

Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw



Joint Research Project by



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"We leave home on Sunday evenings and return home on Fridays. We are transported in an overcrowded bakkie with mattresses, pots and other essentials... As a result of this, I once fell off the bakkie. At the end of the week I often come home with just R30 because I have to buy food on 'the book' and have to pay this back at the end of each week."



"... no written contracts between labour brokers and workers, third world relationship between brokers and workers, no guarantee regarding minimum wage to be paid."

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CHAPTER ONE

Executive Summary

The research was undertaken in response to a growing awareness of the high levels of labour rights violations experienced by farm workers who are contracted through labour brokers.

The key research objectives were to develop a greater understanding of the specific experiences of farm workers in relation to labour brokers as well as to identify key legislative shortcomings with regard to protecting the rights of this vulnerable category of agricultural worker.

The research commenced in August 2007 with a **sectoral consultation process** aimed at identifying the most significant concerns and areas of interest of key role players in the sector which would lay the basis for the research design. The consultation process was followed by a comprehensive desktop literature review of local and international studies, laws and policies focusing on labour brokers. The fieldwork consisted of a series of interviews and focus group discussions in which 107 seasonal workers, 12 labour brokers, 5 employers and a wide range of civil society organisations, trade union officials and government departments participated.

The fieldwork focused exclusively on the apple-producing town of Grabouw which is located in the Western Cape Province. The fieldwork was conducted between November 2007 and February 2008, during what is known as the 'thinning season' in Grabouw. Eight focus groups were held with farm workers and labour brokers. In some instances one-on-one structured interviews were held with labour brokers to supplement information obtained from the focus group discussions.

International case studies investigate Australia, Thailand, Namibia and the United States of America. The most pertinent findings of these case studies reveal that labour brokerage is critically linked to the migration of workers, increased flexibility and minimum costs, and the lack of unionisation of migrant workers and labour brokers. The United States of America has enforced the regulation of brokers via registration, bonds and joint liability. This case study demonstrates a model, aspects of which could be replicated in South Africa. The Namibian Constitutional challenge has raised some interesting considerations for whether South Africa decides to regulate or ban labour brokers. The current political environment is filled with debates regarding this issue, with Cosatu leading the call for banning labour brokerage while President Zuma argues for a more conservative approach of initially regulating labour brokerage and only banning it later.

The international legal framework highlights some pertinent ILO Conventions, some ratified by South Africa and some not. The most important programme of action which South Africa needs to ensure incorporation is in respect of the Decent Work agenda which could go a long way in ensuring the protection of workers' rights. It is also important to note that the ILO has developed a Private Employment Agency Convention which effectively protects the operation of labour brokers. This Convention has however, as yet, not been ratified by South Africa but does have implications for the decision about whether or not to ban labour brokers.

The South African legal framework extrapolates on the notion of a standard employment relationship; however the relationship between employer, labour broker and farm worker does not fall within such a definition. Most importantly, the South African legal framework fails clearly to define an employee as there is a presumption in the Basic Conditions of Employment Act and

the Labour Relations Act as to who constitutes an employee. The legal problem is the question of who constitutes an employee and the distinction between an employee and an independent contractor.

Legislative gaps and challenges which are identified in the research report include: the lack of definition of casual or seasonal workers; collective bargaining that does not cover casual or seasonal workers; the lack of a clear distinction between an employee and an independent contractor; no clear legal imperatives for the employer and contractor regarding liability; inadequate protection for farm workers who are recruited by labour brokers; and the lack of an adequate registration and regulation process for labour brokers within the current legal framework.

Some of the key research findings include: all labour brokers were previously employed as farm workers; seasonal workers do not receive the same advantages and benefits as permanent workers; farm workers are paid below the minimum wage by labour brokers. Further, the transportation and accommodation of seasonal workers is a concern highlighted by the research report; there is a lack of clarity about who the farm worker's employer is; and a lack of clear division of roles and responsibilities between the employer and the labour broker.

The research further underscores the fact that labour brokers fail to understand labour legislation which compounds issues related to non-compliance such as their failure to register farm workers for UIF and Workmen's Compensation. The employment conditions of seasonal and migrant workers are also documented as being generally poor and women are still being discriminated against in respect of wages and the allocation of tasks.

The research shows that 9 of the 107 farm worker respondents are children between the ages of 15 and 18 years, which reflects some elements of child labour on farms in the Grabouw region. Another key finding is that migrant labour often replaces resident labour which impacts negatively on job opportunities for resident labourers. Further, seasonal workers are not unionised which renders them more vulnerable. Lastly, it is found that the nature of labour brokerage as a small emerging business poses significant challenges to the labour broker's ability to negotiate better wages and working conditions for farm workers.

Key recommendations include that a submission addressing the critical legislative gaps be made to the Department of Labour to ensure that South African labour law takes the three-tiered employment relationship and the legislative protection of seasonal and migrant workers into account. The implementation of and compliance with labour legislation needs to be monitored in respect of brokers and employers. The registration and regulation of labour brokers needs to be addressed by a further investigation and adaptation of the USA model. Further, the brokers' lack of management and labour skills needs to be addressed to ensure that they understand the legal framework and managerial skills required to fulfil their roles. The Department of Labour should conduct regular inspections on farms to ensure the compliance of both labour brokers and employers in order to avoid incidents involving the recruitment of child labour, and other human rights violations which are mentioned in the findings.

The Department of Transport needs to address the transportation of farm workers, while farmers need to be held accountable and jointly liable with labour brokers for any labour violations in respect of their workers. Tesco and Eurogap should continue pressurising farmers to comply with labour laws. Agribusinesses and farmers should be encouraged only to employ registered labour brokers and should be fined in the event of non-compliance. The rights of women seasonal workers need to receive particular attention to ensure fairness in labour practices. Trade unions

need to revisit their strategies for organising and engaging seasonal workers, and training on labour rights should be provided to seasonal workers.

Casualisation and the outsourcing of labour to labour brokers is not a phenomenon that will disappear in the near future. It has become a new way of doing business that allows employers to shift the burden of recruitment and compliance to labour brokers. The casualisation of labour also increases the number of seasonal workers and migrant labourers. This creates a less stable workforce and more opportunities for labour brokers and employers not to comply with labour laws.

It is important therefore to address the deficits both in legislation and in the implementation of existing legislation in order to ensure that seasonal workers, who are even more vulnerable than permanent farm workers because of the insecure nature of their employment, do not experience any further violations of their rights.

Key role-players such as civil society, government, trade unions and farmers are responsible for ensuring that the gaps and challenges which arise out of this non-standard employment relationship are addressed in order to minimise the present risk of the exploitation of farm workers, particularly seasonal and migrant workers. More specifically, civil society needs to advocate and lobby government to institute legislative changes and the strict regulation of labour brokers, while farmers need to be held accountable through only employing registered labour brokers.

More importantly, the labour movement, which has thus far largely failed to mobilise the fast-growing community of seasonal and casual workers, has an important role to play. If trade unions are to become effective champions for the rights of farm workers contracted by labour brokers, a radical shift in their current approach to the organisation of workers will be required. The various dimensions related to casualisation such as increased numbers of seasonal and migrant workers and the gender specific nature of seasonal employment requires unions to have a concrete strategy at the heart of their campaigns aimed at the increased unionisation of seasonal and migrant workers.

The research report finally presents advantages and disadvantages, as well as defines various positions for the different role players, in respect of both regulation and banning of labour brokers.

In conclusion, the increase in the casualisation of labour and labour brokerage is indicative of a changing landscape for labour law and practices in South Africa and presents many new and interesting challenges and opportunities for all role players strategically and collectively to engage in a different manner. Ultimately, all need to work in harmony to ensure the protection of farm workers with specific emphasis on advancing the rights of women seasonal and migrant workers.



CHAPTER TWO

Literature Review

The relationship between farm workers and farmers has been of concern for those who work with farm workers in the Western Cape and who have an interest in the impact that labour brokerage has on farm workers' livelihoods.

Casualisation in the agricultural sector is a recent and growing trend in the South African labour market. The impact of open markets and a more flexible labour market has led to an increase in mechanisation and, hence, an increase in the casualisation of labour. As a result of democratisation, globalisation, technology and import and export, the casualisation of the workforce has affected farm workers through the introduction of temporary employment offered by labour brokers.

To increase production and minimise the responsibility placed on farmers, labour brokers have emerged. They provide temporary employment to farm workers by entering into agreements with farmers who enjoy the benefit of the labour without adherence to the legal framework of labour legislation. Labour brokers 'take care' of the legal implications and derive benefit from providing temporary labour to farmers. However, the fact is that an unregulated environment for labour brokers exists, which if not regulated, will leave farm workers at greater risk of exploitation and with very little legal recourse.

Casualisation and the use of labour brokers have a negative impact on farm workers who have reduced powers of negotiation, benefits and job security. Amongst farm workers specifically, problems are being experienced by seasonal workers who could also be classified as temporary workers. Some of these problems include unfair treatment and inadequate benefits compared to those provided to full time farm workers.

Thus, the main objectives of the research were to investigate the extent of labour brokerage in the Western Cape Province and to explore the impact of labour brokerage on farm workers. In order to do so, it is necessary to investigate and identify deficits in policy and legislation pertaining to labour brokers.

In order to provide a foundation for the objectives of the research outlined above, the Literature Review briefly explores the relevant South African agricultural and labour literature, outlines applicable international case studies, and the relevant legal framework. The review forms the backdrop against which the research was undertaken and informed the development of the questionnaires that were utilised to obtain a quantitative and qualitative analysis of the extent and impact of labour brokers in the Grabouw area in the Western Cape province of South Africa.

Context

In understanding the issue of labour brokerage in South Africa it is important to extrapolate on colonialism and the politics of the day. Current debates are raging around the issue of labour brokerage within South Africa but it is important to take a step back historically to contextualise the issue.

It is well documented that farm workers in South Africa are among the most vulnerable workers, earning a basic minimum wage, suffering exploitation and a consistently unfair paternalistic relationship with their employers. In addition, women farm workers are more vulnerable and suffer injustices on farms simply due to their gender.

The paternalistic relationship between farmer and farm worker has been entrenched in the past as indigenous people in South Africa were systematically dispossessed through colonisation and apartheid. Farm workers, who were themselves previous landowners, became workers on land that they were dispossessed of as a result of apartheid. The farm workers who were unable to work due to health problems or old age were evicted from farms and sent to the homelands or reserves.¹

The experiences of dispossession for South Africans are different due to people's status in a society based on inter alia race, class and gender. In sum, the apartheid system turned indigenous and African landowners into labour tenants and farm occupiers. Land has always been an evocative issue in South Africa, raising tensions, emotions – a reminder of the inequalities of the apartheid system.

Given this backdrop, one can see how the recent addition of a 'labour broker' complicates the already negative, destructive and dependant relationship between farm owner and farm worker, in an ever-changing labour landscape. In recent newspaper articles, labour brokers have been equated with the slave owners of the colonial and apartheid era in South Africa. It is therefore not hard to imagine the strong opposition and political debates around the very existence of labour brokers within this already fraught employment relationship. This employment relationship cannot of course be viewed without situating it in an ever-increasing unstable economic situation both nationally and internationally.

COSATU urges Zuma to 'protect workers'. Call for law that bans labour broking.²

Cosatu is demanding that the government ban labour brokers outright, but both ANC Secretary General Gwede Mantashe and President Jacob Zuma said in the first few months of 2009 that the ANC is looking to regulate the sector, not to ban it.

This contrasts with statements made by Mdladlana in which he told numerous gatherings, including a chemical workers' union conference, that the ANC would ban labour brokers who he described as "no better than human traffickers".

Labour analysts have said that any attempt by the government to ban labour brokers would lead to a Constitutional Court challenge and there were other, more effective, ways of regulating the sector.

With Cosatu playing an instrumental role in Zuma's rise to the top of the ANC and his imminent inauguration as president of the republic, it is expected that COSATU will, in the near future, push government to start implementing Cosatu policies.

Cosatu spokesperson Patrick Craven said this in May 2009 "labour broking must be banned," claiming that labour brokers exploit workers to remain competitive by paying "poverty wages" and denying them benefits that are provided for by law.

Richard Pike, CEO of Adcorp, the biggest listed placement and employment company, said a ban on labour brokers is unworkable as it would put too many people out of work.

"The minister of labour is caught between a rock and a hard place because he has made an election promise that he can't fulfil", said Pike. "The minister has tried to pander to the unions to get backing for a role in the Zuma Cabinet."³

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1. Association for Rural Advancement, 10 years of subdued land reform, Mkhize, S, accessed at www.afra.co.za on 27 July 2009.
 2. www.saelections.co.za/articles/3989/cosatu-urges-zuma-to-protect-workers-call-for, accessed on 21 May 2009.

As evidenced from the above, this issue is raging with controversy. The debates have to be viewed against the current economic meltdown and the fact that the call for the banning of labour brokers may have the consequence of huge job losses. In addition, the Namibian example of the attempts to ban labour brokers gave rise to constitutional challenge, disguised forms of brokered employment and huge job losses. The question which arises is whether South Africa can handle higher unemployment in an already unstable economy? How do we ensure the protection of vulnerable workers in the current context? It is therefore important to investigate the extent to which labour brokerage is prevalent in the agricultural sector in South Africa, with a view to finding some answers to the many questions being raised in the political and economic context.

Background

Agriculture

Agriculture is one of the most important pillars of the economy in the Western Cape. It encompasses an area of 11.5 million hectares and produces between 55% and 60% of South Africa's agricultural exports, valued at more than R7 billion per year. Further, there are more than 9 700 farms in the province which have a combined asset base in excess of R680 million.⁴

South Africa exports agricultural products such as sugar, grapes, citrus, nectarines, maize (corn) and deciduous fruit. Wine and fruit production has seen the most dynamic development in the past 10 years. Livestock farming is also practised on South African farms which produce meat and milk.

While agriculture contributes less than 4% to GDP, it accounts for 10% of total reported employment in South Africa. However, investment and output growth are still below the necessary levels to reduce unemployment and to achieve an equitable income. Although the commercial farming sector is relatively well developed, people in some rural areas still survive on subsistence agriculture.

Issues that affect South African agriculture include environmental damage caused by misuse of the land and global climate change. The latter is particularly significant because South Africa is unusually vulnerable to changes in climate and, particularly, related scarcity of water.⁵

In the 1990s, fruit exports increased dramatically. Fruit is often produced on medium-sized commercial farms where employment is concentrated in growing and packing. There is a high level of informal employment and the workforce is predominantly female.⁶ Only permanent workers receive salaries all year round while temporary workers receive salaries on a piece-rate basis and manage to work about 4 months per year in the agricultural sector. Poverty is therefore rife for temporary or seasonal workers, who are often women, since it is very difficult for them to acquire work and to provide an income for the household during off seasons.⁷

The use of workers hired by third party labour brokers is increasing in the agricultural sector in South Africa. Studies indicate that labour brokers are mainly male and who recruit mainly female employees as seasonal workers.⁸

3. www.mg.co.za/printformat/single/2009-05-10-going-for-broke, accessed on 31 May 2009.

4. <http://www.elsenburg.com/economics/statistics/welcome.htm>, accessed on 10 September 2007.

5. http://en.wikipedia.org/wiki/South_Africa#Agriculture, accessed on 7 July 2009.

6. http://www.idrc.ca/en/ev-83649-201-1-DO_TOPIC.html, accessed on 10 September 2007.

7. Ibid.

8. Barrientos S, Female employment in agriculture: Global Challenges and global responses, University of Sussex, 2007, p.5.

