



**FW de Klerk**  
FOUNDATION

**THE FW DE KLERK FOUNDATION**  
*Upholding South Africa's National Accord*

**To:** The Select Committee on Transport, Public Service and Administration, Public Works and Infrastructure  
**For attention:** Mr Hlupheka Mtileni  
**Per email:** [expropriationcomments@parliament.gov.za](mailto:expropriationcomments@parliament.gov.za)  
**RE:** Comments on the Expropriation Bill 23-2020  
**Date:** 06 March 2023 (Deadline for comments: Monday, 6 March 2023)

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**SUBMISSION OF THE FW DE KLERK FOUNDATION ON THE EXPROPRIATION BILL 23-2020**

Dear Honourable Members of the Committee,

**Introduction**

The FW de Klerk Foundation was established in 1999 to protect and promote the Constitution of the Republic of South Africa, as the most important legacy of its founder, former President FW de Klerk.

To this end, the Foundation seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa.

As such, the FW de Klerk Foundation welcomes the opportunity to submit its comments on the Expropriation Bill to the Select Committee. We are also available to make a verbal submission if required.

The Foundation's submission focuses on the arbitrary nature of the deprivation of property envisaged in the Bill and on the absence of proper definitions of the concepts of public purpose, land reform and public interest. It illustrates the impact the Bill will have on the well-being and freedom of South Africans, on national unity, the agricultural sector, investment and economic growth.

The Foundation agrees that there is a need to adopt a new Expropriation Act that will conform with the requirements of section 25 of the Constitution. However, for the reasons set out below, the present Expropriation Bill not only fails to provide an appropriate framework for expropriation – but is irreconcilable with the values that underlie the Constitution and would have very negative consequences for all the people of South Africa.

**Section 25 of the Constitution**

Section 25 states peremptorily that “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

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In the Foundation's view, and in terms of a simple understanding of the English language, the degree to which compensation for expropriation falls below the reasonable and unmanipulated market value of the expropriated property, represents deprivation of property.

The degree to which a law to deprive people of their property would be arbitrary would be determined by whether it would be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". In assessing whether a law is arbitrary or not – the following requirements in section 36 of the Constitution would have to be considered:

- **the nature of the right** – which in the case of property rights is a right assured by the Universal Declaration of Human Rights – and has been shown throughout the world and throughout human history to be a *sine qua non* for prosperity and freedom. Property rights are so fundamental that they may be regarded as part of the rule of law;
- **the importance of the purpose of the limitation:** the goal of land reform is extremely important - but not more important than the rule of law to which property rights are inextricably linked;
- **the nature and extent of the limitation:** the Bill presents a potentially limitless threat to property rights of all South Africans and includes no credible assurances regarding the continued protection of the property rights of any South African citizens;
- **the relationship between the limitation and its purpose:** the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change has confirmed that section 25 of the Constitution provides no legal impediment to accelerate the land reform process and that the goals of land reform can be achieved without resorting to expropriation without compensation (EWC);
- **less restrictive means to achieve the purpose:** It has been noted by the High Level Panel that the failure of land reform thus far does not lie in any shortcoming in section 25 of the Constitution – but rather in incompetence and corruption in the government's administration of land reform schemes and its failure to make available adequate resources for land reform. Government possesses more than enough land – and sufficient land comes onto the market every year - to meet the requirements of a comprehensive land reform programme without having to resort to extensive expropriation – let alone expropriation without compensation. There have been numerous constructive proposals – and positive pilot projects – aimed at achieving a successful and effective land reform process – but they have been largely ignored by government.

The Foundation's principal objection to the Bill is that, although it and EWC would likely be used to target primarily the property rights of white South Africans, it would undermine the property rights and freedom of *all* South Africans. It would, in particular, pose a threat to the 8,5 million black households that own their homes and the millions more households that occupy land in the traditional areas without proper title deeds.

It is for the abovementioned reasons that the Foundation's considered view is that the Bill fails to meet

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the requirements of both the Constitution and the rule of law.

