

**REPORT IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE  
REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC  
PROTECTOR ACT, 23 OF 1994**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

**REPORT No: 56 of 2022/23**

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**INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND/OR FAILURE  
BY THE CITY OF JOBURG AND PIKITUP TO EXERCISE OVERSIGHT ON THE  
JOZI@WORK PROGRAMME**

<b>TABLE OF CONTENTS</b>		
<b>No.</b>	<b>DESCRIPTION</b>	<b>PAGE</b>
	<b>LIST OF ACRONYMS</b>	<b>3</b>
<b>1.</b>	<b>INTRODUCTION</b>	<b>4</b>
<b>2.</b>	<b>THE COMPLAINT</b>	<b>4</b>
<b>3.</b>	<b>POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR</b>	<b>6</b>
<b>4.</b>	<b>ISSUE IDENTIFIED FOR INVESTIGATION</b>	<b>7</b>
<b>5.</b>	<b>INVESTIGATION</b>	<b>8</b>
<b>6.</b>	<b>THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS</b>	<b>11</b>
<b>7.</b>	<b>FINDINGS</b>	<b>23</b>
<b>8.</b>	<b>CONCLUSION</b>	<b>25</b>

## LIST OF ACRONYMS AND ABBREVIATIONS

<b>CONSTITUTION</b>	The Constitution of the Republic of South Africa, 1996
<b>COJ</b>	City of Johannesburg Metropolitan Municipality
<b>CSA</b>	Capacity Support Agent
<b>GEMS</b>	Government Employees Medical Scheme
<b>MD</b>	Managing Director
<b>PTY LTD</b>	Proprietary Limited
<b>PUBLIC PROTECTOR ACT</b>	Public Protector Act 23 of 1994
<b>SLA</b>	Service Level Agreement
<b>SMME</b>	Small Micro Medium Enterprise
<b>SOC LTD</b>	State Owned Company Limited

## 1. INTRODUCTION

- 1.1 This is a Report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution), and sections 8(1) and (3) of the Public Protector Act 23 of 1994 (the Public Protector Act) and Rule 44(4) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018*<sup>1</sup> (Public Protector Rules) as promulgated under section 7(11) of the Public Protector Act.
- 1.2 The report relates to the outcome of a review application lodged with the Public Protector in terms of Rule 44 (1) on a matter investigated by the Public Protector Gauteng Provincial Office (the Provincial Office), regarding allegations of maladministration arising from a failure by the City of Joburg and Pikitup (SOC) Ltd (COJ-Pikitup) to exercise oversight on the Jozi@work programme.
- 1.3 In terms of Rule 44(1), Complainants who are dissatisfied with the decision of any official of the Office of the Public Protector or the Public Protector to close or refuse the investigation of a complaint, may except where the Public Protector has released a final report in terms of section 182(1) (b) of the Constitution, 1996 and section 8(1) of the Act request an internal review of that decision.
- 1.4 The report is submitted to Mr Kenneth Mungeka (the Complainant) in his capacity as the representative of Tayanja (Pty) Ltd, (Tayanja) in terms of Rule 44(4) of the Public Protector Rules.

## 2. THE COMPLAINT

- 2.1 The complaint was lodged with the Public Protector, Gauteng Provincial Office on 23 January 2019, by Mr Mungeka.

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<sup>1</sup> Published under Government notice No 945, Government Gazette 41903 of 14 September 2018 and Amended in Government Notice No 1047, Government Gazette 43758 dated 2 October 2020.

- 2.2 In essence, Mr Mungeka alleged that:
- 2.2.1 The COJ's Pikitup failed to exercise oversight on one of the Capacity Support Agents (CSA) that it had appointed, namely Waste Group Projects (Pty) Ltd (Waste Group).
  - 2.2.2 Tayanja and nine (9) other business (Small Medium and Micro Enterprises / SMME's) entities were among the first to be appointed by the COJ's Pikitup steering committee and recommended for Capacity Support with Waste Group, which would be the CSA for the Waste Package from Pikitup.
  - 2.2.3 A one year sub-contract agreement was signed by the Complainant with the Waste Group for the period commencing in April 2015 to April 2016, but that thereafter, disputes arose between the Complainant, other SMMEs and the CSA relating to payments as per the signed agreements.
  - 2.2.4 The COJ-Pikitup failed to act through its instrument, the Waste Group, to ensure that all SMMEs were empowered, to enable them to be self-sufficient businesses.
  - 2.2.5 That, COJ-Pikitup failed to monitor and / or ensure proper implementation of the mandate it gave to the CSA. The CSA was appointed by the COJ-Pikitup to oversee the transition of the SMMEs to fully fledged businesses that could provide jobs, services to the community and the COJ-Pikitup itself.
  - 2.2.6 Waste Group had breached several clauses in the service level agreement with COJ-Pikitup and it continuously ignored such breaches.
- 2.3 The complaint, as set out above, was investigated by the Gauteng Provincial Office and the investigation culminated in the Closing Report dated 21 December 2021.

