#RegisterESGM #StandUp4HumanRights

Challenging the Refusal to Register an Advocacy Group

Simelane & Others versus Minister of Commerce and Industries & Others

In September 2019, Eswatini's Registrar of Companies refused to register the organisation Eswatini Sexual and Gender Minorities (ESGM). The Registrar argued that ESGM's purpose was unlawful because same-sex sexual acts are illegal in the country. ESGM and its members filed an application to contest these claims. They argue that the Registrar's refusal violated ESGM members' rights to dignity, to associate and express themselves freely, to be treated equally and not to be discriminated against. ESGM is represented by human rights lawyer, Thulani Maseko and supported by the Southern Africa Litigation Centre (SALC). **The Eswatini High Court will hear arguments in the case on 24 June 2020.**

Background

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

Courts in Botswana, Zambia and Kenya, among others, have defended the rights of members of LGBTI organisations to share their ideas and to collectively assert their rights.

In 2016, the Botswana Court of Appeal ruled that the rights to dignity, freedom of expression and association meant that LGBTI advocacy groups can operate the same way as any other organisation. Although consensual sex between persons of the same sex is a crime, this does not prevent people from associating with each other on issues that affect their interests. The Court said that "there is nothing unlawful about advocating for a change or changes in the law."

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 organisations. 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 encourages sexual acts between men, which are criminalised. The Registrar also said that the right to equality in the Constitution does not apply to LGBTI persons because sexual orientation and sex are not mentioned explicitly in the Constitution.

What are ESGM's main arguments in this case?

ESGM argues that the Registrar misrepresented the law and that his refusal to register ESGM violated its members' constitutional rights. ESGM argues 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 interest of LGBTI 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 us all fairly.** Our laws also do not make it a crime to campaign to protect the rights of LGBTI persons. **We are free to speak our minds and to associate with – spend time with – anybody we want to.**

ESGM disagrees with the Registrar's argument that our constitutional rights were not violated by the Registrar. **Constitutional rights in Eswatini belong to everybody, whatever our difference. We all have the right to have our 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. The Registrar's reasons for refusing to register ESGM does not amount to a legitimate State aim. **There is no democracy when you cannot freely associate, assembly and express yourself.**

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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