SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

SAKELIGA'S JURISPRUDENTIAL RESISTANCE TO PROPERTY CONFISCATION (EXPROPRIATION WITHOUT COMPENSATION), 2019-PRESENT

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KEY POINTS

- Although the South African Parliament in December 2021 voted against a constitutional amendment to allow for expropriation without compensation, the threat of brazen property confiscation remains. The government's unchanged legislative agenda constitutes a substantial risk to economic prosperity and constitutional order within South Africa.

- The South African government has undertaken two significant initiatives to put into practice property confiscation since December 2019:
    - The Constitution Eighteenth Amendment Bill, and
    - The Expropriation Bill.

  Both would enable the seizure of private property without the payment of fair compensation.

- Most significant of the two proposals was the Constitution Eighteenth Amendment Bill, which sought to replace the constitutionally limited process of expropriation (for compensation) with that of confiscation ("expropriation" without confiscation). Confiscation typically boils down to government takings of property without payment of compensation, for instance via the forfeiture of goods used in committing crimes. If successful, the Constitution Eighteenth Amendment Bill would have removed the constitutional obligation to provide (any) compensation where government decided to seize private property for virtually any reason.

- The Expropriation Bill seeks to do the same as the constitutional amendment, but provides more technical detail on how confiscation would take place in practice.

- The sponsors of the Constitution Eighteenth Amendment Bill failed to acquire the requisite parliamentary majority to amend the Constitution. The amendment was formally withdrawn in December 2021.

- Even though the Expropriation Bill depended on the success of the Constitution Eighteenth Amendment Bill for its confiscatory provisions to be constitutionally allowable, the African National Congress executive government has decided nonetheless to proceed with the legislative adoption of the Expropriation Bill, even without a constitutional amendment. It is likely that ANC legislators will vote to pass this bill when it comes before them.

- However, whatever legislators think they can do, the fact is that confiscation cannot stand in a constitutional state.

- Sakeliga's arguments played a substantive role in the defeat of the constitutional amendment. Additionally, Sakeliga stood ready with a comprehensive litigation strategy in the event the constitutional amendment succeeding in Parliament.

- The strategy has now shifted to prepare for litigation against the second threat, the Expropriation Bill, which equally threatens private property.

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INTRODUCTION

Since December 2019, the South African government has undertaken two legal initiatives to bring about its intended power to confiscate private property without always being required to pay compensation. The most significant was the proposed Constitution Eighteenth Amendment Bill ("**Eighteenth Amendment**"), designed to make "nil compensation" a valid "amount" to "pay" upon the "expropriation" of private property; and to empower the State to place certain kinds of property under State "custodianship." The second initiative is the proposed **Expropriation Bill,** which intends to provide more technical details around how government would confiscate property.

On 7 December 2021, the National Assembly soundly defeated the Eighteenth Amendment by a vote of 204 to 145. The ayes required at least 267 (two-thirds of the total of 400) to succeed in changing the Constitution.[1] Despite this defeat, the Expropriation Bill, with its confiscatory provisions, remains on government's legislative agenda.

Sakeliga took a firm and public stand against the Eighteenth Amendment and developed a very strong set of substantive arguments that would have been argued in the courts to challenge the amendment on the grounds of constitutionality. These arguments were also shared in public through ongoing public commentary.

It is our view that these arguments contributed significantly to the amendment's defeat and will also contribute in the future to the defeat of the Expropriation Bill.

FENDING OFF THE DIRECT THREAT TO THE CONSTITUTION

Constitution Eighteenth Amendment Bill

Confiscation ("expropriation without compensation") consisted of two phenomena under the Eighteenth Amendment:

1. The first was that the Eighteenth Amendment removed the unqualified obligation on government to pay an amount of compensation whenever it expropriates property,[2] and allowed government, going forward, to omit the payment of an amount of compensation.
2. The second was that Parliament could determine, in ordinary legislation, under which circumstances government may omit to pay an amount of compensation – these circumstances were not spelled out in the Eighteenth Amendment.

