

# Empty promises in post-apartheid South Africa

The inability of the labour and tenure legislation to protect  
South African farmwomen



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## Abstract

In this study, it is shown that the post-apartheid labour and tenure legislation is unable to protect South African women who work on farms. There is a tendency among scholars to attribute this weak legal position of farmwomen 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. The laws examined are the Labour Relations Act (LRA) 66 and the Extension of Security Act (ESTA). The study shows that these Acts seem to hold a narrow-minded approach to rights, in assuming 'employees' and 'occupiers' to be male, urban workers with permanent contracts. This does not cover farmwomen, as they are hindered by the intersectional impact of gender and rurality. It is therefore recommended to develop amendments to these Acts.

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## Introduction

*"We condemn the lack of legal protection for farm workers and the gross exploitation which exists on many farms. We demand that farm workers be allowed full trade union rights. Today, we are drawing your attention to the terrible miscarriages of justice which have gone on for decades."*<sup>1</sup>

The quote above was stated by former South African president Nelson Mandela on 25 March 1990, during a rally of the African National Congress (ANC). Mandela talks about a "gross exploitation" when referring to the position of farmworkers in South African society. This can be observed while analyzing the working conditions of farmworkers under the system of apartheid.<sup>2</sup> A report published by Oxfam in 1990 found that farmworkers were subject to extremely low wages, long working hours and second-rate accommodation.<sup>3</sup> Moreover, hundreds of thousands of workers had been evicted from farms since 1960.<sup>4</sup> Luwellyn Landers, former Deputy Minister of Population Development, stated in 1989 that farmworkers were 'no better off than slaves'.<sup>5</sup>

The report by Oxfam links the exploitative practices with the almost total absence of legal protection for farmworkers.<sup>6</sup> The only law that included the agricultural sector under apartheid was the Workmen's Compensation Act, which ensured the right of workers to receive financial compensation with regard to sickness, death and injury.<sup>7</sup> Other Acts, such as the Basic Conditions of Employment Act (BCEA) only covered the rights of mining- and industrial laborers, thereby excluding the agricultural sector. 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.<sup>8</sup> With regard to tenure rights, the Extension of Security of Tenure Act (ESTA) was adopted to facilitate security of tenure and regulate fair evictions.<sup>9</sup> 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

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

<sup>2</sup> The term 'apartheid' refers to the official system of racial segregation that existed in South Africa and Namibia between 1948 and 1990. The word 'apartheid' means 'being different' in Afrikaans.

<sup>3</sup> Davies, *We cry for our land*, vii.

<sup>4</sup> Ibid, 13.

<sup>5</sup> Ibid, vii.

<sup>6</sup> Ibid, 11.

<sup>7</sup> Ibid, 12.

<sup>8</sup> 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.

<sup>9</sup> Republic of South Africa, *Extension of Security of Tenure Act*, 62 of 1996 2.

raised hope for farmworkers.<sup>10</sup> Did the 'long walk to freedom' finally come to a happy end? And did the position of farmworkers ameliorate because of the new legislation? This question encompasses one of the main objectives of this study.

In the spring of 2017, I participated in a research project carried out by the non-governmental organization Women on Farms Project (WFP). The research resulted in a report that examined the protection of farmworkers' rights in South Africa's Western Cape. It found that the labour rights of farmworkers have systematically been violated. For example, 39% of farmworkers have never signed a contract.<sup>11</sup> The WFP report also shed light on the rights violations of seasonal workers. Of the seasonal workers surveyed in 2017, 75% are not paid the legal minimum wage and more than two-thirds are exposed to dangerous pesticides.<sup>12</sup> This indicates a non-compliance with the legislation. Subsequently, this situation raises certain key questions: why is the legislation, enacted to improve the conditions within the agricultural sector, unable to protect (seasonal) farmworkers? Why are they subject to systematic rights violations?

These questions are of particular interest considering the fact that the majority of seasonal workers are female.<sup>13</sup> This is a result of the deregulation and liberalization of the agricultural sector after 1994. In order to save expenses, many employers 'feminized' the workforce by replacing permanent male workers with temporary female workers.<sup>14</sup> This development, however, has not been beneficial for women as seasonal employment tends to be less secure and lower paid.<sup>15</sup> Women are restricted to lower-level jobs; higher paying positions are reserved for men.<sup>16</sup> 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."<sup>17</sup> Another commented: "There are no opportunities for us, as women. Jobs that are higher in the hierarchy are reserved for men."<sup>18</sup> This necessitates the need for a focus on *female* farmworkers as a specific subject of study. Why is the law unable to protect this group?

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<sup>10</sup> 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.

<sup>11</sup> S. Devereux, G. Levendal, E. Yde, *The Farmer Doesn't Recognize Who Makes Him Rich* (Stellenbosch 2017) viii.

<sup>12</sup> *Ibid.*, ix.

<sup>13</sup> F. Shabodien, 'Livelihoods struggles of women farm workers in South Africa', *South African Labour Bulletin* (2006) 4.

<sup>14</sup> S. Devereux and C. Solomon, *Can Social Protection Deliver Social Justice for Farmwomen in South Africa?* (Brighton 2011) 6.

<sup>15</sup> *Ibid.*

<sup>16</sup> Shabodien, 'Livelihood struggles', 1.

<sup>17</sup> Focus Group Discussion, De Doorns, 5 may 2017.

<sup>18</sup> *Ibid.*

Existing research into the subject suggests a relation between the vulnerable position of farmwomen and South Africa's history of colonialism and apartheid. The next section will provide an overview of these studies. Thereafter, it will clarify the way in which this paper complements the existing literature.

## Historiography

Although some research has been carried out on the vulnerability of farmworkers in general, few studies have addressed farmwomen in South Africa as a specific focus group. One of the few studies that does concentrate on the latter is the study by the sociologists Amber Fletcher and Wendee Kubik. These scholars hold the view that the poverty and 'deplorable conditions' that farmworkers and farmwomen in particular endure are attributable to South Africa's history of slavery and colonialism.<sup>19</sup> Today, many farmworkers can still trace their ancestry to the slaves that worked in slave plantations during the seventeenth and eighteenth centuries. Fletcher and Kubik argue that the mindset that was developed during this time has survived because farmworkers have worked for the same farm owner for many generations. Farmworkers' children 'accept things and circumstances without question because that is the way things have been done for centuries.'<sup>20</sup> Other researchers, like the American sociologists Ann M. Oberhauser and Amy Pratt also focus on South African farmwomen, but concentrate on a different historical period. These sociologists argue that current inequalities, specifically for rural women, were developed under colonialism but were further entrenched during the apartheid period.<sup>21</sup> Due to the ideological notions that were created during these times, these women have largely been excluded from employment and property ownership.<sup>22</sup>

The studies discussed in this section have highlighted different explanations for the vulnerability of farmwomen. While Fletcher and Kubik suggest an association with slavery and the ideologies that were created during colonial times, Oberhauser and Pratt seem more concerned with the context of apartheid. Taken together, one may conclude that current societal challenges - such as the rights violations of farmwomen - are logical consequences of historically embedded influences. It goes without saying that the legacy of apartheid and colonialism plays a

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<sup>19</sup> A. J. Fletcher and W. Kubik (ed.), *Women in Agriculture Worldwide: Key Issues and Practical Approaches* (New York 2016) 40.

