LGBTIQ's NON PROFIT-MAKING ASSOCIATION (ESGM): COMPLAINT (REFUSAL OF REGISTRATION BY REGISTRAR OF COMPANIES)

Revised Report

COMMISSION ON HUMAN RIGHTS &

PUBLIC ADMINISTRATION / INTEGRITY

PREPARED BY THE COMMISSION ON HUMAN RIGHTS AND PUBLIC ADMINISTRATION/INTEGRITY

MAY 2020

ESWATINI

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SWAZILAND COMMISSION ON HUMAN RIGHTS AND PUBLIC ADMINISTRATION/ INTEGRITY COMPLAINT ASSESSMENT

Complaint No: **HR/PA/A1/080/2019**

In the matter between:

Eswatini Sexual & Gender Minorities — **Complainant**

And

Registrar of Companies, Ministry of Commerce, Industry And Trade — **Respondent**

COMPLAINT ASSESSMENT

1. Introduction

1.1 The Commission on Human Rights & Public Administration/Integrity is a Constitutional body established under section 163 of the Constitution of the kingdom of Eswatini Act, 1 of 2005. It is empowered by section 164 (1) to investigate complaints concerning alleged violations of fundamental rights & freedoms guaranteed by Chapter III of the Constitution

1.2 The Commission is specifically required to:

1.2.1 Investigate complaints concerning alleged violations of fundamental rights and freedoms under the Constitution;

1.2.2 Investigate complaints of injustice, corruption, abuse of power in office and unfair treatment of any person by a public officer in the exercise of official duties;

1.2.3 Investigate complaints concerning the functioning of any public service, service commission, administrative organ of Government, the Armed forces in so far as the complaints relate to the failure to achieve acceptable delivery

of services or equitable access by all in the recruitment to those services or fair administration by those services.

1.2.4 Section 164 (1) (d) empowers the Commission to take appropriate action for the remedying, correction or reversal of violations through such means as are fair, proper and effective, including; publicising the findings and recommendations of the Commission, negotiation and compromise between the parties concerned and causing the complaint and the findings of the Commission on that complaint to be reported to the superior of an offending person or institution.

2 The Parties

2.1 The Complainant is Eswatini Sexual and Gender Minorities (hereinafter referred to as Complainant).

2.2 The Respondent is Registrar of Companies, under the Ministry of Commerce, Industry and Trade (hereinafter referred to as the Respondent).

3 Background information of the complainant and the allegations

3.1 Complainant is a group that advocates for the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) population in the country.

3.2 In May 2019, the Complainant resolved to form and register a non-profit making association. They applied for registration with the Registrar of Companies in terms of section 17 of the Companies Act No. 8 of 2009. The objectives of the association are as follows:

i. To advance protection of the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) in Eswatini and reduce harm that affect their wellbeing based upon sexual orientation and gender identity.

ii. To research the issues that make the LGBTI vulnerable to HIV and AIDS, and further reduce prevalence by addressing the issues of prevention, treatment and care amongst them.

iii. To ensure that there is equal opportunity and treatment for all people in terms of service delivery.

iv. To advocate in order to increase acceptance of LGBTI members of society in respective communities and families.

v. To address the challenges individual sexual and gender minorities come across in their daily livelihood, and create a conducive policy environment for LGBTI at a local and national level.

vi. To carry out any activity necessary and incidental or conducive to achieving its aims and objectives or one of them.

vii. To apply the income received by the company towards financing development programmes in line with the above objects.

3.3 In a letter dated 09th September 2019 the Respondent rejected the application for registration and informed the Complainant of reasons thereof. The Respondent argued that in terms of sections 17and 27 of the Companies Act 8 of 2009, companies and associations are only registered for a lawful purpose; and that, Complainant does not satisfy the "communal or group interest" requirement.

