IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 918/2018

In the matter between:

Charles Myeza **Applicant**

And

Elections and Boundaries Commission **1st Respondent**

Minister of Justice and Constitutional Affairs **2nd Respondent**

Attorney General **3rd Respondent**

Neutral citation: *Charles Myeza v Elections and Boundaries Commission & 2 Others (918/2018) [2018] SZHC 162 (25 July 2018)*

Coram : T. L. Dlamini J

Heard : 05 July 2018

Delivered : 25 July 2018

Constitutional law – General elections – Disqualifications for membership of Parliament.

Elections Act – Disqualifications for nomination as a candidate for election as a member of Parliament, Indvuna yeNkhundla or Bucopho.

Summary: *Applicant was convicted of charges of fraud, forgery and uttering of documents knowing them to be forged – He wishes to be nominated for election as a Member of Parliament – The Elections Act, 2013, disqualifies him from being eligible for nomination – Applicant submits that in terms of the Constitution he is eligible and qualifies to be nominated – He further submits that the provision of the Elections Act that disqualifies him is unconstitutional and inconsistent with sections 96 and 97 of the Constitution of 2005.*

Held: *That the list of disqualifications stipulated in the Constitution is not exhaustive.*

Held further: *That the Constitution contemplates and recognizes that other disqualifications are to be imposed by laws relating to general elections.*

And further held: *That having been convicted of fraud, forgery and uttering, the applicant is not eligible to be nominated as a candidate for election in terms of the Elections Act.*

JUDGMENT

[1] The applicant is a registered voter of kaPhunga under the Kubuta *Inkhundla* (Constituency) in the Shiselweni region. In August 2013 he was convicted by this court of multiple charges of fraud, forgery and uttering of documents knowing them to be forged. Accordingly, he was on the 3rd September 2013 sentenced to five (5) years imprisonment.

[2] He has filed an application before this court seeking, *inter alia*, the following orders:

(a) condoning the non-compliance with the Rules of this court and hearing the matter as an urgent one;

(b) declaring that the applicant, being a registered voter who wishes to be nominated, is eligible to be nominated as a candidate for election to the House of Assembly;

(c) declaring that section 31(8)(d) of the Elections Act, 2013, is unconstitutional and inconsistent with sections 96 and 97 of the Constitution of the Kingdom of Eswatini Act of 2005; and

(d) costs of suit against the respondents.

[3] The applicant deposed in his founding affidavit that he is a registered voter and is entitled to be nominated as a candidate for election in the upcoming 2018 general elections.

[4] He also deposed that in August 2013 he was convicted for criminal offences and thereafter sentenced to five (5) years imprisonment. Despite the conviction, he submits that he was however nominated as a candidate for election. He thereafter became the elected candidate during primary elections but lost the election at the secondary level.

[5] He further deposed that having been allowed to be nominated as a candidate despite the conviction and sentence, the nomination became a precedent of his eligibility to be nominated. He deposed, furthermore, that he was never thereafter convicted and sentenced for any other offence.

[6] He also deposed that the sentence that was imposed upon him is *null* and *void* because there was no record of the proceedings of the trial up to today.

[7] It was also submitted by the applicant that section 31(8)(d) of the Elections Act which disqualifies him from being eligible for nomination is unconstitutional and inconsistent with sections 96 and 97 of the Constitution of the Kingdom of Eswatini Act No. 001 of 2005 (the Constitution).

[8] The application is opposed on the merits. Two points *in limine* were raised as well. The first point (*in limine*) is that the applicant is abusing the court's process, and the second point is that the urgency is self-created (by the applicant).

[9] On the merits, the respondent's opposition is, firstly, that the applicant is confusing the qualifications and disqualifications for becoming a voter with those of becoming a member of Parliament, secondly, the respondents submitted that with regard to the 2013 general elections, the applicant was convicted after he had already been nominated and won the primary elections. It was further submitted that section 31(8)(d) of the Elections Act was therefore of no application to him.

