IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between: Case No. 1897/2019

MELUSI SIMELANE N.O	1st Applicant
SENELE MDLULI	2nd Applicant
MBALI NOKWANDA DLAMINI	3rd Applicant
THUTHU MAGAGULA	4th Applicant
MARY PAIS DE SILVA	5th Applicant
THANDEKA MAZIYA	6th Applicant

and

MINISTER OF COMMERCE & INDUSTRY	1st Respondent
REGISTRAR OF COMPANIES	2nd Respondent
THE ATTORNEY GENERAL	3rd Respondent

Neutral citation	:	***Melusi Simelane & 5 Others v Minster for Commerce and Industry & 2 Others (1897/2019) [2020] SZHC 66 (29th April, 2022)***
Coram	:	**M. Dlamini J**
Heard	:	**20th October, 2020**
Delivered	:	**29th April, 2022**

Constitution: ***Fundamental rights;***

Held : *The right to life forms part of the fundamental rights inherent in every human being. No doubt, a right to life entails the right to earn a livelihood, namely, the right to access means of living. This may include the right to employ and be employed (employment) and to engage or be engaged in business (including the right to form a company). The South African Constitution refers to the right to economic activity. This right to life is gender neutral. It applies across the board without regard to the gender or gender preference of the individual. So that LGBTIs are equally entitled to the right to life as are the heterosexuals or the genderless.* |69|

Held : *...business and social interaction are activities that fall outside the zone of privacy. These are matters falling within the public realm. The individual's right to claim a violation of the right to privacy therefore diminishes in the public sphere. On the same vein, in the present case, registration of applicants' company whose objective is to sell matters of sexual intimacy to the public is untenable in law by virtue of the fundamental principle of our law that recognises a demarcation between private and public spaces.* |68|

Held : *So that it is safe to say that LGBTs have the rights conferred by section 14 of the Constitution. They have a right to life, liberty, privacy or dignity. They have a right not to be discriminated against or be subjected to inhumane and degrading treatment. They have a right to associate or form a company. They have a right to freedom of expression. These rights are inherent in them not by reason of their sexual preferences as LGBTs but as human beings. These rights are however subject to the laws as prevailing in the Kingdom and which have not been challenged anywhere.* |82|

Apology : No doubt this judgment has been inordinately delayed. A number of variables came to play. The writer took her accumulated leave. She returned to work in the last quarter of 2021 to be confronted with voluminous pleadings running into 2474 pages at the instance of the applicants and 561 pages by the respondents, let alone a 219 page book of pleadings. Nevertheless, the delay is greatly regrettable and the court is grateful to all the parties for the patience displayed.

By M. Dlamini J with M. Fakudze concurring; C. Maphanga dissenting.

Summary: A tripartite order was sought against the decision of the Registrar of Companies (Registrar) declining to register applicants' Association. It was for a review or setting aside the decision of the Registrar and a declaratory order to the effect that the decision of the Registrar was unconstitutional, at the same time declaring that the registration of applicants' Association was commensurate to section 17 of the Companies Act No. 8 of 2009 (Act). The respondents were opposed to the orders sought on a number of grounds.

The Parties

The applicants

1. In as much as the applicants herein appear *ex facie* as natural persons, none has defined his or her gender as per the Rules of pleadings. Each merely asserts the place of residence with the exception of 1st applicant who states a principal place of business. No doubt, this is against the Rules of pleadings. The applicants ought to have identified themselves in terms of their gender and places of residence.

2. 1st applicant attests that 1st applicant is "*a founding member of the association with a direct interest in its registration.*"[1] It is further stated of 1st applicant:

"The principal place of business of the First Applicant is on the Second Floor, Development House, Swazi Plaza, Mbabane."[2]

3. 2nd and 6th applicants are said to reside at Mbabane. 3rd, 4th and 5th applicants reside in Manzini. 3rd applicant is a co-founder with 1st applicant of the Association which bears the name, Eswatini Sexual and Gender Minorities.

