IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

[redacted]

SIGNATURE DATE: 10 March 2026

Case No. 2023-123305

In the matter between:

SEKELA XABISO CA INCORPORATED	Applicant
and	
TRANSNET SOC LIMITED	First Respondent
HAMILTON MAENETJE NO	Second Respondent
ARBITRATION FOUNDATION OF SOUTHERN AFRICA	Third Respondent

Summary

It is contrary to section 217 (1) of the Constitution, 1996, for an organ of state to bind itself to continue to procure services from a specific contractor, or to agree to refrain from procuring such services from any other contractor, beyond the period provided for in an otherwise lawfully concluded contract. Such an agreement provides the contractor with an unconstitutional monopoly on state resources for the period of the restriction.

JUDGMENT

WILSON J:

1 The applicant, Sekela Xabiso, is a firm of auditors which tendered for work from the first respondent, Transnet. In its request for proposals, Transnet specified that it intended to appoint successful bidders for a period of five years. After an open and competitive tendering process, Sekela Xabiso was designated as one of two preferred bidders. Contractual negotiations ensued, in which it was revealed to Sekela Xabiso that Transnet intended to appoint it as one of two firms to do all of Transnet's auditing work for a period of just one year. This was because, during the tendering process, Transnet had taken a decision, in principle, to bring all of its auditing functions in-house. Transnet did not want to commit itself to a five year agreement, since that would have been incompatible with its intention to insource the functions it had put out to tender.

2 Sekela Xabiso took the view that it was not worth its while to perform the work for just a year. It managed to secure an agreement from Transnet that it would perform half of Transnet's auditing work for a period of two-and-a-half years, after which it was envisaged that Transnet would take its auditing functions in-house. In the event that this did not happen, Sekela Xabiso secured itself an extraordinary contractual advantage. That advantage, embodied in clause 6.1 of its agreement with Transnet, was that Transnet would be "restricted for a period of 60 months from [24 October 2019] from procuring" services similar to the services it had procured from Sekela Xabiso from anyone else. This meant that if Transnet did not insource those services, it would have no choice but to purchase them from Sekela Xabiso (clause 6.2). That undertaking would

remain in effect for a period of two-and-a-half years after the expiration of the initial period for which Transnet had retained Sekela Xabiso's services.

3 On the face of it, the effect of clause 6 was to require Transnet to purchase auditing services from Sekela Xabiso for the full five year period for which it had initially issued the request for proposals, unless Transnet insourced its auditing services during the second half of that period. In other words, Transnet was forbidden, for a period of five years, from exercising its ordinary public procurement powers to obtain from anyone else the services it had bought from Sekela Xabiso. At the end of the two-and-a-half year period for which it had initially contracted with Sekela Xabiso, Transnet would either have to insource its auditing work, or contract Sekela Xabiso to do that work for whatever portion of the remaining two-and-a-half year period that it did not insource its auditing functions.

4 After the expiration of the initial two-and-a-half year period, Transnet extended Sekela Xabiso's contract for a further year, but at the end of that period, Transnet informed Sekela Xabiso that it did not intend to renew the agreement further. Nor did it intend to insource its audit function. Transnet instead issued a new request for proposals for its auditing work, and ultimately employed Deloitte & Touche to provide auditing services for a five year period. Sekela Xabiso's contract was renewed for a further four months for the purposes of handing over its work to Deloitte & Touche.

5 The upshot of all of this was that Sekela Xabiso was deprived of the benefit of the clause 6 restriction for fourteen months of the five year period to which Transnet had agreed to be bound by it. Aggrieved, Sekela Xabiso commenced

arbitration proceedings for the damages it claimed it had suffered as a result of Transnet's failure to observe the full extent of the restriction.

Arbitration

6 The arbitration proceedings were conducted under the standard rules formulated by the third respondent, AFSA. The second respondent, Mr. Maenetje, was appointed as arbitrator. In its statement of defence, Transnet averred that clause 6 of its contract with Sekela Xabiso is unconstitutional and invalid, since the restriction it embodies is contrary to section 217 of the Constitution, 1996. Section 217 (1) requires public procurement to take place "in accordance with a system which is fair, equitable, transparent, competitive and cost-effective". The gist of Transnet's case at arbitration was that clause 6 of the agreement is neither transparent nor competitive, since it bound Transnet to Sekela Xabiso for a period far beyond the initial contract period. Assuming that it did not insource its auditing function, Transnet agreed not to exercise its ordinary powers of public procurement for a period of up to two-and-a-half years after the contract expired. To tie itself in this way to one service provider in the absence of a contract was, Transnet argued, unconstitutional.