<sup>20</sup> *Ibid.*, 40-41.

<sup>21</sup> A. M. Oberhauser and A. Pratt, 'Women's collective economic strategies and political transformation in rural South Africa', *Gender, Place & Culture* 11.2 (2004) 224-225.

<sup>22</sup> *Ibid.*, 211-212.

major role in South Africa's society.<sup>23</sup> 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.<sup>24</sup> On a national level, the post-apartheid legislation 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. One woman stated: "everything that has happened after the elections is new; a person like me also has rights now." Another woman expected that the changed political circumstances would significantly improve her future conditions, because "we were promised this."<sup>25</sup> The post-apartheid legislation thus raised hope for farmwomen. Still, the 2017 report by WFP has shown that the legal position of farmwomen today is poor. Their circumstances seem to have changed little over the past 25 years. How can the inability of the post-apartheid legislation to protect farmwomen be explained?

### Theoretical framework

The South African scholar Andries du Toit explains the vulnerability of farmworkers by focusing on 'paternalist discourses' that have been established over the course of many generations.<sup>26</sup> Du Toit uses the theoretical concept of 'paternalism' to refer to a relationship of dependence in a family-like community. In this discourse, the farm owner holds absolute power over the 'child', meaning the farmworkers.<sup>27</sup> However, Du Toit refers to relations between the farm owner and the farmworkers as a whole, thereby failing to take into account the specific position of women who work on farms. Earlier, I demonstrated the unequal treatment of men and women on farms. Du Toit's theoretical view does not do justice to these gender relations. It is for this reason that this paper proposes a different theoretical approach.

First, it is necessary to clarify what is meant by the term 'gender'. This term refers to certain roles and learned behaviors of men and women that are socially constructed. This description is

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<sup>23</sup> One example is the unequal income distribution. A statistical survey that was published in 2015 found that the income of white South Africans is almost five times higher than black South Africans. Source: Statistics South Africa, 'Living Conditions of Households in South Africa: An analysis of household expenditure and income data using the LCS 2014/2015' (2015) 14-15.

<sup>24</sup> See for example F. Anciano, *Agents of change? The impact of social movements in post-apartheid South Africa* (Johannesburg 2012), H. Bhorat, *The post-apartheid challenge: Labour demand trends in the South African labour market, 1995-1999* (n.p. 2003) and J. R. Greenstein, 'Social rights, essential services, and political mobilization in post-apartheid South Africa', *Journal of Consumer Policy*, 29.4 (2006).

<sup>25</sup> A. Kritzing and J. Vorster, 'Women farm workers on South African deciduous fruit farms: Gender relations and the structuring of work', *Journal of Rural Studies* 12.4 (1996) 349.

<sup>26</sup> A. Du Toit, 'Farm Workers and the 'Agrarian Question'', *Review of African Political Economy* 61.21 (1994) 378-380.

<sup>27</sup> *Ibid.*, 379.

close to that of the World Bank, which defines gender as 'a social category that largely establishes one's life chances, shaping one's participation in society and in the economy.'<sup>28</sup> However, explaining farmwomen's vulnerability as a result of gender inequality only, is unsatisfactory. According to the American scholar Edith Cheitman, rural women have to be identified as an oppressed rural *class*.<sup>29</sup> The experience of women who work on farms is different from women who work in urban areas. For farmwomen, their rural location, physical dispersion and isolation hinder them in accessing public services.<sup>30</sup> Cheitman argues that any group that is subjected to unequal access to services becomes *de facto* an oppressed class. She goes on to argue: 'If no one has identified rural women as an oppressed class and is asking questions about them, whence will come the solutions to problems?'<sup>31</sup> When trying to explain the vulnerability of the group, it is thus also necessary to include an analysis of the impact of rural class, hereafter referred to as 'rurality'. 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'.<sup>32</sup> The following section will provide a short overview of this theory. It will then go on to elaborate on the vital role of this theory to understand the vulnerability of farmwomen in relation to post-apartheid law.

The concept of intersectionality has been interpreted in various ways. Among others, the term has been referred to as 'a political project', 'a paradigm', 'an approach' and 'a human rights policy methodology'.<sup>33</sup> Taken together however, a common theme can be recognized in the literature. The relevant studies all recognize that multiple identities make up an individual's position in society. These identities can overlap and simultaneously create forms of oppression. This paper will adopt a definition by the American scholar Adele Norris, which corresponds to this theme. Norris states: 'Intersectionality theory directs a critical lens toward the compounding effects of the simultaneous interaction of two or more subordinate social identities.'<sup>34</sup> Most

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<sup>28</sup> E. M. King and A. D. Mason, *Engendering Development: Through Gender Equality in Rights, Resources, and Voice. World Bank Research Policy Report* (Washington 2001) 2.

<sup>29</sup> E. A. Cheitman, 'Heritage and politics of poverty and inequality for rural women' *Journal of Social Work and Social Welfare* 8, (1981) 19.

<sup>30</sup> Devereux, *Can Social Protection Deliver Social Justice*, 7.

<sup>31</sup> Cheitman, 'Heritage and politics', 19.

<sup>32</sup> 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.

<sup>33</sup> M. T. Berger and K. Guidroz (eds.) *The Intersectional Approach: Transforming the Academy Through Race, Class and Gender* (Chapel Hill 2009) 1., A. M. Hancock, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm' *Perspectives on politics* 5.1 (2007) 5., M. T. H. Vivar, *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Frankfurt 2011) 1 and L.R. Agustín, *Gender Equality, Intersectionality, and Diversity in Europe* (New York 2013) 64 respectively.

<sup>34</sup> A. N. Norris, 'Rural women, anti-poverty strategies, and Black feminist thought', *Sociological Spectrum* 32.5 (2012) 454.



scholars have used the theory of intersectionality to focus on the simultaneous interaction of gender and race on individuals.<sup>35</sup> This paper aims to enrich this literature by focusing on the intersection of gender and rurality (the latter as part of the concept of rural class) – an approach that has received little attention so far.<sup>36</sup> As the South African scholars Relebohile Moletsane and Sithabile Ntombela argue: ‘cultural constructions of gender and, in particular, the social status of women and girls in rural communities contribute to the intensity of their lived experiences, rather than for their male counterparts and those living in urban spaces.’<sup>37</sup> Thus, for this paper, I argue that it is more useful to focus on the intersection between these factors, as it is the key element of rurality that distinguishes farmwomen from other women.

