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**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

NOT REPORTABLE
Case No: 585/2013

In the matter between:

GLEN MORARE

APPELLANT

and

SA RAIL COMMUTER CORPORATION LIMITED

RESPONDENT

Neutral citation: *Morare v SA Rail Commuter Corporation Limited*
(585/2013) [2014] ZASCA 7 (13 March 2014)

Coram: Navsa, Theron and Wallis JJA and Swain and Mathopo AJJA

Heard: **28 February 2014**

Delivered: 13 March 2014

Summary: Delict – appellant claiming he was pushed through an open door of a train and suffered injuries – appellant failed to prove he was on a train operated by respondent – appeal dismissed.

ORDER

On appeal from the full court of the South Gauteng High Court, Johannesburg, sitting as the court of appeal (Kathree-Setiloane J with Saldulker J concurring, Makgoka J dissenting):

1 The appeal is dismissed with no order as to costs.

JUDGMENT

Swain AJA (Navsa, Theron and Wallis JJA and Mathopo AJA concurring):

[1] The appellant, Mr Glen Morare, claimed payment of damages in the sum of R1 900 000 from the respondent, SA Rail Commuter Corporation Limited (SA Rail), in the South Gauteng High Court (Randera AJ). Mr Morare alleged that whilst being conveyed on a train operated by SA Rail he was attacked by unknown persons and pushed through an open door, whilst the train was in motion. He said that as a consequence he was seriously injured. He claimed compensation from SA Rail on the basis that SA Rail had negligently failed to ensure his safety whilst being conveyed on the train and had failed to take steps to prevent the train travelling whilst the door in question was open, which had enabled his assailants to eject him from the train.

[2] By consent between the parties the issues of liability and quantum were separated in terms of rule 33(4) of the Uniform Rules of Court and the court of first instance was asked to determine only the issue of the liability of SA Rail to compensate Mr Morare.

[3] That issue was resolved in favour of Mr Morare in the form of an order declaring that SA Rail was liable to compensate Mr Morare 'for such damages as he was able to prove in consequence of being pushed out of the train on 7 November 2008 at or near Doornfontein Station'. The trial court accepted his evidence that he was travelling on a train from Park Station to Naledi and SA Rail was liable to compensate him for the injuries he sustained as a result of being ejected from the train.

[4] An appeal to the South Gauteng full court by SA Rail, was successful, the order being set aside and replaced with an order dismissing Mr Morare's claim with costs. The present appeal is with the leave of this court.

[5] From the outset SA Rail placed in issue the following allegations made by Mr Morare in his particulars of claim:

'5.1 On the 07th November 2009 at approximately 20h10 at Park Station, the Plaintiff boarded the commuter train traveling from Park Station to Naledi Station.

5.2 Between Doornfontein and Braamfontein, the Plaintiff was attacked and was pushed and/or became dislodged from the said train at a dangerous and inopportune moment by persons unknown to the Plaintiff.

5.3 The Plaintiff was pushed through the open door of the moving train.'

The entire factual basis for Mr Morare's claim depended on his having been on a train. This was in issue, because although it was uncontested that Mr Morare had been found alongside the railway tracks at Doornfontein Station which is east of Park Station, the train to Naledi from Park Station travels west towards Braamfontein.

[6] Mr Morare had to prove on a balance of probabilities that he had been a passenger on a train operated by SA Rail. Intrinsically linked to proof of this issue was proof of Mr Morare's allegations as to where he had boarded the train, the time he did so, where the train was headed and where the incident

occurred. His difficulty was that he was found at a place in the opposite direction from that in which he claimed to have been travelling.

[7] Mr Morare testified that on the day in question he had finished working as a packer at a Pick & Pay family store at Craighall at 18h00, after working overtime. He travelled in a taxi from Craighall to Park Station in order to board a train to travel to his home in Naledi, Soweto. He was familiar with the route and the train he had to catch, because he had been travelling by train between his home and work for at least five months prior to the incident.

[8] Having arrived at Park Station he boarded the train at some time between 19h00 and 20h00, from platforms one and two, as these platforms were combined in the same area. The train he boarded was travelling to Naledi via Braamfontein and Mayfair. He agreed that platforms one and two were known as the Soweto platforms because trains travelling west to Naledi and Soweto departed from these platforms. The first stop at Braamfontein Station was only a few hundred metres down the line so that you could, according to Mr Morare, see the trains at Braamfontein Station from Park Station. He agreed that Doornfontein Station was in the opposite direction to Braamfontein Station from Park Station.

[9] When it was put to Mr Morare in cross-examination that SA Rail would lead evidence that he was found injured at Doornfontein Station and he was asked how he got there, he replied 'I ask myself, how did I get to Doornfontein'. When it was suggested to him that the question was whether he was on a train at all he replied 'Yes, I was on the train'. When it was then put to Mr Morare that he could not have been on the train to Naledi, he replied 'I was assaulted. I cannot say we were on the train going towards Doornfontein or towards Braamfontein'. When pressed for an explanation he said 'I do not have any'.

