

Empty Promises in Post-Apartheid South Africa: The inability of the labor and tenure legislation to protect South African farmwomen

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ABSTRACT

In this study, it is shown that the post-apartheid labor and tenure legislation are unable to protect South African farmwomen. There is a tendency among scholars to attribute this weak legal position to the country's legacy of colonialism and apartheid. This study proposes a different narrative, by focusing on the inclusive nature of post-apartheid legislation. It is the aim of this paper to examine to what extent the inability of this legislation to protect farmwomen can be explained by using an intersectional lens. This lens explores the effects of 'rurality' and gender on the legal position of farmwomen.

Keywords

South Africa, Post-Apartheid, intersectionality, farmwomen, gender, rurality.

INTRODUCTION

Subject to extremely low wages, long working hours and second-rate accommodation, the position of South African farmworkers under apartheid was referred to as 'no better off than slaves'.¹ A report published by Oxfam in 1990 links these exploitative practices with the almost total absence of legal protection for farmworkers.² It was only in 1994, with South Africa's transition to democracy, that this situation changed. The country adopted a constitution which brought the agricultural sector into the ambit of legal protection. The *Labour Relations Act* (LRA) was adopted to advance collective bargaining and the constitutional right of workers to belong to a trade union.³ With regard to tenure rights, the *Extension of Security of Tenure Act* (ESTA) was adopted to facilitate security of tenure and regulate fair evictions. Promises of healthy working conditions and more security of tenure as formulated in the abovementioned acts seemed revolutionary in contrast to the lack of legal protection under apartheid. As 'one of the most progressive', 'among the most advanced in the world' and 'a model for other countries', the constitution and its body of laws raised hope for farmworkers.⁴ It seems as though 'the long walk to freedom' has finally come to a happy end.

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In the spring of 2017, I participated in a research project carried out by the non-governmental organization *Women on Farms Project* (WFP). The results of the report reveal that the labor rights of farmworkers have systematically been violated. For example, 39% of farmworkers have never signed a contract.⁵ The WFP report also shed light on the rights violations of seasonal workers. Of the seasonal workers surveyed in 2016, 75% are not paid the legal minimum wage and more than two-thirds are exposed to dangerous pesticides. This is of particular interest considering the fact that the majority of seasonal workers are female.⁶ In order to cut expenses, many employers 'feminized' the workforce by replacing permanent male workers with temporary female workers. The unequal treatment of male and female workers was confirmed by farmwomen that were interviewed for this research. One interviewee said: "We do the same work but don't get paid the same." Women are restricted to lower-level jobs; higher paying positions are reserved for men. This necessitates the need for a focus on female farmworkers as a specific subject of study.

Existing research into the subject suggests a relation between the vulnerable position of farmwomen and South Africa's history of colonialism and apartheid. One example is the study by the sociologists Amber Fletcher and Wendee Kubik, who hold the view that the mindset that was developed during this time has survived because farmworkers have worked for the same farm owner for many generations.⁷ Other researchers, like the American sociologists Ann M. Oberhauser and Amy Pratt argue that current inequalities, specifically for rural women, occur due to the ideological notions that were developed under colonialism and further entrenched during the apartheid period.⁸ This standard narrative, however, is limited because it fails to consider variables that emerged *after* the abolition of apartheid, otherwise referred to as 'post-apartheid' by scholars.

On a national level, the post-apartheid legislation

¹ W. Davies, *We cry for our land: farm workers in South Africa* (Oxford 1990) viii.

² *Ibid*, 11.

³ M. Visser and S. Ferrer, *Farm Workers' Living and Working Conditions in South Africa: Key Trends, Emergent Issues, and Underlying and Structural Problems* (n.p. 2015) 54.

⁴ South African Human Rights Commission (SAHRC), *Final Report on the Inquiry into Human Rights Violations in Farming Communities* (n.p. 2003) 1., L. London, 'Human rights, environmental justice, and the health of farm workers in South Africa', *International journal of occupational and environmental health* 9.1 (2003) 61., and H. Bhorat, *Poverty and well-being in post-*

apartheid South Africa: An overview of data, outcomes and policy (n.p. 2005) 1 respectively.

⁵ S. Devereux, G. Levendal, E. Yde, *The Farmer Doesn't Recognize Who Makes Him Rich* (Stellenbosch 2017) viii.

