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**Track 4: Raising the Floor for Rights at Work in a Globalizing Economy**

STATE AND NON-STATE INITIATIVES FOR THE PROTECTION OF AGRO-  
FOOD SECTOR WORKERS: COMPARATIVE PERSPECTIVES FROM SOUTH  
AFRICA

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## INTRODUCTION

South Africa as a member of the ILO has undertaken to work towards attaining the overall objectives of the Organization to the best of [its] resources and fully in line with its specific circumstances. Like all members of the ILO, South Africa has an obligation to ensure that decent work becomes a reality for all workers in the country. No sector presents a greater challenge to the realisation of this lofty goal than the agro-foods sector. While being one of the biggest employers of labour, the sector is reputed for appalling working conditions. Work in the sector is characterised by lack of job security, irregular and low wages, lack of social security coverage and the denial of basic entitlements to paid leave and regulated working hours.

This paper seeks to examine state and non-state forms of protecting agro-foods workers in South Africa. We begin the history of the state's regulation of the agro-food sector in section I. This country has adopted a very progressive stance in relation to farm workers evidenced by their inclusion in all national labour legislation. Importantly, farm workers are subject to a dedicated Sectoral Determination which is published by the Minister of Labour in terms of the Basic Conditions of Employment Act (the BCEA). The effectiveness of legislation in protecting farm workers and the challenges they face will be considered in section II. This is followed by a discussion of the impediments to the effective implementation and enforcement of labour law in the agro-food sector, which include lack of capacity on the part of the labour inspectorate and inadequate and ineffective organisation of workers.

In section IV, we consider the rise non-state regulation as a mechanism for worker protection. We focus on ethical trade and the rise then consider a South African multi-stakeholder organisation called the Wine Industry Ethical Trade Initiative (WIETA), its history, objectives and mode of operation. Our analysis of WEITA's auditing and accreditation system demonstrates its limited potential to improve the working lives of the majority of workers in the agro-foods sector. And if WIETA's impact on the employment relationships within the agro-foods sector is limited, its potential impact on broader global market dynamics in the sector is even more questionable.

We conclude that is necessary to be cautious and realistic about what ethical trade initiatives such as WIETA are able to achieve and to be conscious of the social and economic terrain within which they operate. While it would be foolish to pin one's hopes on ethical trade as a panacea to the problems faced by workers, it would be unwise to dismiss it completely. Ethical trade has a place and a role to play in the struggle to improve the lives of workers in the agro-foods industry. Its role could be strengthened under certain conditions.

## 1 OVERVIEW OF STATE REGULATION OF THE SECTOR

The legal and social position of farm workers has changed significantly from that of slaves and servants during the colonial and apartheid eras to bearers of rights under the constitutional order and new labour regime. Master-slave relations during the colonial era were characterised by paternalism, which required masters to protect and care for the slaves and placed the latter under the authority of their masters.<sup>1</sup> This ideology was based on the assumption that slaves were not mature human beings.<sup>2</sup>

According to du Toit, the abolition of slavery after its 170-year tenure did not dislodge the paternalistic ideology that had become entrenched within the master-slave relationship.<sup>3</sup> Rural paternalism continued to underpin and shape labour relations under master and servant legislation that governed inter alia work on farms during the 19<sup>th</sup> and 20<sup>th</sup> centuries.<sup>4</sup> The master and servant legislation introduced penalties for breach of contract, indiscipline and damage to property, which became increasingly oppressive for farm workers in particular.<sup>5</sup> It was integral to the construction and maintenance of a discriminatory labour regime in which farm workers (amongst others) were excluded from the protections extended to white workers under the industrial relations legislation.<sup>6</sup>

The repeal of the master and servants legislation in 1974 was the first step towards dismantling the fragmented labour regime establishment of a unified labour market policy for all workers in South Africa.<sup>7</sup> Another key development was the enactment of the Agricultural Labour Act 147 of 1993 which extended the provisions of the then Labour Relations Act<sup>8</sup> and the Basic Conditions of Employment Act<sup>9</sup> to farm workers for the first time. The next significant milestone was the transition to a constitutional democracy in South Africa. Section 23(1) of the Constitution extends the right to fair labour practices to “all workers” and post-transition labour legislation applies to all employees regardless of sector, with a few exceptions.

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<sup>1</sup> A du Toit and F Ally *The externalization and casualization of farm labour in the Western Cape: A survey of labour patterns in key Western Cape districts and their implications for labour justice* Research Report No 16, Programme for Land and Agrarian Studies and the Centre for Rural Legal Studies (2003) p 4.

<sup>2</sup> Du Toit and Ally op cit note, p 4.

<sup>3</sup> Du Toit and Ally op cit note, p 4.

<sup>4</sup> Du Toit and Ally op cit note p 4. The principle master and servant laws were the Master and Servant Ordinance 1 of 1941, the Master and Servant Act of 1856 and amendments to the latter Act in 1873 and 1926.

<sup>5</sup> See commentary on the Master and Servants Act 15 of 1856, Master and Servants Amendment Act of 1873 and Master and Servant Amendment Act of 1926 accessed from the O'Malley Archives at <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01672.htm> on 20/02/2012.

<sup>6</sup> D Du Toit et al *Labour Relations Law: A Comprehensive Guide* (Fourth Edition) (Durban: LexisNexis Butterworths, 2003) 6-8.

<sup>7</sup> See Du Toit et al op cit note p 10-11.

<sup>8</sup> 28 of 1956.

<sup>9</sup> 3 of 1983.

Farm workers enjoy the full suite of labour rights under the new labour dispensation. At the centre of the legislative framework is the Labour Relations Act (LRA).<sup>10</sup> The LRA's primary objects include the provision of a framework for collective bargaining, worker participation in decision making in the workplace<sup>11</sup> and effective dispute resolution.<sup>12</sup> The Employment Equity Act (EEA)<sup>13</sup> aims to address the historical labour market inequalities through the elimination of unfair discrimination<sup>14</sup> and the promotion of "affirmative action measures to ensure their equitable representation of designated groups in all occupational categories and levels in the workforce".<sup>15</sup>

Farm workers are also covered by the Occupational Health and Safety Act,<sup>16</sup> which requires employers to take measures to protect workers against work-related hazards to their health and safety. They are also entitled to employment-related social security protection in terms of the Unemployment Insurance Act (UIA) and the Compensation for Occupational Injuries and Diseases Act (COIDA).<sup>17</sup> These require employers to make contributions to the relevant social security agents to enable workers to claim benefits in the event of unemployment, occupational injury or disease. The agriculture sector is also covered by the Skills Development Act (SDA)<sup>18</sup> and has its Sector Education and Training Authority (SETA) to cater to skills acquisition and development provision of opportunities for employees and market entrants to acquire and develop skills in the sector.<sup>19</sup>

Importantly, there have been attempts to specifically regulate workers in the agricultural sector. In 2001, the Vision and Code of Conduct for Agricultural Labour Relations was concluded between trade unions, employers and government.<sup>20</sup> During the following year, the Minister of Labour issued a sectoral determination to cover the farm worker sector in terms of the Basic Conditions of Employment Act (BCEA).<sup>21</sup> The Determination regulates a broad spectrum of minimum conditions, including minimum

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<sup>10</sup> Labour Relations Act 66 of 1995 (LRA).

<sup>11</sup> Section 1(c) of the LRA.

<sup>12</sup> Section 1(d) (iv) read with the long title of the LRA.

<sup>13</sup> Act 55 of 1998.

<sup>14</sup> Section 2 of the Employment Equity Act.

<sup>15</sup> Section 2 of the Employment Equity Act.

<sup>16</sup> Act 181 of 1993.

<sup>17</sup> Acts 63 of 2001 and 130 of 1993 respectively.

