

**a. COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

b. CaseNumber: 21/IR/Apr02

In the matter between:

Dumpit Waste Removal (Pty) Ltd

Applicant

and

The City of Johannesburg

1st Respondent

**Pikitup Johannesburg (Pty) Ltd
Respondent**

2nd

a)REASONS

Introduction

1. This is an application for interim relief in terms of section 49C of the Competition Act as amended ("the Competition Act").
2. The applicant, Dumpit Waste Removal (Pty) Ltd ("Dumpit"), an independent waste remover, alleges that the respondents, the City of Johannesburg ("COJ") and Pikitup (Pty) Ltd ("Pikitup"), a corporate entity wholly owned by the COJ, are abusing their dominance in the waste removal market by engaging in exclusionary acts by inducing Dumpit's customers not to deal with Dumpit.
3. The respondents opposed the granting of relief contending that the function of waste removal is regulated by statute. In terms of the Constitution waste removal is a functional area over which

municipalities have the executive authority to make and administer by-laws. In terms of its existing by-laws the removal of waste is a service that may only be undertaken by a person licenced to do so. Thus private operators have no right to carry on business as waste removers - they may only do so once they have been issued a permit or have otherwise been authorized by municipalities for that purpose and then only within the limits of their permit. The respondents effectively contend that this is not a matter within the jurisdiction of the Competition Act. Moreover, argue the respondents, the applicant has not met any of the requirements for interim relief in terms of section 49C(2)(b) of the Act.

Background

4. The applicant, Dumpit, has been an independent operator in the removal of commercial and domestic waste since 1997. Permits to remove industrial refuse, builders rubble, special industrial refuse and recyclable refuse were issued to it by the Northern Metropolitan Local Council, the Southern Metropolitan Local Council and the Eastern Metropolitan Local Council.¹ The respective permits expired during the period 30 September 2000 to 30 June 2001.
5. The City of Johannesburg Metropolitan Municipality was established during September 2000 after five separate Councils consisting of the Greater Johannesburg Transitional Metropolitan Council and the Northern-, Southern-, Eastern- and Western Johannesburg Transitional Metropolitan Local Councils were amalgamated into a single municipality. Previously the disestablished councils governed waste removal through by-laws, which required not only waste removers but

¹ It is not clear from the permit issued by the Northern Metropolitan Local Council precisely what kind of waste Dumpit was authorized to remove. See page 460 of the record. Also see pages 461 and 462 of the record for copies of the permits issued by the other two councils.

also the owner or occupier generating the waste to apply for a permit from the relevant local council before using a private waste contractor.²

6. On 11 April 2003 the Executive Director of the Johannesburg Contract Management Unit³ informed Dumpit that its permits, which had been issued by the Northern, Southern and Eastern Metropolitan Local Councils and which had expired on 1 January 2001, 30 June 2001 and 30 September 2000 respectively, were renewed. The renewed permits would expire 3 months from the date of promulgation of the Waste Management by-laws⁴ and were issued for services previously done by Dumpit excluding the following, which services would henceforth be provided by Pikitup exclusively:⁵

- *collection and disposal of domestic waste;*
- *collection and disposal of business waste;⁶*
- *collection and disposal of putrescible waste;*
- *cleansing, that is, street cleaning, lane flushing, and area cleaning;*
- *management of litter bins;*
- *collection and disposal of waste illegally dumped; and*
- *collection and disposal of animal carcasses found in a public place.*

7. Dumpit was also informed that its application to operate in the Western Metropolitan Local Council was turned down because it constituted a new application as opposed to a renewal of a permit previously held.

² Each of these councils was largely autonomous, performing its functions under by-laws specific to its region. The by-laws were largely remnants of local government structures established before 1995.

³ This is the division within the COJ that issues permits for the removal of waste.

⁴ These by-laws are not yet in force. See footnote 11.

⁵ See page 602 of the record.

⁶ Business waste is defined in the letter as: “*Business waste means up to 1999 litres of waste, other than hazardous waste, healthcare risk waste, building waste, industrial waste, generated on a weekly basis by an end user on premises utilized for commercial activities.*” See page 603 of the record.

8. As stated earlier the function of waste removal is regulated by statute. The key statutes involved are the South African Constitution and the Municipal Systems Act 32 of 2000 ("the Systems Act").

