REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-2020/00087

JOHN LENGA **APPLICANT**

and

THE COMMISSIONER GENERAL OF THE NAMIBIAN CORRECTIONAL SERVICE **FIRST RESPONDENT**

THE CHAIRPERSON FOR THE DISCIPLINARY HEARING N.O **SECOND RESPONDENT**

HEAD: DIRECTORATE LEGAL SERVICES AND DISCIPLINE N. O **THIRD RESPONDENT**

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **FOURTH RESPONDENT**

ATTORNEY GENERAL OF THE REPUBLIC OF NAMIBIA **FIFTH RESPONDENT**

Neutral citation: *Lenga v Commissioner-General of the Namibian Correctional Service* (HC-MD-CIV-MOT-GEN-2020/00087) [2023] NAHCMD 412 (20 July 2023)

Coram: LIEBENBERG J, D USIKU J, SIBEYA J

Heard: **28 June 2023**

Delivered: **20 July 2023**

Flynote: Review – Whether or not a disciplinary inquiry reinstituted after being dismissed without the merits being heard amounts to double jeopardy – Article 12 and 18 of the Constitution – *Audi alteram partem rule* – Whether the delay of nine months to reinstitute the inquiry constitute a delay – Constitutionality of ss 51(15) and 54(14) of the Correctional Service Act 9 of 2012.

Summary: The applicant, a correctional officer, attended to the Lucius Mahoto Training Centre situated at Omaruru. He was charged with a disciplinary contravention for allegedly being under the influence of intoxicating substances or drugs whilst on duty on 12 April 2019, alternatively not being fit for duty due to the influence of drugs in contravention of the College Order number 6.2.1. He was further charged for being late for class without a reasonable explanation.

A disciplinary inquiry was held on 25 June 2019 where the applicant pleaded not guilty to both charges. The applicant raised a point *in limine* that he was already found guilty and punished for the same offence while he was a student trainee at the Training College. The applicant argued that proceeding with the inquiry will violate Article 12(2) of the Constitution which prohibits double jeopardy. The Presiding Officer dismissed the point *in limine* raised and ruled that the applicant never appeared before a disciplinary inquiry contemplated in s 54 of the Act, and therefore, the inquiry did not violate Article 12(2) of the Constitution. The Presiding Officer directed the Initiator to adduce evidence.

The applicant accepted the ruling of the Presiding Officer and thereafter raised an objection that there was no report by the Commandant directed to the officer in charge of Oluno Correctional Facility as required in terms of clause 6.6.5 of the College Orders. The Initiator failed to produce the said report and the Presiding Officer dismissed the matter. The Initiator stated that, after the adjournment, he obtained the recommendation letter written by the Commandant to the officer in charge of Oluno Correctional Facility recommending that disciplinary proceedings be

instituted against the applicant. A ruling was, however, already made by the Presiding Officer.

On 15 July 2019, Commissioner Malobela, addressed a letter to the applicant stating that the Presiding Officer erred by dismissing the case against the applicant without hearing evidence. He further stated that the proceedings and the ruling of the Presiding Officer are irregular and have been set aside, furthermore, that the disciplinary inquiry will commence afresh.

On 11 March 2020, the applicant was served with a Notice to appear for a disciplinary inquiry dated 9 March 2020 to be held on 25 – 27 March 2020. Disgruntled by the decision of Commissioner Malobela of 15 July 2019, and the said notice to appear for a disciplinary inquiry, as allegedly constituting double jeopardy, the applicant launched this application.

Held: the *audi alteram partem* principle is one of the common law principles of natural justice that requires that no one must be judged unheard. This is a well-established principle that a party to be affected by a decision must be heard before the decision is made. The applicant, however, failed to prove that he will be prejudiced and will not be afforded substantial redress at the disciplinary inquiry.

Held that: both ss 51(15) and 54(14) of the Act do not make provision for representations from the correctional officers affected before the decision to reinstitute the disciplinary inquiry is taken. Section 55 of the Act affords the correctional officers, applicant included, of the right to appeal to the Minister responsible for Correctional Service against the finding or order of the Commissioner-General or the senior correctional officer and the disciplinary measure, including the decisions taken in terms s 54(14) of the Act.

Held further that: the disciplinary inquiry was neither concluded nor terminated on the merits, but rather on a technical irregularity or defect in the procedure, hence, double jeopardy does not arise, which, justifies the invocation of s 54(14) of the Act.

Held: that the applicant failed to establish that the decision by Commissioner Malobela of 15 July 2019, and the notice to appear for the disciplinary inquiry dated 9 March 2020 are unlawful, unconstitutional and invalid. The applicant further failed on the facts of this matter in his quest to prove that ss 51(15) and 54(14) of the Act are unconstitutional and invalid. The application, therefore, falls to be dismissed with costs.

ORDER

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1. The applicant's application to review and set aside the decision and action of the third, alternatively, the first respondent's decision to set aside prior disciplinary proceedings and to institute disciplinary proceedings against the applicant dated 15 July 2020, is refused.

2. The applicant's application to review and set aside the first respondent's decision dated 9 March 2020 and action to charge the applicant, is refused.

3. The applicant's application to declare the decisions of the first, alternatively the third respondents to charge him, dated 15 July 2019 and 9 March 2020, respectively, is refused.

4. The applicant's application to declare ss 51(15) and 54(14) of the Correctional Service Act 9 of 2012 as unconstitutional and invalid, and set aside the decisions taken pursuant to such sections, is refused.

5. The applicant must pay the costs of the respondents including the costs of one instructing and one instructed legal practitioner.

