

SOUTH AFRICA / JUDGMENT

Tshivenga v S - Appeal (2248/2023)

[2023] ZAFSHC 327 (17 August 2023)

[2023] ZAFSHC 327**COURT**

Free State High Court, Bloemfontein

BEFORE

P. J. Loubser

CASE / FILE NUMBER

2248/2023

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**IN THE HIGH COURT
OF SOUTH AFRICA,
FREE STATE
DIVISION, BLOEMFONTEIN**

Appeal number: 2248/2023
REPORTABLE: YES/NO
OF
INTEREST TO OTHER JUDGES: YES/NO

**CIRCULATE TO
MAGISTRATES:** YES/NO
In

the matter between: MPANDELI
CLIVE TSHIVENGA
Applicant
and
THE
STATE
Respondent

CORAM: LOUBSER, J
HEARD

ON: 11 AUGUSTUS 2023

JUDGEMENT

BY: LOUBSER, J

DELIVERED ON: 17 AUGUSTUS 2023

- [1] This is an application for leave to appeal against the judgement of this Court dismissing the applicant's urgent application to be released on bail on the basis of new facts that emerged since the refusal of his bail application in the Magistrate's Court in 2019.
- [2] The application for leave is based on the submission that there is a reasonable prospect that another Court would come to a different conclusion than the one reached by this Court in the bail application on new facts. Before the question of reasonable prospects can be considered, it must be established whether the applicant has shown new facts before this Court that would constitute exceptional circumstances allowing his release on bail. This is so, because the applicant and his co-accused are currently standing trial on Schedule 6 offences, and in terms of section 60(11)(a) of the Criminal Procedure Act 51 of 1977, an applicant for bail on new facts should still prove exceptional circumstances, which in the interest of justice permits his release on bail.
- [3] The new facts alleged by the applicant are two-fold. Firstly, he submits that the respondent has not presented any real evidence against him before the close of the state's case. He submits that the only evidence against him consists of the evidence relating to cell phone records and video footage showing him in the company of the hitman at the casino on the night prior to the killing of the deceased. That evidence did not establish anything against him, and
- therefore the case against him is weak, he contends.
- [4] Secondly, the applicant points out that the Pretoria Moot case has been withdrawn against him, which fact did not exist at the time of his initial bail application.
- [5] As for the first new fact alleged, this Court pointed out in its judgement that application was made for the discharge of the applicant after the close of the state case, but that the presiding Judge had dismissed that application, stating that he is of the view that the applicant has a case to answer. In this respect this court found that it was not in a position to find that there is no evidence against the applicant and that it has to rely on the judgement of the trial judge, who should know best in the circumstances.
- [6] To put it differently, the alleged new fact of a weak case must be considered together with the new fact of the dismissal of the application for a discharge at the end of the state case. This new fact alleged by the applicant, therefore stands in the shadow of uncertainty, and it cannot as such constitute an exceptional circumstance. In my view, there is no prospect that another court would find differently.

[7] As for the second new fact alleged, this court has referred in its judgement to the opposing affidavit filed by the state, indicating that the Pretoria Moot case against the applicant, as well as other cases, will be revisited, and in all probability, he will be charged on all those pending cases. The present status of the Pretoria Moot case therefore cannot be said to be a new fact. Even if it could qualify as such, then it could certainly not qualify as an exceptional circumstance for the granting of bail. In the premises, I make the following order:

1. The application for leave to appeal is dismissed.

P. J. LOUBSER, J

For the applicant: Adv. M. A. Madira Instructed by: Abrams Madira Attorneys, Pretoria c/o Motaung Attorneys, Bloemfontein For the respondent: Adv. J. De Nysschen Instructed by: Office of the Director of Public Prosecutions Bloemfontein

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Prepared on 9 October 2026 · Esheria