9. Chapter 7 of the Constitution of the Republic of South Africa states in sections 156(1)(a) and (2) that:

(1) A municipality has executive authority in respect of, and has the right to administer, -

a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5

b)

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

10. One of the matters, which the Council has executive power to administer is listed in schedule 5 of Part B and regards waste management and includes "*refuse removal, refuse dumps and solid waste disposal*".

11. Section 73(1) of the Systems Act states that

A municipality must give effect to the provisions of the Constitution....

and Section 76(b)(i) states that:

A municipality may provide a municipal service in its area or a

part of its area through-

- a) *an internal mechanism, which may be*
 - i.a department or other administrative unit within its administration; or*
 - ii.any business unit devised by the municipality*
 - iii.any other component of its administration; or*
- b) *an external mechanism by entering into a service delivery agreement with –*
 - i.a municipal entity;*
 - ii.another municipality;*
 - iii.an organ of state,...*

The Systems Act defines a 'municipal entity' as:

- a) *a company, co-operative, trust, fund or any other corporate entity established in terms of any applicable national or provincial legislation and which operates under the ownership control of one or more municipalities, and includes, in the case of a company under such ownership control, any subsidiary of that company; or*
- b) *a service utility*

12. As part of a policy initiative and in apparent conformity with the Systems Act – the statute which effectively provides for the manner in

which municipal powers and functions are exercised and performed - the COJ converted its waste management division into a separate municipal entity, called Pikitup.⁷

13. The COJ thus decided to go the 'external mechanism' route and concluded, in compliance with section 80 of the Systems Act, a Service Delivery Agreement ('SDA') with Pikitup.⁸ In terms of the SDA Pikitup is given the right to conduct waste management services in Johannesburg. Certain of these services, which the agreement defines, and which are referred to as 'council services', are given to Pikitup to perform on an exclusive basis. In terms of Clause 8 of the SDA:

Pikitup shall be entitled to and shall provide the Council services in the service area to the exclusion of other service providers.

14. The council services referred to in the SDA are set out in Annexure B of the SDA and reproduced above. For ease of exposition we list the reserved services below:

- *collection and disposal of domestic waste;*⁹
- *collection and disposal of business waste;*¹⁰
- *collection and disposal of putrescible waste;*
- *cleansing, that is, street cleaning, lane flushing, and area*

⁷ The COJ owns 100% of Pikitup. The company has a management team that is managed by a Managing Director. The management team reports to a Board of Directors who are prominent members of the local community in Johannesburg. The assets, as well as employees, of the Council and its predecessors involved in the management of waste were transferred to Pikitup.

⁸ See section 80 of the Systems Act, which states that when municipality services are done externally, as in the case of Pikitup, a Service Delivery Agreement ("SDA") must be concluded between the municipality and the municipal entity.

⁹ The SDA defines domestic waste as: "Domestic Waste means waste generated on premises used solely for residential purposes and purposes of public worship including halls or other buildings used for religious purposes, but shall not include building waste, garden waste, bulky waste or special domestic waste." See page 68 of the record.

¹⁰ The SDA defines business waste as: "Business waste means up to 1999 litres of waste, other than hazardous waste, healthcare risk waste, building waste, industrial waste, generated on a weekly basis by an end user on premises utilized for commercial activities." See page 65 of the record.

cleaning;

- *management of litter bins;*
- *collection and disposal of waste illegally dumped; and*
- *collection and disposal of animal carcasses found in a public place.*

15. In addition, the SDA gives Pikitup the right to perform other waste removal services that fall outside the definition of council services. However, these are not granted on an exclusive basis.

16. As already noted prior to the formation of the COJ in 2000 waste removal was regulated by the various entities that later became the COJ. Private operators who performed waste removal services did so in terms of permits issued by the respective entities. Initially when the COJ was established, no new permits were issued to private operators.

17. The COJ avers that enforcing the different by-laws of its predecessors became unworkable without the personnel that were lost to Pikitup. The COJ thus decided to stop renewing existing permits or issue new permits to independent waste operators until it could promulgate a new set of by-laws to deal with a uniform permitting system.¹¹ As a result the independent operators that continued to remove waste without a legal permit were in breach of the existing by-laws. However, avers the COJ, it realized that independent operators played an important role and it decided not to prosecute them.