6. The matter is removed from the roll and regarded and is considered as finalised.

JUDGMENT

SIBEYA J (concurring Liebenberg J and D Usiku J)

Introduction

[1] No person should be subjected to double jeopardy. It is an established rule of law that no person should therefore be retried again for the same offence for which he or she was already tried, convicted or acquitted. This rule is further entrenched in Article 12(2) of the Namibian Constitution (the Constitution).

[2] This case revolves around the question whether or not the decision of the senior correctional officer of the Correctional Service to recharge the applicant on misconduct charges which were quashed by the Presiding Officer of the disciplinary hearing, violates the rule against double jeopardy.

[3] Sections 51(15) and 54(14) of the Correctional Service Act 12 of 2012 (the Act) authorises the Commissioner-General and the senior correctional officer to re-institute misconduct charges against a correctional officer in specified circumstances. The applicant impugns the constitutionality of the said provisions on the facts of this matter and the court is seized with the determination of the propriety of the application.

The parties and representation

[4] The applicant is Mr John Lenga, a major male employed as a Correctional Officer stationed at Oluno Correctional Service in Ondangwa.

[5] The first respondent is the Commissioner-General of the Namibian Correctional Service, duly appointed in terms of Article 32(4)*(c)(cc)* of the Constitution and has the powers and duties regarding efficient supervision, administration and control of the correctional service, including powers to issue rules,

standing orders or administrative directives. For ease of reference, the first respondent shall be referred to as 'the Commissioner-General'.

[6] The second respondent is the Chairperson of the Disciplinary hearing, Senior Superintendent Kamwanyamuzi N.O, the chairperson of the disciplinary proceeding pending against the applicant.

[7] The third respondent is the Head of the Directorate of Legal Services and Discipline in the Office of the Commissioner-General, Commissioner Raphael Malobela. The third respondent shall be referred to as 'Commissioner Malobela'.

[8] The fourth respondent is the Government of the Republic of Namibia, a juristic person.

[9] The fifth respondent is the Attorney-General, duly appointed in terms of Article 32(3)*(i)(ee)* of the Constitution.

[10] The respondents oppose the application. Notwithstanding the said opposition, only the third and fifth respondents filed answering affidavits.

[11] Where reference is made to the applicant and the respondents jointly, they shall be referred to as 'the parties'.

[12] The applicant is represented by Mr Amoomo while the respondents are represented by Mr Chibwana.

Background

[13] The applicant attended to the training together with other correctional officers at Lucius Mahoto Training Centre situated at Omaruru 'the Training College'. He was charged with a disciplinary contravention for allegedly being under the influence of intoxicating substances or drugs whilst on duty on 12 April 2019, alternatively not being fit for duty due to the influence of drugs in contravention of the College Order[1]

[1] Namibian Correctional Service College Orders issued by the Commissioner-General, on 7 August 2015.

number 6.2.1. He was further charged for being late for class without a reasonable explanation.

[14] At a disciplinary inquiry held on 25 June 2019, the applicant, represented by Mr Amoomo, pleaded not guilty to both charges. The applicant raised a point *in limine* that he was already found guilty and punished for the same offence while he was a student trainee at the Training College. It was argued that proceeding with the inquiry will violate Article 12(2) of the Constitution which prohibits double jeopardy. The Presiding Officer of the disciplinary hearing dismissed the point *in limine* raised and ruled that the applicant never appeared before a disciplinary inquiry contemplated in s 54 of the Act, and therefore, the inquiry did not violate Article 12(2) of the Constitution. The Presiding Officer directed the Initiator to adduce evidence on the preferred charges.

[15] The applicant accepted the above ruling of the Presiding Officer. He thereafter raised an objection that there was no report by the Commandant directed to the officer in charge of Oluno Correctional Facility as required in terms of clause 6.6.5 of the College Orders. The Initiator failed to produce the said report as per College Order 6.6.5 to charge the applicant, as a result, the Presiding Officer dismissed the matter. Thereafter, the Initiator stated that after the adjournment, he obtained the recommendation letter written by the Commandant to the officer in charge of Oluno Correctional Facility recommending that disciplinary proceedings be instituted against the applicant. The Presiding Officer however responded that the ruling was already made.

[16] On 15 July 2019, Commissioner Malobela, addressed a letter to the applicant stating that the Presiding Officer erred by dismissing the case against the applicant without hearing evidence. Commissioner Malobela further stated that the proceedings and the ruling of the Presiding Officer are irregular and have been set aside, furthermore, that the disciplinary inquiry will commence afresh.

[17] On 11 March 2020, the applicant was served with a notice to appear for a disciplinary inquiry dated 9 March 2020 to be held on 25 – 27 March 2020. Disgruntled by the decision of Commissioner Malobela of 15 July 2019 and the

aforesaid notice to appear for a disciplinary inquiry, as allegedly constituting double jeopardy, the applicant launched this application on urgency. The parties agreed to stay the disciplinary inquiry pending the present review.

Applicant's case

[18] The applicant states that the case against him was already dismissed on 25 June 2019, and by institution, it constitutes double jeopardy, contravening Article 12(2) of the Constitution.

[19] The applicant further contends that the Commissioner-General took about nine months before reinstituting the disciplinary proceedings. The applicant claims that the said period of nine months amount to unreasonable delay which prejudiced him.