[10] Thirdly, the respondents submitted that section 97(1)(e) of the Constitution anticipates that a person may also be disqualified by a law in force in the Kingdom of Eswatini relating to general elections. There is therefore nothing unconstitutional about section 31(8)(d), the respondents submitted.

[11] Other issues for determination will be considered as I go on with the judgment. I now proceed to determine the contested issues.

[12] *In limine,* the respondents submitted that the applicant knows and is fully aware that he does not meet the provisions regulating the nomination of

candidates for election. He seeks an order declaring that he qualifies to be nominated in order to legitimize his desire to be nominated yet that would be illegal in terms of the election laws.

[13] The respondents argued that the applicant is abusing the process of the court because he knows that he does not qualify to be nominated for election.

[14] In *contra* argument, the applicant submitted that he qualifies to be nominated in terms of the Constitution. He has approached the court, according to his argument, because he believes that the Elections Act wrongfully interferes with his right of eligibility for nomination.

[15] I am in agreement with the applicant's argument that by approaching the court, he is not abusing its process. He is entitled and is justified to seek recourse to the courts whenever he is of the view that his right to be nominated is wrongfully interfered with and restricted. The fact that he knows about the existence of the provision of the law that disqualifies him does not take away from him the right to challenge the legality of that provision. To challenge the provision is not, in my view, an abuse of the process of the court. This point of law, in my finding, is to be dismissed and I so order.

[16] It was also submitted that the urgency is created by the applicant because he ought to have filed the application after his release from custody.

[17] The applicant submitted that the matter qualifies to be heard as an urgent matter in terms of Rule 6 of the Rules of this Court because the election process has already commenced. Nominations will soon be held on the 28 and 29 July 2018. If the matter was to follow the normal course of application proceedings, it was argued, a judgment of the court would be academic as the general elections for 2018 would have ended.

[18] The respondents submitted on the other hand that the applicant knew immediately his conviction and sentence were confirmed by the Supreme Court that in terms of the Elections Act he will not qualify to be nominated as a candidate for the 2018 general elections. He therefore ought to have brought the application there and then or soon thereafter.

[19] It was argued on behalf of the respondents that the applicant had the right, in terms of section 35(1) of the Constitution, to approach this court on the basis of likelihood. That is, to come to court when he realizes that the right **may be**, but before it is, actually infringed. It was therefore submitted that the applicant ought to have approached the court soon after his release from imprisonment. His delay until the election process has commenced is without justification and the urgency is therefore self-created.

[20] Section 35(1) of the Constitution provides as quoted below:

> ***"Enforcement of protective provisions***
>
> ***35. (1) where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress".*** (own emphasis)

[21] This section, in my opinion, is applicable to provisions that fall under Chapter III of the Constitution. I say so because section 35 falls under chapter III and the words used, *viz*., ***"provisions of this Chapter"*** are instructive in that regard.

[22] The right to be nominated, which the applicant asserts *in casu*, is provided for under Chapter VII of the Constitution. I accordingly reject the respondents' reliance on section 35(1) of the Constitution in support of their submission.

[23] I however agree that the applicant knew a long time ago about the provision of the Elections Act that disqualifies him. It is public information that the applicant was a member of the ninth (9th) Parliament of the Kingdom of Eswatini. **See: Eswatini Government Gazette, Legal Notice No. 73 of 2008**.

[24] The Election Act, 2013, was passed by this 9th Parliament and the applicant participated when the law was debated by the Parliament whilst it was still a Bill. He thereafter endorsed it for assent by His Majesty the King. Even if it

can be argued that he was not for its endorsement because the members had to vote, he however still became aware and knew about its existence.

[25] In the appeal case of **Charles Myeza v Rex (13/2013) [2016] SZSC 77 (30 June 2016)** the Supreme Court dismissed the applicant's appeal and confirmed his conviction and sentence of five years imposed by this court. In July 2017 he was however released from imprisonment owing to a Prerogative of Mercy that was granted by His Majesty the King in 2015 and 2016. **See: Charles Myeza v The Commissioner General and 3 Others (835/2017) [2017] SZHC 163 (28 July 2017).**

[26] In my opinion, the applicant ought to have filed this application soon after his release from imprisonment in July 2017. The urgency is therefore a result of his long and unexplained delay in filing the application.

