

Editorial: Environmental and Energy Law – Special issue dedicated to Willemien du Plessis

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Liber amicorum is formally defined as a scholarly anthology honouring a distinguished colleague, and it would have been apt to call this special issue honouring Willemien du Plessis just that. But the special issue we present here is so much more than merely a collection of papers from long-standing colleagues and friends. The papers are deep reflections on some of the many burning issues that Willemien dedicated her life to, and they are therefore representative (although not fully) of the scope and breadth of her interests and vast academic expertise. Perhaps more importantly, they are reflective of the diversity of people spanning the globe, ranging from early career to senior scholars, from all walks of life, that have been inspired by Willemien, touched by her acumen, kindness, motivation, mentorship, curiosity and collegiality over the years.

We are both pupils of Willemien; *leerlinge* in the widest sense of the beautiful Afrikaans meaning of the word. Like with so many others over so many years, she has decisively shaped our views of society, the law and its many (often contentious) functions in society, our academic and professional demeanour, and how we as academics (should) engage with the many diverse actors in a complex epistemic, political and social environment. We are who we are, also because of her, with her life and work focused throughout on promoting the collective good, unleashing potential and fully embodying the spirit of *uBuntu*: I am because we are.

It is fair to say that neither of us would have become environmental law academics if it had not been for Willemien. At a time when environmental law as a legal discipline and politico-activist movement took off in South Africa in the 1990s, she helped mobilise and consolidate a group of scholars, ranging from lawyers to political, social and environmental scientists, to actively engage with and populate, what would later become, a well-established and sophisticated scholarly movement in Southern Africa. As a young female academic, she elbowed her way through a conservative apartheid-oriented university system. As soft spoken and humble as she is, Willemien is also

(and had to be) tenacious, calculated and strategic (although never competitive, cruel or malicious) in her relentless efforts to pry open the many closed spaces of systemic privilege, both in academia and in society, and to reveal the multiple forms of injustice characterising the uneven world order. Willemien was perfectly positioned, professionally and personally, to execute this enormous task. Among many other qualities, she has a deep knowledge of the historical foundations of South African law and of legal pluralism, she has an uncanny sense of justice and fairness, she understands how people tick, and knows how to bring people to the table – even if (and especially when) they think they do not belong there.

Looking back at a life dedicated to her work, no reflection on her legacy will do justice to the contribution Willemien has made to science, to the legal profession, to the academia and to the lives of scholars, students and others she has touched and continue to influence. But we hope that this part of the special issue focusing on environmental and energy law could in some way pay tribute to her and show our deep collective appreciation of the impact she's had. It gives us enormous pleasure to present here a collection ranging from often deeply personal reflections expressed in *laudatios* authored by *Nicola Smit, Oliver Fuo, Melandri Steenkamp, John Rantlo, Anél du Plessis* and *Louis Kotzé*, to rigorous scholarly analyses authored with appreciation by students, colleagues and friends from South Africa and elsewhere in the world.

Michael Faure, a long-time friend and collaborator of Willemien's in the Netherlands, teases out the intricate, contentious and often complex relationship between environmental law and environmental protection and growth-driven, environmentally destructive investment law and governance. Law is inherently linked to conflict (law often *is* conflict); it must solve conflict but also creates conflict, either intentionally or unintentionally. And this is also true for environmental law. Michael Faure's contribution shows how this conflict plays out when economic growth confronts the increasingly urgent need for environmental protection, and the role that environmental law plays in exacerbating and mediating such conflict. The solution to this conflict is "not black or white", as he says, but will ultimately be determined by various considerations and contexts which must all be weighed to find an optimal solution. Having said that, we need to be clear that "there is no reason to be afraid of a stringent environmental policy"; a blunt message that Willemien has preached throughout her career in her efforts to transform environmental law from rhetoric to reality as the planetary crisis continues to deepen.

Odile Lim Tung explores new frontiers in urban sustainability and reflects in her article on the rise of smart cities around the world, and specifically in Mauritius. She reminds us that we should not only look to Europe or North America for best case examples and solutions as we often tend to do; there is abundant innovation happening in Africa – also a mantra of Willemien over the years. The paper engages a range of different legal domains including urban sustainability law,

agricultural law, and land use and planning law; all specific but related areas of the law that Willemien navigated with ease over the years in her own work. Certainly, as Odile Lim Tung writes, her paper "aligns with and speaks to the pioneering body of scholarship that Willemien du Plessis has thoughtfully developed over the course of many years. Her scholarship, especially insofar as it relates to the African context, has managed to substantially shape the discourse in these fields".

The focus on urban law and sustainability continues with the contribution from *Nonhlanhla Ngcobo*, which canvasses the constitutions, policies, and manifestos of political parties active in the South African local government sphere with a view to determining the role of political parties in urban environmental governance. She asks: how do political parties in South Africa conceive of their accountability in the environmental governance context? Amidst the worrying continuing decline of municipalities in many parts of the country, as the work of Willemien has also shown over many years, this is a critical concern for which there are no easy solutions. A main recommendation revolves on the need for greater accountability: "municipal councils are accountable for environmental governance and should improve on this responsibility. The accountability should start with parties making explicit environmental commitments and holding their councillors accountable for failing to fulfil them".

Reminding us again of the extraordinary breadth of Willemien's interlinked scholarly interests and expertise, and how diverse, seemingly unrelated areas of the law overlap, *Inge Snyman and Philip Bothma* take a legal historical, common law, and statutory environmental law view to determine how wild animals in protected areas could be reclassified as *res publicae*. They investigate the possibility of developing the common law to provide that wild animals that are sufficiently contained in a protected area managed by an organ of state are *res publicae* that are owned by such an organ of the state. This could present a simple yet effective opportunity not only to support the state in its conservation obligations but also to ensure that these obligations are adhered to. Their article specifically speaks to Willemien's passion for legal history, and her unique ability to relate the relevance and utility of legal history to contemporary environmental protection and energy governance efforts.

