

Protection against violence and discrimination based on sexual orientation and gender identity, in relation to the human rights to freedom of expression, association and assembly

Submission to the IE on SOGI

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Submitted by:

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Eswatini Sexual and Gender Minorities (ESGM)²

Nyasa Rainbow Alliance (NRA)³

SALC, ESGM and NRA hereby make a joint submission following the call by the IE on SOGI. We focus on information that is within our knowledge and direct areas of work. SALC is providing legal support to ESGM and NRA in the litigation before domestic courts in Eswatini and Malawi respectively to obtain registration as LGBTIQ+ organisations. It should be noted that these cases are taking place within a context where the independence of the judiciary has been attacked by religious leaders and Members of Parliament following progressive rulings on the rights of LGBTIQ+ persons, including Namibia⁴ and Botswana.⁵ The ESGM and NRA cases are examples of how the judiciary and governments repeatedly deny access to justice through endless adjournments for superficial reasons.

Eswatini

In 2019, ESGM applied to be registered as a non-profit organisation. However, the Registrar of Companies, under the Minister of Commerce, Trade, and Industry, denied their registration, citing that same-sex sexual activities are criminalised in common law. By refusing to register ESGM, based on criminalisation, the Registrar was assuming that criminalisation of same-sex conduct means criminalisation of LGBTIQ+ advocacy organisations. The Registrar also opined that section 20 of the Constitution, which enshrines equality before the law and prohibits discrimination, does not include LGBTIQ+ persons, arguing that LGBTIQ+ people can be discriminated against because they are not included in the protections prescribed in the Constitution. The Registrar also referred to section 27 of the Constitution, which speaks to the right to find a family, suggesting

¹ <https://www.southernafricalitigationcentre.org/>

² <https://eswatiniminorities.org/>

³ <https://nra-mw.com/about-us/>

⁴ <https://www.southernafricalitigationcentre.org/2023/07/20/namibias-proposed-amendment-of-the-marriage-act-an-attack-on-the-rule-of-law-and-the-judiciary/>

⁵ <https://www.southernafricalitigationcentre.org/2023/08/14/botswana-religious-groups-threaten-rule-of-law-and-refuse-lgbtq-rights/>

that LGBTIQ+ persons cannot have a family, and therefore are also not entitled to their rights to freedom of association, assembly, and expression.⁶

ESGM went to court and challenged the Registrar's decision arguing that LGBTIQ+ people have the constitutional rights to dignity,⁷ the right to equality before the law and equal protection under the law,⁸ the right to freedom of expression⁹ as well as the right to freedom of association and assembly.¹⁰ After much delay, on 29 April 2022, the High Court handed down its decision dismissing the application by ESGM with a dissenting opinion asserting that ESGM be registered as a not-for-profit company.

The dissenting judgment 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".

Although the High Court agreed with ESGM that LGBTIQ+ people are entitled to their constitutional rights to dignity, freedom of association and assembly, equality and non-discrimination, and protection and freedom of expression, the majority of the High Court bench still dismissed the application saying that if they registered ESGM they would be breaking the law since same-sex sexual activities are prohibited under the common law.¹¹ The majority of the bench stated that the conduct of the applicants is prohibited by cultural values and morality, both expressed by the law, that the Constitution does not provide for the right to sexual orientation, and that since businesses operate in the public domain and ESGM promoted sexual orientation, it could not benefit from the right to privacy.¹²

The appeal was heard in the Supreme Court in 2023, shortly after the assassination of ESGM's attorney, Thulani Maseko. At the Supreme Court, ESGM noted that the High Court had made a mistake in interpreting the law because identifying as LGBTIQ+ is not a crime and that the majority bench was interpreting and making new laws that were discriminatory towards LGBTIQ+ persons. The Supreme Court followed the decision of the minority judge in the High Court, who held that the refusal to register ESGM was unprocedural. The Supreme Court ordered the Minister to reconsider his decision in accordance with the law.¹³ After exceeding the period ordered by the Court, the Minister again refused ESGM's registration, claiming, like he did previously, that the organisation's mandate goes against the traditional values of Eswatini. ESGM was forced to file a new application with the High Court of Eswatini to challenge and overturn the Minister's decision

⁶ https://www.constituteproject.org/constitution/Swaziland_2005

⁷ Kingdom of Eswatini Constitution Section 18

⁸ Kingdom of Eswatini Constitution Section 20

⁹ Kingdom of Eswatini Constitution Section 24

¹⁰ Kingdom of Eswatini Constitution Section 25

¹¹ <https://www.southernafricalitigationcentre.org/2022/04/29/news-release-eswatini-high-court-denies-registration-of-lgbtqi-organisation/>

¹² <https://www.southernafricalitigationcentre.org/wp-content/uploads/2022/04/Judgement-ESGM-case.pdf>

¹³ <https://www.southernafricalitigationcentre.org/2023/06/16/supreme-court-of-eswatini-unanimously-finds-registrars-decision-on-lgbtqi-organisation-unconstitutional/>

to reject ESGM's registration and seek a declaration that the Minister's decision violates the applicants' fundamental rights to freedoms of assembly, association, and expression.