The respondents

4. The 1st respondent is a Government official appointed in terms of section 64 of Act No. 1 of 2005 (Constitution) and is at the helm of *inter alia* the registration of companies.

5. The 2nd respondent is the Registrar of Companies, duly appointed as such in terms of the Company laws of the Kingdom whose main offices are at Mbabane, Hhohho region.

6. The 3rd respondent is the Legal Advisor of Government including Ministers of the Crown. The head offices of the 3rd respondent are

[1] See para 6, page 6 of Book A
[2] See para 7, page 7 of Book A

situate at 4th Floor, Justice Building, Mhlambanyatsi- Usuthu Link Road, Mbabane, Hhohho region.

Parties' contentions

The applicants'

7. The applicants highlighted reasons and motivated grounds for the registration of their Association. They asserted in that regard:

> *"[I]n this section I first deal with the important need to establish an association aimed at the promotion, protection and advancement of the rights and interests of the LGBT community in Eswatini."*[3]

8. He then proceeded to state the reason for the call to register the Association as follows:

> *"While our right to peacefully and freely assemble and associate as Eswatini Sexual and Gender Minorities is protected and guaranteed under the Constitution, the compelling need to register Eswatini Sexual and Gender Minorities as an association that aims to act as a voice for LGBT persons* ***is compounded by negative lived experiences of LGBT persons, which I seek to highlight in this section.***"

9. Asserting the grounds for review of the Registrar's decision, the 1st applicant deposed:

[3] See para 24, page 13 of Book A

"I am advised and submit that each of the reasons advanced by the Registrar are unreasonable, irrational, unlawful and unable to pass muster in that they violate several of our constitutional rights."[4]

10. The applicants pointed out that the objectives of the Association are lawful. They are intended to safeguard the rights of lesbians, gay, bisexual, transgender and intersex persons; to provide support for advocacy. The Association's goals are consistent with the National Multi-sectoral HIV and AIDS Strategic Framework (NSF). The NFS seeks to protect and advance the interest of the vulnerable group, namely men who have sex with men. The Association's objective is aligned to the provisions of the Constitution and "*any other legislation*"[5], contended the applicants. There was no law prohibiting LGBT persons *per se*. It is only the same sex sexual intercourse that is criminalised. No enactment prevents association of LGBT.

11. The decision of the Registrar violates the right to freedom of expression and opinion enshrined under section 24 of the Constitution. Social change is necessary following that the LGBT are discriminated and stigmatised by the larger community in the Kingdom. The NSF confirms that the LGBT are segregated and vulnerable. The decision is also in contravention of the right to assemble and associate as provided for under section 25 of the Constitution. Further, the Constitution

[4] See para 59, page 31 of Book A
[5] See para 61.3, page 33 of Book A

clearly states that all people are equal before the law. The Registrar's decision declining registration of the Association amounts to discrimination, an act prohibited under section 20(3) of the Constitution. It impairs the right to dignity under section 18(1) of the Constitution.

The respondents'

12. Although the respondents raised *points in limine*, they abandoned the same during the hearing. The 1st respondent, under the hand of the Principal Secretary, with the Registrar filling a confirmatory affidavit, deposed that registration of the Association would result in legality of the otherwise unlawful Association. Sections 17 and 37(3) of the Act empowers the Registrar and the Minister to decline registration of an unlawful association, so contended the deponent. Pertaining to the Association's constitutional rights, it was deposed on behalf of the respondents:

> *"May I state that the preamble to the Constitution acknowledges the supremacy of the almighty God who is the objective moral law giver and that this further informed the decision of the Registrar to also retain the provisions of the preamble to the Constitution in refusing to register the said company under its present name."*[6]

13. Setting aside the decision of the Registrar would be tantamount to legalising the LGBTI and thereby the court would, *"be overstretching*

[6] See para 7.1, page 176 of Book A

its mandate."[7] This would, *"have a drastic impact on the cultural, religious, social interest and legislative functions in Eswatini as it would amount to legalizing LGBTI through the back door."*[8] The respondents dispute that the decision of the Registrar violates the applicants' rights. It is further contended that the, *"non-registration of the Eswatini Sexual and Gender Minorities Association is within the confines of the law and that its liberty is circumscribed where it offends common good and public interest and that the state (sinc) has a duty to protect the morals and traditional values recognized by the community.*[9] Section 14(3) provides for limitation on the rights of individuals and this is such a case.