Critics of the theory have argued that intersectionality assumes *a priori* that multiple dimensions of marginalization lead to a negative impact for individuals.<sup>38</sup> As a result, it could be presumed that ‘all farmwomen are subordinated’, when this is not always true. In support of these claims, this paper does not regard structures of gender and rurality as inherently adverse or fixed. In the same vein, I do not rule out the existence of other factors that influence the lives of farmwomen, such as the attitude of the farm owner. Still, I argue that the theory can be used to ‘test the visibility’ of rural women in law. It is here that the value of the theory for this paper becomes apparent. 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.<sup>39</sup> Intersectionality challenges this tendency by addressing multiple differences between and within groups. This theory will allow for a critical evaluation of the presumed inclusive nature of post-apartheid legislation. Therefore, the position of farmwomen will be examined within this theoretical framework. The question that this paper aims to answer is: *To what extent can the inability of the post-apartheid legislation to protect farmwomen be explained by using an intersectional analysis?*

An analysis of the post-apartheid legislation will enhance our understanding of the way in which the position of farmwomen can be improved meaningfully. As the South African scholar Catherine Albertyn states: ‘laws can create and perpetuate inequality, as they did in apartheid

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<sup>35</sup> 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).

<sup>36</sup> R. Moletsane and S. Ntombela, ‘Gender and Rurality in southern African contexts: An introduction’ *Agenda* 24.84 (2010) 5.

<sup>37</sup> *Ibid.*

<sup>38</sup> P. Y. S. Chow, ‘Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence’ *Human Rights Law Review* 16.3 (2016) 473.

<sup>39</sup> *Ibid.*, 457.

South Africa before 1994, or they can advance equality.<sup>40</sup> Put differently, the law has the ability to divide groups - but also has the potential to be transformative.

## Methods

The overall structure of this paper is divided into three parts. First, it is necessary to examine the successes and limitations of the legislation. I will therefore concentrate on two Acts. The WFP report reveals the need for a focus on labour rights, as these rights have been violated systematically in the case of farmwomen. Moreover, I will concentrate on tenure legislation which is closely linked to the latter, since farms are a place of employment as well as a place of residence for farmworkers. This results in a vulnerability, since farmworkers are faced with the possibility of eviction when they are dismissed. Put differently, both labour and tenure legislation have the ability to give farm workers more security of occupation and are thus of particular importance for the group.<sup>41</sup> The first two chapters of this paper will therefore critically evaluate the labour and tenure legislation respectively. Sub-questions that will be raised are: how have the effectiveness of the labour and tenure laws been regarded by other scholars? Why is this legislation unable to protect farmwomen? What are the barriers to legal protection for the group? The third chapter will encompass 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?

The rights violations of farmwomen have been demonstrated in the WFP report that was published in 2017. In order to explain these findings, the time period preceding this report will be examined. However, a strong emphasis will be placed on the first decade after the democratic elections of 1994. It was in this time that many legal and policy reforms were made, marked by 'a heady optimism.'<sup>42</sup> A focus on this time will allow a deeper insight into the way in which the legislation, which contained such promises, has affected farmwomen in its early stages.

Concerning source material, both primary and secondary sources will be utilized. The primary sources can be grouped into three types. The first type is related to legislative bodies. I will 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 labour and tenure rights. The

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<sup>40</sup> C. Albertyn, 'Law, gender and inequality in South Africa' *Oxford Development Studies* 39.2 (2011) 143.

<sup>41</sup> J. Ewert and J. Hamman, 'Why paternalism survives: Globalization, democratization and labour on South African wine farms' *Sociologia Ruralis* 39.2 (1999) 216.

<sup>42</sup> M. Langford et al. (ed.), *Socio-economic Rights in South Africa: Symbols Or Substance?* (New York 2013) 6.

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. An examination of this case, called 'Landbou Navorsingsraad versus Klaase', will provide an illustration of the effects of the stipulations of the ESTA on a female farmworker. Finally, the third primary source type covers a Focus Group Discussion (FGD) with farmwomen that took place on the 5<sup>th</sup> of May in 2017 and that lasted between 1,5 and 2,5 hours. The group consisted of sixteen women who work and live on farms in De Doorns, a region in the Western Cape of South Africa. The participants were asked to discuss the provisions of the legislation and the changes they would wish to see happen. The aim of this approach is to allow farmwomen's voices to be heard.

This study will also make use of secondary sources in order to gain an understanding of the way in which the effectiveness of the legislation has been regarded by scholars. Moreover, it will enable this study to see which issues demand further attention. One of the literary sources that significantly contributed to this paper includes the study by Andrietta Kritzing and Jan Vorster, who have based their study on interviews with farm owners and farmworkers that were conducted in 1996. This data contributes to this paper, as it will enhance our understanding of the way in which the newly promulgated legislation was first regarded. However, the problem with their study is that it fails to show the effect of the legislation on farmworkers during the years that followed. This is an area to which this paper can make a contribution. Another study that provided this paper with relevant insights is the research by Moletsane and Ntombela. These scholars give an extensive overview of the lived experiences of rural women, by drawing upon studies that explore the relation between gender, rurality and themes such as income poverty and education. Nevertheless, what is still missing in their study is an analysis of the relation between gender, rurality and law. This paper aims to fill that gap.

This study has chosen to focus on the post-apartheid legislation because the violations of these rights prove that there is an urgent need to explain this issue. However, the reader should bear in mind that this study only encompasses one source of social protection for farmwomen. Apart from the legislation, there are two other important sources of social protection for the group: the employer - in this case: the farm owner, by providing for basic needs - and the government, by giving social grants.<sup>43</sup> Further research is needed to examine the impact and the effectiveness of these other sources of social protection for female farmworkers.

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<sup>43</sup> Devereux, *Can Social Protection Deliver Social Justice*, 2.

## 1. The Labour Relations Act

### **Introduction**

In 1995, the Labour Relations Act (LRA) 66 was adopted to promote fair labour practices for workers. The purpose of the Act is to 'advance economic development, social justice, labour peace and the democratization of the workplace.'<sup>44</sup> For the first time in South African history, the labour legislation also extended to the agricultural sector. The recent report by WFP, as well as a study by Human Rights Watch in 2011 show however that the legal position of farmwomen in particular remains weak, even though they are entitled to the rights of the Act.<sup>45</sup> Why is the LRA unable to protect farmwomen? This chapter sets out to critically evaluate the Act. It will begin with a brief overview of the debate concerning the effectiveness of the LRA. It will then go on to show two visible shortcomings.