7 It is now well-established that it is beyond the competence of an arbitrator to determine the constitutional validity of an act of public procurement (see, for example, *NAD Property Income Fund (Pty) Ltd v Bushbuckridge Local Municipality* [2025] ZASCA 184 (4 December 2025), at paragraph 24). Both parties recognise this, and the arbitration has been stayed pending the outcome of this application.

The application before me

8 In this application, Sekela Xabiso asks for an order declaring clause 6 of its agreement with Transnet to be constitutionally valid and enforceable. By contrast, Transnet counter-applies for an order reviewing and setting aside its decision to incorporate that clause into the agreement. The parties agree, in my view correctly, that clause 6 is severable from the rest of the agreement.

9 At the outset of the argument, the parties agreed that the principal issue before me is the meaning of clause 6 in the context of the agreement as a whole. Ms. Mgudlwa, who appeared for Sekela Xabiso, submitted that the meaning of clause 6 is that, in the event that Transnet's audit function was not insourced, Sekela Xabiso's contract would be automatically renewed beyond the initial two-and-a-half year period on the same terms and conditions, until the end of the whole of the five-year period to which clause 6 applied. For his part, Mr. Maleka, who appeared with Ms. Long for Transnet, submitted that the true effect of clause 6 is to give Sekela Xabiso the exclusive right to perform Transnet's outsourced auditing functions for a period of five years. The first two-and-a-half years of that period would be on the terms set out in the agreement itself. For the remaining period, however, Transnet's undertaking to contract only with Sekela Xabiso meant that Sekela Xabiso could impose whatever terms it chose, because Transnet was forbidden from seeking better terms on the open market.

10 Counsel were agreed that, if the meaning of clause 6 is as Ms. Mgudlwa contended, then it is not contrary to section 217 (1) of the Constitution, since it is no more than an agreement to retain Sekela Xabiso on definite terms and

conditions in the event that Transnet did not insource its auditing functions during the five-year period (on the obvious legality of which see, for example, *Gauteng MEC for Health v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA)). If, however, clause 6 means that Transnet had to employ Sekela Xabiso for the whole five-year period, during the second half of which neither party would be bound by the other terms and conditions set out on the agreement, then clause 6 is unconstitutional, since it would allow Sekela Xabiso to dictate the terms of its employment during the second half of the five-year period, and would prevent Transnet from seeking better terms from other service providers. That, it was agreed, could neither be competitive nor transparent.

Clause 6

11 I turn, then, to the meaning of clause 6. That is to be determined by reference to the ordinary grammatical meaning of the words used in the clause, evaluated in the context of the contract as a whole, taking into a account the purpose for which the contract was concluded and the circumstances surrounding its genesis. Although the interpretive exercise starts with the text and its structure, no one source of meaning is to be preferred over another. The point is to arrive at a sensible, businesslike, interpretation of the clause in light of its full textual and circumstantial context (see *Capitec Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA), paragraphs 46 to 51 and *Democratic Alliance v City of Johannesburg* 2025 (3) SA 204 (GJ), at paragraph 23).

12 Clause 6 reads as follows –

6 RESTRICTIONS

6.1 Notwithstanding any clause in this Agreement it is hereby recorded that the Company [Transnet] shall be restricted for a period of 60 months from the Effective Date [24 October 2019] from procuring, participating in any Transversal Contract and/or contract procured by any state owned entity including Government Department for Services and/or similar services procured in this Agreement.

6.2 If the Company wishes to procure such Services and/or similar services it shall procure such Services from the Service Provider [Sekela Xabiso].

6.3 This Agreement shall remain in force and effect after the expiry of 30 months from Effective Date and continue for a further period agreed between the Parties within the 90 days prior to the expiry period of the Term. The Company shall inform the Service Provider of the intention to extend the Term of the Agreement in accordance with Clause 5. Extension of [the] contract will be subject to National Treasury Regulations, Transnet Procurement Procedure Manuals and Transnet Delegation of Authority framework.

