SECOND CARNEGIE INQUIRY INTO POVERTY
AND DEVELOPMENT IN SOUTHERN AFRICA

Farm labour and the law
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FARM LABOUR AND THE LAW

Introduction

The legal and material position of South Africa's 1.3 million farmworkers has only recently begun to receive a small share of the attention focussed on their industrial counterparts. This is not because continuing reports of conditions on some farming operations have revealed that there is no bottom line to how bad such conditions may be under the law. Such exposes are not novel. What is novel is the request by the Minister of Manpower to the National Manpower Commission in terms of the Labour Relations Act, 1956 to investigate inter alia the suitability of introducing new legislative measure to regulate the relationship between farmer and farmworker.

The farmworkers have historically been excluded from the scope of many of the statutory instruments which provided the framework for South Africa's industrial relations machinery. More recently, the Wiehahn Commission of enquiry explicitly recommended that farmworkers be brought into line with industrial workers. The Government White Paper responded that it would give attention to this recommendation once it had consulted with 'all parties'. It is presumably for this purpose that the abovementioned investigation has been
initiated. But the high hopes for a fresh look at the position of farmworkers that followed the Minister's announcement have abated since his subsequent reassurance to the farming community. The hostile reaction by farmers' organisations to the Minister's announcement led to a further 'clarifying' statement. He stressed that the commission would take into account the 'very sound' relationship between farmers and their workers, and the 'whole package of privileges which such employees enjoy'. The object of the investigation, he stated, was 'to protect agriculture from malicious attacks and, inter alia, to report on the particular problems with which agriculture is burdened in relation to the availability and stability of a sufficient number of workers'.

With the Commission still to deliver its report, it is perhaps an opportune time to present some thoughts on the legal regime which currently regulates the farmworkers' circumstances.
Farmwork and the Contract of Employment

Firstly it is often asserted that the legal position of the farmworker is one entirely regulated by the common law, and that the farmworker has suffered at the hands of statutory neglect. This characterisation is not completely correct. There is a definite regime of statute and subordinate legislation governing a variety of aspects of the conditions of employment which restrict the freedom to sell one's labour to an employer of one's choice, and also which proscribe and limit the wide variety of contractual arrangements which are possible between the men who labour on the land and land owners.

In relation to their industrial counterparts, farmworkers have been disadvantaged as much from statutory commission as statutory omission.

Secondly, it should be noted that the disparity between the legal position of farmworkers and industrial workers is not peculiar to South Africa. The Wiehahn commission noted only two countries where a 'formalised or structured system' of industrial relations existed for farm workers. The I.L.O. has between 1922 and 1969 adopted some 10 conventions relating to agricultural workers which impose on the signatories the obligation to enforce the protections and rights specified in the conventions. In the U.S.A. the Migrant and Seasonal Worker Protection Act provides in the main for such migrant workers to have access to information on the terms of their contract.
There are a number of reasons for this, not the least of which is the difficulties faced by farmworkers in exercising anything like the power of industrial unions. Factors explaining the relative imbalance in the position would be the small size of enterprises, feudal dependency relationships, the lack of competitive education and training, the dispersed location of labour, etc. Where enterprises take on the features of an industrial operation, such as is the case with agri-business, then there is a concomitant rise in conventional employee organisations and employee approaches. In the absence of effective employee organisations not only is an improvement in the material and legal position of farmworkers likely to be tardy, but such legal measures that are introduced may not be enforced or policed. Professor Kahn-Freund in discussing the role of law in labour relations states:

Where labour is weak - Acts of Parliament cannot do much to modify the power relation between labour and management. The law has important functions in labour relations but they are secondary if compared with the impact of the labour market and the spontaneous creation of a social power on the workers side to balance that of management. Even the most efficient inspectors can do but little if the workers dare not complain to them about infringements of the legislation they are seeking to enforce. The Truck Acts and other protective legislation began to be effectively enforced when membership in trade unions gave the workers the strength to insist on the maintenance of the legal standards, and the modern legislation acknowledges this fact.
It is for this reason that well intentioned protective legislation will have minimal results if enacted in a vacuum. Where the apparent panacea of minimum wage legislation for agriculture has been opted for, there have been examples of a drop in the remaining conditions of employment of such farmworkers and the welfare of their families brought about by a commensurate withdrawal of payment in kind or the imposition of fines and deductions. In this context the absence of enforcement agencies in South Africa would mean that the rights granted in law would be ephemeral.

The third aspect of the legal position of farmworkers that needs some comment is the contractual form within which the law has framed the relationship between farmer and farmworker.

A report on farm service conditions stated that "The only limit on how low S.A. farm workers wages can go is physical starvation." The importance of this is that this state of affairs is not only sanctioned by the common law contract but partly a result of it. Jurisprudents and legal writers have subjected the representation of the employment relationships as a species of contract to extended criticism. Contract doctrine embodies a particular conception of society — atomised and juridically equal individuals who voluntarily enter relationships by striking a bargain on the terms of a contractual exchange. The important element is reciprocal exchange between equals.
The employment relationship has not always been viewed as a simple contract. From feudal times until the 18th century, it was regarded as partly status - where obligations went beyond contractual terms - and was dealt with under the Law of Persons (as for family relations, etc.). The extension of contract doctrine to the employment relationship facilitated the employer's ability to terminate the contract at will not only to suit production requirements but also to use the power of dismissal to discipline his labour force and enforce his rights to command. Moreover, as the commentators point out, the implications of termination of a contract are very different for the employee who is dependent on wage labour for his and his family's survival, and for whom substituting this relationship is far more difficult - particularly in South Africa. More fundamentally, as Kahn-Freund has argued, the parties can hardly be described as equals - socially, economically or in terms of bargaining power.19

Anderman summarizes the position as follows:

The common law viewed employer and employee as free and equal contracting parties, ignoring the obvious discrepancy in their bargaining power and the fact that the employment relationship provided income to a family unit for one party and constituted a cost of production or service for the other. Hence, as long as contractual notice of termination was given, the employer was free to dismiss an employee for whatever reason he wished, with no obligation to reveal his reason for dismissal to the employee, much less to justify it.20
This is only one aspect of the way the unequal power of the parties is reflected in an asymmetrical distribution of rights and duties. The contractual framework is further distorted to encompass that distinctive feature of the relationship - the power of only one party (the employer) to unilaterally make the rules. The employee's duty is to acquiesce; the employer's right is to command. As long as one party has both the power to command and the power to adjudicate on whether his commands are reasonable and consistent with the contract then pure contract is an ill-fitting cloak. From a legal perspective, the authority of the master over the servant was imported from medieval master and servant laws and incorporated into the contract as an implied term. Selznick comments:

In the first place a contract giving broad powers of decision to one party and establishing the subordination of another was hardly an ordinary contract. It was at best a Hobbesian compact giving full discretion to the sovereign employer. This violated the spirit of 19th century contractualism which looked to voluntary agreement, based on bargaining over specific terms as the substitute for prescriptive regulation by government. Secondly, this authority was an incident of ownership, a matter of property right ... not contractual agreement alone).

Kahn-Freund describes the relationship thus:

"But the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the contract of employment."
Although these observations apply in the industrial areas, they are all the more compelling in the rural setting. For farm labour the fictional nature of the contractual metaphor is further accentuated. In particular the termination of employment may also mean loss of housing and land where a family has lived for generations and which they are unlikely to ever replace. By and large the conditions under which they work are also the conditions under which they live after working hours. Farmers are generally compelled to provide accommodation for them unless the farmworkers commute from "black areas"\textsuperscript{23}. In this sense the farm is a 'total institution' similar to a prison, a military camp, a compound\textsuperscript{24} in that the authority of the master over his servant extends beyond the work period and work place. In law the employer's jurisdiction over his employee is limited after hours but the real power to dismiss and/or evict enables the employer to establish the rules of behaviour. Thus Scoble in discussing whether misconduct outside service warrants dismissal says quaintly

"most native female servants find service conditions intolerable unless their employer turns a blind eye to their entertaining a male (native) [sic] suitor in their rooms at night time. It is submitted such native custom would not justify dismissal without notice - unless the servant had received prior warning of the master's disapproval of such custom"\textsuperscript{25}.\[1\]
Under the old colonial statutes and even up to recent times imbibing liquor or dagga so as to render one unfit to work properly was a punishable offence^26.

The extent of the relationship is expressed in the servant's dependence or need for such diverse benefits as access to farm schooling for his children, provision of food, access to land for private cultivation or grazing, and their continued presence on the farm once they are old^27. Simultaneously the farmer may have extra contractual expectations of his servant such as ensuring that the employee's family members make themselves available for work, expectations which he may enforce by virtue of his power to dismiss. Despite the contractual form the employer can demand and obtain servile demeanour and due deference^28.

In addition to this there are legal restrictions on the mobility of the labourer. He may not move with facility between farms^29 and legally may not move from agriculture to another industry unless with official approval, usually where there is a surplus of farm labour in the area or his employer consents^30. For these reasons the relationship between farmer and farm labourer, in practice and in law, assumes the colour of a status relationship under contractual subterfuge, closer to the medieval master-servant relationship than the ideal pure contract doctrine upon which the law bases its conception of industrial employment.
This is not a cry for medieval law but if anything for the necessary legislative protection of farmworkers who enjoy neither equivalence nor the extended personal reciprocity of a feudal relationship. The Rieckert proposal that elderly farmworkers who have exhausted their physical capacity to work be allowed to remain on their employer's premises is an attempt to encourage the latter.

In the case of industrial workers the state has historically intervened in recognition of the inequality of the employees' bargaining position. This is all the more necessary in the case of farm workers. In the situation where parliament is responsible to white farmers and not black farmworkers, this may be unlikely.

Legislative Backdrop

It would constitute a truncated picture of the legal position of farmworkers if one neglected to survey the legislation that has markedly altered, restricted or prohibited the variety of contractual arrangements that were common between white farmers and black labourers. Such agreements included the following: farming on the half (rental in kind); cash tenancy; labour tenancy; remuneration for services in cash or kind; squatting; labour farms operating on a rental component in cash or kind,
or seasonal labour\textsuperscript{31}. The Development Trust and Land Act of 1936 \textsuperscript{32} in conjunction with the Black Land Act\textsuperscript{33} effectively divided the country into 'scheduled' and 'released' areas and prohibited the purchase of land by blacks outside these areas. These areas constituting approximately 13\% of the land was set aside for occupation by 70\% of the population.

These Acts proscribed ownership or tenancy of any kind by blacks\textsuperscript{34}. In 1969 squatting became illegal\textsuperscript{35} and in 1978 labour tenancy was also proscribed\textsuperscript{36}. The proscription of these forms of contract were buttressed by criminal sanction provisions in these 'Land' Acts as well as by the Trespass Act\textsuperscript{37} the prevention of Illegal Squatting Act\textsuperscript{38} and the operation of Black Labour Control Boards\textsuperscript{39}. Although the contracts of labour tenancy could be construed as a hybrid form of tenancy, labour tenants were classified as servants\textsuperscript{40}.

The Masters and Servants Laws rendered all such servants open to prosecution and imprisonment for disobedience, neglect, desertion and other breaches of contract. Until their repeal in 1973 these laws rendered the breach of duty to an employer an offence against the state. A legal commentator justified the use of this executive booster to the common law authority of the master in the following terms:

\begin{quote}
In regard to the domestic and labouring class of servant the legislature realising the ineffectiveness of civil remedy (in favour of the employer) has imposed penal sanctions\textsuperscript{41}.
\end{quote}
The cumulative effect of such legislation has been to compel blacks in white areas to enter into contracts of service - and only such contracts. Sol Plaatje, a vigorous campaigner against the 1913 Land Act, has shown how blacks who were previously in a kind of partnership with whites were compelled to become their servants.