3.4 The Respondent further relied on that in terms of section 20(3) of the Constitution of the Kingdom of Eswatini 'sexual orientation and sex' is not protected in the laws of the land and further that section 27(1) of the Constitution only provide for marriage between men and women. (The full response to application is attached and Marked **"ESGM 1"**)

4. Legal Framework

4.1. Key International Instruments

4.1.1 Universal Declaration on Human Rights, 1948

Right to non-discrimination

Article 2 states that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Right to recognition before the law

Article 6 states that everyone has the right to recognition everywhere as a person before the law.

Equality before the law

Article 7 states that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Right to freedom of assembly and association

Article 20 (1) states that everyone has the right to freedom of peaceful assembly and association.

4.1.2 International Covenant on Civil and Political Rights, 1966

Right to non-discrimination

Article 2 (1) states that each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Right to freedom of association

Article 22 provides that:

(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

(2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

(3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Equality before the law

Article 26 states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, .color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

4.2 Regional Instruments

4.2.1 African Charter on Human and Peoples Rights, 1981

Right to non-discrimination

Article 2 states that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Equality before the law

Article 3 states that:

(1) every individual shall be equal before the law.

(2) every individual shall be entitled to equal protection of the law.

Right to freedom of association

Article 10 (1) states that every individual shall have the right to free association provided that he abides by the law.

4.3 National Legislation

4.3.1 The Constitution of the Kingdom of Eswatini Act 1 of 2005

Supremacy clause

Section 2(1) states that the Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

Equality before the law

Section 20 provides that:

(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.

(3) For the purposes of this section, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.

Right to freedom of association

Section 25 states that:

(1) A person has the right to freedom of peaceful assembly and association.

(2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of peaceful assembly and association, that is to say, the right to assemble peacefully and associate freely with other persons for the promotion or protection of the interests of that person.

4.3.2 Companies Act No. 8 of 2009

Section 17(1) states that any association-

(a) formed or to be formed for any lawful purpose;

(b) having the main object of promoting religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interests, including all game sanctuaries and other similar institutions concerned with the protection of wildlife or flora in Swaziland;

(c) which intends to apply its profits or income in promoting its said main object

(d) which prohibits the payment of any dividend to its members; and

(e) which complies with the requirements of this section in respect of its formation and registration,

may be incorporated as a company limited by guarantee.

Section 27 states that any two or more persons associated for a lawful purpose or, where the company to be formed is to be a private company with a single member, any one person for a lawful purpose, may form an incorporated company by complying with this Act in respect of registration.

5. Respondent's response

The Commission did not consider it necessary to contact the Respondent as *ESGM 1* had already enunciated his reason and grounds for the refusal to register the organization. The grounds are as follows:

(a) all companies and associations in Eswatini will be registered for a lawful purpose as provided by sections 17 and 27 of the Companies Act.

(b) the purpose of the Companies act is to regulate businesses through the constitution, incorporation, registration, management etc of companies and non-profit making association that are meant to promote particular objectives that are business oriented. He further attributed this reason to the regulation of investment and value addition to the economy and community development in the country.

(c) Complainant does not satisfy the "communal or group interest" as enunciated section 17 of the Companies Act;

(d) Section 20 of the Constitution as well as the Marriage Act 1964 provides that marriage is between men and women and further stated same-sex relations have not been decriminalized;

(e) It will be inappropriate for the Respondent to register an entity whose objectives are not provided for in the Constitution or any legislation;

(f) The Complainant wants to promote same-sex relationships which are explicitly prohibited by the Constitution;

(g) Discrimination on the basis of sexual orientation and sex is not protected by our Constitution or in any domestic laws.

6. Preliminary Findings

It is the finding of the Commission that:

- Complainant's objectives amongst others are to promote the protection of the rights of sexual minorities in particular lesbians, gays, bisexual, transgender and intersex (LGBTI). In its quest to advance their rights, Complainant endeavours to focus on issues that affect their health; economic development; equal opportunities in terms of service delivery; recognition in families and society; and to apply income received towards development programmes and this is contained in the objectives .
- Respondent is established in terms of section 4 of the Companies Act to be custodian of the Act and is rightfully placed to register Complainant in terms of section 17 of the Act;
- Respondent's refusal to register the organisation is discriminatory in that it is based on the sexual orientation and preferences of the persons to benefit from the registration.

