



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: **33188/2022**

- | |
|---|
| (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED |
|---|

.....08 MARCH 2024
SIGNATURE	DATE

In the matter between:

MICHAEL BOOYSEN

Applicant

and

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

First Respondent

**THE CHAIRPERSON, NATIONAL COUNCIL FOR
CORRECTIONAL SERVICES**

Second Respondent

**THE MINISTER OF THE STATE OF SECURITY
AGENCY**

Third Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 08 March 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] This is a judicial review brought in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 [PAJA] by the Applicant [Booyesen] against the decision of the First Respondent [the Minister] taken on 21 February 2023 not to place Booyesen on parole [the impugned decision].

[2] The impugned decision was taken after the Minister was directed to do so in terms of a Court order dated 22 December 2022 [Court order]. The Court order granted by agreement, set aside the Minister's decision of 28 April 2022 [April 2022 decision] not to place Booyesen on parole. The matter was remitted back to the Minister for reconsideration. Booyesen was granted leave to further supplement his founding papers and to persist with the judicial review if, the outcome was not favourable, alternatively, if there was no outcome, no decision.

[3] Pursuant to the Court order, the Minister made the impugned decision. Procedurally, Booyesen filed a further supplementary founding and amended the relief he sought. The further supplementary affidavit speaking to the impugned decision.

[4] If this Court should find in favour for Booyesen he moves for an order in terms of section 8(c)(ii)(aa) of PAJA relying on exceptional circumstances.

REASON FOR THE COURT ORDER SETTING ASIDE THE APRIL 2022 DECISION GIVING RISE TO THE IMPUGNED DECISION

[5] The reason for the agreement between the parties to set aside the Minister's April 2022 decision was that the Minister had, *inter alia*, based his decision or part thereof, on a report authored by the Third Respondent [the State

of Security Agency]. The State Security Agency classified the report as 'Secret' [State report]. Booyesen nor the Third Respondent [NCCS] had insight to the State report. As a direct result such failure to provide insight to the State report, the April 2022 decision was set aside for want of procedural fairness in terms of section 3 of PAJA.

[6] The Minister as directed in terms of the Court order made the following impugned decision without allegedly relying on the State report:

"Parole is not approved. This matter should be placed again before the Council within 12 months.

In the interim:

- 1. The offender should undergo individual psychotherapy to address his offending behaviour and medium to high – medium risk of re-offending.*
- 2. A risk assessment by a Criminologist should be conducted (as the current report of the Criminologist is dated 8 May 2018).*
- 3. Parole is denied based on the interests of the community not to be exposed to increased danger with regard to the risk of the offender re-offending."*

[impugned decision]

[7] The procedural consequence of the Court order was that the Minister had not, at that time of the Court order, filed his answer to the founding nor supplementary papers. Once Booyesen filed his further supplementary founding papers, which now dealt with the impugned decision, the Minister filed his answering affidavit. It appears from the content of the answering affidavit that the Minister dealt with all the allegations including dealing with the grounds raised as against the 22 April 2022 decision. This may have been done out of an abundance of caution and for completeness' sake as the interim measures in the April 2022

decision relating to Booyesen having to undergo individual psychotherapy and the need for an updated report by a Criminologist, are repeated in the impugned decision [same conditions].

[8] However, reading the papers filed it is only Booyesen's further supplementary founding affidavit which chronologically can, and which does speak to the grounds of review as against the impugned decision. Notwithstanding this Court takes cognisance of all the papers filed, as a whole, in considering the review.

[9] The specific primary reviewable grounds raised in the further supplementary founding affidavit as against the impugned decision appear to be an irregularity challenge in terms of section 3(2)(b)(ii) of PAJA as against the Minister for his failure to allow Booyesen to make representations before the Minister made the decision not to align himself with the NCCS March 2022 recommendation in favour of parole and, failure by the Minister to refer the matter back to the NCCS in so far as he based the impugned decision on the State report which Booyesen alleges he can't disabuse his mind from the content of the State Report and a section 6(2)(f)(ii) rationality challenge. This Court intends to deal with these grounds first and will, where necessary, deal with the remaining challenges which were raised as against the same conditions.