[27] For the foregoing, the applicant's submission that the application was filed expeditiously is rejected and the point of law is upheld.

[28] On the merits, the applicant submitted that section 31(8)(d) of the Elections Act, 2013, is silent, unreasonable, not clear, overbroad and meaningless. The section provides as quoted below:

"Nomination of candidates

31. (1) On the day, times and places specified under section 27, the returning officer shall attend to receive nominations of candidates for election.

(2) …

(3) …

(4) …

(5) …

(6) …

(7) …

(8) A candidate shall not be nominated for election –

(a) …

(b) …

(c) …

(d) Where the candidate <u>has at any time been, under a</u> – (emphasis added)

(i) the Prevention of Corruption Act, 2006;

(ii) the Prevention of Organized Crime Act;

(iii) the Sexual Offences and Domestic Violence Act, 2013; or

(iv) any other offence listed in the under (sic) the Fourth and Fifth Schedules of the Criminal Procedure and Evidence Act, 1938

Provided that if five years or more have elapsed since the termination of the sentence of imprisonment, this paragraph shall not apply."

[29] The applicant's argument is that the *words* ***"has at any time been, under a"*** used in section 31(8)(d) are meaningless, not clear and are silent.

[30] The respondents conceded in paragraph 13.4 of their answering affidavit that there was a drafting error. The error does not, however, make the provision not clear, meaningless or silent, they argued. Their attorney submitted that the proviso puts beyond any doubt that the section refers to conviction under those listed schedules and laws.

[31] I agree with the respondents' argument that the section disqualifies from nomination persons who have been convicted under the laws listed in (d), and also those who have been convicted of the offences listed in the fourth and fifth schedules of the Criminal Procedure and Evidence Act of 1938 as amended (the CP & E Act).

[32] When interpreting a statute, the primary rule in constructing a provision is to ascertain the intention of the legislator, firstly, by giving the words used in the statute their ordinary grammatical meaning, unless doing so would result in an absurdity so glaring that the legislator could not have contemplated it. **See: Commissioner, SARS v Executor, Frith's Estate 2001 (2) SA 261 (SCA) 273 (H).**

[33] In **Principal Immigration officer v Hawabu and Another 1936 AD 26 at page 30, De Villiers J.A.** quotes with approval **Solomon J.A.** in **Dadod v Krugersdorp Council 1920 AD at page 554,** who states as follows:

> ***"Prima facie, the intention of the legislator is to be deduced from the words which it has used."***

[34] The words used in the proviso, *viz*., that **this paragraph shall not apply if five years or more have elapsed since the termination of the sentence of imprisonment** place it beyond any doubt that Parliament disqualifies those who have been sentenced to imprisonment in respect of the offences and laws listed in (d).

[35] The foregoing position is clear even to the applicant himself, hence he submits in paragraphs 8.3 and 8.4 of his founding affidavit that notwithstanding his conviction and imprisonment for five years in 2013, he was nonetheless permitted to be a candidate.

[36] For the above reasons, I reject the submission and argument that section 31(8)(d) of the Elections Act is meaningless, silent and not clear. A proper construction of section 31(8)(d) is that a person who has been convicted and sentenced to imprisonment for offences under the listed statutes, including the offences listed in the fourth and fifth schedules of the CP & E Act as amended, does not qualify to be nominated for election. That person only becomes eligible for nomination five years after having completed the imprisonment period.

[37] The applicant also seeks an order declaring that he is eligible to be nominated as a candidate for election in the upcoming nominations to be held on either the 28 or 29 July 2018.

[38] It is common cause that the applicant was in August 2013 convicted of multiple offences of fraud, forgery and uttering of forged documents. All these offences fall under the fourth schedule. In September 2013, the applicant was sentenced to five years imprisonment. On 30 June 2016 the Supreme Court dismissed his appeal against conviction and confirmed the five years custodial sentence imposed on him.