<sup>18</sup> Act 97 of 1998.

<sup>19</sup> All economic sectors in South Africa are covered by a SETA which is established in terms of the Skills Development Act and tasked to develop and implement skills development plans according to the needs of the specific sector. SETAs are funded through skills development levies which employers are obliged to pay to the Skills Development Fund.

<sup>20</sup> South African Human Rights Commission. *Progress made in terms of land tenure, security, safety and Labour relations in farming communities since* (2008) p 67.

<sup>21</sup> Act 75 of 1997. The BCEA establishes minimum conditions of employment and regulates their variation. It allows the Minister to establish sectoral determinations to cover specific sectors. The Minister has issued these determinations to cover sectors that require sector-specific standards, are poorly organised, and whose workers are particularly vulnerable and work under poor conditions. The Minister initially issued Sectoral Determination 8 under Government Notice 24114 of 2 December 2002 and this was superseded by Sectoral Determination 13 under Government Notice 38518 of 17 February 2006.

wages, permissible deductions, working hours, overtime, leave and the provision of accommodation.

Like other employees in South Africa, farm workers are entitled to refer their labour disputes to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Labour Court, depending on the nature of the dispute. They are also covered by the Department of Labour's Inspection and Enforcement Service. This body is responsible for monitoring and enforcing compliance with minimum conditions stipulated in the BCEA and in sectoral determinations.

The inclusion of farm workers in the country's labour regulatory machinery and the development of a sectoral determination demonstrate South Africa's commitment to address the historical injustices against farm workers and establishing substantive equality amongst workers. Addressing the position of an undervalued and marginalised segment of the workforce is one concrete measure towards bringing about social justice and social transformation in the country. While the *legislative* protection of farm workers is commendable, the question whether they *actually* enjoy the protection in practice is a separate question must be answered on the basis of empirical evidence. It is to the latter question that we now turn.

## **2 WORKING CONDITIONS IN THE AGRO-FOOD SECTOR**

In this section, we consider the empirical evidence on working conditions in the farming sector. A number of qualitative and quantitative studies have been undertaken to shed light on this matter. These studies have adopted different methodologies and focused on different farming activities and geographical areas and have been conducted at different points in time. It would therefore be impossible to deduce the exact levels of legislative compliance from these studies. What is clear from the studies, however, is that substantial levels of non-compliance have been recorded in the sector.

The discussion below highlights key areas where problems have been identified in the research, namely pay-related issues, health and safety concerns, housing concerns and the growing externalisation and casualization of work. We highlight the challenges experienced by three particularly vulnerable groups, namely women, African workers and foreign migrants. Finally, we outline the consequences for workers and their families, and broader society.

### **2.1 Payment-related issues**

Farm workers are amongst the lowest paid workers in the country, with their gazetted minimum wages being lower even than those of domestic workers, who are also

amongst the lowest paid.<sup>22</sup> As from 1 March 2012, farm workers will be entitled to 7.71 rand per hour (US\$1.00), 374.10 rand per week (US\$48.52), and 1503.90 rand per month (US\$195.05).<sup>23</sup> A 2010 survey of the earnings of workers in South Africa indicated that the bottom 25% farm workers earned a median of R 1000 per month and that the overall median wage for all farm workers was R 1 213 per month.<sup>24</sup> This amounted to about of what the median wage for formal sector worker (R 3683 per month).<sup>25</sup> The overall median monthly wage fell short of the then gazetted minimum wage for farm workers, indicating non-compliance with the sectoral determination.

Research highlights that many employers fail to provide workers with contracts of employment, or where provided, fail to ensure that their terms are adequately understood, thus making it difficult for workers to know their rights and obligations at work.<sup>26</sup> Many farm workers are also denied access to work-related social security benefits such as UIF and COIDA, as employers are unwilling to register them and make the necessary deductions.<sup>27</sup> There are further complaints that some employers make unauthorised or excessive deductions from workers' wages.<sup>28</sup> For instance, workers have complained about deductions being made for protective clothing which is prohibited by legislation and exorbitant interest rates for loans provided to workers.<sup>29</sup> Non-payment for overtime, annual and sick leave is reportedly common.<sup>30</sup>

## **2.2 Health and safety concerns**

The Occupational Health and Safety Act requires employers to take measures to provide and maintain a safe workplace. One key hazard relating to farm work is the exposure to hazardous chemical substances or biological agents. The Minister has gazetted regulations to ensure that employers at workplaces where there is risk of such exposure take measures to address these risks.<sup>31</sup> These measures include providing information and training, providing medical surveillance and training in certain cases, and respiratory protective equipment and protective clothing.

The above provisions are not adequately implemented by employers in the farming sector, with many employers failing to provide adequate training and protective

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<sup>22</sup> Human Rights Watch op cit note p 28.

<sup>23</sup> As per Government Gazette 34946 of 18 January 2012.

<sup>24</sup> Statistics South Africa earnings of South Africans, 2010 Statistical Release Monthly P 0221.2, p xv.

<sup>25</sup> Statistics South Africa earnings of South Africans, 2010 Statistical Release Monthly P 0221.2, p xv.

<sup>26</sup> S Smith, D Auret, S Barrientos, C Dolan, K Kleinbooi, C Njobvu, M Opondo and A Tallontire "Ethical Trade in Horticulture: Gender Rights and Participation" Research Report undertaken by the Institute of Development Studies (2004) accessed at [www.ids.ac.uk/ids/global\\_on\\_23/01/2012](http://www.ids.ac.uk/ids/global_on_23/01/2012) 18.

<sup>27</sup> South African Human Rights Commission (2003) op cit note p 26; PLAAS and CRLS op cit note p 37, 42.

<sup>28</sup> Smith et al op cit note p 22.

<sup>29</sup> South African Human Rights Commission op cit note p 28; PLAAS and CRLS op cit note p 42.

<sup>30</sup> Du Toit and Ally op cit note p 34; South African Human Rights Commission (2008) op cit note p 65; Human Rights Watch op cit note p 11, 69; Smith et al op cit note p 20.

<sup>31</sup> Regulations for Hazardous Chemical Substances, 1995 and Hazardous Biological Agents Regulations 2001.

clothing, and in some cases requiring workers to use banned substances.<sup>32</sup> Consequently, exposure to pesticides and organic dusts occurs frequently, leading to a host of respiratory illnesses and reproductive and other disorders.<sup>33</sup> Farm workers are also exposed to ergonomic and mechanical hazards and it is reported that injury rates amongst farm workers are higher than in other sectors.<sup>34</sup> In addition, some employers reportedly fail to provide access to clean drinking water, toilets and hand washing facilities as required by law, thus exposing their workers to a host of infections and illnesses.<sup>35</sup>

Another pertinent health-related issue relates to the 'dop' or 'tot' system, whereby farm workers receive alcohol as partial compensation for their labour, predominantly in the Northern Cape and Western Cape. Although this was outlawed in South Africa decades ago, there is some evidence that some farmers still provide workers with alcohol as partial compensation, albeit in limited cases.<sup>36</sup> While the complete eradication of the dop system on farms remains a challenge, addressing its legacy presents an even more formidable challenge.<sup>37</sup> The imprint of the dop system in some farming communities has a number of dimensions: the institutionalization of alcohol abuse, a high prevalence of fetal alcohol syndrome and social problems such as domestic violence and even sexual abuse.<sup>38</sup>

### **2.3 Housing concerns**

Farmers have historically provided on-farm accommodation for permanent and, in some cases, seasonal workers working for them. In many cases, on-farm housing accommodates the families of farm workers who may or may not work on the farm. The rules governing the provision of accommodation for farm workers are found in Sectoral Determination 13 and the Extension of Security of Tenure Act (ESTA).

