IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 2623/23**

In the matter between:

MELUSI SIMELANE N.O. (in his capacity as representative of Eswatini Sexual and Gender Minorities, a company in the course of formation) **1st Applicant**

SISANDA MAVIMBELA **2nd Applicant**

MBALI DLAMINI **3rd Applicant**

SAM LAPIDOS **4th Applicant**

WANDILE TSABEDZE **5th Applicant**

MAPEZU KUNENE **6th Applicant**

BUYILE MAVIMBELA **7th Applicant**

EMMANUEL NDLANGAMANDLA **8th Applicant**

SENELE MDLULI **9th Applicant**

PHUMELELE DLAMINI **10th Applicant**

SINDISIWE DLAMINI **11th Applicant**

THANDO NTSHANGASE **12th Applicant**

THUTHU MAGAGULA **13th Applicant**

MDUDUZI DLAMINI **14th Applicant**

SWAZILAND RURAL WOMEN'S ASSEMBLY **15th Applicant**

And

MINISTER OF COMMERCE, INDUSTRY AND TRADE **1st Respondent**

REGISTRAR OF COMPANIES **2nd Respondent**

CIVIL REGISTRY OF THE HIGH COURT
P.O. BOX 19
2026 -07- 29
MBABANE H100
KINGDOM OF ESWATINI

ATTORNEY GENERAL
P.O. BOX 578
29 JUL 2026
MBABANE H100
ESWATINI

ATTORNEY GENERAL **3rd Respondent**

FILING AND SERVICE NOTICE

Presented for filing.

REPLYING AFFIDAVIT

DATED AT MATSAPHA THIS 29th DAY OF JULY 2026.

MotsaMavuso ATTORNEYS
(Applicants' Attorneys)
c/o ***Musa M. Sibandze Attorneys***
Mkhiwa House, North Wing
Karl Grant Street
MBABANE
REF: Nhlabatsi

To: _____

THE REGISTRAR OF THE HIGH COURT
MBABANE

AND TO: THE ATTORNEY GENERAL

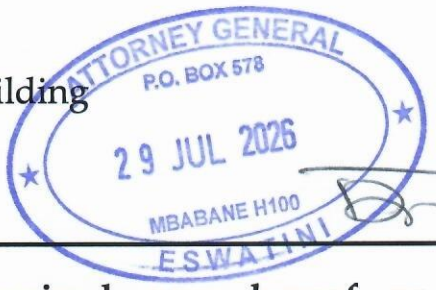
(Respondents' Attorneys)

Attorney General's Chambers

4th Floor, Ministry of Justice Building

Usuthu Link Road

MBABANE



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Received copy hereof on this the ___day of _____2026

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MBABANE H100
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And

MINISTER OF COMMERCE, INDUSTRY AND TRADE	**1st Respondent**
REGISTRAR OF COMPANIES	**2nd Respondent**
ATTORNEY GENERAL	**3rd Respondent**

REPLYING AFFIDAVIT TO THE 1st RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

MELUSI SIMELANE

do hereby make an oath and state that:

1. I am an adult citizen of Eswatini. I am the 1st Applicant in these proceedings and am authorised to depose to this affidavit on behalf of the Applicants.

2. The facts contained herein are all within my personal knowledge, unless the contrary appears from the context. They are true and correct in all respects.

3. Where I do make submissions of law, I do so on the advice of the Applicants' legal representatives.

4. I have read the Answering Affidavit of the 1st Respondent, Minister Khumalo. I will deal with the 1st Respondent's assertions *seriatim*. Before doing so, however, I wish to say the following briefly:

   a) The Respondents' response to our application is, with respect, a result of their misunderstanding, misapplication and misinterpretation of the laws of Eswatini and the nature of our application before this Honourable Court.

   b) The Respondents' decision to refuse to register ESGM was not rationally connected to the statutory power conferred by the Companies Act of 2009. A decision is irrational when there is no reasoned, logical explanation for the decision, or when there is no rational connection between the decision and the purpose of the conferred power.

   c) The Respondents irrationally concluded that ESGM did not satisfy the requirement of promoting "communal or group interests". ESGM is an organisation which was formed to advance the interests of lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons in Eswatini. Its objectives include advancing the protection of LGBTI persons in Eswatini, researching issues that make persons vulnerable to HIV and limit their access to health services because of their perceived sexual orientation or gender identity, and ensuring equal opportunity and acceptance of LGBTI members in society. All of these objectives are intended to promote communal or group interests.