[20] The applicant states further that he had no sight of the decision made in terms of ss 51(15) or 54(14) of the Act by the Commissioner-General, or a similar decision authorised by the Commissioner-General. The applicant contends further that if a decision in terms of ss 51(15) or 54(14) of the Act was made, then such decision is liable to be set aside on the basis that he was not afforded *audi* before the decision was taken contrary to the provisions of Article 18 of the Constitution.

[21] The applicant contends further that ss 51(15) and 54(14) of the Act are unconstitutional as they authorise the Commissioner-General or any other senior correctional officer to reinstitute disciplinary proceedings in cases where the charged employee was already found not guilty, thus constituting double jeopardy.

[22] After receipt of the review record, the applicant deposed to a supplementary affidavit on 26 April 2021. In the supplementary affidavit, the applicant objects to the production of the letter dated 23 April 2019 for the reason that it was not disclosed to him during the disciplinary hearing. He reiterated that College Order 6.6.1 was pursued in accordance with the provisions of ss 51(15) and 54(14) of the Act which are unlawful and unconstitutional as they offend Article 12(2) and Article 18 of the Constitution.

Respondents' case

[23] Commissioner Malobela deposed to an answering affidavit dated 8 June 2021 after being authorised by the first, second and fourth respondents to do so. In the said affidavit, Commissioner Malobela stated that he was not opposed to the review application, but filed the affidavit to assist the court in adjudicating the matter and stated further that he will abide by the decision of the court.

[24] Commissioner Malobela stated further, in the answering affidavit, that he is the Head of Namibia Correctional Service's Directorate of Discipline and Legal Services and the senior Correctional Officer authorised by the Commissioner-General to attend to disciplinary issues of correctional officers, including the applicant. He stated further that on 18 April 2019, the applicant appeared before the Head of Management Development Training on allegations of contravening para 9.1 of the College Orders, after being observed smoking while under a tree and later observed to be making strange movements, sweating heavily, breathing deeply, shivering and walking with difficulties whilst returning to the training room. Whilst in the training room, the applicant smelt of intoxicating liquor. He was taken to the clinic where he indicated that he used marijuana since 2012. He was further alleged to have been late for class without a reasonable explanation.

[25] Commissioner Malobela further stated that the Head of Management Development Training found the applicant guilty of contravening College Order number 6.2.1 and dismissed the applicant from the Training College and ordered him to return to his duty station at Oluno Correctional Facility. The applicant filed an appeal against the dismissal from the Training College. The appeal was unsuccessful. Commissioner Malobela deposed further that after being dismissed from the Training College, the applicant was instructed to report to his duty station on 23 April 2019. He further states that a report was sent by the Commandant of the Training College to the Officer in charge of Oluno Correctional Facility on 23 April 2019 for the applicant to be charged in terms of the College Order 6.6.6(b).

[26] Commissioner Malobela states further that the applicant was subsequently arraigned before a disciplinary inquiry on 25 June 2019 on the following charges:

(a) Charge 1: acting in the manner likely to discredit the good order and reputation of the Correctional Service, and

(b) Charge 2: neglecting to observe an administrative directive made under s 5(3) of the Act.

[27] Commissioner Malobela stated that, at the commencement of the hearing, the applicant requested to be provided with the report compiled by the Commandant of the Training College to the Officer in charge of Oluno Correctional Facility in compliance with College Order number 6.6.6(b). The report was not readily available and the Presiding Officer dismissed the matter. After an adjournment, the Initiator brought the report to the hearing, but the matter was already dismissed. Commissioner Malobela opined that the conduct of the Presiding Officer was irregular, regard being had to the provisions of s 54(14)*(c)* of the Act and, therefore, he addressed a letter to the applicant informing him that he has decided to reinstitute the disciplinary inquiry in terms of s 54(14) of the Act on the same charges..

[28] On 28 January 2022, Commissioner Malobela deposed to a further affidavit (the further affidavit) on behalf of the first to the fourth respondents, subsequent to filing a notice to oppose the application on 20 September 2021. The notice to oppose and the further affidavit revealed a change of heart and a clear stance to oppose the application based on the averments set out in the answering affidavit referred to above.

[29] The Attorney-General who, on permission granted by the court, was joined to the proceedings, filed a notice to oppose the application and deposed to an answering affidavit. The Attorney-General contends that the applicant did not demonstrate the manner in which the implementation of ss 51(15) and 54(14) violated his rights or negated any of his constitutionally protected rights.

<u>The arguments</u>

[30] Mr Amoomo argued that the purpose of the College Order 6.6.5 is to permit the Commissioner-General, upon proper consideration of the matter, to decide whether or not to pursue further disciplinary actions against the applicant. He argued that Commissioner Malobela, who charged the applicant on the same offences, did not properly consider the matter before deciding to recharge the applicant.

[31] Mr Amoomo further argued that the said impugned ss 51(15) and 54(14) do not provide for the Commissioner-General or the senior correctional officer to seek representations from the concerned Correctional Officers, before invoking the said sections, thus violating the *audi alteram partem rule* and Article 18 of the Constitution.

[32] Mr Amoomo argued further that ss 51(15) and 54(14) of the Act are unconstitutional for empowering the Commissioner-General or the senior correctional officer to reinstate finalised disciplinary proceedings. He argued further that the said provisions provide the Commissioner-General and the senior correctional officer with limitless powers to charge correctional officers, whether they were found guilty or not guilty before on the same or amended charges, emanating from the same facts; thus rendering such provisions unconstitutional for violating Article 12(2) of the Constitution.

