Public Administration) awarded in 1999; Post Graduate Diploma in HRM (Organisational Development)

4.4.2.146 Email dated 25 January 2016 from Mr Ncanana addressed to Mr Clive Viveiros: Pin Point.

4.4.2.147 Unsigned Internal Memorandum dated 31 January 2013 for the appointment of General Manager: Human Resources Services.

4.4.2.148 Offer of employment dated 04 February 2013 from Mr Thekiso addressed to Mr Ncanana for the position of General Manager: HRS.

4.4.2.149 Contract of employment dated 14 February 2013 entered into between Mr Ncanana and Ms Nair.

4.4.2.150 Salary printout reflecting salaries of Mr Ncanana from date of employment.

4.4.2.151 Request for salary review of Mr Ncanana dated 21 May 2013 from Mr Thekiso addressed to Ms Nair.

Information relating to Ms Phumla Mokele’s appointment and remuneration:

4.4.2.152 A copy of the advertisement with a closing date 09 November 2010 for a number of positions including the position of Manager: Human Resources Services.

4.4.2.153 Curriculum Vitae of Ms Phumla Mokele dated 29 April 2016, Senior Certificate, National Diploma with field of study in Human Resources Management.
4.4.2.154 A copy of the interview score sheet.

4.4.2.155 Internal Memorandum for the appointment of Manager: Human Resources dated 31 March 2011 approved by Mr Zami Nkosi, the former Managing Director.

4.4.2.156 Offer of employment dated 01 April 2011 from Mr Nkosi.

4.4.2.157 Outcomes of the grievance hearing dated 13 June 2012.

4.4.2.158 Request for salary adjustment of Ms Mokele dated 20 August 2014 from Mr Ncanana addressed to Mr Thekiso.

4.4.2.159 Salary printout reflecting salaries of Ms Mokele from date of employment.

4.4.2.160 Job profile, HR Officer: Compensation and HR Admin, Land Bank – Level 5b.

4.4.2.161 Job profile HR Officer Compensation and benefits 2009, Land Bank.


4.4.2.163 Ms Mokele’s salary printout – period 2008 to 2009 from Land Bank.

4.4.2.164 Ms Mokele’s salary printout – period 2009 to 2010 from Land Bank.

4.4.2.165 Ms Mokele’s salary printout – period 2010 to 2011 from Land Bank.

4.4.2.166 Ms Mokele Job Profile: HR Officer, Compensation and HR Admin at Land Bank.
4.4.2.167 Ms Mokele Job Profile: HR Officer, Compensation and Benefits at Land Bank reviewed on 26 February 2009.

*Information relating to Mr Kelvin Ngwenya's appointment and remuneration:*

4.4.2.168 Letter dated 28 January 2013 from Ms Nair addressed to Mr Thekiso requesting him to consider an internship or some level of on the job training for Mr Ngwenya.

4.4.2.169 Curriculum Vitae of Mr Ngwenya, Senior Certificate and academic record from UNISA reflecting subjects towards B Com in Business Management.

4.4.2.170 Temporary employment contract dated 04 February 2013 entered into between Mr Ngwenya and Ms Nair on behalf of Pikitup.

4.4.2.171 Temporary employment contract dated 25 April 2016 entered into between Mr Ngwenya and Mr Maharaj, Acting Managing Director on behalf of Pikitup.

4.4.2.172 Salary printout reflecting salaries of Mr Ngwenya from date of employment.

4.4.2.173 Internal Memorandum dated 01 February 2016 from Mr Thekiso and copied to Ms Nair addressed to Dr Trish Hanekom, Chairperson of the Board providing an update on the appointment of Mr Ngwenya.

*Information relating to Ike Roger Sampson's remuneration:*

4.4.2.174 Salary printout reflecting salaries of Mr Sampson from date of employment.
Information relating to Ms Priya Lutchman’s appointment:

4.4.2.175 Curriculum Vitae of Ms Lutchman, Senior Certificate and Bachelor of Accounting Science.

Information relating to Ms Kathija Docrat’s appointment:

4.4.2.176 Internal Memorandum dated 16 July 2015 from Luncedo Njezula, Acting Executive: Strategic Support addressed to Ms Nair regarding motivation for the appointment of a Marketing and Events Specialist on a temporary basis.

4.4.2.177 Internal Memorandum dated 19 October 2015 from Ms Bulelwa Zimba, Manager: Marketing and Events addressed to Jacky Mashapu, General Manager: Communication & Stakeholder Management regarding motivation for the extension of employment contract of a Marketing and Events Specialist.

4.4.2.178 Internal Memorandum dated 18 April 2016 from Ms Zimba addressed to Jacky Mashapu, General Manager: Communication and Stakeholder Management regarding motivation for the extension of employment contract of a Marketing and Events Specialist.

4.4.2.179 Temporary employment contract dated 03 August 2015 entered into between Ms Docrat and Ms Nair on behalf of Pikitup.

4.4.2.180 Temporary employment contract dated 06 November 2015 entered into between Ms Docrat and Ms Nair on behalf of Pikitup.

4.4.2.181 Temporary employment contract dated 22 April 2016 entered between Ms Docrat and Mr Maharaj.
Information relating to Ms Michelle Alexander:

4.4.2.182 Internal Memorandum dated 24 November 2015 from Lucky Madikiza, Manager: Stakeholder Liaison addressed to Jacky Mashapu, General Manager: Communication and Stakeholder Management regarding motivation for the appointment of Ms Michelle Alexander in the position of a Regional Stakeholder Specialist.

4.4.2.183 Undated Temporary employment contract entered between Ms Alexander and Ms Nair.

Documents relating to alleged irregular removal of black employees from critical positions and replacing them with Indian employees:

4.4.2.184 Curriculum Vitae of Mr Maharaj including academic records.

4.4.2.185 Curriculum Vitae of Dr Ismail Dawood including academic records.

4.4.2.186 Curriculum Vitae of Ms Sara Jamina Pillay including academic records.

4.4.2.187 Curriculum Vitae of Dhanasakaran Moodley including academic records.

Documents relating alleged failure by Pikitup to investigate theft of Pikitup cellular telephones which resulted in Ms Nair and Mr Denyssen being arrested:

4.4.2.188 Unsigned Corporate Investigations Report into theft of cellular telephones dated 01 April 2014 including supporting documents prepared by Anton Engelbrecht: Regional Security Risk Manager.
4.4.2.189 Minutes of the Audit Committee meeting held on 25 April 2014 dated 16 September 2014.

4.4.2.190 Letter dated 10 June 2015 from Dr Hanekom to Detective Constable Kgotsoko regarding withdrawal of charges against Ms Nair and Mr Denyssen including an unsigned affidavit from Anton Engelbrecht.

4.4.2.191 Bill of Account dated 12 June 2015 from Satch Govender Attorneys amounting to R26 000.00.

4.4.2.192 Email dated 26 June 2015 from Francois Dekker, Company Secretary addressed to Ms Nair and Mr Denyssen regarding recovering of legal fees from them:

4.4.2.193 Report dated 01 July 2015 addressed to the Board of Directors regarding payment of legal costs: Ms Nair and Denyssen.

4.4.2.194 Internal Memorandum dated 03 July 2015 addressed to the Chief Financial Officer and General Manager: Supply Chain Management regarding request for payment of legal fees including invoices.

4.4.2.195 Letter dated 07 August 2015 from Dr Hanekom addressed to Ms Nair regarding the Board's decision on devices allocated to Ms Nair and appointment of Mr Denyssen.

4.4.2.196 Letter dated 27 August 2015 from Ms Nair addressed to Dr Hanekom providing a response.
Documents relating to irregular appointment of consultants:

4.4.2.197 Unsigned report dated 19 September 2013 addressed to the Board of Directors providing information on appointment of independent contractors.

4.4.2.198 Curriculum Vitae of Doris Dondur.

4.4.2.199 Fixed term contract of employment on a part-time hourly basis dated 16 October 2012 entered into between Ms Dondur and Ms Nair on behalf of Pikitup.

4.4.2.200 Curriculum Vitae of Joanne Murphy.

4.4.2.201 Fixed term contract of employment on a part-time hourly basis dated 05 October 2012 entered into between Joanne Murphy and Ms Nair on behalf of Pikitup.

4.4.2.202 Fixed term contract of employment on a part-time hourly basis dated 01 November 2013 entered into between Joanne Murphy and Ms Nair on behalf of Pikitup.

4.4.2.203 Curriculum Vitae of Rene Aloise Kenosi.

4.4.2.204 Fixed term contract of employment on a part-time hourly basis dated 21 May 2013 entered into between Ms Rene Aloise Kenosi and Ms Nair on behalf of Pikitup.

4.4.2.205 Fixed term contract of employment on a part-time hourly basis dated 16 November 2012 entered into between Ms Kenosi and Ms Nair on behalf of Pikitup.
4.4.2.206 Fixed term contract of employment on a part-time hourly basis dated 20 December 2013 entered into between Ms Kenosi and Ms Nair on behalf of Pikitup.

4.4.2.207 Reconciliation of number of hours claimed by Ms Dondur, Ms Murphy, Ms Kenosi, Molefe Happy and Habib Fatima Mohamed.

Documents relating to procurement of office space to relocate Pikitup Head Office

4.4.2.208 Minutes of the meeting of the Board of Directors held on 30 November 2012.

4.4.2.209 Letter dated 19 February 2013 regarding office relocation – Pikitup shareholding in Friedshelf 128 (Pty) Ltd.

4.4.2.210 Report dated 22 April 2013 to the Audit Committee regarding sale of Friedshelf shareholding.

4.4.2.211 Report dated 20 August 2013 addressed to the Audit Committee providing progress report on the relocation of Pikitup’s Head Office.

4.4.2.212 Report dated 10 October 2013 addressed to the Audit Committee providing progress report on the relocation of Pikitup’s Head office and possible divestment of shareholding in Friedshelf.

4.4.2.213 Request to initiate tender PU375/2013 for the appointment of a service provider to provide office space to Pikitup Head Office on a lease basis.

4.4.2.214 Bid Evaluation Report dated 22 April 2014 in respect of tender PU375/2013 for the provision of office space to Pikitup Head Office on a lease basis.
4.4.2.215 Pricing schedule.

4.4.2.216 Certified copies of BBBEE certificates.

4.4.2.217 Budget confirmation prior to award dated 10 April 2014.

4.4.2.218 National Treasury Restricted Supplier List.

4.4.2.219 Request to confirm that Directors are not employed by Pikitup or City of Johannesburg.

4.4.2.220 Walkthrough inspection reports.

4.4.2.221 Internal memorandum dated 19 May 2014 from Anton Fourie to Basil Chinasamy.

4.4.2.222 Minutes of the BAC meeting no. (15/2014) held on 20 May 2014.

4.4.2.223 Minutes of the BAC meeting no. (16/2014) held on 27 May 2014.

4.4.2.224 Internal Memorandum dated 03 June 2014 addressed to the Mr Thekiso, Acting Managing Director regarding cancellation of the Bid.

4.4.2.225 Cancellation Letters dated 10 July 2014 addressed to Mr Titus Molefi, Ms Queen Mjwara, Mr Franz Gmeiner and Mr Nigel Adriaanse.

4.4.2.226 Internal Memorandum dated 03 November 2014 from Mr Anton Fourie addressed to Mr Maharaj, Acting Managing Director regarding deviation from normal procurement for the lease of new Head office facility.

4.4.2.227 Sourcing?? Strategy Document dated 19 January 2015 including emails to various service providers regarding provision of office space.
4.4.2.228 Report dated 17 February 2015 addressed to the Operations Committee regarding developments to the relocation.

4.4.2.229 Internal Memorandum dated 09 March 2015 regarding evaluation of the facilities shortlisted and recommendations.

4.4.2.230 Letter dated 05 April 2015 from Liberty Properties addressed to Ms Nair regarding proposed offer to lease.

4.4.2.231 Report dated 15 April 2015 addressed to the Operations and Service Delivery Committee regarding developments to the relocation.

4.4.2.232 Internal Memorandum dated 14 May 2015 addressed to the Chief Financial Officer providing the process followed during the acquisition of suitable office space for Pikitup Head office.

4.4.2.233 Letter dated 14 May 2015 from DLA Cliff Dekker Hofmeyer to the Board of Friedshelf confirming sale of Pikitup 50% shareholding.

4.4.2.234 Report dated 25 May 2015 addressed to the Board of Directors providing the history of the relocation of Head office.

4.4.2.235 Report dated 07 July 2015 addressed to the Audit Committee to apprise of the developments pertaining to the eminent relocation of Pikitup Head office.

4.4.2.236 SCM process and financial implications embarked upon subsequent to the cancellation of PU375/2014.
4.4.2.237 Invoices dated 24 November 2015, 10 and 30 December 2015 from Liberty Group Ltd dated 24 March 2016 and 21 April 2016 from Methodo Properties (Pty) Ltd.

Documents regarding investigation conducted by Pikitup

4.4.2.238 Forensic Investigation Report dated 27 June 2016 from Qhubeka Forensic Services on an investigation into allegations against Ms Nair, Managing Director received from SAMWU.

4.4.2.239 Notice of Disciplinary enquiry dated 05 July 2016 from Dr Hanekom addressed to Ms Nair and various correspondence exchanged between Dr Hanekom and Ms Nair.

4.4.2.240 Notice of Motion dated 05 August 2016 in the matter between Ms Nair and Pikitup held at Johannesburg in the Commission for Conciliation Mediation and Arbitration under Case No. H02520-16.

4.4.2.241 Founding Affidavit undersigned by Dr Hanekom dated 05 August 2016.

Interviews conducted

4.4.2.242 Interview held and conducted by the Deputy Public Protector and his team with the Pikitup Chairperson and members of the Board on 03 May 2016.

4.4.2.243 Interview held and conducted by the Deputy Public Protector and his team with Mr Muhadi, Sourcing Specialist: SCM Department on 03 and 06 May 2016.

4.4.2.244 Interview held and conducted by the Deputy Public Protector and his team with Ms Christa Venter, GM: Special Projects on 03 and 06 May 2016.
4.4.2.245 Interview held and conducted by the Deputy Public Protector and his team with Cllr Mfikoe on 03 May 2016.

4.4.2.246 Interview held and conducted by the Deputy Public Protector and his team with Mr Maharaj on 04 May 2016.

4.4.2.247 Interview held and conducted by the Deputy Public Protector and his team with Mr Thekiso on 04 May 2016.

4.4.2.248 Interview held and conducted by the Deputy Public Protector and his team with Ms Nair on 04 and 09 May 2016.

4.4.2.249 Interview held and conducted by the Deputy Public Protector and his team with Mr Donavan Naicker, Director of Aqua on 04 May 2016.

4.4.2.250 Interview held and conducted by Mr Abongile Madiba, Chief Investigator and team with Ms David on 13 June 2016.

4.4.2.251 Interview held and conducted by Mr Madiba and team with Mr Denyssen on 13 June 2016.

4.4.2.252 Interview held and conducted by Mr Madiba and team with Mr Ncanana, on 13 June 2016.

4.4.2.253 Interview held and conducted by the Deputy Public Protector and team with Mr Ngwenya on 14 June 2016.

4.4.2.254 Interview held and conducted by the Deputy Public Protector and team with Dr Mabuya on 14 June 2016.
4.4.2.255 Interview held and conducted by the Deputy Public Protector and team with Ms Phumla Mokele, Manager: Human Resource Services on 15 June 2016.

4.4.2.256 Interview held and conducted by the Deputy Public Protector and team with Ms Mokele on 15 June 2016.

4.4.2.257 Interview held and conducted by the Deputy Public Protector and team with Mr Booyzen on 15 June 2016.

4.4.2.258 Interview held and conducted by the Deputy Public Protector and team with Mzukisi Tshem, GM: Landfill and Disposal on 15 June 2016.

4.4.3 Notices issued in terms of section 7(9)(a) of the Public Protector Act, 1994:

4.4.3.1 Ms Nair dated 04 October 2017

4.4.3.2 Mr Denyssen dated 04 October 2017

4.4.3.3 Mr Shongwe dated 04 October 2017

4.4.3.4 Mr Lungile Dhlamini, current Managing Director of Pikitup, dated 04 October 2017

Responses received to notices issued in terms of section 7(9)(a) of the Public Protector Act, 1994 from:

4.4.3.5 Ms Nair dated 22 January 2018

4.4.3.6 Mr Denyssen dated 23 October 2017
4.4.3.7 Mr Shongwe dated 16 October 2017

4.4.4 Legislation and other prescripts

Acts

4.4.4.1 The Constitution;

4.4.4.2 The Public Protector;

4.4.4.3 Preferential Procurement Regulations, 2011;

4.4.4.4 The Municipal Finance Management Act, No 56 of 2003 (MFMA);

4.4.4.5 Municipal Supply Chain Management Regulations, 2005;

4.4.4.6 Municipal Regulations on Minimum Competency Levels, 2007;

4.4.4.7 Guidelines for Municipal Competency Levels: Other Senior Managers, 2007;

4.4.4.8 Local Government: Municipal Systems Act, No 32 of 2000, as amended;

4.4.4.9 Municipal Systems Act - Regulations on Appointment and Conditions of Employment of Senior Managers, 2014;

4.4.4.10 Municipal Systems Act- Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers;

4.4.4.11 The Labour Relations Act 66 of 1995;

4.4.4.12 The Basic Conditions of Employment Act 75 of 1997; and,

**Codes**

4.4.4.14 The Code of Conduct, Municipal Systems Act; and,

4.4.4.15 King III and the Code of Governance Principles for South Africa.

**Policies**

4.4.4.16 Pikitup Supply Chain Management Policy version 2/2013;

4.4.4.17 Pikitup Supply Chain Procedure Manual, 06/08/2014;

4.4.4.18 Pikitup Recruitment and Selection Policy Number :CS-Hr/2013-005/2014;

4.4.4.19 Pikitup Secondment, Transfer and Assignment Policy, 27/11/2008;
4.4.4.20 Delegations of Authority January 2013;

4.4.4.21 Pikitup Employment Plan 2011-2015 Version 0.2 March 2014 Revision;

4.4.4.22 Cellular telephone Policy and Guidelines, 2013;

4.4.4.23 Disciplinary Code of Conduct, 2013;

4.4.4.24 Policy on Employment Termination - HR021, 2008;

4.4.4.25 Recruitment and Selection Policy, 2010; and

4.4.4.26 Recruitment and Selection policy, 2014.
5. DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether Pikitup improperly awarded and subsequently extended the contract for the supply, operation and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as ad hoc rentals as and when required of the service provider (Yellow Plant project) to Aqua despite the findings of Ernst & Young, Gobodo Forensic & Investigative Accounting and National Treasury investigations:

*Common cause issues*

5.1.1 Pikitup awarded and subsequently extended contract number PU 298/2012 to Aqua for the supply, operation and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as ad hoc rentals as and when required of the service provider.

5.1.2 The Fleet Management Department submitted the Request to Initiate a Tender dated 05 September 2012 for the supply, operation and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as ad hoc rentals as and when required of the services (Yellow Plant Project).

5.1.3 The Request to Initiate a Tender was received by Supply Chain Management on 14 September 2012 and it specified that the services were for a duration of 3 years with an estimated cost of R393 million at R131 million per annum.
5.1.4 The BSC, which was appointed by Mr Boya on 27 August and 12 September 2012, convened and held meetings 7 times to compile the specifications for this service.

5.1.5 On 08 October 2012, the BSC concluded its task of compiling the specification for the Yellow Plant Project without noting the available budget and ensuring that the specifications were aligned to the available budget.

5.1.6 According to the Bid document, the evaluation criteria were divided into three categories:

**Pre-compliance criteria**

a) Attendance of Compulsory information meeting;
b) Submission of original valid Tax Clearance Certificate;
c) A copy of the Municipal statement or letter from the Landlord and/or from the Bidder, certifying that the Bidder has no undisputed commitments with any municipality or other, service provider in respect of which payment is overdue for more than 30 days;
d) Signed and completed MBD forms (MBD 4, MBD 5, MBD 8 and MBD 9);
e) Annual Financial statements for the past 3 years or since establishment from the Registered Accounting Officer or Registered Auditors (in case of a Joint Venture, both companies submit); and,
f) A certified copy of proof for third party liability insurance indemnity of at least R10 million.

**Other Returnable documents that formed part of Pre-compliance criteria**

a) Proof of Company registration;
b) Certified copy of ID documents of owners/members/shareholders;  
c) Original certified copy of BBBEE scorecard;  
d) Company profile;  
e) Letter of good standing (COIDA);  
f) Schedule of sub-contractors;  
g) Schedule of Plant and Equipment;  
h) Schedule of Tenderer’s experience;  
i) Insurance (attach proof of insurance with insurance details);  
j) Copy of bank rating from the bank; and  
k) Schedule of Plant as well as Maintenance schedule and methodology plan.

**Functionality Criteria**

<table>
<thead>
<tr>
<th>Criterion</th>
<th>Details</th>
<th>Points</th>
<th>Score</th>
</tr>
</thead>
</table>
| Financial Capability| Financial capability  
- Debt to equity ratio  
- Letter of support from Financial Institutions  
- Good credit rating | 10     | Rating 0-5 |
| Technical capability Infrastructure | Qualifications and experience of the personnel (10)  
- Competency  
- Adequacy of OHSA  
- Substantiated track record, experience, skills in yellow plant, equipment, machinery and management thereof  
- Earth moving works and deep civil experience | 35     | Rating 0-5 |
<table>
<thead>
<tr>
<th>Criterion</th>
<th>Details</th>
<th>Points</th>
<th>Score</th>
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<tbody>
<tr>
<td></td>
<td>- Depots/Workshop(s)</td>
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<td>- Accessibility (offices) with</td>
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<td>CoJ/Greater Johannesburg</td>
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<td></td>
<td>- Organogram of operation as well as experience of the various teams (10)</td>
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<td></td>
<td>- CV of the Bidder's key personnel (5)</td>
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<td></td>
<td>- Contactable references of similar projects (10)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Resources: Equipment</td>
<td>- Proof of current stock of plant and equipment</td>
<td>20</td>
<td>Rating 0-5</td>
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<td></td>
<td>- Valid maintenance agreements in place for servicing of plant/fleet</td>
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<td></td>
<td>- Insurance</td>
<td></td>
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<tr>
<td>Methodology Management Plan</td>
<td>- Implementation Plan</td>
<td>10</td>
<td>Rating 0-5</td>
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<tr>
<td></td>
<td>- Reclaimers Management (2)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Performance Indicators and Key milestones</td>
<td></td>
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<td></td>
<td>- Compliance with Service Specification</td>
<td></td>
<td></td>
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<td></td>
<td>- Lead time to deliver vehicles (2)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joint Venture Subcontracting proposal</td>
<td>Submit JV proposal and agreement or sub-contract proposal and agreement</td>
<td>15</td>
<td>Rating 0-5</td>
</tr>
<tr>
<td>Maintenance Schedules</td>
<td>Comprehensive maintenance schedule</td>
<td>5</td>
<td>Rating 0-5</td>
</tr>
<tr>
<td>Locality registered office within boundaries</td>
<td>- Situated within CoJ–5pts</td>
<td>5</td>
<td>Rating 0-5</td>
</tr>
<tr>
<td></td>
<td>- Gauteng–4–pts</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>- Other province 3pts</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Other 0pts</td>
<td></td>
<td></td>
</tr>
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</table>
### Price and Preference Criteria

<table>
<thead>
<tr>
<th>Price points</th>
<th>Preference points</th>
<th>Total points</th>
</tr>
</thead>
<tbody>
<tr>
<td>90</td>
<td>10</td>
<td>100</td>
</tr>
</tbody>
</table>

5.1.7 Pikitup placed a publication for an invitation to bid as per contract number PU298/2012 for the supply, operation and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as ad hoc rentals as and when required of the services in the *So wetan* newspaper on 12 October 2012; and *City Press* as well as *Sunday Times* newspapers on 14 October 2012. *The Star* newspaper also carried the same advertisement on 15 October 2012. The closing date of the invitation to the bid was 12 November 2012.

5.1.8 The budget in the amount of R263 million for the provision of this service was confirmed on 04 December 2012 by Pikitup.

5.1.9 On 19 October 2012, a compulsory information meeting facilitated by SCM, Landfill and Disposal and Fleet Departments was held and Pikitup issued 37 bids to prospective bidders.

5.1.10 On 05 November 2012, a meeting was held to discuss questions raised by the bidders and responses to the said question were circulated to them prior the closing date of the tender.

5.1.11 The GFIA was appointed by Pikitup on 09 November 2012 to provide due diligence services in respect of the award of Tender Number PU298/2012 and the scope included to:
a) Determine in terms of the Municipal Finance Management Act Circular No. 62 of 2012, if any of the employees of the City or Pikitup are connected to potential bidders and or are directors/shareholders/members of the companies of the potential bidders;

b) Observe and guide the tender closing and opening processes were in line with SCM Regulations;

c) Be part of site visits to verify whether Pikitup's processes were compliant;

d) Observe the evaluation process and guide SCM on the evaluation process in line with the Municipal Finance Management Act Circular No. 62 of 2012 and SCM Regulations;

e) Review the Bid Evaluation Report for completeness and accuracy in line with SCM Regulations;

f) Compile a report providing assurance that the Bid Evaluation process was conducted and completed in line with SCM Regulations and Bid Specifications; and

g) Guide on pricing efficiency of the bid and risks.

5.1.12 On 12 November 2012, officials from SCM opened the bids in public at the Ground Floor cnr Bertha & Juta Street, Braamfontein. Mr Dries Vorster from GFIA served as an Independent Observer and as well as an official from Internal Audit.