M.S MW

5. Thus, the 1st Respondent's conclusion that ESGM does not serve a communal or group interest is irrational. The 1st Respondent did not explain how protecting the rights of LGBTI members and protecting vulnerable members of that group do not serve a group interest. Instead, the 1st Respondent relied on irrelevant considerations in his reasoning for refusing ESGM's registration.

AD PARAGRAPH 4

6. Save to admit that the 8th and 15th Applicants are not members of Eswatini Sexual and Gender Minorities, I deny the 1st Respondent's assertion that they lack a vested interest in the matter.

7. Emmanuel Ndlangamandla is the former Executive Director of the Coordinating Assembly of Non-Governmental Organisations in Eswatini (CANGO). As a professional who has worked to promote the right to association, he understands the significance of ESGM in filling the gap in protecting the communal interests of LGBTI persons. His professional life has been dedicated to defending and expanding the civic space in which associations such as ESGM operate, and the outcome of this application will directly affect the scope of that civic space and, with it, his own continuing work. Furthermore, as a citizen of Eswatini, he has standing under section 2(2) of the Constitution as he seeks to defend the constitutional right to freedom of association. I am advised that the 8th Applicant will file a confirmatory affidavit to this effect.

8. Swaziland Rural Women's Association (SRWA) has legal standing in this case because of their interest in protecting and promoting the right to association, especially for women. Their objectives are aimed at rural women who include lesbian, bisexual and transgender women, and the organization continues to work closely with ESGM. The 15th Applicant, as a registered non-governmental organization, has standing under section 35(1) of the Constitution to the extent that their members are deprived of belonging to an organization that would serve their specific needs as LGBTI persons. I am advised that the 15th Applicant will file a confirmatory affidavit to this effect.

MS MW

AD PARAGRAPH 5

9. I deny the contents of this paragraph. The decision to refuse registration of ESGM on the grounds of unlawful purpose, misleading or morally offensive name, and immoral association was misconceived. There is nothing offensive or immoral in the name "Eswatini Sexual and Gender Minorities" as it identifies a specific and marginalised group.

AD PARAGRAPH 6

10. I deny the contents of this paragraph. The Supreme Court ordered the Minister to decide the matter within 60 days. Yet, the decision letter was dated 25 September 2024, well outside the 60 days from the judgment on 16 June 2023.

AD PARAGRAPHS 7 & 8

11. I deny the contents of these paragraphs and am advised that further legal argument will be advanced as to the court's power of review in this matter.

12. In the Minister's letter of rejection, he noted that:

"ESGM as comprising sexual gender minorities is calculated to mislead the public to believe that homosexuality is lawful in Eswatini, wrongly, yet it is not so. The name is also offensive to public morality insofar as it includes homosexuality"

13. I am advised that this statement activates section 39 of the Companies Act, as the name ESGM is cited as one of the reasons for refusal of registration.

14. I am further advised that whilst section 39 of the Companies Act anticipates shortened time frames for reviewing decisions taken under sections 37 and 38 of the Act, it does not exclude the court's inherent review jurisdiction as it applies to decisions taken under any provisions of the Companies Act. To interpret the section to exclude such reviews is legally incorrect, and legal arguments to this effect will be made in court.

AD PARAGRAPHS 9 & 10

MS MW

15. I deny the contents of these paragraphs. The 1st Respondent draws an incorrect link between the criminalisation of same-sex sexual conduct and the registration of ESGM. This assertion is founded on the misconceived premise that the official recognition of an organisation that protects and promotes the rights and aspirations of the LGBTI community is incongruous with the criminalisation of consensual same-sex sexual acts.

16. I reiterate that a person's inherent sexual orientation is not a criminal offence in Eswatini, nor is advocating for the rights of persons who are subject to discrimination based on their sexual orientation or gender identity. The law does not criminalise individuals, and to construe it otherwise would be contrary to the fundamental principles of criminal law. Therefore, the assertion that ESGM seeks to pursue unlawful objectives of promoting homosexuality and homosexual acts, barring it from complying with the requirements of section 17 of the Companies Act, is false and unfounded.