The Feminisation of Labour

The overall increase in women's participation in the labour force has been termed the 'feminisation of labour'.⁹ While there has been an increase in the employment of women, the jobs available to them are poor quality and insecure, which makes women more vulnerable to exploitation. While agricultural production offers women the opportunity to enter into paid employment, casual employment does not allow women to access benefits and minimum wages.

Casual work also increases the risk of safety issues at work and casual workers are often required to work overtime, which is problematic for women with respect to childcare and other family responsibilities. This form of work often results in segregation and inequalities as, for many women, work is not a choice but is part of the unequal sharing of family responsibilities between women and men.¹⁰ Women generally hold various roles within their families, both that of caregiver and provider. This is so especially within the current economic context as women have no choice but to work to ensure the survival of their families. In this context, women often carry a dual role within the family unit. Women face a variety of challenges in the labour market.

- Women's burden of unpaid labour, childcare and household work;
- Women's high level of unemployment, especially in rural areas;
- Bias in access to skills training;
- Gender segmentation by industry and occupation, so that women have fewer choices than men and lower earnings;
- Women's predominance in agricultural work, casual work and informal activities;
- Gender differences in earnings for workers with similar education;
- Differences in benefits.¹¹

Despite all these challenges facing women they continue with seasonal work primarily because they lack viable alternatives.

Globalisation, Trade Liberalisation and Migration

In order to understand the increase in the casualisation of the workforce, it is important to investigate the factors that are contributing to this form of labour in South Africa. Three main factors are apparent: globalisation, trade liberalisation and migration.

Globalisation offers the potential for poverty reduction in the developing world but the reality is that many poor countries are not deriving this benefit and are instead stagnating. In South Africa, many small farmers rely on multinational marketing chains to enter into the global market. Often this partnership requires new storage and transport infrastructure, large set-up costs and marketing connections.¹²

In South Africa and Kenya it was found that skilled workers benefited from globalisation while unskilled workers did not. For example, increased technological processes favour skilled labourers while such processes serve as substitutes for unskilled labour, hence increasing inequality in the workplace. For globalisation to have a positive effect in South Africa, the government needs to engage in a process of strategic integration and active domestic pro-poor development policies.¹³

In addition, the agricultural sector has undergone many changes in recent years both in terms of liberalisation and restructuring. Trade liberalisation firstly encourages capital intensity to produce

9. Naledi, *Globalising poverty: the gender dimension to Job Losses, Casualisation and Poverty*, Liesl Orr, 2000, p.5.

10. *Ibid.*, p.7.

11. *Ibid.*, p.11.

12. United Nations University (2007) *Linking globalization to poverty*, Policy Brief, Number 2, p.3 and 4.

13. *Ibid.*

on a mass scale to meet global demands. The result is a decrease in labour and an increase in mechanisation which further results in an increase in seasonal labour and a decrease in full-time employees.¹⁴

In recent years there has been an increase in migration of people either across borders or across continents. Often migrants seek better employment opportunities in other countries. However, upon their arrival in the countries of their choice, women in particular may experience many problems including lack of access to formal employment, social security and health services.¹⁵ In addition, migrants generally have little or no access to rights. Without legal protection, they face harassment, violence, debt and increased poverty. However, the International Covenant on Civil and Political Rights¹⁶ provides protection to migrants including freedom from forced labour and from inhuman or degrading treatment. This Covenant, therefore, allows migrants to access their rights to health and social security within the countries to which they have migrated.

Many migrants are poor and under-skilled and migrate for a variety of reasons, often as a result of conflict, unrest and poor economic conditions in their countries of origin. Migration has many positive outcomes such as the ability to increase income, the acquisition of new skills, the improvement of social status, the accumulation of assets and the improvement of the quality of life of both those migrating and their families.¹⁷

As a result of the factors mentioned, casualisation of labour is increasing in South Africa, with migrants seeking quick employment for very little money. They often engage with labour brokers in the regions in which they find themselves in order to access informal or casual employment opportunities. It is important to note that in South Africa, migrants may also include people who move from a rural to an urban area within South Africa.

International Case Studies

Australia

In Australia, casual work is commonly understood to encompass jobs that attract an hourly rate of pay but very few other rights and benefits for the employee. These other rights include the right to notice, the right to severance pay and most forms of leave that are normally awarded to permanent employees. It is an accepted principle that casual workers suffer in respect of their rights and benefits as opposed to their permanent employee counterparts. It is also apparent that casual employees are more vulnerable to summary dismissal, variation in hours and days of work and underpayment.¹⁸ This is true for casual workers in South Africa as well, who do not enjoy the same benefits as permanent workers.

The Australian labour market has seen an increase in casualisation in new workplaces and firms. The main reasons for the increase in casual labour in Australia are structural changes in industries, privatisation and a reduction in unionisation. For employers, the increase in casual labour ensures increased flexibility and minimum costs. At the same time there may be negative impacts on the economy since casual work can decrease innovation and productivity as well as limit skills formation. In Australia, the majority of casual labour consists of students and women, with one

14. Naledi, *The extent and effects of casualisation in Southern Africa: Analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe*, Oupa Bodibe, November 2006, p.9.

15. DFID, *Moving out of poverty-making migration work better for people*, 2007, p.4.

16. Of 1966, ratified by South Africa in December 1998.

17. DFID, op. cit.

18. May, Campbell and Burgess, *The rise and rise of casual work in Australia: Who benefits, who loses?* Paper for Seminar 20, Sydney University, p.1.

third of women workers performing casual labour. The reason for this is that women often have to combine childcare with income generating activities. For this reason, women choose casual employment because it allows for a more flexible work environment.¹⁹

In Australia, labour brokerage takes place primarily when people from other countries come to work in Australia as is evident by the example provided below:

Slave Labour Claim Follows Building Accident

Compere: Tony Jones

Reporter: Andrew Geoghegan

TONY JONES: The South African High Commission claims a man badly injured in a construction accident in New South Wales last week was being used as slave labour. The High Commission says the construction company that brought the man to Australia had him discharged from hospital early, and then sent him back to South Africa to avoid being caught. With more on this story, here's Andrew Geoghegan. The construction accident at Lake Cargelligo in New South Wales left two men dead and three injured when scaffolding collapsed at this water tower. Two of the survivors remain in hospital but the third, South African Oagiles Malothone, was discharged from hospital just six days after being seriously injured.

ANDREW FERGUSON, CFMEU: He was then taken out of the hospital -- contrary to medical advice -- and taken out of the country. We believe now he's in South Africa and we're seeking to track him down to assist him in terms of underpayment of wages and his injuries and proper compensation.

The CFMEU says the black South African man was brought to Australia in July to work 12 hours a day, seven days a week and was paid \$100 a month. The union calls it slave labour. ANDREW FERGUSON: Well, basically, he was being paid starvation wages. According to the South African High Commission, Mr Malathone came to Australia illegally on a business visa which allows someone to develop investment opportunities.

ROSHEEDA ADAMS, SOUTH AFRICAN HIGH COMMISSION: He came in on a visa, the 456 visa, a business visa for a short stay he clearly can speak very little English and he's not skilled in any way so he managed to get into the country and he was exploited all the time. Ms Adams says Mr Malathone was brought to Australia by Anthony Beytel who died in the accident. Mr Beytel was the principal of BGA Projects, the construction company contracted by the New South Wales Public Works Department at the Lake Cageligo site. With help from Federal Police, the South African High Commission discovered that Mr Beytel's wife sent Mr Malathone back to South Africa. The congress of South African Trade Unions says Mr Malthone is a victim of a labour brokering service which provides slave labour to white South Africans around the world. What usually happens is the labour broker takes anything from half the salary to up to 80 per cent of the labourer's salary and that is paid over by the employing company. And the labourer is given just enough to buy food to sustain himself.

ANDREW FERGUSON: We in fact want a complete cessation to any visas being issued to employers to bring labour into the building industry in this country. South African officials are discussing their claims with the Department of Immigration.²⁰

This example demonstrates how labour brokers operate in other countries and how much exploitation is suffered by employees at the hands of labour brokers. Even though this example is not focused on agriculture, it is clear that some of the elements of exploitation at the hands of labour brokers is evident here in respect of poor wage payments and non-compensation for injuries sustained. The current study into labour brokerage in Grabouw reveals a similar level of exploitation within the South African agricultural context.

19. May, Campbell and Burgess, op. cit., p.5.

20. <http://www.abc.net.au/lateline/stories/s715241/htm>, accessed on 14 September 2007.

United States of America

Migrants are often used in the agricultural industry in the United States of America, with large farms hiring thousands of migrants on a temporary basis. Labour contractors are frequently responsible for moving migrants between farms. Migrants eventually regard labour contractors as the enemy because they charge high transportation and housing fees and offer very few hours of work. Trade unions, however, find it difficult to organise labour contractors.²¹

Between December and May, Florida produces virtually the entire US crop of field-grown fresh tomatoes. But conditions in the state's fruit-picking industry range from exploitation to forced labour. Tens of thousands of men, women and children are excluded from the protection of America's employment laws; they are banned from unionising, and work for low rates of pay.

The migrants are largely Hispanic, many of them from Mexico. They are paid 45¢ (US) (around 22p (GB) and approximately ZAR293) for every 32-pound bucket (approximately 14.51 kilograms) of tomatoes collected. A worker has to pick nearly two-and-a-half tons of tomatoes in order to reach the minimum wage.

Florida has a long history of exploiting migrant workers. These migrant farm labourers have no protection under US law and can be fired at will. For several years, a campaign has been under way to improve the workers' conditions.²²

In the last decade there have been six successful federal government criminal prosecutions in Florida for forced labour and slavery resulting in up to 15-year prison terms and the freeing of over 1 000 workers. The violations, as well as investigations by the Department of Justice, are ongoing. Forced labour and slavery are driven by the economic and legal context in which farm workers find themselves. These violations are enabled by:

- 1) discriminatory and inadequate labor laws;
- 2) failure to ensure basic economic and social rights;
- 3) economic structures enabling slavery through concentrated buying power which has driven down wages and fuelled inhumane working conditions.

The U.N. Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights "have the obligation to promote, secure the fulfilment of ensure respect of and protect human rights recognized in international as well as national law"²³ While the Norms are not binding, they provide valuable guidance for civil society actors, particularly those with great influence on human rights conditions in their fields.

Large corporate purchasers are in the best position to help eradicate slavery by a simple change of policy or priority. Even small increases in price, if passed on to the workers, would significantly improve their economic and social rights. Moreover, they are also well positioned to impose human rights codes of conduct on suppliers. Large purchasers are beginning to recognize their responsibility and influence within the agricultural sector.

In the 1960s, the government began to regulate contractors by means of registration, bonds and joint liability. In the first instance, the contractor was required to fill out an application form for a state license. They would be penalised with fines if they were discovered charging employees or workers for job matching without a license. Later, the government required contractors to post

21. Martin P. *Merchants of Labour: Agents of the evolving migration infrastructure*, International Institute for Labour Studies Geneva, ILO, 2005, p.4.

22. www.nesri.org/fact_sheets_pubs/modern%20Day%20Slavery%20in%20u.s.%20Agriculture.pdf, accessed on 7 July 2009.

23. <http://www.unhcr.ch>, 2003, A. General Obligations, accessed on 27 July 2009.

bonds to cover some of the wages owed to workers, and contractors were required to pass labour and related law tests before renewal of their license.²⁴

The last step implemented by the government, which remains contentious, is joint liability which requires that the contractor and employer are jointly and severally held liable for any labour violations. Enforcement in this instance remains difficult as most temporary employees do not have written contracts. There is currently a suggestion that there should be a presumption of joint liability if no written contract exists.

Another difficult issue concerned wage systems, as temporary workers were often paid on a piece basis and not according to the minimum wage.²⁵ Eventually the minimum wage was extended to migrants and the percentage on the piece-rate declined. This resulted in a triangular link between the minimum wage, the piece-rate and the productivity standards required of workers. For example, if the minimum wage is R5 an hour and the piece-rate is R10 a bin, a worker must pick at least 4 bins in an eight hour day to earn R40 which is the minimum wage. This example demonstrates a best practice model, which may be able to be replicated in order to hold labour brokers accountable, although USA still seems to be experiencing enforcement difficulties, which are a challenge in most countries.

Thailand Case Study

Samut Sakhon in Thailand is a key destination for migrant workers who travel from Myanmar with the assistance of informal brokers. Migrants pay the brokers for all services provided and this includes exploitative and hazardous travelling and working conditions.

Samut Sakhon is one of the wealthiest provinces in Thailand and is central to the seafood processing industry. Only 70 000 workers from Myanmar are registered in the province and this is largely due to limited access to gain legal entry and high registration costs. Myanmar workers have limited knowledge of their legal rights and are therefore subject to abuse and exploitation at the hands of brokers and employers who are interested in employing cheap labour.

Brokers are of Thai and Myanmar origin and collaborate with employers and law enforcement officials. Myanmar brokers will usually transport the workers to the Thai border where they will be handed over to a Thai broker who may either deliver them directly into employment or to the destination area where the workers will need to locate another broker to find work.²⁶

In Thailand, the employer sub-contracts all employment services to brokers. Some brokers only enter into contracts with one employer and others with many. This arrangement allows for brokers rarely to be held accountable and employers are never held responsible. The broker registers the worker for a work permit and health insurance. Brokers also limit freedom of movement of workers by withholding their working permits thus preventing them from moving from one broker to another. If a worker is desperate to leave a broker, they will pay the broker for their release.

Some recommendations that have been put forward to remedy this situation include the following:

- Enforcement of labour laws to protect migrant workers from exploitation and abuse;
- Ensure understanding of rights of migrant workers both amongst the workers and the employers;

24. Ibid., p.5.

25. Ibid., p.6.

26. Siren Field Report, Strategic Information Response Network, United Nations Inter-Agency Project on Human Trafficking (UNIAP): Phase II, Thailand, June 2007, p.3.

- The registration system of migrant workers should be revised to allow for registration for 3 to 4 year periods, on an ongoing basis at less cost and in migrants' own languages.²⁷

The International Labour Organisation told Myanmar on Saturday, 9 June 2009 to end forced labour.

The following are the specific measures recommended by the ILO's committee on labour standards:

- bring Myanmar legislation into line with the convention banning forced labour;
- amend the new constitution to remove a provision allowing forced labour;
- ensure the total elimination of forced labour which is persistent and widespread;
- prosecute and punish official perpetrators of forced labour, both civil and military;
- make an authoritative statement at the highest level confirming that forced labour is to be eliminated and perpetrators will be punished;
- approve a simply-worded brochure in accessible language explaining that forced labour is banned;
- stop harassing victims of forced labour who complain about it, and people who help them.²⁸

It is clear from this newspaper report that the ILO has come out against forced labour. It is also important in the context of the broader study on labour brokers to understand that there are clear links between labour brokerage, migrant workers, trafficking and forced labour in many countries.

Namibia

Labour brokering is called labour hire in Namibia and is regarded as a particular form of outsourcing which emerged in the late 1990s. Basically labour hire companies supply labour to third parties with whom they have a commercial contract. This labour hire practice applies to part-time and full-time employees.²⁹

In a study undertaken by Jauch, the view was expressed that employers use labour hire companies to cope with peaks in demand for employees, to reduce costs, to avoid industrial relations problems, to ensure greater flexibility in the workforce and also to avoid retrenchments and trade unions.³⁰ On the flip side of the coin, workers employed through labour hire companies are faced with job insecurity, low wages and poor working conditions, limited training and skills development and low levels of unionisation.

These workers are also often confused about who their employer is; whether it is the labour hire company or the client company. The labour hire workers are often paid much less than permanent workers and labour hire companies withhold at least 15-55% of workers' hourly wage rates as their fees. The workers do not receive paid leave, severance pay and are employed on a 'no work-no pay' basis. In addition, there is no job security as workers may be replaced, hired and fired at will, and permanent workers may also be replaced by labour hire workers which creates further and additional job insecurity for permanent workers.