⁶ F. Shabodien, 'Livelihoods struggles of women farm workers in South Africa', *South African Labour Bulletin* (2006) 4.

⁷ A. J. Fletcher and W. Kubik (ed.), *Women in Agriculture Worldwide: Key Issues and Practical Approaches* (New York 2016) 40-41.

⁸ A. M. Oberhauser and A. Pratt, 'Women's collective economic strategies and political transformation in rural South Africa', *Gender, Place & Culture* 11.2 (2004) 211-212.

that was promulgated in 1994 represented a new beginning for the country. Interviews with women who worked on farms in 1996 show that 73% were optimistic about their work situation because of the political transformation. Still, the 2017 report by WFP has shown that the legal position of farmwomen today is poor. The question that I aim to answer with this paper is: To what extent can the inability of the post-apartheid legislation to protect farmwomen be explained by using an intersectional analysis?

Theoretical framework

Earlier, I explained that men and women are treated differently in rural areas. However, explaining farmwomen's vulnerability as a result of gender inequality only, is unsatisfactory. For farmwomen in South Africa, their rural location, hereafter referred to as 'rurality', hinders them in accessing public services.⁹ In other words, notions of gender and rurality simultaneously influence the lives of farmwomen. The belief that individuals experience discrimination due to an interaction of factors is consistent with the theory of 'intersectionality'.¹⁰

Most scholars using the theory of intersectionality have included a focus on the impact of race as a subordinate social identity.¹¹ However, for this paper, I argue that it is more useful to focus on the intersection between gender and their rural location, as it is the key element of rurality that distinguishes farmwomen from other black women who live in urban areas.

By addressing multiple differences between and within groups, this theory can 'test the visibility' of rural women in law. Laws are typically known for the 'either/or' thinking, thereby generating artificial boundaries. For example, an individual is either classed as female or male, or as part of a majority or minority group. However, the law does not only have the ability to divide groups - but also has the potential to be transformative. An analysis of the post-apartheid legislation will therefore enhance our understanding of the way in which the position of farmwomen can be improved meaningfully.

Methods

The overall structure of this paper is divided into three parts. In the first two chapters of this paper, I will critically evaluate the labor and tenure legislation respectively. Both the labor and the tenure legislation have the ability to give farmworkers more security of occupation, since farms are a place of employment as well as a place of residence for farmworkers. The third chapter encompasses a theoretical analysis of the findings of the first two chapters. What is the impact of gender and rurality on farmwomen? How can the weak legal position of this group be explained with the theory of intersectionality? Concerning source material, both primary and secondary sources are utilized. The primary sources can be grouped into three types. The first type is related to legislative bodies. I analyze the Labour Relations Act (LRA) 1996 and the Extension of Security of Tenure Act (ESTA) 1997, as they are the two cornerstones with regard

to labor and tenure rights. The second type of primary sources concerns a legal case that was dealt with by the Land Claims Court, the institution that was appointed to cover cases of evictions. Finally, the third primary source type covers a Focus Group Discussion (FGD) with sixteen farmwomen that took place on the 5th of May in 2017 and lasted between 1.5 and 2.5 hours. The aim of this approach is to allow farmwomen's voices to be heard.

1. The Labour Relations Act

In 1995, the Labour Relations Act (LRA) 66 was adopted to promote fair labor practices for workers in South Africa. For the first time in South African history, the labor legislation also extended to the agricultural sector. However, the recent report by WFP found that after twenty years, unionization among this group is only marginally higher, at 10% of the workforce. This finding is problematic considering the fact that unions can play an important role in protecting female seasonal workers. An example is the Western Cape based union Sikhula Sonke that challenges unfair labor practices and negotiates with farm owners to pay women equal wages to those of men. One farmwoman stated: "it is very good to be a member. Things have changed a lot in my life. I have started to stand on my own feet." In order to assess the ability of the LRA to protect farmwomen, the following section examines the way in which the act enables for the creation of trade unions for the group.