### **Historiography**

A number of studies have highlighted the limitations of the LRA in relation to the situation of farmworkers. This is demonstrated in the study by Fletcher and Kubik, who write about the enforcement of the Act. According to these scholars, it is difficult to assess rights violations on farms. This is because the LRA requires inspectors to give farm owners notice of inspections, thereby weakening their ability to address violations.<sup>46</sup> Moreover, they show that a mere 107 inspectors are responsible for the inspections of labour practices on 6,000 farms in the Western Cape, as well as all other sectors in the province. As a result, violations will not be systematically reported and brought forward to relevant authorities. This leads them to question whether the rights of vulnerable employees will be protected.<sup>47</sup>

On the other hand, several studies are positive about the effectiveness of the LRA. One example is the study by the South African scholars Joachim Ewert and Johann Hamman. They argue that the Act is successful in protecting farmworkers against unfair dismissals by the farm owner. During apartheid, farm owners could dismiss farmworkers at will. This changed after the LRA was adopted. Between 1996 and 1999, 64% of the cases of dismissal disputes were described as 'unfair', thereby giving farmworkers more security.<sup>48</sup> Ewert and Hamman do however

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<sup>44</sup> Republic of South Africa, *Labour Relations Act*, no. 66 of 1995, Section 1.

<sup>45</sup> Human Rights Watch, *Ripe with abuse. Human rights conditions in South Africa's Fruit and Wine Industry* (New York 2011) 29.

<sup>46</sup> Fletcher, *Women in Agriculture*, 50.

<sup>47</sup> Ibid.

<sup>48</sup> Ewert, 'Why paternalism survives', 216.

raise doubts about unionization – a right which is described in section 27(2) of the LRA. They found that only 7 per cent of the permanent workers on farms were members of unions in 1999. Ewert and Hamman attribute the low rate of unionization among farmworker to the fact that unions have to promote their cause on each individual farm, as workers are often passive and ignorant about their rights.<sup>49</sup> The representation of *seasonal* workers - hence, the majority of women who work on farms - in trade unions remains unclear in their study. The report by WFP found that after twenty years, unionization among this group is only marginally higher, at 10% of the workforce.<sup>50</sup>

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 labour practices and negotiates with farm owners to pay women equal wages to those of men.<sup>51</sup> 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."<sup>52</sup> A report commissioned by the Department of Labour into Employment Conditions in the Agricultural Sector in 2001 found that farmworkers are highly dependent on the farm owner "for continued access to goods, services and especially homes, as well as for employment."<sup>53</sup> According to South African scholar Astrid Grub, unions can help farmworkers in making claims and enforcing their rights.<sup>54</sup> Put differently, unions can serve as a 'mediator' between farmworkers and farm owners, or between farmworkers and the rights of the LRA. In order to assess the ability of the LRA to protect farmwomen, the following section will examine the way in which the Act enables the creation of trade unions for farmwomen.

### **"We don't stand together as workers"<sup>55</sup>**

My interviews with farmwomen revealed that some were not aware of the existence of unions that specifically addressed farmworker's needs.<sup>56</sup> As one interviewee said in the FGD: "There was no trade union when I started working. Until now I never saw people from the trade union."<sup>57</sup> Another

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<sup>49</sup> Ewert, 'Why paternalism survives', 216.

<sup>50</sup> S. Devereux, *The Farmer Doesn't Recognize*, 33.

<sup>51</sup> F. White, 'Deepening democracy: A farm workers' movement in the Western Cape' *Journal of Southern African Studies* 36.3 (2010) 679.

<sup>52</sup> *Ibid.*, 686.

<sup>53</sup> A. Grub, *The impact of labour legislation on South African farm workers' livelihoods in the Skuinsdrift area, North West province* (Johannesburg 2006) 29.

<sup>54</sup> *Ibid.*, 46.

<sup>55</sup> Focus Group Discussion, De Doorns, 5 may 2017.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

stated: "There is no union for female farm workers."<sup>58</sup> These responses suggest a common belief that farmwomen are not entitled to legal protection from trade unions. How can this belief be explained?

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.'<sup>59</sup> As mentioned earlier, the 2017 WFP report shows that only 10% of female, seasonal farmworkers claim to be members of a union. 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.<sup>60</sup> 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.

The following section illustrates another reason why the Act is unable to protect farmwomen; this time with an analysis of the Act's definition of 'employees'.

### **Labour rights: for every worker?**

Unions only allow workers to join when they are qualified as 'employees'.<sup>61</sup> 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 of an employer.'<sup>62</sup> 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.

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<sup>58</sup> S. Devereux, *The Farmer Doesn't Recognize*, 35.

<sup>59</sup> Republic of South Africa, *Labour Relations Act*, no. 66 of 1995, Section 39 (1)(a).

<sup>60</sup> C. Webb, 'Between Precarity and Paternalism: Farm Workers and Trade Unions in South Africa's Western Cape Province' *Global Labour Journal* 8.1 (2017) 56.

<sup>61</sup> Fletcher, *Women in Agriculture*, 47.

<sup>62</sup> Republic of South Africa, *Labour Relations Act*, no. 66 of 1995, Section 213.

According to the South African scholar Stephen Greenberg, the exclusion of independent contractors from the Act has facilitated the process of casualization, a process where employment contracts shift from permanent positions to short-term positions. Greenberg states: 'There is evidence that employers in different sectors have convinced their employees to sign contracts converting them into independent contractors - even when their work remains unchanged.'<sup>63</sup>

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.<sup>64</sup> In the case of farmwomen however, many stay on the same farm but are only granted contracts that do not last that long.<sup>65</sup> Consequently, farmwomen do not qualify as employees and are therefore not legally allowed to join unions. Nonetheless, since a number of male farmworkers are organized in unions, farmwomen might be able to reap certain benefits of their husband's membership.

## **Conclusion**

This chapter has given two reasons to explain why the LRA is unable to protect farmwomen. First, the Act has set a threshold for collective bargaining that is unattainable for farmwomen because of the wide dispersion of farms and the unattractive nature of the group's seasonal employment to unions. The LRA does not take these two findings into account. It presupposes a sector of employment in which workers are easily approachable by unions and have permanent jobs. Moreover, the analysis has revealed that in determining who qualifies as an 'employee', the Act fails to include seasonal workers who work less than three months. As a result, women who work on farms are unable to legally join a union. Consequently, the group is unable to seek legal protection from unions and are likely to remain vulnerable to exploitation. It is for this reason that this paper does not share the views of Kritzinger and Vorster, who claim that the post-apartheid labour legislation has led to the empowerment of female farmworkers. This will be demonstrated further in the chapter that follows, which will show the inability of tenure legislation to protect farmwomen.