[10] Before dealing with the grounds of review the Court deals with certain material background facts to place the arguments and reasoning into perspective. Each matter to be adjudicated on its own facts, and in accordance with the procedural path taken.

BACKGROUND FACTS

[11] On the 24 July 2004, Booyesen was sentenced to life imprisonment for murder, 5 (five) attempted murders and possession of an unlicensed firearm and ammunition. Prior to his life sentence, he had a previous record for multiple crimes, these included, multiple assaults, resisting/hindering/obstructing a police officer and possession of Mandrax. The first recorded conviction recorded in 1988 when it appears, Booyesen was approximately 18 (eighteen) years old.

[12] The facts which resulted in an appropriate sentence of life sentence are that Booyesen, on 21 June 1999, a member of the Sexy Boys at the time, together with other gang members, fired on a group of innocent people. At the time they were who were armed with automatic weapons and pistols. The offence occurred without warning or provocation. As a direct result thereof, Booyesen killed a 16 (sixteen) year old young boy and injured others. The offense occurred in the neighbourhood Chestnut Place, in Belhar.

[13] Booyesen has already served more than 20 (twenty) years of his life sentence and become eligible for parole already on 23 November 2015 after having served 12 (twelve) 4 (four) months thereof. He has had previous parole hearings.

[14] According to the record, which unfortunately was poorly put together and, at times confusing as certain reports were not filed according to their page sequence, demonstrated that at the pre-sentencing stage, Booyesen was incarcerated for over 4 (four) years and was kept in various Correctional Centres due to security reasons. Furthermore, that whilst serving his sentence Booyesen has mainly been kept in a single cell environment, mostly in Maximum facilities with little movement and participation with other inmates.

[15] Notwithstanding the minimum interaction, a Criminologist, Professor Hesselink who authored a report dated 8 May 2018, stated that Booyesen was still affiliated, involved and played a role whilst incarcerated with a correctional gang, he stated that: *“Mr Booyesen is incarcerated for serious violence and aggressive crimes, and according to his criminal record, he exhibits a history of aggressive tendencies. Mr Booyesen acknowledges his affiliation, involvement and role in his recent gang (The Sexy Boys), and also with regards to his gang status and prominent position with the 27’s gang while incarcerated (own emphasis). Hence, it goes without saying that Mr Booyesen is very connected with serious criminal syndicates, street gangs and correctional gangs.”*

[16] Of significance is that the purpose of Prof Hesselink's report was to outline possible risk indicators for reoffending and/or to highlight any presence of future dangerous behaviour. Whilst Prof Hesselink outlined numerous risk factors associated with Booyesen reoffending, he failed to venture and predict the possibility of future dangerous behaviour. This he stated was because there were no recorded incidents in the Department's file. In consequence he rather asked, that when the Parole Board make the decision, they attempt by to strike a balance.

[17] Notwithstanding, the outcome of the report was significant and helpful in that Booyesen's continuous alliance, involvement and apparent need to work within the structure of a gang was confirmed by Prof Hesselink even whilst Booyesen was incarcerated.

[18] A year later, and on 7 May 2019, WAA Hanekom, [Hanekom], a clinical psychologist, performed a rating scale test to determine Booyesen's risk of reoffending. The results expressed a high-medium risk of reoffending violently, determined between 50% and 60%. Furthermore, Hanekom stated that his risk for general non-violent crime was found to be even higher than for violent crimes. These results were interpreted to demonstrate that Booyesen would be violent under specific circumstances, especially considering his psychopathic traits and violent attitudes with power and control interpersonal style.

[19] For this reason, Hanekom recommended that a release proposal was the most important consideration, because if Booyesen was to find himself associated with nightclub security and the Sexy Boys or 27's gang, he may end up in trouble. In consequence, Hanekom stated that the only agency who may assist with the proposed integration was the SAPS Crime Intelligence at the Western Cape Regional level.