Jauch found that most labour hire workers earned R3-6 per hour, they enjoy very few benefits and most of them work between 37 to 46 hours per week. Comparatively speaking, this equates

27. Ibid., p.6.

28. <http://in.reuters.com/article/southAsiaNews/idINIndia-40131220090606>, reported on 9 June 2009, accessed on 11 June 2009.

29. Namibian labour hire does not only refer to the agricultural sector but is inclusive of all work sectors in Namibia.

30. Jauch H. Confronting Outsourcing Head-on? Namibia's ban on Labour Hire, International Labour Research and Information Group (ILRIG), 30 March 2009.

to approximately R480 per month compared to a permanent worker's salary of approximately R1200 per month, and to working hours of 40 hours per week which is the average amount of hours worked by permanent workers. In addition, he found that there are gender disparities in respect of division of labour with men being employed as drivers, artisans, loss controllers and truck assistants while most women are employed as shop assistants and operators. Women still earn lower wages than men.³¹

Most of the labour hire workers are also migrant workers who come from towns in the northern parts of Namibia to find work. These migrant workers mainly rent rooms in private houses and have to send money back to their families as well as sustain themselves on a daily basis by buying food and paying for accommodation; their wages are often insufficient to cover all their expenses.

Whilst most of these companies describe themselves as black economic empowerment companies, they do not contribute very much to the decent work principle. Currently in Namibia, there are at least 10 labour hire companies, with a South African company being one of the largest.

In 2007, the Namibian Parliament adopted the new Labour Act 2007 and article 128 has been the most contentious article in the Act. This article states that labour hire will be prohibited in the Republic of Namibia: "No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party."

Namibia's Labour Act, which came into operation on the 1st of November 2008, prohibits the practice of 'labour hire'. The provision pre-empts a potential infringement on the constitutional right to '... carry on any ... trade or business', by saying that it is 'in the interest of decency and morality'.

In 2008, a High Court case ensued in which a unanimous verdict found that 'labour hire is not lawful in Namibia because it has no legal basis in Namibian law'.

African Personnel Services (APS) (which operates throughout southern Africa) brought a Constitutional challenge to the section. In a judgment delivered on the 1st of December 2008, the Namibian High Court dismissed the argument that APS's freedom of trade had been infringed, as a labour broker's contract of employment had 'no basis in law'.

In coming to this conclusion the court defined 'labour hire' as a splitting of what would otherwise be a contract of employment into a number of contracts for the provision of personal service between the employee and the labour broker and between a client of the labour broker for whom the employee renders his or her service. The court referred to the common law position and the general principles of a contract of employment, and concluded that there can be no contractual privity of a third-party labour broker to an employment contract. In sum, the tripartite employment relationship could not give rise to a lawful contract of employment.

This judgement has been taken on appeal to the Supreme Court and there is still no outcome on the case in Namibia. However, the problems experienced in Namibia in attempting to ban labour brokers, bears relevance to South Africa because of the key learnings to take this issue forward here.

South Africa

Casualisation refers to non-standard and non-permanent employment relations such as temporary work, fixed term contracts, seasonal work and outsourcing or sub-contractors. Some of

31. Ibid.

these employees may be employed directly by the employer or through labour brokers or agencies. Employers choose this method of employment to have the freedom to pay low wages and/or to change the number of workers, and to determine how and when work is conducted.³² As a result of the feminisation of poverty, it is mostly female workers who are forced into these informal employment arrangements and the poor wages paid to them do not ensure poverty alleviation.³³ Hence, the current labour market reproduces gender and race inequalities because most casual workers are either female or 'in racial terms African'.³⁴

Casual work can, however, negatively impact on farm dwellers' livelihoods as it generally results in employment insecurity and clear differences between the working conditions of permanent and seasonal workers. In addition, casual or seasonal workers earn less and do not receive benefits such as provident funds and bonuses as do permanent employees.³⁵ Casual workers often work overtime and on public holidays but do not receive compensation for the additional time worked. It appears that employers use casual workers to avoid complying with labour standards and regulations.

The health and safety conditions for casual workers are also compromised as they often do not undergo the necessary training in how to use dangerous machinery and/or chemicals like pesticides. Because of the limited time period of their employment, employers do not contribute to the compensation fund. This in itself renders the casual worker and his/her family vulnerable in the case of injury or death at the workplace.³⁶

The extent to which linkages between casual workers and labour brokers, or between migrants and labour brokers exist in South Africa is currently unclear. The research in Grabouw investigated whether these linkages exist in South Africa. It is, however, known that there is labour brokerage of domestic workers between rural and urban towns in South Africa.³⁷ The research, therefore, seeks to investigate whether similar linkages are present within the agricultural sector.

The International and National Legal Framework

International Legal Framework: International Labour Organisation

Labour brokerage has, internationally, been equated with the International Labour Organisation (ILO) concept of forced labour. Forced or compulsory labour is

all work or service which is exacted from any person under the menace of a penalty and which the person has not entered into of his or her own free will. It occurs where work is forced by the State, or private enterprises or individuals who have the will and power to impose on workers by severe deprivations, such as physical violence or sexual abuse; restricting peoples' movement or imprisoning them; withholding wages or identity documents to force them to stay on the job; or entangling them in fraudulent debt from which they cannot escape.³⁸

Forced labour is a criminal offence and a violation of fundamental human rights.

Forced labour takes many forms and can be an outcome of trafficking in persons and irregular migration. Victims of forced labour are often drawn from minority social and ethnic groups who

32. Naledi, 2006, op. cit., p.4.

33. Ibid., p.5.

34. Ibid., p.12.

35. Ibid., p.10.

36. Ibid, p.11.

37. www.anexcdw.org.za, ILO: South Africa Child Domestic Workers: A National Report, 2002, accessed on 27 July 2009.

38. www.ilo.org, Forced Labour: Definition, Indicators and Measurement, 2004, accessed on 27 July 2009.

are subject to discrimination, and who live and work in poverty. Mechanisms of force include debt bondage, slavery, misuse of customary practices and deceptive recruitment systems.

The ILO estimates that at least 12.3 million people are victims of forced labour worldwide. Of these, 9.8 million are exploited by private individuals (potential brokers), including more than 2.4 million as a result of human trafficking. The remaining 2.5 million are usually forced to work by the state or by rebel military groups. Gender disparity seems to come into play in this work environment, with children aged less than 18 years who represent 40-50% of all forced labourers. The ILO estimates further that women and girls account for almost all forced commercial sexual exploitation and 56% of forced economic exploitation.³⁹

The ILO posits that forced labour is for the most part rooted in poverty, inequality and discrimination, and most often driven by the pursuit of financial profit at the expense of vulnerable, unprotected and unorganized workers.

The ILO has found that inadequate legislation and poor law enforcement mean that the perpetrators are rarely prosecuted and punished. Furthermore, the lack of prosecutions allows for the potential gains for unscrupulous employers, agents and traffickers who resort to forced labour practices. The ILO is of the view that whether politically, socially or economically motivated, forced labour has no place in the 21st century.⁴⁰

ILO Conventions

The Forced Labour Convention, 1930 (No.29), calls for the elimination of all forms of forced or compulsory labour. This was supplemented in 1957 by the Abolition of Forced Labour Convention, (No.105). Adopted at a time when there had been growing use of forced labour for political purposes, it calls for the suppression of forced labour as a means of:

- political coercion or education, or punishment for the expression of political views;
- workforce mobilisation for purposes of economic development;
- labour discipline;
- punishment for participation in strike action; and
- racial, social, national or religious discrimination.

These two instruments are considered 'fundamental' ILO Conventions. This means that freedom from forced labour, along with freedom of association and the right to collective bargaining, and the elimination of child labour and of discrimination at work, is indispensable to the achievement of decent work. The forced labour Conventions are very widely ratified and have been ratified by South Africa which means that South Africa is bound to ensure that the principles of these Conventions are included in domestic legislation and implemented accordingly.

Another important ILO Convention to the research topic is the Private Employment Agencies Convention, 1997. This Convention effectively allows for the operation of labour brokers and is one which South Africa has not ratified. The Convention therefore regulates labour brokerage and provides guidance for countries on how to deal with the existence of these brokers to ensure the ultimate protection of workers. The existence of this Convention would require the South African government to think strategically as to whether or not to ban labour brokers.

Decent Work

The ILO has an agenda or programme regarding decent work and countries who have ratified ILO Conventions should attempt to incorporate these principles into their programme agendas.

39. http://www.unglobalcompact.org/docs/issues_doc/labour/Forced_labor/QxA FL FS.pdf, accessed on 7 July 2009.

40. Ibid.

Decent work is captured in four strategic objectives: fundamental principles and rights at work and international labour standards; employment and income opportunities; social protection and social security; and social dialogue and tripartism. The ILO makes it clear that these objectives protect all workers, women and men, in both formal and informal economies; in wage employment or working on their own account; in the fields, factories and offices; in their home or in the community. The 'decent work' agenda and principles would therefore be relevant for all workers who are employed by labour brokers as well. 'Decent work' is being defined in national programmes of action.⁴¹

International legal instruments are important to provide insight and guidance to countries on labour violations or the dimensions associated with the changing labour landscape. It would be important for South Africa to start dialogue in respect of the incorporation of the 'decent work' agenda into South African law and policy. This will go a long way in seeking to protect workers who are being exploited by labour brokers.

The South African Legal Framework

Theron⁴² and Roskam⁴³ argue that the labour broker and not the broker's client is the employer of the worker. The basis for this argument is contained in Section 198 which governs 'temporary employment services' in the Labour Relations Act:

Section 198 (2) makes it clear that the client is jointly and severally liable with the labour broker if there is a contravention of:

- i) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
- ii) a binding arbitration award that regulates terms and conditions of employment;
- iii) the BCEA; or
- iv) a sectoral determination.

Therefore, when a labour broker is involved in the employment relationship, it is no longer considered to be a standard employment relationship, but instead commonly referred to as a triangular employment relationship.

Standard Employment Relationship

A standard employment relationship would involve the following factors:

- Employment is full-time and the employee has one employer;
- That the employee works on the premises of the employer and there is a designated workplace;
- The employment is ongoing and the employee has an employment contract.⁴⁴

When we refer to the involvement of labour brokers in the employment relationship we are not referring to a standard employment relationship.

41. www.ilo.org.za, accessed on 7 July 2009.

42. Theron, J. *Atypical Employment in South Africa*, Annual Department of Labour Seminar, 2007, p.4.

43. Roskam, A. An exploratory look into labour market regulation, DPRU working paper 07/116, January 2007, p.40.

44 Theron, op. cit.

The Contract Parties Involved

Independent Contractor

This type of contract is one of the methods used by employers to escape their legal obligations, and to oust the employee's legal entitlement. A true independent contractor will be a registered provisional taxpayer who runs his/her own business and therefore works his/her own hours. The person will invoice the employer each month for his/her services rendered and be paid adequately but not be subject to usual 'employment' matters such as the deduction of PAYE or UIF from his/her invoice, will not receive a car allowance, annual leave, sick leave, 13th cheque and so on. Furthermore, the independent contractor would be able to carry out work for more than one employer at the same time if he/she wanted to.⁴⁵

Temporary Employee

The temporary employee ('temp') is usually a person who is employed by a labour broker or a temporary employment service (TES), but can also be a person employed directly by the employer without any mediation. The basis of the employment relationship is that the agency hires out the services of the 'temp' to a third party, for instance to the farmer, for a fee. The agency invoices the third party for the services rendered by that temp on a monthly basis, the third party pays the agency and, finally, the agency pays the 'temp' the agreed salary. The fee that the labour broker or agency charges the third party is at least 75% higher than the salary that the 'temp' receives while, on average, it is double or more.⁴⁶

The concept of the 'temp' in this triangular relationship is supposed to be applied in those instances where the third party requires an employee only on a temporary basis in order to fill in for another employee who is on maternity leave, or requires temporary personnel to help out over a seasonal busy period. Accordingly, the relationship between the agency or labour broker and the 'temp' is usually a Temporary Contract of Employment whereas the relationship between the agency and the third party is a Contract of Work. The completion or termination of the assignment will automatically bring about the termination of the former, and with each new assignment a new Temporary Contract of Employment is entered into between the 'temp' employee and the labour broker or agency. Similarly, a new Contract of Work is entered into between the agency and the third party for the new assignment. It is important to highlight that, in this context; there is no employment relationship between the worker and the third party.⁴⁷

Temporary Employment Services (TES)

Temporary Employment Service (TES) is a form of temporary employment and refers to an organisation that finds work for farm workers. The BCEA says a TES is "any person who, for reward, procures for or provides to a client other persons:

- Who render services to, or perform work for, the client; and
- Who are remunerated by the temporary employment service."⁴⁸

In this instance TES is responsible for all labour implications such as wages, UIF, sick leave, etc.

They advertise their services by emphasising the fact that the employer can transfer employment risk and reduce exposure. In addition, employers can spend less time on recruitment, disciplinary enforcement and performance management. TESes also advertise wage cost flexibility, which is

45. http://www.labourguide.co.za/employee_status.htm, accessed on 7 July 2009.

46. Ibid.

47. http://www.labourguide.co.za/employee_status.htm, accessed on 7 July 2009.

48. Ibid.

absolutely necessary in the global market, in respect of recruitment costs, advertising costs; time spent screening, administration costs, payroll costs, labour consultant or attorney fees and no CCMA awards.⁴⁹

The problem is the lack of definition of the beginning and end of the temporary employment relationship, which results in the continued temporary employment of workers who do not enjoy the same benefits as permanent workers.

Fixed-Term Contractor

The Fixed Term Contract is similar to the Contract of Temporary Employment except that a Contract of Temporary Employment in most cases ends when a special event named in the contract occurs, or on a specific date which is not further negotiable. When the termination date arrives, the contract ends and if there is another job, the contract can only be renewed once because a third period would be unacceptable. If further renewal is required, a Contract of Permanent Employment should be given. In legislation there is no specified limit on the period of validity of a Fixed Term Contract but it must be made quite clear to the employee that the employment offered is only for the period laid down in the contract and no longer.

Employee

The Basic Conditions of Employment Act and the Labour Relations Act both provide the following “presumption as to who is an employee”: A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of contract, if any one or more of the following factors is present:

- (a) The manner in which the person works is subject to the control or direction of another person;
- (b) The person’s hours of work are subject to the control or direction of another person;
- (c) In the case of a person who works for an organisation, the person is a part of that organisation;
- (d) The person has worked for that other person for an average of at least 40 hours per month over the last 3 months;
- (e) The person is economically dependent on the other person for whom that person works or renders services;
- (f) The person is provided with tools of trade or work equipment by the other person; or
- (g) The person only works for or renders services to one person.⁵⁰

In the BCEA “Definitions”, the Act gives the definition of an employee as “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 any other person who, in any manner, assists in carrying on or conducting the business of an employer and ‘employed’ and ‘employment’ have a corresponding meaning”.⁵¹

Migrant Worker

The migrant labour system has always existed, not only in South Africa, but around the world. The experience is similar across cultures. While the legal conditions for a contract for a migrant worker are the same as for all other South Africans, the pressure is much higher for migrant workers to agree to an unfair or even illegal contract. Studies have also shown that, because of

49. Cf. http://www.labourbroker.co.za/labour_broking.html, accessed on 7 July 2009.

50. Section 83 A of the BCEA and Section 200A of the Labour Relations Act.

51. http://www.labourguide.co.za/employee_status.htm, accessed on 7 July 2009.

their desperate circumstances, migrant workers would be more willing to approach a labour broker for work.