[33] Mr Amoomo further, in the heads of argument, equates the decision of the Presiding Officer of the disciplinary hearing to dismiss the claim to a discharge of the accused at the end of the state's case in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA). He argued that the consequence in the above two scenarios is the same, i.e. that the matters are finalised. Reinstituting the already concluded disciplinary proceedings on the same charges constitutes double jeopardy, he submitted.

[34] During oral argument, Mr Amoomo appeared to abandon the argument that the applicant was acquitted on the merits when his case was dismissed by the Presiding Officer at the disciplinary hearing. He further conceded, on a question by the court regarding his comparison of the dismissal of the applicant's case at the

disciplinary hearing to a discharge of the accused in terms of s 174 of the CPA, that the two processes are different in that the decision made in terms of s 174 is based on the evidence presented, while in the applicant's case no evidence was tendered. Mr Amoomo, however, still maintained that although his main argument is that the applicant was not afforded *audi* before an adverse decision was taken, the double jeopardy was a backup argument.

[35] Mr Amoomo further argued that it took Commissioner Maloela a period of nine months before reinstituting the disciplinary proceedings, a period he argued is unreasonable and prejudicial to the applicant.

[36] He concluded his written arguments with reference to the matter of *Brandford v Maetrorali Services (Durban) and Others,*[2] where the South African labour Court found that a second inquiry would only be justified if it will be fair to reinstate it. He invited the court to uphold the application with costs.

[37] The respondents, in their written heads of argument, argued that the Presiding Officer of the disciplinary inquiry irregularly and prematurely terminated the proceedings and dismissed the matter without following due process and hearing evidence, resulting in the provisions of ss 51(15) and 54(14) being invoked. Mr Chibwana argued that Commissioner Malobela, has the powers transferred by the Commissioner-General to have the disciplinary hearing commence afresh in terms of s 54(14).

[38] Mr Chibwana argued that the manner in which ss 51(15) and 54(14) of the Act are impugned is that whenever the said provisions are invoked, the Commissioner-General or the senior correctional officer violates Article 12(2) of the Constitution. He argued that what the applicant fails to do, in his challenge to the constitutionality of ss 51(15) and 54(14), is to engage the fact that the exercise of the powers provided for in the said provisions only arises if the acquittal is not reached according to law.

[39] Mr Chibwana argued further that there is no entitlement for the applicant to be heard *(audi)* before being recharged. He argued that the applicant can raise all his

[2] *Brandford v Maetrorali Services (Durban) and Others* 2004 (3) BLLR 199 (LAC).

concerns at the reinstituted disciplinary inquiry and no law prohibits him from doing so. He further argued that the contention by the applicant that there is no forum in which he could challenge the decision of the senior correctional officer or the Commissioner-General is not correct as the Act provides for an appeal to the Minister of Safety and Security to a correctional officer who is disgruntled with a decision of the Commissioner-General.

[40] In respect of the alleged prejudice suffered by the applicant for the nine months delay to reinstitute the proceedings, Mr Chibwana contends that the applicant suffered no prejudice as he was at work during this period, receiving a salary. He called for dismissal of the application with costs.

The issue for determination

[41] The issue before court for determination is to review and set aside the decision of 15 July 2019, to reinstitute the disciplinary inquiry and the notice of 9 March 2020, to appear at a disciplinary inquiry for hearing on 25 – 27 March 2020. The decisions are impugned for not affording the applicant *audi* before taking such decisions and for taking the said decisions after an unreasonable delay of nine months which, it is said, is prejudicial to the applicant. The applicant further contends that by the time that the applicant's case was dismissed, he was already found guilty on the same charges, thus any subsequent proceedings constitute double jeopardy.

[42] Mr Amoomo argued that the review application should first be considered with the aim of determining whether it can be decided based on common law or statute law without having recourse to the Constitution. He argued further that a determination as to whether Articles 12 and 18 of the Constitution was violated by the impugned decisions should only be considered if the application cannot be disposed of without having regard to the Constitution.

[43] Damaseb DCJ in *Road Fund Administration v Skorpion Mining Company (Pty) Ltd*[3] stated that regard is to be had to the Constitution as the last resort in resolving disputes and remarked as follows at para 45:

[3] *Road Fund Administration v Skorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) para 45.

'The Constitution must be the last and not the first resort in the resolution of disputes that come before the courts. In the present case, the exact opposite happened. The High Court preferred to have recourse to the Constitution instead of first considering if the claim and the competing allegations could be resolved applying the common law. Given that the court was faced with two mutually destructive versions in an action proceeding, the dispute was capable of and was one which had to be resolved by the application of tried and tested techniques known to the common law. We have warned in the past that the court must first try to resolve a dispute by the application of ordinary legal principles before resorting to the Constitution.'

[44] Mr Amoomo is, therefore, correct in his argument that this matter should be resolved without having regard to the Constitution, except if on common law review grounds, the application cannot succeed. It follows that if the application can be resolved on common law or statute, then the Constitutionality of the impugned provisions need not be considered. The difficulty with Mr Amoomo's oral arguments is to insist on double jeopardy as a backup argument, according to him.

Audi alteram partem

[45] The applicant mentions, in the founding affidavit, that the decision to reinstitute the disciplinary inquiry offends against his right to *audi,* protected by Article 18 of the Constitution because he was not heard prior to the impugned decisions being made. The *audi alteram partem* principle is one of the common law principles of natural justice that requires that no one must be judged unheard. This is a well-established principle that a party to be affected by a decision must be heard before the decision is made.[4]

[46] In the relief sought, nowhere does the applicant state any violation of the *audi* principle or Article 18, and on that basis alone, his complaint should fail. In any event, even if it can be said that by alleging *audi* in the founding affidavit the applicant substantively raised *audi*, the applicant failed to prove that he was prejudiced by the concerned decisions, and that he will not be afforded substantial redress at the disciplinary inquiry.