7. Human Rights Considerations

7.1. Legislations that informed respondent's decision

There are two main legislations that informed Respondent's decision and it is imperious that the Commission tackles the Companies Act before canvassing the Human Rights consideration made from the facts of the complaint.

- Section 17 of the Companies Act 8 of 2009 lists five different categories of associations that may be incorporated as a company of which "formation for lawful purpose" and "promotion of communal or group interests" excludes such groups as the LGBTI Community.

  The respondent argues that the complainants do not satisfy the provision of s. 17 (communal or group interests) but does not say how they fail to do so. In

fact the communal or group interests is so wide enough to cover even the complainants in the matter.

- The respondent further argue that the Constitution and the Marriage Act criminalize same sex relationships. However, there is no legislation in Eswatini that criminalize same sex relationships but only one legislation that criminalize the act of sodomy. The act of sodomy is not a same sex relationship but a sexual act which is not connected to the former.
- The respondent further argue that the complainants want to promote same sex relationships which are explicitly prohibited by the constitution. However, there is no explicit provision to this effect in the constitution. Furthermore, there is not requirement that only entities whose objectives are stated in the constitution must be registered by the respondent.

It is true that our Constitution or any domestic law does not prohibit discrimination on the basis of sex and sexual orientation and such omission was deliberate. However, the ICCPR and African Charter on Human and Peoples' Rights (Article 20(1) & 20(3) subsumes that all persons are equal before and under the law and prohibits giving different treatment to different classes of people.

- The Constitution of Eswatini guarantees fundamental rights and freedoms which are to be respected by everyone as well as every organ of the state.[1] Further, Eswatini has ratified various international human rights instruments such as the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. By ratification, Eswatini has shown her commitment to promote and protect human rights. Human Rights belong to an individual as a consequence of being human and its distinct characteristics are that, they are: universal; inherent and inalienable; interdependent and interrelated; and, indivisible.[2]

The **universality** of human rights it is meant that everyone is born with and possesses the same rights, regardless of where they live, their gender or race,

[1] Section 14(2), The Constitution of the Kingdom of Eswatini, 2005.
[2] *https://www.unfpa.org/resources/human-rights-principles*

or their religious, cultural or ethnic background. The universality of human rights is encompassed in Article 1 of the Universal Declaration of Human Rights which states that "all human beings are born free and equal in dignity and rights."[3]

Inherent and inalienability of human rights denotes that they accrue to a person as soon as they are born and should not be taken away except in specific justifiable circumstances.[4] That is to say, the mere fact that they are human beings guarantees the existence of their rights.

Interdependent and interrelated means all rights (political, civil, social, cultural and economic) are equally important and none can be fully enjoyed without the other. The fulfilment of one right often depends, wholly or in part, upon the fulfilment of other rights. For instance, fulfilment of the right to health may depend, in certain circumstances, on fulfilment of the right to development, to education or to information.[5]

The **indivisibility** of human rights entails that all human rights have equal status, and cannot be positioned in a hierarchical order. Denial of one right invariably impedes enjoyment of other rights, thus, one right cannot be compromised at the expense of other rights.[6] In the context of the Complainant, denial of the enjoyment of the right to non-discrimination has an impact on other rights such as the right to health.

- It would seem from respondent's response to Complainant that the crux of his argument against the registration of Complainant is that sexual orientation and/or sexual preference is not listed in Section 20(3) of the Constitution. The question therefore becomes; does an omission mean exclusion from the enjoyment of guaranteed human rights? Does a constitutional omission translate to exclusion and therefore legitimize discrimination?

The legislative strength of Section 20(1) overrides that of Section 20(3). The former activates the basis rights and freedoms without limitations, however the latter then limits certain aspects of the rights by defining discrimination which

[3] (n2 above).
[4] (n2 above).
[5](n2 above).
[6] (n2 above).

definition excludes sex and sexual orientation. However, such definition cannot be a basis to discriminate over a basic right as guaranteed by the main section (s.20(1)). The introductory section will always be superior to the subsequent ones.