"Let (a new arrival to South Africa) see both the Natives and the landowning white farmers following to perfection the give and take policy of 'live and let live', and he will conclude that it would be gross sacrilege to attempt to disturb such harmonious relations between these people of different races and colours. But with a ruthless hand the Natives Land Act has succeeded in remorselessly destroying those relations... Under severe pains and penalties natives were to be deprived of the bare human right of living on the land, except as servants in the employ of the whites."42

This legislative development finds its supplement in the laws and regulations which govern and restrict the mobility of farm labour. But before we explain the mechanics of such a system, it is necessary to situate the canalisation of labour within the conditions in the reserves/bantustans. The impact of the laws cited above together with the removal of 'black spots', 'badly situated areas' and other removals has resulted in the already overcrowded reserves being swollen even further. The Tomlinson Commission, Quail Report and Buthelezi Commission indicate that less than 50% of the inhabitants of the reserves have access to land from which they may obtain means to subsist.43 The remainder have to seek re-entry into the labour market to physically survive.
The canalisation of labour occurs through the twin system of influx control and the Labour Bureaux system. In brief the influx control is effected through the Black (Abolition of Passes and Co-ordination of Documents) Act 44 which requires blacks to carry reference books - evidencing whether they have permission to be in the area where the police find them. The Black (Urban Areas) Consolidation Act 45, having divided the area into prescribed (urban) and non-prescribed (rural) areas, requires that blacks must either qualify to be in an urban area or have a permit because they are employed and housed or are seeking employment. A black may qualify to be in an urban area by virtue of birth, 15 years of continuous employment, or 10 years of continuous employment with one employer 46. In regard to rural workseekers the official who will give them such permission is the labour officer. He is thus able to sanction or prevent entry into the industrial areas of South Africa to take up employment.

There is an disingenuous complement to this system which ensures that farmers have an adequate labour supply. Farmers have complained of an inadequate labour supply or desertion from farm service since the 19th century - the abolition of slavery. Indeed this is the origin of the Masters and Servants Laws 47. With the development of manufacturing and mining industry and because conditions of service especially wages were vastly inferior - particularly in the light of the diminution of such benefits as access to land - agriculture
could not compete with these industries. Instead of upgrading conditions of service farmers looked to the State to protect them from competition and to enable them to persist with their feudal practices. Thus in 1939 the Government Report of the Farm Labour Committee stated that

"Farmers see relief only in the direction of compulsion on natives to seek farm work and the imposition of further restrictions upon the movement of those already so employed."

The framework of the legislative compulsion towards farmwork is provided by the Black Labour Act 67 of 1964 and the regulations promulgated thereunder, in particular the 1965 and 1968 Black Labour Regulations. The general framework provides for recruitment of labour by labour recruiters, labour bureaux and licensed and authorised employers organisations. The regulations set out numerous formalities for attesting and registration of all such contracts. One may not recruit outside of this system and it is an offence not to register a worker. In summary the regulations enable the labour officer to endorse the industrial category into which the applicant work seeker is allocated. The farmer is not entitled to recruit labour himself unless he has a permit. All contracts must be attested and filed. The effective compulsion occurs as the labour officer may and does refuse to allow a person categorised as farm labourer ever to change his category unless there is a surplus or his employer or employers body consents. In any event he can refuse to allow him to
enter an urban area to seek work. Furthermore certain areas can be set apart as areas in which only farm labour may be recruited. It is not legally possible to obtain employment outside of the formal control structure laid down by the Act. Finally a farm worker may not obtain fresh employment so long as his annual contract subsists or until he is released, thus limiting the ability of farm workers to bargain with other farmers or to move to better employers. The effect of these regulations is that once categorised 'farm labourer' the worker is in most cases indentured to farm labour for life. In this sense these regulations mark a departure from any notion of voluntary and free labour. The way it works has been spelt out by no lesser person than the Deputy Minister of Bantu Administration and Development in 1968 at the Agricultural Show at Middelburg:

"It is not only government policy that Bantu labourers may not move from the farms to the urban areas to work there, it is clearly laid down in the relevant regulations....A record of every registered Bantu Farm Labourer in your service is kept in a central register in Pretoria, and the position is that the labourer cannot be employed in the urban areas, because as soon as his service contract must be registered, it will be established that he is a farm labourer, and then he cannot legally be taken into service."

And he explained to the Albany Agricultural Union in August 1968:

"As far as the interests of agriculture are concerned, it has always been the policy, since the inception of the labour bureaux in 1952, to identify Bantu farm labour and to divorce it from urban labour which is inclined towards the industrial and commercial sectors. For this reason Section 10 of Act No 25 of 1945 was amended from time to
time to control the influx of labour into towns in order to prevent as far as possible the infiltration of farm labour into urban areas." 57

Notice here should also be taken of the heavy penalties (a R500 fine) provided for employers who employ blacks ("illegals") in the urban areas who have not obtained the necessary permission.

The effect of undercutting the freedom of farmworkers to sell their labour has enabled farmers to resist the pressures to provide improved terms of employment or to extend the benefits of agricultural service to their employees.

This statutory backdrop reveals that the common law contract of employment does not stand on its own in determining the content of the rights and duties of farmworkers. Farmer Brown and a fictional Nxumalo could conceivably enter into a contract with a miriad of variations and nuances. Statute has proscribed many of these and the permissible service contracts only provide a framework for the relative inequality of the two parties to express itself.