18. This decision of the COJ left a vacuum in the waste permit system. The first respondent avers that, in order to provide for a more orderly situation until such time as the new by-laws would be promulgated, the Council Contract Management Unit of Johannesburg or “CMU”

¹¹ The process has been delayed by the finalization of fine schedules that needs to be approved before the by-laws, which were adopted by Council, can be promulgated. See page 688 of the record.

recommended to the COJ that it renew all permits previously issued by its predecessors to independent waste removers.¹²

19. It is, aver the respondents, within this framework that Dumpit competes with Pikitup. That is to say, Dumpit (or any other licensed private waste remover) only competes with Pikitup for services that fall outside the designated 'council services' exclusively reserved for Pikitup.

20. We now turn to Dumpit's complaint and the relief that it seeks.

Application brought by Dumpit

History of the application

21. Subsequent to the applicant filing its interim relief application on 30 April 2003 the respondents wrote a letter to Dumpit indicating that its founding affidavit was vague and embarrassing and that the interim relief application did not comply with Tribunal Rule 26.¹³ The applicant then filed a supplementary affidavit during May 2003 in order to deal with the issues raised by the respondents in their letter.

22. The respondents filed their answering affidavit on 27 June 2003 in which they raised certain points *in limine* and objections to the application brought by the complainant. In reaction to this the applicant filed an application to amend its papers. The respondents opposed the application and the matter was heard on 1 October 2003.

23. In the course of this earlier hearing the respondents in this matter – the COJ and Pikitup – withdrew their opposition to the amendment

¹² See letter sent to Dumpit on 11 April 2003, page 602 of the record.

¹³ See page 261 of the record.

application. The determination of the costs of this application was held over until the finalisation of the application for interim relief. The Tribunal also ordered that the applicant file its replying affidavit by 22 October 2003 and that the respondents could file supplementary affidavits, should they wish to, within 10 business days after receiving the applicant's replying affidavit. The interim relief hearing was set down for 20 November 2003.

The complaint

24. Dumpit alleges that Pikitup is threatening and intimidating legitimate customers and potential customers of Dumpit, thereby dissuading or attempting to dissuade its customers from contracting with Dumpit. Secondly, the COJ is refusing to grant Dumpit and/or its customers or potential customers permits so as to allow Dumpit to provide services to its customers or potential customers.

25. Dumpit, therefore, seeks the following relief:

- 1. Orders, in terms of section 58(1)(a)(v) of the Act, declaring the conduct of first and second respondents to be an abuse of a dominant position and to amount to the performance of exclusionary acts as contemplated in sections 8(c) and 8(d)(i) of the Act; and*
- 2. orders, in terms of section 58(1)(a)(i) of the Act, interdicting first and second respondents from abusing their dominant positions, inter alia, by performing any exclusionary acts as contemplated in sections 8(c) alternatively 8(d)(i) of the Act.*

3. Ordering that costs be paid by first and second respondents

4. Further and/or alternative relief.

26. The respondents opposed the granting of the relief contending that Dumpit had not met any of the requirements for interim relief in terms of section 49C, even after amending its papers.

Jurisdiction

27. The applicants effectively allege that the respondents are excluding it from the market for the provision of waste delivery services. This exclusion is effected by the respondents' refusal to issue permits to the applicant or its customers and potential customers. Moreover, alleges the applicant, employees of the respondents are attempting to induce consumers of the waste delivery service to utilise the services of the second respondent, Pikitup. This inducement, it is alleged, largely takes the form, of advising actual and potential customers of the applicant that the latter does not possess the necessary authority to offer removal services in respect of those categories of waste specified in Clause 8 of the SDA. However, there is, in our view, little point served in examining the intricacies of the case made out in terms of the Competition Act until we have decided the jurisdictional point taken by the respondents.

28. We are persuaded that the respondents are on secure ground. The Constitution clearly reserves the provision of waste delivery services to the municipalities. Moreover, it appears that, in giving effect to the Constitution, the first respondent has meticulously followed the provisions of the Systems Act. In particular it has established an

entity, Pikitup, responsible for the collection of waste within the area of its jurisdiction. The form taken by this entity – ‘an external mechanism’ designated ‘a municipal entity’ – is expressly sanctioned by Section 76 of the Systems Act. In compliance with the further provisions of Section 76, the first respondent has entered into a Service Delivery Agreement with the second respondent.