[10] Evidence that Mr Morare was found injured alongside the tracks at Doornfontein Station was given by Ms Elizabeth Khumalo, a segment security commander employed by SA Rail, who explained that her duties included receiving reports of any incidents from the joint operation centre of SA Rail and

then attending the scene of the incident to investigate. A guard or train driver who witnessed an incident would usually report it to the joint operation centre.

[11] Ms Khumalo gave evidence as to what Mr Morare said to her as well as what she was told at the scene by a security guard named Mr Mshengu employed by Hlanganani Security, who apparently found Mr Morare injured next to the track and moved him onto the platform. In turn SA Rail led the evidence of Mr Patrick Seshonga, a supervisor employed by Hlanganani Security who, apart from giving direct evidence that Mr Morare was lying injured on the platform when he came on the scene, also gave evidence as to what Mr Morare said to him, and what he was told by Mr Mshengu, and another security guard employed by Hlanganani Security, Mr Kuba. No regard was paid to the admissibility of any of these statements, or the weight to be attached to them during the proceedings before the court of first instance. Simply put, one of the statements made by Mr Morare was a previous consistent statement and the statements by Mr Mshengu and Mr Kuba were hearsay evidence. Mr Shepstone, who appeared on behalf of the appellant, sought to find corroboration for Mr Morare's evidence that he had been travelling on a train at the relevant time, in the statements made to Mr Khumalo and Mr Seshonga by Mr Morare, Mr Mshengu and Mr Kuba. I will assume in favour of Mr Morare that these statements are admissible and only deal with the weight to be attached to their content.

[12] Ms Khumalo confirmed that trains from Park Station bound for Naledi, Soweto departed from platforms one and two. She said that there was a train known as Jigaleza that ran in the opposite direction from Park Station via Doornfontein to Naledi and Soweto, during the peak hour in the morning, but that this train did not operate during the afternoon and evening, which are the times relevant to the incident. Ms Khumalo said that trains that travelled from Park Station towards Doornfontein in the evening did not travel to Naledi, but travelled to Springs, Pretoria and Thembisa. She was emphatic that no trains travelled to Naledi from Park Station via Doornfontein in the evening. This evidence was never challenged by Mr Morare. In addition, when cross-examined she said that if Mr Morare had been travelling on a train to Naledi in

the evening, he would not have been found at Doornfontein Station, but would rather have been found between Johannesburg and Braamfontein.

[13] I turn to Ms Khumalo's evidence of what transpired at Doornfontein Station. She said Mr Mshengu was on the scene when she arrived and she found Mr Morare lying on the platform. Doornfontein Station was not operational at the time as it was being renovated for the Soccer World Cup, with the result that trains did not stop there and commuters did not enter the station. Ms Khumalo said Mr Mshengu informed her that Mr Morare had been found lying next to the tracks and had been moved to the platform. Although badly injured, Mr Morare was able to furnish his personal details such as his name, identity number, home address and telephone number. She asked Mr Morare whether he had a ticket to which he replied 'no'. Mr Morare told her that he had been robbed and pushed from the train but did not say he had been assaulted. However, she agreed that it was recorded in the occurrence book of the joint operations centre at 21h50 that she had reported that 'at Doornfontein there is a person who has been hit by a train'. Mr Louw, counsel representing SA Rail, however, agreed when questioned by the court of first instance that this 'is a generic term used for an accident'. This concession is somewhat startling when regard is had to clause 10 of the railway occurrence report, partially completed by Ms Khumalo at the scene, which provides for a number of ways in which a person may be killed or injured by a train.

[14] Be that as it may, Ms Khumalo also agreed that there was a later entry in the occurrence book that recorded at 00h25 that she had reported 'that at Doornfontein Station Glen Morare of 5605 Protea Glen alleged that he jumped from unknown metro and is 30 years of age contact no. 9[...] fell between km points AE12/631 and AE 12/729 as jumped off . . . was not in possession of valid ticket'. She initially agreed that she had reported that Mr Morare had jumped from the train and that she had obtained this information from Mr Morare. She however then added that the word 'jumped' was totally wrong. There is, however, a later entry in the occurrence book at 00h30 to which Ms Khumalo was not referred, which refers to a report by her 'that the person . . . was hit by the train at 20:48'.