14. It was incorrect for the applicants to rely on the NFS as this is a document developed for purposes of resource allocation and strategies on the HIV response in the Kingdom. It is irrelevant for purposes of registration of the Association. The aim of the NFS was, *"saying we know that you are there and in the fight against HIV and AIDS we cannot turn a blind eye and act as if we are un-aware of the fact that there is a group of Men who are having sex with Men out there. That's why the Government of Eswatini decided to include Men who are having sex with Men in the fight against HIV because our mission is that, we want to be a country that is HIV free in 2023."*[10]

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[7] See para 7.2, page 178 of Book A
[8] *Supra*
[9] See para 10.1, at page 177 of Book A
[10] See para 11.2, page 178 of Book A

15. The applicants' application is intended to create a new breed of rights which are non-existent, it was so deposed on behalf of the respondents. The Constitution does not confer a right to engage in an unlawful act. The right conferred by section 20(3), 24 ad 25 do not extend to what the applicants seek to do. It must be borne in mind that society frowns upon such activity as per public interest. The conduct of the applicants is prohibited by cultural values and morality which are both expressed by the law. The applicants have failed to adduce evidence demonstrating that they are denied access to health care. The Constitution does not provide for the right to sexual orientation. For this reason, the LGBTI's rights are limited in terms of section 14(3) of the Constitution. The respondents further contended:

> *"The actions of Eswatini Sexual and Gender Minorities constitutes unnatural action which ought to be stopped in our society for purposes of our young generations as well as the public interest. May I state that every other form of sexual action other than what is in the order of nature, capable of producing off spring is unnatural and therefore prohibited in terms of our law."*

16. On Dr. Muller's research paper and affidavit, it was attested:

> *"I am advised and verily believe that the matter before court is totally different from the supporting Affidavit of Alexandra Muller referred to by the Applicants, viz. the application before court is about the non-registration of Eswatini*[11] *Sexual and*

[11] See para 18, page 181 of Book A

Gender Minorities as it is evidence from the prayers sought. Therefore there can be no basis for the Applicants to rely on this affidavit. May I implore/urge this court to develop its own indigenous jurisprudence and not rely on foreign decision/writings in interpreting of the Constitution."

Adjudication

The prayers

17. The applicants prayed mainly:

> "*1. Reviewing and setting aside the decision of the Second Respondent in refusing to register Eswatini Sexual and Gender Minorities as an association not-for-gain in terms of section 17 of the Companies Act of 2009 ('Companies Act')*
>
> *2. Declaring that the Second Respondent's decision was unlawful, unreasonable and irrational as it is in breach of the rights in terms [sic] sections 14, 18 (1), 20, 24, 25 and 33 of the Constitution of the Kingdom of Swaziland, as well as section 17 of the Companies Act.*
>
> *3. Declaring that the registration of an association that promotes the interests and aspirations of lesbian, gay, bisexual and transgender persons in Eswatini is not unlawful or incompatible with section 17 of the Companies Act.*"

Comparative analysis

South Africa

18. **Ackerman J**[12] once noted:

> *"Our law has never proscribed consensual sexual acts between women in private and the laws criminalising certain consensual acts between males in private and certain acts in public have been declared constitutionally invalid."*

19. His Lordship was precise on the point as section 9(3) of the Republic's Constitution (1996) read:

> *"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour,* ***sexual orientation,*** *age, disability, religion, conscience, belief, culture, language and birth."*

20. A trilogy of cases drew much emphasis on, "sexual orientation" in defining and upholding the rights of lesbians, gays, bisexuals and transgender as a minority and vulnerable group in society. The term, 'sexual orientation' is generally defined as the sexual attraction towards the opposite, same or both sexes. So that gay men are sexually attracted to the same sex as themselves, as correctly pointed out by the applicants