There are however some limited rights conferred on the employee and it is appropriate to examine what such rights are - presuming for the purposes of this paper that farmworkers have the means and the knowledge to enforce them.
Farmworkers and the common law contract of employment

The common law contract of employment is essentially the framework wherein the rights and duties of employer and farmworkers are fixed. The contract of employment, as has been noted, misleadingly purports to provide for the even distribution of rights and duties – service in return for wages, terminable at either party’s instance, reasonable notice etc. However the courts and the legislature have come to accept that this is not the factual position. Much industrial legislation has sought to encroach on the rights of employers and inhibit employees from accepting detrimental terms. By and large farmworkers have been excluded from such legislation. Thus the Labour Relations Act, the Wages Act, the Unemployment Insurance Act, the Factories Act and until recently the Workmens’ Compensation Act, all expressly excluded farmworkers from the ambit of their protection. The legislature more recently expressly excluded farmworkers from the terms of the Basic Conditions of Employment Act when it was within their power to redress partially this historical imbalance. Where certain regulations in terms of the Black Labour Act apply they are superimposed on the contract and deemed to be incorporated within the contractual framework. It is thus important to know whether a worker is a farmworker or not, covered by protective legislation or not.
The Farmworker

The definition of a farmworker arises in two contexts. The first is whether the work he is performing falls within the category of farming operations and not some other category (which are usually governed by industrial statutes or agreements which exclude farmworkers from their ambit). The second context is whether the contractual relationship with which the two parties are associated is a contract of service or some other contract (lease, labour tenancy, etc.)\(^5\). With regard to the first context the standard demarcation tests apply. Where a worker is involved in non-farming activities (building a silo) the test is whether the operation or enterprise for which the activity is performed is a farming operation or enterprise\(^5\). Where the worker is involved in additional non-farming operations over and above his farmwork the question is in which industry are the employer and employee primarily associated\(^6\). In the future the problems which these simplified tests obscure will emerge. As the Wiehahn Commission noted, farming operations are increasingly carried out in conjunction with secondary operations such as milling, refining, etc. In this way workers who are doing the same job tasks as industrial workers are denied the protections and wages which cover such industrial workers.
As regards the second context in which the definition of farmworker may have once been relevant, the question turns on the period of service for which remuneration is received as well as the form of remuneration.

Once a black is not in the actual service of the master he is a squatter in terms of Act 18 of 1936 and ceases to be qualified to be in a white area\textsuperscript{61}.

**The Contract**

With regard to duration, two types of contract may be distinguished. These are

(1) a fixed period contract. This contract may be tacitly renewed although the contract terminates on a specified date\textsuperscript{62}.

(2) Indefinite contracts. These may be terminated by either party by giving the agreed period of notice. If no such period has been agreed, a 'reasonable' period of notice will suffice.

The contract may be verbal or written, however, in terms of the Black Labour Regulations the contract must be written in quadruplicate and formally attested\textsuperscript{63}. Strangely the one person who is not entitled to a copy is the worker himself\textsuperscript{64}.

According to the usual principles the contract may consist of express and implied terms agreed at the date of engagement or
subsequently. The terms on which the parties do not expressly agree may be determined from the common law or local custom. The contract is concluded once the parties have agreed on the essential terms, the wage and the type of work to be done. However the necessary formalities must also be complied with such as attestation of the contract.

The law requires that the wage be certain. However, in the case of farm work, as the wage may be, and generally is, paid partly in kind, it is submitted that in the absence of a specific agreement on such items of kind (stocking land, housing, rations, schooling etc) a worker may resile from the contract should the payment in kind not be what he understood or agreed. Note that the basis of recovering for wages for work done would be through the principle of unjustified enrichment. It is submitted that this principle would not apply where the farmer unilaterally alters the proportion of cash to kind. Here the farmer has departed from the terms of the contract and the worker's remedy is to enforce the proper proportion of payment in cash. It is unlikely that a farmworker would have access to a lawyer to enforce such small claims.

For a contract of service to come into operation there must be an agreement between the parties between whom it is intended that the vinculum juris will exist. Thus notwithstanding the common practice, it is not legally possible for a father, a
guardian or a kraal head to contract on behalf of other persons to work for an employer, no matter that they are under his control in customary law. However the question arises in relation to the practice of a farmer making the continued employment of his employee conditional upon his employees children or relatives also making themselves available to work. It is common for such a parent to be evicted/dismissed once or if his children leave for employment elsewhere. While this condition may be contra bonos mores and severable it appears there is nothing to prevent the farmer from terminating his employee's employment on reasonable notice and there is no remedy available to the worker to prevent such termination. Farmworkers would not be able to make use of the law relating to unfair labour practices and seek relief from the Industrial Court. Hence the practice whereby a young adult who wishes to seek industrial employment will entice and pay a relative to assume his place on his father's employers farm.

The exception to the above principles is provided in the Black Labour Regulations whereby a 'team leader' may contract through the Labour Bureaux as if he was an independent contractor who fictionally employs the members of his team.

Our law will not uphold illegal contracts or any terms of a contract that are illegal or contra bonos mores. However, it
is submitted that where the contract is in breach of legislation, such as the Black Labour Regulations, this will not prevent the worker claiming wages under the principles of unjustified enrichment 74.

The common law does not prohibit child labour. In the absence of statutory protection against the employment of farm children such children over the age of 7 (ie capable of consent) may enter contracts of employment which are ratified by their guardians and in which they consent 75. If there is no parental consent the contract is voidable but not void. In terms of the Black Labour Regulations, written parental consent is needed if the minor is employed on a farm separate from that where his guardian or parent resides 76. From this we may assume that farmer may employ his own workers children without obtaining the worker's written consent. In common law such contracts are voidable if the parent refuses consent but this is academic as the farmer is in a position of such power as to induce his labourer's children to work. The use of child labour perpetuates illiteracy and a cycle of poverty in the rural areas.
What Rights the Common Law Does Not Give

In law there must be some "mutuality" in the contract. As the contract is quite clearly unequal it is unclear what this means as a general principle. One specific example is that periods of notice must be the same for both parties.

There is no common law right to public holidays, sick pay or even leave pay. These benefits must be expressly contracted for, but seldom are, in which case custom will determine whether the farmworker can claim them. In practice employers may regard these as privileges and not as contractual terms. Whether they are or are not privileges will depend on the intention of the parties.

Where, on termination of his employment an employee is entitled to take leave, he will be able to claim cash in lieu of leave.