5.1.13 Pikitup received 14 bids from the companies listed below:
<table>
<thead>
<tr>
<th>No.</th>
<th>Company name</th>
<th>Quoted amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Dikala Leka Zenzelani JV</td>
<td>R631 962 451.01</td>
</tr>
<tr>
<td>2.</td>
<td>Interwaste Environmental Solutions</td>
<td>R591 040 214.15</td>
</tr>
<tr>
<td>3.</td>
<td>Rajavic Projects &amp; Trading</td>
<td>R401 409 024.00</td>
</tr>
<tr>
<td>4.</td>
<td>Rantoa Service Provider</td>
<td>R392 305 644.44</td>
</tr>
<tr>
<td>5.</td>
<td>Casalinga t/a Waste Rite</td>
<td>R351 404 604.97</td>
</tr>
<tr>
<td>6.</td>
<td>Midmar Plant Hire</td>
<td>R351 304 642.37</td>
</tr>
<tr>
<td>7.</td>
<td>X-Moor t/a Crossmoor Transport</td>
<td>R350 060 085.93</td>
</tr>
<tr>
<td>8.</td>
<td>Mbitha and Bankuna JV</td>
<td>R344 172 115.87</td>
</tr>
<tr>
<td>10.</td>
<td>Tranacon Construction</td>
<td>R318 200 083.20</td>
</tr>
<tr>
<td>11.</td>
<td>Boitumelong</td>
<td>R317 354 400.00</td>
</tr>
<tr>
<td>12.</td>
<td>Mphephethwa</td>
<td>R312 019 738.19</td>
</tr>
<tr>
<td>13.</td>
<td>Barleda,232 cc</td>
<td>R290 563 336.80</td>
</tr>
<tr>
<td>14.</td>
<td>Metsana/Moreteng JV</td>
<td>R290 010 607.50</td>
</tr>
</tbody>
</table>

5.1.14 Out of 14 bids that were received by Pikitup, 9 were disqualified at pre-compliance stage of which 8 were as a result of submitting annual financial audited statements for a period of 2 years as opposed to the recommended 3 years. Aqua remained in the running.

5.1.15 Five Bidders proceeded to the next stage of evaluation on functionality. On 20 and 21 November 2012, and 03 and 05 December 2012 the BEC met and evaluated the bidders on functionality.

5.1.16 The BEC argued that the functionality criteria contained in the bid document which provided scores per category and in some instances per sub-category were subjective. The Commodity Manager sub-divided the criteria and assigned a lesser point to each criterion as follows:
<table>
<thead>
<tr>
<th>Criterion</th>
<th>Details</th>
<th>Points Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Financial Capability</strong></td>
<td>Financial capability (10)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>-Debt to equity ratio</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>-Letter of support from Financial Institutions</td>
<td>3</td>
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<td></td>
<td>-Good credit rating</td>
<td>4</td>
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<td>Less that C–0pts</td>
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<tr>
<td></td>
<td>C rating–2pts</td>
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<td></td>
<td>B rating–3pts</td>
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<td></td>
<td>A rating 4 pts.</td>
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<tr>
<td><strong>Technical capability &amp;</strong></td>
<td>Qualifications &amp; experience of the personnel (10)</td>
<td>1</td>
</tr>
<tr>
<td><strong>Infrastructure</strong></td>
<td>-Competency</td>
<td>1</td>
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<tr>
<td></td>
<td>-Adequacy of OHSA</td>
<td>4</td>
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<tr>
<td></td>
<td>-Substantiated track record, experience, skills in yellow plant, equipment, machinery and management thereof</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>-Earth moving works and deep civil experience</td>
<td>1</td>
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<td></td>
<td>-Depots/Workshop(s)</td>
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<td></td>
<td>-Accessibility (offices) with the City/Greater Johannesburg-Organogram of operation as well as experience of the various teams (10) and management thereof</td>
<td>2+</td>
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<tr>
<td></td>
<td>Organogram</td>
<td>8</td>
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<td></td>
<td>3 yrs experience</td>
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<td></td>
<td>2 yrs experience</td>
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<td>1yr. experience</td>
<td>5</td>
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<td></td>
<td>-CV of the Bidder's key personnel (5)</td>
<td>3</td>
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<tr>
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<td>3 yrs experience</td>
<td>1</td>
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<td></td>
<td>2 yrs experience</td>
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<tr>
<td>Criterion</td>
<td>Details</td>
<td>Points Weighting</td>
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<td></td>
<td>1 year experience</td>
<td>10</td>
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<td></td>
<td>- Contactable references of similar projects (10)</td>
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<td></td>
<td>3 projects &amp; more</td>
<td>6</td>
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<tr>
<td></td>
<td>2 projects</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>1 project</td>
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<tr>
<td>Resources: Plant Equipment</td>
<td>Resources: Plant Equipment (20)</td>
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<tr>
<td></td>
<td>- Proof of current stock of plant and equipment</td>
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<td></td>
<td>- Valid maintenance agreements in place for servicing of plant/fleet</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>- Insurance</td>
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A Report of the Public Protector on Pikitup
5.1.17 On 11 December 2012, the BEC members together with Supply Chain Management, Internal Audit and a GFA official conducted a site inspection on the premises of the three shortlisted bidders, namely, Aqua Transport and Plant Hire, X-Moor t/a Crossmoor and Midmar Plant Hire. The Team concluded that no evidence existed that the shortlisted bidders had misrepresented their ability to render the services as per their bids submission.

5.1.18 Mr Ben Mochadibane, a member of the BEC, participated in the evaluation process even though he was on precautionary suspension.

5.1.19 The BEC included Mr Mochadibane’s scores upon Ms Ramashala’s advice that the suspension of an employee is considered a precautionary measure pending an enquiry. It does not preclude the employer from requesting the employee to perform certain ad hoc duties while on suspension.

5.1.20 The BEC made its recommendation to the BAC on 12 December 2012 that Tender Number PU298/2012 should be awarded to Aqua Transport and Plant Hire and Pikutup must enter into negotiations aimed at ensuring that the allocated budget of R263 000 000.00 was not exceeded.

5.1.21 Aqua’s offer to provide the required service was for the amount R342 879 406.12. This resulted in an excess of R79 879 406.12 from the allocated budget. This was the subject of the recommended negotiation.

5.1.22 Mr Chinasya addressed an email dated 21 December 2012, forwarding a copy of the BEC Report to Ms Nair and further advised that as Ms Nair
requested, he would email the Gobodo due diligence report as soon as they have finalised it.

5.1.23 Mr Chinasamy further advised Ms Nair that the bid offer was R342 million subject to annual escalation and there was already a shortfall on the budgeted amount which must be addressed prior to the award.

5.1.24 The BAC met on 7 occasions to adjudicate on the bid. The BAC was confronted with issues of budgetary shortfall as the price offered exceeded the available budget, the dispute between Pikitup and Aqua emanating from a forensic investigation that was conducted by Ernst and Young upon request by Pikitup on identified contracts as well as the suspicion of collusive tendering between Crossmoor and Waste Rite, Aqua and Midmar highlighted in the GFIA reports issued on 07 January 2013 and 11 March 2013.

5.1.25 In a meeting held by the BAC on 17 and 18 January 2013, the BAC raised concerns that Ms Nair held a meeting with Aqua while Pikitup was considering a tender in which Aqua was a bidder. Ms Nair addressed an email to members of the BAC, including an SCM official who was present at the meeting. In the email, Ms Nair stated that:

"I understand that there was a sitting of the BAC yesterday to engage on the Yellow Plant tender and was advised that I was criticised for having met with one of the tenderers. Comment was made that the MD should not meet with bidders or words to that effect.

Firstly, may I request that if anyone has an issue with my actions or approach to any matter, feel free to talk to me directly- I would prefer that the matter was not dealt with by a throw away comment at such a meeting where all manner of interpretations of my actions and innuendoes can possibly prevail."
On the matter of my discussion with Mr Donavan Naicker of Aqua facilitated by MMC Mathaung, I am aware of the fact that Aqua is a Bidder in the tender – there was NO discussion in my meeting with the two parties on the matter.

The purpose of the meeting was to clarify certain issues that are of no relevance to anybody on the BAC or BEC. Nor did it have any relevance to the yellow plant tender.

On receipt of the request for a meeting from MMC Mathaung, I consulted with the external legal team and auditors assisting me on certain matters that formed the basis of the meeting and I was assured that there was no risk to having the discussion. I received a fairly high level of confidence that my meeting will not compromise any processes. I was careful to ensure that the matter of the current tender was consulted with any potential conflict that may arise.

I would hope that my experience and exposure in various senior management and executive roles during my career provides me with the capability to make a judgement of who I meet, on what basis that meeting takes place, to ensure that the relevant advice/consultations are held ahead of the meeting and that I am capable of discerning when it is prudent to engage and when not to.

I would also hope that I have the ability to ensure that Pikitup is not compromised nor am I and my reputation is not sullied with innuendoes that I may have skewed judgement. Perhaps even a suggestion that meeting such individuals may be construed as a corruption on my part?”

5.1.26 The BAC addressed a report dated 21 January 2013 signed by Ms Hleza, Acting CFO and Chairperson; Ms Magasa, Executive: Operations and Ms
Christa Venter, Acting Executive: PCE and Disposal to Ms Nair. The BAC recommended that the appointment of a service provider should be put on hold until the following issues were resolved:

5.1.26.1 The Accounting Officer provide written feedback to the BAC regarding whether the findings on Aqua emanating from the Ernst & Young report were resolved and whether there was an impact on those findings on the tender;

5.1.26.2 The Accounting Officer address the risk of collusive tendering prior to awarding the tender;

5.1.26.3 The budget shortfall be provided prior to awarding the tender;

5.1.26.4 The Accounting Officer consider extending the contract with Waste Rite for a further period of six months until all the above-mentioned risks were resolved; and

5.1.26.5 The Accounting Officer approve the extension of the validity of the bids received for the tender.

5.1.27 In an email dated 15 February 2013 addressed to Mr Chinasamy providing Ms Nair’s responses to the BAC recommendations, Ms Nair noted that:

“Doris would liaise with JW to review the reconciliation on the invoices and review Pikitup SAP system;

Formal letters should be written to the preferred Bidders that outlines Gobodo’s observations and obtain their inputs, comments as well as additional declaration with regards to collusion;
Contract cannot be awarded outside of the allocated budget as set out in the legislative and policy provisions, please proceed with the award and negotiation;

If permissible, she will lead the first meeting with the Prospective Bidder with regards to the reduction and or other options to align the spending within the budget;

There can be no further extension to the contracts with WasteRite and contract, PU98/2012 under consideration and the finalisation of contract PU98/2012 should be effected by end of extension period; and

BAC should proceed with necessary advice and consent to all Bidders.”

5.1.28 In a report dated 13 March 2013, the BAC recommended that Ms Nair should not award the tender to Aqua for the following reasons:

5.1.28.1 The dispute between Aqua and Pikitup was still not resolved and although the reconciliation was done, there was an incorrect charge that had occurred of R195 407.60;

5.1.28.2 The report from Gobodo indicates that responses received from the bidders on collusive tendering were not satisfactory and further investigation should be conducted by Pikitup; and

5.1.28.3 The BAC further recommended that an alternative solution should be considered through consultation with the Accounting Officer.

5.1.29 Mr Wilson submitted a final report dated 20 March 2013 which was presented to the BAC meeting held on 22 March 2013 and the report entailed the following:
5.1.29.1 There was no sufficient evidence to conclusively prove that collusive tendering transpired between Midmar and Aqua;

5.1.29.2 There was no reason not to award the tender;

5.1.29.3 Should it make the award, Pikitup should exercise proper contract management with a view to ensuring that the successful bidder rendered the required service in accordance with the terms and conditions of the tender; and

5.1.29.4 Ensure that there was no cross-hiring of plant between Aqua and Midmar.

5.1.30 On 22 March 2013, the BAC held a meeting which concluded that an assurance in respect of the Ernst & Young investigation against Aqua that the dispute was resolved should be requested from Ms Nair.

5.1.31 In an email dated 23 March 2013, Ms Nair addressed an email to Mr Chinasamy and indicated that she had no intention of signing off on the said letter.

5.1.32 Ms Nair further sought an opinion from Ms Lester Peterson, the Executive Director: Legal Compliance, Environment and Safety. She indicated that:

"I was briefed that the BAC convened a meeting on 22 March 2013 to deliberate on the yellow plant. At the said meeting the BAC instructed the GM: SCM to inform the MD to provide an assurance letter confirming E&Y findings on Aqua have been resolved."
Gobodo had concluded their investigation and found no collusive tendering. Most of all, the report recorded a view that there was no reason for the BAC not to award.

Notwithstanding the feedback from Gobodo on the allegations of collusive tendering, the BAC had not made a recommendation purported under SCM Regulations. It appears that the BAC is refusing to make recommendations unless it receives an assurance letter from the MD. I was requested to express a view on the BAC's conduct in the matter (yellow plant hire).

I doing so, I advised that the role/responsibility of the BAC is regulated by statute. In terms of Regulations 29(1) (b) (i) & (ii), the BAC has for tenders over 10 million the responsibility to recommend to the Accounting Officer to make a final award or recommend how to proceed further with the relevant procurement in the event of it not making a recommendation.

It was significant to emphasize that Regulation 29 is peremptory and the recommendations articulated above which the BAC is empowered to make cannot be made concurrently. Thus it is a must for the BAC to make a recommendation, to award or recommend how to proceed further if the final award is not made. Furthermore, I am of the following view:

A failure and/or wilful omission to comply with Regulation 29 is a repugnancy of a statutory duty and tantamount to an unethical conduct if not transgression of the relevant codes of conduct applicable to BAC.

The Accounting Officer (MD in casu) is under no obligation whatsoever to provide the said letter. The request or instruction is improper.

Seeking an assurance letter from the Accounting Officer is a clear demonstration of BAC's lack of appreciation of their statutory duties and an
unwillingness to apply their minds to matters at hand. The National Treasury Guidelines for Municipal Bid Adjudication Committee dictate that it is the duty of the BAC to apply their minds to all matters placed before them.

According to these guidelines, the fulfilment of such as duty ensures that meaningful and accountable decisions are taken by the BAC.

_In due course, he would as per the request, advice on the consequence of the repugnance of the statutory duties by the BAC._

5.1.33 On 25 March 2013, the BAC made the following recommendations:

5.1.33.1 Aqua should be appointed for a period of 3 years;

5.1.33.2 The Accounting Officer should enter into negotiations with the preferred bidder for the reduction of the scope of work as the bidder's quoted amount of R342 879 406.12 exceeded the available budget of R263 000 000.00;

5.1.33.3 The annual escalation for the non-fixed portion of the bid price should be budgeted for on a yearly basis; and

5.1.33.4 Proper contract management be exercised during the tenure of the contract to ensure that services were provided in accordance with the terms and conditions of the tender and no cross-hiring of plant between parties who could be construed as having colluded took place.

5.1.34 Subsequent to the BAC report dated 25 March 2013, Ms Nair approved a request to negotiate with the preferred bidder for a reduction in scope.

5.1.35 On 26 March 2013, Ms Nair, Ms Peterson, Mr Tshem, Mr Jack, Mr Hunter, Mr Chinasamy, Ms Maluleke and an Aqua representative held a meeting to negotiate with the preferred bidder and resolved that:
5.1.35.1 The award should be made within the budget of R263 000 000.00 with the proviso to enter into a process of negotiations;

5.1.35.2 The scope of work can be increased should the budget become available to a tendered amount of R342 000 000.00;

5.1.35.3 The landfill site equipment and its hours of operation cannot be reduced, User Department and Finance must do the calculations to ensure that the scope is aligned to the available budget; and

5.1.35.4 A meeting must be held between the current service provider and Aqua to agree on handing over.

5.1.36 On 28 March 2013, Ms Nair addressed a letter to Aqua informing them of their appointment to provide services in respect of contract PU298/2012.

5.1.37 On 30 June 2015, Ms Nair approved the BAC report dated 30 June 2015 signed by Mr Kruger as the Chairperson of the committee recommending an extension of the contract to Aqua in the amount of R38 196 976.80.

**Issues in dispute**

5.1.38 On 11 June 2013, the Star newspaper published an article in which it was stated that Ms Nair controversially awarded a multi-million rand tender to Aqua despite it being implicated in an alleged fraud.

5.1.39 The newspaper article further indicated that Ms Nair awarded the contract to Aqua even though the Pikitup's BAC had questioned her decision because of a forensic investigation by Ernst & Young which had implicated the company in alleged wrongdoing.
5.1.40 In a letter dated 25 August 2014 received from Dr Mabuya, she submitted that Ernst & Young was appointed by Pikitup to review tenders awarded between the years 2010 and 2011.

5.1.41 A contract that was awarded to Aqua in the amount of R30.6 million for the provision, operation and maintenance of plant and equipment at Pikitup disposal sites was included in the scope of investigation.

5.1.42 Ernst & Young delivered its comprehensive report to Pikitup on 23 August 2012 and a summary version on 30 October 2012.

5.1.43 Following Ms Nair's assumption of duty at Pikitup as a Managing Director on 23 October 2012, the Board required of her to give effect to the recommendations of the Ernst & Young report.

5.1.44 The Ernst & Young report identified the following irregularities regarding the submission of invoices by Aqua and payments made by Pikitup:

5.1.44.1 Aqua owed Pikitup an amount R1 443.42 in respect of credit note IC102046 dated 13 July 2011 for the total credit of R87 577.20;

5.1.44.2 Aqua overcharged Pikitup an amount of R3 705.00 and R94 215.00 for the period 01 April 2011 to 02 May 2011 in respect of the Plant and Equipment used at the Robertson Deep Landfill site and other sites;

5.1.44.3 Aqua invoiced Pikitup and Johannesburg Water for the same plant during the same period which amounted to R1 581 465.00 and overcharged Pikitup an amount of R81 624.00; and
5.1.44.4 Aqua charged Pikitup an amount of R247 074.48 for compactors with registration numbers VJZ 141 GP; THV 853 GP; and XNR 132 GP that did not render services to Pikitup.

5.1.45 Ernst & Young made the following recommendations against Aqua:

5.1.45.1 Pikitup should consider recovering amounts totalling R428 041.90 that were overcharged in respect of goods and services supplied;

5.1.45.2 Pikitup should consider laying a criminal charge of fraud with the SAPS in respect of an invoice for R97 920.00 for plant and equipment hire at various sites in April and May 2011 where the plant and equipment were not delivered; and

5.1.45.3 Pikitup should consider laying a criminal charge with the SAPS in respect of invoices totalling R247 047.48 for compactors with registration numbers VJZ 141 GP; THV 853 GP and XNR 132 GP which were not delivered.

5.1.46 The Ernst & Young report also recommended that based on the findings and conclusions set out in the report, Pikitup should conduct a reconciliation of all invoices with the relevant accompanying timesheets to establish the full extent to which Aqua overcharged Pikitup.

5.1.47 The National Treasury further reviewed and disputed the bid process that was followed by Pikitup leading to the appointment of Aqua Transport and Plant Hire and a report titled “Verification of Compliance with Statutory and Regulatory Requirements during the Bidding Process (PU298/2012 – Supply Operation and Maintenance of Plant and Equipment at Designated Landfills, Garden and Depots)” was issued by the National Treasury on 10 December 2013. The report highlighted, amongst others, that:
5.1.47.1 The demand consideration phase was characterised by poor planning, lack of good corporate governance, failure to calculate accurate cost estimates and lack of application of best practice in Supply Chain Management based on the following:

5.1.47.1.1 Late recording of the estimated cost of the project of R393 million at initiation stage and the non-recording thereof in the minutes of the first BSC;

5.1.47.1.2 The calculation of the tender’s estimated costs was based on a "quick analysis" and there was no evidence that cost/benefit analysis was conducted which resulted in an inaccurate estimate;

5.1.47.1.3 The bid conditions that gave Pikitup the right to increase or decrease the scope of service could lead to abuse of the Supply Chain Management prescripts;

5.1.47.1.4 No record keeping of meetings was kept where a strategic shift in the company’s business was discussed;

5.1.47.1.5 No submission of a Request to Tender by the End User Department to SCM without the draft specification as required by Pikitup's Supply Chain Management policy;

5.1.47.1.6 Regarding the development of a bid specification, the National Treasury indicated that the same process was characterised by weaknesses as there was no recording of the estimated cost in the minutes of the BSC and failure to appreciate that the substantial gap between the estimated costs and the available budget required restructuring of the demand for services which should have resulted in a bid document that should have
called for proposal for services that were to be paid from the available budget; and

5.1.47.1.7 There was a delay of 3 months in the administrative process of confirming the available budget for the required service and that Pikitup failed to comply with the requirements that an institution must ensure that budget was available before a tender was advertised.

5.1.48 The evaluation process was flawed in that:

5.1.48.1 The subdivision of the functionality should have been done during the specification development;

5.1.48.2 The inclusion of the scores of a suspended BEC member and his attendance of BEC meetings compromised the integrity of the Supply Chain Management systems;

5.1.48.3 The observations and scores made during site visits were not taken into consideration in the functional evaluation;

5.1.48.4 The BEC’s recommendation to reduce the scope of work by R79.8 million which resulted in substantial reduction in scope;

5.1.48.5 No verification was made to ensure that prices offered were the best prices and that contractors did not render similar service elsewhere; and

5.1.48.6 At adjudication of the tender, the BAC failed to comply with the SCM prescripts in the following respect:

5.1.48.6.1 The appointment of different chairpersons without any valid reasons;

5.1.48.6.2 The acceptance of the SCM’s recommendation that the tender re-advertisement could not be considered as it could yield the same results was incorrect as this option should have been considered and the outcomes of the committee’s deliberations should have been recorded in the minutes;

5.1.48.6.3 The issue of collusive tendering handled in a piecemeal manner; and
5.1.48.6.4 The BAC recommendation for the reduction of scope of work by R79.8 million which resulted in a substantial reduction in scope.

5.1.49 The negotiation process was flawed because of the following:

5.1.49.1 The first meeting did not agree on items to be reduced in the scope by R79.8 million;

5.1.49.2 No further negotiations took place and the schedule identifying items to reduce the scope of work was finalised on 15 April 2013;

5.1.49.3 The undertaking to increase the contract price when the budget became available compromised the integrity of the SCM systems and resulted in the abuse of the systems by Ms Nair; and

5.1.49.4 Failure by Ms Nair to negotiate the price offered as indicated in the bid document, but preferred to reduce the scope of work to meet the available budget.

5.1.50 The deficiency with respect to the appointment letter and Service Level Agreement was noted as follows:

5.1.50.1 The appointment letter was sent to Aqua before the negotiations were concluded.

5.1.51 The GFIA’s role as advisor was as follows:

5.1.51.1 No evidence that the GFIA advised both the BEC and BAC to note the implications of reducing the scope of work by R79.8 million as it resulted in substantial reduction of the scope;

5.1.51.2 No evidence that the GFIA advised Pikitup to refer the collusive tendering to the Competition Commission;
5.1.51.3 No evidence that the GFIA advised Pikitup to establish that prices offered were the best prices and that the contractors did not render similar services for a lower price elsewhere; and

5.1.51.4 No evidence that the GFIA advised the BEC to exclude questionable scores of a suspended member and prevent him from attending meetings to avoid compromising the integrity of SCM processes.

5.1.52 The National Treasury recommended that Pikitup’s Board of Directors consider the following measures:

5.1.52.1 The Accounting Officer should implement an effective system of demand management that would ensure that the resources were delivered at the correct time, price and place and that the quantity and quality satisfy the needs of the institution;

5.1.52.2 The Accounting Officer should set aside the tender and sign a month to month contract with Aqua and commence with a new process that should be completed within 120 days;

5.1.52.3 The Accounting Officer should refer the recommended bidders to the Competition Commission for investigation of possible restrictive practices;

5.1.52.4 The Board should consider taking disciplinary action against the Accounting Officer for compromising the integrity of the Supply Chain Management system; and

5.1.52.5 The Board should ensure that regular Supply Chain Management training is provided for all Pikitup staff involved in procurement to ensure consistent and appropriate application of Supply Chain Management prescripts.

5.1.53 Regarding setting aside the contract awarded to Aqua, the Board raised serious concerns about the impact on service delivery by the setting aside of the contract and was inclined to adopt the option to cap the contract price to the amount of R263 million that was budgeted for without any further escalation or
undertaking of an increase in the contract value. The National Treasury was advised that Aqua would be directly engaged.

5.1.54 On 02 April 2014 Mr Maharaj, as the Acting Managing Director, addressed the following letter to Aqua:

"We are instructed by our Board of Directors to advice and place on record the following material facts:

At all times and even to date, the intention of the parties in executing the above mentioned agreement is fixed for the duration of the agreement and the costs of rendering the services within the available budget of R263 000.00.

Any suggestions of variation or extension of scope when the budget is available may at this stage be viewed as the abuse of SCM procedure and Pikitup will at this juncture not consider any variations or extension of the current scope of the agreement".

5.1.55 On 06 March 2014, the Competition Commission received a complaint of collusive tendering into the contravention of section 4(1)(b)(i) and (iii) of the Competition Act, 1998 against Aqua, Midmar and Crossmoor and Waste Rite.

5.1.56 The Competition Commission investigation resulted in the referral of the Aqua and Midmar case as per case number 2014MAR0087 to the Competition Tribunal for an order declaring that the service providers contravened section 4(1)(b)(i) and (iii) of the Competition Act, 1998 and as well as being liable for the payment of an administrative penalty equals to 10% turnover.
5.1.57 On 13 March 2014, Ms Nair was subsequently placed on suspension pending the finalisation of her disciplinary enquiry.

5.1.58 Mr Gugulethu Oscar Mdlanga, who was appointed by Pikitup to assist with the matter, addressed a letter dated 13 May 2014 to the Chairperson of the disciplinary enquiry providing him with the charges against Ms Nair, and the testimonies of witnesses. The charges against Ms Nair, particularly relating to the award of contract number PU298/2012 to Aqua included the following:

5.1.58.1 The unexplained advertising of the tender with a scope exceeding the available budget of R263 million;

5.1.58.2 The unexplained poor demand management within Pikitup which was shown by, amongst others, the entity's reserving of rights to increase or decrease the scope during the tenure of the contract;

5.1.58.3 The unexplained escalation of the costs regarding the tender from R42 million contained in the July 2012 Pikitup Fleet Replacement Strategy to the current R399.7 million;

5.1.58.4 The evident poor planning and corporate governance shown by the failure to calculate cost estimates and lack of application of best practices in Supply Chain Management, particularly in relation to Demand Consideration; Advertisement of the Tender; Evaluation of the Tender; Bid Specification and Negotiations; and

5.1.58.5 Gross dishonesty and abuse of power by Ms Nair by unduly influencing and pressurising members of the BAC to award the Yellow Plant tender.