[20] The Court was not referred to an integrated release plan alluded to by Hanekom but the release plan for consideration, at that time iHaneko authored the report Booyesen was to live with the mother of his two children in Platteklouf, Cape Town and that he was to take up a position as co-owner in the family businesses of property and security at 72 night clubs and retail outlets. The very

trigger Hanekom expressed was a problem. Hanekom however, recommended day parole depending on information from the SAPS Crime Intelligence and that parole should not be made in the absence of adequate SAPS information.

[21] Against this backdrop, and on 18 December 2019, the NCCS recommended that the Applicant not be placed on parole and that he be reconsidered within 24 (twenty-four) months once again for placement on parole and that in the interim there were certain requirements which needed to be met. The 2019 NCCS recommendation contained the same conditions as in the April 2022 and impugned decision namely:

- “1. *The offender should be engaged in individual psychotherapy with the psychologist to address his propensity for violence.*
2. *...*
3. *A risk assessment should be conducted to address his risk for recidivism.*

[22] After the NCCS 2019 recommendation, another clinical psychologist, A Kibi, authored a report dated 25 November 2021 in which Booyesen’s risk factors for recidivism was again highlighted, she stated: “*Mr Booyesen’s biggest risk factor for offending behaviour is likely to be gang related behaviour or activities rather than alcohol or substance abuse related (own emphasis). It is unclear if Mr Booyesen has ceased from participating in gang related activities as his behaviour was strictly monitored during his admission at correctional services. This item applies somewhat at a risk factor to the offender. Mr Booyesen’s risk has not changed much since the previous psychological assessment. He is currently deemed medium to high medium risk*”.

[23] Kibi classified Booyesen as a cluster B personality. In other words, inconsistent and unpredictable behaviour with an exaggerated sense of importance. This report was bolstered by a report by a social worker, K Smith, dated 10 December 2021 wherein she remarked that Booyesen is a highly ranked

member of a gang and his power and control issues are also high risk factors for a relapse.

[24] Booyesen's risk for reoffending remained an unaltered risk factor over the period 2019-2021, an above average risk for violent crime relapse in certain circumstances, particularly gang related circumstances, circumstances which persisted whilst incarcerated.

[25] On 25 March 2022 the NCCS recommended that Booyesen be placed on parole under certain conditions. Of significance is that the NCCS calls, *inter alia*, for the completion of a pre-release programme, that the SAPS should be involved in the development of Booyesen's program on gangsterism with a social worker and high-risk monitoring and support at Community Corrections. These conditions akin to the recommendations voiced by Hanekom in 2019 and in some degree by Kibi in 2021. Conditions repeated and not always met.

[26] At the time of the hearing, the Court was not referred to a particular 'completed pre-release program' to consider in respect of Booyesen's proposed release on parole.

[27] The Minister in April 2022, contrary to the NCCS's recommendation decided not to place Booyesen on parole, the content of the State's report forming part of the reason at that time. This was the April 2022 decision which has subsequently been set aside.

GROUNDINGS OF REVIEW

[28] This Court commences with Booyesen's section 6(2)(f)(ii) challenge based on rationality of the impugned decision as it was the thrust of the argument and the rationality of the decision a recurring reason for raising other grounds. Turning to the further supplementary papers for the basis, the thrust of the grounds of review are not clearly set out but it appears to be that the Minister, "*- cannot disabuse his mind from the content of the Report of the State Security*", upon which "*he based his first refusal (April 2022 decision-own emphasis) not to place*

me on parole –“, the decision which followed is irrational and not based on documents which served before the NCCS (section 6(2)(f)(ii)(cc)).