In addition the Commission is alive to the direction and guidance given by the definition of discrimination by the Human Rights Committee: *as any distinction, exclusion, restriction or preference based on any ground which has the effect of infringing people from the enjoyment of all rights and freedoms.*[7]

It should be pointed out at the outset that the African Commission on Human and Peoples Rights has not specifically outlined sexual orientation as a right which is also the case with most African countries.[8] However, the African Commission has adopted a resolution where it strongly condemns human rights violations on the basis of sexual orientation and most countries have undertaken to follow suit.[9] Although sexual orientation is not outlined as a right it does not mean people of the LGBTI community are excluded from enjoying human rights. The mere fact that they are human beings they have the right not to be discriminated against and to be treated equally as others.

In the Constitution of Eswatini, "sex and sexual orientation" is deliberately not mentioned too. However, s.20(3) defines discrimination to mean "to give different treatment to different persons attributable **only or mainly** to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability". As a state party to international instruments, Eswatini has an obligation to abide by international human rights standards that guarantees the rights of every person and therefore its interpretation of discrimination should not be one that conflicts with these standards.

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[7] General comment No. 18: Non-discrimination by the Human Rights Committee on the ICCPR (1989) para 7.

[8] Murray R & Viljoen F, Towards Non-discrimination on the Basis of Sexual Orientation: The Normative Basis & Procedural Possibilities Before the African Commission on Human and Peoples' Rights and The African Union, Human Rights Quarterly, Vol 29, No.1 (2007), pp 86-111.

[9] African Commission on Human and Peoples' Rights Resolution 275: Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or gender Identity.

Courts on the continent have however, played a part to address the draftsmen's omission and/or exclusion of the words "sex and sexual orientation" in constitutional provisions. In the Botswana case of ***Attorney General v Dow***[10] the court had to make a determination whether the omission of the word 'sexual orientation' in the Botswana Constitution had the effect of excluding LGBTIs from the enjoyment of the right to non-discrimination. In this case section 15(3) of the Botswana Constitution lists categories of persons who should not be discriminated against and sexual orientation is excluded. The court held that the categories mentioned in the Constitution do not mean that the list is forever closed.[11] It was further held that this does not mean that discrimination on the basis of sex is not a breach of the Constitution. The court further indicated that constitutional provisions should be interpreted in accordance with the international obligations of the State regarding non-discrimination.[12]

Schreiner JA in the ***Dow case*** stated that at times statutes specifically direct that a particular meaning be given to a word and however, for a Constitution creating or protecting human rights, the interpretation should be liberal and generous.[13] The fact that sex or sexual orientation is not mentioned in section 20 of the Constitution of Eswatini does not mean that discrimination on the basis of sex or sexual orientation is permitted.

While the refusal to register Complainant by the Respondent constitutes a violation of the right against non-discrimination, this should not be read in isolation with other human rights guaranteed in the Constitution which may further be violated by the no-registration of the organization. This is the basis upon which the interdependent and indivisible principle rests. For example, the decline to register the organization may affect the minorities' right to health, right to education, access to services to mention a few. The Human Rights Committee stated that the principle of equality

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[10] *1992 BLR 119 (CA) para 146*
[11] *Attorney General v Dow 1992 BLR 119 (CA) para 146.*
[12] Attorney General v Dow 1992 BLR 119 (CA), *pp 28-30.*
[13] Attorney General v Dow 1992 BLR 119 (CA) para 183.

requires state parties to take affirmative action in order to eliminate conditions which propagate discrimination.[14]