5.1.59 The letter further indicated the following as the witnesses in the matter:

5.1.59.1 Mr Solly Tshitangano, the National Treasury Chief Director: Governance, Monitoring and Compliance: who would testify and speak on the National Treasury's Report, particularly with regard to alleged irregularities occasioned in the course of awarding the Yellow Plant tender.
to Aqua; the legal implications of the alleged irregularities, including the relevant procedural requirements necessary in the process of tendering and the flouting of the relevant prescriptive statutory provisions of the Municipal Finance Management Act, 56 of 2003; Supply Chain Management: enhancing compliance and accountability; MFMA circular No. 62; the Municipal Supply Chain Management Regulations and other statutes, including the practices of good conduct and corporate governance issues on tendering in general and in particular responsibilities of Accounting Officers of institutions such as State Owned Companies and State Owned Entities.

5.1.59.2 **Dr Nomonde Mabuya**, the former Chairperson, will testify on the gross breach of the relationship of trust and confidence as well as Ms Nair’s undue influence on the members of the BAC to award the Yellow Plant tender thereby abusing the integrity of the Supply Chain Management system and her position as the Managing Director.

5.1.59.3 **Ms Christa Venter** would testify on the role she played during the BAC as the Acting Executive: PC and Disposal and Chairperson of the BAC on certain occasions. She would place on record that Ms Nair met with Mr Donavan Naicker, the Director of Aqua and Member of the Mayoral Committee for Economic Development before the finalisation of the tender process and during the process of the bid adjudication of tender number PU298/2012.

She would state that she questioned and raised the issue of Ms Nair’s meetings with Aqua and in particular its Director and placed the matter before the BAC. She would also state that Ms Nair wrote an email in which she expressed her anger for having raised the matter during the BAC meeting. She would further state that in about 4 BAC meetings, it was resolved not to award the tender to Aqua due to a number of unresolved
issues to which the BAC had obtained a legal opinion not to award the said tender.

She would further state that in a meeting they attended with Ms Nair to explain their resolution not to award the tender, Ms Nair was visibly irritated and told them that she was tired of doing their jobs. She was particularly harsh towards Mr Ramashala who had given the opinion not to award the tender. She ridiculed him asking questions about his qualifications.

She would again state that on 24 March 2013 before the BAC meeting of 25 March 2013, they received an email threatening the BAC that if they were not awarding the tender, there would be consequences. The BAC members felt intimidated by the threat and were particularly scared of losing their jobs. It was pressurised by Ms Nair to award the tender to Aqua.

5.1.59.4 Mr Ramashala would state that Ms Nair summoned them to her office after he recommended that the tender should not be awarded to Aqua in view of the various issues including collusive behaviour. He would state that he gave advice that there were more reasons militating against awarding the tender. He would further state that after he provided legal advice, he was summoned by Ms Nair questioning his advice and was subsequently ridiculed by her asking him where he obtained his legal qualification. The questions were solely intended to put pressure on him to concede that his advice was not cogent.

He would further state that the BAC had in more than 4 meetings resolved not to award the tender in view of the issues that remained unresolved.

5.1.59.5 Mr Anand Naidoo would state that during the evaluation of tender number PU298/2012, he was summoned to Ms Nair's house with other members of the BAC to discuss the award of the Yellow Plant tender. It was
inappropriate to hold the meeting at her house. He would further testify that Ms Nair influenced the BAC to award the tender to Aqua. She irregularly discussed bid adjudication matters relating to the tender in a meeting arranged to introduce a new executive team. She lambasted the BAC members and called them useless and informed them that she had given the Gobodo investigators a direct mandate to that of the BAC.

He would state that the individual members of the BAC were pressurised by Ms Nair to award the tender to Aqua to the extent that despite all the previous resolutions not to award the tender, it was awarded to Aqua on 25 March 2013 after a threatening email of 24 March 2013.

5.1.59.6 Mr Basil Chinasamy would state that he was the General Manager: SCM and that during the adjudication of tender number PU298/2012, he was one of the BAC members. He would confirm that during the adjudication of the tender, he was also reporting and updating Ms Nair of all matters relevant thereto.

He would further state that the BAC resolved not to award the tender to Aqua partly due to guidance by Mr Ramashala. He would confirm that Ms Nair, in a subsequent meeting at the office, strongly questioned Mr Ramashala whether he had a law degree and where he obtained his qualifications.

He would testify that the Ernst & Young report on a dispute between Aqua and Pikitup was presented to the BAC which requested a letter of assurance that issues that led to the BAC refusing to award the tender to Aqua had been resolved. Ms Nair refused to sign the letter as per her email dated 24 March 2013.
5.1.60 Mr Pieter Paw, Chairperson of the disciplinary enquiry ruled that Ms Nair suspension be lifted and resumed employment.

5.1.61 During an interview with the Deputy Public Protector held on 09 May 2016, Ms Nair made the following submissions:

5.1.61.1 She commenced employment with Pikitup in October 2012 and few days later was requested to correct the contract number and duly did so and the tender was advertised;

5.1.61.2 The tender evaluation commenced and the BEC completed the evaluation around December 2012. At the time, there was an existing contract with WasteRite which was extended before she assumed occupation with Pikitup. The contract was again extended during her time due to delays by the BAC to adjudicate and make its recommendation on the award of contract number PU 298/2012. As the Accounting Officer, she engaged with the BAC and informed the members that it did not matter who they recommend as it was its responsibility to do so;

5.1.61.3 The National Treasury became involved in August 2013 after the award process was concluded and the tender was already awarded to Aqua in late March 2013;

5.1.61.4 She was subsequently subjected to a disciplinary enquiry in which issues relating to the award were adequately ventilated. She met with Mr Naicker in January 2013 for the first time and the purpose of the meeting had nothing to do with the tender, but for Aqua to provide her with information and documentation relating to the forensic investigation that was conducted by Ernst & Young on allegations that were made by SAMWU in 2011 against the then Managing Director, Mr Zama Nkosi, in relation to irregular procurement processes;
5.1.61.5 She was requested by the Board under the chairmanship of Dr Mabuya to implement the outcomes of the recommendations on 11 tenders that were investigated and one of the issues was the double billing against Aqua and credit issue;

5.1.61.6 Mr Naicker had attempted to provide the information to Ernst & Young and the information was never obtained by Ernst & Young and he tried to contact her, but she was unable to meet with him;

5.1.61.7 Mr Mathang met with her and informed her that she was refusing to meet with Mr Naicker. She consulted with Pikitup's lawyers and Dr Dondur who was monitoring the Ernst & Young investigation advised that she could meet with Mr Naicker. During this time of the meeting with Mr Naicker, there was no recommendation submitted to her from the BAC;

5.1.61.8 There was a lot of contention around the word recommendation and the very first time she was confronted with the recommendations from the BAC was on/or around 23 March 2013;

5.1.61.9 An email dated 13 February 2013 addressed to Mr Chinasamy providing her responses to the BAC recommendations, was in response to a report that was submitted to her regarding the outcomes of the challenges that the BAC was dealing with;

5.1.61.10 Regarding an email dated 15 February 2013 she provided direction, as the Accounting Officer, to Supply Chain on how the matter ought to be handled and the basis for such direction was aligned with the MFMA, Supply Chain Management Regulations and Accounting Officer Guidelines with respect to Supply Chain Management. In providing an explanation on the contents of the email, she indicated that:
5.1.61.10.1 Regarding Dr Dondur, she appointed her to continue with the work that had been done by Ernst & Young in respect of the forensic investigation;

5.1.61.10.2 With respect to the possibility of collusion, she had to provide parties an with an opportunity to respond; and

5.1.61.10.3 The available budget for the service was R263 000 000.00 and Aqua tendered an amount R393 000 000.00 and the demand determination process yielded a figure of R342 000 000.00. Whilst the law allowed for Pikitup to negotiate, she did not use the term preferred bidder instead a prospective bidder. The reason for the term prospective bidder was that there was no preferred bidder at that stage and she was not engaged with the substance of recommendation for a particular Bidder in the process.

5.1.61.11 Regarding an email dated 22 March 2013 from Mr Chinasamy in which the BAC requested her to provide an assurance letter in respect of the Ernst & Young investigation against Aqua, she was being put in a position of conflict of interest because she consulted with Mr Lester Peter, Executive Director: Legal Compliance, Environment & Safety and subsequently wrote an email advising that she would not the sign a letter providing assurance that the dispute between Aqua and Pikitup was addressed;

5.1.61.12 The opinion from Mr Peter simply stated a legal position with regard to the role and responsibilities of the BAC as outlined in the Supply Chain Management Regulations;

5.1.61.13 The BAC never put a recommendation to her. The BAC would normally say re-advertise, extend this and not put a recommendation. The conduct of the BAC was very worrying as it seemed it was not confident about its own perspective on the matter. The law allowed the Accounting Officer to
consider the BAC's recommendation and not to adopt it. She indicated that she was under no obligation as the Accounting Officer to accept any recommendation from the BAC. If the BAC recommended to award to a particular service provider, she could have rejected such an award to another service provider and outline her reasons and communicate that to the National Treasury;

5.1.61.14 She received a lot of criticism on relying on the work of Gobodo and Doris Dondur in respect of the Ernst & Young report. Companies do not envisage that an Accounting Officer or a decision-maker must have all the intellectual and technical understanding of the work, it creates a platform for one to rely on the work of others;

5.1.61.15 Regarding the extension, she noted that Pikitup had the equipment that was procured, lying around and not being effectively used. She sat down with her team and worked out how Pikitup could make productive use of the said equipment. Aqua was approached to provide Pikitup with a balance of the plant in order to support the need. A report was compiled that set out all the technical issues as to why Pikitup needed additional equipment and to invoke the 15% provision. At the time, the full 15% was not utilised as at the end of the contract and of comfort, Pikitup had the equipment working; and

5.1.61.16 At the beginning of April 2016, a letter was addressed to Aqua informing them that the contract was ending at the end of April 2016. Because of the Pikitup strike, the BEC could not meet to evaluate the tender and she looked at options to utilise a Regulation 32 or 36 appointment.

5.1.62 In his response to my section 7(9)(a) notice dated 16 October 2017, Mr Shongwe, the current Pikitup Board Chairperson, agreed in principle with my preliminary findings in that there was misconduct on the part of Ms Nair as Pikitup's Accounting Officer with regard to the extension of the Aqua contract.
Mr Shongwe further indicated that as the Board, they were ready to implement my remedial action once they receive my final report.

5.1.63 In her response to my section 7(9)(a) notice submitted on 22 January 2018, Ms Nair did not agree with my findings. She simply referred me to the record of her 2014 disciplinary hearing in connection with the matter. According to her, this issue was fully ventilated during the disciplinary hearing and she further seemed to suggest that no other pronouncements should be made on this issue which were distinguishable from the outcome of her disciplinary hearing in 2014.

5.1.64 Whilst I am aware as rightfully informed by the Board of Pikitup that on 29 January 2015 that the Chairperson of the disciplinary enquiry found that Ms Nair was not guilty of misconduct related to this issue, this does not warrant an assumption by Ms Nair that an investigation or a finding by me should be similar to that of a disciplinary forum. The constitution of the Republic of South Africa requires me to conduct my investigation independently and this was emphasised in the Mail & Guardian judgement.

5.1.65 It is common cause that an investigation by me and the proceedings in any disciplinary hearing are decided against separate standards and result in two separate outcomes even if they relate to the same alleged act of impropriety. The submission by Ms Nair therefore stands to be rejected on the basis that my investigation on the merits of the complaint transcends lawfulness and includes consideration of fairness, equity, good administration and proper conduct that involves both legal and non-legal issues. Over and above that, Ms Nair never included such record of her 2014 disciplinary hearing in her response in order for me to peruse.
Application of the relevant legal framework

5.1.66 Section 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

5.1.67 Paragraph 3.2.1 in the Supply Chain Management Guide for Accounting Officers of Municipalities and Municipal Entities (National Treasury, October 2005) requires that “the Accounting Officers must ensure amongst others:

Specifications are determined;
Requirements are linked to the budget”

5.1.68 In addition, Regulation 5.2 of the Preferential Procurement Regulation, 2011 requires that “an Accounting Officer must, prior to making an invitation to tenders – as far as possible, accurately estimate the costs for the provision of the required services, works or goods and the estimated costs can be determined by conducting an industry and commodity analysis whereby prospective suppliers may be approached to obtain indicative market related prices that may be utilised for benchmarking”.

5.1.69 Paragraph 3.2.1 placed accountability on Pikitup’s Managing Director as the accounting officer to ensure that the end user department, in particular, aligned the supplies to the available budget and the specifications were accordingly redrafted before the publication of the bid.

5.1.70 The difference between the estimated cost of the project in amount of R393 000.00 and the available budget in amount of R263 million demonstrated that
the end user department did not conduct an industry and commodity research
or study.

5.1.71 The advertisement of this tender with a budget shortfall in the amount of R79
million was a contravention of Regulation 5.2 of the Preferential Procurement
Regulations, 2011.

5.1.72 In terms of Regulation 28 (1) (a) (i) of the Municipal Supply Chain Management
Regulations, a bid evaluation committee must evaluate bids in accordance with
specifications for specific procurement. Regulation 6.2 of the Preferential
Procurement Regulation, 2011, states that the "Accounting officer must clearly
specify in the bid document the evaluation criteria for measuring functionality;
weight of each criterion and applicable values that will be utilised when
scoring". The BEC argued that the functionality criteria contained in the Bid
document which provided scores per category and in some instances per sub-
category was subjective. The Commodity Manager sub-divided the criteria and
assigned a lesser point to each criterion in contravention of the said
Regulations.

5.1.73 The provisions of Schedule 2 of the Municipal Systems Act, 2000 (MSA) which
deals with the Code of Conduct of Municipal staff members provides that, staff
members must act in the best interest of the municipality and in such a way that
the credibility and integrity of the municipality are not compromised.

5.1.74 The relevant provision of the Constitution that relates to Pikitup’s accountability
in the public administration is section 195(1), which provides that the "public
administration must be governed by the democratic values and principles
enshrined in the Constitution, including a high standard of professional ethics
which must be promoted and maintained; efficient, economic and effective use
of resources which must be promoted as well as a public administration which
must be accountable".
5.1.75 In terms of Municipal Supply Chain Regulations, MFMA Circular No. 62 a contract may be varied by no more than 15% of the original value of the contract and in this case the variation was less than 15%. However, the award and subsequent variation of the Aqua contract by Ms Nair was not in the spirit of section 195 of the Constitution since Aqua and Midmar had already been referred to the Competition Tribunal for collusive tendering.

5.1.76 Section 99(1) and (2) of MFMA provides that "the accounting officer of the municipal entity is responsible for the management of the expenditure of the entity and must take all reasonable steps to ensure:

(a) that the entity has and maintains an effective system of expenditure control including procedures for the approval, authorisation, withdrawal and payment of funds;
(b) ...
(c) ...
(d) ...
(e) ...
(f) ...
(g) That the entity's available working capital is managed effectively and economically in terms of any prescribed cash management and investment framework;
(h) That the entity has and implements a supply chain management policy in accordance with section 111 in a way that is fair, equitable, transparent and cost-effective."

5.1.77 Section 100 of the MFMA provides that "the accounting officer of a municipal entity is responsible for implementing the entity's budget, including taking effective and appropriate steps to ensure that:
(a) the spending of funds is in accordance with the budget;
(b) revenue and expenditure are properly monitored;
(c) spending is reduced as necessary when revenue is anticipated to be less than projected in the budget.”

5.1.78 By extending the Aqua contract beyond the available budget Ms Nair clearly violated the above legal provisions of MFMA.

Conclusion

5.1.79 It follows therefore that an award and the extension of the contract for the supply, operations and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as ad hoc rentals as and when required of the service provider (Yellow Plant project) to Aqua was not only irregular and improper in the light of the findings of Ernst & Young, National Treasury investigations and the referral of the service provider to the Competition Tribunal, but it was also against the dictates of sections 99 and 100 of the MFMA.

5.2 Regarding whether Ms Nair irregularly appointed her friends and former colleagues as well as relatives without putting them through interview processes and offered them higher salary scale levels than the normal remuneration of other Pikitup officials:

The appointment of Ms Aneesa David into the position of a General Manager (GM): Fleet and the salary offered by Pikitup

Common cause issues

5.2.1 The position of a GM: Fleet was advertised on 22 February 2015 with a closing date of 27 February 2015.
5.2.2 The requirements of the position were Bachelor of Commerce (BCom) or relevant Bachelor's Degree; five (5) to ten (10) years' experience in senior management, good fleet and logistics management experience, proven understanding of local government functions, proven understanding of relevant legislative frameworks, proven thorough understanding of the waste industry; proven good understanding of fleet and logistics best practices, standards and norms as well possession of a driver's licence.

5.2.3 Pikitup received 71 applications which were captured into the Management Response Summary and Ms David's name was not on the list.

5.2.4 After the closing date of the advertisement, Ms Pillay addressed an email dated 10 March 2015 forwarding Ms David's Curriculum Vitae (CV) to Mr Ncanana and copied Ms Nair.

5.2.5 On 02 April 2015, the Chief Operating Officer (COO), Mr Magasa, addressed an internal memorandum to Ms Nair requesting the inclusion of Ms David on the list of candidates to be interviewed for the position of a GM: Fleet.

5.2.6 Ms Nair approved the memorandum for the inclusion of Ms David's name to be interviewed for the said position, on the same day.

5.2.7 On 07 April 2015, Ms Nair chaired the interviews for the filling of GM: Fleet assisted by the COO and Mr Ncanana and there were no representatives from IMATU and SAMWU trade unions.

5.2.8 According to the memorandum dated 08 April 2015 that was compiled by Mr Ncanana, he indicated that the panel was satisfied with the performance of Ms David as she showed an understanding of the role and responsibilities and was able to provide practical examples and analytical skills that impressed the
panel. Further, it was indicated that she presented necessary eloquence, maturity and confidence for the position.

5.2.9 On 10 April 2015, Ms Nair entered into an employment contract on behalf of Pikitup with Ms David who was employed as GM: Fleet and her employment was deemed to commence on 19 May 2015 on an annual remuneration package of R1 350 000.00 total cost to company which was already above the maximum salary scale of the GM: Fleet Manager.

5.2.10 With effect from 01 July 2015, Ms David’s salary was increased to R1 444 500.00. The table below reflects the increment:

**Salary printout reflecting salaries of Ms David from date of employment:**

<table>
<thead>
<tr>
<th>Start Date</th>
<th>End Date</th>
<th>Amount</th>
<th>Level</th>
<th>Annual Salary</th>
<th>Variant</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015.05.19</td>
<td>2015.06.30</td>
<td>112,500.00</td>
<td>E1</td>
<td>1,350.000.00</td>
<td></td>
</tr>
<tr>
<td>2015.07.01</td>
<td>9999.12.31</td>
<td>120,375.00</td>
<td>E1</td>
<td>1,444.500.00</td>
<td></td>
</tr>
</tbody>
</table>

*Issues in dispute*

5.2.11 The COO stated in the memorandum addressed to Ms Nair that Ms David did not meet one of the requirements of the position which was possession of a Bachelor’s Degree, but possessed extensive fleet logistics and management experience. However, Ms Nair approved the memorandum for the inclusion of Ms David’s name to be interviewed for the said position, notwithstanding the lack of the required academic qualification on the part of Ms David.

5.2.12 According to the CV of Ms David, at the time of her interview and appointment by Pikitup:
a) She held a One Year Programme Certificate in Financial Management, NQF Level 6 with 48 Credits obtained on 12 March 2015 from the University of South Africa (UNISA) and was still studying towards a Bachelor of Commerce with UNISA.

b) She also did not have a grade 12 certificate (matric) while the requirements of the position according to the advertisement clearly required a candidate to possess a Bachelor of Commerce degree or relevant Bachelor’s degree; 5 to 10 years’ experience in senior management, good fleet and logistics management experience, proven understanding of local government functions, proven understanding of relevant legislative frameworks, proven thorough understanding of waste industry; proven good understanding of fleet and logistics best practices, standards and norms as well possession of a driver’s licence.

5.2.13 Ms David admitted on record during the investigative interview conducted by my office on 13 June 2016 that she does not have the BCom degree nor the equivalent Bachelor’s degree as required by the post.

5.2.14 Ms Nair argued during the investigative interviews conducted by my office on July 2016 and contended that she invoked Recognition of Prior Learning (RPL) since Ms David was running a Fleet company which demonstrated that she had the necessary experience.

5.2.15 According to Ms David’s CV which my office obtained from Pikitup’s Human Resources Management there is inconsistent information which, had it been subjected to an objective and diligent pre-selection process, such discrepancy should have been detected.
5.2.16 Ms David mentions in her CV that she had been appointed as Chief Executive Officer (CEO) at Fleetmatics VMS since 2009. However, on the same CV document she contradicts herself by stating that in February 2012, she had been appointed in the position of a Chief Executive Officer at Fleetmatics VMS after successfully growing the lease division.

5.2.17 This meant from the period 2009 to January 2015, Ms David was not a Chief Executive Officer at Fleetmatics. It is therefore clear that apart from the required academic degree, Ms David also did not have necessary 5 to 10 years of senior management experience as per the advertisement.

5.2.18 It follows therefore that Ms David did not meet the requirements of the advertisement for the position of a General Manager at Pikitup and the invoking of the RPL in these circumstances by Ms Nair still does not justify the appointment of Ms David.

5.2.19 Regarding Ms David’s remuneration, Ms Nair authorised an annual remuneration of R1 350 000.00, total cost to company on 10 April 2015 in excess of the annual upper limit of R1 171 777.44 for the 2014/15 financial year.

5.2.20 It follows from the evidence that Pikitup entered into salary negotiations with Ms David before the appointment of a successful candidate was completed.

5.2.21 As a result, Pikitup suffered a loss of R14 851.86 for the period Ms David assumed appointment with effect from 19 May 2015 to 30 June 2015.

5.2.22 On 01 July 2015, Pikitup increased Ms David remuneration to R1 444 500.00 in excess of the approved upper limit of R1 253 801.39 for the financial year 2015/16 causing Pikitup to suffer a loss in the amount of R202 590.16.
5.2.23 The total loss to Pikitup stood at R221 442.02.

5.2.24 Replying to my section 7(9)(a) notice, the Chairperson of the Board of Pikitup agreed with my preliminary findings in this regard. The Board further indicated that Ms Nair was charged with misconduct in her capacity as the accounting officer for approving the appointment of Ms David and that other officials acted on the instruction of Ms Nair. According to the Board’s response, Ms Nair also failed to argue that she has been wrongly advised.

5.2.25 The Board further submitted that Pikitup’s calculation of the total loss to Pikitup, as set out in the Particulars of the Claim against Ms Nair is an amount of R252 551.00 plus interest calculated at the rate of 10.25% per annum a tempore morae from 08 September 2016. The Board expressed its willingness to support any of my finding that this amount be recovered from Ms Nair.

5.2.26 In her response to my section 7(9)(a) notice, Ms Nair merely denies some allegations related to this issue while at the same time she chose not to comment on others. Ms Nair further referred me to her Plea and Third Party notice filed on her behalf by her attorneys of record in the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 9524/17.

5.2.27 Upon perusal by my office of this Plea and Third Party notice, it was noted that such plea is nothing more than a Claim in Reconvention by Ms Nair (defendant) against Pikitup (plaintiff). In this plea several third parties who are mostly senior employees of Pikitup are cited by Ms Nair as possible joint wrongdoers together with her. Ms Nair sought to influence the court that should her conduct be found to constitute deliberate, negligent or unlawful conduct as envisaged in MFMA\(^2\) and that if she was found liable to pay the amounts claimed, the third parties were joint wrongdoers who were jointly and severally liable together with her.

\(^2\) Section 176(2) of MFMA
By implication, Ms Nair fails to apprehend that as the accounting officer at Pikitup the buck stopped with her when maladministration took place under her watch.

5.2.28 According to this plea, Ms Nair made a claim in reconvention and argued that she was entitled to a contribution from the said third parties equivalent to their proportionate share. This plea does not adequately reply to the issue in question as raised by my section 7(9)(a) notice and therefore stands to be rejected as irrelevant to the issue which is the focus of investigation. The issue does not relate to a question of who misled Ms Nair, instead the issue is whether or not the appointment of Ms David was irregular.

5.2.29 Furthermore, it should be highlighted that this response and referral by Ms Nair to documents designed for the purpose of a judicial platform does not take this issue forward. The institution of the Public Protector is modelled on the institution of the Ombudsman whose function is to ensure that government officials carry out their tasks effectively, fairly, without corruption and prejudice. This submission therefore stands to be rejected on the basis that court processes are adversarial and the court is bound to issues raised for consideration and determination by the parties to the proceedings. The Public Protector processes on the other hand are inquisitorial in nature and my mandate is an investigatory one.

*Application of the relevant legal framework*

5.2.30 The provisions of clause 7.3.2.11 of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005 deals with *Advertisement Content Requirements* and provides that “late and incomplete application forms will not be considered”.

5.2.31 It is noted in evidence that Pikitup received 71 applications which were captured into the Management Response Summary and Ms David’s name was
not on the list. It is further noted after the closing date of the advertisement, Ms Pillay addressed an email dated 10 March 2015 forwarding Ms David's CV to Mr Ncanana and copied Ms Nair. On 02 April 2015, Magasa, addressed an internal memorandum to Ms Nair requesting the inclusion of Ms David on the list of candidates to be interviewed for the position of a GM: Fleet. Ms Nair approved the memorandum for the inclusion of Ms David's name to be interviewed for the said position, on the same day.

5.2.32 This conduct by Ms Nair, Ms Pillay, Mr Magasa and Mr Ncanana was clearly in violation of clause 7.3.2.11 of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005

5.2.33 Clauses 9.2 and 9.3 of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005 which deals with, making a Job Offer provides that "an appointment must first be made before any salary negotiations can be entered into".

5.2.34 It was indicated by evidence that Ms David forwarded her payslip to Mr Ncanana reflecting that her net salary from her previous employer was about R61 200.00, total cost to company per month, thereby implying that her appointment was already communicated to her and salary negotiations were also entered into before Ms Nair's approval of her appointment.

5.2.35 Ms Nair approved a memorandum dated 08 April 2015 that was compiled by Mr Ncanana, which contained this information without addressing the implication of such.