[39] On account of a Prerogative of Mercy by His Majesty the King issued in 2015 and 2016, the applicant finished his imprisonment term and was freed from the correctional facility in July 2017.

[40] In order to determine if the applicant is eligible to be nominated in terms of section 31(8)(d) of the Elections Act, the question that has to be asked and answered is whether or not five years have elapsed after the termination of his imprisonment period. The answer to the question is, in my view, **an emphatic no**. The five years period will lapse at the end of June in 2022.

[41] I accordingly find that the applicant is not eligible to be nominated as a candidate for election in the upcoming 2018 general elections. The prayer for a declaratory order that he is eligible to be nominated as a candidate for election in the upcoming 2018 general elections is therefore dismissed.

[42] The applicant also seeks an order declaring that section 31(8)(d) of the Elections Act is unconstitutional and inconsistent with section 96 and 97 of the Constitution. As to how the section is inconsistent with the two constitutional provisions, my finding is that the applicant has not made any substantive case. All that he submits in his heads of arguments is that sections 96 and 97 of the Constitution deals with qualifications and disqualifications for nomination and election into the House of Assembly. His emphasis is that the Constitution is the Supreme law. This submission does not, in my view, substantiate how section 31(8)(d) is inconsistent with the aforesaid sections 96 and 97 of the Constitution.

[43] Section 96 of the Constitution lists qualifications to be met in order to be eligible for nomination, election or appointment as a Senator or a member of the House of Assembly. The section provides as quoted below:

> "***Qualifications for membership of Parliament.***
>
> ***96. Subject to the provisions of this Constitution, a person qualifies to be appointed, elected or nominated, as the case may be, as a Senator or a member of the House, if that person –***
>
> ***(a) is a citizen of Swaziland;***
>
> ***(b) has attained the age of eighteen years and is a registered voter;***
>
> ***(c) has paid all taxes or made arrangements satisfactory to the Commissioner of Taxes; and***
>
> ***(d) is registered as a voter in the inkhundla in which that person is a candidate (in the case of elected members)."***

[44] In Section 31(8)(d) of the Elections Act, I find nothing inconsistent with section 96 of the Constitution. Section 96 simply state qualifications for appointment, election or nomination to be a Senator or member of the House of Assembly.

[45] Section 97 (of the Constitution) on the other hand, lists disqualifications for appointment, election or nomination as a Senator or member of the House of Assembly. The section provides, *inter alia*, as quoted below:

> ***"Disqualification for membership of Parliament***
>
> ***97. (1) Notwithstanding the provisions of section 96, a person does not qualify to be appointed, elected or nominated as the case may be, a Senator or member of the House if that person –***
>
> ***(a) has been adjudged or otherwise declared-***
>
> ***(i) insolvent under any law and has not been rehabilitated; or***
>
> ***(ii) to be of unsound mind;***
>
> ***(b) is under sentence of death or of imprisonment for more than six months for an act which is a criminal offence in Swaziland;***
>
> ***(c) is a member of the armed forces of Swaziland or is holding or acting in any public office and has not been granted leave of absence for the duration of Parliament;***
>
> ***(d) is not qualified to be a voter under any provision of this Constitution;***
>
> ***(e) <u>is otherwise disqualified by law in force in Swaziland relating to general elections;</u>*** (emphasis added)
>
> ***(f) has been found to be incompetent to hold public office under any law relating to tenure of public office whether elected or not;***
>
> ***(g) is a party to, or is a partner in, a firm or a director or manager, of a company which is a party to any subsisting Government contract and has not made the required disclosure of –***
>
> ***(i) the nature of the contract;***

(ii) the interest of that person in the contract;

(iii) the interest of that firm or company in the contract;

(h) holds or is acting in any office the functions of which involve any responsibility for or in connection with the conduct of any election or the compilation or a revision of any electoral register."

[46] A proper reading of the entire section infers that the list of disqualifications mentioned therein is not exhaustive. Subsection (1)(e) is instructive on that as it states that a person may **otherwise be disqualified by a law in force relating to general elections**.

