



**FREE MARKET FOUNDATION**

PO Box 4056 | Cramerview 2060  
011 884 0270 | [gailday@fmfsa.org](mailto:gailday@fmfsa.org)

**Free Market Foundation submission on Expropriation (ACT)**  
(The Expropriation BILL has been passed by both houses and is awaiting Presidential assent)

**To:** Committee 1 (Triple Challenges of Inequality, Poverty and Unemployment)  
High Level Panel on the Assessment of Key Legislation

**By:** Free Market Foundation

**1. The Free Market Foundation**

The Free Market Foundation (FMF) is an independent non-profit public benefit organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships.

**2. Introduction**

The Expropriation Bill (B4D-2015), has already been passed by both houses of Parliament, but has not yet been promulgated by the President. In leading this opposition, the FMF has raised concerns about how the bill strikes at the heart of South Africans' private property rights, violates the Constitution, and also the defective procedure which was followed in its passing.

**3. Property rights**

Political rhetoric surrounding the Expropriation Bill fuels the fatal illusion that it will produce white victims and black beneficiaries, whereas its effect will be precisely the opposite. Multiple state entities are empowered to seize any property (not just land) arbitrarily and to under-compensate or not compensate at all. The great irony of the Bill is that black people have always been and will continue being the primary victims of compromised property rights.

Apart from denial of democratic rights for black South Africans, the most heinous aspect of apartheid was denial of property rights. Instead of assurances that their property rights will never be violated again, the Bill ensures that black people will never enjoy the rights for which many fought and died. Most white investors, suburban residents and farmers have resources with which to protect themselves. Most victims, especially as transformation advances, will be poor blacks. The effect of transformation is that predominantly black people's property will be misappropriated for dams, roads, airports, projects, mines and the like. Wealthy interests are always best placed to mobilise expropriation laws to their advantage by getting organs of state to expropriate at their behest for 'development' purpose. Black victims in particular will be as defenceless as they were under apartheid.

It is universally acknowledged that secure property rights are a precondition for prosperity. This Panel's mandate is to address challenges facing South Africa regarding poverty, inequality, and unemployment. No existing legislation has the potential to be as detrimental to our country as the Expropriation Bill. One of its most extreme provisions is that a 'disputing party' may not dispute the validity of expropriation. (The right to dispute is confined to compensation).

The definition of 'expropriation' uses legalistic sleight of hand to vest 'custodianship' rather than ownership in the expropriating authority thus eliminating the need for just compensation. The lack of judicial oversight

gives the expropriating authority the power to expropriate by mere notice. Apart from obvious injustice to innocent people, this is a disincentive to investment and development.

Apartheid was characterized by its deprivation of property rights from black South Africans, in a regime where the government was 'custodian' of 'reserves' for 'natives'. The Expropriation Bill in its current form is essentially indistinguishable from what was called 'a crime against humanity'.

#### **4. Compensation**

The definition of 'expropriation' serves to remove from the State the obligation to compensate dispossessed owners – a stark reminder of apartheid.

Section 17(4) allows the expropriating authority to avoid the obligation to pay compensation on the date of expropriation by simply 'proposing a later date or dates'. If the owner disagrees with the proposed date, then the owner will have the obligation and cost of taking it to court. This is unrealistic in a country plagued by poverty, inequality and unemployment, and courts that are over-burdened and, for many, geographically remote. Taking a dispute to court will take many months if not years. Meanwhile owners will have neither their property nor whatever compensation, if any, they might get. If they lose, which the Act ensures is the likely outcome, they lose, in addition to their property and compensation, legal costs and related costs. In the real world, owners are forced to accept whatever, if anything, bureaucratic whim offers.

Section 17(3), states that even if there is a delay, of whatever length, in the payment of compensation, the possession of the property will in any case vest in the expropriating authority. There is thus no substantive incentive for the State to make timely payments. What renders this particularly ominous is the fact that expropriation often, if not typically, serves private interests such as developers.

The compensation provisions violate section 25 of the Constitution which requires compensation to be 'just and equitable'.

The Bill should be amended to oblige the expropriating authority to pay the full and fair compensation before ownership, custodianship or possession of expropriated property vests in an expropriating authority.

#### **5. Incorrect procedure**

President Jacob Zuma's positive response has been to refer the Bill to the Speaker of the National Assembly and the Chairperson of the National Council of Provinces. The Bill seems to have passed though the NCOP improperly.

#### **6. Conclusion**

The FMF recognizes the triple challenges of poverty, inequality, and unemployment. During apartheid and during democracy the FMF has consistently, in line with international experience, asserted that secure and certain property rights for all South Africans is a precondition for prosperity, justice and equality. So long as the threat of expropriation constantly hangs over the heads of citizens – especially small businesses and newly empowered black people with everything to lose – investment will be directed elsewhere and capital flight will be perversely rewarded.

It is with this in mind that the FMF proposes the following:

1. The definitions of 'expropriation' and 'disputing party' must be amended.
2. The provisions relating to compensation must be reformulated to bring it in line with the 'just and equitable' requirement of section 25 of the Constitution.
3. The Bill must, when reformulated, be passed through Parliament using the legally correct procedure.