[1] It could be argued that they would in fact have required a three-quarters majority.
[2] References to "land" tend to confuse laypersons. According to South African property law, "land" includes whatever is acceded to that land. In other words, any reference to "land" must be read as a reference to all *fixed property*.

The amendment employed questionable terminology in the context of expropriation, which always requires payment of fair compensation. It proposed the possibility of "expropriation" where the amount of compensation is "nil." In other words, it was reasoned, an amount of compensation *would be* paid, but that *amount* would be R0.

The phenomenon of State custodianship, a late addition to the Eighteenth Amendment, was worded to effectively bestow on government the power to declare and place "certain land" under the custodianship of the State.

"Custodianship" in South African law is a formal, legal-technical term that refers in substance to nationalisation. Previous examples of resources being nationalised under the guise of custodianship are water, minerals, and petroleum. With such resources, the State claimed it did not become the owner, but nonetheless acquired broad control and discretion over the resources, which resembles all the important entitlements of ownership. The State, in other words, uses the concept of custodianship to actually become the effective owner without it appearing like blatant and obvious nationalisation.

Basic structure doctrine/constitutionalism

According to section 74 of the Constitution, Parliament has the authority to bring about amendments to the Constitution. In doing so, Parliament must however comply with the constitutional requirements for making amendments as well as with other relevant provisions of the Constitution. The substance of an amendment is in no way limited by section 74, meaning that in theory, an amendment could have any scope.

Parliament's amendment power, however, does not include the power to replace or subvert the Constitution itself! Neither may it do anything else to the text, *other than amend it.* When it comes to the integrity of the constitutional text, Parliament has a single power: that of *amendment.*

Parliament is an institution established by the Constitution, and its source of formal authority is the current Constitution. **Parliament does not have the power to replace the Constitution and/or to adopt a new constitution.** Even if it invokes the language of section 74, and even with a two-thirds or three-quarters majority, Parliament can only amend the Constitution, it cannot replace or subvert it.

Should Parliament attempt, and ostensibly succeed, in adopting a new constitution, Parliament would no longer be Parliament! This is because Parliament is constituted and lawfully exists only as contemplated in the *existing* Constitution. The new "Parliament" would not really be a parliament at all but simply be an arbitrary group of people gathered together pursuing their own particular political goals outside of the bounds of the South African Constitution.

The Eighteenth Amendment did not claim to replace the whole Constitution. Nonetheless, the same principle applies. Whether Parliament wanted to abolish or change "the entire Constitution," "half of the Constitution," "a few important parts of the Constitution," or "one important part of the Constitution," it would still run into the problem that it had fundamentally ended the Constitution from which the Parliament draws its legitimacy.

Any change to the basic structure of the Constitution – in other words, to the most fundamental characteristics that makes the 1996 Constitution, the 1996 Constitution – would be unconstitutional, because Parliament has no authority to establish an entirely new constitutional law. Parliament's power is exclusively from (not above) the Constitution, in that it may only *amend* the existing Constitution.

The meaning of "amendment" does not include replacement or destruction. This is commonly understood among jurists, constitutional experts, and legal scholars. The 1996 Constitution, after all, is about *something,* and amendments are about improving or elucidating that *something*, not making it about *something else*.

In summary, section 74 bestows upon Parliament the power to bring about amendments (effectively, improvements in clarity, specifying ambiguity, rectifying contradictions, and so on) to any provision of the Constitution. Parliament does not have the power to replace or destroy the Constitution, understood to include any part of it that forms part of its basic structure – its most important underlying principles, assumptions, logic, and values.

Property rights integral to the Constitution's identity

The question then becomes:

Are secure property rights (including the universally recognised right to receive compensation upon expropriation) part of the underlying principles, assumptions, logic, and values of the Constitution?

This question is answered in the affirmative, with reference to four interrelated observations about property rights within the framework of the Constitution.