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<sup>63</sup> S. Greenberg, *Women Workers in Wine and Deciduous Fruit Global Value Chains* (n.p. 2004) 6.

<sup>64</sup> Fletcher, *Women in Agriculture*, 50.

<sup>65</sup> Ibid.

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



## Introduction

The previous chapter has critically evaluated the ability of the labour legislation to protect women who work on farms. It found that the stipulations of the LRA do not take the dispersion of farms and the seasonal nature of the employment of farmwomen into account. This second chapter will examine the tenure legislation, another body of law that could be used for the protection of farmwomen. For many farmworkers, the farm is not just their place of employment, but also their place of residence – a concept known as ‘tied housing’.<sup>66</sup> When a farmworker is dismissed, the worker loses his/her right to reside on the farm and may be faced with an eviction.<sup>67</sup> Hence, legislative protection in this area holds significance to workers in rural areas. This chapter will therefore examine the ability of tenure legislation to protect farmworkers. First, it is necessary to provide background information regarding the tenure position of the group.

## Tenure rights: a contextual background

Between 1950 and 1994, almost 5 million people were evicted from white-owned land.<sup>68</sup> Farm owners could freely evict farmworkers because the group was not granted tenure rights.<sup>69</sup> This changed after the democratic elections of 1994, with the adoption of the Extension of Security of Tenure Act (ESTA). Moreover, the Land Claims Court (LCC) was appointed to deal with cases of forced removals.<sup>70</sup> In the same year, a Gender Policy document was approved by the Department of Land Affairs that aimed to address the discrimination against women with regard to land- and tenure rights. Measures that were to be taken to achieve this goal included the removal of legal restrictions on women's access to land and the promotion of women's active participation in decision-making.<sup>71</sup>

These measures were not welcomed by everyone. The ESTA was opposed by many farmers and their unions, with the backing of the National Party (NP), the Conservative Party (CP), the Freedom Front (FF) and the Inkatha Freedom Party (IFP). The South African newspaper South African Land News Online explained this by stating that ‘farmers and political parties are

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<sup>66</sup> R. Hall, K. Kleinbooi and N. Mvambo, *What land reform has meant and could mean to farm workers in South Africa* (Stellenbosch 2002) 5.

<sup>67</sup> Republic of South Africa, *Extension of Security of Tenure Act*, 62 of 1996, section 8.2.

<sup>68</sup> N. Pons-Vignon and W. Anseeuw, ‘Great expectations: Working conditions in South Africa since the end of apartheid’ *Journal of southern african studies* 35.4 (2009) 893-894.

<sup>69</sup> Centre for Rural Legal Studies, ‘New agricultural labour relations legislation’ *Review of african political economy* (1994) 449.

<sup>70</sup> *Ibid.*, 32.

<sup>71</sup> Department of Land Affairs, *White Paper on South African Land Policy* (Pretoria 1997) 13.

bitter about the power imbalance that is now due to change so dramatically.<sup>72</sup> The new legislation would thus result in a power imbalance, as it would mean that these farmers and political parties could no longer exert control over farmworker's tenancy.

For farmworkers however, the Act was received as a victory. The article described the right of farmworkers to be given sufficient notice before evictions as a 'breakthrough'. For the first time, the tenure position of farmworkers, 'who have been living in fear and uncertainty' was heard- and addressed by the government.<sup>73</sup> 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.'<sup>74</sup> In reaction to the opposition, the Minister of Land and Agricultural Affairs Derek Hanekom argued: "those of you who welcomed this bill sleep well tonight, and those of you who opposed it go and talk to your consciousness."<sup>75</sup>

In spite of all good intentions, however, the number of evictions that occurred post-apartheid did not decline. The Nkuzi Development Association estimated in 2005 that approximately 930,000 farmworkers have been evicted since 1994. This number has increased by 13 per cent compared to the decade before the first democratic elections.<sup>76</sup> These findings are remarkable. How is it possible that the number of evictions has increased – after the ESTA was adopted? Why is the Act unable to protect farmworkers? This chapter seeks to explain these questions. It begins with an overview of the debate concerning the effectiveness of the ESTA. The second part deals with the impact of the Act on farmwomen specifically.

## Historiography

Much of the academic literature evaluating the ESTA has emphasized its limited effectiveness.<sup>77</sup> One example is the study by the South African scholar Ruth Hall, in which she highlights the hostile reactions of farmers and their representative organizations to the Act. Hall cites Mr. van Dyk, chairperson of the Cape Fruit Producer Employers Organization, who states that none of the farm owners who are a member have plans to make housing improvements because of the

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<sup>72</sup> A. B. Ali-Dinar, 'Evictions and South Africa's Security of Tenure Bill', South Africa Land News Online, 5 September 1997.

<sup>73</sup> Ibid.

<sup>74</sup> Cited in: R. Hall, *What land reform has meant*, 3.

<sup>75</sup> A. B. Ali-Dinar, 'Evictions and South Africa's Security of Tenure Bill', South Africa Land News Online, 5 September 1997.

<sup>76</sup> Nkuzi Development Association, *National Evictions Survey. Briefing to Parliamentary Portfolio Committee for Agriculture and Land Affairs* (Pretoria 2005) 10.

<sup>77</sup> See for example F. White, 'Deepening democracy', 683, M. Visser, *Farm Workers' Living and Working Conditions*, 84 and N. Pons-Vignon, 'Great expectations', 895.

ESTA.<sup>78</sup> This is because the Act requires farm owners to provide farmworkers with 'suitable alternative accommodation', which should be no less favorable to the farmworker's situation prior to eviction.<sup>79</sup> As a result, farmers have become more reluctant in improving the standard of housing.<sup>80</sup>

The South African scholar Shamim Meer is more concerned with the provision of the Act to promote gender equality. Meer has examined the land reform programs which aim to ensure the participation of women in decision making processes. Evidence from the pilot in the Western Cape shows that women's participation is poor.<sup>81</sup> Meer attributes this to the staff profile of men, who are likely to have a 'traditional background'. These traditional values are further explained in the study by the South African scholar Cheryl Walker, who cites the Chairperson of the Community Trust:

"I am the manager of my household. I have knowledge about a number of things. Therefore, I don't want my wife getting involved because she might fumble and mess things up. A woman will do things in a female way and mix things up, but the man will be held responsible should there be a problem. When police come, they ask for the man. Women should follow their husbands."<sup>82</sup>

In this case, the existing power dynamics seem to hinder women from participating in decision making processes.

The abovementioned studies demonstrate different explanations for the weak implementation of the ESTA. Still, little is known about the way in which the stipulations of the Act itself provide for women's tenure rights. The next section will therefore go on to focus on this issue.