5.2.36 This action by Mr Ncanana and Ms Nair was a direct contravention of clauses 9.2 and 9.3 of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005.
5.2.37 Regulation 8 of the Municipal Finance Systems Act: on Appointment and Conditions of Employment of Senior Managers 2014, provides that "no person may be appointed as a senior manager on a permanent basis or on probation to any post on the approved staff establishment of a Municipality unless he/she possesses the relevance competency, qualifications, experience and knowledge.

5.2.38 Ms David did not possess the requisite competency, experience qualifications, experience and knowledge.

5.2.39 Section 107 of the MFMA provides that "the accounting officer, senior managers, any chief financial officer and all other financial officials of a municipal entity must meet the prescribed financial management competency levels"

5.2.40 Section 94(1)(b) of the MFMA requires that "the accounting officer of a municipal entity must act with fidelity, honesty, integrity and in the best interest of the entity in managing the financial affairs of the entity."

5.2.41 Section 94(1)(c) of the MFMA also requires the Accounting officer, to disclose to the board of directors all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the board.

5.2.42 Section 94(1)(d) of the MFMA requires that the Accounting Officer "seek, within the sphere of influence of that accounting officer, to prevent any prejudice to the financial interests of the parent municipality or the municipal entity."

5.2.43 Section 94(2)(a) of the MFMA provides that "the accounting officer may not act in a way that is inconsistent with the responsibilities assigned to accounting officers of municipal entities in terms of this Act"
5.2.44 Section 95(a) of the MFMA provides that "the accounting officer of a municipal entity is responsible for managing the financial administration of the entity, and must for this purpose take all reasonable steps to ensure that the resources of the entity are used effectively, efficiently, economically, and transparently".

5.2.45 Remunerating Ms David beyond the salary limits within her bracket was a direct contravention of sections 94(2)(a) and 95(a) of the MFMA by the Pikitup.

5.2.46 Ms Nair neglected her fiduciary duty of an accounting officer by failing to act in line with sections 94 and 95 of the MFMA, by approving the salary package of Ms David in excess of Pikitup's annual limit and without the Board's approval. Such approval was a direct conflict of sections 94(1)(d) and 94(2)(a) of the MFMA.

Conclusion

5.2.47 It follows therefore that the action of Pikitup's officials in the circumstances was a contravention of the Pikitup Recruitment and Selection Policy, and the MSA Regulations, Regulation 8 on Appointment and Conditions of Employment Senior Managers 2014 and MFMA and was further against the provisions of section 2, Schedule 2 of the MSA.

The appointment of Mr Gerhardus Booysen into the position of a Manager: Fleet Operations and the salary offered by Pikitup

Common cause issues

5.2.48 When Pikitup advertised the position of Manager: Fleet on 22 February 2015 for the position of a GM: Fleet with a closing date on 27 February 2015, Mr Booysen also applied.
5.2.49 On 02 April 2017, Ms Nair approved a memorandum from the COO in which he requested Ms Nair’s permission to include Mr Booysen’s name to be interviewed for the position of a GM: Fleet.

5.2.50 Mr Booysen was interviewed on 07 April 2015 and came second with a score of 31.5.

5.2.51 Mr Ncanana noted in a memorandum dated 08 April 2015 which Ms Nair approved, that as the panel that comprised of Ms Nair, Mr Ncanana and the COO, they agreed that Mr Booysen should be appointed into the position of a Manager: Fleet Operation.

5.2.52 The panel, further acknowledged that whilst the assessment was for a General Manager position, the same pool could be used to recommend a candidate for a lower position in order to save on the cost of advertisement.

5.2.53 The minimum requirements for the position of Manager: Fleet Operations, was a matric or NQF equivalent, Assessors/Moderator’s course, tertiary qualification in Fleet management cited as an advantage as well 3 years relevant experience.

5.2.54 According to his CV, Mr Booysen holds a NQ3 Road Transport Certificate, NQ5 Road Transport Diploma, NQF 5 and NQF 6 B-Tech Bridging in Road Transport Management as well NQF 7 B-Tech in Road Transport Management.

5.2.55 On 10 April 2015, Ms Nair approved the appointment of Mr Booysen into the position of a Manager: Fleet. Graded at D2.

5.2.56 Mr Booysen was offered an annual package of R820 000.00, which was the maximum package of the scale for D2 level.
5.2.57 In the circumstances, there is no doubt that Pikitup appointed Mr Booysen into the position of a Manager: Fleet which is graded at D2 as revealed by evidence.

*Issues in dispute*

5.2.58 SAMWU indicated that Pikitup appointed Mr Booysen in a position of a Manager: Fleet while such a position was not advertised by Pikitup.

5.2.59 Mr Ncanana and Mr Magasa and Ms Nair participated in the appointment Mr Booysen and Ms Nair approved his appointment knowing that the position which Mr Booysen was interviewed for, which was that of a GM: Fleet was not on the same level with the position of Manager: Fleet.

5.2.60 The duties and the requirements for the two positions were not similar as the GM performs senior management and the Manager performs middle management duties and the Manager: Fleet reports to the GM Fleet although they both operate in the same environment.

5.2.61 Mr Ncanana and Mr Magasa and Ms Nair interviewed Mr Booysen in a position for which he did not meet the minimum requirements. Ms Nair accepted his inclusion in the shortlist to be interviewed for a position of a GM: Fleet and he was subsequently appointed in a position that was never advertised by Pikitup, namely Manager: Fleet Operations.

5.2.62 Replying to my section 7(9)(a) notice, Ms Nair disputed the preliminary findings on the basis that it made imminent sense to address the need for the position to which Mr Booysens was appointed and served the need for efficiency. Ms Nair further argued that it was within her powers as the Managing Director to manage this process in the manner that it was managed.
5.2.63 I am unable to accept the above submission by Ms Nair on the basis that any situation that is statutorily regulated by policy or other legal prescript should be dealt with in accordance with the guidelines as provided for in that applicable policy or prescript. Any unjustifiable exercise of discretion which is outside that policy or prescript is unlawful and irrational.

5.2.64 The Board indicated in its response to my section 7(9)(a) notice that it is not able to comment whether Mr Booysens' appointment was irregular or not. However, the Board still acknowledged my interim findings and undertook to strengthen internal controls within Pikitup to ensure that there is no recurrence of these violations.

**Application of the relevant legal framework**

5.2.65 Section 7.2 of Pikitup Recruitment and Selection Policy No CS HR/2013_005 which deals with Advertisement provides that "vacant positions can be advertised internally and can run concurrently with external advertisements. It further provides that all administrative, junior and middle management positions up to operations manager must be advertised internally through Pikitup website. External adverts can be used additionally at the discretion of the Executive responsible for that department."

5.2.66 According to the evidence, Pikitup did not advertise this position of a Manager: Fleet either internally on its website or externally as required by this Recruitment and Selection Policy.

5.2.67 Section 7.6 Pikitup Recruitment and Selection Policy No CS HR/2013_005 deals with Filling of additional posts and states that "if a post has been advertised, and a similar post becomes vacant after the first post has been advertised, the delegated official may approve that the second post be filled from the applications received for the first post. This is, provided that the
relevant positions are on the same level, with similar duties and requirements, and that the posts are geographically close to each other. Furthermore, the time period between the advertising of the first post and the approval of the nomination for the second post must be reasonable".

5.2.68 It is clear from the evidence that the relevant post of the GM: Fleet for which Mr Booysen was interviewed was not on the same level, neither were the duties and requirements similar, as those for the post of the Manager: Fleet on which he was ultimately appointed to by Pikitup.

Conclusion

5.2.69 Based on the evidence gathered, it can be concluded that the Pikitup officials violated Section 7.2 of Pikitup Recruitment and Selection Policy No CS_HR/2013_005 which requires that vacant positions should be advertised as well as Section 7.6 Pikitup Recruitment and Selection Policy No CS_HR/2013_005 which regulates the filling of additional posts.

The appointment of Mr Donovan Denyssen as an Independent Contractor and later as a GM: Enterprise Infrastructure and the salary offered by Pikitup

Common cause issues

5.2.70 Ms Nair instructed Ms Leslie to appoint Mr Denyssen as an Independent Contractor in January 2013 on an hourly rate of R330.

5.2.71 A position of a GM: Enterprise Infrastructure became vacant and Mr Denyssen was later appointed on 01 November 2013 as GM: Enterprise Infrastructure in accordance with Pikitup’s Recruitment and Selection Policy. Pikitup appointed
Mr Denyssen on a fixed term contract of five years and he was offered a package of R730 512.31 cost to company.

5.2.72 The position of GM: Enterprise Infrastructure required one to hold a relevant degree in Computer Science or equivalent qualifications.

5.2.73 The CV of Mr Denyssen which is in the possession of my team confirmed that Mr Denyssen’s highest education qualification is a Senior Certificate obtained in 1999 and IT Project Management with the University of Johannesburg, but such IT certificate was not furnished to my office upon request.

5.2.74 In early 2014, Mr Denyssen was charged by Pikitup with misconduct relating to the alleged theft of cellular telephones and subsequently resigned from Pikitup in April 2014 in the face of a disciplinary enquiry against him. Following his resignation, the disciplinary hearing continued in his absence and he was dismissed in absentia on 13 January 2015.

5.2.75 According to the evidence received by my office on behalf of the City from Qhubeka Forensic Services (which is dated 27 June 2016), in 2015, Mr Denyssen was appointed by Pikitup as an Independent Contractor from March 2015 to May 2015 at a negotiated rate of R1 200.00 per hour on the basis that he has in-depth understanding of the business. Pikitup submitted that this arrangement was with the permission of Mr Denyssen’s employer at the time.

5.2.76 Mr Denyssen later applied for a vacant position of GM: Enterprise Infrastructure and was successful. The salary scale was R833, 473.00 to R1, 171.777.00 and Ms Nair offered him R1 100.000.00 per annum which Ms Nair believed was within the salary band and commensurate with Mr Denyssen’s experience.

5.2.77 The position of GM: Enterprise Infrastructure during his appointment on 01 May 2015 still required one to hold a relevant degree in Computer Science or
equivalent and Mr Denyssen did not have any such qualifications and failed to furnish my office with a copy of such a a degree.

5.2.78 In the circumstances, I am persuaded that the complaint is probable.

*Issues in dispute*

5.2.79 It was argued in the Qhubeka Forensic Services report when there were delays in the appointment of Mr Denyssen that Ms Nair put pressure and threatened Ms Leslie that if she did not make the appointment, Ms Nair would proceed and appoint Mr Denyssen in her (Ms Nair’s) office as IT advisor.

5.2.80 Ms Nair disputed in her submission and argued in response to Mr Denyssen’s appointment as follows:

5.2.80.1 That Mr Denyssen’s resignation took place while she was on suspension and she was not aware of his resignation;

5.2.80.2 She established later that Mr Denyssen was charged with theft of cellular telephones and was subjected to a disciplinary enquiry;

5.2.80.3 An appointment was made of a Chief Technology Officer (CTO) in her absence and it later transpired that the candidate was not a fit for the environment; and, the said appointed CTO destabilised the IT environment at Pikitup; and

5.2.80.4 When she came back from suspension, Mr Thekiso advised her to bring back Mr Denyssen and he was contracted on an hourly basis and later permanently employed by Pikitup to the position of a GM: Enterprise Infrastructure.
5.2.81 Mr Denyssen did not reply to this specific allegation despite having been served with a section 7(9)(a) notice in terms of the Public Protector Act.

5.2.82 Replying to my section 7(9)(a) notice, the Board, through the Chairperson, agreed with my preliminary findings and further indicated that Pikitup's calculation of the total loss to Pikitup, as set out in the Particulars of the Claim against Ms Nair is an amount of R298 800.00 plus interest calculated at the rate of 10.25% per annum a tempore morae from 08 September 2016. The Board expressed its willingness to support any of my findings that this amount be recovered from Ms Nair.

**Application of the relevant legal framework**

5.2.83 Regulation 35(2) of the Municipal Supply Chain Management Regulations and Chapter 5 Supply Chain Management: a Guide for Accounting Officers of Municipalities and Municipal Entities 2005 provides that "the services of a consultant must be procured through a competitive bidding process".

5.2.84 In this particular case, Pikitup violated the above regulation by failing to procure the services of the consultant through a competitive bidding process as required by regulation.

5.2.85 Section 9.8.4 of Pikitup Recruitment and Selection Policy No CS_HR/2013_005 provides that "an employee whose services were terminated as the result of misconduct in terms of section 17(2) (e) of the Public Service Act 1994 or in terms of Labour Relations Act, 1995 may not be re-employed".

5.2.86 It is clear from the evidence traversed above that Mr Denyssen was facing a charge of misconduct relating to the theft of a cell phone when he resigned from Pikitup while the disciplinary hearing was still underway.
5.2.87 Regulation 8 of Municipal Finance Systems Act: on Appointment and Conditions of Employment of Senior Managers 2014, provides that "no person may be appointed as a senior manager on a permanent basis or on probation to any post on the approved staff establishment of a Municipality unless he/she possess the relevance competency, qualifications, experience and knowledge".

5.2.88 Mr Denyssen did not possess the requisite qualifications as required by Regulation 8.

5.2.89 In response to my section 7(9)(a) notice, Ms Nair sought to dispute the provisions of Regulation 35(2) of the Municipal Supply Chain Management Regulations and Chapter 5, of the Supply Chain Management: a Guide for Accounting Officers of Municipalities and Municipal Entities 2005. Ms Nair resorted to quoting the provisions of the SCM Regulations in general. In doing so, Ms Nair failed to indicate how such quoted provisions relate to the issue under discussion.

5.2.90 I am unable to place any legal weight to this denial by Ms Nair and I dismiss it as a desperate attempt aimed at watering down the profound effect of the adverse finding on this issue.

**Conclusion**

5.2.91 It follows therefore that all Pikitup officials that were involved in the appointment of Mr Denyssen as an Independent Contractor violated Regulation 35(2) of the Municipal Supply Chain Management Regulations and Chapter 5 of the Supply Chain Management: a Guide for Accounting Officers of Municipalities and Municipal Entities 2005,

5.2.92 It further follows that all Pikitup officials that were involved in the initial appointment and re-appointment of Mr Denyssen violated Section 9.8.4 of
Pikitup Recruitment and Selection Policy No CS_HR/2013_005 provides that an employee whose services were terminated as a result of misconduct in terms of section 17(2)(e) of the Public Service Act 1994 or in terms of the Labour Relations Act, 1995 may not be re-employed and Regulation 8 of Municipal Finance Systems Act: on Appointment and Conditions of Employment Senior Managers 2014, which provides that "no person may be appointed as a senior manager on a permanent basis or on probation to any post on the approved staff establishment of a Municipality, unless he/she possess the relevance competency, qualifications, experience and knowledge."

The appointment of Mr Mthembeni Ncanana into the position of a GM: Human Resources and Industrial Relations and salary offered by Pikitup

Common cause issues

5.2.93 The recruitment process for the position of a GM: Human Resources and Industrial Relations at Level E1 was embarked upon through Pinpoint One Human Resources (Pty) Ltd.

5.2.94 The position of a GM: Human Resources and Industrial Relations at Level E1 was advertised as follows:

5.2.94.1 On 08 September 2012 on the Pikitup website with a closing date of 20 October 2012;

5.2.94.2 The advertisement placed in the Sunday Times newspaper on 07 October 2012 with the closing date of 02 November 2012; and

5.2.94.3 The requirements for the position were an Honours Degree in Industrial Psychology and/or in Human Resources Management, Postgraduate
Diploma in Industrial Relations and five (5) years Management experience in Industrial Relations and/or Human Resource Management environment.

5.2.95 On 21 December 2012 after the closing date of the advertisements, Mr Ncanana submitted his CV to Pinpoint One.

5.2.96 On 31 December 2012, Pinpoint One submitted to Pikitup a list of applicants that applied for the position which comprised of 73 applications and Mr Ncanana's name was not included on the list.

5.2.97 On 15 January 2013, Mr Viveiro, from Pinpoint One informed Ms Nair and copied the Executive Director, Mr Thekiso, that three candidates namely Boledi Seopela, Nakampe Mogale and Mthembeni Ncanana were shortlisted and interviews would be finalised on 23 January 2013.

5.2.98 Mr Viveiro subsequently submitted an interview report on 24 January 2013 and recommended that Mr Ncanana should be appointed in the position of GM: Human Resources and Industrial Relations.

5.2.99 According to the memorandum, eight applicants were interviewed for competency by Pinpoint One.

5.2.100 The memorandum further reads that a final shortlist of candidates comprising of Boledi Seopela, Nakampe Mogale and Mthembeni Ncanana was agreed to in consultation with the Managing Director. On 24 January 2013, a panel consisting of Mr Jonathan Thekiso, Executive Director: Corporate Services, Ms Nair and Joanne Murphy, Independent Consultant interviewed the candidates.

5.2.101 The memorandum further reads that the panel unanimously recommended that Mr Ncanana should be appointed in the position of GM: Human
Resources and Industrial Relations with effect from 01 March 2013 on a five-year fixed contract at R760 000.00 total cost to company plus a performance bonus up to 14%.

5.2.102 On 14 February 2013, Ms Nair and Mr Ncanana signed an offer of employment letter including a contract of employment dated 04 February 2013 appointing him in the position General Manager: Human Resources and Industrial Relations.

5.2.103 On 21 May 2013, Mr Thekiso addressed a memorandum requesting Ms Nair's approval to adjust Mr Ncanana's salary.

5.2.104 In the memorandum, Mr Thekiso requested Mr Ncanana salary's offer to be reviewed. According to Mr Thekiso, the minimum and maximum salary at the time was from R730, 512.31 to R1, 027, 024.17 for the GM: Human Resources and Industrial Relations position.

5.2.105 The review was based on SAP system configuration of pensionable earnings, loss of performance bonus from previous employer, loss of prospective medical aid and retirement benefits (with employer contributions) from the previous employer.

5.2.106 The memorandum further indicated that in March 2013 Mr Ncanana would have been eligible from his previous employer for a bonus of up to 10% for the period 2012/2013 and forfeited R$4, 000.00 less one month pro rata.

5.2.107 Mr Thekiso further submitted that notwithstanding the provision for performance bonus at Pikitup, the financial year commences in July and ends in June and therefore Mr Ncanana would be eligible for an incentive in 2014.
5.2.108 The acceptance of the offer also meant forfeiture of medical aid and retirement benefits as well as cost of living increase of not less than 5.9% (CPI).

5.2.109 Mr Thekiso submitted that Mr Ncanana should be offered R950,000.00 and stated that to avoid ex-post facto reviews, all prospective employees are be given a dummy payslip to understand the financial implications of the salary offered by Pikitup before accepting the offer.

5.2.110 On 22 May 2013, Ms Nair then approved the revised salary offer to Mr Ncanana of R950,000.00.

**Issues in dispute**

5.2.111 In an unsigned memorandum dated 31 January 2013, Pikitup apparently prepared for the Board and made available to my office, it was indicated that Pikitup received seventy four applications as indicated below.

<table>
<thead>
<tr>
<th>Race and Gender</th>
<th>Number of Responses</th>
<th>Percentages</th>
</tr>
</thead>
<tbody>
<tr>
<td>African Females</td>
<td>21</td>
<td>28.77%</td>
</tr>
<tr>
<td>African Males</td>
<td>46</td>
<td>61.64%</td>
</tr>
<tr>
<td>Coloured Females</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Coloured Males</td>
<td>1</td>
<td>1.37%</td>
</tr>
<tr>
<td>Indian Females</td>
<td>1</td>
<td>1.37%</td>
</tr>
<tr>
<td>Indian Males</td>
<td>1</td>
<td>1.37%</td>
</tr>
<tr>
<td>White Female</td>
<td>1</td>
<td>1.37%</td>
</tr>
<tr>
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<td>1.37%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>74</td>
<td>100%</td>
</tr>
</tbody>
</table>
5.2.112 It is in dispute that Mr Ncanana submitted his CV to Pinpoint One on 21 December 2012 after the closing date of the advertisements which was 02 November 2012.

5.2.113 On 31 December 2012, Pinpoint One submitted to Pikitup a list of applicants that applied for the position which comprised of 73 applications and Mr Ncanana’s name was not included on the list.

5.2.114 It is in dispute that Pinpoint One submitted a list of 73 applications without the name of Mr Ncanana whilst Pikitup submitted to my office, a list of 74 including the name of Mr Ncanana.

5.2.115 It is further in dispute as to why and how, on 15 January 2013, Mr Viveiro, from Pinpoint One informed Ms Nair and copied Executive Director, Mr Thekiso, that three candidates namely Boledi Seopela, Nakampe Mogale and Mthembeni Ncanana were shortlisted and interviews would be finalised on 23 January 2013, while Mr Ncanana’s CV was submitted after the closing date.

5.2.116 Evidence further reveals that Mr Ncanana in an email dated 25 January 2013, addressed to Mr Viverio of Pinpoint One stated that he accepted the offer in principle, and requested Mr Viverio to negotiate on his behalf, the salary offer as he argued that he stood to forfeit a 10% bonus in the region of R64 000.00 if he assumed employment with Pikitup.

5.2.117 This request for a salary review started before the offer of employment was made by Pikitup to Mr Ncanana. It is therefore unclear how Mr Ncanana would have come to know about his offer before the appointment process was completed by Pikitup.

5.2.118 Ms Nair did not comment on this issue when replying to my section 7(9)(a) notice except to indicate that it is a practice for a salary slip or confirmation of
remuneration to be requested from a candidate. However, this submission is neither here nor there and does not raise valid legal or factual grounds that justify the departure from my intended finding.

Application of the relevant legal framework

5.2.119 The provisions of Section 7.3.2.11 of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005 deals with Advertisement Content Requirements and provides that "late and incomplete application forms will not be considered." The application of Mr Ncanana was not on the list of applications received before the closing date submitted by Pinpoint One to Pikitup. The shortlisting of Mr Ncanana while his application was received after the closing date was therefore inappropriate.

5.2.120 Section 9.2 of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005 provides that "once the selection process is concluded and the MD has approved the appointment, the job must be formally offered to the successful candidate. No offer of employment, verbal or otherwise may be made before the conclusion of the process."

5.2.121 In the circumstances, it clear from the evidence that Mr Ncanana was informed or offered the job and the salary package by Pikitup or PinPoint One (Pikitup’s recruitment agent) before the conclusion of the selection process. This is clear from his request for the salary review which started in 25 January 2013 (shortly after the interviews were conducted) and the job offer was officially made to him on 04 February 2014.

Conclusion

5.2.122 Pikitup failed to comply with section 7.3.2.11 and Section 9.2 of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005 which requires that
"no offer of employment, verbal or otherwise may be made before the conclusion of the process."

5.2.123 In response to my section 7(9)(a) notice, the Board acknowledged my conclusion in this regard, and its view is that internal controls must ensure that there is no recurrence of these violations.

The appointment of Ms Phumla Mokele into the position of Manager: Human Resources Services and salary offered by Pikitup

Common cause issues

5.2.124 Pikitup advertised on its website a position of a Manager: Human Resources Services with a closing date of 09 November 2010.

5.2.125 The requirements for the position were a Bachelor's degree in Human Resources or Industrial Psychology, five years HR and managerial experience including knowledge of relevant legislation.

5.2.126 The CV of Ms Phumla Mokele which is in possession of my office indicates that she held a Senior Certificate with effect from April 1994, a National Diploma in Human Resources Management with effect from 01 October 2007.

5.2.127 Ms Mokele's CV further indicates that she worked as a Secretary/Receptionist: Propnet, property division of Transnet from 2002 to March 2004; Human Resources Officer: Transnet Rail Engineering from 2004 to 2005; Training Coordinator (Human Resources): Transnet Rail Engineering from February 2005 to December 2007; Human Resources Officer: Transnet Rail Engineering (Recruitment and OD) from January 2008 to June 2008; Human Resources Specialist: Land Bank from July 2008 to 2011; Acting
Manager: Payroll and Administration from 2010 May to January 2011; current occupation: Manager Human Resources Services, Pikitup from 2011 to date.

5.2.128 On 27 January 2011, interviews for the position of a Manager: Human Resources Services were held by Pikitup.

5.2.129 The panel consisted of Ms Sbongile Mkwanazi, HR Executive; Mr Mzu Tshem, GM: MD Office and Mr Bafana Ngwenya, GM: HCD and TM. The observers were Mr Phumlile Shange, SAMWU; Mr Peter Tsikoe, SAMWU and Mr J.J Khumalo, IMATU. The panel scored Ms Mokele 122 points and she came second.

5.2.130 The panel did not recommend Ms Mokele for the position. The recommended candidate was Mr Mahlatse Mashiane with a score of 144 points.

5.2.131 An internal memorandum dated 31 March 2011 was compiled by Mr Livhuwani Mamuthubi, supported by Mr Ngwenya and addressed to Mr Nkosi.

5.2.132 In the memorandum, it was indicated that Pikitup received 150 applications and 7 candidates were shortlisted.

5.2.133 It was further submitted that while Mr Mahlatse Mashiane scored highest among the interviewees, the panel reached a consensus that in the interest of employment equity, the second placed candidate Ms Mokele should be appointed.

5.2.134 The memorandum further indicated that Ms Mokele should be offered a position at grade D4 and be remunerated as such.

5.2.135 Mr Nkosi approved the appointment of Ms Mokele to a position of Manager: Human Resources Services on 31 March 2011.
5.2.136 Pikitup offered Ms Mokele a fixed term contract for the duration of five (5) years in the position of a Manager: Human Resources Services at a remunerated package of R 513, 292.00 per annum total cost to company and an annual merit/performance bonus of up to 14% subject to achievement of performance management objectives as per letter dated 31 March 2011.

5.2.137 The offer letter was signed by Mr Ngwenya, on 31 March 2011 and the former Managing Director on 01 April 2011 and accepted by Ms Mokele on 06 April 2011.

5.2.138 Ms Mokele lodged a grievance when she learnt that she was not remunerated at the right grade. At the time she was being remunerated at D3 instead of D4 level.

5.2.139 On 13 June 2012, Mr Boya approved that Ms Mokele’s remuneration package should be adjusted to a D4 level and be paid from 01 September 2011 without any increase for the preceding year. He stated that she would be entitled to a salary increase for the financial year 2011/2012 if such increases are approved. Ms Mokele’s salary was adjusted by 11% retrospective from 01 September 2011.