The right of female workers to form and join trade unions is described in section 27(2) of the LRA. Additionally, the right to engage in collective bargaining is described in Section 23(5). Collective bargaining is possible when statutory councils are established. In order to establish a statutory council, the LRA declares that only a representative trade union may apply 'whose members constitute at least 30 per cent of the employees in a given sector and area.'¹² Unionization amongst farmworkers is difficult because of their isolated and dispersed locations, where no mobile reception or public transport is available. Additionally, it is particularly hard for unions to organize seasonal farmworkers. Their wages are lower and less stable than those of permanent workers, thereby providing less security for unions. As mentioned earlier, only 10% of female, seasonal farmworkers claim to be members of a union. Because this group does not meet the 30% threshold, seasonal farmworkers are unable to apply for the establishment of a statutory council and exercise their right to collective bargaining.

Furthermore, unions only allow workers to join when they are qualified as 'employees'.¹³ In section 213 of the act, an 'employee' is defined as '(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business

⁹ S. Devereux and C. Solomon, Can Social Protection Deliver Social Justice for Farmwomen in South Africa? (Brighton 2011) 7.

¹⁰ K. Crenshaw, 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', *University of Chicago Legal Forum* (1989) 139.

¹¹ See for example: P. S. Rothenberg, *Invisible privilege: A memoir about race, class, and gender* (Lawrence 2000), D.Gillborn and H.

Mirza, 'Mapping race, class and gender' *Educational inequality* (2000) and A. Brah and A. Phoenix., 'Ain't I a woman? Revisiting intersectionality' *Journal of international women's studies* 5.3 (2004).

¹² Republic of South Africa, *Labour Relations Act*, no. 66 of 1995, Section 39 (1)(a).

¹³ Fletcher, *Women in Agriculture*, 47.

of an employer.¹⁴ The term ‘independent contractors’ is used here to refer to atypical workers, e.g. individuals who work part-time or seasonally. Hence, this stipulation excludes the majority of farmwomen. The finding that certain groups were excluded from the act was acknowledged by the South African government in the amendments to the LRA in 2015. The act now includes sections 1998 and 200A that cover the rights of people who work in ‘Temporary Employment Services’ (TES). Workers are now entitled to the rights of the act when the contracts they are given last more than three months. In the case of farmwomen however, many stay on the same farm but are only granted contracts that do not last that long.¹⁵ Consequently, farmwomen do not qualify as employees and are therefore not legally allowed to join unions.

These two shortcomings explain why the LRA is unable to protect farmwomen. The amendment that was made in 2015 does however show a concern for atypical workers – and among them, farmwomen. And that leaves room for hope.

2. The Extension of Security of Tenure Act

Another body of law that could be used for the protection of farmwomen is tenure legislation. Farmworkers may be faced with an eviction when they are dismissed, since the farm is their place of residence as well as employment. Under apartheid, farm owners could freely evict farmworkers because the group was not granted tenure rights. This changed after the democratic elections of 1994, with the adoption of the Extension of Security of Tenure Act (ESTA). For farmworkers, the act was received as a victory. In formulating its vision for ESTA, The Department of Land Affairs stated: ‘there should be a marked reduction in legal evictions while illegal evictions should be the exception.’¹⁶ In spite of all good intentions, however, the number of evictions that occurred post-apartheid did not decline. This number has increased by 13% compared to the decade before the first democratic elections.¹⁷ These findings are remarkable. Why is this act unable to protect farmworkers?

The Nkuzi Development Association found that women and children comprise over 75% of those evicted from farms.¹⁸ This can be explained when analyzing the gender differentiation in access to housing. As the ‘head’ of the household, the man has a primary employment relationship with the farm owner. According to the ESTA, he is ‘the occupier’ of the land. Women who are employed on the farm also have a contractual relationship with the employer. Regardless of the latter, women and children – referred to as ‘the spouse’ and ‘the dependents’ in the act – are cited as ‘all those who derive title to occupy the property through him.’¹⁹

The legal case of the Landbou Navorsingsraad

versus the Klaase family serves as an illustration. In this case, an eviction order was granted against the dismissed farmworker Jan Klaase. His wife, Elsie Klaase, stated that she had been an employee on the farm and was entitled to housing because of her contract of employment. The judge however stated that the term ‘occupier’ in terms of the ESTA is not applicable to persons who derive their right of residence through occupiers who are in charge of the property.²⁰ In other words: because her husband was in charge of the household, Elsie Klaase did not qualify as an ‘occupier’. Due to this patriarchal practice, the tenure rights of farmwomen remain weak and they do not receive protection from the ESTA. This is explained in further detail in the chapter that follows, in which the theory of intersectionality sheds light on the issue.