1. The first and most basic observation is the appearance of property rights not only in section 25, but explicitly in other provisions of the Constitution.
2. The second observation is the appearance of property rights as necessary implicit features of other provisions and institutions of the Constitution.
3. The third observation is the role that property rights play within the logic of constitutionalism itself, of which the Constitution is a manifestation.
4. The final observation is the role that property rights played during the negotiation and adoption of the Constitution, i.e., that process from which the Constitution was itself constituted – *its own* source of authority and legitimacy.

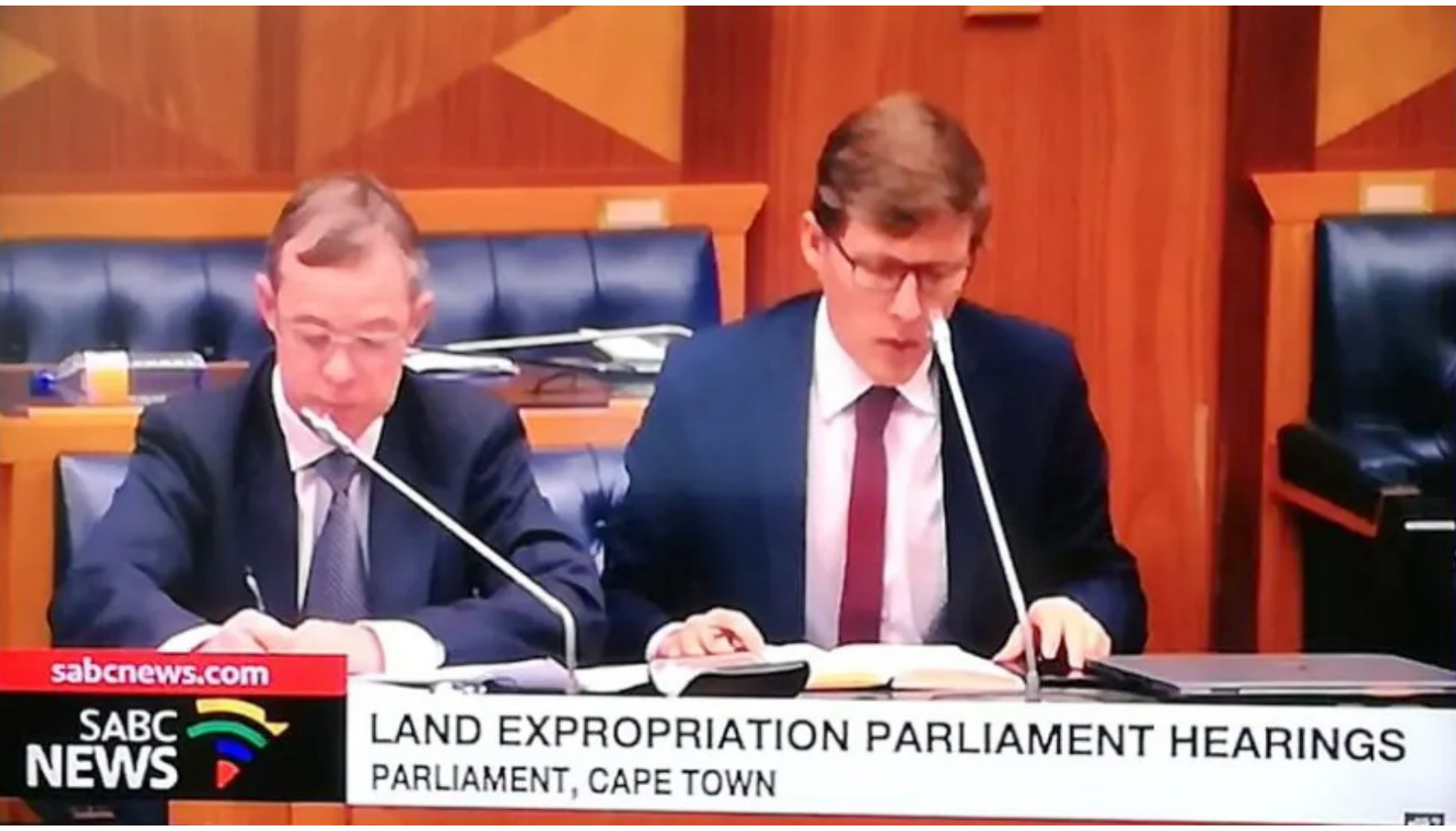
The first two observations clearly establish property rights as a constitutional institution that intermingles with other institutions and phenomena in the Constitution. It is, in other words, not something that can be effortlessly excised from the Constitution only by making changes to section 25.