Much of Willemien's environmental law scholarship of recent years focused on the meaning of and instruments required for effective environmental governance. In his thought-provoking paper, *Caiphas Soyapi* critiques the state of environmental governance in South Africa, stating that it points at "hollow environmentalism". He uses this term to describe the "inevitable long-term outcome of promulgating laws and policies that are idealistic and seem symbolic and that at times fail to achieve their intended objectives or environmental promise". He substantiates this argument with a reality check on environmental governance, emphasising that the state is not a neutral actor, necessitating closer

scrutiny of state decisions. He continues to argue that the symbolic nature of our environmental laws often makes it challenging for the state (government) to fully meet the elevated ideals the law presents, thereby also complicating judicial action and "stabilising environmental disputes" (e.g., in the context of the climate crisis).

Melissa Strydom and Tracy-Lynn Field report on research aimed at collecting and analysing prosecutions for industrial-related transgressions (conducted mainly in Magistrates' Courts) and involving offences under South Africa's *National Environmental Management Act*, the *National Environmental Management: Waste Act*, the *National Environmental Management: Air Quality Act* and the *National Water Act*. They write that "(a)n analysis of 53 prosecutions shows that most cases resulted in convictions, half were concluded through plea and sentence agreements, half involved the conviction of individuals, no direct imprisonment penalties were imposed, and low fines were imposed in most cases. The findings include that there is some inconsistency in how different listed activities or water uses are treated as separate or consolidated criminal charges, and the exact number, outcome, or trends arising from such cases are difficult to determine as there is no central, readily accessible database of concluded prosecutions". In line with the focus of Willemien's earlier research on access to information, the authors argue that increased access to information "will improve knowledge, implementation and the effective use of the criminal sanction through prosecutions". They convey the important message that information is required to effectively address environmental harm through the criminal justice system and in so doing, fulfil the promise of South Africa's substantive constitutional environmental right.

Michael Kidd, who has known and worked with Willemien for many years, focuses on the recent case of *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs* (39724/2019) [2022] ZAGPPHC 208. The judgment was founded on the understanding that the environmental right in section 24 of the Constitution consists of two separate rights in subsections (a) and (b), and that the right in section 24(a) is immediately realisable. In his paper, Michael convincingly argues that this approach is incorrect and that "a logical and contextual interpretation of section 24 cannot justify the conclusion that the court reached". He believes instead that "section 24(b) is a qualifying 'internal modifier' to section 24(a), and that, in practical terms and due to the modifier in section 24(b), in many situations section 24 would have to be regarded as implementable over time, and not immediately". Michael further considers the use of the *National Environmental Management: Air Quality Act* to address the increasingly worrying levels of air pollution in the area known as the Highveld Priority Area in South Africa.

The protection of cultural heritage that forms part of the protective scope offered by environmental law in South Africa, is at the heart of the case note by *Peter*

Kantor with whom Willemien worked for many years in her capacity as the Secretary of the Environmental Law Association of South Africa. In his paper, Peter analyses the case of *Khoïn v Jenkins in Re: Observatory Civic Association v Trustees for the Time Being of the Liesbeek Leisure Properties Trust* 2023 1 All SA 110 (WCC), which was handed down in 2022 by the Western Cape High Court. One of his observations is that the *Khoïn*-case gives judicial recognition to the concept of intangible heritage as a part of South African heritage law. However, one of the main criticisms levelled against the judgment is that it did not adhere to judicial precedent because it failed to find that the right to consultation of First Nations Peoples (before administrative action is taken that allegedly violates their constitutional rights to intangible heritage), is sufficient to satisfy the test for the existence of a *prima facie* right for the purposes of obtaining an interim interdict.

In his paper, *Alexander Paterson* departs from the understanding that area-based approaches are a central component of global efforts to conserve biodiversity. He writes that while the focus of many countries has been mainly on protected areas, other effective area-based conservation measures (OECMs) have been accorded global recognition in the past decade as a vital complementary approach to protected areas: "This recognition has been reemphasised in the *Kunming-Montreal Global Biodiversity Framework* adopted by parties to the *Convention on Biological Diversity* in December 2022, with its Target 3 ratchetting up area-based coverage targets to 30 per cent by 2030. Growing focus and reliance on OECMs to contribute towards achieving this target is anticipated." He argues that the South African government has recognised the potential contribution of OECMs towards the achievement of domestic and global area-based biodiversity targets but has alluded to the need for legal intervention to ensure that they achieve positive and sustained long-term outcomes for the *in situ* conservation of biodiversity. He investigates this potential link and specifically considers whether the current domestic legal and policy framework applicable to these conservation areas (also an area of expertise of Willemien), is sufficiently robust.

Willemien continues to be one of only a hand-full of energy law and governance experts in Southern Africa. *Germarié Viljoen* and *Felix Dube* in their joint paper show just how important this field of law continues to be. They remind the reader that the South African government is navigating many basic municipal service delivery challenges, including a growing electricity supply deficit and Eskom Holdings SOC Limited, the state-owned power utility, is struggling to generate and supply a stable and uninterrupted flow of electricity through its grid system. At the heart of their paper is the fact that inadequate generation capacity has been causing rotating power outages, known as "loadshedding", for many years now and occur when demand surpasses generating capability. Based on the alternative remedies the private sector and individuals are pursuing as a result, their paper considers from a legal perspective how and to what extent legislation

on electricity supply and municipal by-laws empower household consumers to fulfil their right to electricity by going off-grid. The paper forms part of a growing body of South African scholarship on energy security and critical questions about sustained and adequate access to energy for all.

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