## **Secondary rights**

The Nkuzi Development Association found that women and children comprise over 75% of those evicted from farms.<sup>83</sup> 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

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<sup>78</sup> R. Hall, *What land reform has meant*, 5.

<sup>79</sup> Republic of South Africa, *Extension of Security of Tenure Act*, 62 of 1996, section 10(2).

<sup>80</sup> R. Hall, *What land reform has meant*, 5.

<sup>81</sup> S. Meer, 'Gender and Land Rights: The Struggle over Resources in Post-Apartheid South Africa' *IDS Bulletin* 28.3 (1997) 138.

<sup>82</sup> C. Walker, 'Piety in the sky? Gender policy and land reform in South Africa' *Journal of Agrarian change* 3.1-2 (2003) 30.

<sup>83</sup> S. Seehaam, *Evictions; towards a transformative interpretation of the constitutional requirement of considering 'all relevant circumstances'* (Cape Town 2006) 53.

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.'<sup>84</sup> On farms, this has led to the discriminatory consequence that land owners have defined women's tenure rights as 'secondary'.<sup>85</sup> So how does that influence farmwomen's tenure rights in the case of evictions? In the FDG, one farmwomen stated:

"My husband doesn't work anymore because he is 60 years old. What can happen? Because I saw it already with others. The husband is dismissed or gets a better offer on another farm and then the farmer comes and says they have to empty the house and in one month they have to leave. It is important for me to know in case it happens because the farmer can do what he wants."<sup>86</sup>

This citation indicates that the woman does not feel protected, as she is dependent on her husband for her tenure position.

The legal case of the Landbou Navorsingsraad versus the Klaase family serves as another illustration. The case was sent for review by the Land Claims Court (LCC), who in turn delivered a judgment that is in accordance with the ESTA. In this case, an eviction order was granted against the dismissed farmworker Jan Klaase. Klaase lived on the farm with his wife Elsie and their three children and two grand-children. Should the eviction order be executed, they would be rendered homeless.<sup>87</sup> Elsie Klaase stated that she had been an employee on the farm and was entitled to housing because of her contract of employment. The LCC did however not approve her claim. The judge 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.<sup>88</sup> In other words: because her husband was in charge of the household, Elsie Klaase did not qualify as an 'occupier'. Instead, she was referred to as a 'resident'. As a result, Mrs. Klaase's application for a suspension of the eviction order was dismissed and she – as well as her family - did not receive protection from the ESTA.<sup>89</sup> Similar decisions were made in the cases of Venter versus Claasen and Dique versus Van der Merwe.<sup>90</sup> These cases have been criticized by the South

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<sup>84</sup> 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

<sup>85</sup> Seehaam, *Evictions*, 53.

<sup>86</sup> Focus Group Discussion, De Doorns, 5 may 2017.

<sup>87</sup> Land Claims Court, *Case No. 09R/2014*, paragraph 13.

<sup>88</sup> *Ibid.*, paragraph 23.

<sup>89</sup> Land Claims Court, *Case No. 09R/2014*, paragraph 27.

<sup>90</sup> Seehaam, *Evictions*, 55.

African scholar Seeham Samaai, who states that the treatment of women as secondary occupiers has been perpetuated by these cases.<sup>91</sup>

## **Conclusion**

This chapter has identified that the ESTA is unable to protect farmwomen because they do not qualify as occupiers of their land. As a result, when a male farmworker is dismissed and his right to reside is terminated, his wife is equally vulnerable to eviction. Farmwomen are thus not only dependent on the farmer for their livelihoods: they are also dependent on their husband's actions. Due to this patriarchal practice, the tenure rights of farmwomen remain weak and they do not receive protection from the ESTA. This will be explained in further detail in the chapter that follows, in which the theory of intersectionality will shed light on the issue.

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<sup>91</sup> Ibid.

### 3. An Invisible Group

#### **Introduction**

The first two chapters of this paper have described the inability of the LRA and the ESTA to protect women who work on farms. This chapter aims to explain this finding by using the theory of intersectionality, which examines the effects of the simultaneous interaction of two subordinate identities. As was noted in the introduction, this paper has chosen to focus on the intersection of gender in combination with rurality, because it is the element of rurality that distinguishes the position of farmwomen. The theory will be used to address the differences between the lived experiences of farmwomen in relation to other groups. Moreover, it will allow for a critical reflection of the inclusive nature of the legislation. The chapter will begin with an overview of the literature that deals with the intersection of gender and rurality. It will then move on to examine the key question: how can the weak legal position of South African farmwomen be explained by using an intersectional lens? Finally, the chapter will present the practical implications of these findings.

#### **Historiography**

Rarely are gender and rurality viewed as worth studying in their own right.<sup>92</sup> There is only a small body of literature that recognizes the impact of the two factors in relation to South African farmwomen. One example is the study by Vasu Reddy, Lisa Wiebesiek and Crystal Munthree. In their article, the South African scholars give an overview of the experiences of women living in rural areas with regard to HIV infection. Drawing on interviews, these scholars argue that 'women living in rural areas face serious challenges and in some cases complete inability to access treatment and ongoing care because they cannot afford it.'<sup>93</sup> Because the circumstances of rural women and urban women are different, programs active in rural areas should be adapted to local realities.<sup>94</sup> This study demonstrates that the notion of rurality results in an experience that is different from other women. In another part of the study, the scholars argue that the South African labour legislation is successful in recognizing, acknowledging and enshrining the human and constitutional rights of all South Africans.<sup>95</sup> This argument is questionable because, as the first chapter of this paper has shown, seasonal workers – like most female farmworkers - are excluded from legal protection under the LRA, as they do not qualify as 'employees.'

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<sup>92</sup> R. Moletsane and S. Ntombela, 'Gender and Rurality in southern African contexts: An introduction' *Agenda* 24.84 (2010) 5.

<sup>93</sup> V. Reddy, C. Munthree and L. Wiebesiek, 'Rural women, HIV and human rights abuses In South Africa: A critical review' *Agenda* 24.84 (2010) 30.

<sup>94</sup> *Ibid.*, 32.

<sup>95</sup> *Ibid.*, 33.