5.2.140 On 20 August 2014, Mr Ncanana addressed a memorandum to Mr Thekiso for the approval to adjust Ms Mokele’s salary to R 830,000.00 total cost to company effective from 01 September 2014.

5.2.141 Mr Ncanana indicated that he was in receipt of a request from Ms Mokele for the review of her salary on the basis of performance, which Mr Ncanana had subsequently discussed with her.
5.2.142 On 28 August 2014, Mr Thekiso approved 2% salary adjustment of Ms Mokele package from R736 874.00 to R830 000.00 effective 01 September 2014.

Issues in dispute

5.2.143 It is noted from the evidence that the requirements for this position were a Bachelor’s degree in Human Resources or Industrial Psychology, five years HR and managerial experience including knowledge of relevant legislation, while Ms Mokele only possessed a National Diploma in Human Resources Management. It is indicated in evidence that Ms Mokele did not have the requisite Human Resources experience.

5.2.144 It was disputed by Land Bank that while Ms Mokele was in their employ she was a Human Resources Specialist from July 2008 to 2011. Instead, they indicated that she was a HR compensation and Administration Officer which is a lower position than that of an HR specialist. Such evidence was provided to my office in a letter dated 25 May 2016 by Ms Mpule Dlamini, Executive Manager of Human Resources at Land Bank.

5.2.145 This evidence given by Land Bank is in stark contrast with what appears on the CV of Ms Mokele.

5.2.146 It is therefore clear that Ms Mokele never had the relevant Bachelor’s degree nor the managerial experience as was required by the advertisement.

5.2.147 While Ms Nair correctly pointed out in her response to my section 7(9)(a) notice that an appointment process of Ms Mokele predates her office tenure at Pikitup, the Board has acknowledged and accepted my intended finding in this regard. The Board further indicated it has instructed Ms Mokele to acquire the necessary qualifications or demonstrate recognition of prior learning
commensurate with her qualifications, failing which she will be placed in a position commensurate with her qualifications, competencies and capabilities.

5.2.148 On Wednesday 15 June 2016, my team conducted an interview with Ms Mokele in connection with this issue. Ms Mokele conceded on record\(^3\) that she only possesses a Diploma in Human Resources Management from University of Johannesburg (UJ). Ms Mokele further indicated to my team that she has a one year certificate in Human Resources Management from University of Witwatersrand (Wits). In response to her managerial experience and position previously held at Land Bank’s Human Resources, Ms Mokele told my team that she cannot remember well but she “\(thinks\)^4 she was an HR specialist. This was categorically denied by Land Bank as already explained above.

*Application of the relevant legal framework*

5.2.149 The regulatory framework applicable in this issue shall be the advertisement of the post itself that appeared on Pikitup’s website with the closing date of 09 November 2010 which provides that the requirements for the position of an HR manager were a Bachelor’s degree in Human Resources or Industrial Psychology, five years HR and managerial experience including knowledge of relevant legislation.

5.2.150 It is noted in evidence that Ms Mokele was appointed to the position of HR Manager by Pikitup despite her not having the necessary educational qualifications as well as the required managerial experience.

\(^3\) Audio transcribed on 07/11/2017 at page 3-5.

\(^4\) This statement carried a lot of doubts, hesitation if not dishonesty on the part of Ms Mokele. In my view such a statement beggars belief.
5.2.151 It is clear from the evidence extrapolated above that Ms Mokele only has a National Diploma in Human Resources Management and not a Bachelor’s degree as required by the advertisement.

5.2.152 It also became clear from the evidence that Ms Mokele did not have the five years of managerial experience in Human Resources as all the positions she occupied previously were junior positions and not managerial positions as confirmed by Land Bank.

5.2.153 It was submitted by Pikitup that while Mr Mahlatse Mashiane scored highest among the interviewees, the panel reached a consensus that in the interest of employment equity, the second placed candidate Ms Phumlal Mokele should be appointed.

Conclusion

5.2.154 It follows therefore that Pikitup improperly disregarded their own requirements of the Human Resources position as contained in the advertisement and irregularly appointed Ms Mokele under the pretext of the Employment Equity Act.

The appointment of Mr Kelvin Ngwenya into the position of a Payroll Administrator and the salary offered by Pikitup

Common cause issues

5.2.155 On 24 January 2013, Ms Nair addressed a letter to Mr Thekiso to consider an internship or training for Mr Ngwenya.

5.2.156 Ms Nair indicated in the letter that Mr Ngwenya was studying at the UNISA for a Bachelor’s degree, that Ms Nair was sponsoring Mr Ngwenya’s studies.
5.2.157 In the same letter, Ms Nair further indicated that Mr Ngwenya is her family associate and that the letter should be placed on record as her declaration of interest in the matter.

5.2.158 On 28 February 2013, Ms Nair subsequently concluded a temporary employment contract with Mr Ngwenya to commence employment at Pikitup as a Payroll Officer on a salary scale of R9 575 97 from 25 February 2013 to 31 August 2013.

5.2.159 Subsequent to that, Mr Ngwenya was appointed on a temporary basis as a Payroll Officer in 2013.

5.2.160 Mr Ngwenya remained in the employ of Pikitup and on 01 April 2016, he was again offered a contract of temporary employment until 30 June 2016 as a Payroll Administrator concluded by Mr Suren on 25 April 2016.

5.2.161 The Board of Pikitup informed the Deputy Public Protector during an interview on 04 April 2016 that Ms Nair advised that Mr Ngwenya was participating in an internship programme.

5.2.162 The salaries offered to Mr Ngwenya as opposed to salaries paid to a person employed as an intern were significantly high. From March 2013, he was receiving a package of R114 912.00 which increased on 01 July 2015 to R122 955.00.

5.2.163 Ms Nair confirmed knowledge of the letter during the interview on 09 May 2016 and further stated that:

a) She thought it was the right thing to do and that she provided Mr Thekiso with Mr Ngwenya’s CV;
b) Pikitup has an intake of interns twice annually and the letter was not intended to put Mr Ngwenya at an advantage; and

c) Mr Ngwenya was appointed as a temporary employee.

*Issues in dispute*

5.2.164 It is argued by the Complainants that Mr Ngwenya did not apply for an intern or a temporary position at Pikitup but was rather favoured and offered the position by Pikitup on the instruction of Ms Nair.

5.2.165 It was revealed in evidence that Mr Ngwenya was a family associate of Ms Nair who stayed with her in the same house and that Mr Ngwenya's mother was the domestic worker in the house of Ms Nair at the time of this investigation.

5.2.166 Mr Thekiso made it clear during an investigative interview held on 04 May 2016 in my office that Mr Ngwenya was never subjected to an interview\(^5\) process and that Ms Nair compromised his integrity by recommending the appointment of Mr Ngwenya without following the Pikitup recruitment policies. Mr Thekiso lamented during the interview with my team the fact that he was only two weeks at Pikitup when he was given the letter by Ms Nair basically pressurising him to employ Mr Ngwenya. Mr Thekiso further submitted to my team that if he knew what he knows now, he would not have appointed Mr Ngwenya.

5.2.167 Over and above this, the totality of responses given by Mr Thekiso to my team around the appointment of Mr Ngwenya were rather long winded, self-serving

\(^5\) Audio transcripted 05/11/2017 at page 15 and 17.
and carried a lot of obfuscation. For this reason, Mr Thekiso’s responses ought to be rejected on the basis that at his level (Executive Manager) he should have not allowed himself to be manipulated. By employing Mr Ngwenya in the manner that he did, Mr Thekiso became complicit in this matter.

5.2.168 Replying to my section 7(9)(a) notice, Ms Nair did not deny all the allegations, but she indicated that there was no instruction from her to appoint Mr Ngwenya. She argued that she only asked that Mr Ngwenya should be considered as a possible candidate. She further contended that Mr Thekiso exercised his judgment on his own volition and proposed an independent contractor position for Ngwenya. However, it is not clear to me how a suggestion by a person in the position of Ms Nair can be regarded as a mere suggestion and not an instruction by employees below her in rank in the normal power play that exists in the workplace. I am further not convinced by what appears to be an obvious shirking of responsibility between Ms Nair and Mr Thekiso surrounding the irregular appointment of Mr Kelvin Ngwenya and accordingly hold both of them accountable for irregularity on this issue.

5.2.169 The Board has graciously accepted this preliminary finding and agreed with me in its response to the section 7(9)(a) notice. The Board further indicated that Mr Ngwenya has since resigned from Pikitup with effect from 03 February 2017.

Application of the relevant legal framework

5.2.170 The provisions of clause 7.3.2. Of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005 deals with Advertisement Content Requirements and provides that vacant positions can be advertised internally and can run concurrently with external advertisements. It further provides that all administrative, junior and middle management positions up to operations
manager must be advertised internally through the Pikitup website. External adverts can be used additionally at the discretion of the Executive responsible for a department.

5.2.171 It is noted in evidence that the position of Payroll Administrator in which Mr Ngwenya was appointed as a temporary employee was never advertised by Pikitup and Mr Ngwenya never applied for that position but his CV was instead forwarded to Pikitup HR by Ms Nair.

5.2.172 Section 94(1)(b) of the MFMA requires that "the accounting officer of a municipal entity must act with fidelity, honesty, integrity and in the best interest of the entity in managing the financial affairs of the entity."

5.2.173 Section 94(1)(c) also requires the accounting officer, to disclose to the board of directors all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the board.

5.2.174 Section 94(1)(d) of MFMA requires that the Accounting Officer should "seek, within the sphere of influence of that accounting officer, to prevent any prejudice to the financial interests of the parent municipality or the municipal entity."

5.2.175 Section 94(2)(a) of the MFMA provides that "the accounting officer may not act in a way that is inconsistent with the responsibilities assigned to accounting officers of municipal entities in terms of this Act."

5.2.176 By appointing Mr Ngwenya without following the Pikitup recruitment policies, Ms Nair was in direct contravention of Section 94(2)(a) of the MFMA.

5.2.177 Ms Nair neglected her fiduciary duty of an accounting officer by failing to act in line with the MFMA, Section 94(1)(b) by appointing Mr Ngwenya and
offering him a salary package without following the due HR processes. Such appointment was in a direct conflict of section 94(1)(d) of the MFMA.

Conclusion

5.2.178 It follows therefore that Pikitup in the appointment of Mr Kelvin Ngwenya failed to follow its own Recruitment and Selection Policy, and as well to observe the MFMA.

The appointment of Ms Kathija Docrat into the position of a Marketing and Events Specialist and salary offered by Pikitup

Common cause issues

5.2.179 Ms Kathija Docrat was employed on a temporary basis as a Marketing and Events Specialist which appointment was approved by Ms Nair as follows:

5.2.180 An internal memorandum dated 16 July 2015 from Mr Lunceno Njezula, Acting Executive: Strategic Support was addressed to Ms Nair requesting her to allow the Communication and Stakeholder Management Department to appoint a Marketing Specialist on a temporary basis, pending the recruitment process of a permanent Marketing Specialist.

5.2.181 Mr Njezula submitted that since the departure of Ms Sharon Mould who used to manage the marketing, branding and events functions, the unit was left ineffective. In order to ensure the efficient running of the unit, it was critical for the department to appoint the services of a temporary employee as early as 01 August 2015.

5.2.182 Mr Njezula indicated that the position would cost the company a salary of R44 000.00 per month and the budget would be sourced from the
Communications and Stakeholder Management salary budget in the 882121 Cost Centre.

5.2.183 Mr Njezula, as the writer, signed the memorandum on 23 July 2015 and Mr Thekiso supported the recommendation mentioned in paragraph 8 of the memorandum for a temporary appointment for a period of 3 years and signed on 27 July 2017.

5.2.184 Ms Nair also supported the recommendations mentioned in paragraph 8 and signed on 24 July 2015. The Acting Head: Finance Services identified in the memorandum as Mr Maharaj noted that there was no paragraph 8 and no budget provision confirmed and Line Management should identify savings and she signed it on on 29 July 2015.

5.2.185 A temporary employment contract entered into between Ms Docrat and Ms Nair on 03 August 2015 stated that Pikitup shall employ her as the Marketing and Events Specialist for a fixed period of 3 months deemed to commence on 01 August 2015 and terminate on 31 October 2015. The contract further stated that the Marketing and Events Specialist shall be paid an amount of R44 000.00 payable in monthly arrears.

5.2.186 An internal memorandum dated 19 October 2015 from Ms Zimba was addressed to Jacky Mashapu, GM: Communication and Stakeholder. The purpose of the memorandum was to motivate for the extension of a contract of employment of the marketing and events specialist, Ms Docrat, for a period of 3 months with effect from 01 November 2015 to 31 January 2016. According to the memorandum, Ms Docrat was employed by Pikitup on 01 August 2015 on a contract basis and her contract came to an end on 30 October 2015.
5.2.187 Ms Zimba, as the writer, signed the memorandum on 19 October 2015 and Jacky Mashupa supported. Mr Njezula, Acting Executive: Strategic Services signed, but did not indicate whether he supported or not supported the motivation. Mr Thekiso approved the recommendation on 20 October 2015. Ms Nair on 23 October 2015 approved a period of 6 months extension.

5.2.188 A temporary employment contract entered into between Ms Docrat and Ms Nair on 06 November 2015 stated that Pikitup shall employ Ms Docrat as the Marketing and Events Specialist for a fixed period of 6 months deemed to have commenced on 01 November 2015 and terminated on 30 April 2016. The contract further stated that the Marketing and Events Specialist shall be paid an amount of R 44,000.00 payable in monthly arrears.

5.2.189 Ms Docrat’s contract was further extended from 01 May 2016 to 31 July 2016 subsequent to a memorandum dated 18 April 2016 from Ms Zimba supported by Mr Thekiso and approved by Mr Maharaj as the Acting Manager.

*issues in dispute*

5.2.190 It was argued by the Complainants that Ms Docrat was appointed by Pikitup without such post being advertised, without Pikitup compiling job requirements, level of experience required for the post, the form on which application must be submitted, the required documentation that must accompany the application, to whom and what address the application for the post can be submitted and the closing date for the post.

5.2.191 The Complainants argued that Ms Docrat was ever subjected to an interview or other pre-selection process by Pikitup before she was appointed in the position of Marketing and Events Specialist.
5.2.192 Evidence further revealed that there was no budget provision confirmed by the Line Management in relation to this post as pointed out by the Acting Head: Finance Services Mr Suren Maharaj in the memorandum.

5.2.193 In response to my section 7(9)(a) notice, Ms Nair again denied all allegations related to this issue while at the same time she chose not to comment on others. Ms Nair again conveniently referred my office to her Plea and Third Party notice filed on her behalf by her attorneys of record in the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 9524/17.

5.2.194 However, it should be highlighted that this response and referral of my office to documents designed for the purpose of a judicial platform does not take this issue forward. This submission is therefore unfounded as I did not request such documents for my own enquiry, set of facts, evidence, standards and issues under my investigation. I am therefore not in a position to factor-in or reconcile such documents with issues investigated by me in a generic fashion that is envisaged by this referral. It is my view as an ombudsman that Ms Nair should have replied directly to my preliminary findings.

5.2.195 The Board agreed in principle with my preliminary findings and further indicated that Pikitup's calculation of the total loss to Pikitup, as set out in the Particulars of the Claim against Ms Nair is an amount of R396 600.00 plus interest calculated at the rate of 10.25% per annum a tempore morae from 08 September 2016. The Board expressed its willingness to support any finding of minthat this amount be recovered from Ms Nair.
Application of the relevant legal framework

5.2.196 Section 7.2 subsection 7.2.1 of Pikitup Recruitment Policy provides that “vacant positions can be advertised internally and can run concurrently with external advertisements”.

5.2.197 Section 7.2.5 of the same policy provides that “all administrative, junior and middle management positions up to operations manager must be advertised internally through the the Pikitup website. External adverts can be used additionally at the discretion of the Executive responsible for that Department”.

5.2.198 It is noted in evidence that the post on which Ms Docrat was appointed, was never advertised in accordance with the directives of the Pikitup recruitment policy. There is also no evidence which shows that she was interviewed for the position of Marketing and Events Specialist. There was also no budget provision confirmed by Line Management for this position.

5.2.199 Section 94(1)(b) of MFMA requires that “the accounting officer of a municipal entity must act with fidelity, honesty, integrity and in the best interest of the entity in managing the financial affairs of the entity”.

5.2.200 Ms Nair as the accounting officer failed to act in line with the dictates of section 94(1)(b) of the MFMA which requires of her to act with honesty, integrity and fidelity in managing the financial affairs of the entity.
Conclusion

5.2.201 Pikitup officials involved in the appointment of Ms Docrat did not follow Pikitup's own Recruitment and Selection Policy, as well as to observe the MFMA.

Ms Michelle Alexander's appointment into the position of a Regional Stakeholder Specialist and salary offered by Pikitup

Common cause issues

5.2.202 Ms Alexander was employed by Pikitup since 2009 and when her fixed term contract expired, when Ms Nair then offered her a new contract. Ms Alexander was then appointed on a temporary basis in December 2015 at the instance of Ms Nair.

5.2.203 An internal memorandum dated 24 November 2015 from Mr Lucky Madikiza, Manager: Stakeholder Liaison and Jacky Mashapu, GM: Communication and Stakeholder was addressed to Ms Nair The memorandum sought Ms Nair’s approval for the appointment of Ms Alexander on a 6 months contract basis.

5.2.204 The memorandum indicated that Ms Alexander was needed to play the role of a Regional Stakeholder specialist, in particular given her experience with Pikitup for 13 years in various roles.

5.2.205 M Nair was advised in the memorandum that Ms Alexander's contract expired on 30 November 2015 and that she was called upon to assist in the Communication and Stakeholder Management unit from 01 December 2015 due to a high workload experienced by the unit.
5.2.206 To that end, Ms Nair concluded a contract of temporary employment with Ms Alexander for a period of six months commencing on 01 December 2015 to 30 May 2016 on a salary of R 40 000.00 per month payable in arrears.

**Issues in dispute**

5.2.207 The Complainants argued that Ms Alexander as a friend and an ally to Ms Nair was recruited in that post without it being advertised and without her being subjected to an interview process as required in terms of the Pikitup Recruitment and Selection Policy.

5.2.208 In her reply to my section 7(9)(a) notice, Ms Nair failed to comment on the preliminary findings and again simply referred my office to her Plea and Third Party notice filed on her behalf by her attorneys of record in the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 9524/17.

5.2.209 In its response to my section 7(9)(a) notice, the Board acknowledged my preliminary findings and further indicated that Pikitup's calculation of the total loss to Pikitup, as set out in the Particulars of the Claim against Ms Nair is an amount of R240 600.00 plus interest calculated at the rate of 10.25% per annum a tempore morae from 08 September 2016. The Board expressed its willingness to support any finding of mine that this amount be recovered from Ms Nair.

*Application of the relevant legal framework*

5.2.210 Section 7.2 subsection 7.2.1 of Pikitup Recruitment Policy provides that “vacant positions can be advertised internally and can run concurrently with external advertisements.”
5.2.211 Section 7.2.5 of the same policy provides that all administrative, junior and middle management positions up to operations manager must be advertised internally through the Pikitup website. External advertisements can be used additionally at the discretion of the Executive responsible for a Department.

5.2.212 Pikitup has not shown that the above legal provisions were complied with in the appointment process of Ms Alexander.

Conclusion

5.2.213 In the absence of any evidence to the contrary, I am inclined to believe the version of the Complainant in that Pikitup in the appointment of Ms Alexander’s failed to follow its own Recruitment and Selection Policy, and as well to observe the MFMA.

Mr Ike Sampson's appointment into the position of a Messenger/Driver and salary offered by Pikitup

Common cause issues

5.2.214 Mr Sampson was part of a group of 2500 employees who were absorbed from a third party contractor into Pikitup in 2011 as a Driver and placed in one of Pikitup depots.

5.2.215 Mr Sampson's salary of R5 858 per month was adjusted like all absorbed Drivers to R9 528.00 per month and his position became redundant and he was offered a Messenger/Executive Driver position in Ms Nair’s office.

5.2.216 According to Pikitup, subsequent increases into Mr Sampson’s salary were made in order for him to improve his dress code and present a professional appearance considering that he was now in Ms Nair’s office.
5.2.217 Mr Sampson’s salary increased from R9 528.00 to R13 885.00 per month.

**Issues in dispute**

5.2.218 The Complainants argued that Mr Sampson as a friend and an ally to Ms Nair was recruited in that post without it being advertised and without her being subjected to an interview process as required in terms of the Pikitup Recruitment and Selection Policy.

5.2.219 Ms Nair indicated in her response to my section 7(9)(a) notice that no comment is made with regard to this issue and on its findings. However, she only pointed out that Mr Sampson did not apply for a position instead he was merely moved into the Office of the Company Secretary in order to render driver services as he was doing since the start of his tenure at Pikitup.

5.2.220 By implication this was an admission by Ms Nair that the post to which Mr Sampson was moved to was not advertised nor was he interviewed in respect thereof.

5.2.221 The Board accepted this conclusion in its response to the section 7(9)(a) notice and further expressed its willingness to implement any remedial action that I shall propose.

**Application of the relevant legal framework**

5.2.222 Section 7.2.1 of Pikitup Recruitment Policy provides that “vacant positions can be advertised internally and can run concurrently with external advertisements.”
5.2.223 Section 7.2.5 of the same policy provides that "all administrative, junior and middle management positions up to operations manager must be advertised internally through the Pikitup website. External adverts can be used additionally at the discretion of the Executive responsible for that Department."

5.2.224 Pikitup has not shown that the above legal provisions were complied with in the appointment process of Mr Sampson.

Conclusion

5.2.225 In the absence of an evidence to the contrary, I am persuaded to believe the version of the Complainant in that Pikitup in the appointment of Mr Sampson failed to follow its own Recruitment and Selection Policy.

5.3 Regarding whether Ms Nair irregularly removed black employees from critical positions and replaced them with Indian employees:

Removal of Ms Lindiwe Hleza the Chief Financial Officer and replacement with Ms Suren Maharaj

Common cause issues

5.3.1 Ms Lindiwe Hleza was appointed to act in the position of Chief Financial Officer when Mr Ntsaluba who occupied the position was placed on suspension.

5.3.2 Mr Ntsaluba eventually left Pikitup and the position of the CFO became vacant.

5.3.3 Ms Hleza applied for the position and she was shortlisted and interviewed for the post.
5.3.4 Mr Maharaj also applied for the same position and he was shortlisted and interviewed as well.

5.3.5 According to the evidence in my possession, Mr Maharaj performed exceedingly well in the interviews and was the top scorer followed by Ms Hleza. However, the panel recommended the appointment of Ms Hleza in order to promote equity at Senior Management level.

5.3.6 Ms Hleza declined the offer and later resigned to join the Ekurhuleni Municipality. Pikitup offered the position to Mr Maharaj.

Issues in dispute

5.3.7 The Complainant's argument was that Ms Hleza was removed from the position of the CFO by Ms Nair because she was black and replaced by Mr Maharaj who is an Indian.

5.3.8 Pikitup vehemently disputed this and explained on 09 May 2016 to my office that Ms Hleza declined the position and subsequently resigned to join the Ekurhuleni Municipality.

Conclusion

5.3.9 Evidence shows that Ms Hleza was offered the position on the basis of equity, but voluntarily declined the position and left Pikitup to join Ekurhuleni Municipality. It follows therefore that the submission of Pikitup is more probable than the version of the Complainants.
Removal of Dr Wayne Letoaba and replacement with Mr Ismael Dawood

Common cause issues

5.3.10 Dr Wayne Letoaba resigned from the position of Occupational Medical Specialist on 03 April 2014.

5.3.11 Dr Dawood was recruited through a recruitment process and his appointment was made by Mr Maharaj in his capacity as Acting Managing Director.

Issues in dispute

5.3.12 The Complainants argued that Dr Letoaba was removed by Pikitup because he is black and was replaced by Dr Dawood who is an Indian.

5.3.13 Pikitup submitted a report to my office indicating that Dr Letoaba resigned of his own volition and Dr Dawood was appointed in his position.

5.3.14 Replying to my section 7(9)(a) notice on this issue, the Board indicated that it discovered *mero motu* that Dr Dawood was remunerated at a salary above the upper limit of the salary band at which he was appointed. Pikitup’s calculation of the total loss to Pikitup, as a result of remuneration of Dr Dawood above the upper limit of the salary band and as set out in the Particulars of the Claim against Ms Nair is an amount of R76 053.22 plus interest calculated at the rate of 10.25% per annum a tempore morae from 08 September 2016. The Board expressed its willingness to support any finding of mine that this amount be recovered from Ms Nair.

5.3.15 The Board also expressed its objection to racial profiling by the Complainants.
Conclusion

5.3.16 It is clear from the submission made by Pikitup that Dr Leotoaba resigned from Pikitup and there is no evidence indicating that he was replaced because he is black. The version of Pikitup is more probable in the circumstances than that of the Complainants.

Removal of Ms Edith Ndlovu, Personal Assistant to the Managing Director replacement with Ms Sarah Pillay

Common cause issues

5.3.17 Prior to 2011, Ms Edith Ndlovu was the Personal Assistant to Mr Nkosi.

5.3.18 In 2011, Ms Ndlovu was then appointed to a senior position of a Supervisor within Pikitup.

5.3.19 In 2015, Ms Ndlovu was again appointed as Operations Manager, a position senior than that of a Supervisor within Pikitup.

5.3.20 When the position of a Personal Assistant to the Managing Director became vacant as a result of Ms Ndlovu’s appointment as Supervisor, Ms Pillay was recruited and appointed in 2013.

5.3.21 Pikitup’s response to my section 7(9)(a) notice the Public Protector indicated that Ms Pillay is not Indian.
Issues in dispute

5.3.22 The Complainants argued that Ms Ndlovu was removed by Pikitup because she is black and was replaced by, Ms Pillay who is an Indian.

5.3.23 Pikitup vehemently disputed this argument and further indicated that Ms Pillay is not even Indian but African.

5.3.24 In its reply to my section 7(9)(a) notice, the Board objected to racial profiling on this issue by the Complainants. The Board further indicated to my office that it has discovered on its own initiative that Ms Pillay was appointed by Ms Nair in a position that did not exist, and without minimum qualifications for the position. It was further revealed by the Board that there is an established personal relationship between Ms Nair and Ms Pillay.