AD PARAGRAPHS 11-14

17. I admit that rights may be limited, and that public morality is listed among the limitations to the rights to freedom of expression and association. However, I deny that any limitation of the Applicants' rights is reasonable and justifiable in this instance.

18. I submit that there is no evidence from the Respondents, just a bare assertion, that the registration of an organisation seeking to protect and promote the communal interests of LGBTI persons would be contrary to public morality. As noted, the Respondents conflate the criminal law offence of same sex sexual conduct with the objectives of ESGM to protect the rights of persons who are vulnerable because of their sexual orientation or gender identity. The argument by the Respondents would suggest that the mere existence of LGBTI persons offends public morality. Yet, there is no evidence of this, especially since these individuals are part and parcel of communities in Eswatini.

19. I deny the assertion by the Respondents that the list of grounds of discrimination in section 20(3) of the Constitution is exhaustive. I am advised that such an interpretation of section 20(3) is incorrect and contrary to our judiciary's existing jurisprudence. While there are grounds not mentioned in the Constitution, such as sexual orientation or health status, this

M.S MW

does not mean persons discriminated against on these grounds are not protected under section 20. If this were so, it would mean that courts would be hamstrung in protecting the rights of persons outside the listed grounds, which is not what the legislature intended.

20. I deny that nothing turns on the right to dignity. This right is crucial to ensuring equal and fair treatment for all people and to protecting the inherent worth of every individual. The notion that the Applicants would have to sue for damages to protect their constitutional right to dignity makes a mockery of the entire constitutional framework.

21. Through the 1st Respondent's refusal to register ESGM, the message is conveyed that the identity and interests of the LGBTI community are not worth government recognition. The denial extends beyond allowing one organisation to exist. The refusal itself creates stigma towards the LGBTI community. It reinforces the discrimination of society towards members of this community by signalling that LGBTI members are not entitled to engage in the same kinds of advocacy as other groups. The refusal denies LGBTI members the ability to associate, advocate, or express themselves on the same terms as others.

AD PARAGRAPHS 15-18

22. I admit that none of the laws of Eswatini criminalises a person's sexual orientation. I deny that the prohibition of same sex sexual acts in any way impedes on the enjoyment of the rights guaranteed by the Constitution.

23. I reiterate that the objectives of ESGM are to promote and protect the rights of LGBTI persons, not to promote acts that are contrary to the criminal laws of Eswatini. The argument that criminal laws extend to criminalising the promotion of the rights of LGBTI persons is unfounded.

AD PARAGRAPH 19

24. I admit that customary law is part of the law of Eswatini; however, I submit that it is not the basis of this application, and therefore the Respondents' argument has no bearing on this case. This application concerns the right of all persons to form an association that

MW-S MW

speaks to their communal or group interests and promotes their rights. Customary law does not speak to the right to form associations for this purpose.

AD PARAGRAPHS 20-22

25. I deny the contents of these paragraphs.

26. It is unclear which social change agenda the Respondents are referring to, or how the registration of a rights advocacy group that intends to promote and protect the rights of LGBTI persons betrays such a social agenda.

27. Lobbying for recognition and protection of rights, including social acceptance to reduce stigma, supports social cohesion. For example, as part of ESGM's objectives of "advocating for increased acceptance of lesbian, gay, bisexual, transgender and intersex members of society in their respective communities and families", ESGM contributes to positive social change through creating space for small, medium and micro enterprises (SMMEs) at various community events. Promoting local handmade crafts at the Malkens Centre flea market and embarking on cleanup campaigns in communities throughout Eswatini are further examples of how ESGM directly contributes to communities.

28. I deny the Respondents' assertion that the Eswatini National Multisectoral HIV and AIDS Strategic Framework does not identify the specific discrimination faced by persons based on their sexual orientation or gender identity. The Eswatini National Multisectoral HIV and AIDS Strategic Framework and other policies documents such as the Eswatini HIV Prevention 2025 Road Map further encourages law reform to reduce all barriers to access to HIV services. The Road Map is attached as **MS1**.

29. The Ministry of Health itself continues to recognize the importance of LGBTI organisations in supporting the right to access to health for all minority groups. I attach **Annexures MS2** and **MS3** which specifically mention the Ministry of Health's engagement with ESGM as an organization representing the specific health needs of LGBTI persons.