[12] National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others 2000 (2) SA 1 at para 49

in their heads of arguments. **Prof. Edwin Cameron**[13] similarly authored on the definition:

> *". . . sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex."*

21. Paramount to the discussion on sex and sexual orientation is the right to equality, dignity and privacy. Again **Ackerman J**[14] noted of these rights:

> *"[T]he rights of equality and dignity are closely related, as are the rights of dignity and privacy."*

22. The court in National Coalition case[15] pointed out that during the drafting of the interim Constitution, much debate ensued on whether sexual orientation should be entrenched as part of the right to privacy. Privacy focuses on the personal sphere of an individual. It is a right that preserves a person's intimate relations, feelings and personal information. Under the discussion of sexual orientation, it was so stated of privacy:

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[13] "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 SALJ 450

[14] See note 12 at paras 31 and 32

[15] *supra*

"Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy."

United States of America

23. **Gerald Lynn Bostock, et al**[16] having lost in the *court a quo*, petitioned the Supreme Court of the United States. Bostock, having worked as a child welfare advocate for a decade in the Clayton County, Georgia, took interest in gay recreation softball league. His sexual orientation came to the fore. He was fired from work. The same fate befell **Donald Zarda** who was employed as a skydiving instructor at Altitude Express in New York. **Ainee Stephens** employed by RG & GR Harris Funeral Homes Michigan presented herself as male. Two years later, owing to loneliness and despair, the doctors advised him to live as a female. She was later dismissed from employment for informing her employer that going forward she would conduct herself as a woman. The question serving before court was whether the respective employers' conduct violated Title VII of the Civil Rights Act 1964. Title VII promulgated:

*"[I]t is 'unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise **to discriminate** against*

[16] **Bostock v Clayton County 590 US (2020)**

any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, ***sex,*** *or national origin.'"* [My emphasis]

24. **Gorsuch J**[17] eloquently defined the bone of contention as:

> *"The only statutorily protected characteristic at issue in today's cases is* ***'sex'*** *-and that is also the primary term in Title VII whose meaning the parties dispute"*[18]

25. The court adopted the causation approach by using the 'but for' test. The court considered the meaning of discrimination and opined that it was treating others in the same condition worse than the others. Title VII concerned not discrimination of a group but individuals. The statute was designed to protect individuals of both sexes from discrimination on equal basis. The court then decided:

> *"The statute's message for our cases is equally simple and momentous:* ***An individual's homosexuality or transgender status is not relevant to employment decisions.*** ***That because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."*** [19][Emphasis]

[17] President Donald Trump's appointee and author of the judgment of the court
[181818] See Para A lines 1-3 n16
[19] See page 9 para B n16

26. The court also proceeded to highlight:

> ***"[H]omosexuality and transgender status are inextricably bound up with sex.*** *Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."*[20]

27. The court further continued:

> *"When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play- both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach."*[21]

28. The court then rejected the employers' submission to the effect that the term sex in the Title did not refer to homosexuality or transgender. It meant in the ordinary language to male or female. The employers arguments were so stated:

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[20] See page 10 para 2
[21] See page 11, n16

"Maybe most intuitively, the employer's assert that discrimination in the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. According to the employers, that conversational answer, not the statute's strict terms, should guide our thinking and suffice to defeat any suggestion that the employees now before us were fired because of sex."[22]

29. The Court responded:

"But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. So an employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. To do otherwise would be tiring at best. But these conversational conversations do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause."[23]

30. The court found in favour of the employees. However, two of their

[22] See page 16, n16
[23] supra

Lordships dissented. **Alito J.** writing the dissenting judgment first commented:

> *"There is only one word for what the Court has done today: legislation. The document that the Court releases as in the form of a judicial opinion interpreting a statute, but that is deceptive."*[24]