### **The Expropriation Bill**

The purpose of the Bill is to replace the existing Expropriation Act (No. 63 of 1975) with a new Expropriation Act that is in line with section 25 of the Constitution - and to spell out in greater detail the circumstances in which nil compensation may be appropriate in the public interest.

However, the Bill's purposes go far beyond its ostensible objectives. In effect, the Bill opens the way to an assault on property rights of all South Africans.

The Bill is intended to deal with the expropriation of *all* forms of property – and not just land. This is evident from its accentuation of the definition in section 25 that “property is not limited to land”; from several clauses in which the Bill refers to expropriation of land as only one of the facets of potential expropriations; and from a specific reference to the expropriation of “intangible property”.

The following provisions are of particular concern:

- The definition of “public interest” is dealt with at greater length below.
- The definition of “public purpose” arouses grave concerns. Although the definition is the same as it was in the 1975 Act, it has traditionally meant expropriation of property required for a public purpose such as the building of a dam, a road or a railway. However, the definition “*includes any purposes connected to the administration of any law by an organ of state*”. When read within the context of the ANC’s National Democratic Revolution (NDR) policy objectives this might be interpreted to include any of the many post-1994 laws relating to transformation - such as the *Promotion of Equality and Prohibition of Unfair Discrimination Act* whose purposes include “the eradication of social and economic inequalities” in accordance with section 9(2) of the constitution. This might empower national, provincial and local authorities to expropriate agricultural land for the purposes of land reform; private residences to achieve equitable housing goals; or, privately held share-holdings in companies in pursuit of the government’s goal of imposing demographic representivity in the private sector. It would place in jeopardy the R4 trillion pool of private pension funds.
- Expropriation is defined as “*the compulsory acquisition of property for a public purpose or in the public interest by an expropriating authority, or an organ of state upon the request to an expropriating authority*”, meaning property would have to be acquired by an organ of state. This creates concerns that should the state deprive owners of property - as the custodian of such property or as a result of regulatory provisions - expropriation would not have taken place and compensation would therefore not be payable. Thus, in 2013, in *AgriSA v the Minister of Minerals and Energy*, no compensation was paid for assets that were taken over by the state as custodians. It is also disturbing that the 2015 Preservation and Protection of Agricultural Land Bill would have declared the government to be the custodian of all agricultural land.
- The inclusion of the words “*including but not limited to*” in the list of the circumstances under which nil compensation may be paid makes a nonsense of the entire clause. It is vague, open

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to any interpretation and unacceptable in terms of the rule of law. It raises the possibility that further circumstances in which nil compensation may be paid could be included at a later stage – perhaps relating to other types of property such as shares in companies.

- The circumstances in clause 12(3) in which nil compensation may be paid – including “*where the land is not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value*” is open to almost any interpretation and requires much closer definition. The application of the same principle to other assets such as shares would, in effect, destroy the stock market and the generation of investment based on the legitimate expectation of appreciation in the market value of shares and assets.
- The payment of nil compensation for land “*where an owner has abandoned the land by failing to exercise control over it*” – might result in serious injustice in circumstances where the owner has been forced from his property by land invasions or building hijackers. According to the Western Cape High Court’s ruling on 15 July 2022 in *South Africa Human Rights Commission v The City of Cape Town*, owners might be deemed to have lost control of their land once an illegal occupier has gone beyond “merely putting pegs in the ground.”
- In terms of the timetable set out in the Bill, expropriated property could be transferred to the expropriating authority long before a court has reached a decision on equitable compensation. In terms of clause 15(3) the expropriating authority may apply to a court to have the compensation paid at a date after transfer of possession. This might create an untenable and inequitable situation for property holders, particularly if they depend on the expropriated property for income.
- Expropriation under the Bill might lead to a situation where the expropriated parties could face eviction from their residences. This would infringe their right to housing under Section 26 of the Constitution. Our courts have ruled that attaching or taking a person’s residential immovable property should be the last resort and should be subject to judicial oversight.