29. The statutory scheme that we have referred to above has meant that the provision of waste services in Johannesburg can only be performed by an entity that has been licensed by the COJ, and then only within the ambit of the license. The COJ has, by virtue of its licensing powers over the provision of waste removal services, the right to determine whether this activity should be subject to market forces. In respect of what it has chosen to define as ‘council services’ it has elected to use its own entity as the sole provider and not to create a market for these services. Absent a market there can be no market power. Pikitup’s monopoly over the so-called ‘council services’ is a function not of market power but administrative fiat. Without market power there can be no abuse of dominance and hence no prohibited practice. Since interim relief is predicated on the existence of an alleged prohibited practice it follows that if the application does not succeed in making out the first of the essential requirements for interim relief, which is the existence of an alleged prohibited practice, it must fail.¹⁴

30. Given that the first respondent clearly envisages that there remains a role – albeit circumscribed – for the market in the provision of waste services, those with an interest in competition policy may well believe that the COJ should move rapidly to establish clear boundaries between those areas of waste collection monopolised by an entity designated by the first respondent and those in which private operators

¹⁴ See Section 49(C)(2)(b)(i)

are permitted to compete. Indeed, they may go further and urge the COJ to leave as much room as possible for the functioning of a market in the collection of waste. There may even be justified grounds for fearing that the form selected by the first respondent – a separate corporate entity – portends likely future privatisation by which time the dominance of the existing statutory monopoly would be well nigh unassailable. However, these policy concerns must give way to the clear provisions of the Constitution and the subordinate legislation – notably the Systems Act – that seeks to give effect to it.

31. Policy considerations aside, the applicants may well be justified in holding that the respondents have flouted the basic requirements of fairness provided for in the Constitution and administrative law. However, these claims must be adjudicated in another forum. The provisions of the Constitution and the Systems Act clearly place these questions outside of the ambit of the Competition Act.

32. The second allegation concerns the conduct of Pikitup's employees. Dumpit complains that the employees of Pikitup are actively attempting to dissuade customers from contracting with Dumpit. Dumpit alleges that Pikitup's employees take direct advantage of the fact that Dumpit and its customers cannot obtain new permits and advise customers or potential customers that Dumpit is operating unlawfully. To this effect it has included in its papers copies of letters from customers who informed it of this alleged conduct by Pikitup.¹⁵

33. Pikitup, in its answering affidavit, admits that its officials have, from time to time, informed Pikitup's customers that Dumpit did not have a permit to perform commercial waste management services. However, this related to business waste of less than 1999 litres, which Dumpit is,

¹⁵ See pages 213, 233 and 565 of the record.

indeed, not permitted to remove. According to Pikitup its employees were merely informing its customers of the prevailing legal framework.

34. The evidence placed before us by the applicant comprises of three letters written, two letters written by existing customers, Maychem¹⁶ and Floraline¹⁷ and a third written by a potential customer, Anne Clulow. All these letters are written in general terms without indicating specifically whether the required service concerns business waste above 1999 litres or less. In fact on close reading of specifically the Clulow letter ¹⁸ Ms Clulow indicates that she is interested in the “....weekly removal of ten 85-litre bins”, which could be an indication that she is referring to less than 1999 litres of business waste. This clearly falls outside of the provisions of Dumpit’s permit.

35. We cannot, on the basis of the evidence before us, conclude that the second respondent was attempting to induce customers or potential customers to forego dealing with Dumpit in that area of waste removal in which Dumpit is permitted to operate and, hence, that a restrictive practice contemplated in Section 8(d)(i) of the Act has occurred.

36. The application for interim relief is accordingly dismissed.

Costs

37. Insofar as Dumpit’s application to amend is concerned, costs, on a party and party scale and including the costs of two legal representatives, are awarded to the applicant in this interim relief application.

¹⁶ See page 219 of the record

¹⁷ See page 604 of the record

¹⁸ See page 600 of the record

38. Costs of the interim relief application, on a party and party scale and including the costs of two legal representatives, are awarded to the respondents in this interim relief application.

D. Lewis

5 January 2004

Date

Concurring: N. Manoim and M.R Madlanga