[47] I agree with the respondents' submission that section 97(1)(e) of the Constitution anticipates that a person may be disqualified by a law that is in force relating to general elections. The Elections Act of 2013 is one such a law. For this reason, the argument that section 31(8)(d) of the Elections Act is unconstitutional and inconsistent with section 97 of the Constitution is rejected and dismissed by this court.

[48] I find it apposite (appropriate) to mention that with regard to persons who have been sentenced to imprisonment, the disqualification from being nominated is imposed by both section 97 (1) (b) of the Constitution and section 31(8)(d) of the Elections Act of 2013. The disqualifications imposed by the Elections Act derive their constitutional legality from section 97(1)(e) of the Constitution

[49] The difference between these disqualifications is that those which are imposed by the Constitution lapse immediately upon completion of the imprisonment term, whilst those imposed by the Elections Act lapse five (5) years after completing the imprisonment term.

[50] In terms of section 97(1)(b) of the Constitution, any person who has been convicted of a criminal offence and sentenced to death or imprisonment for more than six (6) months, does not qualify to be nominated whilst that period has not lapsed. The provision provides as quoted below:

> ***"97 (1) Notwithstanding the provisions of section 96, a person does not qualify to be appointed, elected or nominated as the case may be, a Senator or member of the House if that person –***
>
> ***(a) …***
>
> ***(b) is under sentence of death or of imprisonment for more than six months for an act which is a criminal offence in Swaziland;***

[51] The words used, *viz*., ***"is under sentence"***, are instructive regarding the period of disqualification.

[52] As *obiter*, section 97(1)(b) is in broad terms and covers imprisonment in respect of all criminal offences in the Kingdom of Eswatini. This being a Constitutional provision, it cannot be amended by an Act of Parliament. It requires the Constitution itself to be amended for it to be varied. The Constitution is the supreme law and any other law that is inconsistent with the Constitution is to the extent of the inconsistency, *void.* **See: Section 2(1) of the Constitution Act No. 001 of 2005.**

[53] With regard to the disqualifications imposed by section 31(8)(d) of the Elections Act, the applicant submitted that his conviction and sentence in 2013 did not disqualify him from being nominated. His attorney argued that notwithstanding the conviction and sentence to five years imprisonment the applicant was nominated and became the elected candidate during the primary elections. He lost the election at the secondary stage.

[54] The argument made was that the question of being disqualified in terms of Section 31(8)(d) of the Elections Act was overtaken by events because he was not convicted and sentenced thereafter. It was further argued that his nomination and election in 2013 became a precedent regarding his eligibility for nomination.

[55] In response, the respondents submitted that in 2013 the applicant was convicted after he had already been nominated and won the primary elections. It was argued that section 31(8)(d) did not therefore apply to him at the time of his conviction.

[56] The respondents further submitted that the applicant is being untruthful with regard to the sequence of the events. The nomination dates in 2013 were on the 3 and 4 August whilst the primary elections were on the 24th August.

[57] The respondents' version about the dates of the 2013 general elections is true and is confirmed by a Government Extraordinary Gazette, Legal Notice No. 73 of 2013, which was published on 28 May 2013.

[58] The applicant was convicted by this court on the 22 August 2013**. See: Rex vs Charles Myeza and 3 Others (117/06) [2013] SZHC 186 (22 August 2013)** (unreported). On the 3rd September 2013 he was sentenced to five years imprisonment: **See: Charles Myeza vs Rex (117/06) [2013] SZHC 280 (09 September 2013) paragraph [1]** (unreported)

[59] On the 3rd September 2013 when the applicant was sentenced, this court also presided over an application that he (applicant) filed for bail pending appeal. **See: Charles Myeza vs Rex (117/06) [2013] SZHC 280 (09 September 2013.)** The application was unsuccessful and the applicant was sent to custody in order to serve the imprisonment term.