### **The Definitions of Public Interest and Land Reform**

The Foundation is of the view that there can be no proper public consultation process without a much clearer definition and understanding of what is meant by the “public interest” and “land reform”.

#### The Definition of Land Reform

The Foundation accepts unequivocally the constitutional requirement for land reform. However, “land reform” is a vague term that also requires clear definition - if the legislation is to meet the requirement for informed comment by the public.

Land reform could range from the total abolition of private land ownership and the placement of all land under the custodianship of the state, to a positive and liberating extension and entrenchment of property rights for all South Africans. The kind of process that the government evidently has in mind would appear to have the following characteristics:

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- beneficiaries of land reform will not own the land they farm – but will be tenants. In terms of the State Land Lease and Disposal Policy, beneficiaries of redistributed land would be limited to leasehold tenure for an indefinite period;
- the establishment of hundreds of thousands of small farmers on plots of 10 – 20 ha to meet the NDP goal of 300 000 such farmers by 2030;
- general rejection of large-scale farming with repeated proposals to cap the size of farms;
- the application of demographic representivity to the ownership of agricultural land.

The Foundation would strongly support a process that would culminate in the extension of real land ownership – particularly to formerly disadvantaged South Africans – and that would entrench, and not undermine, the property rights of all South Africans.

The Definition of Public Interest

In terms of section 25 (4) of the Constitution, “public interest” is undefined and open-ended - but includes “*the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources.*”

In the Foundation’s view, the definition of “public interest” cannot be left solely in the hands of the government of the day - but must be rooted firmly in the national purposes outlined in the preamble to the Constitution and the foundational values in section 1. It must take into account international law and the collective experience of free, prosperous and successful societies throughout the world and throughout history.

In assessing the Bill within the context of “public interest” consideration must in particular be given to the centrality of property rights for all successful societies; the inter-relationship between property rights and basic freedoms; the effect that the Bill and EWC would have on national unity and targeted communities and the impact that the limitation of property rights - inherent in expropriation without compensation - would have on the core values and purposes of the Constitution.

**Property rights and the quality of life**

One of the goals in the preamble to the Constitution is “*to improve the quality of life of all citizens and free the potential of each person.*” It is clear from any objective analysis that economic freedom based on property rights is a central requirement for the achievement of this goal. According to the Simon Fraser Institute Annual Economic Freedom Survey for 2022 there is an absolute correlation between economic freedom – of which property rights are a core and essential part – and virtually all positive social outcomes:

<b>Economic Freedom Quartile</b>	<b>Fourth ¼ (Least Free)</b>	<b>Third ¼</b>	<b>Second ¼</b>	<b>First ¼ (Most Free)</b>
GDP per capita	\$6 542	\$14 122	\$23 234	\$48 251
Life expectancy	66	72,3	76,1	80,4

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Infant mortality per 1000 births	36,9	19,9	11,2	4,8
Income earned by the poorest 10%	\$1 736	\$2 641	\$5 654	\$14 204
Poverty rate at \$1,90 PPP per day	31,45%	17,44%	7%	2,02%

**Property rights and freedom**

The Preamble to the Constitution also calls for a “democratic and open society”....“based on democratic values, social justice and fundamental human rights.” “Human freedoms” are one of the foundational values in section 1 of the Constitution. Once again, there is a close correlation between free and democratic societies and respect for property rights – as is evident from the following table:

<b>Respect for Property Rights</b>	<b>Fourth ¼</b>	<b>Third ¼</b>	<b>Second ¼</b>	<b>First ¼</b>
Free	28%	34%	45%	75%
Partly Free	49%	45%	37%	8%
Not Free	23%	21%	18%	17%

*Freedom House: Freedom in the World 2016*

The correlation between property rights and freedom should come as no surprise. Government would enjoy immense power over tenants in a situation in which all land and all homes would, in effect, be leased from the state. Possession of property empowers individuals to make their own life choices, to start businesses, to assist with the education of their children, and to provide security for their old age. It is one of the most important sources of human empowerment and independence – particularly with regard to the individual’s relationship with the state. The collapse of property rights in Venezuela and Zimbabwe was directly related to the collapse of political freedom and prosperity in both countries.