[15] Mr Patrick Seshonga gave evidence that he was employed by Hlanganani Security to ensure that the line between the platform end of Doornfontein Station and Johannesburg Station was patrolled. He had posted two guards to patrol that portion of the line. There is considerable confusion concerning the identity of these two guards. Mr Seshonga mentioned three names, namely Mr Mshengu, Mr Bonga and Mr Malopa. Counsel then continued on the basis that Mr Mshengu and Mr Bonga were one and the same and that Mr Malopa was Mr Kuba. However, it is plain from the documents that Mr Mshengu and Mr Bonga are different people and Mr Bonga was patrolling the section between Doornfontein and Johannesburg with Mr Kuba. It seems likely that Mr Mshengu was patrolling between Doornfontein and Jeppe.

[16] Mr Seshonga had been unable to trace Mr Mshengu and Mr Kuba had since died. No mention is made of any endeavours to trace Mr Bonga. He stated he was at Park Station and received a report from the joint operation centre that a person had been found at Doornfontein Station. He immediately went there and found Mr Morare lying on platforms two and three in the company of Mr Mshengu and Mr Kuba. Ms Khumalo had already arrived at the scene and he questioned Mr Morare after Ms Khumalo had already done so. Mr Seshonga said he asked Mr Mshengu and Mr Kuba what had happened. Mr Seshonga's evidence was as follows 'they tell me the guy is falling off from the train' and 'they said they saw the train, it was (indistinct). He said they fell off . . . They said he fell to the train, so the train was in motion . . .'. This evidence was inconsistent with the statements he obtained from Mr Kuba, Mr Bonga and Mr Mshengu, none of whom claimed to have seen Mr Morare fall from the train. Mr Morare told Mr Seshonga that he was travelling to Naledi and was robbed in the train. He asked Mr Morare for his name, address and his ticket, but Mr Morare did not have a ticket. Mr Seshonga confirmed that it was only the morning trains that travelled from Park Station in the direction of Doornfontein to Naledi, which was never challenged by Mr Morare. By reference to the occurrence report that he completed at the scene, he confirmed that Mr Morare told him he was travelling home from work at the time.

[17] SA Rail had placed in issue the allegation made by Mr Morare that at the time of the accident he was in possession of a valid train ticket. Both Ms Khumalo and Mr Seshonga independently asked Mr Morare whether he had a ticket to which he replied 'no'. That this was his reply is confirmed by the fact that they both recorded Mr Morare's answer in the relevant railway occurrence reports, which they had completed independently and contemporaneously at the scene of the incident. When this evidence was put to Mr Morare in cross-examination his reply was 'they did not search me'. Ms Khumalo and Mr Seshonga confirmed they did not search Mr Morare, because that was the function of the police. When Mr Morare was asked whether he remembered them asking whether he had a ticket he said he did not. However, when regard is had to the evidence of Ms Khumalo and Mr Seshonga that Mr Morare was able to furnish them with his name, identity number, home address and telephone number, there can be no reason to doubt Mr Morare's ability to understand the question and furnish a reliable answer. Although maintaining he did not remember being asked he never disputed that he had given such an answer. When giving evidence Mr Morare maintained that when he boarded the train he was in possession of a monthly ticket. Included in the record is a document which appears to be a metro monthly train ticket valid from Naledi to Johannesburg for November 2008. However, there is no evidence to prove its authenticity or any admission by SA Rail in this regard. Indeed it is recorded in the rule 37 minutes that 'the truth and correctness' of any documents were not admitted and would have to be proved. The court of first instance accordingly erred when it found that a valid ticket was annexed to the particulars of claim and was not placed in dispute. I am accordingly satisfied that Mr Morare failed to prove that he had been in possession of a valid train ticket at the time.

[18] It is quite clear that Mr Morare could not have boarded a train at Park Station, at that time of the night, to travel home to Naledi via Braamfontein Station as he says he did. Mr Morare could not have been mistaken about the train he boarded. The westbound Soweto train to Naledi leaves from platforms one and two at Park Station. That is the train he had taken on a regular basis to travel home from work for the previous five months. Trains travelling east leave from platform nine. I accordingly disagree with the conclusion of the appeal

court that the only reasonable inference is that Mr Morare boarded the wrong train. No evidence was led to suggest that because of the injuries he had sustained his mental faculties had been impaired, or that he was unable to recall what he was doing immediately before the incident. On Mr Morare's version of events there is no logical reason why he would be on a train travelling in the opposite direction to that which he had to board to get home. On this basis there is no reasonable ground for concluding on a balance of probabilities that Mr Morare was travelling on a train and that his injuries were caused by being thrown off that train.

[19] As regards the costs of the appeal Mr Smit, who appeared for SA Rail, did not persist in a prayer for costs against Mr Morare. He also informed us that SA Rail was not intent on recovering the costs of the trial or the previous appeal from Mr Morare.

[20] The following order is accordingly granted:

1 The appeal is dismissed with no order as to costs.

K G B SWAIN
ACTING JUDGE OF APPEAL

Appearances:

For the Appellant:

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Morobane Inc, Bloemfontein

For the Respondent:

M Smit

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