7.2 Undertaking by the country to human rights mechanisms

- The Kingdom of Eswatini has undertaken to promote the right to health to all citizens especially the minority groups to: take action on different issues related to the non-discrimination of LGBTI; prohibit discrimination on the basis of sexual orientation and gender identity, particularly concerning the enjoyment of the right to health, sexual orientation and gender identity; and, ensure and guarantee non-discriminatory access to health services, education, justice and employment for all persons, irrespective of their actual or perceived sexual orientation or gender identity.[15] In the 1st cycle, Eswatini undertook to ensure enjoyment of the right to the highest attainable standard of health, without discrimination on the basis of sexual orientation or gender identity.[16]
- During the reporting on the list of issues on ICCPR to the Human Rights Committee (2017), the country made positive comments on non-discrimination and equality between men and women.[17]

8. Findings

- Non-discrimination and equality are among the core fundamental principles and is the cornerstone of international human rights law.[18]
- The omission of the words "sex or sexual orientation" in the constitution cannot be interpreted as a direct exclusion which was intended by the legislature.

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[14] General Comment Non-d18 oof the Human Rights Committee on Non-discrimination (1989) para 10.
[15] Universal Periodic Review 2nd Cycle (2012-2016).
[16] Universal Periodic Review 1st Cycle (2008-2011).
[17] Swaziland's Compendium on the List of Issues in the Absence of the Initial Report of International Covenant on Civil and Political Rights, 2017, p. 10.
[18] CCPR General Comment No. 18 on Non-discrimination adopted by the Human Rights Committee at the 37th Session (1989) para 1. See also, General Comment No. 6 on equality and non-discrimination by the Committee on the Rights of Persons with Disabilities (2018) para 4 & 5.

The spirit, purport and object of the constitution is such that all people enjoy equal rights.

- An interpretation of non-discrimination which excludes people based on their sexual orientation would be in conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination.[19] To allow discrimination based on sexual orientation would be counter to these constitutional principles.
- The Registrar of Companies or the office's powers to consider applications for registration is administrative and not to set policy or legislative framework. The enabling legislation which is in most cases the Registration of Uniforms, Badges Act and the Companies Act in essence allows the registrar to reject registration (i.e., the names and objects of an application) if such name or objects are offensive in the public eye. In the current case, the Registrar has not considered that fact as applicable.
- There is no provision in the Constitution or any law in the Kingdom that prohibits same-sex relationships. Only common law criminalizes the act of sodomy which has nothing to do with same sex relationships. The objects of the applicant only intend to promote the interests of a group and not sodomy or same sex relationships.
- Refusal to register Complainant violates the right against non-discrimination as guaranteed by the Constitution and further perpetrates discrimination, hatred and further violation of this interest group's rights such as the right to life, right to freedom of association etc. Such refusal by Registrar will also give public officials in key institutions such a health, police, public service and other public institutions the cart blanche of discrimination concerning access to services in such areas by the interest group.
- Such omission or exclusion is against the spirit of the international human rights instruments which require that legislation should not be discriminatory.[20]
- The exclusion of the words "sex or sexual orientation" in the constitution has the effect of impairing the recognition of people in the position of the

[19] Eric Gitara v NGO Board and 4 others (2015) [Kenya Law] Petition 440 of 2013, para 137.
[20] UN Human Rights Committee General Comments No. 18 on Non Discrimination (1989) para 12.

Complainant and the enjoyment of their rights on an equal footing as all other citizens and people within the territory of Eswatini.

9. RECOMMENDATIONS

9.1 Legislature

There is a need for the law reform of the Constitution and the Companies Act so that it explicitly guarantees the rights of LGBTIs. This will ensure that the words 'sex, sexual orientation and gender identity' are included to ensure that the country complies with its international human rights obligations and standards. It is worth to mention that section 20 beyond doubt mentions sexual orientation in its content.

9.2 Complainant

9.2.1. The Commission, on its vested powers under section 164(1)(d) of the Constitution, directs the Registrar of Companies to reverse his decision and take appropriate action to accordingly register the applicants.

9.2.2. If the Registrar of Companies fails to adhere to the above directive by the Commission, the complainant is advised to appeal the Registrar's decision to the Kingdom's courts of law to enforce registration.

Done at Mbabane on this day of 10th May 2020.

SABELO M. MASUKU

COMMISSIONER

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