**Property rights and national unity**

The Preamble envisages a South Africa that “belongs to all who live in it united in our diversity” and calls on South Africans “to heal the divisions of the past.” The Constitution provides the principal framework for the advancement of national unity and for the healing of the divisions of the past.

And yet, it emerges from the NDR, from Radical Economic Transformation and from government policies that, far from healing the divisions of the past, the ANC-SACP government has for the past 29 years been waging an ongoing economic revolutionary struggle against a section of the South African population on the basis of its race.

It regards the assurances that were included in the Constitution at the behest of minorities as temporary “compromises” that can be discarded as soon as changing balance of forces permit. These “compromises” include core rights – such as language rights; the right to education in the language of

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choice; non-racialism; non-discrimination and a carefully balanced approach to the protection of property.

The property clause – section 25 - was one of the most closely contested and negotiated provisions in the 1996 constitution. The negotiating parties agreed to a delicate balance between the need to protect reasonable property rights on the one hand – and the need for expropriation to achieve land reform – on the other. The agreement required –

- payment of compensation for expropriated property that would have to be agreed to by those affected or decided or approved by a court; and that
- such compensation would have to be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected – taking a number of factors into account.

Adoption of the Bill and - of the principle of EWC - read together with the ANC's commitment to the fundamental redistribution of property within the framework of Radical Economic Transformation – would destroy, once and for all the keystone of South Africa's great national accord – and would seriously undermine prospects of national unity.

### **The Agricultural Sector, Food Security, Economic Growth and Job Creation**

When the ANC adopted its decision at NASREC in December 2017 to pursue EWC it added that this goal should be pursued “without destabilising the agricultural sector, without endangering food security in our country and without undermining economic growth and job creation.” It is evident from the following analysis that the Bill and EWC would, in fact, pose a deadly threat to both agriculture and the economy.

#### The Agricultural Sector and Food Security

South Africa is not a rich agricultural country - with only 13% of its territory being suitable for arable production. The sector is changing rapidly: the average age of commercial farmers in 2017 was 62; the number of commercial farmers dropped from 57 357 to 35 250 in just three years between 2013 and 2106 - and was expected by government to fall to fewer than 25 000 after 2020. The number of farms for sale increased from 13 254 in February 2015 to 19 280 in May 2016.

Despite the smaller number of farms, income produced by the sector increased to R 332,8 billion – 2,6% of GDP – in 2017. Most of this was produced by large farms. 100 very large farms produced 25% of agricultural production. Some 2 200+ large farms (including the top 100 farms) – with a turnover of over R22,5 million – contributed 64,5% of the sector's income in 2017. Medium-size farms contributed 7,7% and small and micro farms contributed 27,8%. *Collectively, commercial farmers produce 95% of South Africa's locally grown food.* According to a 2015 WWF Report, “although accurate data is slim, this suggests that the remaining 5% of food is produced by 220 000 emerging farmers and the 2 million subsistence farmers in the country”.

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South Africa's commercial farmers – aging and rapidly diminishing - are widely regarded as among the best in the world and produce 95% of our food. The imposition of demographic representivity on the agricultural sector would, over time, force them from the land. They would, in terms of government policy, be replaced by hundreds of thousands of emerging tenant farmers on 10 – 20 hectare plots.

The government's land reform model flies in the face of all current experience. Absence of property rights has been one of the main obstacles to the revival of agriculture in Zimbabwe. According to Patrick Imam of the IMF, the fundamental problem was that "the title system is broken." Accordingly, land in Zimbabwe was "dead capital, as it cannot be collateralised". "The first best solution to revive the sector would be to tackle the most binding constraint, which is property rights".