5.3.25 Pikitup’s calculation of the total loss to Pikitup, as a result of remuneration of Ms Pillay to a position that did not exist and as set out in the Particulars of the Claim against Ms Nair is an amount of R794 175.78 plus interest calculated at the rate of 10.25% per annum a tempore morae from 08 September 2016. The Board expressed its willingness to support any finding of mine that this amount be recovered from Ms Nair.

Conclusion

5.3.26 It is clear from the evidence above that Ms Ndlovu was never removed by anybody at Pikitup. Instead, she was getting promotions and as result, her position as a Personal Assistant became vacant and was occupied by Ms Pillay.
Removal of Ms Susan Lehola, Acting General Manager: Supply Chain Management & replacement with Ms Priya Lutchman

Common cause issues

5.3.27 Ms Lutchman was appointed on 14 May 2014 by Pikitup in the position of GM: Cost & Management Accounting on a fixed term contract.

5.3.28 Upon resignation of the erstwhile GM: Supply Chain Management, Ms Lehola acted in that position with effect from 01 September 2014 until the position was advertised.

5.3.29 Ms Lehola applied for the post of GM: Supply Chain Management when it was advertised, but was unsuccessful.

5.3.30 The position remained vacant and Ms Lutchman was laterally transferred to the position of GM: Supply Chain Management on 04 March 2015.

Issues in dispute

5.3.31 The Complainants argued that Ms Lehola was removed by Pikitup from the position where she was the Acting General Manager: Supply Chain Management because she is African and was replaced with Ms Priya Lutchman who is Indian.

5.3.32 Pikitup disputed this argument and further indicated that Ms Lehola applied for the position of General Manager: Supply Chain Management, but was not successful during the selection process and later Ms Lutchman was laterally transferred to the position of GM: Supply Chain Management.
5.3.33 In response to my section 7(9)(a) notice, the Board objected to racial profiling by the Complainants and acknowledged my conclusions of the on this issue.

5.3.34 Ms Nair did not wish to make a comment in reply to my section 7(9)(a) notice on this issue.

Conclusion

5.3.35 Evidence traversed above shows that Ms Lehola was acting in the position of General Manager: Supply Chain Management for which she later applied, but was unsuccessful. Ms Lutchman was laterally transferred to the position of GM: Supply Chain Management on 04 March 2015. There is no evidence which indicates that Ms Lehola was removed because she is African.

Removal of Ms Abigail Muguto, General Manager: Bulk and replacement with Mr Dan Moodley

Common cause issues

5.3.36 Ms Muguto was employed by Pikitup on a five-year fixed term contract in a position of General Manager: Special Projects from 07 August 2008 to 06 August 2013. The contract expired and it was extended for a further six months from 07 August 2013.

5.3.37 On 01 April 2014 Ms Muguto was transferred from Special Projects to a position of General Manager: Commercial Operations Bulk. She remained in this position until it was advertised on 19 June 2015.

5.3.38 Ms Muguto applied for this position of General Manager: Commercial Operations Bulk and her application was not successful.
5.3.39 Mr Dan Moodley was appointed to the position of General Manager: Commercial Operations Bulk subsequent to the recruitment process that was followed by Pikitup.

*Issues in dispute*

5.3.40 The Complainants contended that Ms Muguto was replaced by Pikitup because she is an African employee and was replaced by an Indian, Mr Moodley.

5.3.41 Pikitup submitted that the contract of employment of Ms Muguto expired and further that Ms Muguto did not make it in the selection process for the position after it was advertised. Mr Moodley was instead appointed.

5.3.42 Ms Nair did not wish to make a comment in reply to my section 7(9)(a) notice on this issue.

5.3.43 In response to my section 7(9)(a) notice, the Board objected to racial profiling by the Complainants and acknowledged my conclusions on this issue.

*Conclusion*

5.3.44 Evidence shows that Ms Muguto was not removed, but her contract had expired and the position was advertised accordingly and Mr Moodley was the successful candidate.
Removal of Mr Ika Magasa, COO and replacement with Ms Aneesa David

Common cause issues

5.3.45 Mr Magasa who held the position of the COO at Pikitup fell ill and sadly passed on in April 2015.

5.3.46 Ms David was appointed to act in the position of the COO.

Issues in dispute

5.3.47 The Complainants submitted in their complaint that Mr Magasa was replaced by Ms David who is an Indian, something which the Complainants viewed as an act of racism by Ms Nair at Pikitup.

5.3.48 In response to my section 7(9)(a) notice, the Board objected to racial profiling by the Complainants and acknowledged my conclusions on this issue.

5.3.49 MS Nair did not make any comment on this issue in her response to my section 7(9)(a) notice.

Conclusion

5.3.50 It stands to reason that if someone like a COO passes on, somebody has to be appointed to act in that position. There is no evidence which suggests that Ms David was appointed to act solely because she is an Indian.
Ms Matseo Kekana a Project Manager was also replaced

Common cause issues

5.3.51 The Complainants only made a bare allegation that Ms Matseo Kekana, a Project Manager, was also replaced, but did not indicate by whom she was replaced.

5.3.52 The submission made by Pikitup was that Ms Kekana's contract of employment expired and the position became vacant and was not yet filled at the time my office raised the issue with Pikitup.

5.3.53 In response to my section 7(9)(a) notice, the Board acknowledged my conclusions on this issue.

Conclusion

5.3.54 I was unable probe this allegation given the fact that the Complainants did not furnish any corroborating or supporting evidence.

5.4 Regarding whether Pikitup improperly failed to investigate the alleged theft of Pikitup cellular telephones which resulted in Ms Nair and Mr Denyssen being arrested by Hillbrow South African Police Service, bail paid and legal representation provided to them at the expense of Pikitup.

Common cause issues

5.4.1 The cellular telephones listed below valued at R33 237.30 were issued to Ms Nair by Mr Denyssen without completing the declaration form:
(a) Four (4) Samsung S3 cellular telephones;
(b) One (1) IPhone S5 16 Gig; and
(c) One (1) Galaxy TAB 3 T211 7.

5.4.2 On 15 July 2013, Mr Denyssen issued 3 Samsung S3 cellular telephones to Ms Nair following a house robbery at Ms Nair’s place for the purpose of being utilised by Ms Nair’s family members.

5.4.3 In December 2013, Mr Denyssen further issued to Ms Nair 1 iPhone S5 16 Gig.

5.4.4 In February 2014, Ms Nair was issued with a Samsung S3 cellular telephone and 1 Galaxy TAB 3 T211 7. Mr Denyssen alleged that Ms Nair informed him that they were birthday presents for Cllr Mfikoe’s son.

5.4.5 An investigation into the theft of cellular telephones against Mr Denyssen was conducted and tabled at Pikitup’s Audit Committee to obtain permission to institute a disciplinary hearing against Mr Denyssen for repeatedly and unofficially issuing Pikitup cellular telephones to Ms Nair without obtaining permission from his superior and properly completing necessary documentation, institute civil recovery of all cellular telephones to the value of R33 237.30 against Ms Nair and register a case of theft against Mr Denyssen.

5.4.6 In early 2014, Mr Denyssen was charged by Pikitup with misconduct relating to the alleged theft of cellular telephones and subsequently resigned from Pikitup in April 2014 on the face of a disciplinary enquiry against him. Following his resignation, the disciplinary hearing continued in his absence and he was dismissed, but later re-appointed.

5.4.7 On 03 June 2015, Mr Denyssen and Ms Nair were arrested and detained by the Hillbrow SAPS following an investigation of theft of the cellular telephones and they were both charged as per Hillbrow CAS 1308/04/2014.
5.4.8 Ms Nair was charged with possession of stolen goods (the same cellular telephones in question) while Mr Denyssen was charged with theft of the cellular telephones.

5.4.9 According to the legal bill from Satch Govender Attorneys dated 12 June 2015, Ms Nair and Mr Denyssen’s legal fees amounted to R26 000 and were paid for by Pikitup with conditions that the legal fees would be recovered from them should an internal process find wrongdoing on their part.

5.4.10 There was no internal disciplinary proceeding that was instituted by Pikitup against Ms Nair with regard to the theft of cellular telephones despite having been criminally charged.

5.4.11 The legal fees of R26 000 that were paid by Pikitup to Satch Govender Attorneys in order to represent Ms Nair and Mr Denyssen for the theft of cellular telephones was never recovered by Pikitup including the cellular telephones.

5.4.12 On 10 June 2015, the Board of Pikitup sent a letter to an investigating officer (detective Constable Kgotsoko of Hillbrow SAPS) informing the police that Pikitup was withdrawing the charges against Ms Nair and Mr Denyssen.

5.4.13 On the same day, Mr Anton Engelbrecht who was in Pikitup’s Risk and Security deposed an affidavit under oath and formally withdrew the charges against Ms Nair and Mr Denyssen as authorized by the resolution of Pikitup’s Board.

5.4.14 Ms Nair was entitled only to one cellular telephone from Pikitup as an executive to enable her to execute her official duties.
5.4.15 It has been argued by the second Complainants that Mr Denyssen improperly issued official cellular telephones to Ms Nair and to her family members as well as to MMC Mfikoe’s son against the Cellular Telephone Policy of Pikitup.

5.4.16 It has also been submitted that the Pikitup Board did not take any disciplinary steps against Ms Nair and further interfered in the criminal case for the theft of the cellular telephones against both Ms Nair and Mr Dennyssen.

5.4.17 The second Complainants argued further that Pikitup used the taxpayers’ money to fund and defend the legal proceedings against Ms Nair and Denyssen and paid their bail.

5.4.18 They also argued that the manner in which Satch Govender Attorneys was appointed to represent Ms Nair and Mr Denyssen was irregular and not in line with procurement policies and legal prescripts.

5.4.19 Ms Nair confirmed in an interview conducted with her in June 2016 in my office that she was indeed arrested in connection with the theft of cellular telephones, but she disputed that Pikitup paid bail for her. She indicated that her husband paid the bail for her.

5.4.20 In his response to my section 7(9)(a) notice on 23 October 2017 Mr Dennyssen, objected to my proposed finding by merely stating in a terse statement that the issue of cellular telephones was resolved internally by the Board. He also indicated in his response that all the cellular telephone devices issued to family members of Ms Nair after the armed robbery at her house have been returned and accounted for. By implication this was an admission by him that he issued Pikitup cellular telephones to non-employees of Pikitup. My investigation was
not concerned with whether the cellular telephones were returned or not, but the legitimacy and the validity of giving out state equipment to non-employees of Pikitup against an existing Cellular Telephone Policy of the company.

5.4.21 Similarly, Ms Nair also admitted in her response to the section 7(9) notice that cellular telephones issued post the robbery at her house was a temporary measure to enable her family (children) to communicate immediately after the robbery and were returned to Pikitup. Ms Nair argued that she never stole any cellular telephones. I reject this argument on the basis that Pikitup has a Cellular Telephone Policy in place which had to be taken into account and it does not cover private family members of the employees of Pikitup.

5.4.22 In its response to my section 7(9)(a) notice, the Board indicated Mr Engelbrecht made a statement withdrawing the charges with a supporting resolution of the Board but the National Prosecuting Authority (NPA) did not accept the withdrawal of the charges and the case proceeded. Although the NPA did not withdraw the case at the instance of the withdrawal statement supported by the Board’s resolution, I cannot understand the reasons behind such an attempt to interfere with the criminal justice system.

5.4.23 The Board revealed that after four court appearances it was reported that the charges were dropped by the NPA on 31 July 2015 due to lack of evidence. According to the Board, there is no evidence to support the claim that cellular telephone devices were issued to MMC Mfikoe’s son. The Board further confirmed that the cellular telephones loaned out to Ms Nair family members were returned. The Board also confirmed that Pikitup did not pay bail for Ms Nair.

5.4.24 It was further argued by the Board in its response that no decision was taken by its Audit Committee to charge Mr Denysse for theft of cellular telephones due
to a non-quorate meeting and that there was no evidence to charge Ms Nair with theft of cellular telephones.

5.4.25 With regard to the legal fees paid by Pikitup to Satch Govender Attorneys the Board confirmed that a total amount of R46 000 was incurred. The Board expressed its willingness to recover this amount.

*Application of the relevant legal framework*

5.4.26 The issue of cellular telephones is regulated by Pikitup’s Cellular Telephone Policy Number: 003 which was approved by the Chairperson of the Board on 21 November 2013.

5.4.27 Clause 3 of Pikitup’s Cellular Telephone Policy provides that the policy covers employees of Pikitup as well as fixed term employees.

5.4.28 It is clear therefore that the family members of Ms Nair are not covered by this policy and were not entitled to Pikitup’s cellular telephones.

5.4.29 Clause 5 of Pikitup’s Cellular Telephone Policy provides that once a need has been established that an employee requires to use a cellular telephone during the course of his/her employment, a written application must be submitted and approved by the relevant Head.

5.4.30 Section 94(1)(b) of the MFMA also requires that “the accounting officer of a municipal entity must act with fidelity, honesty, integrity and in the best interest of the entity in managing the financial affairs of the entity.”

5.4.31 Section 95(a) of the MFMA provides that “the accounting officer of a municipal entity is responsible for managing the financial administration of the entity, and
must for this purpose take all reasonable steps to ensure that the resources of the entity are used effectively, efficiently, economically, and transparently."

5.4.32 It is noted in the evidence that Ms Nair did not comply with the requirements in terms of the Cellular Telephone Policy when she requested to be issued by Mr Denysen with cellular telephones for use by non-employees of Pikitup. This act of Ms Nair was also at odds with the spirit of the above section of the MFMA.

5.4.33 Clause 12 of Pikitup’s Cellular Telephone Policy provides further that the utilisation of cellular telephones is for official purposes and it is regarded as a work tool to execute official business of Pikitup.

5.4.34 There is no doubt that the issuing of official cellular telephones to Ms Nair’s family was against the above policy provision in the sense that such telephones issued to family members of Ms Nair that are not employees of Pikitup were not regarded as a work tool to be used in order to execute the business of Pikitup.

5.4.35 Section 172(1) of the MFMA provides that the accounting officer of a municipal entity commits an act of financial misconduct if that accounting officer deliberately or negligently contravenes a provision of the Act or fails to comply with a duty imposed by a provision of the Act on the accounting officer of a municipal entity or makes or permits, or instructs another official of the municipal entity to make an irregular or fruitless and wasteful expenditure.

5.4.36 Section 173(2) of the MFMA provides that the accounting officer of a municipal entity is guilty of an offence if that accounting officer deliberately or in a grossly negligent fails to take reasonable steps to implement the municipality’s supply chain management policy referred to in section 111 or fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure.
Conclusion

5.4.37 It follows therefore that Pikitup failed to adhere to its own Cellular Telephone Policy by issuing official cellular telephones to family members of Ms Nair against the policy guidelines.

5.4.38 The responsibility of managing the financial administration and resources of the entity effectively, efficiently, economically is placed on the Accounting Officer. The allocation of official cellular telephones to Ms Nair’s family, who were not employees of Pikitup, was in violation of section 95(a) of the MFMA and therefore constitutes an act of financial misconduct on the part of Ms Nair, who was the Accounting Officer.

5.4.39 It is also obvious from the evidence extrapolated above that the Board of Pikitup interfered with the administration of justice by unduly taking a resolution which sought to cause the withdrawal of the criminal proceedings against Ms Nair and Mr Denyssen from the court roll.

5.4.40 It is further concluded from the evidence that Pikitup improperly failed to institute disciplinary proceedings against Ms Nair regarding the theft of cellular telephones as well as to recover the legal costs that were incurred by Pikitup as result of her arrest in connection with the theft of cellular telephones.
5.5 Regarding whether Pikitup irregularly appointed consultants namely: Doris Dondur; Joenne Murphy; and Rene Kenosi without following proper Supply Chain Management processes.

Common cause issues

5.5.1 According to a report that was tabled at the Board meeting on 19 September 2013 and following the appointment of Ms Nair as Managing Director of Pikitup in October 2012, three people were appointed to assist with various aspects of the business whilst a new executive management team was being recruited.

5.5.2 This matter was discussed and the Board concluded that it would not be possible to implement (Pikitup’s) capital expenditure plan without access to consultants and other professional service providers from time to time and Pikitup did not have the in-house capacity at (the time).

5.5.3 The duties and benefits of using such independent contractors were identified and summarised by the Board as being to assist Pikitup in the following:

   aa) The organisation had to confirm the macro structure and was in the process to populate the structure with relevant skills and the recruitment process was time consuming and there were urgent matters identified that had to be actioned as soon as possible. Independent contractors were to focus on specific delivery areas and could start addressing these matters immediately;

   bb) An independent and objective view was required to diagnose some of the problems in the organisation and action plans had to be developed for implementation and as many of the then staff had
been part of the process and did not offer an objective assessment of the issues and with independent contractors would be an objective analysis without influence of prior personalities, processes or systems;

cc) Independent contractors were a temporary solution to address specific needs of the organization where skills, expertise or capacity did not exist at the time in the organization and the matter was addressed in the capacitation process of the Macro and Micro structure; and

dd) Independent contractors skills and competencies required could be contracted when the skills that would normally be associated in the execution of various functions in a line management responsibility and the work done assists with the implementation of the roadmap and time frames.

5.5.4 The following contractors were recruited and paid based on an hourly rate of R1100.00 that was agreed and concluded in terms of the independent contractor’s agreement:

i) Doris Dondur;

ii) Joenne Murphy; and,

iii) Rene Kenosi.

*Issues in dispute*

5.5.5 It has been submitted by Complainants that the consultants as indicated above were appointed by Pikitup without following a proper Supply Chain Management Policy of Pikitup and without observing other applicable procurement-legal prescripts.
5.5.6 Replying to my section 7(9)(a) notice, Ms Nair denied this allegation and again simply referred my office to her Plea and Third Party notice filed on her behalf by her attorneys of record in the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 9524/17.

5.5.7 Having had sight of the plea by Ms Nair, I am unable to accept this referral as an adequate response to my section 7(9)(a) notice. The plea does not specifically address this issue which relates to my investigation. It merely points out the obligations of third parties who according to the Ms Nair by virtue of their directorship/employment at Pikitup were also required in terms of Local Government: Municipal Systems Amendment Act\(^6\) to provide effective, transparent, and accountable and corporate coherent governance, ensure that Pikitup complied with all applicable legislation. I note that the purpose of this plea by Ms Nair was mainly to highlight to the court that should her conduct in the circumstances be found to have constituted deliberate or negligent unlawful conduct as alleged by Pikitup, there are third parties (other employees/directors of Pikitup) that are joint wrongdoers together with her.

5.5.8 Although Ms Nair denied any liability for damages in her plea to the court, that may be attributed to her alleged deliberate and negligent conduct while executing her duties, I am persuaded to believe that the convenient citing of third parties as joint wrongdoers by Ms Nair is tantamount to an admission of guilt or civil liability.

5.5.9 In response to my section 7(9)(a) notice, the Board informed my office that its own sanctioned GRAS forensic investigation report findings about this issue indicate that Mr Dennyssen, Ms Dondur, Mr Habib, Ms Hunter, Ms Kenosi, Mr Matsila, Ms Molefe and Ms Murphy were all irregularly appointed. According to

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\(^6\) section 93H and 93L, Local Government: Municipal Systems Amendment Act
the GRAS report, the procurement did not follow a competitive bidding process and the value of the contract exceeded R200 000 (VAT included).

Application of the relevant legal framework

5.5.10 Section 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

5.5.11 Pikitup and all organs of state therefore have an obligation to comply with the provisions of the Constitution when procuring goods and services which must be in accordance with a fair, equitable, transparent, competitive and cost effective system and in this case, the conduct of Pikitup was clearly at odds with the dictates of the Constitution.

5.5.12 Section 105(1)(c) of the MFMA places an obligation on all official of a municipal entity exercising financial management responsibilities to take all reasonable steps within that official's areas of responsibility to ensure that any irregular expenditure, fruitless and wasteful expenditure and other losses are prevented.

5.5.13 In terms of Section 113 of the MFMA,

(1) A municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process.

(2) If a municipality or municipal entity decides to consider an unsolicited bid received outside a normal bidding process, it may do so only in accordance with a prescribed framework.
(3)

(4) The framework must strictly regulate and limit the power of municipalities and municipal entities to approve unsolicited bids received outside their normal tendering or other bidding processes.

5.5.14 The MFMA: Regulation 35(2) of the Municipal Supply Chain Management Regulation which deals with appointments of consultants provides that, a contract for the provision of consultancy services to a municipal entity must be procured through competitive bids if the value of the contract exceeds R200 000 (VAT included) or if the duration period of the contract exceeds one year.

5.5.15 Chapter 5 of the Supply Chain Management, Guide for Accounting Officers of Municipalities and Municipal Entities 2005 also deals with appointments of consultants provides in that a contract for the provision of consultancy services to a municipal entity must be procured through competitive bid if the value of the contract exceeds R200 000 (vat included) or the duration period of the contract exceeds one year.

5.5.16 It is noted in evidence that Pikitup did not comply with the MFMA: Regulation 35(2) of the Municipal Supply Chain Management Regulation in the sense that the consultants were not procured through competitive bids since the value of their contracts exceeded R200 000 (VAT included).

Conclusion

5.5.17 Pikitup as an organ of state failed as indicated above to comply with the relevant legal prescripts regulating the manner in which the services of the consultants or service providers should be procured.
5.5.18 The gist of the Board's response to my section 7(9)(a) notice with regard to the irregular appointments and its concomitant irregular remuneration/expenditure was that it subjected Ms Nair to a disciplinary hearing. However, on 29 January 2015, Ms Nair was not found guilty on the disciplinary charges and the Board decided to accelerate the termination of her contract and instituted a civil claim against her for all identifiable financial misconduct. An amount of R1 127 437.69 is held in trust by the Board's attorneys of record pending the resolution of the civil claim.

5.6 Regarding whether the procurement process followed by Pikitup in the acquisition of its office space to relocate Pikitup Head Office was improper and in contravention of applicable legal prescripts:

Common cause issues

5.6.1 The Pikitup Facilities department submitted a Request to Initiate a Tender for the appointment of a service provider to provide office space for Pikitup head office relocation.

5.6.2 The available budget confirmed by the Pikitup Finance department on 01 December 2013 was R27, 5 million over a 5 year period.

5.6.3 On 12 December 2013, bid number PU375/2013 was advertised in the City Press and Sowetan newspapers as well as Pikitup website and Notice Board.

5.6.4 The following service providers submitted bids:

<table>
<thead>
<tr>
<th>Bidder's name</th>
<th>Building offered</th>
</tr>
</thead>
<tbody>
<tr>
<td>Terrace Drive Properties</td>
<td>Braampark, Braamfontein</td>
</tr>
</tbody>
</table>
5.6.5 During a sitting on 27 May 2014, the BAC resolved that Bid PU375/2013 should be cancelled based on the following reasons:

5.6.6 The specification of 6000 square metres was unjustifiable in terms of cost and space.

5.6.7 The BAC recommended that the tender should be cancelled and Mr Anton Fourie, the Pikitup General Manager (GM): Facilities, table a revised bid specification taking into account the following:

5.6.7.1 The GM: Facilities must approach the Joburg Property Company (SOC) Ltd (JPC) to assist in the development of the correct specification, based on the allowable space per square metre, cost implications as well as building class;

5.6.7.2 The specification must take into account the City of Joburg (CoJ) Office Space Optimization Plan as well as the Financial Recovery Plan; and

5.6.7.3 The GM: Facilities must table the revised specification to BAC as soon as possible.

5.6.8 The Space Optimization Plan was intended to accommodate CoJ's departments and Municipal entities within the CoJ owned/newly developed
buildings where possible. Pikitup was earmarked to be accommodated at the Metro Centre.

5.6.9 In March 2016, the Acting Managing Director, Mr Suren Maharaj, provided my office with an internal memorandum dated 03 November 2014 with the subject "Deviation from Normal Procurement Process for the Leasing of a new Head Office facility".

5.6.10 The memorandum was from the GM: Facilities addressed to Mr. Maharaj. The purpose of the memorandum was to request the Acting Managing Director to approve the deviation in the acquisition process for the leasing of a new Pikitup Head Office building.

5.6.11 The memorandum provided a motivation, background and stated the following reasons:

5.6.11.1 Pikitup was a tenant at 63 Juta Street since 2001 and it owned a 50% share in the company that owns the building and Pikitup was in a triple net lease;

5.6.11.2 Pikitup was responsible for all costs, namely lease payment, rates and taxes of the property and full maintenance and with such an agreement, the tenant should be receiving preferential rates, but this was not the case within the lease;

5.6.11.3 The monthly rental for Pikitup Head Office was higher than the average rental amount within the Braamfontein District;

5.6.11.4 The organisation has grown and thus office space was inadequate as the building has a total of 4597 square meters;
5.6.11.5 Considering the updated list of positions as a result of organisational requirements taking into account and allowing for 15% growth in personnel at Pikitup Head Office, Pikitup requires 5014 m2 office space;

5.6.11.6 The configuration of office space was designed for fewer number of personnel and thus could not accommodate the growth in numbers that has occurred as the number of offices for general managers was insufficient and the layout was limiting the space to create open plan offices;

5.6.11.7 The information technology and telephone infrastructure was not positioned correctly and thus further limiting the possible open plan office space and the building was old and the plumbing and electrical system were failing causing a lot of frustration and loss of productivity within the organisation. Further major refurbishment was required to get the electrical and plumbing system up to standard;

5.6.11.8 Pikitup followed the normal tender process with the intention of finding a suitable facility to lease, but was not successful as only one company met the compliance and functionality requirement;

5.6.11.9 The facility offered was not within the Braamfontein precinct, not easily accessible for the personnel that use public transport and the building was slightly outdated;

5.6.11.10 Buildings could be identified and the landlord approached to determine if the facility would suit the requirements of Pikitup in accordance with Pikitup Supply Chain Management Policy section (version 2/2023) 14 paragraph 14.1. "The Accounting Officer may dispense with the official procurement processes established by the policy to procure any required goods or service through any convenient process...";
5.6.11.11 The process would have a small committee to do the initial investigation where possible landlords and sites could be identified and the committee should consist of at least Facilities, Supply Chain Management, Finance and Information Technology; and

5.6.11.12 With regard to budget implication, depending on the property, there might be a difference in the rental amount and this could not be established until a property was identified and negotiations have started and the cost that needed to be considered were cost of a new lease, relocation cost including tenant installation and maintenance and repair cost when vacating the existing premises.