6.4 Notwithstanding the Term of this Agreement, clause 6 shall remain in force and effect for a period of 30 months after [the] Term.

13 In this text, the “Agreement” means the contract as a whole, together with any provisions of the tender conditions or bid documents which govern the provision of services to Transnet by Sekela Xabiso (see clause 2.3). “Term” means the initial two-and-a-half year period of the agreement, and any extension of that term agreed between the parties (see clause 2.81).

14 At the core of clause 6 is the undertaking not to procure auditing services from anyone but Sekela Xabiso. That is the effect of clause 6.2. That undertaking is given effect to by the embargo on procuring any such services from anyone else for a period of 60 months, which is embodied in clause 6.1. Clause 6.3 states that the whole agreement will remain in force after the initial two-and-a-

half year period has expired, provided that the parties agree to extend the initial period during the 90 days immediately preceding its expiry. Clause 6.4 provides for clause 6 as a whole (and accordingly the restrictions it contains) to survive the Term (being the initial period plus any extensions agreed to) by a period of 30 months. This technically means that the clause 6 restriction might notionally endure for seven-and-a-half years, but nobody suggests that this was its true meaning. Counsel were agreed that the purpose of the clause was to ensure that Transnet continued to purchase its outsourced auditing services from Sekela Xabiso for five years from 24 October 2019.

15 If, as Ms. Mgudlwa contended, clause 6 is to be read as requiring no more than that the agreement be extended for a maximum period of five years in the event that Transnet does not insource its audit function, then clause 6 of the agreement would have to be read as requiring an extension of the agreement on the same terms and conditions. Whether that meaning can be attributed to clause 6.3, which envisages such an extension, depends on the construction to be given to clause 5, to which clause 6.3 cross-refers.

16 Clause 5 reads as follows –

5. COMMENCEMENT AND DURATION

5.1 Subject to the terms and conditions of this Agreement, this Agreement shall become effective on the Effective Date [24 October 2019]. The rendering of the Services by the respective Service Provider to the Company, in accordance with this Agreement shall commence on the Effective Date and shall endure for a period of thirty (30) months, until the Termination Date, at which time this Agreement shall terminate.

5.2. Notwithstanding the Term of this Agreement the Company may extend the Term for further period of 30 Months subject to the terms and conditions to be agreed by the Parties and subject to the National Treasury granting approval if the extension of the

Agreement results in an amount exceeding the threshold set by National Treasury for contract variation and/or extension which amount shall be calculated using the amount indicated in Clause 13.5.

5.3 90 days prior to the expiry period of the Term the Company shall issue a notice to the Service Provider of its intention to extend the Term of the Agreement in accordance with this clause 5.

17 On its face, clause 5.2 grants Transnet a discretion: it may choose to extend the term of the agreement. If it chooses to do so, the term will be extended on “terms and conditions to be agreed” between Transnet and Sekela Xabiso. In other words, it is on the election of Transnet that the agreement survives the initial period of 30 months (or two-and-a-half years). This sits in obvious tension with the idea that all clause 6 envisages is an extension of the agreement in the event that Transnet’s audit function is not insourced. Not only does Transnet get to choose whether the agreement survives the initial two-and-a-half-year period at all, the extension is itself “subject to the terms and conditions to be agreed”.

18 It seems to me that the only way that clauses 5 and 6 can be read together is to separate the period of the agreement and the terms and conditions on which it is concluded on the one hand from the restriction set out in clause 6 on the other. Even though clause 6.3 provides for the “agreement” to be extended beyond the initial term, that extension must be agreed under clause 5. Clause 5 not only reserves to Transnet the discretion to extend the agreement (in other words, Transnet could decide not to extend the agreement at all), it leaves the “terms and conditions” of such an extension completely open. Such an “agreement to agree” has historically been considered unenforceable unless there is some provision to break any deadlock the negotiations might

reach, although the Constitutional Court has suggested that the least that it might imply is a duty to negotiate in good faith (see *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paragraphs 95 to 103). But whatever may be said of the fact that clause 5 leaves the "terms and conditions" of any extension open, the least that it must entail is that neither party envisaged clause 5 would mean the automatic renewal of the contract on the same terms and conditions, in the event that Transnet's audit function was not insourced.