- 2.4 The Complainant subsequently brought an internal review application dated 17 March 2022, seeking to review the decision taken by the Gauteng Provincial Office to close his matter, citing the following reasons:

*“The main reason my case is closed is more about what the CSA said and not what is the account of Pikitup COJ on their program.*

*The case was turned into a claim for monies from CSA and not the case of failure by Pikitup COJ to do oversight.*

*Our evidence of failure of oversight was turned into accusations against CSA with Pikitup COJ turned mediators between us and CSA.” [sic]*

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

- 3.1. The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

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

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

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

- 3.3. Section 182(2) directs that the Public Protector has the additional powers and functions prescribed by national legislation.
- 3.4. In terms of Rule 44(1), *“Complainants who are dissatisfied with the decision of any official of the Office of the Public Protector or the Public Protector to close or refuse the investigation of a complaint, may, except where the Public Protector has released a final report in terms of section 182(1)(b) of the Constitution, 1996 and section 8(1) of the Act request an internal review of that decision if -*
- (a) the complainant is of the opinion that a decision is wrong because it was made based on incomplete or inaccurate evidence or information that contained inaccurate facts, and he or she can show this using readily available information; or*
  - (b) there is new and relevant information that was not previously available and has a material effect on the decision made.”*
- 3.5. Rule 44(4) provides that *“after reviewing the matter the Public Protector may:*
- (a) Uphold the original decision;*
  - (b) Change the original decision; or*
  - (c) Send the matter back to the original or another investigation team for further investigation or a better explanation.”*

#### **4. ISSUE IDENTIFIED FOR INVESTIGATION**

- 4.1 On analysis of the complaint, the following issue was identified to inform and focus the investigation:

- 4.1.1 Whether there was maladministration and/or failure by the COJ-PIKITUP to monitor and ensure that all SMME's, were empowered, paid accordingly and enabled to be self-sustaining businesses by the CSA and if so, whether such conduct constitutes improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

## **5. THE INVESTIGATION**

### **5.1 Methodology**

- 5.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

### **5.2 Approach to the investigation**

- 5.2.1 The approach to the investigation included an analysis of the relevant documentation, consideration and application of the relevant law, regulatory framework, prescripts and service level agreements.

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

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration and improper conduct?



(d) In the event of improper conduct or maladministration, what would it take to remedy the wrong occasioned by the said improper conduct or maladministration?

5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the COJ-Pikitup failed to monitor the Waste Group and whether was in violation of the Constitution and the applicable prescripts.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by COJ-Pikitup officials to prevent violation of the Constitution and/or the applicable prescripts in order to prevent maladministration and prejudice.

### **5.3 The investigation Process**

5.3.1 The approach to the investigation included an exchange of documentation between the Public Protector, COJ-Pikitup, and the Complainant. Meetings were also held with the aforesaid parties.

5.3.2 All relevant documents and correspondence were obtained and analysed and relevant laws, policies and related prescripts were considered and applied throughout the investigation.

5.3.3 During the course of the investigation, it was established that the Complainant had approached the Gauteng Local Division, Johannesburg in an effort to resolve his complaint with special reference to outstanding payments, that Waste Group was cited as the Respondent under case number 16812/2016 and that the case



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was dormant at the said court with no determination having being made by the court.