5.7 The memorandum further outlined the estimate comparison of the cost for the lease as follows:

<table>
<thead>
<tr>
<th>EXISTING LEASE</th>
<th>YEAR 0</th>
<th>YEAR 1</th>
<th>YEAR 2</th>
<th>YEAR 3</th>
<th>YEAR 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rental Cost</td>
<td>R4501 362.96</td>
<td>R4951 499.26</td>
<td>R5448 649.18</td>
<td>R5991 314.10</td>
<td>R6590 445.51</td>
</tr>
<tr>
<td>Parking</td>
<td>R1313 976.96</td>
<td>R1445 374.66</td>
<td>R1589 912.12</td>
<td>R1748 903.33</td>
<td>R1923 793.67</td>
</tr>
<tr>
<td>Assessment rates</td>
<td>R517 557.60</td>
<td>R569 313.36</td>
<td>R626 244.70</td>
<td>R688 869.17</td>
<td>R757 756.08</td>
</tr>
<tr>
<td>Repairs and Maintenance</td>
<td>R1 608 950.00</td>
<td>R1 608 950.00</td>
<td>R47 250.00</td>
<td>R49 612.50</td>
<td>R52 093.13</td>
</tr>
<tr>
<td>Relocation cost (N/A)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tenant installation</td>
<td>R2 562 216.05</td>
<td>R2 562 216.05</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Net Cash flows</td>
<td>R10 504 063.57</td>
<td>R11 137 353.32</td>
<td>R7 710 056.00</td>
<td>R9 476 899.10</td>
<td>R9 324 088.38</td>
</tr>
<tr>
<td>Discounted (NPV)</td>
<td>R10 504 063.57</td>
<td>R10 577 286.03</td>
<td>R6 954 117.66</td>
<td>R7 282 831.63</td>
<td>R9 324 088.38</td>
</tr>
<tr>
<td>Total:</td>
<td>R44 622 387.27</td>
<td>R44 622 387.27</td>
<td>R44 622 387.27</td>
<td>R44 622 387.27</td>
<td>R44 622 387.27</td>
</tr>
<tr>
<td>NEW LEASE</td>
<td>YEAR 0</td>
<td>YEAR 1</td>
<td>YEAR 2</td>
<td>YEAR 3</td>
<td>YEAR 4</td>
</tr>
<tr>
<td>-------------------</td>
<td>--------------</td>
<td>--------------</td>
<td>--------------</td>
<td>--------------</td>
<td>--------------</td>
</tr>
<tr>
<td>Rental Cost</td>
<td>R5 114 280.00</td>
<td>R5 523 422.40</td>
<td>R5 965 296.19</td>
<td>R6 442 519.89</td>
<td>R8 957 521.48</td>
</tr>
<tr>
<td>Parking</td>
<td>R918 000.00</td>
<td>R1 009 600.00</td>
<td>R1 110 780.00</td>
<td>R1 221 858.00</td>
<td>R1 344 043.60</td>
</tr>
<tr>
<td>Assessment rates (N/A)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Repairs and Maintenance</td>
<td>R3 217 900.00</td>
<td>R30 000.00</td>
<td>R31 500.00</td>
<td>R33 075.00</td>
<td>R34 728.75</td>
</tr>
<tr>
<td>Relocation costs</td>
<td>R1 358 000.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tenant Installation</td>
<td>R5 009 050.00</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Net cash flows</td>
<td>R15 617 230.00</td>
<td>R8 563 222.40</td>
<td>R7 107 576.19</td>
<td>R7 697 452.89</td>
<td>R8 336 694.00</td>
</tr>
<tr>
<td>Discounted (NPV)</td>
<td>R15 617 230.00</td>
<td>R8 233 175.74</td>
<td>R8 410 708.45</td>
<td>R8 593 818.15</td>
<td>R8 336 694.00</td>
</tr>
<tr>
<td>Total</td>
<td>R43 191 426.37</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

5.8 The memorandum was approved by the Acting Managing Director on 23 January 2015 in line with the Sourcing Strategy for the Relocation of Pikitup Head Office dated 20 January 2015. The confirmed budget by Mr Bernie Taljaard, GM: Finance on 20 January 2015 was R33 113,983 million.

5.9 The Sourcing Strategy entailed that the evaluation criteria for the Relocation of Pikitup Head Office would be based on the following requirements:

5.9.1.1 Pikitup required 5100 m2;
5.9.1.2 5 year lease period;
5.9.1.3 3 parking bays per 100 square metre (153 bays);
5.9.1.4 Grade A office space (building renovated or built within 5 to 10 years);
5.9.1.5 The Landlord should make an allowance for the tenant installation equal to one month rent for every year of the lease;
5.9.1.6 There must be easy access to public transport and compliance with the Occupational Health and Safety Act 85 of 1993 (OHS Act).
5.10 The Sourcing Strategy further entailed that a panel consisting of representatives from Facilities, Finance, Supply Chain, Information Technology, Legal and Internal Audit had to be nominated. The Strategy indicated that the panel would be responsible for the following:

5.10.1 Ratify the listed service providers which were Lalela Properties, Office Online, OP and Earlybird Properties;
5.10.2 Verify the list of requirements and amend where necessary;
5.10.3 If deemed necessary meet with the service providers and view the available sites; and
5.10.4 Create a shortlist that will be presented to Executive Committee and the Acting Managing Director.

5.11 The Strategy also highlighted that the focus areas for the search of the facility for the Pikitup Head Office were the Braamfontein and Central Business District.

5.12 A report signed by Mr Thekiso, the Executive Director: Corporate Services on 04 February 2015 and Mr Maharaj as Acting Managing Director on 09 February 2015 was tabled for noting before the Operations Committee: Environment and Infrastructure Services on 17 February 2015.

5.13 The report highlighted that the following companies and possible facilities were identified:

<table>
<thead>
<tr>
<th>Company</th>
<th>Possible facility</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lalela Properties</td>
<td>1. Hill on Empire</td>
</tr>
<tr>
<td></td>
<td>2. 60 Main Street</td>
</tr>
<tr>
<td></td>
<td>3. 1 De Villiers Street</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------------------</td>
<td>--------------------------------------</td>
</tr>
<tr>
<td>4. JSE Annexe</td>
<td></td>
</tr>
<tr>
<td>5. UCBH House</td>
<td></td>
</tr>
<tr>
<td>6. Anglo Vaal Building</td>
<td></td>
</tr>
<tr>
<td>Office on line</td>
<td>5.6.5.1 NBS Building</td>
</tr>
<tr>
<td></td>
<td>5.6.5.2 Life Centre Building</td>
</tr>
<tr>
<td></td>
<td>5.6.5.3 Trust Bank Building</td>
</tr>
<tr>
<td></td>
<td>5.6.5.4 Stimela Square</td>
</tr>
<tr>
<td>OPH</td>
<td>1. 21 Kruis Street</td>
</tr>
<tr>
<td></td>
<td>2. 112 Main Street, Marshalltown</td>
</tr>
<tr>
<td></td>
<td>3. Ikusasa</td>
</tr>
<tr>
<td></td>
<td>4. Umoya</td>
</tr>
<tr>
<td>Earlybird Properties</td>
<td>1. 29 &amp; 31 De Korte Street in Braamfontein</td>
</tr>
</tbody>
</table>

5.14 In an Internal memorandum dated 09 March 2015 from Mr Fourie addressed to Ms Nair, it was submitted during the evaluation process, 15) facilities were identified and based on the submitted information, a shortlist of 5 building was compiled as follows:

(a) Mishumo House, Cnr De Beer and De Korte Street, Braamfontein;
(b) Ikusasa House, 129 Fox Street, Marshalltown;
(c) 21 Kruis Street, Marshalltown;
(d) 112 Main Street, Marshalltown, and
(e) 60 Main Street, Cnr Main and McLaren Streets.

5.15 It was also submitted that a team comprising of individuals from Facilities, Finance, Supply Chain, Information Communication Technology, Legal and the office of the Managing Director visited the sites and selected three (3) buildings. 66 Jorissen Street was included as a fourth possibility and the items that were taken into consideration were:

(a) The environment surrounding the facility;
(b) The space availability;
(c) Tenant installation; and
(d) Proximity to public transport and parking availability.

5.16 The second shortlist consisted of the following sites:

5.16.1.1 (a) Mishumo House, Cnr De Beer and De Korte Street, Braamfontein;
5.16.1.2 (b) Ikusasa House, 129 Fox Street, Marshalltown;
5.16.1.3 (c) 112 Main Street, Marshalltown; and
5.16.1.4 (d) 60 Main Street, Cnr Main and McLaren Streets.

5.17 Mr Fourie further made the following findings with regard to the shortlisted properties:

MISHUMO HOUSE, CNR DE BEER AND DE KORTE STREET, BRAAMFONTEIN:

5.17.1.1 The facility was an old building that had not been renovated recently and partially vacant, with tenants on the ground floor and partial tenancy on the first floor. For Pikitup to have sufficient space the current tenant would need to fully vacate the facility and the landlord indicated that they would be able to relocate the current tenant to start with refurbishment (tearing down of current installations and then new installations). Mr Fourie further submitted that:

a) The building is situated in Braamfontein;
b) The building had more space available than required;
c) The building did not have sufficient parking and additional parking would need to be sourced from alternative facilities in the area and of concern was the small size of many of the parkings in the building; and
d) The facility is within walking distance from the CoJ offices such as Thuso, Metro Centre and Jorissen Place and of the four shortlisted sites, Mishumo House had the highest rental rate.

IKUSASA HOUSE, 129 FOX STREET, MARSHALLTOWN:

5.17.1.2 Two floors were occupied and the building was recently refurbished, the remainder of the building with the exception of the lobby entrance was not occupied and ready for new installations.

5.17.2 The landlord had a design team that would work with Pikitup with regard to the layout and the landlord for approximately eight (8) weeks for the completion of design to complete the installation and the design and construction was included in the monthly rental cost.

5.17.3 The environment around the area had been revitalised and relaxed and a pleasant atmosphere had been created and the building had more space than was required and there was a possibility that one additional tenant could be placed in the building.

5.17.4 The traffic in the city centre was a concern, but the building is in close proximity to M2 Highway and the facility is 2,5 km from the CoJ (Metro Centre). Public transport is in close vicinity and there were ample parkings available within the building and additional parking across the pedestrian walk.

112 MAIN STREET, MARSHALLTOWN:

5.17.5 The building was owned by the same company that owned Ikusasa House and the facility was completely stripped down to the base and the landlord would do the layout and refurbishment to Pikitup requirements.
5.17.6 The building was larger than Pikitup's requirements and thus would become a multi-tenant facility.

5.17.7 The building overlooks Gandhi Square and thus all public transport links (Rea Vaya, Metrobus, Taxis and Gautrain buses are within sight), as well as access to various facilities in the area (Dischem, gyms etc). The building would provide a highly visible branding opportunity. Mr Faurie further submitted that sufficient parking was available in the building (approximately 100 parkings) with the remainder directly across the road.

5.17.8 Traffic in the city centre is a concern, but the building is in close proximity to the M2 highway and the facility is 2.5 Km from the CoJ (Metro Centre).

5.17.9 Both Ikusasa House and 112 Main had the lowest rental and lifecycle costs (costs were inclusive of layout design and construction cost).

66 JORISSEN STREET, BRAAMFONTEIN

5.17.10 The facility is a multi-tenant facility within Braamfontein and is within walking distance from the CoJ (Metro Centre) and houses some of the financial functions of the CoJ. Floors had been stripped and was ready for tenant installation and the landlord was willing to assist with layout, but Pikitup would need to procure a contractor to do the installation.

5.17.11 Floors one (1) to six (6) were occupied and Pikitup had the option to occupy floors seven (7) to twelve (12) and to fulfil the space requirements four (4) floors would need to be occupied.

5.17.12 There was no sufficient parking within the facility and Pikitup could negotiate with the landlord to utilise additional parking within the building due to the fact that the building was not fully occupied and the concern was that as the
building had additional tenants the parking bays would need to be vacated thus leaving a problem with parking and the possibility to find additional parking had to be investigated.

5.17.13 The building is situated within the Braamfontein district and there was more than sufficient space available in a multi-tenant building. The facility is within walking distance from the CoJ offices such as Thuso House and Metro Centre and the building is in close proximity to public transport.

5.17.14 The Budget implications were the following:

<table>
<thead>
<tr>
<th>PROPOSED PIKITUP HEAD OFFICE BUILDINGS- NPV CALCULATION</th>
<th>MISHUMO HOUSE (BRAAMFONTEIN) R</th>
<th>IKUSASA HOUSE (GHANDI SQUARE) R</th>
<th>112 MAIN STREET (GHANDI SQUARE) R</th>
<th>66 JORISON STREET (BRAAMFONTEIN) R</th>
</tr>
</thead>
<tbody>
<tr>
<td>Square Meters (Building)</td>
<td>R5 644</td>
<td>7 200</td>
<td>12 000</td>
<td>8 459</td>
</tr>
<tr>
<td>Square Meters (Pikitup to rent)</td>
<td>R5 644</td>
<td>5 100</td>
<td>5 100</td>
<td>5 639</td>
</tr>
<tr>
<td>Rental per sqm</td>
<td>90</td>
<td>75</td>
<td>75</td>
<td>80</td>
</tr>
<tr>
<td>Rental per month</td>
<td>507 915</td>
<td>382 500</td>
<td>382 500</td>
<td>451 126</td>
</tr>
<tr>
<td>Parking Bays required</td>
<td>153</td>
<td>153</td>
<td>153</td>
<td>153</td>
</tr>
<tr>
<td>Parking Bays available(from)</td>
<td>132</td>
<td>153</td>
<td>153</td>
<td>113</td>
</tr>
<tr>
<td>PROPOSED PIKITUP HEAD OFFICE BUILDINGS- NPV CALCULATION</td>
<td>MISHUMO HOUSE (BRAAMFONTEIN) R</td>
<td>IKUSASA HOUSE (GHANDI SQUARE) R</td>
<td>112 MAIN STREET (GHANDI SQUARE) R</td>
<td>66 JORISON STREET (BRAAMFONTEIN) R</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>---------------------------------</td>
<td>---------------------------------</td>
<td>---------------------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>landlord) Cost per Parking Bay (estimated)</td>
<td>750</td>
<td>750</td>
<td>750</td>
<td>750</td>
</tr>
<tr>
<td></td>
<td>Parking Per Month(from Landlord)</td>
<td>21</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Residual parking bays rented from SouthPoint Cost per Parking bay</td>
<td>12 600</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Rental cost for parking per month(from SouthPoint)</td>
<td>111 600</td>
<td>114 750</td>
<td>114 750</td>
</tr>
<tr>
<td>Estimated Tenant Install cost (1 400 per)</td>
<td>7 900 900</td>
<td>7 140 000</td>
<td>7 140 000</td>
<td>7 894 712</td>
</tr>
<tr>
<td>PROPOSED PIKITUP HEAD OFFICE BUILDINGS- NPV CALCULATION</td>
<td>MISHUMO HOUSE (BRAAMFONTEIN) R</td>
<td>IKUSASA HOUSE (GHANDI SQUARE) R</td>
<td>112 MAIN STREET (GHANDI SQUARE) R</td>
<td>66 JORISON STREET (BRAAMFONTEIN) R</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>--------------------------------</td>
<td>---------------------------------</td>
<td>---------------------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>sqm- strip &amp; new install) IT Installation</td>
<td>-</td>
<td>750 000</td>
<td>750 000</td>
<td>750 000</td>
</tr>
<tr>
<td>Rebate from landlord</td>
<td>(2 539 575)</td>
<td>(7 140 000)</td>
<td>(7 140 000)</td>
<td>(2 819 540)</td>
</tr>
<tr>
<td>Total Installation cost</td>
<td>5 361 325</td>
<td>750 000</td>
<td>750 000</td>
<td>5 825 172</td>
</tr>
<tr>
<td>Escalation</td>
<td>8.0%</td>
<td>10.0%</td>
<td>10.0%</td>
<td>8.0%</td>
</tr>
<tr>
<td>Cost Year 1</td>
<td>13 983 505</td>
<td>6 717 000</td>
<td>6 717 000</td>
<td>12 255 689</td>
</tr>
<tr>
<td>Cost Year 2</td>
<td>8 028 914</td>
<td>6 563 700</td>
<td>6 563 700</td>
<td>7 255 998</td>
</tr>
<tr>
<td>Cost Year 3</td>
<td>8 671 228</td>
<td>7 220 070</td>
<td>7 220 070</td>
<td>7 836 478</td>
</tr>
<tr>
<td>Cost Year 4</td>
<td>9 364 926</td>
<td>7 942 077</td>
<td>7 942 077</td>
<td>8 463 396</td>
</tr>
<tr>
<td>Cost Year 5</td>
<td>10 114 120</td>
<td>8 736 285</td>
<td>8 736 285</td>
<td>9 140 468</td>
</tr>
<tr>
<td>NVP (using a 9.25% discount rate)</td>
<td>39 248 795</td>
<td>28 372 957</td>
<td>28 372 957</td>
<td>5.6.5.4.1.1.1 121 091</td>
</tr>
</tbody>
</table>

5.18 Ikusasa House at Gandhi Square was recommended for the following reasons:

5.18.1 The facility was likely to be the quickest to be converted for Pikitup;
5.18.2 The facility had the lowest lifecycle cost;
5.18.3 It is situated near public transport nodes;
5.18.4 The landlord would provide sufficient parking in the facility and nearby; and
5.18.5 The landlord would carry the cost of the design and tenant installation excluding the IT installation.

5.19 Ms Nair made the approval on 16 March 2015 and noted that Pikitup should focus on 66 Jorissen as the proposed site was not within the Metro Braamfontein precinct.

5.20 A report titled "Head Office Relocation" was tabled before the Audit and Risk Committee to apprise it of the eminent relocation of Pikitup Head Office.

5.21 The report stated that a five (5) year Lease Agreement in respect of 66 Jorissen Place was entered into on the following basis:

5.21.1 Area to be leased: Floors 7 to 10 measuring 5638 square metres and ground floor area measuring 288 square metres;
5.21.2 Cost of R75.00 per square metre excluding VAT; and
5.21.3 112 parking bays available at a rate of R756 per bay per month.

5.22 According to the report the financial implications comparison between the current head office building and Jorissen Place were as follows:
A Report of the Public Protector on Pikitup

RENTAL FOR BUILDING AND PARKING COMPARISON

<table>
<thead>
<tr>
<th>Month</th>
<th>Current Head Office</th>
<th>Jorissen Place including parking</th>
<th>Difference</th>
<th>Budget 2015/16</th>
<th>Difference Current head office and budget</th>
<th>Difference - Jorissen Place and budget</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 15</td>
<td>512 717.80</td>
<td>512 717.80</td>
<td>0.00</td>
<td>512 717.80</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>August</td>
<td>512 717.80</td>
<td>546 428.30</td>
<td>-33 710.5</td>
<td>512 710.80</td>
<td>0.00</td>
<td>-33 710.5</td>
</tr>
<tr>
<td>September</td>
<td>512 717.80</td>
<td>546 428.30</td>
<td>-33 710.5</td>
<td>512 710.80</td>
<td>0.00</td>
<td>-33 710.5</td>
</tr>
<tr>
<td>October</td>
<td>573 673.87</td>
<td>557 428.37</td>
<td>15 800.50</td>
<td>573 673.87</td>
<td>0.00</td>
<td>15 800.50</td>
</tr>
<tr>
<td>November</td>
<td>573 673.87</td>
<td>557 873.37</td>
<td>15 800.50</td>
<td>573 673.87</td>
<td>0.00</td>
<td>15 800.50</td>
</tr>
<tr>
<td>December</td>
<td>573 673.87</td>
<td>557 873.37</td>
<td>15 800.50</td>
<td>573 673.87</td>
<td>0.00</td>
<td>15 800.50</td>
</tr>
<tr>
<td>January 16</td>
<td>573 673.87</td>
<td>557 873.37</td>
<td>15 800.50</td>
<td>573 673.87</td>
<td>0.00</td>
<td>15 800.50</td>
</tr>
<tr>
<td>February</td>
<td>573 673.87</td>
<td>557 873.37</td>
<td>15 800.50</td>
<td>573 673.87</td>
<td>0.00</td>
<td>15 800.50</td>
</tr>
<tr>
<td>March</td>
<td>573 673.87</td>
<td>557 873.37</td>
<td>15 800.50</td>
<td>573 673.87</td>
<td>0.00</td>
<td>15 800.50</td>
</tr>
<tr>
<td>April</td>
<td>573 673.87</td>
<td>557 873.37</td>
<td>15 800.50</td>
<td>573 673.87</td>
<td>0.00</td>
<td>15 800.50</td>
</tr>
<tr>
<td>May</td>
<td>573 673.87</td>
<td>557 873.37</td>
<td>15 800.50</td>
<td>573 673.87</td>
<td>0.00</td>
<td>15 800.50</td>
</tr>
<tr>
<td>June 16</td>
<td>573 673.87</td>
<td>597 534.91</td>
<td>35 121.96</td>
<td>672 455.64</td>
<td>98 781.7</td>
<td>74 920.73</td>
</tr>
<tr>
<td>Total</td>
<td>6 701 218.23</td>
<td>6 666 096.2</td>
<td>35 121.96</td>
<td>6 800 000.00</td>
<td>98 781.7</td>
<td>133 903.73</td>
</tr>
</tbody>
</table>

Issues in dispute

5.23 The contentious issue that was raised by the Complainants in this instance was that in sourcing the new office space for its Head Office, Pikitup did not do so in accordance with the relevant applicable instructions, guidelines, directives and
concomitant procurement processes and procedures as well as financial prescripts applicable to state owned companies.

5.24 Pikitup disputed such allegation and provided my office with an internal memorandum dated 03 November 2014 with the subject, "Deviation from Normal Procurement Process for the Leasing of a new Head Office facility":

5.25 The memorandum enumerated and laid out reasons, motivation and background as can be seen under common cause issues for deviation from the normal procurement process.

5.26 According to the Chief Financial Officer, 66 Jorissen building was a multiple tenant building with the majority of the building being occupied by other CoJ entities. EXCO was taken to the facility and all members were happy with the size of the available space.

5.27 Ms Nair further submitted that the Johannesburg Property Company (JPC) has a mandate to provide all entities with office space. Part of the Pikitup process was to engage with the JPC as it had an Office Optimisation Plan in which the current Metro Centre would be upgraded and all CoJ entities would be housed within the Braamfontein precinct. Ms Nair further reiterated in her response dated 15 August 2018 to my section 7(9)(a) notice that it was a prerequisite which she verified with the MD of the JPC (Ms Helen Botes) to house within Braamfontein precinct all City entities. Ms Nair contends that National Treasury was consulted by the CFO and Head of SCM and it was confirmed that a tender process was not required. However, Ms Nair did not furnish my office with proof of notification to Treasury or Council as she alleges.

5.28 Replying to my section 7(9)(a) notice, Mr Anton Fourie clearly indicated in an email dated 27 June 2018 that the proposed site was not 66 Jorissen Place according to his committee that was evaluating properties. Mr Fourie further
clarified that in the presence of Mr Thekiso, Ms Nair rejected the report findings of the committee and instructed Mr Fourie to secure a lease for 66 Jorissen Place. Mr Fourie further stated in his response that Ms Nair called all EXCO to visit 66 Jorissen Place and stated that is where she wants the head office of Pikitup to move to. According the response from Mr Fourie, the committee was informed that they had to include 66 Jorissen Place as a possible rental. With instruction from Ms Nair and the Board’s approval, Mr Fourie insists that he was instructed by Ms Nair to contact Liberty (owners of 66 Jorissen Place) to draft the contract for legal review and for Ms Nair’s approval.

5.29 The Board also indicated in its response dated 02 July 2018 to my section 7(9)(a) notice that, it appears from the handwritten comment\(^7\) of Ms Nair that it was her intention not to approve Ikusasa House due to recommended space being out of the Metro Braamfontein precinct. According to the Board, Ms Nair’s further comment was “suggest we focus on 66 Jorissen Place.” The Board further recorded in its response that none of the employees involved in the procurement of the new head office space, namely Ms Nair, Mr Maharaj, Mr Thekiso and Mr Fourie are still employed at Pikitup, thereby making it impossible to take disciplinary steps as proposed in paragraph 51.1. of the notice.

5.30 Mr Thekiso corroborated Mr Fourie’s above version in his response to my section 7(9)(a) notice. In a response letter dated 07 July 2018, Mr Thekiso confirmed that indeed Mr Fourie was a General Manager: Facilities reporting to him during his tenure until his resignation from Pikitup around December 2016. Mr Thekiso indicated that on or around 04 February 2015, he signed a report prepared by Mr Fourie which had identified about 15 properties in Braamfontein. This report was presented and noted at Pikitup’s Operations Committee of 17 February 2015. According the Mr Thekiso, “it should be noted

\(^7\) On annexure A of the Mr Fourie’s committee report.
that this report (signed on 4th February 2015) identifying 15 properties in Braamfontein did not include 66 Jorissen Place”. Mr Thekiso was allegedly neither involved nor aware of the procurement process followed thereafter.

**Application of the relevant legal prescripts**

5.31 Section 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. It was expected of Pikitup, as a state institution to also comply with this constitutional obligation.

5.32 The Pikitup’s Supply Chain Management Policy (version 2/2023) paragraph 14 and 14.1 provides that:

“The Accounting Officer may dispense with the official procurement processes established by the policy to procure any required goods or service through any convenient process…”

5.33 The memorandum dated 03 November 2014 provided by Mr Suren Maharaj, in terms of which Pikitup sought a “Deviation from Normal Procurement Process for the Leasing of a new Head Office facility” was apparently drafted and adopted in line with the provisions of section 217(2) of the Constitution as well as in line with Pikitup’s Supply Chain Management Policy (version 2/2023) paragraph 14 and 14.1.
5.34 Regulation 36 of the Supply Chain Management Regulations to the Municipal Finance Management Act, 2003 (MFMA SCM Regulations)⁸ provides that organs of state may also dispense with official procurement processes, these include public tender procedures and procure goods or services "through any convenient process, which may include direct negotiations".⁹

5.35 However, according to the sub-regulation this may only be done in case of:

"(i) emergencies;"

(ii) if the goods or services are only available from a single provider;

(iii) or in any other exceptional case where it is impractical or impossible to follow official procurement procedures. The reasons for any deviations must be recorded and reported to the next meeting of the council, or board of directors in the case of a municipal entity, and a note to this effect must be included in the annual financial statements".¹⁰

5.36 Section 105(1)(c) of the MFMA places an obligation on all official of a municipal entity exercising financial management responsibilities to take all reasonable steps within that official's areas of responsibility to ensure that any irregular expenditure, fruitless and wasteful expenditure and other losses are prevented.

