

Challenging the Refusal to Register an Advocacy Group

Simelane & Others versus Minister of Commerce and Industries & Others

Background

ESGM is an organisation that aims to advance the protection of human rights of lesbian, gay, bisexual, transgender and intersex (LGBTIQ+) persons in the Kingdom of Eswatini. There is a lot of discrimination, stigma and prejudice against LGBTIQ+ persons in Eswatini. Consensual sexual acts between men are a crime, even though the offence is not used in practice. LGBTIQ+ persons have the same rights as every other person in Eswatini. Still, because of stigma and prejudice, their rights are often ignored. **ESGM aims to help Emaswati who experience harm because of their sexual orientation, gender identity and expression.**

In 2019, Eswatini Sexual and Gender Minorities (ESGM) reserved its name with the Registrar of Companies and applied for the association to be registered. On September 2019, the Registrar denied the registration of the association.

Why did the Registrar refuse to register ESGM?

The Registrar argued that ESGM does not meet the requirements of the Companies Act, which regulates Eswatini's not-for-gain companies. The Registrar said the Act requires that organisations must promote "communal or group interests" and be "registered for a lawful purpose". The Registrar concluded that ESGM did not meet these requirements because it assumed that ESGM will encourage sexual acts between men, which are criminalised. The Registrar also said that the right to equality in the Constitution does not apply to LGBTIQ+ persons because sexual orientation and sex are not mentioned explicitly in the Constitution.

What are ESGM's main arguments in this case?

ESGM argued that the Registrar misrepresented the law and that his refusal to register ESGM violated its members' constitutional rights. ESGM argued that the Registrar was wrong to assume that ESGM's purpose was illegal when there was no evidence of this. ESGM's mission is to protect and advance the interests of LGBTIQ+ persons through education and advocacy. Eswatini's laws do not make it a crime to be lesbian, gay, bisexual, or transgender. **The law is the same for everyone. It must treat all fairly.** Eswatini's laws also do not make it a crime to campaign to protect the rights of LGBTIQ+ persons. **All Swatis are free to speak their minds and to associate with – spend time with –anybody they want to.**

ESGM disagreed with the Registrar's argument that Eswatini constitutional rights were not violated by the Registrar. **Constitutional rights in Eswatini belong to everybody, whatever the difference. Every person has the right to have their dignity respected and protected.** The State can only limit Emaswati's constitutional rights if it is reasonable to do so in a democratic society and if it is necessary to further a legitimate State aim.



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The decision of the High Court

On 20 October 2020, a full bench of the Eswatini High Court heard the arguments on the application for the registration of ESGM as a non-profit association. The matter was heard before Justice M. Dlamini (Presiding), Justice M. Fakudze and Justice C. Maphanga.

On 29 April 2022, the High Court handed down its decision. The High Court ruled against setting aside the decision of the Registrar and registering ESGM, with a dissenting judgment asserting that ESGM be registered as a not-for-profit company.

The Court held that LGBTIQ+ persons are entitled to constitutional rights, including the right to life, liberty, privacy, dignity, not to be discriminated against, the right to freedom of expression, to associate and form a company and the right not to be subjected to inhumane and degrading treatment. The Court held that these rights were inherent to all persons based on their status as human beings.

The High Court nevertheless upheld the refusal to register ESGM on a number of grounds:

- Since the applicants were not challenging the law criminalising same-sex intercourse, to allow its registration would be to, directly and indirectly, perpetuate the contravention of the law.
- The conduct of the applicants is prohibited by cultural values and morality both expressed by the law and that the Constitution.
- The Constitution does not provide for the right to sexual orientation.
- Since businesses operate in the public domain and the organization promoted sexual orientation, it could not benefit from the right to privacy.

The dissenting judge noted that the rights to freedom of expression, association and assembly form part of the fundamental freedoms of persons and that the rights *“must be construed against international norms as pertains to the legal standards on the protection of human rights and in particular the right to freedom of association and assembly to which Eswatini has subscribed and made commitments to”*.

Grounds of Appeal

In May 2022, ESGM filed a notice of appeal against the decision of the High Court. The appellants argue that the High Court erred in law and in fact in stating that the Applicants sought to create a new breed of rights that are non-existent. The court has set 26 April 2023 for the hearing of the appeal.

Courts in Botswana, Zambia and Kenya, among others, have defended the rights of members of LGBTIQ+ organisations to share their ideas and to assert their rights collectively and have held that it is not unlawful to advocate for a change in the law.

WE CALL ON ALL TO SUPPORT OUR JOINT STRUGGLE TO PROTECT AND PROMOTE THE RIGHTS TO FREEDOM OF ASSOCIATION, ASSEMBLY AND EXPRESSION IN ESWATINI.



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