#### 5.4. **The key sources of information**

##### **Documents and correspondence exchanged**

- 5.4.1. Service Level Agreement between COJ-Pikitup and Waste Group, dated 08 April 2015;
- 5.4.2. Sub-contract Service Level Agreement between Waste Group and Tayanja, dated 01 July 2015.
- 5.4.3. The original complaint received by the Public Protector from the Complainant, dated 23 January 2019;
- 5.4.4. Allegations Letter from the Public Protector to COJ-Pikitup, dated 13 February 2019;
- 5.4.5. Letter from COJ-Pikitup to the Public Protector, dated 22 May 2019;

#### 5.5. **ADR Meetings**

- 5.5.1 ADR meeting held between the Public Protector, COJ-Pikitup and the Complainant on 15 December 2021.

#### 5.6. **Legislation and other prescripts**

- 5.6.1. The Constitution of the Republic of South Africa, 1996;
- 5.6.2. The Public Protector Act, 23 of 1994;
- 5.6.3. The Local Government Municipal Systems Act, 32 of 2000.

5.7. **Case law**

- 5.7.1. Sealed Africa (Pty) Ltd v Kelly and Another (3957/04) [2005] ZAGPHC 69; and
- 5.7.2. Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others (1000/2019 and 31514/2018 and 33401/2018) [2020] ZASCA 111

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

- 6.1. **Whether there was maladministration and/or failure by the COJ-PIKITUP to monitor and ensure that all SMME's, were empowered, paid accordingly and enabled to be self-sustaining businesses by the CSA and if so, whether such conduct constitutes improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.**

*Common cause issues*

- 6.1.1 Pikitup Johannesburg (SOC) Ltd, is one hundred percent (100%) owned by the City of Johannesburg (COJ). It was established in terms of the Companies Act 71 of 2008 and is mandated to provide integrated waste management and refuse removal services to the residents of Johannesburg.
- 6.1.2 COJ and Pikitup signed a Jozi@work Service Level Agreement (SLA) with Mr Spencer Malongete (Mr Malongete), the Managing Director of Group Waste Projects on 08 April 2015, for his company to be a Capacity Support Agent (CSA) on behalf of the COJ-Pikitup.

6.1.3 Mr Malongete in turn, signed a Sub Contractor SLA with the Complainant, representing Tayanja, a company that would provide services to the COJ-Pikitup.

*Issue in dispute*

6.1.4 The issue for the Public Protector's determination is whether there was a failure by the COJ-Pikitup to monitor and ensure that all SMME's were empowered, paid accordingly and enabled to be self-sustaining businesses by the CSA.

*Complainant's version*

6.1.5 The Complainant made the following allegations against the COJ-Pikitup:

6.1.5.1 That, the COJ-Pikitup failed to exercise oversight on one of the CSA's, namely the Waste Group, which was appointed and that the CSA's contractual obligations were ignored;

6.1.5.2 That, the CSA was allowed to carry out work beyond its mandate for capacity support and complaints that were lodged by Tayanja and other SMMEs were ignored by the COJ-Pikitup;

6.1.5.3 That, a one-year sub-contract agreement was signed with the Waste Group for the period commencing in April 2015 to April 2016, but thereafter, disputes arose between the complainant/SMMEs and the Waste Group, relating to payments as per the signed agreements;

6.1.5.4 That, the COJ-Pikitup failed to act through its instrument, the Waste Group, to ensure that all SMMEs were empowered, to enable them to be self-sufficient businesses; and



6.1.5.5 That, the COJ-Pikitup failed to monitor and or ensure proper implementation of the mandate it gave to Waste Group. The Complainant further alleged that the Waste Group was appointed by the COJ-Pikitup to oversee the transition of the SMMEs to fully-fledged businesses that could provide jobs and, services to the community and the COJ-Pikitup itself.

*Response from Mr Segala Malahlela, Acting Managing Director at COJ-Pikitup*

6.1.6 A letter of inquiry dated 13 February 2019, was sent to COJ-Pikitup by the Public Protector, inviting responses and comments to the allegations brought against the entity.

6.1.7 In his submission to the Public Protector, as per the letter dated 22 May 2019, Mr Segala Malahlela (Mr Malahlela), the Acting Managing Director at COJ-Pikitup, disputed the allegations stating that everything was done according to the contract and SLA that was signed by all parties.

6.1.8 Mr Malahlela further stated that Tayanja was not contracted to COJ-Pikitup, but was subcontracted to one of the CSA's. Furthermore, that in May 2016, Tayanja filed a High Court Application against COJ-Pikitup and the Waste Group for the cancellation of the contract between COJ-Pikitup and the Waste Group, which application was subsequently dismissed by the court.