Casual Workers

Defining casualisation in a labour market is problematic as issues such as hours worked, the type of employment contract, who pays the employee, non-monetary benefits and whether working in the formal or informal sector, means different things in different contexts.

A casual worker in South Africa is regarded as anybody who works in the informal sector, which means either is an employee or self employed, or a formal sector employee with a casual, temporary or seasonal employment contract or a part-time formal sector employee.⁵² But there are also other names given to non-standard employment which exists such as 'disguised employment' or 'triangular relationship' which all try to describe the emergence of subcontractors, independent contractors, home-based workers and all variations of 'informalised' work.

The reasons for the rising trend are clear: employers want to avoid a standard employment relationship with all the related obligations. As a result, one can find cases of workers who are employed on a continuous temporary basis for a prolonged period.⁵³

The Legislative Gaps

Bodibe (2006) argues that labour legislation does not adequately cater for a casual worker by virtue of the definition of employee.⁵⁴ Further, the definition of a workplace, which is a defined space that an employer provides and is in full control of, does not allow for the tripartite agreement which would include a labour broker. Collective bargaining only covers full time employees and does not take casual workers into account.⁵⁵

However the fundamental problem with respect to the legal framework is the definition of what constitutes an employee and the distinction between an employee and an independent contractor. The Congress of South African Trade Unions (COSATU) best summed up the difference by asking the question "which definition serves to adequately define employment?"⁵⁶ It further defined casual workers as employees who have separate fixed-term contracts normally for a day at a time, temporary employees as those employed for a specific period and part-time employees as those employed on a continuous basis although not full-time.

The Basic Conditions of Employees Act (BCEA), Employment Equity Act (EEA) and Unemployment Insurance Acts define an employee as: "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 any other person who in any manner assists in carrying on or conducting the business of an employer."⁵⁷ Bodibe says that the exclusion of independent contractors and self employed and informal workers created a loophole which prompted an amendment to the Labour Relations Act (LRA) and BCEA in 2000 which created a presumption that one is an employee unless the employer can prove otherwise. Bodibe is of the view that this amendment

52. Ibid.

53. Naledi (2006) *The Extent and Effects of Casualisation in Southern Africa*, Research Report for the Danish Federation of Workers, edited by Oupa Bodibe.

54. Ibid., p.65.

55. Ibid.

56. <http://www.cosatu.org.za/shop/shop0903/shop0903-11.htm>, accessed on 22 April 2007.

57. Section 1 of the BCEA and Employment Equity Act and Chapter 1 of the Unemployment Insurance Act.

still failed to provide adequate protection to casual workers and the Constitutional Court expanded the definition to "those engaged in work relationships akin to an employment relationship".⁵⁸ This definition relies on a review of cases according to their facts to establish the employment relationship.

An independent contractor on the other hand, is someone who works for a client and not for an employer. The effect of the distinction lies in the fact that employees are protected by all labour legislation whereas independent contractors are not.⁵⁹

It appears that some of these legal dilemmas were addressed in a Code of Good Practice entitled *Who is an Employee* issued by Government in December 2006.⁶⁰ This code distinguished between an employee and an independent contractor in the following manner:

58. Op. cit. n. 48, p.66.

59. CRLS, Working for Contractors, p1.

60. Government Gazette, 1 December 2006, No. 29445, p.17.

Employee	Independent Contractor
Object of the contract is to render personal services	Object of the contract is to perform a specified work or produce a specified result
Employee must perform services personally	Independent contractor may usually perform through others
Employer may choose when to make use of services of employee	Independent contractor must perform work (or produce result) within period fixed by contract
Employee obliged to perform lawful commands and instructions of employer	Independent contractor is subservient to the contract, not under supervision or control of employer
Contract terminates on death of employee	Contract does not necessarily terminate on death of employee
Contract terminates on expiry of period of service in contract	Contract terminates on completion of work or production of specified result

The Labour Relations Act (LRA) offers some protection in section 198, stating that where workers work in areas covered by the following pieces of legislation or agreements:

- The Basic Conditions of Employment Act;
- The Wage Act;
- A binding arbitration award that regulates terms and conditions of employment; or
- A collective agreement concluded in a Bargaining Council,

the labour broker is also bound by these laws.

The labour court came to an interesting conclusion in a case involving a labour broker, although the contract took place across the South African border. In *LAD Brokers (PTY) Limited v Robert Mandla*,⁶¹ a United Kingdom-based company with no ties to South Africa sought the services of two employees to work on an off-shore drill platform located off Cape Town. It accordingly employed the employees through a labour broker, who facilitated the employment and the payment of the salaries and then rendered monthly invoices to the UK Company as part of its fee. The employees entered into contracts with the labour broker entitled 'independent contractor – contracting agreement'. The employees worked on the drilling rig under the control of the UK Company until such time as the company gave notice to the employees, terminating the agreement. One of the employees instituted action against the labour broker.

At the labour court and appeal court, the broker tried to argue that the employee was an independent contractor. The court found that the broker was the employer and that the employee was not an independent contractor. In establishing who the employer was, the court found the UK Company to be the employer but that section 198 of the LRA placed an obligation on the broker who paid the remuneration to be held liable as the employer.

The case however created the situation of two alternative employers both denying liability, which clearly indicates the lack of clarity which exists within the current labour framework and which, unless corrected, will continue to cause doubt between contractual parties involved in employment relationships. It appears that the USA system of joint liability may be an option for South Africa to explore to ensure that all loopholes are covered and labour brokers are held accountable for their involvement in employment relationships.

61. Unreported case number CA14/00(1).

Either way, there seems to be no clear definition of who constitutes a labour broker, neither does there appear to be any protection of the farm worker recruited by the labour broker. In addition, the requirement in the 1983 amendment to the Labour Relations Act for labour brokers to register was never enforced and was later dropped in the 1995 Act.⁶² Later the Skills Development Act made a further attempt to enforce the registration of labour brokers by requiring that an “employment service for gain” be registered. The term was not defined and seemed to be wide enough to encompass TES, who had decided that the provision did not apply to them.⁶³

Other attempts thus far to regulate labour brokers in South Africa have been via the Wine Industry Ethical Trade Association (WIETA) which develops and monitors their Code of Good Practice based on International Labour Organisation (ILO) Conventions and legislation. Labour Brokers are included in its membership with the aim of monitoring their labour standards against its code of labour practice.

The ILO has established many guidelines to ensure the equal treatment of labourers. In 1997, they devised guidelines which deal with equality, stating that migrant workers should be treated like other workers in the countries in which they work. The Convention aims to protect migrants and ensure equal treatment by encouraging countries to sign bilateral agreements governing labour migration, with agreements spelling out procedures for private and public recruitment and the exchange of information on migration policies and regulations.⁶⁴ However, South Africa has not ratified this particular guideline, stating that they need to ensure their own citizens have work before catering for the needs of migrant workers.⁶⁵

More recently, in July 2007 the Department of Labour released Draft Regulations⁶⁶ with regard to employment services. These regulations define an employer as

any person, including a person acting in a fiduciary capacity, who pays or who is liable to pay any person any amount by way of remuneration as defined in the Basic Conditions of Employment Act, 75 of 1997 and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds, excluding any person not acting as a principal as defined in the Unemployment Insurance Act, 63 of 2001 and shall include all private employment service agencies.

Regulation 2 sets out the procedure for registration as a private employment services agency which ensures that an application must be made in the prescribed manner, and the applicant has to comply with various criteria⁶⁷ including compliance with labour legislation.

This legislation is meant to register and regulate the actions of private employment services agencies, personnel agencies, temporary employment services, labour brokers and labour recruitment agencies. We have yet to see whether these regulations will be passed as final and implemented by the Department of Labour in respect of labour brokers.

62. Theron, 2009, op. cit., p.17.

63. Ibid.

64. Martin P, *Merchants of Labour: Agents of the evolving migration infrastructure*, International Institute for Labour Studies, Geneva, ILO, 2005, p.6.

65. http://www.migrantsrights.org/ILO_report101199.htm, accessed on 16 September 2007.

66. Draft Private Employment Services Regulations 2007.

67. Regulation 2(2) a-d:

- (a) Proof that the company is registered as an entity in terms of the relevant legislation;
- (b) Proof that the entity is registered with SA Revenue Services for employee's tax; skills development levy, unemployment insurance fund contribution and/or VAT where applicable;
- (c) Proof that the entity is registered with a bargaining council where applicable;
- (d) Proof that the entity is registering at its lowest level or stand alone level of organizational structure.

The gaps in the law relate particularly to the definition of labour brokers. The law currently provides mainly for the standard employment relationship without taking seasonal workers and the outsourcing of work through labour brokers into account. Consequently, there are still key challenges with respect to the registration, regulation and skills development of labour brokers in this non-standard employment relationship. Lastly, there are also deficits in the law with respect to the economic and social benefits which seasonal and migrant labourers do not receive as a result of their employment in a non-standard employment relationship.

Roskam concludes the following in respect to the employment relationships involving labour brokers:

- The relationship between the labour broker and the workers is one of employment;
- The relationship between the labour broker and the client is based on a commercial contract;
- The relationship between the client and the workers is governed by statute which means the broker and client are jointly and severally liable in certain instances.⁶⁸

It seems that there are clear gaps in definitions and responsibilities, given the new and changing employment relationship as well as the casualisation of employment in South Africa. It may require a review of key labour relations provisions to ensure clarity. The decisions in court cases will also assist in providing clarity on the employment relationship which involves a labour broker. Ultimately, however the relevant parts of the legislation which will be identified for review will be dependent on the decision as to regulate or ban labour brokers.

Conclusion

In conclusion therefore, it appears that there are clear linkages between the casualisation of labour, migration and labour brokerage in other parts of the world. In addition, the majority of casual or seasonal workers appear to be women as a result of the *feminisation of labour*. It appears further that very few women are labour brokers and that this area of work seems to be dominated mostly by men. Whether this holds true for South Africa is exactly what the research intended to establish, particularly the extent to which these scenarios are applicable to the Western Cape.

It is also apparent that the agricultural sector is an economically viable entity in South Africa. Because of the nature of the harvesting of crops, it is a sector that is likely to engage in seasonal work and, hence, would attract both women as casual workers and labour brokers who would participate in recruitment practices. At the same time, it is also apparent that high levels of poverty prevail in rural areas in South Africa and that farm workers, whether permanent or seasonal workers, have families whom they need to support. Farm workers remain the most vulnerable workers in South Africa and require protection from exploitation that may occur as a result of a tripartite relationship which may exist between the employer, employee and a labour broker.

On the one hand, even though our laws have been described by various writers as 'exemplary', there are clear gaps which exist in respect of the aforementioned tripartite relationship. Even though the legislature has tried to address some of these deficits by introducing the presumption clause in S83A of BCEA and S200A of LRA, the lines of ultimate accountability remain blurred. In addition, the laws do not provide a specific framework within which a labour broker can be

68. Roskam A. An exploratory look into labour market regulation, DPRU working paper 07/116, January 2007, p. 41. Includes certain contraventions of labour related agreements, awards, statutes or sectoral determinations. This would mean that the client may acquire the status of employer in certain instances.

registered. If they are currently registered, one would assume it is via commercial law as section 21 Companies. This does not allow for adequate labour law training to ensure that their conduct is in adherence with current labour standards. In addition, without any proper registration or licensing process, control and regulation of the activities of labour brokers remains unregulated and allows them to act outside the current labour framework. This situation also makes monitoring and enforcement of their activities impossible.

It is also clear from the labour court case cited above that liability between employers and labour brokers remains vague and dependent upon the facts of each case. It is irresponsible to allow situations pertaining to the most vulnerable workers to be left to chance and trial and error. This situation is particularly disturbing given that it is mainly women who are engaged in casual labour. The question arises therefore: do we wait for an accident at work or some other alarming incident before we ensure that casual workers are protected in this unequal distribution of power between the employer, employee and labour broker? Or do we assess the current situation and the extent to which this is a problem in South Africa and advocate for a stricter regulatory environment? It is clear that the latter needs to be pursued to ensure that the rights of farm dwellers in South Africa receive adequate attention and to provide access to justice for casual workers who may be at the mercy of labour brokers for their livelihoods and that of their families.

A strong recommendation for South Africa would be to revisit the USA examples of the regulation of labour brokers in respect of licensing, training in labour laws, bonds and joint liability to ensure that vulnerable workers are adequately protected.



CHAPTER THREE

Research Background

The research took place in the Grabouw area which served as the sample area for this study. Grabouw was chosen because of the large numbers of seasonal or contract workers in the area. Since the literature review revealed that there are clear relationships between labour brokers and seasonal or contract workers, Grabouw was deemed an appropriate area to investigate labour brokerage as well as the linkages between labour brokers and seasonal workers.

Grabouw is a fruit farming area where primarily apples and pears are grown. There are three main seasons during which high volumes of labour are needed in the orchards – viz. the thinning season, which occurs in October/November; the picking season, which stretches from February and lasts for about 3 months; and, lastly, the pruning season which also lasts for a three-month period towards the middle of the year. In other words, farmers often need labour only during the three seasons described; hence the high number of seasonal workers in the Grabouw area.

As mentioned in the introduction, poverty is still a profound problem in South Africa, particularly in rural areas. Poverty can be defined as a lack of capability and manifests in nutritional status, literacy status and access to infrastructure including housing.¹

Farm workers are the lowest paid workers amongst the formally employed. Furthermore, female workers receive lower wages, fewer benefits and are less likely to be permanent workers than are male workers. For males, the average wage was found to be R667 per month whereas the average wage paid to females was only about R458. This is not, however, an absolute amount, as a quarter of the wages paid to farm workers are 'in-kind'. This causes high levels of debt to the farmer or 'farm shop' as is evidenced by the research findings and comments from research participants in this study. Consequently, farm workers and their families live in both absolute and relative poverty. Poverty manifests itself in the correlation between farm worker income and access to housing, household services, literacy levels, health services, etc.

Due to colonialism and apartheid, farm workers have been excluded in very real terms from many opportunities afforded to other workers. These exclusions include, but are not limited to, health care, social security, housing and tenure of security, education and opportunities for skills development. This history of exclusion, coupled with an inherent paternalistic relationship between farmer and farm worker reinforces the farm worker's continued dependence on the farmer. The right to housing and the provision of tenure has also materially been linked to dependence on the farmer and has in some instances disempowered farm workers of their ordinary rights to economic ownership and the ability to make good financial and economic decisions. This situation is further compounded by the low minimum wage currently being paid to farm workers and the continued gender disparity which exists on farms.

In an ever-changing labour landscape, the lives of farm workers are further complicated by the increase in the casualisation of employment and the use of migrant workers and labour brokers. Increased casualisation, whilst beneficial for farmers and labour brokers, is often exploitative and harmful to farm workers and has in some quarters been equated with 'slave labour'. Migrant

1. <ftp://ftp.hst.org.za/pubs/other/farmworkers.pdf>, accessed on 27 July 2009.

workers, who are desperate to earn a living, often accept very poor wages and working conditions. Labour brokers have been known to exploit particularly casual and migrant workers on farms.

Low unionisation of farm workers has not assisted farm workers in securing their economic and social independence. By remaining un-unionised, they remain in a continuous master and servant relationship with the farmer and lately with the labour broker which increases their insecurity on farms in the Western Cape.

Increasing and continuous threats of evictions have further resulted in insecurity not only for the farm worker but for their families as well. Whilst enjoying tenure on farms, it is often at the expense of what would constitute normal family life, as they are restricted in owning livestock, pets and also in receiving visitors on farms owned by farmers.