[29] However, the rationality ground was clarified and expanded in argument to include section 6(2)(f)(ii)(aa) by Counsel who invited the Court to consider the Walus matter.¹ By doing so, Counsel wished to demonstrate that because Booyesen’s risk factors remained unchanged, static as you will, that to constantly apply them and not to recommend parole would have the effect that Booyesen would or could never be released on parole. This, therefore, as the argument was advanced, meant that he would serve a full life sentence of imprisonment. Such then inexplicable and if so, then there is no connection between the exercise of the Minister’s power and purpose of the enacting provision or the information which was before the Minister.² The decision in consequence, irrational.

[30] The Minister on the other hand, argued that when making the impugned decision he applied the criteria in Chapter VI(1A)(19) of the B-Order under the heading ‘Criteria for Parole Selection’ (Parole Board Manual), section 63(1) of Act 8 of 1959 enjoining the Minister to consider the nature of the offence,³ the Policy document of the Department of Correctional Services [Policy document], he considered the 25 November 2021 report of Kibi, the report by Prof Hesselink dated 8 May 2018, the recommendations of the NCCS dated 18 December 2019, the CMC report and Parole Board report, applied positive factors in favour of the placement on parole (his behaviour and general adjustment whilst incarcerated, various programmes completed within the correctional centre aimed at rehabilitation, support system on being placed on parole), and a letter from the SAPS Belville South dated 3 February 2022, whose Station Commander expressed the opinion that it would not be in the interest of the community of Belville if Booyesen was released.

¹ Walus v Minister of Justice and Correctional Services and Others (CCT 221/21) [2022] ZACC 39;2023 (2) BCLR 224 (CC); 2023 (1) SACR 447 (CC) (21 November 2022).

² Section 136 read with section 36 of the Correctional Services Act 111 of 1998.

³ Derby-Lewis v Minister of Correctional Services and Others 2009 (6) SA 205 (GNP).

[31] Considering the advanced argument relying on the Walus matter, the Court agrees that the risk factors considered by the Minister will in all likelihood not change in the future. These factors were established on the record by Hanekom in 2019 and were reaffirmed by Kibi and K Smith, the social worker in 2021. Booyesen's continuous alliance, involvement and apparent need to work within the structure of a gang was already established in 2018 [collectively "constant factors"].

[32] However, to understand the application of the constant factors argument in this matter, demands that one needs to place these constant factors into perspective as against the ever-present factors which were under scrutiny by the Constitutional Court [CC] in the Walus matter. In the Walus matter the factors applied to justify a 'no recommendation of the placement on parole' by the Minister where factors relating to the nature and seriousness of the crime and the sentencing remarks of the trial and Supreme Court of Appeal. These factors remained static in time, they were confined to what had already occurred in the past and as such, incapable, in context, of change. Furthermore, the Applicant before the CC had a low risk of recidivism. It was for this reason that the CC remarked that applying the same factors which were incapable of change to all future decisions would result in an inexplicable reason not to recommend parole, this outcome in contrast with the empowering provision resulting in an unfair and unjust justification.

[33] In the present matter and in placing the factors into perspective, the factors, although constant are distinguishable from those considered by the CC and the Minister in the Walus matter. This is because, in the present matter, the constant factors relate to possible future events which may possibly occur after Booyesen is released on parole. Future events which will possibly trigger Booyesen's risk of relapse thereby affecting both Booyesen and the community.

[34] Simply put: the above 50% prospect of Booyesen reoffending is argued to be a 'given'. The 'given' is heightened by the fact that Booyesen may be employed to manage and secure property. Such property management includes the security of 72 night clubs. Presently, in the absence of a proposed structured

integrational plan alluded to by Hanekom in 2019, and Kibi's warning of Booyesen's biggest risk factor being gang related activities, nor for that matter a completed pre-release program with high control mechanisms as recommended by the NCCS in the 2022 recommendation, the consideration of the constant factors surely justified. If so, considering and weighing them against other factors means the decision is explicable.

[35] The Minister argues that he applied all the criteria including considering the interest of the community and in doing so, struck a reasonable equilibrium, resulting in the interests of the community outweighing the remaining considerations.