Clause 8(1) of the Sectoral Determination allows an employer to deduct up to ten per cent of a worker's salary for accommodation provided. The accommodation must meet certain minimum standards, including durable and waterproof roofing, glass windows, running water and electricity in the house and a flush toilet or pit latrine in close proximity to the house.<sup>39</sup> Despite these provisions, many farm workers are provided

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<sup>32</sup> South African Human Rights Commission *Final Report on the Enquiry into Human Rights Violations in Farming Communities* (2003) p 28; South African Human Rights Commission (2008) op cit note p 69.

<sup>33</sup> Human Rights Watch op cit note p 11, L London 'Human Rights, environmental justice, and the health of farm workers in South Africa' 9 *International Journal of Occupational Environmental Health* (2003) 59 60.

<sup>34</sup> L London 'Human Rights, environmental justice, and the health of farm workers in South Africa' 9 *International Journal of Occupational Environmental Health* (2003) 59 60.

<sup>35</sup> Human Rights Watch op cit note p 11.

<sup>36</sup> London op cit note p 62.

<sup>37</sup> South African Human Rights Commission (2008) op cit note p 15.

<sup>38</sup> D Bek, C McEwan, K Bek 'Ethical Trading and socioeconomic transformation: critical reflections on the South African wine industry' (2007) 39(2) *Environment and planning A* 11 South African Human Rights Commission (2008) op cit note p 15; Human Rights Watch (2003) op cit note p 65-6.

<sup>39</sup> Clause 8(3) of the Sectoral Determination.

with accommodation that there is “substandard, unsafe housing that lacks adequate sanitation and fails to provide protection from the elements or other threats to health”.<sup>40</sup> Worst still, there is evidence that some employers make deductions in relation to this accommodation.<sup>41</sup> Another problem is that some farmers deduct an additional fee for each non-working family member residing with a farm worker.<sup>42</sup> To the extent that these additional fees may place a worker’s total deduction above the ten per cent threshold, this is prohibited by the Determination.

ESTA provides for the legal procedures under which farmers may evict farm dwellers from farm accommodation. Research in the Limpopo and Western Cape provinces highlights the prevalence of illegal evictions of farm workers, members of their families and former farm workers from farm accommodation.<sup>43</sup> Farmers choose to ignore the ESTA procedures and resort to a range of tactics to remove farm workers from the premises: the use of force, instructing new workers to displace existing farm dwellers, cutting off the supply of basic amenities, or offering incentives such as money or pre-built wooden structures to leave the premises.<sup>44</sup>

Vulnerable groups such as women, children, the unemployed and the elderly are adversely affected by evictions.<sup>45</sup> The latter group is placed in a precarious position despite the fact that section 8(4) of ESTA provides for long-term security of tenure for those who are over 60 years of age. Moreover, the refusal to accommodate family members of farm workers highlights the primacy of employers’ property rights and concerns about sustainability and security over the workers’ right to family life.<sup>46</sup> Increasingly, the costs of providing accommodation and the prospects of the acquisition of tenure by farm dwellers have made farmers more reluctant to provide accommodation or to adequately maintain or make improvements to existing housing.<sup>47</sup>

## **2.4 The growing casualization and externalization of work**

An additional challenge faced by farm workers in South Africa is increasing job insecurity in light of the growing trend towards the casualization and externalization of farm labour. Casualization is the trend towards employment relationships that deviate

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<sup>40</sup> Human Rights Watch op cit note p 46. See also Sikhula Sonke ‘Poor housing still a reality for many farm workers’ 13 April 2011, accessed from [http://www.ssonke.org.za/index.php?option=com\\_content&view=article&id=83:poor-housing-conditions-still-a-reality-for-several-farm-workers&catid=1:local-news-a-views&Itemid=1](http://www.ssonke.org.za/index.php?option=com_content&view=article&id=83:poor-housing-conditions-still-a-reality-for-several-farm-workers&catid=1:local-news-a-views&Itemid=1) on 25/01/2012.

<sup>41</sup> Human Rights Watch op cit note p 46.

<sup>42</sup> R Hall ‘Farm workers and farm dwellers in South Africa: Tenure, Livelihoods and Social Justice’ Presentation to the Parliamentary Portfolio Committee on Rural Development and Land Reform, 16 March 2011 p 67.

<sup>43</sup> Hall op cit note p 67, Human Rights Watch op cit note p 53-4.

<sup>44</sup> Hall op cit note p 67, Human Rights Watch op cit note p 53-4. .

<sup>45</sup> Hall op cit note p 40.

<sup>46</sup> Hall op cit note p 56-61; Human Rights Watch op cit note p 30.

<sup>47</sup> Human Rights Watch op cit note p 30.

from the norms of full-time and/or permanent employment. While there are several forms of casualization,<sup>48</sup> it commonly occurs in the form of seasonal or fixed-term employment in the farming sector. While the periodic fluctuations in demand for labour in the farming sector have always necessitated the use of seasonal or temporary labour, this has increased in recent years, with some employers reducing the proportion of permanent to temporary workers on their farms.<sup>49</sup>

Casualization has the effect of “diluting the employment relationship” by making the application or enforcement of employment rights more difficult.<sup>50</sup> One reason for this may be that some provisions which have been drafted in accordance with the full-time and permanent model of employment and do not fit readily with part-time, fixed-term and casual employment.<sup>51</sup> Research in the farming sector indicates that temporary workers tend to be denied benefits such as a guaranteed day rate in the event of inclement weather, bonuses, sick leave and other non-wage benefits.<sup>52</sup>

Externalization of employment via intermediation has given rise to arrangements involving three or more parties. These arrangements come into being by virtue of a commercial contract in terms of which an employer (styled as the client or user) benefits from the labour of workers who are employed by a third party (the intermediary).<sup>53</sup> While this form of externalisation takes on a range of forms, the most pertinent in the agricultural sector are “job contracting” and the use of temporary employment agencies.<sup>54</sup>

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<sup>48</sup> Thus, it may involve the employment of workers on a short-term or temporary basis through fixed term as opposed to indefinite contracts. They may be seasonal workers who are engaged to work for a specific season of the year, on fixed-term contracts. Or they may be casual or contingent workers who are engaged occasionally when their services are required by the employer. Workers may also be engaged on a part-time basis that is, working for fewer hours than those in the standard working week. See J Giesecke “Socio-economic effects of atypical employment: evidence from the German labour market” (2009) 25(6) *European Sociological Review* 629-630; S Mills, “The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility” (2004) 25 *ILJ* 1203-1218-9; J Theron and S Godfrey, *Protecting Workers at the Periphery* Development and Labour Monograph 1/2000 (Cape Town: Institute of Development and Labour Law, 2000), 9-10.

<sup>49</sup> Du Toit and Ally op cit note p 10-15; J Murray and C van Walbeek ‘Impact of the Sectoral Determination On the South African Sugar Industry: Case Study the KwaZulu Natal North and South Coasts’ (2007) 46(1) *Agrekon* 116-126-127.

<sup>50</sup> Le Roux (note 33) 190.

<sup>51</sup> Mills (note 116) 1220-1221.

<sup>52</sup> Women on Farms Project and Centre for Rural Legal Studies *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* (Stellenbosch: Centre for Rural Legal Studies, 2009) p 34; Murray and van Walbeek 127.

<sup>53</sup> H Sato “Atypical employment: a source of flexible work opportunities?” 2001 4(2) *Social Science Japan Journal* 161-163.

<sup>54</sup> Du Toit and Ally op cit note p 17.