As far as the third observation is concerned, the Eighteenth Amendment would have eliminated legal certainty by subjecting a constitutional institution, i.e., the right to property, to simple majoritarian parliamentary discretion. In this way it would have de-constitutionalised every explicit and implicit constitutional right and institution that has safe and secure property rights as a necessary precondition.

Indeed, **the purpose of constitutionalism is to constrain government power to the benefit of the persons subject to the jurisdiction of that government**. The Eighteenth Amendment contained no pretence of constraining government power, and by all accounts, was dedicated to the exclusive aim of expanding government power into a domain that has thus far been a protected constitutional right. In other words, where first there was no government power, there would be near absolute government power. In the sense of constitutionalism, the Eighteenth Amendment was not a constitutional enterprise but a means of undermining constitutionalism.

Were the Eighteenth Amendment adopted, the so-called "Constitution" would no longer have reflected the Constitution that was adopted in 1996. It would at best have been a new Constitution and at worst merely a purported constitution, meaning, as far as the final observation is concerned, such a changed "constitution" would not have been adopted in 1996.

Such an "amendment" as contemplated in the Eighteenth Amendment would therefore not have constituted an amendment but a replacement, and would therefore, in our view, have been an unlawful action by Parliament, dissolving its own legitimate constitutional authority to a great extent or perhaps entirely.



Sakeliga is represented in Parliament by Piet le Roux and Professor Koos Malan during discussions on property confiscation.

Fraus legis

For this argument – that the Eighteenth Amendment is incompatible with the basic structure of the Constitution – to have been successfully argued, it would have to have been shown that the Eighteenth Amendment *introduced something* rather than just *clarified something that was already the case*. Even today, the dominant (though we believe incorrect) academic narrative is that the Eighteenth Amendment, at least as it relates to property confiscation, simply sought to "make explicit that which is already implicit" in section 25, i.e., would really have been a legitimate *amendment.*

However, the Eighteenth Amendment did, in fact, attempt to introduce something new. It introduced confiscation or dispossession into a part of the Constitution that only dealt with expropriation. Never has the Constitution, either implicitly or explicitly, contemplated dispossession – quite the contrary, section 25 obliges government to undo dispossession, not worsen it.

As a result, had Parliament adopted the Eighteenth Amendment, it would have defrauded the law (*fraus legis*).[3] To defraud the law is to take a legal transaction or initiative that is in substance unlawful, and give it a formal appearance of lawfulness. In other words, it is a formal misrepresentation of an (unlawful) reality. This would in the present context have been done in two important ways:

1. The first way would have been by disguising "expropriation [in fact confiscation] without compensation" in the terminology of "expropriation where the amount of compensation is nil." In other words, it was submitted that what we were dealing with was, in fact, expropriation, because compensation must always be paid, but this included "paying" R0 in compensation. This is a textbook example of using the mechanics of form (language trickery) to paper over the true substance of a phenomenon.

