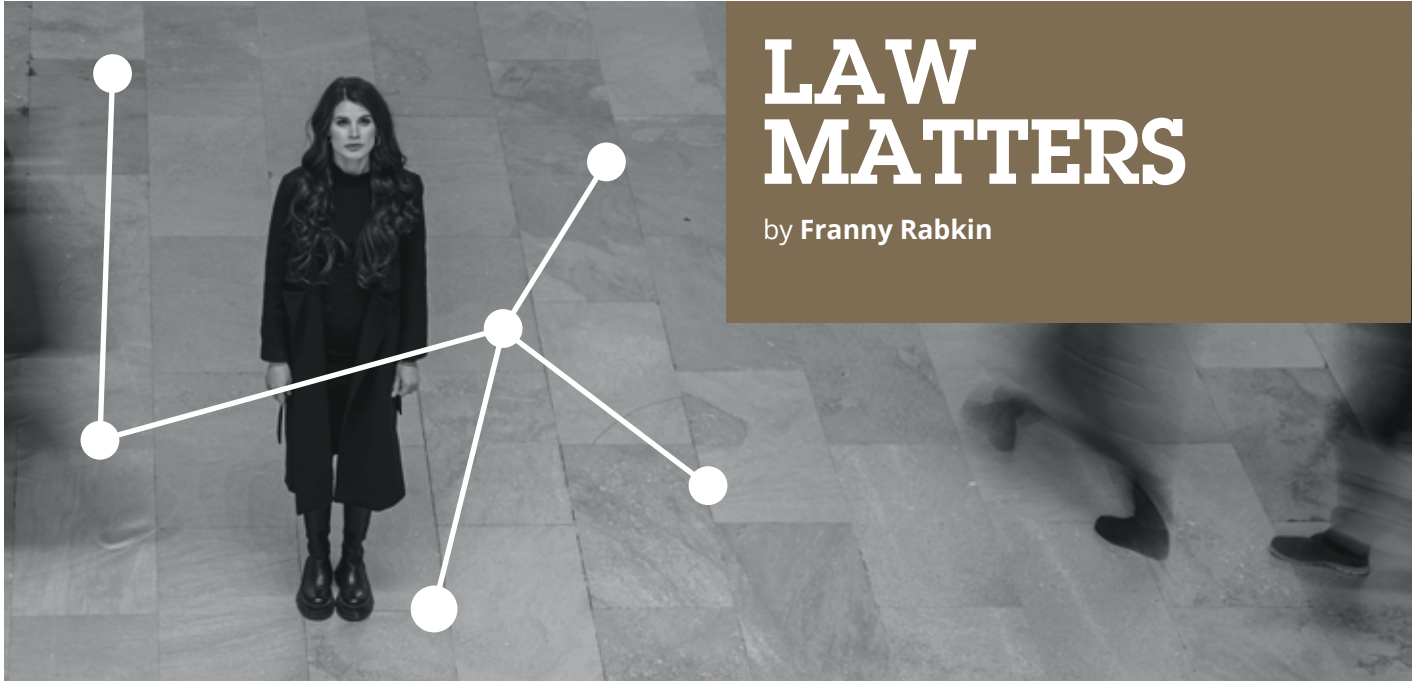




LAW MATTERS

by Franny Rabkin

I've never been one for conspiracy theories. I am reluctant to "join the dots". I was once told by one of my editors that this was a weakness in my journalism: "You need to learn how to triangulate, Franny," he said.

Dot-joining is well and good if you have all the facts. Courts may safely do it because they are protected by procedural rules that ensure that they have all the facts before them, well at least most of them. The problem is that often we in the media and the public don't. We can do the journalism legwork to try and obtain all the facts (verify, request comment etc.), but this doesn't mean we will get them all.

And often, the line between two dots is connected by little more than our preconceived theory or prejudices. Then, one new fact can be introduced into the mix and the whole theory or narrative collapses like a house of cards.

As I write, the entire country seems to be gripped by a wave of high key join-the-dottiness. It's because of the Madlanga Commission, which began two weeks ago, and the allegations that triggered it.

The allegations are of a conspiracy: a criminal cartel infiltrating itself into our organs of state – going as high up as the Minister of Police, maybe even the President; and spreading its tentacles almost everywhere: the NPA, IDAC, members of parliament, the judiciary.

"Hmm," I thought when KZN Provincial Commissioner Nhlanhla Mkhwanazi first gave his bombshell press conference in July. I listened carefully to his story. I went back and listened again. I made a little chronology. The dots were not joining on the facts, as he gave them then. There were gaps. "Maybe he will fill them later," I thought, "Let's see".

After three days of Mkhwanazi giving evidence, some of the initial gaps were indeed closed. But new ones emerged. He readily admitted that some of the facts he alleged did not, on their own, prove anything, and more investigation was needed. But he was painting a picture, he said. More witnesses would come to corroborate, he said.