19 The upshot is that clause 6 must mean that, short of insourcing its audit function, Transnet had to contract with Sekela Xabiso come what may, and that it was forbidden from seeking similar services on the open market, even after the terms on which Sekela Xabiso provided them during the initial period had expired. This conclusion is reinforced by clause 25.1 (b) of the agreement, which refers to any extension of the agreement as being "at [Transnet's] option for a further period to be agreed between the parties", and by clause 2.81, which defines the Term of the agreement as 30 months, and such further period agreed "in accordance with Clauses 5.1 and 5.2". There would be no point in affording Transnet the discretion not to renew the agreement – as clauses 5 and 25 plainly do – if clause 6 meant an automatic renewal on the same terms and conditions anyway.

20 The circumstances surrounding the conclusion of the agreement also suggest that the purpose of clause 6 was not to renew the agreement on the same terms and conditions in the event that Transnet did not insource its audit function. What Sekela Xabiso really wanted was guaranteed work for five years if Transnet did not insource its audit function. It was the period rather

than the precise terms of the work that animated the insertion of clause 6 in the first place. Sekela Xabiso was not content to contract for a year. It wanted to do so for five years. It accepted two-and-a-half years in the hope that it might get five years if Transnet did not take its audit function in-house.

21 If the purpose of clause 6 was really no more than that the agreement with Sekela Xabiso would continue for a period of 5 years on the terms and conditions specified unless and until Transnet insourced its audit function, then it is not clear to me why that was not set out explicitly in the agreement itself. If that were the agreement's true purpose, much of clause 5 would make no sense at all. But I must read clause 5 as if the parties intended it to have both meaning and force. If that is done, it seems to me that the automatic renewal of the agreement in the event that Transnet's audit function remained outsourced cannot be the true purpose clause 6.

22 It follows that clause 6 is no more than a restrictive covenant that bound Transnet to purchase auditing services from Sekela Xabiso for a period of five years, and that prevented Transnet from exercising its ordinary powers to procure such services elsewhere, unless it insourced its audit function.

The unconstitutionality of clause 6

23 So construed it seems plain to me that clause 6 is unconstitutional. At the very least, it is an unlawful fetter both on Transnet's contractual power, provided for in clause 5 itself, to decline to renew the agreement after the initial period expires, and on its constitutional obligation to procure services transparently and competitively on the open market as envisaged section 217 of the Constitution, 1996. This is not a case in which I must consider the degree to

which Transnet may fetter its contractual power to refuse to renew the agreement with Sekela Xabiso, or its constitutional obligations to procure services competitively and transparently. The effect of clause 6 in this case is to completely extinguish that power and those obligations for the period of the restriction. A fetter of that nature is, the Constitutional Court has held, obviously unlawful (see *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), paragraph 198).

24 Moreover, and in any event, in requiring that procurement be "competitive" and "transparent", section 217 of the Constitution forecloses the possibility of one company cornering the market for the provision of services to a particular state entity, even for a limited period – especially if the effect of it doing so would be that it could name its own price. Ms. Mgudlwa made no submissions to the contrary. But that is exactly the effect of clause 6 as I have construed it. The very purpose of section 217 is to prevent private entities from monopolising state resources. But that is the effect of clause 6, albeit for a limited period.

25 The situation would have been different if Transnet and Sekela Xabiso had simply agreed that the contract would run for five years unless and until the audit function was insourced. A private entity that provides the state with a service in return for remuneration pursuant to an otherwise constitutional procurement process acts perfectly lawfully. But that is not what happed here. In this case, Sekela Xabiso sought to capture the state's purchasing power for a period exceeding the term of the contract. That sort of arrangement cannot lawfully be executed, not least because it will inevitably lend a legal veneer to

corrupt control of state resources. There is no suggestion that either party has any corrupt intent in this case. On the face of things, Sekela Xabiso sought no more than an agreement on the most favourable terms that it could get. But the tendency of the arrangement embodied in clause 6 to lend itself to corrupt relationships between the state and capital seems obvious to me. The application to declare clause 6 to be constitutionally valid must fail.