[4] *Mouse Properties Ninety Eight CC v Minister of Urban and Rural Development and Others* 2022 (2) NR 426 (SC).

[47] The above finding is supported by the fact that both ss 51(15) and 54(14) of the Act do not make provision for representations from the correctional officers affected before the decision to reinstitute the disciplinary inquiry is taken. It must be pointed out that where a decision to reinstate the disciplinary inquiry is taken, nothing prohibits the correctional officers from challenging any decision or raising concerns at the disciplinary inquiry.

[48] In further consideration, s 55 of the Act affords the correctional officers, applicant included, of the right to appeal to the Minister responsible for Correctional Service against the finding or order of the Commissioner-General or the senior correctional officer and the disciplinary measure, including the decisions taken in terms s 54(14) of the Act. This provision further takes care of the applicant's complaint that there is no forum that he could approach to seek the relief sought in the application. As is apparent from the above, such assertion is incorrect as the applicant could challenge the impugned decisions with the Minister as per s 55 or raise the challenge at the disciplinary inquiry.

Unreasonable delay

[49] The applicant complains of the unreasonable delay to reinstitute the disciplinary inquiry after a period of nine months lapsed from the date that the Presiding Officer dismissed the case. The respondents' stance to the complaint is that the delay was as a result of having to ensure that due process was followed so that the decision to rehear the matter was correct.

[50] The Act does not prescribe the period within which the decision to reinstitute the disciplinary inquiry or not should be made. In the absence of the stipulated period of time, it follows that such decision must be made within a reasonable time. Guidance to deciding within a reasonable time can be found from authorities that discussed unreasonable delay to launch review proceedings. The leading matter in our jurisdiction is the Supreme Court decision of *Keya v Chief of the Defence Force and Others*[5] where O'Regan AJA remarked as follows:

[5] *Keya v Chief of the Defence Force and Others* 2013 (3) NR 770 (SC).

'[21] This court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay.[6] In considering whether there has been unreasonable delay, the high court has held that each case must be judged on its own facts and circumstances[7] so what may be reasonable in one case may not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.'[8]

[51] Considering the above authority, it is clear that the determination whether a decision was unreasonably delayed or not depends on the facts of each case. In *casu*, the decision of nine months is attributed to making sure that due process is followed and further ensuring that the decision is a correct one. The explanation appears to be reasonable as it reveals that the Correctional Service intended to ensure that they act according to law and that their decision was correct. For this reason, the court accepts that the decision to recharge the applicant was not unreasonably delayed.

[52] In any event, the applicant does not point to the prejudice that he suffered as a result of the period that it took for the decision to be made. The prejudice that the applicant stated in the founding affidavit relates to the consequence of the decision,

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[6] See *Krüger v Transnamib Ltd (Air Namibia) and Others* 1996 NR 168 (SC) at 170 – 171, citing with approval the South African decision *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 798G – 799E. See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others; Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another* 2009 (1) NR 277 (HC); *Namibia Grape Growers and Exporters v Minister of Mines & Energy and Others* 2002 NR 328 (HC); *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) paras 41 – 43 and *Ogbokor and Another v Immigration Selection Board and Others*, unreported decision of the High Court [2012] NAHCMD 33 (17 October 2012). For other South African decisions, see *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39 B – D; Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander 1986 (2) SA 57 (A); *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) ([2004] 4 All SA 133) paras 46 – 48; *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) ([2006] 3 All SA 245) paras 5 and 22.

[7] See *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC) at 132 (per Strydom JP). See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others*; *Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another* cited above in footnote 6 para 14.

[8] See *Radebe* cited above in footnote 6 at 798I; *Setkosane* cited above in footnote 6 at 86E – F; *Gqwetha* cited above in footnote 6 para 48.

which includes being subjected to another disciplinary hearing and legal costs that he will incur. No prejudice regarding the nine months' delay of the decision features in the founding affidavit. Mr Amoomo argued without substantiation that the applicant suffered professional prejudice during the delay. The court is not privy to what constitutes professional prejudice and refuses to speculate on the subject. Mr Chibwana, on the other hand, argued that the applicant suffered no prejudice as he was employed and was receiving a salary during the concerned period. This court finds that in the absence of the applicant setting out the prejudice that he claims to have suffered, the applicant has not established such prejudice, and therefore, nothing turns on this argument.

[53] The above findings and conclusions demonstrate that the review application based on common law and statutory law ought to fail. As alluded to before, the applicant insisted on the ground of review of double jeopardy as a backup argument. His attack of double jeopardy is directed at challenging the constitutionality of s 51(15) and 54(14) of the Act.

[54] It therefore needs to be determined whether or not ss 51(15) and 54(14) of the Act are unconstitutional in that their implementation results in double jeopardy and, thus, violating Article 12(2) of the Constitution. The court is further required to determine whether, on the facts of this matter, the applicant has established that he is entitled to the relief sought.

The constitutional test for legislative provisions

[55] It is settled law that the party who alleges the unconstitutionality of a statutory provision bears the *onus* to prove the said unconstitutionality.

[56] Parker J in *Disciplinary Committee for Legal Practitioners and Others v Makando,*[9] remarked as follows on the onus of proof of the unconstitutionality of a statutory provision:

[9] *Disciplinary Committee for Legal Practitioners and Others v Makando* (Case No. A 216/2008) (delivered on 08 October 2011).