[36] An equilibrium Booyesen's family too wished to strike in the event he was released on parole. This is evident from an email dated 21 January 2022 in which feedback was provided by Mr Christo Dourie of the outcome of a meeting with Booyesen concerning his address and support system required by the NCCS feedback letter of 18 December 2019. It is as a result Booyesen confirming that because of the risk factor raised by his own family that staying with his own children at the property in Platteklouf, Cape Town was not advisable, but rather in Glenhaven, Belville as the given address. The weight of the SAPS Belville South becomes apparent.

[37] The answer, the impugned decision is not inexplicable as relied on by Booyesen's Counsel relying on the Walus matter and therefore not irrational as argued.

[38] The further, advanced argument that certain of the interim measures imposed in the impugned decision, being yet another risk assessment is only moving the goal posts. This, at first blush could appear arguable but, even so, it was not only the risk factors which were applied when the Minister made the impugned decision as discussed in full.

[39] Furthermore, is the impugned decision irrational because it is not based on documentation that served before the NCCS? The Minister states that he did not rely on the State report when he considered the impugned decision.

[40] Considering the answer filed by the Minister, it can't be said that the Minister did not apply his mind to the documents before him, nor really can it be established that the Minister was unable to disabuse his mind from the content of the State report, he stated the reverse was in fact true.

[41] In fact, the record and the evidence demonstrate that the Minister did not just rubberstamp the recommendation placed before him, he considered it and his evidence is that the same conditions previously recommended had still not adequately addressed. This is all an indication that he applied his mind when he made the impugned decision and nothing can be gainsaid that he took it arbitrarily or capriciously (section 6(2)(e)(vi)). Booyesen may not like or agree with outcome of that decision-making process, nor the weight attributed to certain documents or factors, but that is not the enquiry to be entertained in the present application. The impugned decision excipiable and therefore rational, a decision a reasonable decision-maker could have reached (section 6(2)(h)).⁴

[42] I now deal with the remaining grounds as raised as against the impugned decision.

Was the procedure fair, the irregularity challenge?

[43] Booyesen relying again on section 3 of PAJA, as he did with the April 2022 decision, contends now that because he did not receive the reasons for the NCCS 2022 decision which, recommended placing him on parole, that such failure constituted an irregularity and was procedurally unfair as he was unable to make representations to the Minister. The thrust of the complaint is directed at Booyesen's failure to possess an opportunity to participate in the decision-making process, because of such irregularity.

⁴ Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (SA) 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004).

[44] In context, the NCCS 2022 decision is a recommendation to the Minister in respect of the April 2022 decision which has already been set aside. Nothing on the papers demonstrates that after Booysen's legal team received a copy of the NCCS 2022 recommendation, that they even attempted to participate in any way in the next decision-making process after the Court order. Booysen simply filed his further supplementary founding papers, made the irregularity allegation in paragraph 9 thereof, gave no particularity of how he approached the Minister to demonstrate his intent to participate and how the Minister then failed to give him an opportunity to make representations. Booysen also knew that the Minister had a timeline in which to make the impugned decision in terms of the Court order, namely 40 days. Armed with this knowledge no correspondence to the Minister is attached to his further supplementary founding papers for the Court to consider the steps taken during that time to demonstrate an attempt, an intent and frustration on his behalf.

[45] In consequence any reliance on section 3 of PAJA in respect of the impugned decision appears stands to fail.

[46] The grounds of review relied on by Booysen all stand to fail as relied on and argued. In consequence the necessity for this Court to deal with exceptional circumstances arising in respect of section 8(c)(ii)(aa) of PAJA become unnecessary.

[47] With regard to costs there appears no reason nor argument that the costs should not follow the result.

[48] This Court then makes follows order:

The order:

1. The application is dismissed with costs, including the cost of Senior Counsel.

L.A. RETIEF
Judge of the High Court
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Date of hearing:

24 January 2024

Date judgment delivered:

08 March 2024