The review

26 Ms. Mgudlwa submitted that, even if I reached that conclusion, I should not review and set aside Transnet's decision to include clause 6 in its agreement with Sekela Xabiso. This is because, so it was submitted, Transnet has unreasonably delayed in instituting its review. Transnet signed the agreement on 9 September 2020. Yet Transnet waited until Sekela Xabiso sought to rely on clause 6 before placing its constitutionality in issue. Transnet only launched its review as a counter-application in these proceedings. The counter-application is dated 20 December 2023.

27 I am prepared to accept that Transnet unreasonably delayed in instituting its self-review. I am not given much insight, in Transnet's answering affidavit, into what led Transnet to wait more than three years before launching its review. The attitude seems to have been that Transnet could sit back and wait to see if Sekela Xabiso would try to enforce the offending clause. That was unfortunate.

28 The fact remains, however, that clause 6 is plainly constitutionally invalid. Transnet's overwhelming prospects of success in demonstrating this seem to me to be reason enough to condone the unreasonable delay. There is also

the fact that it is Sekela Xabiso itself that has chosen to place the legality of clause 6 in issue, for the purposes of confirming its right to contractual damages. During argument, I asked Ms. Mgudlwa what would happen if I were to refuse the relief Sekela Xabiso seeks, while at the same time declining to set aside Transnet's decision to incorporate the clause into the agreement. Ms. Mgudlwa accepted that this would achieve little more than to confuse the position before the arbitrator. The delay will be condoned.

Justice and equity

29 Section 172 (1) (a) of the Constitution enjoins me to declare clause 6 of the agreement to be invalid. Section 172 (1) (b) affords me a wide discretion to determine the relief that should flow from this invalidity. Just and equitable relief is ordinarily relief that vindicates the rule of law (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC), paragraph 85), and which corrects or reverses the consequences of unconstitutional conduct. The default position is accordingly that the unlawful decision to include clause 6 in Transnet's contract with Sekela Xabiso must be set aside (*Allpay (No 2) Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (4) SA 179 (CC), paragraph 30).

30 The question is whether there are any special circumstances in this case which warrant a departure from this default position. I can see none. In the arbitration, Sekela Xabiso seeks contractual damages on the basis that clause 6 was breached when Transnet put its auditing services out to tender during the restriction period. But if the restriction period was itself unlawful, damages

cannot and should not follow. There is no suggestion that Sekela Xabiso was not remunerated for the work that it actually did over the three years and ten months that it rendered services to Transnet. All Sekela Xabiso seeks is the benefit of a contractual provision, to which it was never entitled, that held Transnet as a captive customer for a period of fourteen months. There is no reason why that provision should continue to benefit Sekela Xabiso notwithstanding its unlawfulness.

31 Clause 6 will be declared invalid, and Transnet's decision to enter into it will be reviewed and set aside.

Costs

32 Ms. Mgudlwa submitted that the costs shield provided for in *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) should apply in the event that I ruled for Transnet. I am not convinced of that proposition, since Sekela Xabiso seeks to vindicate purely commercial interests, both in this application, and in the arbitration proceedings that precipitated it. Nevertheless, I do not think I need to apply *Biowatch* to come to the conclusion that there should be no order as to costs. Transnet ought to have known that clause 6 was unenforceable from the outset. In choosing to wait for these proceedings to be launched before instituting its self-review, Transnet put Sekela Xabiso to the litigious effort and expense that Transnet ought properly to have assumed itself some time ago. In those circumstances, Transnet is not entitled to its costs.

Order

33 For all these reasons –

33.1 The application is dismissed.

33.2 The counter-application succeeds.

33.3 The first respondent's decision to incorporate clause 6 in the master agreement concluded between the applicant and the first respondent pursuant to RFP number: GSM/17/05/1529 on 11 September 2020 is declared unconstitutional and invalid, and is set aside.

33.4 Clause 6 of the master agreement is declared unconstitutional and invalid, and is severed from the remainder of the master agreement.

33.5 Each party will pay their own costs.

[redacted]

S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 10 March 2026.

HEARD ON:	12 February 2026
DECIDED ON:	10 March 2026
For the Applicant:	L Mgudlwa Instructed by MVR Attorneys
For the First Respondent:	IV Maleka SC PR Long Instructed by MHA Attorneys