'[9] In considering the first respondent's constitutional challenge based on Article 12(1) and Article 18, I keep in my mental spectacle the following trite principles of our law concerning (1) constitutional challenge in general and (2) constitutional challenge of a provision of a statute in particular. Under item (1), it has been said that the person complaining that a human right guaranteed to him or her by Chapter 3 of the Constitution has been breached must prove such breach (*Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC). And before it can be held that an infringement has, indeed, taken place, the applicant must define the exact boundaries and content of the particular human right, and prove that the human right claimed to have been infringed falls within that definition (*S v Van den Berg 1995* NR 23). Under item (2), the inquiry must be directed only at the words used in formulating the legislative provision that the applicant seeks to impugn and the correct interpretation thereof to see whether the legislative provision – in the instant case, Article 12(1) and Article 18 of the Namibian Constitution – has in truth been violated concerning the applicant (*Jacob Alexander v Minister of Justice and Others* Case No. A 210/2007 (HC) (Unreported))'.

Analysis

[57] It is prudent to address one issue before getting to the constitutionality or not of ss 51(15) and 54(14) of the Act.

[58] To commence with, the applicant appears to have qualms with the ruling of the Presiding Officer of the disciplinary inquiry delivered on 25 June 2019, on the objection made that the applicant was already found guilty on the same facts and punished in terms of the College Orders. Subjecting him to a further disciplinary hearing constitutes double jeopardy. The Presiding Officer, in dismissing the objection, found that the applicant was a student at the time of the alleged commission of misconduct and that the College Orders provided that such a student, after being dismissed from the Training College, had to appear before a disciplinary inquiry.

[59] Subsequent to the said finding, the legal representative for the applicant replied as follows:

'We accept the ruling by the presiding officer'

[60] The above ruling and the response by the applicant's legal representative puts the above qualms to rest. In any event, the qualms do not form part of the relief sought by the applicant, therefore, nothing further needs to be said on this matter.

The factual basis of the constitutional attack

[61] It should be clear by now that the applicant claims, in the written heads of argument, that his disciplinary inquiry was dismissed by the Presiding Officer after the Initiator failed to provide the requested report entitling him to an acquittal. In oral argument, Mr Amoomo abandoned the claim to an acquittal but still maintained the applicant's stance on the claim of double jeopardy. The double jeopardy claim is, therefore, addressed below.

[62] The applicant contends that the decision to subsequently reinstitute the disciplinary inquiry on the same charges constitutes double jeopardy and offends Article 12(2) of the Constitution. In determining the propriety of the applicant's claim, it is necessary to have regard to the record of the disciplinary proceedings.

[63] During the disciplinary inquiry of 25 June 2019, and after the applicant had pleaded not guilty to the preferred charges, the Presiding Officer, having dismissed the objection of double jeopardy, ordered the Initiator to lead evidence. Before evidence could be led, however, Mr Amoomo requested the Initiator through the Presiding Officer, to provide him with a full report compiled by the Commandant directed to the Officer in Charge of Oluno Correctional Facility, recommending the institution of disciplinary proceedings. The Initiator responded that the said report was not available.

[64] The Presiding Officer, after a brief adjournment, ruled that, in the absence of a report from the Commandant to the Officer in charge of Oluno Correctional Facility as required by the College Orders, 'I dismiss the case.' After the ruling, the Initiator said that 'after we went for the adjournment I went to consult, so, I got the recommendation letter written by the Commandant himself to the officer in charge of Oluno Correctional Facility recommending disciplinary proceeding *(sic)* be instituted

against charged officer.' The Presiding Officer responded that he already made his ruling.

[65] It is this case (the disciplinary inquiry) that was dismissed which Commissioner Malobela sought to reinstitute on 15 July 2019. As alluded to above, the applicant impugns the said decision of 15 July 2019 together with the written notice to appear for a disciplinary inquiry dated 9 March 2020, as constituting double jeopardy and offending Article 12(2) of the Constitution.

[66] Commissioner Malobela, in the answering affidavits, deposed that when he decided to reinstitute the disciplinary inquiry he acted in terms of s 54(14) of the Act. No fact was established in this matter that there was any decision made pursuant to s 51(15) of the Act. Although similarly worded, the difference in the said two provisions is that whereas s 51(15) authorises the Commissioner-General to reinstitute a disciplinary inquiry against a senior correctional officer under circumscribed instances, s 54(14) authorises the Commissioner-General or the senior correctional officer to reinstitute a disciplinary inquiry against a junior correctional officer in specified circumstances. It appears, therefore, that s 51(15) which was not invoked in this matter is being impugned by the applicant by association.

[67] It is apparent from the record, and it is common cause between the parties, that no evidence was led at the disciplinary inquiry regarding the merits of the charges preferred against the applicant. The charges were, therefore, dismissed without evidence being led on the merits of the charges. Strictly speaking, the Presiding Officer dismissed the case out of a technical irregularity for failure by the Initiator to produce the requested report.

[68] Where the acquittal is not on the merits of the case but on a technical irregularity, there can be no jeopardy.

[69] Section 54(14) of the Act empowers the Commissioner-General or the senior correctional officer where he or she opines (in the exercise of his or her discretion) that a junior correctional officer was found not guilty or where the Commissioner-

General or the senior correctional officer sets aside the finding of guilty on, *inter alia*, a technical irregularity or defect in the procedure, he or she may direct that a disciplinary inquiry be instituted afresh on the same charge or amended charge before a different presiding officer. These powers may only be exercised where there is a failure of justice or where the proceedings are not according to law.