Job contracting involves engaging a person or persons to perform a specified piece of work within a specified time frame.<sup>55</sup> In the case of temporary employment services or labour broking, the purpose of the transaction is to provide a certain number of workers to the client for a specified time period and for a fee per worker provided. In most cases, these workers are handed over to the client, who assigns work to and supervises the workers.<sup>56</sup>

The common denominator in these arrangements is that the intermediary is the nominal employer and is responsible for the legal obligations of the employ. The client usually exercises direct or indirect control over the work performed and to a large extent dictates the duration and conditions of the workers' employment.<sup>57</sup> However, because it does not have a contractual relationship with the workers, it is absolved from the obligations related to employment and passes the associated risks and costs to the contractor or labour broker.<sup>58</sup> It is for this reason that farmers have increasingly turned to intermediaries to provide an increasing proportion of their labour needs.<sup>59</sup>

The research highlights diversity in the size and business focus of contractors and labour brokers in the farming sector, from small, unregistered operators providing unskilled labour, to large firms providing general and specialist labour. There is evidence that some intermediaries in the sector pride themselves in providing quality services and in complying with the applicable minimum standards.<sup>60</sup> However, the fierce competition to secure contracts and unequal socio-economic positions of most brokers has resulted in asymmetrical relationships between most intermediaries and farmers.<sup>61</sup> In most cases, contractors and brokers are unable to negotiate rates that secure significant margins and their ability to provide fair working conditions.<sup>62</sup>

Consequently, many of their workers labour without a contract stipulating their conditions of employment and usually work for little pay, with no social security deductions, and without pay on rainy days and public holidays.<sup>63</sup> In addition, some

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<sup>55</sup> R Moonilal, "Workers' Protection: The case of Trinidad and Tobago" Report submitted to the ILO Committee on Workers in Situations Needing Protection (2000), 25.

<sup>56</sup> Moonilal 26; Kalleberg 346.

<sup>57</sup> European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs *Transformation of Labour and the Future of Labour Law in Europe* (Luxembourg, EC Commission, 1999) ["The Supiot Report"], 9-10; J Theron, "Intermediary or Employer? Labour brokers and the triangular employment relationship" (2006) 26 ILJ 618, 619; Le Roux (note 114) 29; J Fudge, "The legal boundaries of the employer, precarious workers and labour protection" in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oregon: Hart 2006, 295-315, 300; International Labour Organisation *The Employment Relationship*, Report V (1) 13.

<sup>58</sup> European Commission ["The Supiot Report"] 9-10; Fudge (note 136) 301.

<sup>59</sup> E Jacobs 'Farm workers, job security and labour contractors' 2008(2) *Elsenburg Journal* 5; Murray and Van Walbeek op cit note 126; Women on Farms Project and Centre for Rural Legal Studies op cit note p 37.

<sup>60</sup> Du Toit and Ally op cit note p 34-36.

<sup>61</sup> Du Toit and Ally op cit p 25-27, 42; Women on Farms Project and Centre for Rural Legal Studies p 38.

<sup>62</sup> See Du Toit and Ally op cit p 25-27, 42; Women on Farms Project and Centre for Rural Legal Studies p 38.

<sup>63</sup> J Theron and P H Bamu 'Sour Grapes' PLAAS Working Paper 11 (2009) p 26; Women on Farms Project

contractors and brokers who cannot secure guaranteed contracts cannot guarantee continuous employment for their workers, thus placing the latter in a precarious position.<sup>64</sup>

## 2.5 Vulnerable workers in the sector

The above discussion demonstrates the difficult circumstances under which many farm workers labour in South Africa. It is necessary to point out three categories of farm workers whose position is more precarious than their counterparts. These are female, African and foreign migrant farm workers.

Female farm workers are discriminated against in a number of ways. In most cases, they are employed on a temporary as opposed to a permanent basis, and in most cases do not receive employment contracts.<sup>65</sup> Gender patterns in the allocation of tasks place women in seasonal, lower-skilled positions such as harvesting and packing that pay less and provide few opportunities for training and upward mobility.<sup>66</sup> Pay discrimination also exists on farms, with female workers likely to be paid less than male workers.<sup>67</sup> In addition, women are usually denied certain benefits such as on-farm housing in their own right.<sup>68</sup>

Moreover, pregnant workers are more likely to be denied legislative protections such as maternity leave and protective clothing.<sup>69</sup> Pregnant women are especially vulnerable, with job seekers being denied employment or workers being dismissed for being pregnant.<sup>70</sup> This has led to some women hiding their pregnancies in order to acquire or keep their jobs.<sup>71</sup> There is also evidence that employers take little note of and action to address domestic violence and sexual violence perpetrated against women on farms.<sup>72</sup> Sexual harassment is also fairly widespread, with male supervisors demanding sexual favours in exchange for promotion, pay rises and continued employment.<sup>73</sup>

Racial discrimination in South Africa was not simply a matter of discrimination between black and white, but was constructed through the stratification of society into four

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Centre for Rural Legal Studies op cit note p 36; Du Toit and Ally p 41-42.

<sup>64</sup> Du Toit and Ally op cit p 25-27, 42.

<sup>65</sup> Human Rights Watch op cit note p 29, Du Toit and Ally op cit note p 27.

<sup>66</sup> Smith et al op cit note p 25, 26.

<sup>67</sup> Women on Farms Project and Centre for Rural Legal Studies op cit no p 35; South African Human Rights Commission (2008) op cit note p 82.

<sup>68</sup> South African Human Rights Commission (2008) op cit note p 56; Hall op cit note p 65-67; Human Rights

Watch op cit note p 29; Du Toit and Ally op cit note p 13.

<sup>69</sup> Human Rights Watch op cit note p 29, 70.

<sup>70</sup> Smith et al op cit note p 24-25.

<sup>71</sup> Smith et al op cit note p 24-25.

<sup>72</sup> South African Human Rights Commission (2008) op cit note p 62.

<sup>73</sup> Smith et al op cit note p 29.

distinct groups, namely whites, coloureds (those of mixed race), Indians and others of Asian origin and indigenous Africans. The latter was the most marginalized group and received the most inferior education and employment opportunities. The legacy of this racial system is still evident in the agricultural sector, where African workers are discriminated against in hiring and promotion, while coloured workers where a preference still exists for coloured workers in more skilled positions.<sup>74</sup> Farmers justify this on the grounds that African workers are less familiar with the demands of farm labour and do not speak Afrikaans which is traditionally spoken on farms.<sup>75</sup>

A growing number of migrant workers from neighbouring countries such as Mozambique, Zimbabwe and Lesotho are working on South African farms. While some of them are documented as asylum or country-specific dispensations covering unskilled workers, most of them do not have legal authorization to work in the country. Their undocumented status and need to earn a living in the absence of social safety nets renders them vulnerable and likely to accept unfavourable working conditions on farms.<sup>76</sup> In most cases, undocumented migrant workers are denied basic rights such as employment contracts and paid sick leave and annual leave.<sup>77</sup>

## **2.6 Consequences for farm workers**

The foregoing discussion paints a bleak picture for farm workers in South Africa. It would be impossible to determine the exact levels of non-compliance with labour legislation in the farming sector. Research reports and statements by trade unions and government officials indicate that the levels of non-compliance are substantial. We would argue that a mere tally of legislated versus actual working conditions would not give a complete picture of the plight of many farm workers in the country and the consequences for themselves, their families and society in general.

The consequences for farm workers and their families include the following: growing income insecurity and poverty, an inability to provide for their basic needs, inadequate and poor housing. Farm workers are also likely to face a range of health problems with many occupational health hazards also impacting on their families. Their vulnerable socio-economic status, lack of access to information, migratory status and membership in split households also renders them vulnerable to HIV infection.<sup>78</sup> The health related challenges they face are compounded by their limited access to health care services due

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<sup>74</sup> Smith et al op cit note p 24.