*Submission from the Complainant*

6.1.9 The response from COJ-Pikitup was communicated to the Complainant in a letter dated 22 May 2019. On 28 May 2019, the Public Protector received a submission from the Complainant stating the following:



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- 6.1.9.1 That, Tayanja had no civil case against the City of Joburg and Pikitup, and that it was a misrepresentation of facts by the COJ-Pikitup to claim that there was such a case or there were court findings against Tayanja at any stage.
- 6.1.9.2 Furthermore, that there had never been a prayer for the cancellation of the contract between COJ-Pikitup and the Waste Group.
- 6.1.9.3 The Complainant advised the Public Protector that there is a pending case registered by Tayanja in the Gauteng Local Division, Johannesburg and that the case is only against Waste Group Projects for claims based on the contract.
- 6.1.9.4 According to the Complainant, Waste Group Projects had a contractual relationship with the COJ-Pikitup and this was only for CSA purposes to SMMEs.
- 6.1.9.5 The Complainant further stated that, the CSA unilaterally introduced what they called 'retention' and consequently, thousands of rands due to SMMEs were withheld and this was in breach of the prescripts of the SLA. According to the Complainant, no one has knowledge of the funds nor can they be traced.
- 6.1.9.6 The Public Protector was informed by the Complainant that they had tried all avenues to bring the conduct of the CSA to the attention of the COJ-Pikitup Management as intimated in the copy of the SMME's petition that was submitted to the Public Protector. The Public Protector was also provided with a copy of the communication from the Complainant requesting a meeting with the Managing Director's office at COJ-Pikitup;
- 6.1.9.7 The Complainant also informed the Public Protector that Tayanja and other SMMEs escalated the matter to the office of the COJ-Pikitup's Managing Director, Ms Amanda Nair (Ms Nair). A meeting was subsequently held on 19 May 2016 at Pikitup's Head office, in Braamfontein;



- 6.1.9.8 The Complainant stated that in the said meeting, COJ-Pikitup was represented by Mr Ncedo Njezula (Mr Njezula) who introduced himself as a Director-General in the office of the Managing Director (MD), and Ms Serra Pillay (Ms Pillay) who introduced herself as the Manager in the same MD's office;
- 6.1.9.9 The Complainant stated that the two officials indicated from the onset that they were meeting with him as a mere formality and they were not supposed to talk to him, but only to the CSA on any Jozi@work matters. The officials allegedly argued that they were only contracted to the CSA and not Tayanja, further that they neither know Tayanja nor have any relationship with the SMME); and
- 6.1.9.10 The Complainant further stated that the officials continued to inform him that they would listen and take the matters to their legal department for advice and that it would be an internal process. The COJ-Pikitup officials further indicated that Tayanja must not expect any response as they are obliged to protect the contract between COJ-Pikitup and the Waste Group as a first priority.

*Alternative Dispute Resolution (ADR) Meeting*

- 6.1.10 On 15 December 2021, the Public Protector held a virtual Alternative Dispute Resolution (ADR) meeting with the Complainant and the officials of the COJ-Pikitup, represented by Mr Larry Mallela (Mr Mallela), Manager: Corporate Legal Services at COJ-Pikitup. The meeting mostly dealt with the issues raised by the Complainant and the funds that were allegedly due to the Complainant.
- 6.1.11 In the meeting, Mr Mallela indicated that there was a civil claim by other SMMEs that were also disputing the same issues as the Complainant and that the matter was currently in court. He further stated that the documentation provided by the Complainant regarding the breakdown of the funds outstanding, is related to the retention of funds.