[70] Double jeopardy may only be successfully raised after the determination of the matter according to law and after evidence was adduced on the merits of the matter. The present matter was not brought to completion on the merits, to the contrary, the disciplinary inquiry was terminated on account of the Initiator's failure to produce the requested report. No merits of the disciplinary inquiry were at all considered as no evidence was led. The retraction of the initial suggestion by Mr Amoomo, that the dismissal of the case by the Presiding Officer is similar to a discharge of the accused in terms of s 174 of the CPA was, therefore, correctly made as in criminal proceedings the court would have been required to consider the evidence led up to the end of the state's case.

[71] In view of the fact that the merits of the case were not considered, it would have been appropriate for the Presiding Officer to strike the matter from the roll as opposed to dismissing the case. By analogy, O'Regan AJA in the Supreme Court matter of *Shetu Trading CC v Chair, Tender Board of Namibia and Others*[10] considered an appeal against a High Court order of dismissing an application for lack of urgency and where the merits of the matter were not considered and said that:

> '[34] What is clear now that we have the benefit of the reasons of Ndauendapo J is that he did indeed not decide the merits but concluded that the applicant had failed to establish urgency. In such circumstances, a judge will ordinarily not dismiss the application, but will strike it from the roll.'

[72] The disciplinary inquiry in this matter was neither concluded nor terminated on the merits, but rather on a technical irregularity or defect in the procedure. Hence, double jeopardy does not arise, which, justifies the invocation of s 54(14) of the Act. On this basis alone, the application should fail.

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[10] *Shetu Trading Cc v Chair, Tender Board of Namibia and Others* 2012 (1) NR 162 (SC) 173 para 34.

The impugned ss 51(15) and 54(14) of the Act

[73] Section 51(15) provides that:

'Where the Commissioner-General is of the opinion that the senior correctional officer was found not guilty, or where the Commissioner-General sets aside the finding of guilty on the ground that –

(a) the board was not competent to do so;

(b) the charge sheet on which the senior correctional officer was found guilty was invalid or defective in any respect; or

(c) there has been any technical irregularity or defect in the procedure,

he or she may direct that a disciplinary inquiry under subsection (1) in respect of the same disciplinary offence again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if a disciplinary inquiry has not previously been instituted against such senior correctional officer: Provided that, a senior correctional officer who was a member of the disciplinary board that conducted the original disciplinary inquiry, must not be appointed as a member of the board to be appointed to conduct disciplinary inquiry so directed by the Commissioner-General.'

[74] Section 54(14) on the other hand provides that:

'Where the Commissioner-General, or the senior correctional officer authorised thereto by the Commissioner-General, is of the opinion that, the junior correctional officer was found not guilty, or where the Commissioner-General, or the senior correctional officer authorised thereto by the Commissioner-General, sets aside the finding of guilty, on the ground that –

(a) the presiding officer was not competent to do so;

(b) the charge sheet on which the junior correctional officer was found guilty was invalid or defective in any respect; or

(c) there has been any technical irregularity or defect in the procedure,

he or she may direct that a disciplinary inquiry under subsection (1) in respect of the same disciplinary offence again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if a disciplinary inquiry has not previously been instituted against such junior correctional officer: Provided that, the presiding officer who conducted the original disciplinary inquiry, must not be appointed to conduct the disciplinary inquiry so directed by the Commissioner-General or the senior correctional officer.'

[75] The decisions complained about consist of the decision by Commissioner Malobela of 15 July 2019, to reinstitute the disciplinary inquiry of the applicant and the notice addressed to the applicant dated 9 March 2020, to appear for a disciplinary inquiry scheduled for 25 - 17 March 2020.

[76] As it has become apparent at this stage, the applicant contends that ss 51(15) and 54(14) of the Act violates Article 12(2) of the Constitution. Article 12(2) provides that:

'No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-Article shall be construed as changing the provisions of the common law defences of "previous acquittal" and previous conviction".'

[77] A consideration of Article 12(2) together with Article 12(1)*(a)* makes plain that Article 12(2) is not only limited to criminal proceedings, as Article 12(1)*(a)* provides for the determination of civil rights and obligations or any criminal charges against persons by a competent court or tribunal. The right against double jeopardy guaranteed in Article 12(2), therefore, applies not only to a competent court but also before a tribunal, including a disciplinary hearing instituted at the place of employment.

[78] International law[11] and common law recognise the principle of *ne bis in idem*, according to which no one should be tried or punished again for an offence for which he or she has already been convicted or acquitted in accordance with the law.

[11] Article 14(7) of the International Convention on Civil and Political Rights provides that: 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'

[79] The provisions of Article 12(2), therefore, conforms to the internationally recognised principle of the rule against double jeopardy.

[80] The old decision of the Appellate Division of *R v Manasewitz*[12] laid down the law on double jeopardy when it said the following:

'I accept, for the purpose of these reasons, the following requisites to establish a plea of *autrefois acquit*, namely that the accused has been previously tried (1) on the same charge, (2) by a court of competent jurisdiction and (3) acquitted on the merits. Obviously an accused so tried must have been in jeopardy. The proposition is sometimes stated slightly differently thus: That the accused has been previously indicted on the same charge, was in jeopardy, and was acquitted on the merits. If so stated it is necessary to add that if the indictment was invalid or the Court had no jurisdiction the accused was not in jeopardy. Again, if after conviction a superior court quashes an indictment as bad *ab initio* the accused cannot on retrial rely upon the previous-ultimate-acquittal. This view can be justified either on the ground that the crime alleged in the subsequent, good, indictment is not that alleged on the previous, bad indictment, or on the ground that the accused was never (legally) in jeopardy or that the acquittal was not on the merits.'