5.37 The Pikitup Acting Managing Director did not indicate any of the above exceptional circumstances and statutory reasons to justify deviation in its

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⁹ MFMA SCM reg 36(1)(a).
¹⁰ MFMA SCM reg 36(2). This reg (36(2)) does not apply to the procurement of, e.g., water and electricity (MFMA SCM reg 36(3)). See also s 10G(5)(c) of the Local Government Transition Act 209 of 1993 (Local Government Transition Act) which provides that a municipality may dispense with the calling of tenders "within such limits as may be prescribed by a national law".
memorandum and, more importantly, Pikitup did not record and report same to the Board and the meeting of the Council as required by the sub-regulation.

5.38 In his response dated 27 June 2018 to my section 7(9)(a) notice, Mr Maharaj seeks to highlight that Clause 14.1 of Pikitup’s Supply Chain Management Policy is exactly the same as Regulation 36 of the MFMA. According to Mr Maharaj, it cannot therefore be said that Pikitup improperly followed and relied on Clause 14.1 as in essence Pikitup used Regulation 36 of the MFMA. Mr Maharaj further seeks to assert that exceptional circumstances and valid reasons existed to substantiate this deviation. In contrast, Mr Maharaj does not indicate any emergency and similarly does not show that 66 Jorissen Place was indeed the only available service provider as required by the sub-regulation. However, the weight of expositions and responses given by Mr Fourie, Mr Thekiso, the Board and it being taken cumulatively as briefly extrapolated above, it is apparent that Ms Nair influenced the appointment of 66 Jorissen Place in an offhand manner.

Conclusion

5.39 In the absence of an indication by Mr Maharaj of any of the above exceptional reasons to justify deviation in the memorandum and more importantly, from the failure by Pikitup to record and report same to the Board and to the meeting of the Council as required by the sub-regulation, it can be concluded that the conduct of Pikitup failed to meet the prescribed policy and legal standards required.

5.40 In the circumstances, the motivation and reasons provided by Pikitup in its memorandum for its deviation from the normal procurement process are not cogent, sound or exceptional.
5.41 Owing to the fact that Pikitup failed to show any of the valid or exceptional reasons for deviation from normal procurement processes as required by Regulation 36 to the MFMA and also that Pikitup failed to report the deviation to its Board and Council, I am inclined to accept that this deviation was irregular and improper.

6. FINDINGS

The exercise of the power or the performance of that functions as per my substantiated findings below was not in good faith, as envisaged in section 176(1) of the MFMA and the conduct of all implicated officials herein was deliberate and/or negligently unlawful as invasaged in section 176(2) of the MFMA. This is because the accounting officer ought to have been aware or was aware of the normal process on the recruitment and SCM process, but decided to deviate from that normal process without any justification.

6.1 Regarding whether Pikitup improperly awarded and subsequently extended the contract for the supply, operations and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as ad hoc rentals as and when required of the service provider (Yellow Plant project) to Aqua despite the findings of Ernst & Young, Gobodo Forensic & Investigative Accounting and National Treasury investigations:

6.1.1 The allegation that Pikitup improperly awarded and subsequently extended the contract for the supply, operations and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as ad hoc rentals as and when required of the service provider (Yellow Plant project) to Aqua in despite the findings of Ernst & Young, Gobodo Forensic & Investigative Accounting and National Treasury investigations is substantiated.
6.1.2 Pikitup failed to comply with Regulation 3 of the Preferential Procurement Regulations, 2011 which requires that an organ of state must, prior to extending tender invitations, accurately estimate the costs for the provision of the required services.

6.1.3 Although in terms of the Municipal Supply Chain Regulations, MFMA Circular No. 62, a contract may be varied by no more than 15% of the original value of the contract, in this case the variation was less than 15%. However, the extension of the Aqua contract on its own was not appropriate in the sense that the alleged conduct of Aqua and Midmar regarding its engagement in collusive tendering was referred to the Competition Tribunal by the Competition Commission.

6.1.4 By overlooking the fact that Aqua and Midmar had been referred to the Competition Tribunal by the Competition Commission, the conduct of Pikitup was therefore also at odds with section 195(1) of the Constitution, which provides that the “public administration must be governed by the democratic values and principles enshrined in the Constitution, including a high standard of professional ethics which must be promoted and maintained; efficient, economic and effective use of resources which must be promoted as well as a public administration which must be accountable.”

6.1.5 Pikitup therefore improperly awarded and subsequently extended the contract for the supply, operations and maintenance of plant equipment to the designated landfill, garden sites and waste management depot as well as ad hoc rentals as and when required of the service provider (Yellow Plant project) to Aqua despite the findings of Ernst & Young, Gobodo Forensic & Investigative Accounting and National Treasury investigations.
6.1.6 Accordingly, the conduct of Pikitup in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether Ms Nair improperly appointed her friends and former colleagues as well as relatives without putting them through interview processes and offered them higher salary scale levels than the normal remuneration of other Pikitup officials:

With regard to the appointment of Ms Aneesa David:

6.2.1 The allegation that the appointment of Ms David was irregular is substantiated.

6.2.2 Ms David’s CV for the position of General Manager: Fleet was received after the closing date which was 27 February 2015.

6.2.3 Ms Nair irregularly approved the inclusion of Ms David in the list of candidates to be interviewed even though her application was received after the closing date and such was in contravention of the provisions of section 7.3.2.11 of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005.

6.2.4 Ms David did not meet the minimum requirements for the position of General Manager: Fleet and Ms Nair irregularly appointed her in contravention of the Municipal Systems Act Regulations, specifically Regulation 8 on Appointment and Conditions of Employment of Senior Managers 2014.

6.2.5 Similarly, remunerating Ms David beyond the salary limits within the salary bracket of the position was in direct contravention of section 94(2)(a) of the MFMA by Pikitup.
6.2.6 Accordingly, the conduct of Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

Appointment of Mr Gerhardus Booysen

6.2.7 The allegation regarding the irregular and improper appointment of Mr Booysen is substantiated.

6.2.8 Ms Nair irregularly and improperly appointed Mr Booysen in the position of Manager: Fleet, which Pikitup did not advertise, thereby flouting section 7.2 of Pikitup Recruitment and Selection Policy No CS_HR/2013_005 which deals with advertisement. This policy does not provide for exceptions to the requirement of advertisement and this was neither a headhunting nor secondment exercise.

6.2.9 The Fleet personnel of Pikitup interviewed Mr Booysen for the position of General Manager: Fleet, the requirements of which he did not meet and Ms Nair improperly accepted his inclusion while, as an accounting officer of Pikitup, she ought to have known that such was not in line with Pikitup's Recruitment and Selection Policy and thereby prejudicing those that met the requirements.

6.2.10 Accordingly, the conduct of Pikitup and Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.
Appointment of Mr Donovan Denyssen

6.2.11 The allegation that the appointment of Mr Denyssen by Ms Nair as someone associated with her is substantiated.

6.2.12 Pikitup and Ms Nair, in particular, improperly and irregularly appointed Mr Denyssen and offered him a contract of employment as an Independent Contractor without following proper SCM processes and in contravention of the MFMA: Regulation 35(2) of the Municipal Supply Chain Management Regulations and Chapter 5 of the Supply Chain Management: a Guide for Accounting Officers of Municipalities and Municipal Entities 2005.

6.2.13 Ms Nair re-appointed Mr Denyssen to the position of General Manager: Enterprise Infrastructure while knowing that his contract as Pikitup’s Independent Contractor was terminated.

6.2.14 Pikitup and Ms Nair re-appointed Mr Denyssen in the position of General Manager: Enterprise Infrastructure while being aware that that he did not meet the requirements for the position as he was not in possession of a degree in Computer Science or equivalent degree as required by the post.

6.2.15 Pikitup and Ms Nair violated Regulation 35(2) of the Municipal Supply Chain Management Regulations and Chapter 5 of the Supply Chain Management: A Guide for Accounting Officers of Municipalities and Municipal Entities 2005. Section 9.8.4 of Pikitup. Recruitment and Selection Policy No CS_HR/2013_005 of Pikitup provides that an employee whose services were terminated as the result of misconduct in terms of section 17(2)(e) of the Public Service Act 1994 or in terms of Labour Relations Act, 1995 may not be re-employed. Regulation 8 of Municipal Finance Systems Act: on Appointment and Conditions of Employment Senior Managers 2014, provides that “no person may be appointed as a senior manager on a permanent basis or on probation
to any post on the approved staff establishment of a Municipality provided, that he/she possesses the relevant competency, qualifications, experience and knowledge."

6.2.16 Accordingly, the conduct of Pikitup and Ms Nair in particular, in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

Appointment of Mr Kelvin Ngwenya

6.2.17 The allegation that Pikitup irregularly and improperly appointed Mr Ngwenya, Ms Nair's associate, friend or relative is substantiated.

6.2.18 Ms Nair's conduct was improper when she unduly influenced Mr Thekiso to consider Mr Ngwenya for an internship or some job training (without Mr Ngwenya applying) which subsequently resulted into a temporary employment contract for Mr Ngwenya while she knew or reasonably ought to have known that such was against the Pikitup Recruitment and Selection Policy and as well as section 94 of the MFMA.

6.2.19 By appointing Mr Ngwenya without following the Pikitup Recruitment and Selection Policy, Ms Nair was in direct contravention of section 94(2)(a) of the MFMA.

6.2.20 Accordingly, the conduct of Pikitup and Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.
6.2.21 The allegation relating to the irregular and improper appointment of Mr Ncanana is substantiated.

6.2.22 Pikitup irregularly appointed Mr Ncanana knowing that his application was submitted to Pin Point One, Pikitup’s recruitment agent, after the closing date and approved his appointment in contravention of the Pikitup Recruitment and Selection Policy.

6.2.23 On 22 May 2013, Ms Nair improperly approved the revised salary offer to Mr Ncanana of R950 000.00 after Mr Ncanana accepted an offer of R760 000.00 for the position of General Manager: Human Resources graded at Level E1 in which the respective minimum and maximum salary at the time was from R730 512.31 to R1 027 024.17 and Mr Ncanana had already assumed employment at Pikitup on 01 March 2013.

6.2.24 Mr Ncanana was improperly offered the job and the salary package by Pikitup or Pin Point One before the conclusion of the selection process. This is clear from his request for the salary review which is dated 25 January 2013 (shortly after the interviews were conducted) and the job offer was officially made to him on 04 February 2014.

6.2.25 Such conduct was clearly at odds with section 9.2 of the Pikitup Recruitment and Selection Policy No CS_HR/2013_005 which requires that no offer of employment, verbal or otherwise may be made before the conclusion of the recruitment process.

6.2.26 Accordingly, the conduct of Pikitup and Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.
The appointment of Ms Phumia Mokele and salary offered to her

6.2.27 The allegation regarding the irregular and improper appointment of Ms Phumia Mokele is substantiated.

6.2.28 Ms Mokele was irregularly and improperly appointed to the position of HR Manager by Pikitup despite her not having the necessary educational qualifications as well as the required managerial experience.

6.2.29 Ms Mokele only had a National Diploma in Human Resources Management and not a Bachelor's degree as required by the job advertisement. Ms Mokele did not have the five years of managerial experience in Human Resources as all the positions she occupied previously were junior and not managerial positions and the same was confirmed by Land Bank, her previous employer.

6.2.30 Ms Mokele intentionally and unlawfully misrepresented facts in her CV by stating that she held a position of a Human Resources specialist/manager at Land Bank when she did not.

6.2.31 Pikitup improperly and irregularly disregarded its own post requirements of the Human Resources position as contained in the advertisement and irregularly appointed Ms Mokele under the pretext of complying with the requirements of the Employment Equity Act. Employment equity should not have been misconstrued as implying that unqualified candidates for positions should be appointed. Equity relates to the group of the society that has been historically disadvantaged and not unqualified candidates for jobs.

6.2.32 Accordingly, the conduct of Ms Mokele and the Pikitup's former Managing Director who approved the appointment at the time, Mr Nkosi, amounts to
improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Appointment of Mr Ike Sampson

6.2.33 The allegation that the appointment of Mr Ike Sampson was improper and irregular is substantiated.

6.2.34 Mr Sampson was improperly and irregularly recruited in the post of Executive Driver/messenger of Ms Nair without the position being advertised and without him being subjected to an interview process as required in terms of section 7.2.1 of the Pikitup Recruitment and Selection Policy which provides that vacant positions can be advertised internally and can run concurrently with external advertisements.

6.2.35 Mr Sampson’s appointment was also in violation of section 7.2.5 of the same policy which provides that all administrative, junior and middle management positions up to operations manager must be advertised internally through the Pikitup website. Pikitup failed to show that the above legal provisions were complied with in the appointment process of Mr Sampson.

6.2.36 Accordingly, the conduct of Pikitup, specifically that of Ms Nair in particular, in the circumstances, amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

Appointment of Ms Kathija Docrat

6.2.37 The allegation that the appointment of Ms Kathija Docrat was irregular is substantiated.
6.2.38 The post on which Ms Docrat was appointed, was never advertised in accordance with the directives of the Pikitup Recruitment and Selection Policy. Section 7.2.1 of Pikitup Recruitment and Selection Policy provides that vacant positions can be advertised internally and can run concurrently with external advertisements.

6.2.39 Section 7.2.5 of the same policy which provides that all administrative, junior and middle management positions up to operations manager must be advertised internally was also violated and contravened by Pikitup in these circumstances. There was also no budget provision confirmed by the Line Management for this position and Pikitup failed to show that policies were complied with in the appointment of Ms Docrat. There is no evidence that such position was on the organisational structure of Pikitup except an indication that since the departure of Ms Sharon Mould, the marketing and events unit was left ineffective.

6.2.40 Pikitup, specifically Ms Nair, failed to act in line with the dictates of section 94(1)(b) of MFMA which require of her to act with honesty, integrity and fidelity in managing the financial affairs of the municipal entity by appointing Ms Docrat in violation of Pikitup Recruitment and Selection Policy.

6.2.41 Accordingly, the conduct of Pikitup and specifically that of Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.
Appointment of Ms Michelle Alexander

6.2.42 The allegation that the appointment of Ms Alexander was improper and irregular is substantiated.

6.2.43 When Ms Nair was advised in a memorandum that Ms Alexander’s contract expired on 30 November 2015, she irregularly and improperly concluded a contract of temporary employment with Ms Alexander for a period of six months, commencing on 01 December 2015 to 30 May 2016 on a salary of R40 000.00 per month payable in arrears to assist in the Communication and Stakeholder Management due to a high workload experienced by the unit, without such post being advertised and selection processes being conducted.

6.2.44 Such conduct by Ms Nair was improper and clearly in contravention of section 7.2.1 of the Pikitup Recruitment and Selection Policy which provides that vacant positions can be advertised internally and can run concurrently with external advertisements. Section 7.2.5 of the same policy provides that all administrative, junior and middle management positions up to operations manager must be advertised internally through the Pikitup website. External advertisements can be used additionally at the discretion of the Executive responsible for a particular Department.

6.2.45 Pikitup also failed to indicate whether there was a budget for this post in order to reconcile such appointment with the requirements of section 94(1)(b) of MFMA which demand of accounting officers to act with honesty, integrity and fidelity in managing the financial affairs of the entity.

6.2.46 Accordingly, the conduct of Ms Nair in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as
envisaged in section 6(4)(a)(i) and abuse or unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

6.3 **Regarding whether Ms Nair irregularly removed black employees from critical positions and replaced them with Indian employees:**

**Removal of Ms Lindiwe Hleza and replacement with Mr Suren Maharaj**

6.3.1 The allegation that Ms Lindiwe Hleza was removed from the position of the Chief Executive Officer (CFO) by Ms Nair because she was black and replaced by Mr Maharaj who is an Indian is not substantiated.

6.3.2 Evidence at my disposal shows that Ms Hleza was in fact offered the position of the CFO by Pikitup on the basis of equity despite not being number one during the interviews, but she voluntarily declined the position and left Pikitup to join the Ekurhuleni Municipality.

6.3.3 Accordingly, the conduct of Ms Nair in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

**Removal of Dr Wayne Letoaba and replacement with Mr Ismael Dawood**

6.3.4 The allegation that Dr Wayne Letoaba was removed from the position of an Occupational Medical Specialist by Ms Nair because he was black and replaced by Dr Ismael Dawood who is an Indian is not substantiated.

6.3.5 Evidence in my possession indicates that Dr Letoaba resigned from the position of an Occupational Medical Specialist on 03 April 2014 and Dr Dawood was recruited through a recruitment process and his appointment was made by Mr Maharaj in his capacity as the Acting Managing Director.
6.3.6 The conduct of Ms Nair in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Removal of Ms Susan Lehola, Acting General Manager: Supply Chain Management and replacement with Ms Priya Lutchman

6.3.7 The allegation that Ms Lehola was removed from the position of General Manager: Supply Chain Management and replaced with Ms Priya Lutchman is not substantiated.

6.3.8 Evidence obtained by my office shows that Ms Lehola was acting in the position of General Manager: Supply Chain Management for which she later applied, but was unsuccessful. Ms Lutchman was laterally transferred to the position of General Manager: Supply Chain Management on 04 March 2015. There is no evidence which indicates that Ms Lehola was removed because she is black.

6.3.9 Accordingly, the conduct of Ms Nair in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Removal of Ms Abigail Muguto, General Manager: Commercial Operations Bulk and her replacement with Mr Dan Moodley

6.3.10 The allegation that Ms Abigail Muguto, General Manager: Commercial Operations Bulk was replaced with Mr Dan Moodley is not substantiated.

6.3.11 Evidence at my disposal shows that Ms Muguto was not removed, but her contract had expired and the position was advertised accordingly. Mr Moodley became the successful candidate, following an open recruitment process.
6.3.12 Accordingly, the conduct of the Pikitup and Ms Nair in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

**Removal of Ms Edith Ndlovu and replacement with Ms Pillay**

6.3.13 The allegation that Ms Ndlovu was removed and replaced by Ms Pillay from the position of a Personal Assistant to the Managing Director because she is black, is not substantiated.

6.3.14 Evidence in my possession shows that in 2011, Ms Ndlovu was appointed to a senior position of a Supervisor within Pikitup and in 2015, she was again appointed as Operations Manager, a position senior than that of a Supervisor within Pikitup.

6.3.15 When the position of Personal Assistant to the Managing Director became vacant as a result of Ms Ndlovu’s appointment/promotion as Supervisor, Ms Pillay was recruited and appointed in 2013.

6.3.16 It is clear from the evidence above that Ms Ndlovu was never removed by anybody at Pikitup. On the contrary, she was promoted and as a result, her position as a Personal Assistant became vacant and was occupied by Ms Pillay.

6.3.17 Accordingly, the conduct of Ms Nair in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
6.4 Regarding whether Pikitup improperly failed to investigate the alleged theft of Pikitup cellular telephones which resulted in Ms Nair and Mr Denyssen being arrested by the Hillbrow South African Police Service, bail paid and legal representation provided to them:

6.4.1 The allegation that Pikitup improperly failed to investigate the alleged theft of Pikitup cellular telephones which resulted in Ms Nair and Mr Denyssen being arrested by the Hillbrow SAPS, bail paid and legal representation provided to them is substantiated.

6.4.2 Pikitup failed to adhere to its own Clause 3 of Cellular Telephone Policy Number: 003 which was approved by the Chairperson of the Board on 21 November 2013. It provides that the policy covers employees of Pikitup as well as fixed term employees.

6.4.3 The issuing of official cellular telephones to Ms Nair's family was against the above policy provision in the sense that such telephones were issued to family members of Ms Nair who are not employees of Pikitup and were not regarded as a work tool to be used in order to execute the business of Pikitup.

6.4.4 Evidence indicated that the Board of Pikitup interfered with the administration of justice by unduly taking a resolution which sought to cause the withdrawal of the criminal proceedings against Ms Nair and Mr Denyssen from the court roll. I view such conduct by the Board as a breach of its fiduciary duty.

6.4.5 Pikitup improperly failed to institute disciplinary proceedings against Ms Nair and Mr Denyssen regarding the theft of cellular telephones as well as to recover the legal costs that were incurred by Pikitup as result of their arrest in connection with the theft of cellular telephones.
6.4.6 Accordingly, the conduct of Pikitup, specifically that of the Board in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution, maladministration as envisaged in section 6(4)(a)(i) and unjustifiable exercise of the power in terms of section 6(4)(a)(ii) of the Public Protector Act.

6.5 Regarding whether Pikitup irregularly appointed consultants namely: Doris Dondur, Joenne Murphy, and Rene Kenosi without following proper Supply Chain Management processes:

6.5.1 The allegation that Pikitup irregularly appointed the above mentioned consultants without following proper SCM processes is substantiated.

6.5.2 The MFMA: Regulation 35(2) of the Municipal Supply Chain Management Regulations which deals with appointments of consultants provides that a contract for the provision of consultancy services to a municipal entity must be procured through competitive bids if the value of the contract exceeds R200 000.00 (VAT included) or if the duration period of the contract exceeds one year.

6.5.3 The evidence has revealed that Pikitup did not comply with Regulation 35(2) of the Municipal Supply Chain Management Regulations in the sense that the consultants were not procured through competitive bids since the value of their contracts exceeded R200 000.00 (VAT included). There was also no indication of a proper and approved deviation process from the normal procurement processes in this instance from Pikitup which could have otherwise justified the non-compliance with the applicable legal prescripts.

6.5.4 Pikitup therefore failed, as indicated above, to comply with the relevant legal prescripts regulating the manner in which the services of the consultants or service providers should be procured.
6.5.5 Pikitup contravened section 105(1)(c) of the MFMA which places an obligation on all officials of a municipal entity exercising financial management responsibilities to take all reasonable steps within the officials areas of responsibility to ensure that any irregular expenditure, fruitless and wasteful expenditure and other losses are prevented.

6.5.6 As a result, the appointment of the consultants contrary to the Municipal Supply Chain Management Regulations and section 217 of the Constitution has resulted in the Pikitup incurring an irregular expenditure.

6.5.7 The exercise of the power or the performance of that function in this regard was not in good faith, as envisaged in section 176(1) of the MFMA and was also deliberate and/or negligent unlawful action, as envisaged in section 176(2) of the MFMA. This is because Ms Nair, as the accounting officer, was aware or should have been aware of the process to be followed and she decided not to follow that process without any justification.

6.5.8 Accordingly, the conduct of Pikitup in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.6 Regarding whether the procurement process followed by Pikitup in the acquisition of its office space to relocate Pikitup Head Office was improper and in contravention of applicable legal prescripts:

6.6.1 The allegation that the procurement process followed by Pikitup in the acquisition of its office space to relocate Pikitup Head Office was improper and in contravention of applicable legal prescripts is substantiated.
6.6.2 Pikitup improperly followed and relied on clause 14.1 of its SCM Policy (version 2/2023) to procure its Head Office building.

6.6.3 Failure by Mr Maharaj to indicate any of the prescribed reasons for deviation in the memorandum and failure by Pikitup to record and report same to the Board and to the meeting of the Council amounts to a contravention of the MFMA SCM sub-regulations 36(1) and (2).

6.6.4 Accordingly, the conduct of Pikitup in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

7.1 The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is that:

The Chairperson of the Pikitup Board must:

7.1.1 Within 60 working days of the issuing of this report, ensure that disciplinary steps are taken against all implicated officials of Pikitup who together with Ms Nair flouted, subverted or violated the MFMA and the Pikitup’s SCM Policy in this matter;

7.1.2 Within 60 working days of the issuing of this report, ensure that disciplinary steps are taken against all implicated officials of Pikitup who together with Ms Nair flouted, subverted or violated the Pikitup’s Recruitment and Selection Policy in this matter;
7.1.3 Within 60 working days of the issuing of this report, ensure that all irregular employment appointments identified in this report are reviewed and properly processed in line with the Pikitup’s Recruitment and Selection Policy;

7.1.4 Within 60 working days of the issuing of this report, ensure that all the contracts with the service providers or consultants irregularly procured are cancelled;

7.1.5 Within 60 working days of the issuing of this report, ensure that criminal action is instituted (in accordance with section 173(2) of the MFMA) against all current and/or former employees of Pikitup implicated in this report to have committed an act of financial misconduct;

7.1.6 Within 90 working days of the final report, ensure, through a civil litigation claim and in line with section 176(2) of the MFMA, recovery of unauthorised, irregular or fruitless and wasteful expenditure by Ms Nair and/or any other official in their personal capacity for all the financial misconduct identified in this report. An actual amount is to be determined by the Board following a thorough verification of financial losses emanating from the procurement and misconduct identified in this report;

7.1.7 Within 60 working days of the issuing of this report, ensure that all the relevant Pikitup staff receive regular training on the Pikitup’s SCM Policy as well as the Recruitment and Selection Policy; and

7.1.8 Within 30 working days of the issuing of this report, Pikitup’s Board of Directors must implement the following recommendation from the National Treasury:

7.1.8.1 The Board should ensure that regular Supply Chain Management training is provided to all Pikitup staff involved in procurement to ensure consistent and appropriate application of Supply Chain Management prescripts.
8. MONITORING

8.1 The Chairperson of the Pikitup Board is to submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7 above will be implemented within 15 working days from the date of receipt of this report.

8.2 Each remedial action listed in paragraph 7 above is legally binding on the person directed to implement, unless it has been reviewed and set aside by a Court or an appropriate interim Court Order to stay the implementation of the remedial action is obtained within the compliant period stated therein.

[Signature]

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 20/10/2018

Assisted by: Vusumuzi Xolani Dlamini, Senior Investigator,
Good Governance and Integrity Unit: Gauteng Provincial Office.