   According to the Constitutional and Legal Services Office (CLSO) of Parliament, which presumably participated in the technical drafting of the Eighteenth Amendment, this was done purposefully. The CLSO admitted that "expropriation without compensation" is incompatible with the basic structure of the Constitution, because expropriation necessarily always requires compensation. This is uncontentious. But the CLSO reasoned that simply changing the wording would have saved the Eighteenth Amendment from this incompatibility, while at the same time admitting that the practical consequence, the reality, the substance, remained entirely unchanged: some people would have had their property seized from them and they would not have received one cent in compensation for it.

2. The second way the law would have been defrauded was by using the terminology of "expropriation" rather than "confiscation" or "dispossession." Parliament would have hidden the reality of what they were in fact doing under the disguise of well-known and uncontroversial legal terminology. One can think back to the leaders of the Confederate States of America referring to slavery as "that peculiar institution," or sometimes "labour" or "work," or to German leaders during the previous century referring to Jewish internment and genocide as "protective custody" or "evacuation."

In summary, therefore, had Parliament adopted the Eighteenth Amendment, it would have been guilty of trying indirectly to "amend" something new into the Constitution which it could not lawfully do directly. If it did so directly, using accurate language ("confiscation," "without compensation"), it is widely acknowledged that the enactment would be unlawful. It was instead doing so indirectly, using dishonest language ("expropriation with nil compensation"). **This conduct would have been constitutionally fraudulent.** The practical effect would have been that, when challenged in court, the court would have been asked to look past the disguised language of the Eighteenth Amendment and have regard to its substance – its reality. There the court would have found confiscation, which is incompatible with the basic structure of the Constitution.

Sakeliga's work on the basic structure doctrine and the essentials of constitutionalism elicited a strong response from the CLSO, the strongest yet acknowledgment that government was operating on thin ice. The CLSO's admission that confiscation would infringe on the basic structure of the Constitution, in our view, changed the game. CLSO's hedge – the unconvincing argument that the Eighteenth Amendment did not introduce confiscation, but rather simply "expropriation with nil compensation" – was playing with words. Sakeliga's response to this was that playing with words to evade legal consequences constituted *fraus legis*, or Parliament acting in such a way as to defraud the very law whose integrity it is sworn to uphold and protect. Parliament cannot and could not make legal that which is illegal simply by giving that illegal act a pretence of legal acceptability.

[3]Also known as simulation, or violating the substance-over-form principle.

Political landscape

While the Eighteenth Amendment has been defeated, there is nothing in law that hinders the pro-confiscation parties in Parliament from keeping their confiscatory plans on the agenda and in the (near or far) future attempting to "amend" the Constitution once more. It is likely that should they attempt to do so, they would need to restart the public participation and legislative process. In the last round, this process endured from February 2018 to December 2021, but should they try again, it might be significantly shorter, as there would in all likelihood not be another Constitutional Review Committee process nor any expert panels on land reform. Both the pre-existing Constitutional Review Committee and expert panel reports and recommendations remain formally valid.

Given the Economic Freedom Fighters (EFF)'s unequivocal stance that it would not accept the African National Congress (ANC)'s "watered-down" Eighteenth Amendment, the only political way, it seems, for the process to be restarted is for the ANC to give the EFF exactly what it desires. How likely or unlikely this is, is difficult to say, particularly in light of South Africa's fluid political landscape in the aftermath of the November 2021 local government elections. Whether the ANC will moderate, radicalise, or continue as before, is unclear at this time.

Confiscation already allowed

As alluded to above, it is becoming legally orthodox (though, in our view, incorrect) to argue that sections 25(2) and (3) of the Constitution, as they stand, already allow government to confiscate property without being constitutionally required to pay an amount higher than "R0." It has become so ingrained in the popular discourse that even opposition parties and some moderately pro-market business groups have claimed that the Constitution has always allowed confiscation and that such confiscations have even taken place in the past without the "sky falling."

The government, in particular President Cyril Ramaphosa, quickly embraced this argument by legal academics, and held out that the Eighteenth Amendment was merely intended to "clarify" the existing position – to make explicit that which is already implicit. Based on our arguments above, we can see at least two reasons why government would use this tactic:

1. If the Constitution already allows for confiscation, then the proposed amendment would merely be clarifying this fact, and could therefore be argued to be an actual amendment, not an illegitimate, structural change to the Constitution's identity.