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- 6.1.12 The Complainant confirmed that his complaint related to unpaid invoices by the CSA and what was not paid, as alleged by Waste Group, was returned to the COJ-Pikitup.
- 6.1.13 The Complainant further confirmed that the issue he raised with the COJ-Pikitup was related to money that was due to them by Waste Group and not the COJ/Pikitup.
- 6.1.14 Mr Mallela reiterated that from correspondence the COJ-Pikitup had received from the CSA and court documents, it is clearly indicated that there is a civil claim pending in court between COJ-Pikitup and Tayanja. In addition, the Complainant confirmed that indeed there was a civil claim, but due to financial constraints to pay his Attorney, his Attorney could not proceed with the claim at the Gauteng Local Division, Johannesburg.
- 6.1.15 The Complainant confirmed that his Attorney informed him that he could not assist him any further due to the failure by Tayanja to pay for his legal services. He also confirmed that there was no signed contract between the COJ-Pikitup and Tayanja, and that only a subcontract agreement existed between the Waste Group and Tayanja.
- 6.1.16 Mr Mallela, confirmed that issues of the oversight role of the COJ-Pikitup were attended to in terms of monthly reports received from Waste Group. He further indicated that their oversight role was in relation to Waste Group, being the main contractor and that is where their role ceased.
- 6.1.17 Mr Mallela contended that the COJ-Pikitup could not be held liable for any action or inaction, due to the fact that there must first be an admission from the CSA that indeed they are liable to the Complainant for monies owed to him. He further advised that the fact that litigation is against the CSA and not the COJ-Pikitup as





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an entity, proves that they have no obligation towards the Complainant for monies owed to him.

- 6.1.18 Mr Mallela indicated that if the CSA was not defending the claim for non-payment at court, then they would have maybe considered it, if the Complainant was able to fully prove his claim, but the fact that the CSA was defending the claim was indicative of their stance in not getting involved in the dispute between the Complainant and the CSA.
- 6.1.19 In addition, Mr Mallela averred that their oversight role did not extend to the contract between the CSA and Tayanja, but only the contracted CSA.
- 6.1.20 According to Mr Mallela, the absence of the Waste Group from the meeting even though they were invited was an indication that they did not want to jeopardize the civil claim against them in court by engaging with the Complainant, who was part of the court proceedings.
- 6.1.21 The Complainant indicated that, with regard to the dispute resolution process, he had attempted to raise all the issues with Waste Group, but there was no resolution and as a result, he took the matter to court.
- 6.1.22 He also confirmed that the disputes were taken to court, because the COJ-Pikitup did not entertain his complaints. He stated that in the SLA between Tayanja and Waste Group, there is no provision which states that COJ-Pikitup should be involved where there is a dispute between his Company, Tayanja and the Waste Group.
- 6.1.23 The Complainant advised that the last time he interacted with his legal representative was in June 2021, when he went to collect his documents, due to his inability to afford the legal fees.

- 6.1.24 The Complainant provided the Public Protector with the high court case number in order for the office to verify the status of the matter in court.
- 6.1.25 On 21 December 2021, the Public Protector confirmed with the Registrar of the High Court that indeed there was a civil matter registered and that the case is dormant.

### *Applicable Legal Framework*

#### **The Constitution of the Republic of South Africa, 1996**

- 6.1.26 Section 195(1) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the principles that Public administration must be development orientated and that the people's needs must be responded to; and the public must be encouraged to participate in policy-making. In the converse; the members of the public should comply with all legislation and additional service level contracts and or agreements affecting their daily interactions with state entities in order to ensure that there is a reciprocated relationship.

#### **Local Government Municipal Systems Act 32, of 2000**

- 6.1.27 The Local Government Municipal Systems Act establishes municipalities as required by the Constitution. Section 73 (1) (a) states that the municipality must give effect to the provisions of the Constitution and give priority to the basic needs of the local community and promote the development of the said community.
- 6.1.28 According to the above-mentioned provisions, there is a duty placed on COJ-Pikitup to treat members of the community in a fair manner, in this case, SMMEs that have been contracted, *albeit*, indirectly, to provide a service on its behalf.

- 6.1.29 The COJ-Pikitup should endeavour to ensure that its relationships with community-based organizations are strengthened to improve economic development through SMMEs. In this endeavour, COJ-Pikitup entered into an SLA with the Waste Group in an effort to empower SMMEs and improve the delivery of services to communities.
- 6.1.30 The evidence at the disposal of the Public Protector revealed that the COJ-Pikitup has contractual obligations towards its direct contracting party, the Waste Group, in ensuring that the said obligations are adhered to and complied with as per the SLA.