While Reddy et al. focus on the differences between rural and urban women, the German scholar Johanna Kehler points towards the differences between male and female farmworkers. She states: “Since women, based on their reproductive and care-taking roles, are the main consumers of services, women are mostly affected when services are inadequate.”<sup>96</sup> For example, when the lack of access to clean water led to a cholera outbreak in rural communities, women had to take care of the sick and were unable to work. A similar observation about the difference between male and female farmworkers is made by the Australian scholar Fiona White, who addresses the unequal workload between the two. This is illustrated in the following table, in which a group of farmwomen from the Western Cape describe their working day in comparison to those of men on the farm.<sup>97</sup>

*A Typical Day*

<i>Women</i>	<i>Man</i>
5am I wake up and go to the toilet	5am Sleeping
6am I prepare to go to work	6am Sleeping
7am Out of the train in the station to work	7am I wake up and dress
8am Start work – plant grapes, remove seeds	8am I eat all the food that the women have cooked
9am I am working	9am I am at the shebeen
10am I am working	10am I am drinking
11am I am working	11am I am drinking
12am Lunch	12am I am drinking more
1pm I start to work again	1pm I am lying down
2pm I am working	2pm I am lying down
3pm I am working	3pm I wake up and go to the shebeen
4pm I am working	4pm I drink more alcohol
5pm I am working	5pm I am at the shebeen
6pm I am working	6pm I am at the shebeen
7pm I arrive at home and start to cook food for supper and wash myself	7pm I am at the shebeen
8pm I dish supper	8pm I come back to see if the wife has cooked after work
9pm I wash dishes after supper	9pm I discover that she has not cooked and punish her
10pm I sleep	10pm I force her to cook and eat all that food
11pm I sleep	11pm I lie down in the bed with my muddy shoes
	12pm I am sleeping

This table illustrates the typical gender relations within a farm community in the Western Cape. According to this group, women spend the majority of their days working, whereas men seem to be more concerned with relaxing, drinking and ‘eating all the food that the women have cooked.’ Moreover, the routines that the women describe reveal that little time is left for participation in decision-making processes, which, as noted in the previous chapter, the Gender Policy document of the Department of Land Affairs seeks to promote.

<sup>96</sup> J. Kehler, ‘Women and poverty: the South African experience’ *Journal of international women's studies* 3.1 (2001) 46.

<sup>97</sup> F. White, ‘Deepening democracy’, 679.

Taken together, all studies appear to demonstrate that the lives of farmwomen are unique. The position of the group is different from male farmworkers as far as their workload is concerned. Additionally, their limited access to healthcare distinguishes them from women who work in urban areas. Kehler argues that the legislation can be used as a measure to eliminate this inequality, with farmworkers being entitled to 'protective labour legislation.'<sup>98</sup> However, she does not specify whether the stipulations of the law are able to take the unique position of farmwomen into account. 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? The following section will move on to examine the latter.

### **Intersectionality and farmwomen's rights**

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. The report by HRW found that even when some women worked year round, they were still not considered 'permanent' laborers.<sup>99</sup> This attitude prohibits female farmworkers to join a union since they favor permanent workers. Moreover, according to the LRA, the contracts of seasonal workers on farms do not last long enough to qualify as an 'independent contractor' or 'employee.'<sup>100</sup> As a result, they are not legally allowed to join unions. 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. Moreover, 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 15 times more likely to own a motor vehicle.<sup>101</sup> Additionally, it is common for rural women to only travel to the 'outside world' with the permission

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<sup>98</sup> Kehler, 'Women and poverty', 49.

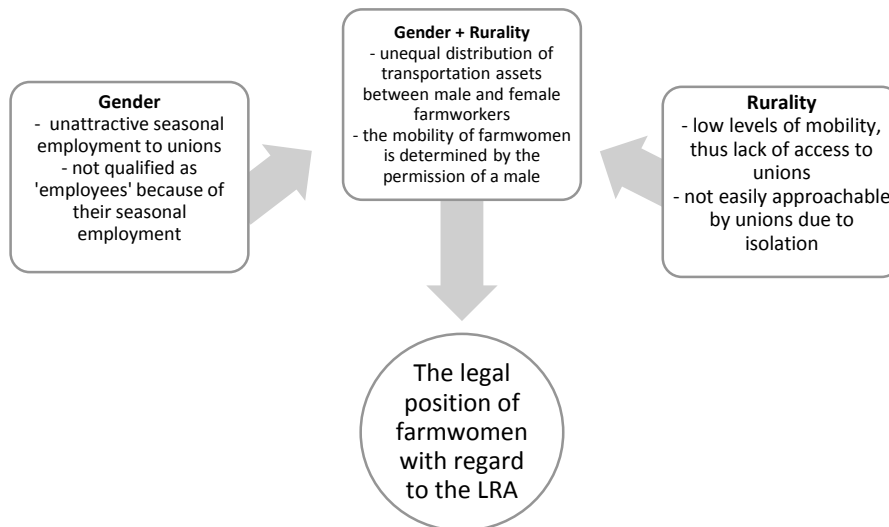
<sup>99</sup> Human Rights Watch, *Ripe with abuse*, 26.

<sup>100</sup> Fletcher, *Women in Agriculture*, 50.

<sup>101</sup> M. Aphane, R. Dzivakwi and P. Jacobs, 'Livelihood strategies of rural women in Eastern Cape and Limpopo' *Agenda* 24.84 (2010) 69.



of the spouse.<sup>102</sup> Thus, the inability of farmwomen to join unions cannot be explained solely by gender inequality. This is further illustrated in the chart below.

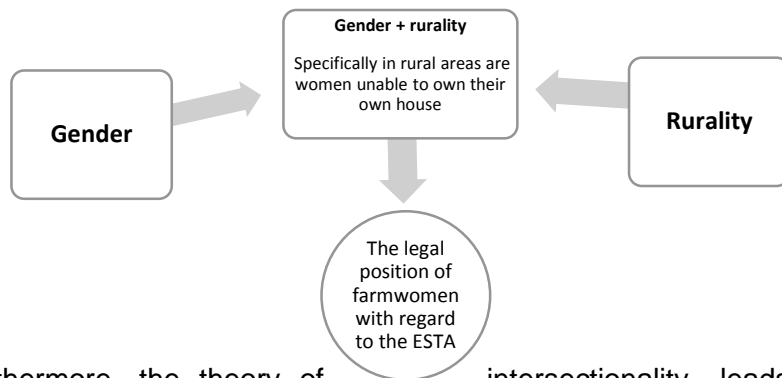


In this case, access to unions for the group is hindered by the impact of both gender and rurality, as well as the impact of the two combined. When looking through this intersectional lens, the low unionization rate of farmwomen can be understood more clearly. Still, for collective bargaining to be possible, the LRA requires a high unionization rate. The Act does not take their intersectional experience into account – thereby leaving farmwomen invisible.

As mentioned in the second chapter, the ESTA, adopted to protect the most vulnerable groups, offers little protection to farmwomen. Rights are only granted to the ‘occupier’.<sup>103</sup> 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 – as shown in the graphic below.

<sup>102</sup> Cheitman, ‘Heritage and politics’ 22.

<sup>103</sup> Seehaam, *Evictions*, 53.