Similarly in the absence of express terms there is no limit to the farmworker's working hours. The most prevalent custom for many farmworkers appears to be dawn to dusk with an hour off for breakfast and lunch respectively. Nor is there a common law obligation to pay overtime if there is no mention of hours of work in the contract.
If there is no work to be done and the farmworker continues to tender his services the employer is not obliged to provide actual work but is obliged to continue paying wages as agreed under the contract.

Similarly where a worker is suspended and there is no implied dismissal the master must continue to pay the wages due under the contract.

Where a farmworker is sick and there are no express terms to the contrary, the farmer is not obliged to pay him while he is not working or pay his medical expenses. In the common law the farmer may dismiss him if he considers the period of sickness unreasonably long. He has theoretical protection from dismissal in that the regulations make the dismissal on account of sickness while a contract subsists subject to a labour officer's approval.

At common law, and in terms of both the Black Labour Regulations and the Machinery and Occupational Safety Act, an employer is required to take reasonable care to ensure the safety of his workers. Farmworkers have only recently been brought within the scope of the Workmens' Compensation Act. The effect of this is to grant them access to compensation from the State but simultaneously it limits their common law right to sue their employer for damages. The amount of compensation paid to farmworkers is very low - partly because of the limited amounts paid out in
general but particularly because of the very low wages paid to such workers (and even then workers may neglect to include the cash value of wages in kind when the calculation of compensation is made). The Industrial Aid Service advice office reported the following cases:

Anna Masuku was paid R15 a month for 7 years for the loss of an eye.

Willie Mtetwa lost his arm on a farm when it was caught in a machine. He was 16 years old. At the time his salary was R3 per month. The Workmens Compensation Commissioner's award was a lump sum of R312.00 for permanent disability.

Isaiah Khasuli lost his arm in a reaper machine. He was a driver aged 28. He received R12 per month compensation between 1968 and 1981 when payments stopped.

The case of Festus Nangonya illustrates another facet of the Workmens' Compensation Act:

He was burnt on duty and left permanently unfit for work. His employer refuses to report the accident to the Commissioner.

There is a built in disincentive to report accidents. In the first place a farmer may be penalised for not having made the appropriate contributions. Secondly his premiums are related,
inter alia, to the accident record of his employees. If any injury results from the farmer's negligence the worker concerned will be entitled to increased compensation from the fund ultimately recoverable from the farmer by the fund.

Finally there has been a dearth of research into agriculture related occupational diseases, diseases such as Zoonosis, Syphilus, Raymond's Disease, trombiculiasis, sporotrichosis, mycetoma, onchocerciasis and others. Thus they are not on the schedule of occupational diseases enabling such workers to claim in terms of the Act.

More serious is the inadequate protection of farm workers against their daily exposure to extremely toxic substances (pesticides, insecticides, fungicides, herbicides, dipping chemicals, paint, fertilizers and fuel). The regulations under the Hazardous Substances Act are simply inadequate and not enforced. There is limited protection in ordering that directions for the handling of substances be displayed. Most farmworkers are illiterate or do not understand the terms. The Erasmus Report cited figures which indicated that as many as 1600 fatal poisonings occur every year - and that does not include non-fatal poisonings or the damage caused by long term exposure to toxic substances.
The problem is compounded in agriculture. There are only rudimentary medical facilities available. Furthermore few farmers will offer their employees training for fear that they will leave for other sectors given the uncompetitive wages in agriculture. Given the integration of agriculture with secondary processes, the inapplicability of the Factories Act regulations is a very real health problem. Section 1 of the Machinery and Occupational Safety Act will encompass farmworkers and at least one interpretation of this Act suggests that Factories Act regulations will then be applicable to agriculture once this act is brought into effect. But here one should note the apparent reluctance to enforce any minimum standards on agricultural enterprises.

One implied term in the contract is that the worker will not do the work below the status contracted for. However the 'degradation of status' rule does not apply to general labourers says Scoble and he tends to regard most blacks as labourers.

The farmer may not unilaterally make deductions for breakages or damage or as a fine although such practices do occur. Even an agreement to be fined is unlawful. In the case of Nkobesomili and Folozana v Joseph Benjamin Turner the farmer made deductions from the wages of his farmworkers for a lost saddlecloth, neglect of duty and waste of milk. The court held
It was contrary to first principles that he was to set himself up as judge as to what he should take for spoilt milk and unproduced saddle cloths.

The regulations also prohibit the granting of more than R20.00 credit but do not prohibit the farmer requiring his employees to purchase goods at his or another specified store.

The provision of ancillary benefits, or payment in kind is a crucial part of the farmworkers' wage. These are seldom agreed upon in detail. They include mostly the provision of rations, housing and sometimes stocking rights, right to cultivate a portion of land, housing for dependants, and perhaps access to a farm school for dependants. Where these are not agreed upon they may be implied from custom or the circumstances.

**Housing**

Generally the right to accommodation is dependent on the contract. If there is no express agreement such may be implied if the farmworker works far from his home. The right to housing/accommodation, and, housing of a particular quality, is strengthened by the Black Labour Regulations. The regulations not only specify that no employment contract can be concluded unless accommodation is provided but the regulations also insist on certain standards of facilities at the workplace. Most farm labourers would be surprised to learn that:
"Every employer shall provide for the use of Bantu employed by him and of residents

(a) adequate arrangements for male and female persons for washing their persons and their clothes

(b) sufficient and suitable latrines

(c) an adequate supply of pure drinking water

(d) suitable refuse bins99.

These regulations also give substantial policing powers to the Compound Manager or Employer100. These provisions also make it a criminal offence to be untidy or unruly in ones quarters. Farmers are however relieved of providing accommodation of the standard laid down for other employees101. But one wonders whether such accommodation as is provided is consistent with local or municipal or health regulations.