31. The learned Justice then embarked on the subject immediately and stated:

> *"Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds, 'race, color, religion, sex, [and] national origin.' 42 U.S.C. §2000e-2(a)(1). Neither 'sexual orientation' nor 'gender identity' appears on that list. For the past 45 years, bills have been introduced in Congress to add 'sexual orientation' to the list, and in recent years, bills have included 'gender identity' as well. But to date, none has passed both Houses.*
>
> *Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both 'sexual orientation' and 'gender identity,' H.R 5 116th Cong., 1st sess. (2019), but the bill has stalled in the Senate. An alternative bill, H. R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty. This bill remains before a House Subcommittee.*[25]

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[24] See page 1 of dissenting judgment, n16

[25] See page 2, n16

32. The learned Judge pointed out that the term 'sex' has not changed its meaning since the inception of the legislation in 1964. He expressed in that regard:

> *"Even as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity. And in any event, our duty is to interpret statutory terms to 'mean what they conveyed to reasonable people at the time they were written.'"*[26]

33. He alluded that a thorough search was conducted and not a single dictionary was located which defined 'sex' to mean sexual orientation, gender identity or transgender. The learned Justice referred to a number of dictionaries and concluded that they all revealed the same meaning of the word, 'sex'. In that regard, the dissenting court[27] drew the conclusion that 'sex' in Title VII refers to biological male or female and certainly not because the person is sexually attracted to members of the same sex or identifies as a member of a particular gender. The court proceeded to give a scenario which was put to Counsel representing the employees. It was that imagine an employer issuing out forms and asking prospective employees to fill them in the employer's absence. In the forms the employer makes a box where each prospective employee would indicate if he is gay, lesbian, homosexual or transgender. Imagine some of those aspiring employees indicating that there are homosexuals or transgender and the employer declines to employ them. What would be the basis of

[26] Page 3, n16

[27] As Thomas J also agreed with the dissenting judgment of Alito J

the employer rejecting their application? Would it be because of their sex or their sexual preference? Counsel for the employees answered that it would not be because of their sex but for their sexual orientation or gender identity. This answer was held by all the judges as correct. In this regard, **Alito J** then stated:

> *"The Court's argument is not only arrogant, it is wrong. It fails on its own terms. 'Sex,' 'sexual orientation,' and 'gender identity' are different concepts, as the Court concedes. And neither 'sexual orientation' nor 'gender identity' is tied to either of the two biological sexes.*[28]

New Zealand

34. Three female couples noted an appeal against the decision of the High Court, confirming the Registrar's decision refusing them the right to marry. Their case was cited as **Quilter v Attorney-General.**[29] The basis of the Registrar rejecting their notices to marry was based on section 23 of the Marriage Act 1955 which only recognised marriage between a man and woman and was silent on same sex marriage. The crux of their case was that section 6 read with section 19 of the Bill of Rights Act 1990 together with the Human Rights Act 1993 prohibited any discrimination on the basis of sexual orientation. The court was therefore enjoined to give an interpretation to section 23 of the Marriage Act consistent with their enshrined rights under the two enactments. The Attorney-General on the other hand contended that Parliament had

[28] Page 7, n16
[29] [1998] 1 NZLR 523

not amended the Marriage Act and was therefore content with the traditional concept of marriage. Any discrimination was justified in terms of section 5 of the Bill of Rights Act which provided for a restriction necessary in a democratic society. Further, section 151 of the Human Rights Act prescribed that any Act contrary to the Human Rights provision shall not be held invalid.

35. Section 21(m) of Human Rights Act 1993 listed, *inter alia*, as a prohibited ground for discrimination:

> *"(m) **sexual orientation**, which means a heterosexual, homosexual, lesbian, or bisexual orientation.*

36. Section 19 of the Bill of Rights Act 1990 reads:

> ***"19 Freedom from discrimination***
>
> *(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993*
>
> *(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.*
>
> *Section 19: substituted, on 1 February 1994, by section 145 of the Human Rights Act 1993 (1993 No 82).*