[60] On the 18th September 2013 the applicant filed another urgent application, *viz.,* **Charles Myeza vs Director of Public Prosecutions and 3 Others, High Court Case No. 1444/2013** (unreported). He sought and was granted an order permitting him to be taken out of the correctional facility during the secondary elections date. He was taken to the various polling stations under his constituency so that he could participate in the elections as he was still a candidate. This relief was granted because the applicant had already appealed

against his conviction and wanted to proceed and contest the elections at the secondary stage.

[61] In the founding affidavit of the urgent application filed under case No. 1444/2013 (supra), the applicant deposed under oath as *inter alia* quoted below:

> ***"CHRONICLES***
>
> ***7. On the 23rd August 2013 I was convicted of fraud by this Honourable Court and thereafter sentenced to a custodial five (5) years without an option of a fine.***
>
> ***8. At the time of my conviction but pending sentencing I had already been nominated under my umphakatsi to stand elections for the position of Member of Parliament (MP). On the 24th August 2013 I participated in the primary elections at my chiefdom, KaPhunga Royal Kraal. I was declared the eventual winner of the primary elections in the said category, and thus the lawful candidate to represent my umphakatsi in the secondary elections*** (own emphasis).
>
> ***9. Subsequent to my election I was sentenced to five years imprisonment without an option to pay a fine. I have since lodged on appeal against both my conviction and sentence*** (own emphasis).
>
> ***10. Having lodged an appeal with the Supreme Court of appeal as aforesaid, I instructed my attorneys of record in the criminal proceedings to move a bail application on my behalf pending determination of the appeal,…***
>
> ***11. In so doing I was desirous of pursing my political campaign in readiness for the secondary elections scheduled for the 20th September 2013. Unfortunately, my application to be admitted to bail was refused by this honourable court".***

[62] Having outlined the facts and events that took place, I find that the applicant is untruthful when he states that in 2013 he was nominated despite the conviction and sentence. The conviction and sentence was after the applicant

had been nominated and won the primary elections. I accordingly reject and dismiss the applicant's submission that his nomination in 2013 is a precedent that he is not barred by section 31(8)(d) of the Elections Act from being nominated.

[63] The applicant also submitted that he was never thereafter convicted of any other criminal offence following his conviction of the fraud, forgery and uttering charges in 2013.

[64] The respondents answered in paragraph 13 of their answering affidavit by stating, *inter alia*, what is quoted below:

> ***"AD Paragraph 8.4***
>
> ***… The contents in so far as they relate to the applicant not being convicted and sentenced for any other offence over that last five years <u>are neither denied</u> nor accepted".*** (own emphasis)

[65] During arguments, the respondents' attorney submitted that the applicant was in 2015 convicted and sentenced for contravening section 7 read with section 8 of the Opium and Habit-forming Drug Act 37 of 1922. The court directed the attorney to furnish documented proof of the conviction. He indeed furnished in chambers a record of fingerprints of the applicant that is kept by the Royal Eswatini Police Service. It shows that the applicant was on the 17th April 2015 convicted for contravening the above mentioned Act and sentenced to pay a fine of E2000.00 or 2 years imprisonment, half of which was suspended for two years.

[66] I will not make a determination on this issue because the applicant's attorney was unaware that it will be one of the issues for argument as it was not denied or challenged in the respondents' answering affidavit. The attorney was entitled to take further instructions from his client on this issue but did not do so because it was not denied in the respondents' answering affidavit. I am not surprised why he did not make a *contra* submission. He was simply taken by surprise.

[67] Another reason why I will not make a determination concerning the subsequent conviction and sentence is because in terms of section 31 (7) of the Elections Act a nominated person is to present himself / herself to the Police for the purpose of getting a clearance certificate. The section provides as quoted below:

> ***"31. (7) Following nomination, a candidate shall present himself to the police for the purpose of getting a clearance certificate which shall be delivered to the returning officer"***.

[68] I do not wish to prematurely make a determination about the alleged subsequent conviction and sentence. This is true even in respect of the peace binding order that was issued against the applicant in May 2018 and which the respondents submitted as being conduct that depicts domestic violence. The steps contemplated in terms of section 31(7) of the Elections Act ought to be allowed to take place before this court can intervene.