2. No matter what happened to the Eighteenth Amendment – pass or fail, and it did in fact fail in Parliament – government would continue to push for what it desires, being the power to seize property without necessarily being required to pay compensation.

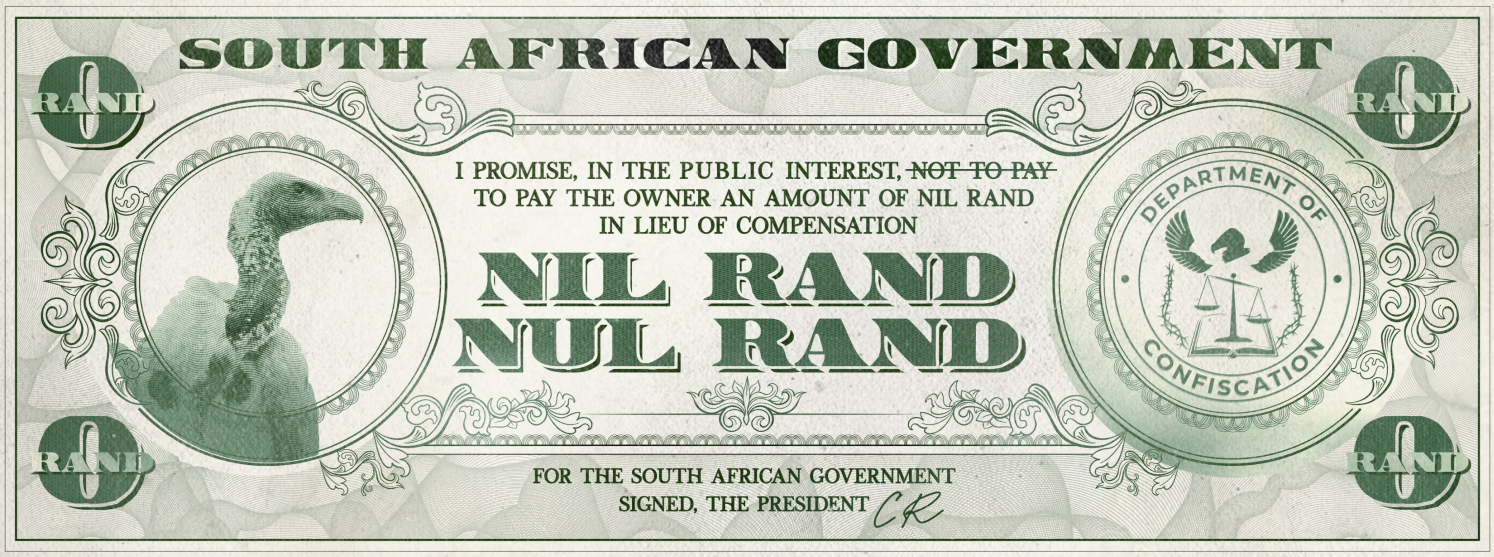
Prominent legal academics, commentators, and practitioners are persisting with this argument.

Due to the attractiveness of this argument for those who wish to give the State the power to seize property, government went about revising the long-delayed new Expropriation Bill to include provisions allowing government to engage in such confiscation. Notably, long before the Eighteenth Amendment came to a vote, the proposed Expropriation Bill was written under the assumption that no amendment of the Constitution would take place. It reproduced section 25 of the Constitution as it then stood and today still stands, verbatim, in the Bill's preamble.

Nonetheless, despite sections 25(2) and (3) requiring compensation, clause 12 of the Expropriation Bill empowers certain functionaries to confiscate property through the "payment" of "nil compensation." This design was based on the argument that such confiscation was possible anyway, even in the absence of a constitutional amendment.

