



11 September 2026

A Pyrrhic Victory? Why Sakeliga May Have Won the Battle but Lost the War

Understanding the Judgment in Context

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When the Pretoria High Court handed down judgment in *Sakeliga NPC v Property Practitioners Regulatory Authority* on 8 September 2026, many commentators immediately heralded the outcome as a decisive victory against B-BBEE in the property sector. The Court declared section 50(a)(x) of the Property Practitioners Act unconstitutional and invalid and directed that the Property Practitioners Regulatory Authority (PPRA) may not refuse a Fidelity Fund Certificate (FFC) solely because of that provision pending Constitutional Court confirmation.

At first glance, the judgment appears to represent a significant setback for transformation-linked regulation. Property practitioners can no longer be denied an FFC on the basis of the current statutory requirement, and the much-debated requirement for possession of a “valid BEE certificate” has been struck down.

However, when the judgment is interpreted textually, contextually and purposively, a different picture emerges. Far from rejecting the principle that transformation may be linked to licensing, the Court effectively endorsed that principle. The judgment is therefore best understood not as a repudiation of transformation-linked licensing, but as a judicial insistence that Parliament articulate such requirements clearly and coherently.

In that respect, Sakeliga may have achieved a legal victory while simultaneously strengthening the legal foundation upon which future transformation-linked licensing regimes will be built.

The Principle Was Lost, Only the Drafting Was Won

The most significant aspect of the judgment is not what the Court invalidated, but what it expressly accepted.

Throughout the litigation, Sakeliga sought to persuade the Court that there is no rational relationship between B-BBEE status and the objectives of a Fidelity Fund Certificate. The Court rejected that proposition. Instead, it accepted that transformation is a legitimate governmental objective and expressly recognised that Parliament may utilise the FFC regime to advance transformation within the property sector.

This finding fundamentally changes the significance of the judgment.

Had the Court accepted Sakeliga's argument, it would have erected a substantial constitutional barrier against future attempts to link transformation objectives to licensing requirements. Instead, the Court confirmed that transformation and licensing are not conceptually incompatible. The Court's concern was not that transformation requirements existed, but rather that the particular mechanism chosen by Parliament was constitutionally defective.

Viewed through this lens, Sakeliga succeeded only on the manner in which the legislature drafted the provision. It failed to establish that the underlying policy objective was unconstitutional.

In constitutional terms, the principle survived. Only the drafting did not.

The Judgment Reinforces the Logic Underlying Section 10(1) of the B-BBEE Act

Although section 10(1) of the Broad-Based Black Economic Empowerment Act was not directly before the Court, the judgment strongly reinforces the philosophy that underpins it.

Section 10(1) requires organs of state and public entities to apply the Codes of Good Practice when determining qualification criteria for licences, concessions and other authorisations. The central premise of the section is that transformation objectives may legitimately form part of licensing and regulatory systems.

The Court's reasoning aligns closely with that premise.

Rather than rejecting the linkage between transformation and licensing, the Court expressly acknowledged that transformation may constitutionally be pursued through licensing mechanisms. It further recognised the transformation objectives embedded throughout the Property Practitioners Act.



The practical consequence is that the judgment substantially weakens any future argument that B-BBEE and licensing are inherently incompatible concepts. To the contrary, the judgment may ultimately stand as authority for the proposition that transformation-linked licensing is both constitutionally legitimate and consistent with South Africa's broader transformative constitutional project.

Vagueness Was the Fatal Defect

The true basis for the constitutional invalidity finding was legal uncertainty.

The Court identified a series of fundamental questions that section 50(a)(x) failed to answer:

- *What constitutes a valid BEE certificate?*
- *Are sworn affidavits sufficient?*
- *Are CIPC certificates sufficient?*
- *Which categories of persons require proof?*
- *What substantive level of compliance must be demonstrated?*
- *What standard determines whether a document is "valid"?*

Compounding the problem, the parties themselves advanced competing interpretations of the provision, and the PPRA had historically applied the requirement inconsistently.

The Court therefore concluded that the section violated the rule of law because neither applicants nor the regulator could determine with reasonable certainty what was required. Importantly, the Court did not hold that transformation requirements are unconstitutional. Nor did it conclude that participation in B-BBEE should never be linked to the issuance of an FFC. Rather, the Court found that Parliament had failed to articulate the requirement with sufficient clarity. The distinction is critical. The judgment is ultimately a victory for legal certainty, not a rejection of transformation.