<sup>75</sup> Du Toit and Ally op cit note and Smith et al op cit note p 24.

<sup>76</sup> International Organisation of Migration Regional Office for Southern Africa *HIV/AIDS Vulnerability Among Migrant Farm Workers on the South African-Mozambican Border* (Johannesburg: Japan International Cooperation Agency, 2004) p 32; A Machava and S Polzer 'Bad work if you can get it: Cycles of exploitability amongst Mozambican Immigrants' (2006) 36(2) *Africanus* 166 166-167, 175-176 South African Human Rights Commission (2008) op cit note p 17, 66, 71; Human Rights Watch op cit note p 71.

<sup>77</sup> South African Human Rights Commission (2003) op cit note p v; South African Human Rights Commission (2008) op cit note p 17, 66, 71; Human Rights Watch op cit note p 71.

<sup>78</sup> International Organisation of Migration op cit note p 2; South African Human Right Commission (2008) Op cit note 68.

their location in remote areas and financial constraints.<sup>79</sup> Moreover, their employers' unwillingness or inability to provide for statutory and voluntary social security schemes means that workers and their families must shoulder the burden and costs of injuries, ill-health and unemployment.

The broader consequences are far reaching. These include greater inequality amongst different categories of farm workers (e.g. along the lines of gender, nationality and employment status). The web of interrelated social problems in farming communities includes the disruption of family life in light of split households, alcoholism, substance abuse, domestic violence and an increase in levels of crime including sexual and violent crime.<sup>80</sup> Disgruntlement over poor working and working conditions appear to have fuelled tensions between farm workers and employers, and anecdotal evidence that labour disputes are amongst the many causes of the growing incidence of violent crimes against farmers in the country.<sup>81</sup>

### **3 FACTORS PREVENTING THE ENFORCEMENT OF FARM WORKERS' RIGHTS**

The first section of this paper briefly outlined the history of the regulation of farm labour and showed that farm workers are covered by labour legislation and are protected by the state machinery responsible for enforcing labour legislation. The second section demonstrated that in many cases, the rights and protections on paper are at odds with the actual working conditions on commercial farms. This section explores the causes of this disjuncture between law and practice. While in reality, these causes are often interlinked, we divide the factors in relation to the individual workers, trade unions and state or legislative institutions charged with enforcing legislation.

A number of factors prevent individual farm workers from taking measures to vindicate their legal rights. These include a lack of awareness of their rights, of the remedies available to them and the steps to be taken to address their problems.<sup>82</sup> But knowledge of rights and avenues of recourse do not necessarily translate into the action, as demonstrated by the reluctance of farm workers to lodge complaints at Department of Labour mobile centres introduced to serve farming areas.<sup>83</sup>

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<sup>79</sup> Human Rights Watch op cit note p 11, 69; International Organisation of Migration op cit note p 6; South African Human Rights Commission (2008) op cit note p 16.

<sup>80</sup> London op cit note p 61, 62; Hall op cit note p 64, 72; South African Human Rights Commission (2008) op cit note p 58.

<sup>81</sup> V Vena 'Anatomy of a Farm Murder' *Mail and Guardian*, 8 April 2010; South African Police Service, Report of the Committee of Enquiry into Farm Attacks (2003) accessed from [http://www.saps.gov.za/statistics/reports/farmattacks/farmattacks\\_2003.htm](http://www.saps.gov.za/statistics/reports/farmattacks/farmattacks_2003.htm) on 20/01/2012 p 417, 418, 428, 445.

<sup>82</sup> South African Human Rights Commission (2008) op cit note p 10.

<sup>83</sup> South African Human Rights Commission (2008) op cit note p 66.

Other factors come into play, including fear of victimization and/or loss of employment. In a context of high poverty and unemployment rates, labour is easily dispensable and the cost of unemployment high and prospects of obtaining employment very low.<sup>84</sup> Undocumented migrant workers may avoid approaching the authorities for fear of attracting attention to their status and risking deportation.<sup>85</sup> Some employers capitalize on these fears and threaten to report workers to the authorities in order to secure workers' silence<sup>86</sup> As a Mozambican farm worker states:

The employ you although they know that you do not have the papers. They make you work hard and when it is pay day, they just chase you away. If you complain, they threaten you saying that they will call the police to arrest you and take you back to (Mozambique).<sup>87</sup>

Compounding the limitations on individual efforts to vindicate their rights is the weakness in the trade union movement in the farming sector in South Africa. While there are some successful examples such as Sikhula Sonke, a social movement championing labour and other social issues on farms in the Western Cape the broader union movement has failed to effectively organize farm workers.<sup>88</sup>

The reasons for this relate in part to the nature of the sector: the geographical dispersion of farms and their remote location; low levels of literacy amongst workers; low pay levels of potential members, long working hours, and the seasonality and transience of many farm workers.<sup>89</sup> The growing trends towards casualization and externalization also inhibit traditional trade union organization strategies, which are premised on the standard employment relationship characterized by full-time, indefinite employment between employer and employee.<sup>90</sup>

In addition, employers (farmers and brokers or contractors) are hostile towards trade unions and have adopted a number of strategies to intimidate and frustrate trade union organisers, including threats of violence and denial of access to farm property.<sup>91</sup> Employers may also victimize and discriminate trade union members, thus making their colleagues reluctant to join the unions.<sup>92</sup> Farm workers are therefore effectively denied their right of freedom of association enshrined in the Constitution and protected by the Labour Relations Act.

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<sup>84</sup> Smith et al op cit note p 18-19.

<sup>85</sup> International Organisation of Migration op cit note p 32; Machava and Polzer op cit note p 175-176.

<sup>86</sup> Machave and Polzer op cit note p 176.

<sup>87</sup> Machave and Polzer op cit note p 176.

<sup>88</sup> Mdladlana 'The giant rises to organize farm, forestry, fishing food and beverages workers into FAWU' Speech given by Honourable Minister Membathisi Mdladlana at Food and Allied Workers Union Conference, Johannesburg, 13 September 2007.

<sup>89</sup> Theron and Bamu op cit note p 32-3; PLAAS and CRLS op cit note p 43; South African Human Rights Commission (2003) op cit note p 29; Human Rights Watch op cit note p 76.

<sup>90</sup> Du Toit and Ally p 47, 48; PLAAS and CRLS op cit note p 43.

<sup>91</sup> Human Rights Watch op cit note p 75, 76; South African Human Rights Commission (2003) op cit note p 29.

<sup>92</sup> Human Rights Watch op cit note p 73; South African Human Rights Commission (2003) op cit note p 29.

The labour inspectorate also faces a number of challenges in enforcing the legislation in respect of farm workers. The inspectorate has for many years been under-staffed and under-resourced, with some inspectors lacking the knowledge and skills required to carry out its mandate effectively.<sup>93</sup> Another key challenge relates to access to farms in order to carry out inspections. In terms of the BCEA, a labour inspector may, “without warrant or notice, at any reasonable time, enter any workplace... that is not a home”.<sup>94</sup> This wide power of entry has been limited by an industry-government agreement requiring labour inspectors to “make an appointment” before coming to carry out an inspection.<sup>95</sup> This makes it possible for employers to ‘doctor’ their employment records and to select and ‘coach’ workers to answer any questions favourably.<sup>96</sup> The CCMA, which is tasked with resolving unfair dismissal and unfair labour practice disputes, tends to be located in urban towns and areas and is therefore inaccessible to many farm workers.<sup>97</sup>

#### **4 NON-STATE INITIATIVES TO REGULATE FARM LABOUR: THE CASE OF WIETA**

Thus far, we have considered the history, scope and shortcomings of the regulation or governance of farm labour *by the state*. There is growing recognition that regulation or governance is no longer the exclusive domain of the state.<sup>98</sup> Non-state actors such as companies, non-governmental organisations and lobby groups are playing a greater role in governance, and sometimes even govern the state.<sup>99</sup> These developments have led to conclude that the divide between the private and public spheres is becoming increasingly blurred.<sup>100</sup>

Non-state regulatory efforts cover a wide range of issues, including the setting and promotion and/or enforcement of economic, environmental and labour standards through various initiatives. A key strategy has been to encourage businesses to provide and/or buy products and services that comply with predetermined standards of ‘fairness’ or ‘ethics’. These developments have been fuelled by ‘the rise of a complex new politics of consumption, partly the result of the development of a consumer sector with high levels of disposable income and good access to media, and partly through campaigning by NGOs and pressure groups from both the “South” and the “North”’.<sup>101</sup>

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<sup>93</sup> London op cit note p 60; South African Human Rights Commission (2008) p 28; Human Rights Watch op Cit note p 59, 80-84.