3. An Invisible Group

Up to this point I have described the inability of the LRA and the ESTA to protect women who work on farms. The question that remains is: how does the distinctive position of farmwomen impact their legal position? Or put differently: how do the LRA and the ESTA relate to the intersectional notions of gender and rurality?

As mentioned in the first chapter, the LRA has set a participation threshold at 30% to allow for collective bargaining. For farmwomen, this stipulation is nearly impossible to meet. Here, the simultaneous effect of gender and rurality plays an important role. The impact of gender can be noted when observing the nature of their employment. Even when some women work year-round, they are still not considered ‘permanent’ laborers.²¹ This attitude prohibits female farmworkers to join a union since they favor permanent workers. In addition, according to the LRA, the contracts of seasonal workers on farms do not last long enough to qualify as an ‘independent contractor’ or ‘employee.’ Thus, due to their gender, it is hard for farmwomen to claim their rights to advance their position.

In addition, the group is further disadvantaged by the isolation that comes with their rurality. Farms are not easily approachable by unions as they are secluded and dispersed. On top of that, the possession of transportation vehicles that could enhance the mobility of farmwomen is unequally distributed between men and women. For example, a 2010 survey in the Eastern Cape found that male farmworkers were fifteen times more likely to own a motor vehicle.²² Additionally, it is common for rural women to only travel to the ‘outside world’ with the permission of the spouse.²³ Thus, the inability of farmwomen to join unions cannot be explained solely by gender inequality.

As mentioned in the previous chapter, the ESTA, adopted to protect the most vulnerable groups, offers little protection to farmwomen. Rights are only granted to the

¹⁴ Republic of South Africa, *Labour Relations Act*, no. 66 of 1995, Section 213.

¹⁵ Fletcher, *Women in Agriculture*, 50.

¹⁶ Cited in: R. Hall, K. Kleinbooi and N. Mvambo, What land reform has meant and could mean to farm workers in South Africa (Stellenbosch 2002) 3.

¹⁷ Nkuzi Development Association, *National Evictions Survey. Briefing to Parliamentary Portfolio Committee for Agriculture and Land Affairs* (Pretoria 2005) 10.

¹⁸ S. Seehaam, *Evictions; towards a transformative interpretation of the constitutional requirement of considering ‘all relevant circumstances’* (Cape Town 2006) 53.

¹⁹ Roux, Theunis. ‘Pro-poor court, anti-poor outcomes: explaining the performance of the South African Land Claims Court’, *South African Journal on Human Rights* 20.4 (2004) 525.

²⁰ Land Claims Court, Case No. 09R/2014, paragraph 23.

²¹ Human Rights Watch, Ripe with abuse. Human rights conditions in South Africa’s Fruit and Wine Industry (New York 2011) 26.

²² M. Aphane, R. Dzivakwi and P. Jacobs, ‘Livelihood strategies of rural women in Eastern Cape and Limpopo’, *Agenda* 24.84 (2010) 69.

²³ E. A. Cheitman, ‘Heritage and politics of poverty and inequality for rural women’, *Journal of Social Work and Social Welfare* 8 (1981) 22.

‘occupier’. This formulation does not cover farmwomen, as tenancy of houses is preserved for men only. This weak legal position is invisible without an intersectional lens. An analysis which would examine the way in which the legislation addresses gender equality, would result in the finding that tenure rights are granted equally to men and women. This is because the houses in urban areas can be assigned to the name of a woman as well. The tenure position of farmwomen is thus more complex, due to the compound effects of gender and rurality.

Both acts build on the assumption that employees and occupiers are predominantly urban, male workers with permanent contracts. Because this perspective is dominant within the legislation, rural, female workers with seasonal contracts are the ones who ‘get left out’.

CONCLUSION

The results of this paper have shown that after 25 years of democracy, little has changed for women who work on farms. My aim was to examine to what extent the inability of the post-apartheid legislation to protect farmwomen could be explained by using an intersectional analysis. I argue that the legislation is unable to protect the group because its stipulations fail to address the unique position of farmwomen, who are hindered by the intersectional impact of rurality and gender inequality.