After the Eighteenth Amendment's failure in December 2021, justice minister Ronald Lamola issued a statement clearly indicating that government did not regard the failure to enact the constitutional amendment as a defeat. Government would utilise "other avenues" to bring about a regime of confiscation, chiefly the Expropriation Bill.[4]

[4] https://www.pressreader.com/south-africa/the-citizen-gauteng/20211209/281621013629945



The absurdity of "nil rand compensation" illustrated.

2022 and beyond

Sakeliga members and the public should remain vigilant for any sign that the ANC and/or EFF might try to restart the process of changing section 25 of the Constitution. Arguments around the impermissibility of such an "amendment" must be expanded and elaborated in the public and academic domains when such opportunities arise.

Given the seriousness of this legal uncertainty, Sakeliga is of the opinion that businesses should join civil-society bulwarks that fend off threats to private property. At the very least, businesses should see these problematic legal and constitutional proposals as being clearly detrimental to their interests, and to an investible business environment. It is important to join and support Sakeliga and similar institutions that aim to counter such assaults on freedom and order by means of litigation and by other types of pressure.

Members and the public should also continue to respond to any arguments made in the academic and popular discourse that the Constitution already allows for confiscation. The proposition that "nil rands compensation" qualifies as the "payment" of an "amount" of "compensation" as required by sections 25(2) and (3) of the Constitution, is intuitively and inherently absurd.

Sakeliga has decided to shift its litigation plans away from the Eighteenth Amendment and toward the Expropriation Bill. We remain confident that these arguments, as elaborated in this report, would prove convincing. By adopting the Expropriation Bill without having amended section 25 of the Constitution, government would be attempting to achieve indirectly that which it could not achieve directly. That is to say, government is attempting, indirectly, to amend the Constitution with ordinary legislation, by effectively redefining in the Expropriation Bill the words "payment"/"amount"/"compensation" as found in section 25 of the Constitution. This is constitutionally impermissible and an evident example of *fraus legis*. In fact, the Expropriation Bill is unconstitutional precisely because its provisions relating to compensation are inconsistent with sections 25(2) and (3) as they stand.

It is exceedingly likely that the Expropriation Bill will be adopted and signed into law in 2022, with a section making provision for confiscation without compensation. The mere existence of such a law on the Statute Book will be commercially and economically deleterious. It would also spell a blow to constitutionalism itself, as government's relationship with private property could become entirely unconstrained in practice.

Other business organisations may have adopted a "nuanced" approach to confiscation without compensation, attempting to strike some kind of compromise or deal with government – including trying to derail the Eighteenth Amendment because section 25 "already" allows what government wants to achieve. Such approaches are misguided and inherently risky to the commercial order.

Sakeliga remains clear on this – as far as commercial life in South Africa is concerned, Sakeliga will continue to fight against property confiscation no matter the legal manoeuvring or tricks in legal terminology.

In our view, pressure must be kept up and efforts redoubled, to ensure a prosperous and investible commercial order in South Africa.

FURTHER READING

Koos Malan. “EWC vs Constitutionalism.” (19 September 2018). *Politicsweb*. **https://www.politicsweb.co.za/documents/ewc-vs-constitutionalism.**

Sakeliga. “What EWC would do to the constitutional order.” (15 November 2018). *Sakeliga.* **https://sakeliga.co.za/en/what-ewc-would-do-to-the-constitutional-order/.**

Martin van Staden. “Property rights and the basic structure of the Constitution: The case of the draft Constitution Eighteenth Amendment Bill.” (2020). 14(2): *Pretoria Student Law Review.* **https://upjournals.up.ac.za/index.php/pslr/article/view/1819.**

Martin van Staden. “*Fraus legis* in constitutional law: The case of expropriation ‘without’ or for ‘nil’ compensation.” (28 June 2021). 24: *Potchefstroom Electronic Law Journal.* **https://perjournal.co.za/article/view/10406/16815.**

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