<sup>94</sup> Section 65(1) of the BCEA.

<sup>95</sup> South African Human Rights Commission (2008) op cit note p 66; Human Rights Watch op cit note p 80-84.

<sup>96</sup> Human Rights Watch op cit note p 80-84.

<sup>97</sup> South African Rights Commission (2008) op cit note p 80.

<sup>98</sup> B Kempa and C Shearing ‘Changes in governance’ (2008) 41(1) *Akron Law Review* 1 3-4.

<sup>99</sup> Kempa and Shearing op cit note.

<sup>100</sup> Kempa and Shearing op cit note.

<sup>101</sup> A du Toit and J Ewert ‘Myths of globalization: private regulation and farm worker livelihoods on Western Cape farms’ (2002) 50 *Transformation* 77 80.

The past two decades have seen a proliferation of private standards regulating the production of goods and provision of services. While most of these have been initiated in the global North, there are a growing number of initiatives that are being driven by actors in the global South. These standards cover a range of issues, and take on various forms, with various modes of implementation and enforcement, including monitoring, auditing, accreditation, and certification and labeling. In this paper, we distinguish between ethical trade and fair trade. While the former refers to a sourcing project that focuses on conditions of labour on the worksite, and fair trade, the latter goes beyond the worksite to challenge unbalanced trade relations between rich and poor countries.<sup>102</sup>

In this section, we consider one non-state initiative to improve working conditions in the South African agro-food sector. While various organisations have embarked on different initiatives to further this aim, the discussion focuses on the activities of the Wine Industry Ethical Trade Initiative (WIETA) which has a longer history than most initiatives and focuses exclusively on labour standards.<sup>103</sup> The association was established following a pilot project by the Ethical Trade Initiative (ETI), which is an alliance of companies, trade unions and voluntary organisations that ‘work in partnership to improve the working lives of people across the globe who make or grow consumer goods’.<sup>104</sup> It was formed in the UK in 1998 and works to ensure that companies implement its Base Code of Labour Practice in their supply chains.<sup>105</sup>

In 1998, the ETI embarked on a pilot project to assess and improve working conditions in the South African wine industry. The ETI conducted several rounds of audits on six wine farms and developed improvement plans which were implemented by the farms. The project involved a wide range of local stakeholders in the industry, with this collaboration laying the foundation for the establishment of WIETA as a non-profit organisation in 2002.

#### **4.1 WIETA: Objectives and operation**

WIETA’s aim is to promote decent working conditions for workers by monitoring members’ compliance with its Code of Labour Practice and working with site managers and owners to improve working conditions. WIETA’s Code is based on the ETI’s Base

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<sup>102</sup> Bek et al op cit note p 3.

<sup>103</sup> Information about WIETA’s history and objectives was obtained from WIETA’s website at <http://www.wieta.org.za/qa.html> on 13/01/2012.

<sup>104</sup> The ETI is funded by the Department for International Development and most of its partners are based in the global North and source goods in the global South. Accessed from the Ethical Trading Initiative website, <http://www.ethicaltrade.org/in-action/projects/south-africa-wineproject> on 20/01/2012.

<sup>105</sup> The nine principles of the Base Code are that employment is freely chosen, freedom of association and The right to collective bargaining are respected, working conditions are safe and hygienic, child labour shall not be used, living wages are paid, working hours are not excessive, no discrimination is practised, regular employment is provided, no harsh or inhumane treatment is allowed.

Code but has been modified according to local labour legislation and conditions. Although initially covering only the wine industry, WIETA extended its membership and efforts to cover the fruit and flower sectors in 2007. Its membership comprises a range of wine, fruit and flower producers; labour brokers; pack-houses; export bodies; export agents; retailers; government bodies; trade unions and NGOs.

Membership in WIETA imposes different obligations on members, depending on their role and position in the sector. Members who are retailers, agents, importers and exporters must educate their suppliers about WIETA and the Code and encouraging them join as members. They must also develop plans to monitor their suppliers' compliance with the Code.

Members who employ labour or agro-processing plants (i.e. growers, producers and labour brokers) must work towards ensuring that working conditions on farms and plants comply with the Code. They must educate their management and employees on the provisions of the Code within a year of joining the organisation. Importantly, they are expected to submit to the audit process within 18 months of becoming a member.<sup>106</sup> Within four months of the audit process, members must develop an improvement plan to deal with shortcomings identified in the audit and this must be implemented within six months of the audit process. Members who are found to comply with the Code or who implement their improvement plans then become accredited WIETA members.<sup>107</sup>

Other members such as trade unions, NGOs, industry bodies and government are required to support and promote WIETA's objectives. They must disseminate information about the Code to their respective constituencies. In addition, they must share information and knowledge to assist WIETA in achieving its objectives. Where possible, they may develop programmes and projects in collaboration with WIETA.

Like the ETI, WIETA is an ethical sourcing initiative aimed at leveraging the buying or market power of member retailers, agents, importers and exporters and producers to ensure compliance with the Code down their supply chains.<sup>108</sup> The system provides a number of carrots to encourage firms to join WIETA and encourage compliance in their supply chain and/or comply with the Code and become accredited. Membership and accreditation enables businesses to attract the business of conscientious consumers and/or businesses striving to ensure compliance with the Code within their supply chains. Members may also have their audit and improvement plans uploaded on the UK-based Supplier Ethical Data Exchange (SEDEX) which links buyers and suppliers who are committed to promoting ethical business practices and enables buyers to track their suppliers' progress in addressing non-compliance.<sup>109</sup> According to Bek et al, '[t]he

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<sup>106</sup> Audits are conducted by independent auditors appointed by WIETA.

<sup>107</sup> Members must become accredited members within three years of joining the organisation.

<sup>108</sup> See 'What we do' accessed from the ETI website at <http://www.ethicaltrade.org/about-eti/what-we-do> On 12/01/2012.