Despite political promises and promising laws, the position of farmwomen has been stagnant for 25 years. The post-apartheid legal system continues to play a role in reaffirming their insecure position. Hence, the current legislative framework proves to be ineffective for the group. There is an urgent need to adopt a lens that recognizes the complex reality of the position of farmwomen and that opens the window to a tailor-made approach which builds upon their needs. Most importantly, farmwomen-specific amendments have to be developed. First, the LRA needs to lower its participation threshold for collective bargaining. Furthermore, the act needs to extend its definition of an ‘employee’ to laborers who work less than three months. In the case of the ESTA, an amendment has to be developed which grants equal legal protection to ‘secondary occupiers’.

The intersectional approach that has been adopted in this paper could also be useful to help identify other ‘invisible groups’ who are not protected by the law, like immigrant homosexuals or prisoners with disabilities. In broad terms, this research can therefore be seen as a plea for more inclusive legislation. In the case of South Africa, the present study offers a valuable insight: the general perception of the legislation being ‘one of the most progressive’ and ‘a model for other countries’ is inaccurate. Recognition of this finding is of importance, as awareness is the beginning of transformation.

ROLE OF THE STUDENT

This research was conducted by Fiore Schuthof as part of an undergraduate degree in International Relations at Utrecht University. She was working under the supervision of Hans van der Jagt. The student was responsible for the research as well as the writing of the study.

REFERENCES

1. Aphane, M., Dzivakwi, R. and Jacobs, P. ‘Livelihood strategies of rural women in Eastern Cape and Limpopo’, *Agenda* 24.84 (2010).

2. Bhorat, H. *Poverty and well-being in post-apartheid South Africa: An overview of data, outcomes and policy* (n.p. 2005).
3. Cheitman, E. A. ‘Heritage and politics of poverty and inequality for rural women’, *Journal of Social Work and Social Welfare* 8 (1981).
4. Crenshaw, K. ‘Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics’, *University of Chicago Legal Forum* (1989).
5. Davies, W. *We cry for our land: farm workers in South Africa* (Oxford 1990).
6. Devereux, S. and Solomon, C. *Can Social Protection Deliver Social Justice for Farmwomen in South Africa?* (Brighton 2011).
7. Devereux, S., Levendal, G. and Yde, E. *The Farmer Doesn't Recognize Who Makes Him Rich* (Stellenbosch 2017).
8. Fletcher, A.J. and Kubik, W. (ed.), *Women in Agriculture Worldwide: Key Issues and Practical Approaches* (New York 2016).
9. Focus Group Discussion, De Doorns, 5 may 2017.
10. Hall, R., Kleinbooi, K. and Mvambo N. *What land reform has meant and could mean to farm workers in South Africa* (Stellenbosch 2002).
11. Human Rights Watch, *Ripe with abuse. Human rights conditions in South Africa's Fruit and Wine Industry* (New York 2011).
12. Land Claims Court, Case No. 09R/2014.
13. London, L. ‘Human rights, environmental justice, and the health of farm workers in South Africa’, *International journal of occupational and environmental health* 9.1 (2003).
14. Nkuzi Development Association, *National Evictions Survey. Briefing to Parliamentary Portfolio Committee for Agriculture and Land Affairs* (Pretoria 2005).
15. Oberhauser, A. M. and A. Pratt, A. ‘Women's collective economic strategies and political transformation in rural South Africa’, *Gender, Place & Culture* 11.2 (2004).
16. Republic of South Africa, *Extension of Security of Tenure Act, 62 of 1996*.
17. Republic of South Africa, *Labour Relations Act, no. 66 of 1995, Section 1*.
18. Seehaam, S. *Evictions; towards a transformative interpretation of the constitutional requirement of considering 'all relevant circumstances'* (Cape Town 2006).
19. Shabodien, F. ‘Livelihoods struggles of women farm workers in South Africa’, *South African Labour Bulletin* (2006).
20. South African Human Rights Commission (SAHRC), *Final Report on the Inquiry into Human Rights Violations in Farming Communities* (n.p. 2003).
21. Theunis, R. ‘Pro-poor court, anti-poor outcomes: explaining the performance of the South African Land Claims Court’, *South African Journal on Human Rights* 20.4 (2004).
22. Visser, M. and Ferrer, S. *Farm Workers' Living and Working Conditions in South Africa: Key Trends, Emergent Issues, and Underlying and Structural Problems* (n.p. 2015).