Successful agriculture requires capital, expertise, entrepreneurial skills, increasingly large-scale farming, a great deal of luck – and above all, secure property rights.

There is no reason to suppose that the government's new tenant-based land reform approach would be any more successful than its previous schemes – at least 70% of which have failed.

The difference between past and future land reform schemes is that the Expropriation Bill could have a devastating impact on the continuing ability of the remaining commercial farmers to produce the food on which South Africa depends. The Bill's first victims would probably be the 60% of commercial farmers with a turnover of less than R500 000 who are already finding it difficult to raise the operational loans that they need to plant their crops.

The expropriation of the first farms with compensation paid at levels substantially below market value would inevitably have a negative impact on land values. Many farmers might soon find that the value of their farms would be little more – or even less - than their outstanding mortgages. This could spell personal ruin for them and raise deep concerns among commercial banks over the viability of their R125 billion exposure to the sector.

Under these circumstances large farms - many of which are trusts and companies – would also experience greater problems in raising finance for their operations and for new investments. Their viability might also be negatively affected by increasing pressures to comply with BBBEE requirements -including divestment of shareholding.

The present outflow of expertise and capital from the agricultural sector might become a flood. After all, why should commercial farmers remain on the land if they know that it will be only a question of time before they face expropriation and the loss of their livelihood and most of their wealth?

All of this would have a catastrophic impact on the agricultural sector; on its contribution to the economy; on the 808 000 people (5,5% of total jobs) it employs; and, on food security. South Africa has thus far been regarded as one of the few food-secure countries in Africa and has made good progress in improving food availability. The number of people who were vulnerable to hunger declined from 29,3% in 2002 to (a still unacceptable) 11,1% in 2019. However, in the 2022 Global Hunger Index (GHI), South Africa ranked 59<sup>th</sup> out of 121 as a country with a "moderate" level of hunger.

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Tragically, the percentage of vulnerable people would rise rapidly in the wake of the agricultural crisis that would be generated by the Bill, EWC and the government's RET policies.

### **Economic Growth and Job Creation**

The Expropriation Bill and EWC will seriously aggravate the unprecedented economic crisis created by COVID. The uncertainty that they will create regarding property rights will undermine the government's efforts to achieve economic recovery – because property rights are the foundation of all free economies. The economy was already in a parlous condition before the COVID crisis.

Coupled with recurrent electricity outages; infrastructural bottlenecks; the increasing burden of BBBEE compliance; and some of the most toxic labour relations in the world, uncertainty regarding property rights was the main reason for South Africa's failure to attract foreign and local investment. Despite President Ramaphosa's best efforts, investment has dropped from 18% of GDP when he became president in 2018 to less than 11% during the third quarter of 2020.

The following table illustrates South Africa's failure to attract sufficient foreign direct investment when compared with other mineral-rich economies – despite the fact that that South Africa possesses the world's greatest mineral reserves – valued at US\$ 2,5 trillion.

<b>FDI INFLOWS: 2015 -2019 - US\$ billions</b>						
<b>Country</b>	<b>2019</b>	<b>2018</b>	<b>2017</b>	<b>2016</b>	<b>2015</b>	<b>Total</b>
Australia	40 074	61 079	47 541	42 980	46 892	238 566
Colombia	14 313	11 535	13 836	13 847	11 723	65 254
Chile	11 928	7 322	6 127	12 328	20 879	58 584
Malaysia	7 650	8 570	9 368	13 470	9 857	48 915
South Africa	4 624	5 569	2 058	2 215	1 521	15 987

### **Concerns of the Banks**

South Africa's economic crisis and its failure to attract investment will inevitably be compounded by adoption of the Bill and the threat of EWC. However, they have also created serious concerns in the banking community. In its submission to parliament on 30 January 2020 regarding the amendment of Section 25 of the Constitution, the Banking Association of South Africa warned that land reform should take place in an orderly manner *that does not dilute property rights*. According to BASA

“A marked decrease in the value of land-based property, caused by either an amendment to legislation and/or market uncertainty, and the resultant reduced appetite from property buyer could destabilise the banking sector and have a negative impact on the credit rating of the sector and the country.”