<sup>109</sup> 'What we do' accessed from the SEDEX website at <http://www.sedexglobal.com/about-sedex/what-we>

imperative is to establish a dynamic upward trajectory of improvement in social conditions on farms rather than to “fail” or shame producers.<sup>110</sup>

At present, WIETA does not have a certification or labelling programme that assures consumers that accredited members’ products are produced under fair working conditions.<sup>111</sup> This is because the auditing process covers producers who source their primary inputs (crops) from a number of growers, making it difficult to guarantee that all the crops they use are produced in compliance with the Code. According to WIETA’s website, the organization will consider developing a labeling system in future. In the meantime, WIETA has been engaging FLO’s certification division about the possibility of joint accreditation with both organisations through parallel processes at lower total costs.<sup>112</sup>

## **4.2 Assessment of the WIETA system for promoting better working conditions**

Du Toit and Ewert summarise the optimist’s perspective on ethical sourcing initiatives thus:

And large overseas corporations, by insisting on tough quality, safety and human rights standards from suppliers, are ensuring that the aims of economic growth and social equity can be reconciled. If only worker activists had thought of this before. Far from being the problem, capitalist growth provides the solutions. Businesses with vision have learned to see beyond the short-term, and realise that capitalism needs to regulate itself... Companies are learning that behaving ethically is integral to success, and that they need to use ethical, social, environmental and other forms of accounting, auditing and reporting as ways to secure their own long-term futures - along with those of unborn generations. And the best way forward for ensuring social justice is to join forces with these tendencies: to ensure that the codes of conduct are monitored and applied, and that businesses make progress towards compliance.<sup>113</sup>

In this section, we evaluate the ethical sourcing initiative under the auspices of WIETA to determine whether the optimist’s view is a realistic or idealistic one. The discussion focuses not only on the impact of the Code on South African farm workers, but also on the design and the implementation of the system. The discussion draws on literature on the WIETA system as well as broader literature on ethical trading initiatives in Africa and particularly in the agro-foods sector.

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[do/](#) on 23/01/2012.

<sup>110</sup> Bek et al op cit note p 16.

<sup>111</sup> The Fairtrade Labelling Organisation (FLO) is an example of an organization that certifies agricultural produce and products. ‘Fairtrade is a certification system where social, economic and environmental aspects of production are certified against Fairtrade Standards for producers and traders. The system monitors the buying and selling of the product until it is packaged and labeled’ See FLO website at <http://www.flo-cert.net/flocert/8.html> accessed on 02/02/2012.

<sup>112</sup> See ‘Questions and Answers’ accessed from the WIETA website at <http://www.wieta.org.za/qa.html> on 20/01/2012.

<sup>113</sup> Du Toit and Ewert op cit note 78.

There is a limited amount of literature evaluating WIETA's operation and impact on the industry. This is unsurprising given the fact that the launch of the ETI in the UK is a fairly recent development. WIETA is a relatively young association, having completed its first full year of audits in 2007 and extended its membership to cover fruit and cut flower producers in 2007. Besides developing and implementing programmes to enable it to carry out its mandate, WIETA has had to secure industry buy-in, recruit membership and navigate conflicting stakeholder interests in order build and strengthen relationships and mutual trust amongst its members.<sup>114</sup>

On the positive side, suspicions stemming from the UK stakeholders' dominance in the initial ETI pilot project<sup>115</sup> have given way to WIETA's recognition as a credible and 'home grown' initiative.<sup>116</sup> It would appear that local stakeholders have taken ownership of the organisation and infused it with a local flavour. This is evident in the WIETA Code which blends the ETI Code with the provisions of South African legislation and takes note of local conditions and practices in the sector. For instance, it provides for housing and security of tenure, the prohibition of the dop system and the forced employment of spouse, cohabiting partners or family members of farm workers.<sup>117</sup> The organisation has therefore found 'ways ...of interpreting the supposedly "universal" principles so that they can make local sense'.<sup>118</sup>

It is difficult to determine the impact of WIETA's impact on labour practices in value chains and the working conditions of workers in the agro-foods sector. This is because market dynamics determine a firm's ability to influence employment practices within their value chain and multiple factors determine a firm's labour practices in its workplace.<sup>119</sup> Given the fact the WIETA Code's similarity to labour laws, it is likely that the impact of the WIETA Code would be limited and hard to isolate conclusively.<sup>120</sup>

WIETA has been cautious in its account for the difference that its Code is making in the lives of ordinary workers in the sector:

WIETA's greatest achievement has been to make owners and producers aware of conditions that can be detrimental to the health, safety and labour rights of their workers. For example, many winery owners did not know that using certain filtration media can cause silicosis and were

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<sup>114</sup> C McEwan and D Bek 'Placing ethical trade in context: WIETA and the South African wine industry' (2009) 30(4) *Third World Quarterly* 723 727; WIETA 'Is there a business case for ethical trade?' *WIETA News*, September 2005 p 9.

<sup>115</sup> A Du Toit 'Ethical trading: A force for improvement, or corporate whitewash?' (2001) 71 *Natural Resource Perspectives* 2.

<sup>116</sup> McEwan and Bek op cit note 729, 738-739.

<sup>117</sup> See See Clause 10, Clause 2, Clause 3.5 and Clause 8.9 of the WEITA Code.

<sup>118</sup> Du Toit op cit note 2.

<sup>119</sup> S Barrientos and S Smith 'Do workers benefit from ethical trade? Assessing codes of labour practice in global production systems' (2007) 28(4) *Third World Quarterly* 713 719.

<sup>120</sup> Du Toit (2001) op cit note p 3; Barrientos and Smith op cit note (2007) 721.

inadvertently putting their cellar workers at risk. Now WIETA has educated them on the problem, preventative measures can be taken.<sup>121</sup>

WIETA's auditing and training programmes provided for management, supervisors and workers have helped to raise awareness. In addition, the auditing process has forced members to implement improvement plans which bring them into compliance with the Code before they have become accredited. WIETA reports that some members have made improvements in health and safety policies, to workers' accommodation and have taken measures to ensure that brokers comply with the provisions of the Code.<sup>122</sup> These improvements are corroborated by independent evaluations of WIETA's impact and that of the ETI Code.<sup>123</sup>

Despite these positive indications, three dimensions of the impact of the Code on working conditions must be interrogated. These are the *depth*, their *breadth* and their *longevity*. With regard to the first dimension, Barrientos and Smith make an important distinction between ethical codes' differential impact on *outcomes standards* and *process rights*. While process rights are 'intrinsic principles of social justice that enable workers to claim their rights' such as freedom of association and non-discrimination, outcomes standards are 'the product of negotiation and/or access to legislated entitlements' such as minimum wages and maximum working hours.<sup>124</sup> Their research on the impact of ethical codes suggests that codes have more of an effect on outcomes standards and little or no effect on process rights.<sup>125</sup>

Thus, while the codes had some impact on the measurable rights of workers, they did not lead to the elimination of patterns of discrimination or lead to an increase in union membership or the establishment of a collective agreement.<sup>126</sup> Similarly, McEwan and Bek report that farm workers report that their employers continue to be hostile towards trade unions.<sup>127</sup> The quotations below succinctly capture the limitations of legislation and ethical codes in transforming the landscape of labour relations in the sector, in light of South Africa's history:

Such a close look highlights that the dynamics of change are much more complex and elusive than the model of sweeping aside paternalist labour relations and replacing them with modern practices might lead us to believe. More specifically, policymakers and scholars have tended to underestimate the implications of the social embeddedness of commercial agriculture - the

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<sup>121</sup> WIETA 'Questions and Answers' accessed from WIETA website at <http://www.wieta.org.za/qa.html> on 22/11/2011.

<sup>122</sup> WIETA 'Questions and Answers' accessed from WIETA website at <http://www.wieta.org.za/qa.html> on 22/11/2011.

<sup>123</sup> McEwan and Bek op cit note p 732-733; Barrientos and Smith op cit note p 721-722.

<sup>124</sup> Barrientos and Smith op cit note 721-723.

<sup>125</sup> Barrientos and Smith op cit note 721-723.

<sup>126</sup> Barrientos and Smith op cit note 721-723.