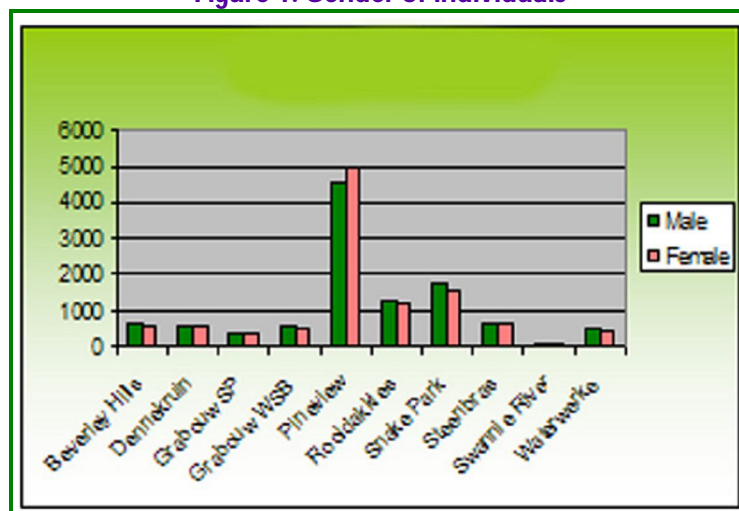
Instead of improving over the years, it appears as though the plight of farm workers is worsening constantly and every day new challenges confront them both in their workplaces and in their family lives. Farm workers remain largely illiterate, poor and unskilled in an already weakening economy.

Grabouw

Grabouw was chosen as the site for research because of the potential links between deciduous farming, labour brokerage, casualisation and gender factors. It is important to note that more than 104 000 workers are permanently employed on approximately 3 000 fruit farms in South Africa and, increasingly, more women are employed as seasonal workers to pick and pack fruit for export. South Africa exports most of its deciduous fruit to Europe and total exports from South Africa are valued at close to R1 billion a year.²

Inhabitants

Figure 1. Gender of individuals



The entire Grabouw population consists of approximately 21 600 inhabitants who are distributed among the different areas within Grabouw. Figure 1 indicates that most people, i.e. 9 500, live in Pineview and that there are more female than male residents in that area. Pineview is a large township which consists of both houses and shacks, on the outskirts of the centre of the Grabouw town.³

2. http://www.actionaid.org.uk/doc_lib/14_1_rotten_fruit.pdf, accessed on 14 September 2007.
3. Settlement areas in the Grabouw area.

Employment Status

As shown in the graph below, there are significant relationships between gender and employment status of the residents of Grabouw. For instance, two thirds of those who were employed were male while females constituted the greatest proportion of those who were unemployed. Furthermore, seasonal workers who were not working consisted mainly of women.

Figure 2. Gender and Employment Status, Grabouw

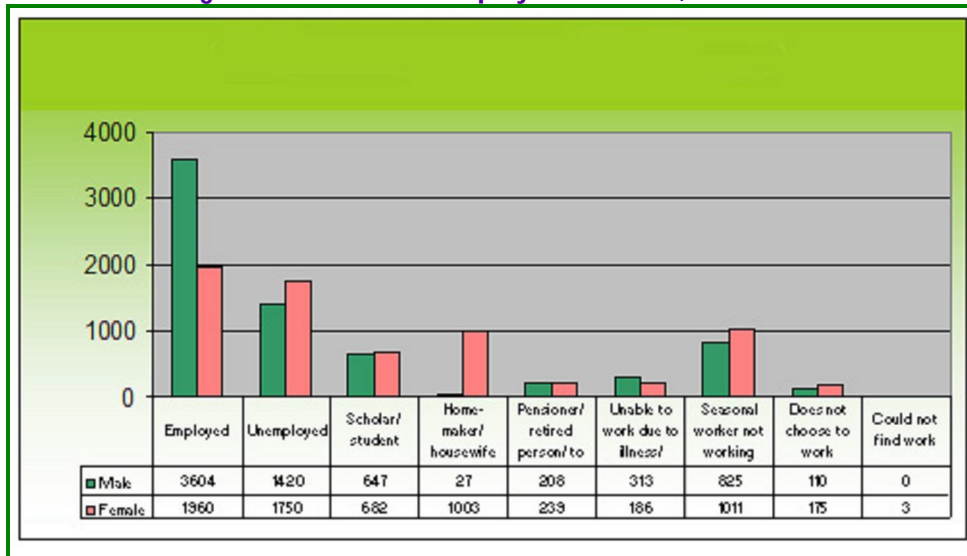
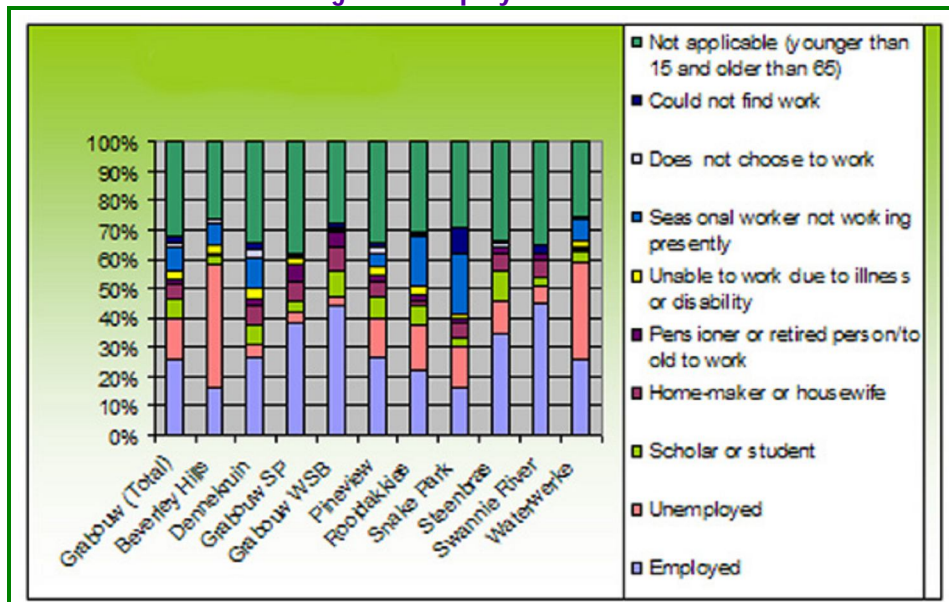


Figure 3 below illustrates employment status proportionately for several areas in Grabouw. Unemployment is lowest in Grabouw WSB and Grabouw SP, while it is highest in Waterwerke and Beverley Hills. This could be ascribed to the distances between the living areas and working areas in the Grabouw area as well as to the location of available jobs.

Figure 3. Employment status



It is clear that Grabouw, like other areas in the Western Cape, is a poverty-stricken community with high levels of unemployment, particularly amongst women. From the information above, one can conclude that it is primarily women who are involved in casual employment.⁴

4. Statistics received from STATSSA, Western Cape in August 2007.

Background Information of Labour Brokers in Grabouw

According to the Employer's Association in Grabouw, an association established by labour brokers and some consultants in the Grabouw region which operates on a largely informal basis,⁵ the association has a membership of 192, while there are approximately 120 smallholdings in Grabouw and 13 000 planted hectares. The Employer's Association indicated that approximately 12 000 seasonal workers are employed during the picking season and 3 800 workers during the pruning season. They further indicated that labour brokers are mainly men, as will be evidenced further by the sample of this research study and the various attempts made by researchers to contact female brokers. At the time of the study, only 2 female labour brokers were known to this association. According to the Association, they make sure that employers ensure that brokers adhere to the administrative requirements of UIF and Workmen's Compensation registration.

Another respondent to the research was Fruitways⁶ which indicated that there has been a growth in the labour market over the last few years as a result of:

- Increased numbers of seasonal workers, who are mainly female;
- Increases in migratory trends because farmers recruit labour from outside Grabouw.

Generally, labour brokers offer a service at a reduced rate because of non-compliance with labour legislation. The sophistication of labour laws in South Africa has increased pressure on agriculture and labour brokerage enables farm owners not to deal with compliance issues and recruitment.

A disturbing example of labour brokers' failure to take responsibility for farm workers is provided in the following case which was dealt with by the Women on Farms Project:

Death of a Migrant Worker: Who Takes Responsibility?

In June 2007, Women on Farms received a telephone call from a mother in the Free State regarding the death of her son who had been recruited by a labour broker to work in Cape Town. His mother had been contacted in the Free State to let her know that her son had been killed and that his body was in the mortuary. The family asked Women on Farms to assist them in ascertaining the whereabouts of the body, what happened to their son and to bring the body back to the Free State for burial.

Women on Farms found the following upon investigating the matter:

The deceased who was 29 years of age was recruited from his home town in Zastron, (Mohokane Municipality), Free State in March by a labour broker to come to the Western Cape to work as a seasonal farm worker.

The deceased came to Cape Town with the broker and worked at a farm in Kraaifontein in Cape Town. On 18 March, the deceased and his friend were visiting in the Klipmuts area when a fight broke out and he was fatally stabbed and died at the scene. His body was taken to the Paarl mortuary where it was kept until Women on Farms intervened. Women on Farms assisted the family to obtain more details and to pay for the transportation of the body back to the Free State. During the course of the Women on Farms investigation, no one had taken responsibility for the incident or for the body, not the broker, nor the employer. The case was reported to the police and is still under investigation.⁷

To date, the accused persons have not been convicted or sentenced. According to the report of an employee at Women on Farms, the accused persons were people known to the deceased. Neither the

5. EGVV: Elgin Grabouw Vyeboom & Villiersdorp Agricultural Association.

6. A fruit export company.

7. Information provided by Women on Farms Project, case reported in June 2007.

labour broker nor the farm owner took responsibility. The farm owner said that he used a labour broker and the incident was therefore not his responsibility.

During the course of this research, which took place between November 2007 and February 2008, there were a number of vehicle accidents involving farm workers. In November 2007, 10 farm workers died in a bus accident in Piketberg and, less than a week later, another eight farm workers died in an accident in De Doorns, near Worcester.

Towards the end of November 2007, a truck with 103 seasonal farm workers who were being transported by a labour broker from Grabouw to a farm in Stellenbosch was pulled off by traffic police. The truck had no ventilation and was generally unsafe for the transportation of so many workers. The workers paid the broker R10 a day for transportation. The driver was fined but the incident received much media attention in light of the spate of farm worker accidents.⁸ The media attention also raised awareness regarding the manner in which seasonal workers in various towns are transported.

These incidents and the information about labour brokers' involvement in the recruitment and employment of farm workers served to emphasise the importance of this research.

Research Methodology

Objectives

The research intended to address the following objectives:

- To investigate the extent of labour brokerage in the Western Cape Province;
- To understand the impact of labour brokerage on the livelihoods of farm workers;
- To investigate and identify gaps in policy and legislation pertaining to labour brokers;
- To advocate and lobby for the regulation of labour brokers.

To flesh out the research methodology and questions, a sectoral consultation process was held in August 2007 with key stakeholders to determine the framework for the research. The participants in the meeting expressed a keen interest in:

- The issue of labour brokers, migrant workers and seasonal workers;
- The linkages between migrant workers, seasonal workers and labour brokers;
- An understanding of the profile of labour brokers;
- The manner in which labour brokers operate;
- Whether or not labour brokers are regulated; and
- Identifying key gaps in legislation and implementation with respect to labour brokers.

Due to the nature of the research and the need to "find out more about labour brokers", the nine-page interview guide was largely qualitative in nature and was designed to enquire about the current situation and to answer the questions raised in the consultative meeting. A qualitative study was used due to the small sample in one geographic area which allowed for a flexible investigative strategy and a deeper understanding of farm worker issues in their own words and through a description of their own experiences.

The research study therefore applied a human rights framework largely due to the lack of human rights which have been applied to farm workers over the years. The human rights framework, includes the following key components in shaping this research report:

8. Information taken from 'Die Burger', 15 and 28 November 2007.

- Recognising the mutual dependency and complementarity of sustainable human development and the different human rights;
- Considering the individual as the central actor in and beneficiary of development;
- Focusing on the rights of individuals.

The research utilised a structured format consisting mainly of open-ended questions in focus group discussions with farm workers. A combination of focus group discussions and one-on-one interviews were conducted with labour brokers and employers.

The views of employers' organisations, trade unions, the labour broker's association, the fruit growers' association and the Department of Labour were elicited by conducting one-on-one interviews with respondents to determine their perceptions of labour brokers and their impact on the labour market.

Hence, the research commenced by identifying labour brokers in the vicinity of Grabouw and conducting focus group discussions as well as one-on-one interviews with 12 such labour brokers. The labour brokers then assisted in identifying farm workers and employers who would be willing to participate in the study.

Research Study Sample

Many of the meetings which were conducted with key stakeholders prior to the commencement of the research study indicated that it would only be possible to access seasonal workers in November as this was the thinning season in the area. It was with this in mind that approximately 120 seasonal workers were targeted since there are 120 smallholdings in the Grabouw area and the number interviewed would represent the larger farming community in the Grabouw region. In addition, 12 labour brokers and 12 employers, equivalent to 10% of the number of farm workers interviewed, were part of the study, to ensure an equal representation of evidence in respect of the number of employers and labour brokers in relation to the number of farm workers and farms in the Grabouw region. Trade unions and other relevant organisations were also targeted to participate in the study. Unfortunately due to the limited number of trade unions working with farm workers, we could not follow the same quantifiable methodology used in respect of farm workers, employers and labour brokers.

Given various limitations, focus groups were conducted with 107 farm workers, all of whom were working for labour brokers, 12 labour brokers, five employers, three trade unions and other organisations relevant to the study. At least half of the farm workers interviewed worked for 6 of the labour brokers who participated in this study, although not all of the labour brokers were willing to avail their workers for the study.

Field workers contacted labour brokers who assisted in ensuring an equal proportion of men and women in eight focus groups. There were approximately 12 respondents in each group. The farm workers who participated in the study worked for specific labour brokers on the following farms: Vuki farm, Protea Farm, Applewaite Farm, Flight Farm, Goldenpond, Snakepark, Pineview, Olyvenboom and Applewood Farm.⁹ Focus groups were held in the evening or during lunch times, either in the orchards or at a neutral venue identified by farm workers in Grabouw.

Research Limitations

The main limitation of this research study is that the sample was small and the research focused on one area in the Western Cape, namely Grabouw. The research is therefore not representative of the broader Western Cape area and can only provide a snapshot of labour brokerage in one

9. Two groups were combined in one focus group, hence the reference to 8 focus groups but nine farms.

area in the Western Cape. However, given the intense nature of fruit farming in this specific area, we are able to extrapolate that Grabouw is representative of many other fruit farming areas in South Africa and is therefore a good case study site to understand labour brokerage in this particular sector.

Various stakeholders also felt that Grabouw is an over-researched area in the Western Cape as it has been the focus of numerous research studies in recent years. Access to farm workers is always a problem in rural areas and, as most of the participants were seasonal workers and not living on farms, it was difficult to access these workers after hours. For this reason, we interviewed farm workers who were selected by labour brokers to participate in the research study. This selection might have created a level of bias in the responses of farm workers to questions pertaining to labour brokers.

Another key limitation was the farm worker accidents which took place in November and December 2007 and which focused attention on the role of labour brokers. This media attention in the middle of the research resulted in labour brokers and employers becoming suspicious and unwilling to participate in the study, hence the small sample of labour brokers and employers.