[69] The applicant further submitted that the Prevention of Organized Crime Act and the Sexual Offences and Domestic Violence Act of 2013 which are listed in section 31 (8) (d), are both not law in the Kingdom of Eswatini. His attorney argued that the provision therefore violates section 21 (5) of the Constitution. The section provides as quoted below

> ***"21. (5) A person shall not be charged with or held to be guilty of a criminal offence on account of any act or omission that did not, at the time the act or omission took place, constitute an offence.***

[70] The applicant's attorney could not, however, explain to the court how this provision was violated. His client (the applicant) was charged and convicted of fraud, forgery and uttering. These are criminal offences and have remained crimes from many decades ago. The argument is accordingly misplaced in my opinion.

[71] It was also submitted on the applicant's behalf that the fourth and fifth schedules listed in section 31(8)(d) do not apply in election laws but meant for bail proceedings. According to the submission made, the schedules relate specifically to sections 95 and 96 of the CP & E Act regarding bail applications. The attorney therefore submitted that the listing of these schedules in section 31(8)(d) is an absurdity that is not in tandem with the law of nomination and election.

[72] I do not understand, and I have not been made to understand, why the fourth and fifth schedules should not be made a reference in respect of offences for

which candidates become ineligible to be nominated once convicted. The schedules simply list offences which are more serious in my view. The fact that sections 95 and 96 of the CP & E Act makes reference to them when bail applications are determined does not render the offences as exclusively bail related offences only. These are criminal offences in respect of which convicted persons become ineligible for nomination. This is equally true even in respect of Section 97(1)(b) of the Constitution. I therefore find no absurdity in the inclusion of the fourth and fifth schedules in section 31 (8) (d) of the Elections Act. The applicant's argument is accordingly rejected and dismissed.

[73] It was also submitted on behalf of the applicant that the proviso to section 31(8)(d) is illegal because it extends the period of sentence by five years. It was argued that rehabilitation of an offender should not be extended beyond the period of custody at the correctional services facility.

[74] In *contra* argument, the respondents' attorney submitted that the rehabilitation of convicted offenders also requires reintegration of the offender into society. The reintegration part takes place after the offender's release from custody. It was also argued that the applicant spent about half of the imprisonment term out of custody because the Supreme Court admitted him to bail pending his appeal. He therefore cannot, it was argued, be said to have adequately rehabilitated during his imprisonment.

[75] In my opinion as well, it does not appear that the applicant was properly rehabilitated if the alleged subsequent conviction in April 2015 for contravening the Opium and Habit-forming Drug Act is true. This opinion is strengthened by the fact that a peace binding order was issued against the applicant by the Manzini Magistrates Court in May 2018 under case No. PB 60/18.

[76] In addition to the above, section 97(1)(e) of the Constitution does not prescribe any considerations to be taken into account when enacting a law that disqualify certain persons from being nominated for election. I was neither referred to any provision to that effect. The applicant's argument that the provision is *ultra vires*, illegal and unconstitutional is without merit. It is therefore rejected and dismissed.

[77] It was also submitted and argued on the applicant's behalf that the sentence imposed and confirmed by the Supreme Court upon the applicant is *null* and *void* because there was no record of the proceedings of the trial court on appeal.

[78] Before this court is not a review application against the sentence. Both conviction and sentence were confirmed by the Supreme Court. **See: Myeza vs Rex (13/2013)[2016] (supra)** This finding and ruling by the Supreme Court was not set aside, and legally, it still stands. The argument that the sentence is *null* and *void* is without substance and is accordingly dismissed.

[79] For the aforegoing reasons, I issue the following order;

1. The application is dismissed.

2. This being a matter that considered some electoral issues of importance for the general public as well, each party is ordered to bear its own costs.

T.L. DLAMINI J

JUDGE OF THE HIGH COURT

For Applicant: Mr Leo N. Dlamini

For Respondents: Mr Vikinduku Manana