Malawi

On 26 July 2016, Nyasa Rainbow Alliance, an organisation advocating for the rights of the LGBTIQ+ community in Malawi, applied for registration as a Trust. A year later, their application was rejected on the basis that section 153 of Penal Code criminalises consensual sex between same-sex partners and alleging that NRA's membership, as LGBTIQ+ persons, engaged in such unlawful practices.

NRA sought judicial review of the decision, which was granted on 12 September 2017. The matter was referred for certification as a constitutional case on 15 March 2018 and was certified as such.¹⁴

The applicants submitted that the decision by the Registrar violates the constitutional rights afforded to all people in Malawi, including LGBTIQ+ people, including the rights to personal liberty,¹⁵ human dignity and personal freedoms,¹⁶ equality and non-discrimination before the law,¹⁷ privacy,¹⁸ and freedom of association,¹⁹ expression,²⁰ and assembly.²¹ NRA noted that the Penal Code prohibits certain sexual acts but does not criminalise individuals or detract from their rights in the Constitution.

Between 2018 and 2024, the NRA case has been stalled by the judiciary,²² exhausting the resources of the NRA and its partners, with the LGBTIQ+ community losing confidence in the judicial system due to the delays.²³ With the delays in the NRA case and incitement of violence by religious groups towards LGBTIQ+ persons and advocacy organisations, the NRA offices were targeted on several occasions.²⁴ These incidents have resulted in the organisation having to minimise LGBTIQ+ community gatherings to ensure the safety of an already vulnerable community.²⁵ In the ongoing case of Jana Gonani, a transwoman convicted under Section 153 of the Penal Code²⁶, church groups such as the Malawi Council of Churches organised a series of nationwide demonstrations in July 2023 against the decriminalisation of consensual same-sex acts and the LGBTIQ+ community; this has negatively impacted the community's drive for justice in

¹⁴ <https://www.southernafricalitigationcentre.org/2017/08/17/malawi-challenging-the-refusal-to-register-lgbti-organisation-in-malawi/>

¹⁵ Constitution of Malawi, Section 18

¹⁶ Constitution of Malawi, Section 19

¹⁷ Constitution of Malawi, Section 20

¹⁸ Constitution of Malawi, Section 21

¹⁹ Constitution of Malawi, Section 32

²⁰ Constitution of Malawi, Section 35

²¹ Constitution of Malawi, Section 38

²² <https://www.southernafricalitigationcentre.org/2022/11/21/justice-delayed-justice-denied-the-impact-on-csos-and-litigants/>

²³ <https://www.southernafricalitigationcentre.org/2022/11/21/justice-delayed-justice-denied-the-impact-on-csos-and-litigants/>

²⁴ <https://www.malawivoice.com/2023/06/18/thieves-break-into-gays-lesbians-rights-defenders-offices/>

²⁵ <https://www.southernafricalitigationcentre.org/2023/08/14/botswana-religious-groups-threaten-rule-of-law-and-refuse-lgbtq-rights/>

²⁶ <https://old.malawilii.org/mw/judgment/magistrate-court-mangochi/2021/1>

the NRA case. There is a lot of fear, and the indication from the church to also join the NRA case brings fear to the community.

Several countries such as Botswana, Eswatini, Malawi, and Zimbabwe are either in the process of reviewing their NGO laws or have already done so, limiting the operations of the organisations and the communities needing more support, and further pushing LGBTIQ+ advocacy organisations to the margins.

Zambia

In Zambia, we have seen a wave of attacks towards LGBTIQ+ organisations endorsed by the State. In 2023, police arrested four women's rights activists during a peaceful march organised by Sista Foundation, approved by the police to commemorate International Women's Day.²⁷ The authorities said that the march was misleading and that it was organised to promote LGBTIQ+ rights. Although the Constitution of Zambia declares that the State is a Christian nation, it upholds the fundamental rights of all persons and aims to practice good governance. The Constitution of Zambia grants all the people of Zambia the right to freedom of expression²⁸ and protection of freedom of assembly and association.²⁹ The government officials, in making false assumptions, stopping the march, and arresting the organisers, clearly violated the rights of the women.

The police have remained adamant that the group was promoting LGBTIQ+ rights and going against the values and norms of Zambia's Christian Constitution. The Zambian Home Affairs and Internal Security Minister further reiterated that his government does not promote LGBTIQ+ rights. Such public actions by the Minister infringe on the fundamental rights to expression, assembly, and association and further, inciting harm and violence toward the women and LGBTIQ+ people.

²⁷ <https://www.voanews.com/a/zambia-police-arrest-feminist-ngo-leaders-accuse-them-of-promoting-homosexuality/6995923.html>

²⁸ Constitution of Zambia, Article 20

²⁹ Constitution of Zambia Article 21