BASA added that its exposure to land-based property was R1,613 trillion – and cautioned that “many banking crises around the world have their starting point in the decline in land-based property and the

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impact that this has on market confidence.”

A study conducted in 2018 by Prof Roelof Botha of the Gordon Institute of Business Science and Prof Ilse Botha of the University of Johannesburg warned that South Africa would experience an “imminent socio-economic disaster” if EWC was implemented. The study found that capital formation had, in the short and medium terms, decreased by an average of 13,9% in other countries that had seriously undermined property rights.

The study noted that capital formation in South Africa had already decreased by 7% during the preceding 11 quarters. It concluded that GDP would decrease by R454,8 billion if capital formation in South Africa were to decline by 10%. This would result in a drop of R261 billion in fiscal revenues and the loss of another 2,28 million jobs.

This was before the COVID crisis which shrank GDP by 7,3% in 2020 and led to a loss of 1,729 million jobs. Unemployment now stands at 32,7% (Q4 - 2022) - or 42,6% if people who have ceased looking for employment, are included. Only 39,4% of the population between the ages of 15 – 64 are employed.

According to the Organisation for Economic Co-operation and Development (OECD), the economy grew by only 1,7% and is projected to grow by 1,1% in 2023 and 1,6% in 2024 – hardly more than the annual population increase. National debt is expected to reach R4,6 trillion (71% of GDP) in 2022. Increasingly mired in a debt trap, South Africa's credit ratings will slide deeper into junk status.

Sustained and inclusive economic growth is the only way out of this trap. President Ramaphosa emphasised this goal in his recent State of the Nation Address. However, South Africa will not achieve the investment levels and growth that it needs if the government continues with the adoption of the Bill – and the implementation of the principle of EWC.

The catastrophic example of countries that have set out to destroy property rights are there for all to see in Venezuela and Zimbabwe. Between 2013 and 2019 the Venezuelan economy shrank by 62% and hyper-inflation reached 10 million per cent. 3,4 million Zimbabweans and 5 million Venezuelans have fled their countries to escape poverty and repression. The difference is that should South Africa follow their example there will be no borders across which its people will be able to escape.

### **Conclusion**

From the foregoing the Foundation concludes that:

- The Bill would severely limit the right to property of *all* South Africans – a core right that is internationally recognised; that is a requirement for free and prosperous societies; and that is essential for the empowerment and the realisation of the potential of citizens.
- The Bill is unconstitutional insofar as –
  - it would facilitate the arbitrary deprivation of property because it does not meet the requirements in section 36 of the Constitution; and

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DW Steward (Chairman)

M Bakala, PS Basson, BC Bester, WAM Clewlow, E de Klerk, J de Klerk-Luttig, I Farlam, FM Mathebula, LG Mcwabeni, C Teichmann



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*Upholding South Africa's National Accord*

- it is irreconcilable with an understanding of the public interest distilled from the constitution and its founding values – particularly with regard to the negative impact it would have on:
  - the improvement of the quality of life of all citizens and efforts to free the potential of each person;
  - national unity and the goal of healing the divisions of the past; and
  - the foundational values of human dignity, equality, the enjoyment of human rights and freedoms and non-racialism for some South Africans.
- The Bill would not achieve the goals that the ANC set for EWC at NASREC or in the parliamentary resolution of 27 February 2018 and would on the contrary cause serious and possibly irreparable harm to agriculture, food security, economic growth and job creation.

The adoption of the Expropriation Bill might represent the point in the history of post-1994 South Africa at which the country turns decisively away from the great constitutional accord on which our new society was founded.

Most Respectfully,

**Tyla Dallas**

***Manager: Constitutional Programmes***

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