[81] The Constitutional Court of South Africa in *S v Basson*[13] cited the above passage from *R v Manasewitz* with approval and proceeded to state that:

‘[255] The requirement that the previous acquittal must have been on the merits, or to put it differently, that the accused must have been in jeopardy of conviction, means that, if the previous prosecution was vitiated by irregularity, then it cannot found a plea of autrefois acquit in a subsequent prosecution. That is because the accused was not acquitted on the merits and was never in jeopardy of conviction because the proceedings were vitiated by irregularity.’

[82] The Appellate Division in *R v Manasewitz (supra)*[14] said as follows on what it means to be in jeopardy:

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[12] *R v Manasewitz* 1933 AD 165 at 173-174.
[13] *S v Basson* 2007 (3) SA 582 (CC) at 668 – 669, paras 254 – 255. See also: *S v Moodie* 1962 (1) SA 587 (A) 595-596.
[14] *R v Manasewitz (supra)* at 168. See also: *S v Singh* 1990 (1) SA 123 (A) 126 where the Appellate Division of South Africa cited the passage from *Manasewitz* with approval. *S v Gabriel* 1971 (1) SA 646 (RA) 656-657. *S v Mutero* (CC 04/2020) [2021] NAHCNLD 97 (27 October 2021) paras 14-20.

‘There is no doubt whatever that by our law an accused person when once acquitted of an offence may not be tried again for the same offence if he was in jeopardy on the first trial. 'He was so in jeopardy if (1) the Court was competent to try him for the offence; (2) the trial was upon a good indictment on which a valid judgment of conviction could be entered, and (3) the acquittal was on the merits, ie by verdict on the trial or in summary cases by dismissal on the merits followed by a judgment or order of acquittal.'

[83] The above decisions lays bare the fact that for a defence of *autrefois acquit* to be raised successfully, the previous acquittal must have been based on the merits and according to law. If the initial prosecution was vitiated by irregularity then a defence of *autrefois acquit* cannot be sustained at a subsequent trial as the acquittal was not according to law. The initial prosecution must have been concluded by a conviction or an acquittal based on the merits. This is the common law that has since been entrenched in Article 12(2) of the Constitution. This legal principle entails that no person must be brought into jeopardy more than once for the same offence. The court finds that the concession made by Mr Amoomo that the applicant does not persist with the claim that he was acquitted is, therefore, correct. As a matter of consequence, the applicant cannot successfully thus claim double jeopardy where the merits were not considered.

[84] It should be made clear that this court is not called upon to decide whether or not it would constitute double jeopardy where the Commissioner-General or the senior correctional officer decides to reinstitute a disciplinary inquiry where evidence was led and the matter decided on the merits. Accordingly, this court expresses no view on the constitutionality of ss 51(15) and 54(14) of the Act in a matter where evidence was led or where the merits of the case were canvassed.

[85] As this matter nears its conclusion, it is apposite to mention that the applicant is silent in his application on whether or not the dismissal of his case by the Presiding Officer was according to law as provided for in Article 12(2) of the Constitution, on which he bases his application. This finding makes it apparent that the applicant did not meet the provisions of Article 12(2) in order to rely on the said Article as a yardstick to measure the constitutionality of the decision to reinstitute the disciplinary inquiry. On this basis, the application should equally fail.

[86] In *casu*, the court is not further provided with materials or established facts to suggest that the powers conferred on the Commissioner-General and the senior correctional officer in terms of ss 51(15) and 54(14) of the Act are unreasonable.

Conclusion

[87] In view of the foregoing findings and conclusions reached hereinabove, the applicant failed to establish that the decision by Commissioner Malobela of 15 July 2019, and the notice to appear for the disciplinary inquiry dated 9 March 2020 are unlawful, unconstitutional and invalid. The applicant further failed on the facts of this matter in his quest to prove that ss 51(15) and 54(14) of the Act are unconstitutional and invalid. The application, therefore, falls to be dismissed.

Costs

[88] It is well settled in our law that costs follow the result. No reasons were brought to the fore why this well-beaten principle should not be followed, neither could the court establish otherwise from the record. In consideration of the fact that the respondents managed to ward off the application, they shall be awarded costs.

Order

[89] In the result, it is ordered that:

1. The applicant's application to review and set aside the decision and action of the third, alternatively, the first respondent's decision to set aside prior disciplinary proceedings and to institute disciplinary proceedings against the applicant dated 15 July 2020, is refused.

2. The applicant's application to review and set aside the first respondent's decision dated 9 March 2020 and action to charge the applicant, is refused.

3. The applicant's application to declare the decisions of the first, alternatively the third respondents to charge him, dated 15 July 2019 and 9 March 2020, respectively, is refused.

4. The applicant's application to declare ss 51(15) and 54(14) of the Correctional Service Act 9 of 2012 as unconstitutional and invalid, and set aside the decisions taken pursuant to such sections, is refused.

5. The applicant must pay the costs of the respondents including the costs of one instructing and one instructed legal practitioner.

6. The matter is removed from the roll and regarded and is considered as finalised.

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O S SIBEYA

JUDGE

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J C LIEBENBERG

JUDGE

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D USIKU

JUDGE

APPEARANCES:

APPLICANT:	K Amoomo Of Kadhila Amoomo Legal Practitioners, Windhoek

RESPONDENTS: T Chibwana
Instructed by the Office of the
Government Attorney, Windhoek