However even these lower standards are not enforced. No single incident of enforcement is known of, and it appears that in 1980 there was not one agricultural labour inspector for 1.4 million farmworkers and no farms were inspected in 1979-80102. Without an enforcement agency these rights are ephemeral. One might cynically suggest that the only occasions when the living conditions of African farm workers are inspected are when disease, such as cholera, which may spread to the white community, breaks out.
For contract workers (and usually other workers too) housing will be a term of the contract. This need not imply housing for the worker's family but it may do so. On termination of the contract the right to housing is also terminated and the farmer may sue for ejectment. Whether the worker may remain on the premises where the contract is alive but the workers has been told to vacate is a more difficult question. This may happen where the master terminates the contract unlawfully or where he simply alters the terms of the contract. In the latter case the worker is entitled to notice. In the former case it is submitted that Scoble is incorrect in holding that the servant has no right to remain on the property. In this case a farmworker may defend an ejectment action successfully until his contract is lawfully terminated.

When the contract has been properly terminated the right to housing falls away. The hardship of immediate eviction - often applicable to whole families who have no alternative land to go to, or of whom the eldest members are too old to find new employment - is extreme. It is a sizeable weapon in the hands of the farmer.

Notice should be taken of the statutory regime which provides an arsenal of legislation for the eviction of 'non-qualified' occupants. A non-qualified occupant of land in a white rural area, one who is no longer an employee, is rendered vulnerable to a number of civil and criminal procedures:
(i) normal civil ejectment proceedings or
(ii) the summary civil proceedings of the section 37 of the Development Trust and Land Act Act 18 of 1936 or
(iii) the criminal proceedings in terms of the Trespass Act Act 6 of 1959
(iv) the criminal proceedings in terms of section 26 of the Development Trust and Land Act
(v) the criminal proceedings in terms of the Prevention of Illegal Squatting Act Act 6 of 1951
(vi) summary eviction following conviction in terms of the latter three Acts.

The question remains however whether the farmer may himself forcibly eject his woker and demolish his dwelling. On common law principles the answer is No\textsuperscript{106}. However the Prevention of Illegal Squatting Act and the Blacks (Prohibition of Interdicts) Act\textsuperscript{107} in certain circumstances actually bar black persons from access to the courts to stay evictions or demolitions even when the eviction or demolition is wrongful. It has been argued that such Acts do not apply in the employer/employee relationship\textsuperscript{108}. However in the case of farmworkers the Blacks (Prohibition of Interdicts) Act would indeed seem to apply in respect of ejectment orders issued in terms of section 26 of the Development Trust and Land Act\textsuperscript{109}. 
Rations

Like housing the Black Labour Regulations specify a compulsory standard that most labourers would be surprised to discover. There is no enforcement agency and in all probability enforcement of these standards would lead to no rations at all - there is strangely no duty to actually supply rations and the standards apply only when rations are offered. The minimum rations must include fresh vegetables daily, peanuts, coffee or cocoa, milk, meat (not more than 25% bone). The farmworker is not entitled to the improvement he has invested in the farmers' land or housing at his own expense. He is however entitled to return to harvest his crops.

Termination of the Contract

Either party may terminate the contract on notice. However in a fixed period contract notice may not be given so as to terminate the contract prior to the expiration of the term for which the contract is to run. This is particularly relevant for farmworkers who are usually hired for yearly contracts. In such cases if the worker is retrenched or has his contract terminated he may recover the wages due to him for the full period of the contract so long as he tenders his services.
We deal now with two issues. What is proper notice in agricultural service, and what are grounds for summary dismissal for farmworkers.

Where no notice period has been agreed or is stipulated by statute, the common law requires a period of reasonable notice to terminate a service contract. This is usually based on the intervals between the payment of remuneration, e.g. a weekly-paid worker is entitled to a week's notice and a monthly paid one to a month's notice. According to the 1965 Regulations all contracts in which the period is not expressly stated are presumed to be for 30 days and hence 30 days notice is required. This is not the same as a calendar month's notice, which must be given on or before the first day of the month. Where a worker continues working after the expiration of the fixed period, notice according to the Regulations is a calendar month if paid monthly, and thus a clear month's notice must be given.

A worker may receive wages in lieu of notice in which case the wages must include an amount equivalent to the cash wage plus the cash value of any payment in kind.
Termination without Notice

Either party may terminate without notice where the other party has committed a fundamental breach of the contract. Such a breach occurs where the continuation of the employment is impossible. Mostly farmworkers stand on the same footing as other workers. Although these are certain categories of behaviour which have been deemed to justify summary termination, these are not exhaustive and proper justification will depend on the facts. In this case only a few of the categories will be dealt with.

A farmworker, particularly, an unskilled worker, may not be summarily dismissed for mere mistakes unless such are gross. Generally mere incompetence or negligence does not deprive a farmworker of the right to notice. Furthermore refusal to obey a command will only be a ground for summary dismissal where it can be proved that the refusal was serious and deliberate and the command was reasonable and lawful.

Thus a command exposing a worker to injury, illness or violence may legitimately be refused. As for general misconduct, summary dismissal would be justified where there is a degree of prejudice suffered by the employer. Drunkenness is an example.

"It seems to me that much depends upon the nature of the employment. One might take the case of a farm labourer who is instantly under the influence of liquor but is able nevertheless to perform his duties efficiently, and well; probably in such a case his drunkeness would not be a ground for dismissal."
To employ a person who is known to be intemperate and then to summarily dismiss him without a prior warning is unjustified. Drunkenesss outside the scope of employment will justify summary dismissal where it affects the employees reputation. In practice employers can and do use dismissal on notice to get rid of 'troublemakers' etc.

**Absenteeism**

Whether deliberate absence will justify summary dismissal depends on the nature of employment. Our courts have held that in the case of 'menial servants' absence during working hours may justify dismissal. There must be prejudice and the cause for absenteeism should not be factors beyond the servant's control. He may allege emergency in which case his absence will not be grounds for summary dismissal. This is because he is absent for reasons beyond his control. The general rule is that sickness suspends the contract until lawfully terminated (ie with notice). If the sickness lasts for an 'unreasonably' long time or is the fault of the employee, he may be dismissed for his inability to perform. As noted above, there is no right to sick pay or medical expenses in the common law.
Statutory Regime

It should be noted exactly which Acts specifically exclude farmworkers from their ambit. Farmworker are excluded from the main industrial relations machinery by Sec 2(2) of the Wage Act and Sec 2(2) of the Labour Relations Act respectively. Thus they are denied the protection of minimum conditions of service given statutory force in terms of those Acts. They are denied the right to register trade unions or make use of the industrial conciliation machinery including access to conciliation boards, or the Industrial Court or to adjudication on unfair labour practices.