"Let's see," I thought.

Enter crime intelligence boss Dumisani Khumalo and the WhatsApp messages between alleged cartel kingpin Vusimusi "Cat" Matlala and the odious NorthWest "businessman" (probably better described as an influence peddler), Brown Mogotsi. The picture Mkhwanazi had begun to paint certainly got more vivid, a repulsive and depressing picture, to be sure. But still, questions remained, at least in my mind. "Let's see," I thought.

Yet the dominant public sentiment was to swallow, without question, the entire story – even before cross-examination and even before the other side's version was told. Worse, side events, connected (or not) to the Madlanga Commission have led to rampant public speculation that something sinister must be going on.

When Terry Motau SC left the commission as evidence leader, the speculation was that it was because of "threats". Then he came out and publicly attributed his departure to the much less exciting reason of budgetary concerns. When former Police Minister Nathi Mthethwa died in Paris, reportedly by suicide, it was because he was "implicated" at the commission. It's possible that he was asked to give evidence at the commission – the spokesperson would not be drawn in on it and we will see. But why, I asked myself, was no one considering the fact that Mkhwanazi's allegations about Mthethwa were very old news: they had been made long before at the Zondo Commission.

Then, when Khumalo's evidence was interrupted because he was "unwell", I was even asked by my editors to try and find out what was wrong with him. Bemused, I thought: "Can't he just be unwell?"

Followed swiftly by: "What the hell is going on with us?"

But, I realised something. With everything happening in South Africa currently, we can be forgiven for believing anything. And it might very well all be true. Chances are that it is.

As the commission was ongoing, the SIU revealed the horrifying results of its investigation into procurement irregularities at Tembisa Hospital. R2 billion worth of public

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funds meant for sick people looted by three separate criminal networks – it is mind boggling. And one of the criminal networks alleged by the SIU was connected – through Vusimusi “Cat” Matlala – to the allegations being tested at the commission.

If that wasn’t enough, in the same week, an eye-popping judgment was delivered by the Pretoria High Court: Over R306m was awarded in a delictual claim due to a “concerted campaign” of intimidation – by members of the Mpumalanga’s provincial government, including a whole former Deputy President, DD Mabuza.

The collusion was done by members of the provincial government “in league with high officials in organs of state” – the Mpumalanga Tourism and Parks Agency and the Regional Land Claims Commissioner, Mpumalanga Province, said the judgment. “They enlisted in their scheme a criminal mob and instructed the SA Police to stand aside while the mob did its work,” said Judge Neil Tuchten.

The judgment was the outcome of 15 years of dogged litigation by Fred Daniel and several other plaintiffs. Daniel had had a “dream” of establishing a world-class reserve and high-end eco-tourism destination in the Badplaas valley in Mpumalanga. But he claimed the defendants colluded to drive him out of the area. This they did through different actions over several years, including arranging violent public protests, procuring that Daniel’s fences were cut and presenting fictitious land claims over parts of the reserve. Eventually, fearing for his life, he sold everything in a “fire sale” and left the area.

The facts of the case are truly astonishing, and it is worth reading the 181-page judgment. One part of it concerns Judge Tuchten’s finding that there was a land claims racket happening in the province at the time.

Recounting the history of land dispossession in the area – based on expert evidence before the court – he said that though black people had been widely dispossessed of their land, this dispossession had happened prior to 1913. The Restitution of Land Rights Act allows claims for land that was dispossessed after June 1913, so restitution claims would not have succeeded.

However, at the time, there was a slump in the agricultural prospects of the land in the area and white farmers were willing to sell to the state in settlement. Broker Peter Visag  bought options on land that white farmers were willing to sell, for inflated prices – double or more than the amount they had been worth before – and then sold them on to the Regional Land Claims Commission, where the price increased “as much as fourfold”.

Eventually Visag  and others were charged in the Magistrates Court. “However the case was removed from the roll and never reinstated”, said the judgment. When the racket was reported to the police, both dockets were later found to be empty of any documents.



Daniel told the court that Visag  had invited him to participate in the racket, offering to buy Daniel’s land at three times any valuation that Daniel could produce, but he refused. “Visag  warned Mr Daniel that if he did not sell, land claims would be gazetted over the project lands and Mr Daniel would then be forced to sell,” said Judge Tuchten.

Land claims followed and were gazetted. They remain unresolved to this day because of delays in the adjudication process, said the judgment. But two experts, one for each side of the case, told the court that the claims lacked legal merit.

Mabuza participated in trying to persuade Daniel to sell to the land claims commission, said the judgment. “Mr Mabuza was a highly influential politician in Mpumalanga in this period ... he was on the Mpumalanga executive council for several years, rising to be the Premier of Mpumalanga in 2009,” said Tuchten.