30. I deny the impression created by the Respondents that advocating for legal reform or rights protection amounts to the promotion of any alleged unlawful activity. Advocating for policy

MS MW

reform and rights protection falls within the "lawful purpose" envisaged by the Companies Act.

31. The Respondents make an ill-informed assumption that advocating for protecting and promoting LGBTI rights is akin to advocating for law reform. The present application does not ask the court to review the criminal law. This case merely concerns the rights to freedom of expression and association of LGBTI persons.

32. This Court is empowered to review present exercises of public power for legality and constitutionality. The existence of democratic processes, such as lobbying parliament for law reform, does not eliminate the right to approach the courts to review the constitutionality of administrative actions that infringe on constitutional rights.

AD PARAGRAPH 23

33. I was not aware of the deficiencies in the expert affidavit and apologise to this Honourable Court for this oversight. We would not wish to delay this matter any further by relying on the affidavit, which merely served to illustrate the obvious discrimination and stigma experienced by LGBTI persons in Eswatini.

AD PARAGRAPHS 24-26

34. I deny the contents of these paragraphs in their entirety.

AD PARAGRAPHS 27

35. I assert that the Applicants ought to be entitled to costs where they assert their constitutional rights, but that the same does not automatically extend to the State should they be successful in this application.

MS MW

DEPONENT

THE DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH WAS SIGNED AND SWORN TO AT Rosebank BEFORE ME THIS 13 DAY OF July 2026.

COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
VISPOL COMMANDER
2026 -07- 13
CSC
ROSEBANK
SUID AFRIKAANSE POLISIEDIENS

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And

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REGISTRAR OF COMPANIES	**2nd Respondent**
ATTORNEY GENERAL	**3rd Respondent**

CONFIRMATORY AFFIDAVIT OF THE 15TH APPLICANT

I, the undersigned,

ZAKITHI SIBANZE

do hereby make oath and state that:

2. I am adult citizen of Eswatini and am duly authorised to depose to this confirmatory affidavit on behalf of Swaziland Rural Women's Assembly, the 15th Applicant in these proceedings.

3. I have read the replying affidavit deposed to by Melusi Simelane in this matter and confirm the contents thereof insofar as they relate to Swaziland Rural Women's Assembly, its interest in these proceedings, and the basis upon which it supports the relief sought by the Applicants.

4. Swaziland Rural Women's Assembly has an interest in this case because the matter concerns the protection and promotion of the constitutional right to freedom of association. That right is essential for civil society organisations, including organisations that work with and for women, to organise collectively and advance communal interests.

5. Although Swaziland Rural Women's Assembly is not a member of Eswatini Sexual and Gender Minorities, its objectives are directed at rural women, including rural women who may be lesbian, bisexual, transgender or otherwise affected by stigma, discrimination or exclusion based on sexual orientation or gender identity.

6. Swaziland Rural Women's Assembly has further worked with Eswatini Sexual and Gender Minorities, and other civil society organisations by submitting a joint shadow report to the United Nations Committee on Economic, Social and Cultural Rights. The report highlighted systemic problems, such as gender disparities in land ownership, weak enforcement of gender laws, restrictions on civil society and trade unions, child marriages under customary law, widespread poverty and evictions, and barriers to transgender healthcare. These issues mainly affect marginalised groups, including

women, rural communities, LGBTI individuals, and children, sustaining cycles of inequality and exclusion. This highlights the collaborative work between SRWA and ESGM and the need for such collaboration to continue through legal recognition of ESGM.

7. Swaziland Rural Women's Assembly accordingly has an interest in ensuring that the needs of rural women and girls, regardless of their sexual orientation or the extent to which they conform to gender or cultural norms, are amplified. It supports the registration of ESGM and the relief sought by the Applicants in these proceedings.

DEPONENT

THE DEPONENT HAS ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH WAS SIGNED AND SWORN TO AT Mbabane BEFORE ME THIS 29nd DAY OF July 2026.

REVENUE E2 ESWATINI

COMMISSIONER OF OATHS

MZWANDILE SUSANNAH DLAMINI
ATTORNERY OF THE HIGH COURT
OF SWAZILAND
COMMISSIONER OF OATHS