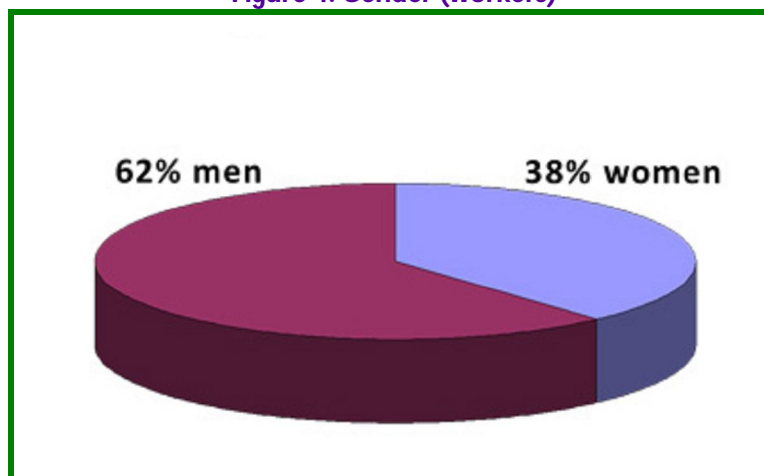
Synchronising the research with the seasonal ebbs and flows in the Grabouw area also meant that the research was conducted during the festive season which impacted on the availability of respondents.

Socio-Demographic Profile of Respondents

Gender

The gender breakdown in the pie chart below shows that more male (62%) than female (38%) respondents participated in the study. Although the study was based on the premise that most seasonal workers are women, the gender breakdown reflected here does not necessarily contradict the fact that most seasonal workers are female. The reason for the particular gender composition of this study is that it took place during the thinning season when primarily men are employed. Mainly women are used during the picking, sorting and pruning seasons.

Figure 4. Gender (workers)

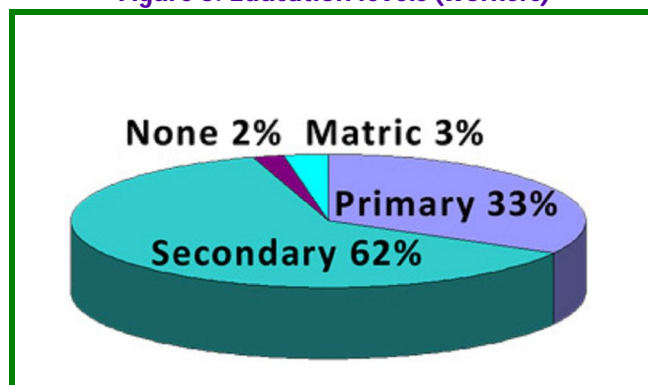


Education Levels

Figure 5 below shows that 62% of respondents have some level of secondary education, while 33% of the respondents had completed primary school, 3% had completed matric and only 2%

had no education at all. These statistics indicate that the majority of the respondents interviewed had some level of formal education and one could therefore infer that their circumstances, their economic situation and insufficient work opportunities have drawn them into working as seasonal workers on farms. Further, in the research findings, farm workers state clearly that they have no choice but to work as seasonal workers because there is no other work available to them.

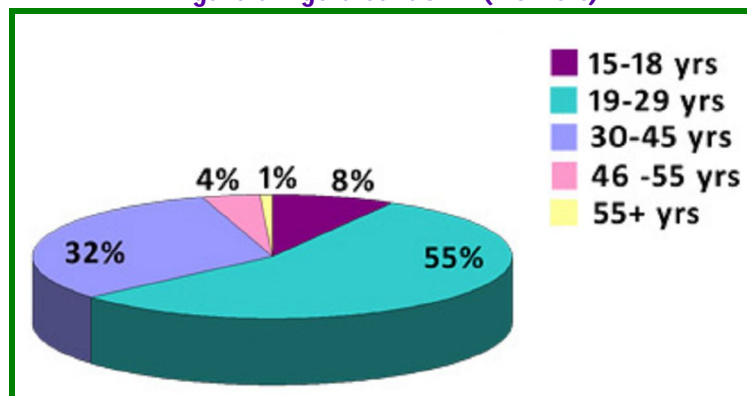
Figure 5. Education levels (workers)



Age

Figure 6 below shows that 55% of the respondents were between the ages of 19 and 29 years of age; and 32% were between the ages of 30 and 45 years of age. This indicates that the majority of the respondents interviewed, and the most utilised age category in this study for seasonal work is between the ages of 19 and 45 years of age. Four per cent (4%) of the respondents were between the ages of 46 and 55, and only 1% were older than 55.

Figure 6. Age breakdown (workers)



Child labour

The most alarming statistic is that 8% of the respondents were aged between 15 and 18 years of age. This indicates that children are being used to work as seasonal workers on farms. This phenomenon is in direct violation of various pieces of labour legislation which state that children below the age of 18 years should not be employed to work, although allowances are made in the law for children to work provided the work is not considered hazardous in any way.

More specifically, Section 43 of the Basic Conditions of Employment Act (BCEA) prohibits the employment of children under the age of 15 years. Even though these children are aged between 15 and 18 years old, these are still school-going years. In addition, our labour legislation further states that children between the ages of 14 and 18 years are prohibited from performing certain

hazardous work; arguably farm work could be included in the definition of hazardous work, depending on the nature of the work.

In our particular study, thinning would not be considered hazardous work, although it may well interfere with children's schooling. In a recent study conducted by the ILO, it was found that whilst subsistence agriculture is less hazardous than commercial farming, it still impacts negatively on children in the following ways:

- They work long hours.
- Great pressure is placed on them during the seasonal planting and harvesting (thinning) periods.
- They experience fear of physical and verbal abuse both from fellow workers and employers.¹⁰

The line between acceptable work and child labour is drawn on the basis of whether the work puts the child at risk of harm by undermining his/her schooling, damaging his/her health, or harming his/her social, psychological or moral development.

What is of significant concern is that all of the respondents in the present study were employed through labour brokers which indicates that labour brokers are not adhering to legislation and are involved in the exploitation of children as a vulnerable group.



10. <http://www.child-labour.org.za>, Economic Need drives children to work in SA agriculture – ILO and DOL, 12 June 2007, accessed 11 March 2008.

CHAPTER FOUR

Research Findings

Profile of Labour Brokers

In this study, twelve (12) male labour brokers were interviewed. Although there are two women labour brokers that were identified in this district, it was agreed that the job of **labour broking was overwhelmingly the domain of men**. Sixty-seven per cent (67%) of the labour brokers interviewed were Coloured and 33% were African.¹ This too is considered to be largely representative of the racial profile of the labour broker sector.

Fifty per cent of the labour brokers interviewed were between the ages of 46 and 55, 33% were between the ages of 30 and 45 and 17% were over 55 years of age. **In contrast to the average age categories of farm workers, the majority of labour brokers fall into the older age category** (i.e. between 46 and 55 years of age).

Fifty per cent (50%) of the brokers interviewed had completed primary school and 50% had completed standard 7 (grade 9) at secondary school level. **None of the brokers interviewed had any form of post-school qualifications**. While all of them reported having some experience as managers or supervisors during their period of employment as farm workers, none had received any training in managing farm workers.

All the labour brokers who were interviewed lived in settlements in the greater Grabouw area. They **live in poor areas themselves and reported that they were struggling to break even**.

All the labour brokers interviewed had previously worked as farm workers in the Grabouw area; many had been managers or supervisors on the farms on which they worked. The main reasons cited for becoming brokers were that the farms that they had worked on had started retrenchment processes and that they needed to secure alternative employment given the lack of pension funds. They were also spurred on by the desire to 'become my own boss' and the need to earn more money.

1. South Africa's population is divided into the following categories according to race: African, White, Coloured and Indian or Asian. The White population descends mainly from the colonial immigrants of the 17th to 19th centuries and speaks English and Afrikaans. 'Coloured' is used to describe people of mixed race and includes people of indigenous Khoisan heritage who speak mainly Afrikaans. Asian describes the population who are Indian in origin and who are largely English speaking. African reflects various ethnic groupings in South Africa. This information was taken from: <http://www.southafrica.info>, accessed 11 March 2008.

Temporary Workers' Profile

Sixty-four per cent (64%) of the farm workers interviewed came from the former-Transkei, 9% from Beaufort West and 26% from Grabouw.

When farm workers were asked **why they worked as seasonal workers, 89% indicated that it was out of lack of alternative employment options**. One worker respondent answered in this way: *"Of course we also want to be permanent workers, but we do not get the work, that is why we must take the work which we get to put food on the table."* The workers described their main duties during the season as thinning, picking and sorting.

When the farm workers were asked the difference between the wage levels of permanent and temporary workers, most thought that **permanent workers earned more in terms of actual per day/week rates. In addition, workers also noted that permanent workers received other benefits** such as a guaranteed day rate even when it rains, bonuses, sick leave and other non-wage benefits.

When labour brokers were asked the same question, **83% indicated that permanent workers earn more than seasonal workers**, while 17% said they earned the same. All the brokers were of the view that the earning potential of seasonal workers could increase significantly if they were paid on a piece-rate rather than a daily rate. However, they all acknowledged that **permanent workers would always be advantaged in terms of the non-wage benefits** to which seasonal workers are not entitled.

Farm workers were asked whether race, gender, age, education, work experience or trade union membership affected wages levels. **Twenty-four per cent of farm worker respondents indicated that wages do indeed differ according to gender and race, with women earning less than men and African workers earning less than Coloured workers**. The remaining 76% said there are no differences in the wages workers receive.

Labour brokers were asked the same question: 67% said that the listed factors have no effect on the amount which workers are paid. However, 33% stated that **men were paid higher wages than women because 'men work harder than women'**.



Women seasonal workers picking fruit

Worker-Broker Relationships

All the farm workers said that they did **not have a relationship with the farmer, and in many cases did not even know the farmer's full name** as they only dealt with the labour broker. This was confirmed by organisations providing labour rights assistance to labour broker-contracted workers, who reported that workers could often not provide accurate details about the farmer.

The **main conflict in the relationship between** workers and brokers related to issues of non— or under-payment. One worker reported that:

You do not get paid out if you get injured at work. If you call and say you're sick, you also do not get paid out because they say that you are not permanent. Public holidays' money also does not get paid to us. Sometimes you just keep quiet because you need the work.

This was confirmed by the brokers. One summarised it as follows: *"Some of the workers are all right. But many complain a lot that they feel they receive too little money."*

Another finding of significance relates to the power dynamic between workers and brokers. It is evident in the responses of both the workers and brokers that the **paternalistic and unequal power relationships that historically characterised the relationship between farm worker and farmer, are now evident in the new relationship between worker and broker**. Even in instances where workers knew that their rights were being violated, they were reluctant to complain as their livelihoods and employment were wholly dependent on the 'mercy' of the broker.

When farm workers were asked who they regard as their employer (the farmer or the broker), the **overwhelming majority (83%) of worker respondents identified the broker as their employer**. Despite this, many workers continued to express confusion about the lines of accountability in this three-tiered relationship by recognising the power of the farmer to overrule the broker. They perceived their livelihoods as being dependent on the farmer rather than the broker.

Workers were asked to identify the main problems that they experienced in being contracted through labour brokers as opposed to direct contracts with farmers. These were the most commonly listed problems:

- Non-payment on rainy days or public holidays;
- Lack of contracts and lack of clarification of the terms of the contract (including workers often not knowing the daily rate);
- Uncertainty about how much they will work, and hence, how much they will be paid;
- No bonuses are ever paid, no matter how hard workers work;
- No UIF is deducted, meaning workers are unable to draw unemployment during off-season;
- If anything goes wrong after arrival in Grabouw, workers often have to find their own way home. This includes instances where the broker is unsuccessful in securing contracts with farmers or instances of labour dispute.

These comments suggest that broker-contracted workers do not receive any of the non-wage provisions that workers should legally be entitled to.

In cases of disputes or problems, 98% of worker respondents identified the broker rather than the farmer as the person with whom they would take up the issue. When workers were asked who has the right to dismiss them, 10% replied that it is the farmer while 90% said it is the broker. There was thus a clear understanding on the part of workers that **the broker and not the farmer is the formal employer**: *"The broker is our boss, as he pays us and found the work for us"*.

While brokers agreed to this formal role, only 25% of them admitted to understanding the legal procedures involved (in dismissals, for example). When workers were asked about brokers' knowledge of labour rights, 62% indicated that they believed that **brokers do understand labour laws** and 38% were uncertain. They based their understanding on the fact that when they are initially employed, brokers are able to explain labour procedures to them.

Farmer-Broker Relationships

It is clear that the **historical power imbalance that characterises the worker-farmer relationship is mirrored in the new relationship between broker and farmer**. This is especially true given that all the brokers interviewed had spent most of their lives working as farm workers. This significantly affects their power to negotiate a fair deal in the contract with farmers, and in turn, the levels of payment to broker-contracted workers. Brokers further reported that they felt that racism is still rife in the sector, with farmers preferring to work with white brokers. They all expressed disappointment that their expectation of a better income had not been realised as working as a broker is not as lucrative as they had anticipated. In fact, many reported that they struggled to break even.

When farmers were asked about their reasons for using labour brokers as opposed to contracting temporary workers directly, the most common reason given was that it was **simply easier to source temporary labour through brokers as they dealt with all the cumbersome logistical arrangements**.

Given their expressed shortcomings of the existing legislative and administration process, **farmers agreed that massive potential exists for the abuse of workers**. They opined that labour rights violations among broker-contracted workers "*probably do exist*", but could not estimate how widespread it was. When asked what farmers could do to ensure that workers' rights are not violated by brokers, they argued that "*Farmers need to hold other farmers accountable by adhering to a code of conduct that monitors brokers*".

Obstacles to Broker Compliance

When asked to identify their training needs, **all the labour brokers indicated that they require training in basic Labour Law**. In particular, they stated that they experience difficulties in the registration of their workers for UIF and Workmen's Compensation. Farmers listed the same key training needs as that of the brokers.

Labour brokers were further asked if any laws needed to change to enable them to operate more efficiently. Seventy-five per cent (**75%**) of the brokers indicated that the laws regulating the **minimum wage need to be scrapped** because they are too restrictive. The remaining 25% said they cannot comment as they do not know the laws.

When labour brokers were asked to identify gaps or problems in the current registration process which they undertake, 50% said they experienced significant difficulty with the registration of workers for UIF and Workmen's Compensation as they struggle to retain the same workers, which increases their administrative burdens.

Labour brokers further indicated that there is a **lack of clarity about the legislative provisions for seasonal or contract workers on the part of the Department of Labour officials**. Further, 25% said they experience problems with migrant workers who have false identity documents which makes registration for UIF and Workmen's Compensation very difficult. Finally, 25% of brokers

said they were not completely sure about the broker registration process and required additional information from the Department of Labour.

Farmers indicated **general support for the legal requirement to make use only of brokers registered with the Department of Labour**. However, while they acknowledged that the use of non-registered labour brokers was probably widespread, only one farmer respondent was willing to admit that *"in some situations, I have to employ unregistered brokers because the volume of work is so high and I would need the workers urgently"*.

All the farmer respondents complained that it was difficult to comply with the requirement of using only registered labour brokers and listed the lack of support from the Department of Labour (DoL) as the main obstacle in this regard. When asked what the DoL could practically do to make the process more efficient, the following suggestions were listed:

- Create a public register of brokers that farmers could access. This register should include a 'blacklist' of brokers who had previously violated labour rights of workers;
- Reduce the administrative burden for the registration process;
- Provide training and support to brokers;
- Institute monitoring mechanisms to ensure that workers contracted through brokers receive the legal minimum wage;
- Take responsibility for the registration process, including registration for UIF and Workmen's Compensation;
- Conduct regular audits of labour brokers;
- General assistance to labour brokers to *"become more organised"*.

They further listed the *"mindset of brokers"* as being a problem. With reference to the relationship between the broker and the farmer, labour brokers still behave deferentially towards farmers and are not assertive in their discussions and negotiations with them. In other words, they have not made the necessary shift in mindset from that of farm worker to business owner. Appropriate training and mentoring of brokers may assist in this process.