Farmworkers are also excluded from the very minimum conditions of service for industrial workers as formerly set out in the Shops and Offices Act, and Factories Act, now contained in the Basic Conditions of Employment Act. The Unemployment Insurance Act excludes farmworkers. Farmworkers have only recently been included in the scope of the Workmens' Compensation Act. On the other hand farmworkers are very much within the scope of the Development Trust and Land Act and the Native Labour Regulations.
Right to Organise and Free Association

The exclusion of farmworkers from the Labour relations Act does not prohibit the formation of trade unions. The exclusion means simply that farmworkers may never register a trade union under the Act. Furthermore they are denied the use of conciliation machinery, and access to the Industrial Court. Strangely, however, there is no bar to a strike (it is not illegal) although such action may lead to summary dismissal, eviction and repatriation. More pertinently, farmworkers are denied protection from victimisation for belonging to trade unions. Further inroads into the freedom of association follow the potential use of the prohibition of all outdoor gatherings in terms of the Internal Security Act and the use of the Trespass Act to prevent groups of farmworkers meeting together on any farm on which they are not employees.

Conclusion

The conclusion is simply that the law leaves farmworkers exposed to sub-standard treatment. Their real conditions reflect both their legal and actual disabilities. One of the indices of the real relationship between farmer and his servant is the continuing reports of assault on farmworkers. Brutal incidents of assault and torture have come before the courts - usually when a farmworker actually dies. Farm labourers
are reluctant to report incidents of assault for fear of victimisation, dismissal or unsympathetic police. This issue reveals the problem of believing that a simple change of the laws will remove the disadvantages which farm labourers live under when such changes are unaccompanied by effective remedies. What is required is not simply legal changes but also the machinery for inspecting and enforcing farmworker rights. The best watchdog of farmworker interests are farmworkers themselves.

The common law, both in substance and procedural terms, reflects and indeed reinforces the inherent inequalities that exist between employers and employees in the bargain for exchange. Whereas legislative intervention has partially redressed this imbalance in respect of industrial workers, it has aggravated it in the case of agricultural workers. The farming lobby has traditionally exercised special powers and extracted special dispensations through the political process. Until the farmworkers are able to produce a countervailing power through organization of their own numbers or, more likely, through allies in the industrial sector, the prospect of improved working conditions will remain remote.

Nicholas Haysom
Clive Thompson
February 1984
FOOTNOTES

1. According to the Farm Labour Report - Submissions to the Manpower Commission on Farm Labour Farm Labour Project 1982 Johannesburg (herein after cited as the Farm Labour Report). There are 1.3 million farmworkers in South Africa. According to the Department of Manpower in its press release of 18 February 1982 there are 1.2 million farmworkers in South Africa.

2. See the Farm Labour Report op cit and the material referred to therein.

3. sec. 2(D) (1) of Act 28 of 1956

4. GN 285 GG 8191 715/82

5. Wiehahn Report Part 5 para. 4.68 - 4.70


7. See press statements released publicly by Department of Foreign Affairs and Information on 18/2/82 and 19/3/82.

8. This is because farmworkers are excluded from the main industrial relations statutes and until recently those dealing with accidents at work, more fully discussed below.

9. e.g. farming on the half, labour tenancy, sharecropping, tenancy


11. ibid
12. Regulation 29 CFR Part 500 implementing the Act
(Pub.L.97-470) 29 U.S.C., 1801 et seq (MSPA) effective on
14/4/1983

13. see Gordon Young: Labour in Transvaal Agri-business in
Wilson, Kooy and Hendrix Farm Labour in South Africa.
David Phillips 1977. This factor was also noted in The
Wiehahn Commission Report v para. 4.68.3

14. Truck Act of 1831 forbade the payment in kind in the U.K.


16. In Zimbabwe health workers expressed concern at the
withdrawal of rations following the introduction of minimum
wages. Farm Labour Report op cit 2.2.4.


121-134, 1969; Kahn-Freund op cit p. 8


21. Selznick op cit p 136

22. Kahn-Freund op cit p6

23. see sec 27 Ch VIII, sec 7 Ch VII of Black Labour

24. E. Goffman defines a 'total institution' as the opposite
to the normal work situation, in that persons do not escape
after hours from the authority structures which regulate
their lives during the day. See 'Asylums' 1961 New York
Anchor.
25. Scoble The Law of Master and Servant in South Africa
Butterworths 1956 p150

26. ibid.

27. The latter was expressly recommended by the Rieckert Commission.

28. In the 19th century The Webbs criticizing the contract
notion of the employment relationship said "If the wage
contract is a bargain of purchase and sale like any other,
why is the workman expected to touch his hat and say 'Sir'
without reciprocity". Industrial Democracy London:
Longmans 1902, cited in Fox supra p. 188

29. In addition to the social blacking of a labourer, Reg 13(1)
of the 1968 Black Labour Regulations make it an offence to
hire someone whose contract has not expired or been
officially terminated. These contracts are usually of a
year's duration.