Furthermore, the theory of intersectionality leads to another insight. Theorist Adele Norris argues that rather than just limiting itself to an analysis of diversity, intersectionality also examines ‘how power is structured and exercised.’<sup>104</sup> The legislation shapes ‘who gets what’ and ‘who get left out’, thereby functioning as a power structure.<sup>105</sup> This becomes apparent in the case of the LRA and the ESTA, when examining their language and definitions of what is meant by an ‘employee’, ‘independent contractor’ and an ‘occupier’. 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 – in the words of Norris - ‘get left out’.

Thus far, this chapter has conceptualized the relation between intersectionality and farmwomen’s weak legal position at a theoretical level. Let us now consider what these findings imply on a practical level. How can the legislation be operationalized in a way that does advance the interests of farmwomen? One answer has been given in the study by the Dutch scholar Mieke Verloor, who writes about a ‘structural approach’. This entails that other structures of society, such as social movements or trade unions, could adopt an intersectional approach. These structures should examine the way in which they realize the existing regulations of the law and examine how their policy can be modified to promote equality.<sup>106</sup> For example, within the management of trade unions, oppressed groups could be given more power of control to allow for their voices to be heard. However, in the case of farmwomen, this approach seems fruitless because of their low levels of mobility and limited access to transportation assets.

Another, more radical approach is suggested by the American theorist Johanna Bond, who criticizes the tendency of the United Nations to neglect violations that occur simultaneously

<sup>104</sup> Norris, ‘Rural women’, 455.

<sup>105</sup> Ibid.

<sup>106</sup> M. M. T. Verloor, *Intersectionaliteit en interferentie: Hoe politiek en beleid ongelijkheid behouden, bestrijden en veranderen* (Nijmegen 2009) 19.

along different axes of identity.<sup>107</sup> She states that the system privileges 'gender' as a category of analysis, while excluding other identity categories.<sup>108</sup> In doing so, the current system 'fragments' human rights, which prevents women from being fully protected by the law. Bond concludes that rights violations can only be accommodated when human rights treaty bodies are thoroughly restructured.<sup>109</sup> This paper has shown that the rights violations of farmwomen occur along the axes of both gender and rurality, which the LRA and the ESTA fail to address. Thus, in order to improve the position of farmwomen, these Acts need to adopt amendments to include the group into their definitions. Additional recommendations will be discussed in further detail in the final conclusion of this study.

## **Conclusion**

In sum, the intersectional approach that this chapter has taken, has led to the insight that the lives of farmwomen are complex and different from other groups, as they are simultaneously impacted by gender and rurality. In essence, without using this intersectional lens, farmwomen may be similarly addressed as male farmworkers or as urban women from a different class. Consequently, the special needs of this group may not be visible. This outcome can be observed in the stipulations of the LRA and the ESTA, which seem to hold a myopic approach to rights. This helps to understand why the legislation is unable to protect women who work on farms.

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<sup>107</sup> J. E. Bond, 'International intersectionality: A theoretical and pragmatic exploration of women's international human rights violations' *Emory Law Journal* (2003) 185.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

## Conclusion

In his 1990 speech, Mandela condemned the lack of legal protection for farmworkers. This paper has shown that after 25 years of democracy, little has changed for women who work on farms. The aim of this paper 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.

In chapter one, it was found that the LRA has set a participation threshold of 30% to allow unions to collectively bargain. This requirement can never be met by farmwomen because of their low levels of mobility and seasonal employment. Moreover, because of their short term contracts, farmwomen do not qualify as employees in terms of the Act. As a result, the LRA does not grant them the right to join a union. Chapter two has shown that the ESTA does not consider farmwomen as occupiers of their land. Rather: the group has to derive tenure rights through males. Consequently, when the husband of a female worker is dismissed and is facing an eviction, his wife is equally vulnerable – as was the case for farmwoman Elsie Klaase. Chapter three adopted an intersectional lens and found that this weak legal position of farmwomen can be attributed to the barriers they face because of the simultaneous impact of gender and rurality. This results in a distinctive, complex position that is overlooked by both the LRA and the ESTA. In essence, the Acts assume individuals to be a permanent, male workers, residing in urban areas. By not including farmwomen in these definitions, the legislation contributes to a weak legal position for the group – leaving them vulnerable to exploitation.

Other researchers in this field of study, like Fletcher and Kubik, and Oberhauser and Pratt, have attributed farmwomen's vulnerability to the ideologies that were created during the times of colonialism and apartheid; notions that have evolved over time. Oberhauser and Pratt argued that these ideological notions have resulted in the exclusion of farmwomen from property ownership. This paper however provides a new point of departure from which to view the vulnerability of farmwomen. As chapter two has demonstrated, the ESTA excludes farmwomen from property ownership. In other words: explanations for farmwomen's vulnerability are not only found in the time preceding 1994. The post-apartheid legal system continues to play a role in reaffirming their insecure position.

Despite political promises and promising laws, the position of farmwomen has been stagnant for 25 years. 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'. Nevertheless, these legislative changes are not enough to improve the position of this group. The negative impact of rurality and gender inequality on farmwomen needs to be addressed in a broader, societal context. Envisaged is an approach that takes intersectionality into account. For example, policymakers of different kinds of expertise, such as gender and land affairs, need to come together to understand how certain categories of rights violations can intersect. Coherent, integrated policies need to be designed that more effectively deal with the different dimensions of identity, gender and rurality. Additional recommendations will be made in the section that follows.

## Recommendations

Based on the findings of this study, several practical and scientific recommendations emerge. First, it was found that farmwomen are highly dependent on the farm owner as well as their husbands for their livelihoods. There is, therefore, a need for the development of programs that promote empowerment and self-reliance among the group. This encompasses a recommendation to policymakers. One example of this can be seen in the community projects that have been established in the Limpopo province. These projects, which include sewing and pottery groups, were found to contribute to livelihood strategies and provide the potential for empowerment among these rural women.<sup>110</sup> Similar development projects need to be developed that recognize the needs of farmwomen. Another recommendation for future practice includes the insecure tenure position of the group. A key question that arises from this study is: how can farmwomen's ownership of property be promoted? For this, independent housing contracts need to be developed in the agricultural sector. The government is called upon to tackle this issue.

If the scientific debate is to be moved forward, further research is recommended in two areas. First, the intersectional approach that this paper has adopted 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. Second, a limitation of this study is that it only examined the LRA and the ESTA in relation to the vulnerability of farmwomen. However, the 2011 HRW report found that many farmwomen were not granted maternity leave, despite Sectoral Determination 13 providing their right for the latter.<sup>111</sup> Further studies could examine why this Act is unable to protect farmwomen – and how that relates to intersectionality.

Notwithstanding this limitation, the present study offers a valuable insight: the general perception of the South African 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.

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<sup>110</sup> Oberhauser, 'Women's collective economic strategies', 225.

<sup>111</sup> Human Rights Watch, *Ripe with abuse*, 69.

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