Parliament Has Been Given a Roadmap

Perhaps the most remarkable aspect of the judgment is that it effectively provides Parliament with a constitutional drafting manual.

Rather than rejecting the transformation objective, the Court specifically indicated how that objective could be pursued lawfully. It stated that Parliament may constitutionally impose transformation-linked requirements where legislation clearly identifies:

- *the documentary requirement;*
- *the persons to whom the requirement applies; and*
- *the substantive standard that must be satisfied.*

This may ultimately become the most influential passage in the judgment.

The Court did not close the door on future B-BBEE-linked licensing conditions. Instead, it explained how such conditions can survive constitutional scrutiny.

As a result, Parliament is now in a substantially stronger position than before. It has received judicial guidance on how to draft a constitutionally compliant replacement mechanism.

The likely outcome is therefore not the permanent removal of transformation from the FFC regime, but the eventual introduction of a more sophisticated and legally defensible framework.



Constitutional Court Confirmation Remains Outstanding

The excitement surrounding the judgment has also obscured an important procedural reality.

The declaration of invalidity has no final force unless confirmed by the Constitutional Court.

The High Court expressly referred the declaration for confirmation in terms of section 172(2)(a) of the Constitution.

Although the interim order currently prevents the PPRA from refusing an FFC solely because of section 50(a)(x), the constitutional position remains provisional. The Constitutional Court may confirm, vary or supplement the judgment and its remedies. It may even reconsider aspects of the relief granted by the High Court.

For that reason alone, any claim that the case represents a permanent victory against B-BBEE-linked licensing is premature.

The Judgment May Strengthen Transformation Jurisprudence

Ironically, the judgment may ultimately strengthen transformation jurisprudence.

The Court expressly acknowledged:

- *the constitutional legitimacy of transformation;*
- *the transformative objectives of the Property Practitioners Act;*
- *Parliament's ability to use licensing structures to advance transformation; and*
- *the continued relevance of South Africa's transformative constitutional framework.*
- *Future regulators defending transformation-linked licensing requirements in other sectors will undoubtedly rely on this reasoning.*

The judgment therefore removes one of the most ambitious arguments advanced by opponents of transformation-linked licensing: namely, that licensing and transformation are fundamentally incompatible concepts.

The Court effectively held the opposite.

Practical Consequences for the Property Sector

The immediate effect of the judgment is straightforward. The PPRA may no longer refuse an FFC solely because an applicant does not satisfy section 50(a)(x), and property practitioners enjoy relief from the current incarnation of the BEE requirement pending Constitutional Court proceedings.

The medium-term consequence is more significant. Parliament will almost certainly be compelled to revisit the legislation. If it elects to retain a transformation-linked licensing requirement, it now has clear judicial guidance regarding the drafting flaws that must be remedied. Any replacement mechanism is therefore likely to be significantly more precise and more resilient to constitutional attack than its predecessor.

In the long term, the judgment may become authority for a proposition far broader than the property sector itself:

Transformation-linked licensing is constitutionally permissible, provided the mechanism is defined with sufficient certainty and implemented through rational legislative means.

That proposition may ultimately prove more valuable to the state than the temporary loss of section 50(a)(x).

Conclusion

The popular narrative is that Sakeliga secured a major victory against B-BBEE in the property sector.

The legal reality is considerably more nuanced.



Sakeliga persuaded the Court that section 50(a)(x) is constitutionally defective. It did not persuade the Court that transformation has no place in licensing. It did not persuade the Court that there is no rational relationship between transformation and regulatory authorisations. Nor did it secure any broader repudiation of transformation-linked licensing.

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Instead, the Court affirmed the legitimacy of transformation objectives, accepted the constitutionality of linking transformation to licensing, and effectively provided Parliament with a blueprint for doing so lawfully.

For that reason, the case may ultimately be remembered not as the judgment that defeated transformation-linked licensing, but as the judgment that refined and strengthened it.

In that sense, the outcome bears all the hallmarks of a genuine Pyrrhic victory: a victory celebrated for what it removed today, but potentially far more significant for what it enables tomorrow.

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