<sup>127</sup> McEwan and Bek op cit note p 733.

extent to which its economic institutions and workings have been intricately interwoven with social identity, culture, gender, race and politics.<sup>128</sup>

The entrenched, institutionalised conservatism of the wine industry is clearly one significant barrier to rapid change. Whilst pressures may be exerted through ethical initiatives, national legislation and western-based retailers and consumers the capacity of the industry elite to absorb these pressures is formidable. Whilst there may be gradual improvements in farm labour standards, albeit from a low base, significant shifts in mindset are required for full compliance to become the norm. Significant changes in patterns of land ownership and in the racialised division of labour within the industry are unlikely to occur in the short to medium term.<sup>129</sup>

The challenge of addressing this legacy must be met by employers who are committed to respecting labour rights because they are *inherently* valuable and play an *instrumental* role in bringing about the social justice demanded by South Africa's constitutional order. This does not seem to be the case for the majority of WIETA's existing and potential members, whose motives for joining and becoming accredited are limited to serving purely commercial interests, namely securing export contracts, increasing sales and market share, and maintaining a good public relations image.<sup>130</sup> The following statements made by local industry players are telling in this regard:

We are here [at an ETI workshop] ... primarily as insurance. We are here so that, if something goes wrong, and if the media start asking questions, we can point to the fact that we are trying to do something about it.<sup>131</sup>

WIETA is a —smart high plus in upmanship on numerous other producer countries providing: —something...that makes our wines stand out. Quite simply, —it will play out greatly to South Africa's advantage if workers (sic) rights and working and living conditions are beyond question.<sup>132</sup>

In addition to the 'converted' are a constituency of skeptics who need to be convinced that joining WIETA will increase their bottom-line. WIETA has therefore been at pains to convince them that membership and accreditation will deliver tangible outcomes. In some cases, the organization has been unsuccessful, as indicated in the quote below"

We don't know whether the supermarkets in the UK see it [WIETA] as important enough ... I certainly don't see that. If I want to sell to Tesco I don't see an imperative to use WIETA policies. I don't know how important the South African industry is to the supermarkets ... and I'm not sure how committed the supermarkets are to the WIETA code. It is an ethical code that means nothing if it does not have the leverage from the supermarkets to ensure it is applied.<sup>133</sup>

The second dimension of the limitations on WIETA's impact is its breadth, that is, the extent to which it covers employers and workers in the sector. Some figures may help put this into perspective. As at June 2011, WIETA had 182 members, of which 20 were

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<sup>128</sup> Du Toit and Ewert op cit note p 90.

<sup>129</sup> Bek et al op cit note p 32.

<sup>130</sup> Du Toit (2001) op cit note p 3; Bek et al op cit note p 23-24.

<sup>131</sup> Du Toit (2001) op cit note p 3.

<sup>132</sup> Bek et al op cit note p 23.

<sup>133</sup> McEwan and Bek op cit note p 735-736.

NGOs, trade unions, government bodies and retailers that were not subject to audit.<sup>134</sup> Of the 164 members, 76 are wine producers. Given that the industry has about over 300 wine producers, this represents a very limited scope of coverage.

Our calculations from the organisations' members list of 164 auditable members indicate that roughly 25% of these members had not been audited; about 40 per cent had been audited; 15 per cent had previously been accredited; and only 20% were accredited members at the time. This indicates significant barriers to joining the organisation and challenges to being audited and reaching and maintaining accredited status. These include high audit and compliance costs (the former which WIETA pegs between R 12 000 and R 30 000), and lack of human and administrative resources needed to successfully complete the audit process.<sup>135</sup> This points to limited potential to achieve full compliance with the Code and therefore, improving the working conditions of those who labour in the sector. Moreover, the barriers could further entrench the inequality between wealthy and marginalised farmers and limit access to high value agriculture to the former.<sup>136</sup>

The third dimension, the longevity of the impact, relates to the extent to which improvement in working conditions are sustained over time as a result of the application of the WIETA Code. The statistics from WIETA indicate that 15 per cent of its membership as at June 2011 had previously been accredited, showing that some members were unable to keep up with the up with the standards of compliance. Moreover, the membership rules do not require members to periodically undergo audits once they have reached accreditation status.<sup>137</sup> Further, the organisation focuses on promoting an upward trajectory towards compliance, and unlike its cousin in the North, lacks an aggressive disciplinary system to deal with non-compliance. These factors signal a lack of impetus for members to continue to comply with the standards.<sup>138</sup>

Having established that the depth, breadth and longevity of WIETA's impact of working conditions of South African workers is limited, it is necessary to consider its potential impact on the broader global market dynamics that impact on the lives of workers. The global agro-food market is a buyer-driven system dominated by large retailers in Europe and the US. The concentration of market power in the hands of a few in a fiercely competitive market has created conditions that force market prices down, narrow profit margins and drive the exploitation of labour by growers and producers in the South.<sup>139</sup>

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<sup>134</sup> See WIETA 'Members' accessed from the WEITA website at [www.wieta.org.za](http://www.wieta.org.za) on 21/12/2012.

<sup>135</sup> McEwan and Beck op cit note p 729.

<sup>136</sup> Du Toit and Ewert op cit note p 89 and Du Toit op cit note p 3, McEwan and Bek op cit note p 729.

<sup>137</sup> Human Rights Watch op cit note.

<sup>138</sup> McEwan and Bek op cit note p 730.

<sup>139</sup> Barrientos and Smith op cit note p 724-725; Du Toit and Ewert op cit note p 86.

Several critics have argued that by concentrating on the producer's conduct and employment practices, ethical initiatives allow corporate members to avoid questions about their market practices which create the conditions that drive worker exploitation.<sup>140</sup> Corporate members' insistence that producers pay the costs of compliance with ethical standards enables them to benefit from ethical trade initiatives at minimum financial cost to them.<sup>141</sup> This failure to address the 'foul and ferocious' practices of corporate members perpetuates asymmetrical relations between parties in the North and the South is a serious shortcoming of ethical trade initiatives.<sup>142</sup>

## CONCLUSION

This paper set out to outline the state's regulation of the agro-food sector and determine the challenges that workers face in the sector. Having outlined the challenges in the implementation and enforcement of the legislative framework, we considered whether non-state regulation could be an alternative or supplement state legislation as a mechanism for worker protection. We then considered WIETA, its history, objectives and mode of operation.

Our analysis of WEITA's auditing and accreditation system demonstrated its limited potential to improve the working lives of the majority of workers in the agro-foods sector. And if WIETA's impact on the employment relationships within the agro-foods sector is limited, its potential impact on broader global market dynamics in the sector is even more questionable. It is therefore necessary to be realistic about what ethical trade initiatives such as WIETA are able to achieve and to be conscious of the social and economic terrain within which they operate.

While it would be foolish to pin one's hopes on ethical trade as a panacea to the problems faced by workers, it would be unwise to dismiss it completely. Ethical trade has a place and a role to play in the struggle to improve the lives of workers in the agro-foods industry. Its role could be strengthened under the following conditions: (1) a change in employers' attitude towards workers' rights and welfare, which would see them as ends in themselves, rather than merely as means; (2) a wider (as opposed to niche) demand for ethically produced goods, which would require intensive consumer education and lobbying, both in the North and the South; (3) greater transparency in the articulation of the benefits, impact and limitation of ethical trade, particularly in relation to consumers;<sup>143</sup> (4) measures to address the inequality between market players in the global North and South; (5) the shift from traditional Fordist-style trade unions and the development of more nuanced strategies to organise, mobilise and

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<sup>140</sup> Du Toit (2001) op cit note p1; Du Toit and Ewert op cit note p 88-89.

<sup>141</sup> Bek et al p 32; Du Toit and Ewert op cit note p 95.

<sup>142</sup> Barrientos and Smith op cit note p 725.

<sup>143</sup> Bek et al p 34.

empower workers<sup>144</sup> and (6) the greater involvement of workers in the development and implementation of ethical trading initiatives.<sup>145</sup>

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<sup>144</sup> Du Toit (2001) op cit note p 3.

<sup>145</sup> Smith et al op cit note p 17.