When Daniel refused to sell, the local community was mobilised to “wreck the venture”. An organisation called the ‘Greater Badplaas Land Claims Committee’ was created – by Mabuza, said Daniel in evidence – to threaten and harass him. Although this was disputed by the defendants, “no evidence to contradict Mr Daniel was presented,” said Judge Tuchten.

In 2005, a group of people were bussed in and assembled at the gate of his land with pliers threatening to cut his fence and a riot took place – tyres were burned, Daniel’s employees were assaulted and he was threatened.

The protesters said the land had been gazetted and belonged to claimants, so he must leave. Land claims commissioners

addressed the crowd telling them the land was theirs. This was “entirely improper,” said Judge Tuchten.

When Daniel tried to get the police involved, they told him they had been instructed to stay away. “This instruction could only have emanated from a highly placed politician or politicians,” said Judge Tuchten.

In 2008, 100 people were bussed in for another attack, saying they had come to arrest Daniel and demanding that he leave and give up the project. Mabuza addressed them this time, telling them the land was theirs and they would get it. Sporadic incidents of violence followed, said the judgment.

When Daniel took up the issue with Mabuza he said that he could only protect Daniel if he admitted the land claims and sold the land to a trust for the claimants.

“This is not language becoming of a politician. Shorn of its protective camouflage, the circumlocution was intended to show Mr Daniel that Mr Mabuza was able to withhold from Mr Daniel the protection of the SAPS, the instrument of state power provided by the Constitution for just such invasion of his rights,” said Judge Tuchten.

“It is in my judgment no coincidence that Mr Mabuza advised Mr Daniel to sell the project lands to the Ndwandwe Trust, one of the instruments chosen by Visage for the execution of the land claims racket.”

For me, the worst part of the story is the cynical exploitation of the wounds of land dispossession for personal gain. In his judgment, Judge Tuchten said: “I asked counsel during argument if they knew of a comparable case in our jurisprudence. They could not point to one and I know of none. I hope there will never be another such a case.”

But there are several features depressingly familiar to

someone who had been watching the Madlanga Commission in the previous days: a prosecution mysteriously withdrawn, an empty police docket, an instruction (which was obeyed) to the police to stand aside when a criminal mob was rioting. In other words, organs of the criminal justice system drawn into the service of a corrupt agenda.

With these uncomfortable parallels, it is tempting to jump to a conclusion that our state is rotten from top to bottom.

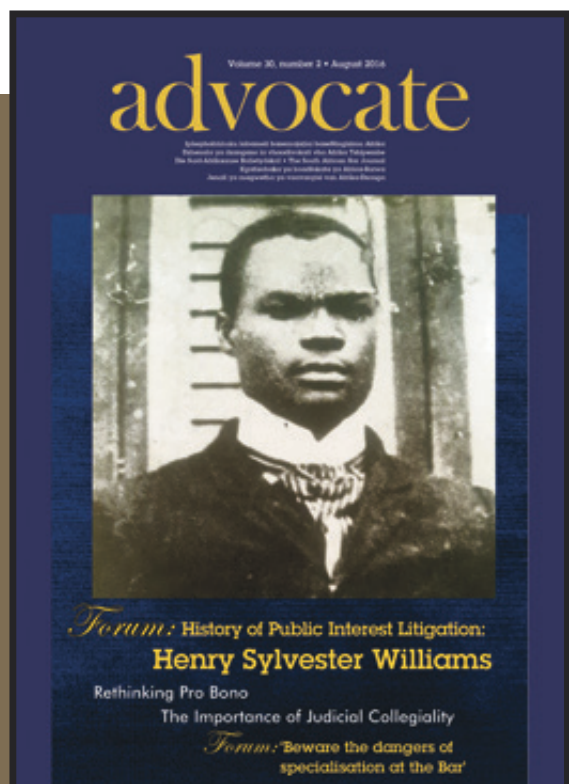
Notably, in his judgment, Judge Tuchten does some dot-joining, and he says as much: In evaluating the evidence, “I have been guided by and sought to apply the principle regarding the proper approach to the ‘overall picture that emerges when the different pieces are stitched together and the seemingly disparate threads tightened’”.

But this is a different kind of dot-joining. It came after a lengthy trial in which all the evidence brought by both sides was rigorously tested through cross-examination (although I wish Mabuza had been joined, had given evidence and been cross-examined).

So, when it comes to Mkhwanazi’s allegations, I still maintain: Let’s see. Let’s let Justice Madlanga do the dot-joining, not us. Everything Mkhwanazi has alleged may be true. But it may also not be. Or, some of it may be true and some of it may not be.

Because the risk is that, if we tar everyone with the same brush, we may ride roughshod over people’s rights and reputations; and over institutions that are not compromised or that may yet be saved. This can unwittingly feed into nefarious agendas that seek to undermine institutions of democracy – like the judiciary.

If it makes me a bad journalist to say this, I can live with that. **A**



advocate

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