30. discussed more fully below

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32. Act 18 of 1936

33. Act 27 of 1913

34. Sec 1 of Act 27 of 1913

35. see 33 (3) of Act 18 of 1936

36. sec 27 of Act 18 of 1936, P. 2089 of 21/9/79

37. Act 6 of 1959

38. Act 52 of 1951
39. Sec. 28-29 of Act 18 of 1936
41. Scoble op cit p 168
43. Farm Labour Report op cit 5.1.4.
44. Act 67 of 1952
45. Act 25 of 1945
46. Sec 10(1) Act 25 of 1945
47. C. Bundy 'The Abolition of the Masters and Servants Act'
    *SALB* Vol.2 No.1
49. R1892 of 1965
50. R74 of 1968
51. Ch. VIII of 1965 Regulations
52. Regulation 6(2) of the 1968 Black Labour Regulations
53. see Reg. 13(1) of the 1968 Regulations
54. Reg. 9 of the 1968 Regulations
55. Reg. 21 ibid
56. Reg. 13(i) ibid
57. cited in *Farm Labour Report* p47
58. Much of the case law concerned with farm labour concerns precisely this and arises out of criminal prosecutions under the Master and Servant Laws or the Trespass Act.
59. Gadda v Maartens 1940 TPD 386
60. Bryant v Minister of Labour and Minister of Justice 1943 TPD 205
61. sec 26 of Act 18 of 1936; See Scoble pp38-44
62. Hunt v Eastern Province Boating Co 3 EOC 12
63. An adult employed in the area where he lives need not comply with this formality. Regulation 8 of the 1968 Regulations
64. Regulation 16 of the 1968 Regulations
65. Ayris v Cooke 1928 CPD 380
66. Schneier & London v Bennet 1927 TPD 346
67. R v Bosch 1932 EDL 235
68. see B.K. Tooling (Edms)Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) 391 (AD)
69. Dongatshu v Barnes 1987 NRL 124. Tshabalala v Van Der Merwe 1926 NPD 75 Note however, that this could take place under Section 3 of the Native Service Contract Act 24 of 1932 whereby a guardian could contract his children's labour regardless of whether such child consents. See Scoble p58.
70. see examples of this practice reported in Drum December 1982 and in The Farm Labour Report.
71. Such workers are excluded from the ambit of Act 28 of 1956 by Section 2(2)
72. Similarly the farmer may not assign the services of his employee to another without the worker's consent, nor may he stipulate that his employee must provide a substitute when he cannot himself work.
73. Reg 20 of 1968 Regulations

74. B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms)

Bpk 1979(1) SA 391 (AD). However, a recent case has suggested that he may not obtain notice pay in these circumstances Lende v Goldberg 1983(2) SA 284(C)

75. but see old Sec 3 Act 24 of 32 where it was possible for a guardian to bind his dependants without their consent

76. Sec 5 and Sec 15 of Chapter VIII 1965 Regulations

77. Boyd v Stuttaford Co 1910 AD 101

78. East London Municipality v Thomson 1944 AD 56 at 61

79. see Scoble op cit p193

80. ibid p191

81. He is only entitled to this when he has served a full year's service and where there is a custom to that effect, Reed v Richmond Local Board 1923 AD 50 at 51, or where the employer prevented him from taking leave when he requested it; Wallachs Printing and Publishing Co v Wallach 1932 AD 26. But where through his own fault he has not taken leave it is questionable whether he can demand payment Reed's case supra.

82. Farm Labour Report op cit ; also Scoble p145

83. Gladstone v Thornton's Garage 1929 TPD 116

84. Boyd v Stuttafords supra

85. Myers v Sierdaski 1910 TPD 869

86. Sec 8 Ch VI 1965 Black Labour Regulations

87. Van Deventer v Workmens Compensation Commissioner 1962 (4) SA 28(T).
88. Examples cited in Farm Labour Report op cit Annexure A-C.

89. For examples of some of the diseases farmworkers are susceptible to see Occupational Dermatoses Schering Corporation, U.S.A. 1980 pp29-31.

90. Farm Labour Report op cit p27.

91. In terms of sec 35(6) of the Machinery and Occupational Safety Act Factories Act regulations will be deemed to have been issued under the new Act. See Adrienne Scott 'The Machinery and Occupational Safety Act' 1983 (1) ILJ p25.


93. According to the common law and Reg of Ch XI of the 1965 Regulations.


95. 1870 NLR 2.

96. Reg 7 Chapter XI of the 1965 Regulations.

97. This protection is contained in many industrial agreements and determinations. It is also contained in the U.S.A. Migrant and Seasonal Agricultural Workers Protection Act supra.

98. Thus the prescribed contract forms require a specification as to whether accommodation will be offered. Although Regulation 13 of the 1968 regulations absolves farmers from the onus of obtaining approval for the quarters provided, Section 27 Ch XIII of the 1965 Regulations prescribes that accommodation must be arranged. Section 7 and Section 8 of Ch VII of the 1965 Regulations also imply that proper accommodation must be supplied to migrant workers.
99. Reg 8 Ch IX of 1965 Regulations
100. Secs 10-18 of Ch VII of 1965 Regulations
101. Reg 13 of the 1963 Regulations
102. Hansard 22/4/81 p455
103. Dependents of farmworkers are entitled to be in non-prescribed areas in terms of Sec 26 of Act 18 of 1936
104. see N. Haysom and C. Thompson Employers, the Police and Due Process 1983(4) Industrial Law Journal 1
105. Rooiberg Minerals Development Co. Ltd. v Du Toit 1953(2) SA 505(T)
106. See Haysom and Thompson supra
107. section 2 of Act 64 of 1956
108. Haysom and Thompson supra
109. Proc R912 of 6/6/69 issued in terms of section 5 of Act 64 of 1956
110. Sec 10 of Ch XI read with the Forty Fourth Schedule of the 1965 Regulations.
111. Urtel v Jacobs 1920 CPD 487
112. In common law and see Sec 37(5)(b) of Act 18 of 1936.
113. section 7 Ch VI of 1965 Regulations
114. Allnat and Rohde v Piper 1906 NLR 90
115. Moonian v Balmoral Hotel 1925 NPD 215
116. Turner v Mason (1845) 14 M & W ILJ
117. Schneier and London Ltd v Benett 1927 TPD 346 at 355
118. Holt v Clarke (1894) 4 EDC 182
119. Dilkes v Postmas Diamond Prospect Ltd 1921 WLD 4
120. Kaplan v Penkin 1933 CPD 223 at 225
121. Begrette v Rhodesian Railways Ltd 1947(2) SA 107 (SR)
122. see press clippings annexed to the Farm Labour Report
op cit annexure 4
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