The brokers estimated that there are between 100 and 150 brokers operating in the Grabouw area alone. When asked to identify the mechanisms required to regulate labour brokers, all the **brokers spoke of the need to form an association of labour brokers**. The reasons offered for this was that an association could:

- Unite brokers in levelling the playing field among brokers in terms of their negotiations with farmers;
- Ensure that the work is distributed fairly and evenly between brokers.

The brokers also echoed the views of farmers in so far as they believed that the DoL should be better at ensuring stricter enforcement of the minimum wage to farm workers employed by brokers.

Labour Broker Associations

During the course of this study, we learned about two brokers associations. One association was established with labour brokers in Grabouw and Villiersdorp, with the following objectives: ensuring better regulation; improved contract negotiation with farmers and protecting the interests of brokers to promote, advance and unify brokers. The association also tries to assist brokers with UIF, Workmen's Compensation and other administrative and legislative difficulties. This association is, however, not really functional as it has struggled since inception to secure the required funding.

The second association was established as an initiative of the South African Fresh Produce Exporters Forum (FPEP). It appears to be better organised in respect of funding as it also receives support from an independent importer group in Europe. Approximately nine brokers are members of the association which seeks to improve negotiating terms with farmers. The forum is also involved in research on fresh produce in South Africa and plans to hold training initiatives for brokers to ensure that issues related to compliance are addressed effectively.

The two associations did not appear to be aware of each other even though both worked with brokers in the same geographic area.

Employment Conditions

One hundred and two (95%) workers interviewed indicated that they did not have a written contract with the broker. Of all the workers interviewed, only five had a written contract of employment. Of these five only one was given a copy of their contract. This statistic was confirmed in the interviews with the brokers. The main reason provided by brokers for their failure to conclude written contracts was the fact that the workers are primarily seasonal workers who only work for a limited period of time which makes *“contracting unnecessary”*. This is an indication of the brokers’ limited knowledge and understanding of Labour Law. Farmers indicated that they were aware that most brokers did not conclude contracts with workers. In the words of one farmer respondent, this was the case because a *“third-world relationship existed between brokers and workers in which there was no guarantee regarding minimum wage”*.

Labour brokers were also asked about their own contracts with farmers. Fifty-eight per cent (58%) of the labour brokers indicated that they had written contracts of employment with the farmers and 42% did not.

All the farm workers interviewed reported that they worked **five days a week, for approximately 10 to 11 hours per day**. Eighty-six per cent (86%) of the farm workers were paid on a Friday and the remaining 14% were paid fortnightly. Twenty-seven per cent (27%) of farm workers were paid by the farm owner, while 73% of workers were paid by the labour broker.

All the farm workers interviewed received R250 per week. The 17% of respondents who were paid on a piece-rate basis reported receiving an average wage of R50 per day. **The amount of R50 per day, or R250 per week, is just under the current legal minimum wage of R1041 per month.**

Labour brokers’ responses to the question about the amount of money that is paid to farm workers varied. Fifty-eight per cent of labour brokers stated that the farm workers receive approximately R50 per day or R250 per week, which corresponds with the workers’ responses. Twenty-five per cent (25%) of the farmers stated that they pay farm workers R60 per day. The remainder of brokers and farmers said the workers get paid according to a piece-rate system that is negotiated between the broker and the farmer.

All the farmers reported that they paid brokers at least the minimum wage for workers when they negotiated with brokers. However, **they all expressed doubts that the workers received this minimum wage.**

Regardless of the actual rate of payment, it is clear that **wages received were not enough to support the livelihoods of workers**. One worker respondent expressed herself in the following way:

The money is so little, we can't afford to join unions. We must pay our debt and the people who look after our children and then, with what we have left, we can only afford to buy some food.

Migrant Workers

All respondents confirmed that the use of migrant labour by brokers is widespread in Grabouw. The reason advanced by labour brokers for this practice was that workers brought in from other places were perceived as being **more reliable and "gave the broker fewer problems"**, whereas local workers frequently moved between brokers for more money and were less reliable. Most of the migrant workers are recruited from the former Transkei and Genadendal areas. One farmer said the following regarding migrant labour:

It is a known fact that labour brokers fetch workers in Transkei and make promises of work and promises of payment of R100 per day and then they come here they get much less and if they are unhappy they go back home or they stay and work for others.

The brokers indicated that all the migrant workers who come to Grabouw to work leave their families behind. After the season ends, they either return to the Eastern Cape or send for their families, and subsequently live in informal settlements in Grabouw with their families. Brokers advanced this as the primary reason for the fast population growth in Grabouw town and the high levels of unemployment.

When brokers were asked whether migrant labour replaced resident labour, 58% said 'no' while 42% said 'yes'. Those who said 'no' argued that people from the town work on building contracts in Stellenbosch and Somerset West in order to earn more money. They also argued that there are not enough people from the villages surrounding Grabouw to fulfil the work contracts during the season which contributes to the need to fetch more workers from the Eastern Cape. The brokers who agreed that migrant labour replaces resident labour stated that farmers prefer workers who are not from Grabouw because they do not want to have workers living on their farms and because farmers find migrant workers more reliable than local workers.

Despite the contradictory responses outlined above, one can conclude that migrant labour as facilitated through labour brokers is likely to have a **negative impact on the work available for resident workers and utilising migrant labour will, therefore, impact on the job opportunities available to resident farm labourers**. The system of migration, the treatment of migrant workers and their particular vulnerability renders these workers even more vulnerable and open to exploitation than resident seasonal workers.

Recruitment Practices

Farm workers were asked how they make contact with labour brokers to obtain work. It is clear that **contact and recruitment was made through informal networks**. In many instances, the brokers live in the same informal settlement as the potential workers. Some of the worker responses included the following:

The broker also lives in Sideview² with us. Most of us heard from other workers who worked for the broker before. We then went to him and asked him for work.

He is also in the area. People pass the word around. The manager also comes to ask if people are interested in work. The farm then provides transport.

2. Sideview is an informal settlement area in Grabouw.

It is clear that workers usually learnt about the brokers by word of mouth from other workers and would then approach the broker at his house. The labour brokers confirmed that they recruited workers in this manner. Some **also indicated that when there was not enough 'demand' from potential workers, they went on a house to house recruitment drive.**

Some brokers indicated that they **travel to the former Transkei to find workers who they then transport to Grabouw by taxi at their own initial expense.** The farmer or broker usually pays for the transport upfront; this cost is later deducted from the workers' wages. For workers transported between the local townships and the farms on a daily basis, it was reported that workers pay half of the transport costs when it is deducted from their wages. The balance of the costs is shouldered by the broker himself.

The study also confirmed that **brokers worked exclusively with contracted temporary (seasonal or migrant workers) and never manage contracts with permanent workers.** Brokers indicated that workers are employed on a seasonal basis because of the seasonal nature of agricultural work. Brokers therefore mostly contract workers during 'the season'. Asked how they think workers sustain their livelihoods when they are not working, one broker stated: "*most of them [workers] sit at home*".

Labour Broker Fees

When farm workers were asked how much they think brokers get paid, their answers varied. However, on average the worker respondents believed that the **broker received about R60 per worker per day, paid the worker R50 per day and was left with the balance as his fee.**

When labour brokers were asked the same question, most echoed the estimates of workers with 67% stating that they pay workers approximately R50 per day and take between R10 and R15 per worker per day. The remaining 33% said they negotiate with the farmer on a piece-rate basis. The piece-rate system of payment works on the following basis, as explained by the labour brokers:

The commission for the labour broker is not a set amount but usually depends on the rain and amount of bins filled. At R40 x 40 bins = R1600 x 5 days = R8000 – after this amount is calculated, the broker must give every worker their respective shares for picking and sorting and then only after everyone is paid out can the broker take his percentage of the money.

A different piece-rate work formula was explained as follows:

Farmer pays 80c to R1.10 per tree, 2 teams are supplied to the farmer with 10 workers in each team. The farmer then works out the amount of trees with piece-rate work rate, this is divided by 2 and multiplied by 5 e.g. 120 trees x 80c/ 2 people x 5 days = amount and then up to the farmer to decide the amount payable to the broker.

Regardless of how the piece-rate formula was applied, brokers reported 'earning' 10% to 20% of the total contract amount paid by the farmer.

All the farmers indicated that the fee is negotiated with the broker and that they calculate a price that complies with the minimum wage for workers. Two of the four farmers interviewed were members of Eurogap and were keen to comply with labour legislation. If they did not comply, they could lose their Eurogap accreditation and hence their contracts in Europe. While all thought that they were at least paying the minimum wage to brokers to pay to workers, **none had a verification system in place and did not feel that this was their responsibility.** The farmers felt that the verification and enforcement was the role of the DoL.

Wage Deductions

When the workers were asked to list any deductions from their wages, 50% reported that UIF was deducted, while the remaining 50% did not think it was deducted. Labour brokers claimed that 67% of them deducted UIF while 33% said they did not deduct UIF or Workmen's Compensation. The main reasons advanced by brokers for failing to make these deductions were:

- Workers do not work every day;
- It was difficult to calculate UIF because of the high levels of workers moving between different brokers on a daily basis according to who pays the highest rate
- Piece-rate basis of payment hampers UIF and other deductions.

Most farmers indicated that while they thought that UIF registration is the broker's responsibility, **they provided assistance as otherwise they did not believe that brokers would comply**. In terms of the legislation, the responsibility to ensure due compliance ultimately rests on brokers and farmers jointly.

Farm workers were asked how much money is deducted from their wages for placement, accommodation, transport, or any other items. Workers indicated that other than transport, only repayment for loans plus interest is deducted. This can add up to significant amounts as workers often come to the area with no cash in hand. They therefore request advances on their wages to meet the cost of food and other basic necessities or, alternatively, buy food on credit directly from the broker at much-inflated prices. Once interest is added, the worker is basically locked into long-term indebtedness to the broker. **The interest rates are not clearly spelled out, but workers expressed a general feeling that "large amounts are deducted as interest on the loans or food purchased from brokers"**.



Dwelling for seasonal workers

Most (67%) broker-contracted workers interviewed lived in informal housing, while the remainder lived in hostels. The majority (78%) of workers who lived in informal housing and hostels are migrant workers who were not from the Grabouw area. Upon completion of the 'season', workers

either returned to their home towns or permanently resettled in the informal settlement areas in Grabouw.

The question of responsibility to provide accommodation for broker-contracted workers varied significantly. The arrangements included:

- Farmers sometimes supply mattresses and accommodation to workers for free;
- Brokers provide accommodation for workers in informal structures at their own homes for the duration of the employment contract;
- Workers live in hostel accommodation.

The standard of accommodation for migrant workers was found to be very poor with workers often living in cramped unhygienic conditions. In addition, women workers often faced risks to their safety with no privacy, the lack of bathroom facilities and in cases of hostels, isolated locations that increases their vulnerability. All the respondents confirmed that the standard of housing available to migrant workers was generally lower than that of permanent on-farm resident workers.

Unionisation

Neither the labour brokers nor any of the seasonal workers interviewed were unionised. Workers regarded this as a norm in the sector: **labour-contracted workers were not unionised**. The main reasons given by worker respondents for this were:

- Farmers and brokers do not like unions and if workers joined a union, they may lose their jobs;
- Workers did not earn enough money to afford union subscription fees;
- Workers were not aware of trade unions and no union had ever attempted to recruit them.

The three trade unions interviewed in this study agreed that they did not think that broker-contracted workers were receiving the minimum wage. They also felt that, **as a result of not being unionised, these seasonal workers lacked the required bargaining power to assert their labour rights**. The unions reported the greatest challenge faced in trying to unionise temporary workers as "*access to seasonal workers*" as farmers do not allow unions to speak to these workers, thus making it almost impossible to unionise them. In addition, because the contracts were so "*irregular*" with varying contract periods, it became difficult for the union to build a relationship with contract workers as members. The only solution the unionist could see towards realising the legal rights of temporary workers was the establishment of a specialised bargaining council for seasonal workers. This would only be possible if the Department of Labour enforces the requirement for all labour brokers to be legally registered.

Training

The study found that workers contracted through labour brokers **had no access to any form of training** even though they all expressed an interest in further training. Workers reported that it was mainly permanent workers who have access to training.

While the workers were almost unanimous in regarding the broker as their employer, 67% believed that it was the responsibility of the farmer to provide training to workers. A further 23% believed that the broker should be responsible, while 10% expressed uncertainty. The main

reason cited for the farm owner bearing the responsibility for training was the perception that brokers would not be able to afford it, while *"farmers have enough money to provide training"*.

In response to the same question, **58% of labour brokers saw worker training as their responsibility, while 9% saw it as the farmers' responsibility**. The remaining 33% did not believe that there was a responsibility for anyone to provide training to temporary workers. They further stated that the season was usually very busy and there was therefore no time available in which to train workers. The only training provided by some of the brokers was a one-day orchard training session.

This finding again confirms the confusion regarding roles and responsibilities between brokers and farmers in relation to workers. This in turn has implications for workers' ability to claim their rights.

When asked about their knowledge of labour rights, all the farm workers who were interviewed indicated that they did not know their labour rights and had never received any form of training about their labour rights: *"We don't know our rights, but we really want to know our rights, so that we can also talk about our problems"*. At the same time, they expressed scepticism about whether this would make an objective difference in their circumstances given their weak bargaining position as contract workers. In the words of one worker respondent, *"It [knowledge of our labour rights] will not help us because we will be too scared to use the knowledge. We just go if they chase us away."*

Analysis and Implications of Findings

The findings of this research can be analysed on three main levels, viz. legislation and policy; labour brokers; and workers.

Legislation and policy

Firstly, because current legislation does not adequately cover casual, seasonal and migrant workers, they do not receive the protection of the labour laws, nor the same benefits as those received by permanent workers. For example, collective bargaining only covers full-time employees, not seasonal, contract or migrant labourers. Given the increasing trend towards casualisation, seasonalisation and migrancy, legislation needs to explicitly address these categories of workers. Secondly, the notion of the so-called standard employment relationship is problematic in this context as it also fails to address the casualisation of labour and the resultant phenomenon of labour brokers in the outsourcing of labour. In other words, the three-tiered employment relationship and all its implications are not explicitly spelt out. For example, the research findings demonstrate that workers are unclear about who their employer is – the farmer or the labour broker. A related issue concerns the issue of liability (to and for the farm worker) when there are 'dual' employers: currently, non-compliance (by both farmers and labour brokers) of existing labour legislation such as the minimum wage, a lack of formal contracts, UIF deductions, and compensation in the event of work-related injury or death is largely attributable to the lack of definition of the three-tiered employment relationship.

In conclusion, then, there is a need to ensure that South Africa's labour law and labour system take account of the three-tiered employment relationship by putting the necessary legislative mechanisms in place which will ensure and enforce responsibility for compliance on both brokers and farmers jointly. It is therefore crucial that the draft Private Employment Services Regulations is passed and implemented to ensure that the activities of labour brokers are effectively

registered and regulated, and that their employees are paid the minimum wage, registered for UIF and Workmen's Compensation, etc.

Labour brokers

Firstly, in the absence of clear definitions of roles or other regulation, the research findings show that labour brokers are effectively able to ignore existing labour legislation, as noted above. It is this very reason which might explain farmers' inclination to use labour brokers. However, while labour brokers do not generally deduct for UIF and Workmen's Compensation, they do deduct for transport costs and any loans made to workers; they also earn 10-20% of the contracts with farmers (the rest is paid out to workers). Nonetheless, most labour brokers experience financial problems which is partly explained by the following reasons. Secondly, while farmers concede that labour brokers are probably exploiting workers, their unequal relationships with labour brokers clearly means that labour brokers have no bargaining power and, thus, have to settle for sub-optimal contracts with farmers, resulting in poor wages and benefits for workers. Thirdly, as former farm workers themselves, the historical unequal relations between farmers and labour brokers are perpetuated into the current relationship with labour brokers even reporting that farmers prefer contracting with white labour brokers.