#### **Jozi@Work Service Level Agreement, 2015**

- 6.1.31 PIKITUP Johannesburg (SOC) Limited (Pikitup) entered into a Jozi@Work Service Level Agreement (SLA) with Waste Group Projects (Pty) Ltd. The agreement commenced on 1 April 2015.
- 6.1.32 The objectives of the SLA are recorded as follows in paragraph 1.1:

*“The COJ recognised the need to harness the intellectual and entrepreneurial Energy at local community level and, for this purpose, developed the Jozi@Work Programmes (J@W) as a municipal service delivery mechanism to mobilise local and / or regionalised labour, skills and knowledge in order to generate income and promote hope, self-reliance and dignity for the citizens or Johannesburg.*

*The role in the economy and the potential for job creation through SMME’s has also been recognised. Particular thought was given to the development of a mechanism through which the COJ supports the community to register*

*Cooperatives and other forms of micro-enterprise and that these community-based enterprises participate in the transparent distribution of Work Packages to promote community buy-in and to avoid the cronyism and patronage which has historically characterised the distribution of community projects.*

*In terms of the Transition Model as contained in paragraph 2 of the SLA:*

*2.1 The COJ designed J@W to encourage the sustainability of SMME's. In terms of the J@W Transaction / procurement model, the COJ has procured the services of a panel of capacity support agents (SCAs) as principal contractors with the necessary industry capacity and technical knowledge to in turn appoint SMMEs (through the J@W procurement mechanism), support and/impact business skills to those SMME's (the support services) and, be responsible for and oversee the implementation by the SMMEs of the Work Packages (the contract services)."*

6.1.33 According to paragraph 3.1 of the SLA, subsequent to the COJ awarding the capacity support agent for the waste sector to Waste Group, in which Pikitup participates through regulation 32 of the SCM Regulations, Pikitup was directed by the COJ to enter into the SLA with Waste Group in order to detail Work Packages scoping, pricing and other deliverables.

6.1.34 Paragraph 7.1 of the SLA stipulates the obligations of Waste Group, as the principal contractor, as follows:

*7.1.1 Waste Group shall fulfil its obligations as an independent contractor and not as an employee, labour broker, (joint venture) partner or agent of Pikitup.*



7.1.2 *Neither Waste Group nor any SMME contracted by Waste Group or their respective employees, managers etc. shall hold themselves out to be an employee, agent or partner of Pikitup or as being in a joint venture with Pikitup.*

7.1.3 *Accordingly, Waste Group acknowledged and confirms that neither it, nor any of its employees shall be employees of Pikitup and shall not be entitled to any benefits as employees of Pikitup.*

7.1.4 *Waste Group and/or its SMME contractors shall not be entitled to bind Pikitup to any obligation or promise, pledge the credit or Pikitup or incur any liability on behalf of Pikitup or purport to do so.*

6.1.35 It is evident from paragraph 21 of the SLA on Dispute Resolution that any disputes will be dealt with through arbitration or mediation which shall be referred to a joint committee comprising of the Chief Executive Officers of each of the parties or a suitably authorised alternate or nominee who will use their reasonable commercial endeavours to resolve the dispute within 20 days of the dispute having been referred to them. Should the joint committee be unable to resolve a dispute within that time period, any party shall have the right to demand that the dispute be referred for determination by an arbitrator agreed on by the parties.

#### **Sub-contractor service level agreement**

6.1.36 Waste Group, in turn, entered into a sub-contractor Service Level Agreement with Tayanja, represented by the Complainant as Chairperson.

6.1.37 The general terms of the SLA are that Waste Group, as the CSA undertakes to supervisory and transactional, technical oversight and quality assurance support requirements, as well as small business development services to the service provider for the execution of work packages.

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*Conclusion*

- 6.1.38 The COJ-Pikitup entered into an SLA with Waste Group to amongst other things, provide support to the SMMEs contracted to Waste Group, such as, Tayanja. However, it is very clear from the SLA that Waste Group, as the CSA shall fulfil its obligation as an independent contractor, separate from Pikitup or the COJ.
- 6.1.39 The independence of Waste Group is further enunciated and amplified in paragraph 7.1.4 which clearly stipulates that Waste Group and/or its SMME contractors shall not be entitled to bind Pikitup to any obligation or promise, pledge the credit of Pikitup or incur any liability on behalf of Pikitup or purport to do so.
- 6.1.40 It can be deduced from the SLA that although the objective of the agreement between Waste Group and Pikitup was to develop small businesses by providing them with capacity and entrepreneurial skills and knowledge in waste management, it was never an intention of Pikitup to be held liable for any breach and/or disputed that may arise between the capacity support agent (Waste Group) and any of its SMMEs, including Tayanja, the Complainant's company.
- 6.1.41 There is no indication in the subcontractor SLA signed between Waste Group and Tayanja, that in COJ-Pikitup had a duty to intervene in the case of a dispute.
- 6.1.42 According to the SLA, disputes which could not be resolved by the operational personnel of the parties, could either be referred to the joint committee comprised of the chief executives of both parties for mediation or arbitration.
- 6.1.43 Therefore, in the absence of a contractual agreement between the COJ-Pikitup and a sub-contractor, there is no basis to hold the COJ-Pikitup officials liable.