In addition to these power inequalities, the research also highlighted labour brokers' need for training in labour laws (specifically the registration of UIF and Workmen's Compensation), human resource management and business management, as well as a need for labour brokers to organise themselves to present a unified and strong voice in order to negotiate better wages for workers and themselves with farmers. Although most labour brokers believed that the minimum wage should be scrapped, they did confirm other gaps in existing law such as a lack of clarity regarding legislative provisions for seasonal and contract workers. Thus, in addition to addressing policy (e.g. registration of labour brokers) and legislation (e.g. explicit definition of provisions for casual and seasonal workers), funding should also be made available for the training and organisation of labour brokers.

Farm workers' wages, conditions and circumstances

Firstly, paternalistic and unequal power relations characterise the relationship between farm workers and brokers in ways that replicate those between farmers and farm workers. Secondly, the majority of respondents reported that, although they would prefer to be employed as permanent workers because they would receive better wages and other legal entitlements such as non-wage benefits, they had no alternative but to work as temporary workers. Thus, part of any labour law reform must be the specific issue of guaranteeing temporary workers the same rights and provisions as permanent workers. Thirdly, the fact that the research findings reveal that there is discrimination along, mainly gender, but also, some race lines, highlights the need for gender training to be part of any training provided to labour brokers, as well as the enforcement of existing legislation which prohibits race and gender discrimination. Fourthly, the perception among both labour brokers and farmers that migrant workers are more reliable has resulted in the growing employment of migrant workers which, together with low levels of unionisation, contributes to the exploitation of temporary workers because of their increased "*desperation*". Legislation that addresses equality and parity among different categories of workers will prevent any exploitable differentials. Trade unions clearly need specifically to target temporary workers, while a bargaining council for seasonal workers needs to be explored once labour brokers are legally registered. Finally, workers all identified the need to receive training like permanent workers. When the issue of the three-tiered employment relationship is defined, responsibility for the provision of training will also need to be clarified.

CHAPTER FIVE

The Way Forward

This final chapter first makes a number of recommendations regarding the roles and responsibilities of the key role players, while the main policy questions are considered in the second part. The third part of the chapter serves as a conclusion for the report.

The Role Players

The rights of seasonal workers will only be protected and guaranteed if the Department of Labour plays a real role in enforcing, regulating and monitoring the activities of labour brokers in relation to seasonal workers. The Department of Labour should allocate sufficient personnel and funds to conduct regular inspections of labour brokers and employers. These inspectors should also speak directly to seasonal and migrant workers to ensure that both labour brokers and employers are complying with labour laws. Government has a responsibility to ensure proper regulation and non-compliance should be penalised. To this end, a further in-depth investigation should be conducted into the USA example of the registration and regulation of labour brokers in order to apply any relevant pieces of the model in South Africa. Auditing processes and appointing an Ombudsperson are measures that could be implemented to address the current compliance gaps.

In addition, it is clear that seasonal workers experience greater violations of their rights than permanent workers as a result of not being organised. For this reason, trade unions should become more proactive and develop strategies to organise seasonal workers more effectively. Training and education about their labour rights, socio-economic rights and all other human rights to which all South Africans are entitled in terms of the Constitution of South Africa also needs to be offered to seasonal workers and migrant workers. The training programmes should take into account literacy levels and language abilities; this should apply to training programmes for both farm workers and brokers.

To further address issues of compliance, the TESCO and Eurogap export companies should continue pressurising employers to comply properly with labour laws. In addition, employers' associations and fruit exporters should go on playing the important role of the continued enforcement of labour legislation and applying pressure on employers to employ only registered labour brokers.

Another important recommendation is that trade unions, employers and consultants should come together and compile recommendations to address the current gaps in legislation, implementation and compliance. These recommendations should be submitted to the Minister of Labour.

In the Grabouw area, high levels of migration and seasonal work are found. It is estimated that approximately 100 to 150 labour brokers operate on a daily basis and employers are increasingly outsourcing labour to brokers to remove the burden of recruitment and compliance. However, the employers do not ensure that the labour brokers who are contracted to recruit and manage labour are sufficiently knowledgeable about the laws and procedures related to the task.

Most of the labour brokers operating within the area are not organised, do not understand labour laws and compliance matters and belong to associations which are not formally constituted because of insufficient funding. In addition, gross violations of the labour rights of migrant and seasonal workers occur on a daily basis. This was illustrated during the course of the research by the number of accidents that occurred, specifically involving seasonal and migrant labour.

The increase of non-formal employment and the non-standard employment relationship in particular is not going to disappear. It is clear from the high levels of unemployment throughout South Africa that workers will continue to move from one place to another to secure an income and employment. In addition, outsourcing and contracting are on the increase. Given this changing labour environment, it is necessary to consider the possible policy options, and examine the roles and challenges facing various role players.

Policy Considerations: Regulation or Banning?

There are two main options being propounded in the political arena in respect of labour brokerage in South Africa. These fundamentally relate to whether labour brokers should be regulated or banned.

Regulation

Regulation would require an amendment of certain aspects of the laws and require specific legislation dealing with the regulation of labour brokers. More specifically, it would require an overhaul of the current labour legislation. The most problematic provision currently is the equation of a labour broker with an employer. The main problem with this concerns collective bargaining. Labour brokers would only be held liable if the breach of a collective bargaining agreement was extended to non-parties (parties who are not directly referred to as employer and employee in a standard employment relationship). If this extension was included then the employees of a labour broker would be legally protected by the collective agreement.

Currently, the Labour Relations Act defines temporary employment services, but fails to give a timeframe for the duration of such temporary employment. This implies that an employee of a labour broker may be continuously employed for an indefinite period which has consequences in respect of the employee's benefits.¹ Workplace forums have also been advanced as a good site for struggle for workers employed by labour brokers. This would require more proactive involvement from trade unions to ensure their effectiveness.

Regulation of labour brokers would require a review of the current labour law framework to ensure the protection of workers employed by labour brokers. The issue of regulation would however, be contrary to strong calls from Cosatu for the banning of labour brokers which we will investigate below.

1. Theron J, Labour Broking in the Road Transport Industry in Southern Africa, January 2009.

The Implications of Regulation for Different Parties

Party	Role	Challenges
Worker Organisations: Trade Unions and Civil Society Organisations	<ul style="list-style-type: none"> • Call for a revision of all labour legislation to ensure the protection of workers employed by labour brokers. • Pressurise DOL to monitor compliance with laws and policies and to ensure effective implementation. • Trade unions: peruse contracts of employment, challenge current employment practices through the CCMA; enforce workplace forums; insist on the temporary nature of employment to become permanent with a view to ensuring that temporary workers receive benefits. • Hold both the labour broker and employer jointly and severally liable in all employment contracts. • Devise strategies of organising temporary workers as well as labour brokers to ensure compliance with labour laws. 	<ul style="list-style-type: none"> • Mobilising farm workers and labour brokers. • Developing effective training material to ensure that farm workers are informed of their rights in relation to the triangular employment relationship. • Lobbying government to ensure that labour laws are revised and changed to effect a protective legal environment for workers. • Challenging the current employment regime.
Government	<ul style="list-style-type: none"> • Ensure the registration of labour brokers. • Ensure compliance of labour brokers with labour laws. • Employ more labour inspectors. • Ensure the protection of workers employed by labour brokers. • Ensure that women are treated equally with men in the employment relationship between workers and labour brokers. • Ensure that labour brokers receive sufficient labour law training to provide strict adherence to labour law provisions. 	<ul style="list-style-type: none"> • Resolving the conflicts between regulation and banning. • Ensuring that all laws are reviewed and changed to regulate brokers. • Ensuring that there are sufficient people capacity to implement the necessary changes effectively. • Monitoring compliance. • Effectively training employers and labour brokers on regulation and labour law. • Ensuring that workers understand their rights in relation to labour brokers. • Ensuring that contracts of employment are drawn up, understood and submitted to workers in their own language or in a manner in which they understand.
Farmers	<ul style="list-style-type: none"> • Employ only registered labour brokers. • Ensure that labour brokers register workers for UIF and that contracts of employment are drawn up and submitted to workers. • Ensure that workers understand who the employer is, who to report to, and to whom they are accountable. 	<ul style="list-style-type: none"> • Engaging and employ registered labour brokers only. • Ensuring that workers understand who the employer is in the triangular employment relationship. • Monitoring labour law compliance by labour brokers. • Ensuring compliance in respect of ethical trade in the current economic environment.
Labour Brokers	<ul style="list-style-type: none"> • Register as a labour broker. • Ensure that they understand the labour laws applicable to workers. • Ensure the fair treatment of workers, with clear contracts of employment. 	<ul style="list-style-type: none"> • Ensuring that they are registered and follow the registration process. • Understanding the labour law environment. • Ensuring that they operate within the

Party	Role	Challenges
	<ul style="list-style-type: none"> • Ensure that they receive the necessary training from DOL to perform their duties appropriately. • Organise as labour brokers to ensure that workers in the agricultural sector are treated consistently and fairly; strengthen their own collective negotiating position in respect of farmers. 	<ul style="list-style-type: none"> • legal framework. • Attempting to organise themselves.
Workers	<ul style="list-style-type: none"> • Receive training on their rights in respect to labour brokers. • Be aware and organise themselves to ensure protection. • Be aware of the need only to contract with registered brokers. • Insist on contracts of employment and challenge any legal transgressions on farms via unions. 	<ul style="list-style-type: none"> • Overcoming patriarchal relationships on farms. • Overcoming restrictions in respect of belonging to trade unions and to be open to being organised. • Not being fearful of repercussions in respect of understanding and questioning labour law rights and their enforcement.
Ethical Trade Organisations	<ul style="list-style-type: none"> • Develop a code of good practice for labour brokers. • Train labour brokers on good practice in the agricultural sector. • Ensure that all ethical trade contracts are amended to ensure that farmers only use registered brokers. In the event that they do not comply, their produce will not be exported. • Continue to ensure that the working conditions on farms are fair and compliant with existing labour laws. • Raise awareness regarding the use of labour brokers on farms in South Africa and assist government departments in providing effective training packages for labour brokers. 	<ul style="list-style-type: none"> • Overcoming barriers on farms to ensure that good practices are followed and adhered to. • Approving export only if relevant labour laws are complied with. • Acting as a realistic enforcer of labour law compliance on farms.

Considering the challenges faced by Namibia in trying to ban labour brokers, the regulation of labour brokers, with a later view to banning, may prove to be the more effective route in the current economic climate to ensure a protective work environment for farm workers.

Banning

Given the perniciousness of labour brokerage in most contexts and the negative impacts on farm workers, it is understandable that many trade unions make strong calls for a ban of labour brokers. However, a reading of both international and national labour trends would suggest a more measured response.

There are several arguments against banning labour brokerage in South Africa, particularly in view of the very real scenario presented by the recent Namibian example. By banning labour brokers, it has been argued that labour brokers will merely find other ways to operate illegally within the country and this will continue the insecure employment environment for workers.

If South Africa were to ban labour brokers, it could also result in a constitutional challenge, similar to the one in Namibia. In addition, it would have the resultant effect of increased unemployment, particularly for temporary workers who are already vulnerable in an uncertain economy.

Another argument against the banning of labour brokers is the existence of the Private Employment Agencies Convention, 1997 by the ILO which effectively means that the ILO has accepted labour brokers. South Africa has, however, not ratified this particular Convention but has always tried to adhere to the labour law initiatives as provided by the international community.

The banning of labour brokers would also mean that trade unions would have to take leaps and bounds in terms of ensuring the mobilisation and unionisation of farm workers. Banning may be appropriate in the long run, but it may not be a realistic and feasible idea in the short-term, given South Africa's high levels of poverty and unemployment.

The Implications of Banning for Different Parties

Party	Role	Challenges
Worker Organisations: Trade Unions and Civil Society Organisations	<ul style="list-style-type: none"> • Lobby for the complete banning of labour brokers. • Lobby for the amendment of labour laws to effectively remove all provisions which cover labour brokers. • Organise workers. • Ensure that labour brokers do not continue to operate illegally. 	<ul style="list-style-type: none"> • More insecure work environment for farm workers who are already not organised effectively in the agricultural sector. • The continued operation of illegal labour brokers. • The abuse and violation of workers rights.
Government	<ul style="list-style-type: none"> • Effect the ban on labour brokers through legislation and enforcement mechanisms. • Monitor the illegal operation of labour brokers who may reconstitute themselves in other forms. 	<ul style="list-style-type: none"> • Dealing with increased dismissals, and violation of labour laws on farms. • Limited capacity to deal with current monitoring and enforcement of labour laws. • Increased insecurity of employment for workers employed by illegal labour brokers. • Possible influx of illegal migrant labourers.
Farmers	<ul style="list-style-type: none"> • Be the sole employer of farm workers and ensure labour compliance on farms. 	<ul style="list-style-type: none"> • Increased employment of migrant labour to avoid labour law compliance. • Limited labour and capacity on farms to ensure production and export.
Labour Brokers	<ul style="list-style-type: none"> • Find alternative means of employment. • Operate illegally or reconstitute themselves under different names to perform the same function. • Violate current labour law practices due to operating illegally. 	<ul style="list-style-type: none"> • Continued insecurity for workers. • Continued labour law violations. • Increased unemployment for the many labour brokers who currently enjoy employment. • Difficulty for trade unions to organise labour brokers and workers employed by labour brokers.
Workers	<ul style="list-style-type: none"> • Work only through farmers not labour brokers. • Understand the implication of the ban of labour brokers. 	<ul style="list-style-type: none"> • Increased job losses. • Increased migrant worker employment which will replace resident labour and create further job

Party	Role	Challenges
	<ul style="list-style-type: none"> • Be aware of the labour laws • Organise themselves more effectively. 	losses and unemployment. <ul style="list-style-type: none"> • Increased dismissals, labour law violations and insecure tenure for farm workers.
Ethical Trade Organisations	<ul style="list-style-type: none"> • Promote the non-use of labour brokers amongst employers. • Monitor labour law compliance of employers. • Ensure the export of produce linked to labour law compliance by employers. 	<ul style="list-style-type: none"> • Having to deal with the resultant insecure work environment which the banning will cause. • May have the effect of limited exports or poor exports initially until the banning has effectively been implemented. • Possibility that Ethical Trade Organisations are signatories to PEAS Convention and may withdraw from South Africa as a result of banning which would have an impact on economy and job losses as well as security of tenure for farm workers.

Conclusion

It is evident that despite calls for banning, South Africa and the international community may not be prepared to do so in the current economic climate. It may be more feasible to find solutions for the regulation of labour brokers than to foresee the possible effects of banning, such as the severe job losses which occurred in Namibia after labour brokers were banned. It may therefore be more prudent to deal with the challenges and limitations in the current situation than create an entirely new situation of which the consequences are uncertain at this stage.

In weighing up all the prospects and challenges of the two options, a better suggestion may be to ensure appropriate regulation of labour brokers in the short-term with a possible longer-term view of banning later.

In conclusion, therefore, the recommendations in this study serve to provide a snapshot of the situation in one particular area which might be typical of many other areas of South Africa. It is recommended that research be embarked upon in other farming areas in other provinces in South Africa to present a comprehensive understanding of the national situation regarding brokerage in agriculture. It is clear that seasonal work and labour brokerage can only be addressed if all role players and stakeholders find diverse intervention strategies to ensure that the rights of the most vulnerable workers are protected.



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