Tayanja has not established any direct contractual relationship with the COJ-Pikitup, but only has an SLA with Waste Group.

## 7. FINDINGS

7.1 Based on an analysis of the information available in its entirety, against the Complainant's reasons for requesting a review, it is the Public Protector's view that the request to review the decision of the Gauteng Provincial Office to close this matter has no basis and the reopening of the investigation cannot succeed for the following reasons:

7.1.1 The COJ-Pikitup entered into an agreement with the Waste Group and not Tayanja. Therefore, there is a clear indication that there is no contractual relationship between COJ-Pikitup and Tayanja. Waste Group, in turn, sub-contracted some of the Work Packages to Tayanja as per the SLA signed by the parties.

7.1.2 The Public Protector could not establish an obligation from Pikitup to intervene in a dispute between the capacity support agent, in this instance, Waste Group and the SMME, Tayanja.

7.1.3 The Public Protector is of the view that the courts would be best suited to deal with this matter, as it relates to a contractual dispute between the parties.

7.1.4 Accordingly, the Public Protector finds that the nature of the dispute between the Complainant, COJ-Pikitup and Waste Group is one that may be appropriately ventilated in a court of law.

7.1.5 In *Sealed Africa (Pty) Ltd v Kelly and Another*<sup>2</sup> the court held that the basic rule regarding the interpretation of contract(s) is that no evidence may be given of its

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<sup>2</sup> *Sealed Africa (Pty) Ltd v Kelly and Another* (3957/04) [2005] ZAGPHC 69 (6 July 2005) at Para 18.



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terms except the document itself, which is a memorial of the agreement, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence. In this regard, it is submitted that the interpretation of contracts is a question of law and not fact, a function reserved for the courts of law.<sup>3</sup>

- 7.1.6 The contractual principle was confirmed in the *GEMS*<sup>4</sup> matter, where the Public Protector was investigating allegations of failure or refusal by GEMS to recognise the Complainant as a beneficiary under the medical aid scheme. In this matter, the Supreme Court of Appeal (SCA) found amongst other things that *the relationship between members and the scheme is essentially one of a contractual nature*. In rejecting the mandate of the Public Protector, the SCA opined that the nature of the complaint, has the consequence that the jurisdictional preconditions for an investigation in terms of sections 6(4) and (5) have not been met. At the end, the SCA found the Public Protector does not have the statutory power to investigate the complaint.
- 7.1.7 In addition to the above, it is confirmed that there is a pending civil action between the Complainant and Waste Group in the Gauteng Local Division, Johannesburg on the issues raised, which is dormant.
- 7.1.8 Accordingly, based on the evidence before the Public Protector, the conduct of the CoJ-Pikitup does not constitute improper conduct as envisaged in s182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

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<sup>3</sup> Christie RH *the Law of Contracts in South Africa*, 5<sup>th</sup> Edition at page 192.

<sup>4</sup> *Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others* (1000/2019 and 31514/2018 and 33401/2018) [2020] ZASCA 111 (29 September 2020) at Paragraph 22 and 38.



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**8. CONCLUSION**

- 8.1 Having considered the investigation conducted in this matter and the review application, in line with Rule 44(4) of the Public Protector Rules, we confirm that the application for an internal review, is unsuccessful.
- 8.2 The Public Protector considers this matter as finalised and cannot take it further. Should any party wish to challenge this decision, they are at liberty to explore legal remedies at their disposal.



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**ADV Kholeka Gcaleka  
ACTING PUBLIC PROTECTOR  
OF THE REPUBLIC OF SOUTH AFRICA  
DATE: 30 DECEMBER 2022**