37. **Tipping J** first considered the definition of discrimination. He pointed out that it meant treating differently the same individuals or group in the same circumstances. The restriction by law was not on the right to marry. It was on the right to choose who to marry. He opined that the right to marry was available to everyone regardless of whether the person is a homosexual or a heterosexual. Further, the restriction to the choice as to who to marry applied equally across the board. It did not apply only to homosexuals and excluded heterosexuals. The learned Justice espoused that when determining discrimination, one must consider the impact. Once it borders on impact, then there is no discrimination. He illustrated this point by that in a heterosexual set up, a married man who intends to marry another woman may also claim discrimination as polygamy is prohibited. The subject on discrimination would then go on and on. He propounded that in such questions of discrimination, the enquiry should be whether there was discrimination. If, yes, was the discrimination justified, not by reason of it being unlawful but that society considers the restriction as necessary and desirable. In that case, **Tipping J** answered the question on the presence of discrimination in the positive. He then embarked on the second stage of the enquiry on whether society considers the restriction evident in the Marriage Act necessary. He concluded in the positive by reason that section 23 of the Marriage Act viewed marriage as between two opposite sex. If it was not justified, Parliament who is tasked with expressing the will of the people would have so demonstrated, according to the learned Justice of the Appeal Court.

38. **Thomas J**, like **Tipping J** found that there was discrimination. He however declined to differ in the ultimate decision for the reason that he held a similar view that to give section 23 of the Marriage Act a different interpretation would be akin to usurping the powers of Parliament. It was not until 2013 that Parliament enacted a law in favour of LGBT in New Zealand.

India

39. **Justice K. S. Puttaswamy & Another v Union of India & Others**[30] is the leading case on the right to privacy by a full bench of nine judges. The government of India developed a compulsory biometric based identity card (Aadhaar) where the individuals' profile could be stored. Under Aadhaar a person did not need other supporting document to prove his identity. Its main objective was to curtail the same individual from holding various identity cards. This would assist the government in a numbers of instances. In the distribution of social grants, for instance, it would ensure that an individual did not claim twice under different identities. Population statistics would easily be accessible for the government to map out national strategic development plan, to name but a few of the Aadhaar benefits. However, at the same time, this unique identity card system enabled the government to keep track of the movements and certain activities or transactions (such as finances) of individuals, i.e. surveillance. Aggrieved by this latter characteristic of the Aadhaar, the retired Judge, 91 years old, petitioned the Court of his right to privacy and called for the striking down of the entire Aadhaar.

[30] 494/2012

40. The Court engaged in a very lengthy analysis of the right to privacy. It espoused that privacy could be classified in three categories. Firstly on the basis of 'harms'. This is where privacy is viewed from the perspective of a family set up. Secondly, on the ground of 'interests'. Three sub-categories were developed. These were 'privacy of repose', 'privacy of sanctuary', and 'privacy of intimate decision'. Privacy of repose relates to the 'right to be let alone'. As the English common law maxim points: "Every man's house is his castle." Privacy of sanctuary is the right to keep others from knowing, seeing and hearing. What is whispered in the closet should not be heard in the streets, so to speak. It is about keeping information within the private sphere. Privacy of intimate decision is about the right to act autonomously. The third category was privacy as an aggregation of rights. The Court stated under this classification:

> *"This approach in classifying privacy as a right ...is not limited to one particular provision in the Chapter of Fundamental Rights under the Constitution but is associated with amalgam of different but connected rights."*[31]

41. **Coke**, on privacy as an aggregation of rights once wrote: *"The house of everyone is to him as his **castle** and **fortress** as well **as for his defence** against injury and violence **as for his repose.**"*[32] The Court opined that sanctity of the home and protection against unauthorized and arbitrary intrusion were an integral part of personal liberty. Personal liberty, right to privacy and right to life mutually co-existed. Those rights

[31] See para 85© of n30
[32] See para 15 of n30

enjoyed an inter-relationship and an overlap with each other. Emphasising on this point, the Court referred to **Justice Subba Rao** as follows:

> *"Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country* ***sanctifies domestic life;*** *it is expected to give him* ***rest, physical happiness, peace of mind and security.*** *In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in Wolf v. Colorado [[1949] 238 US 25] pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one.* ***If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree.*** *Indeed,* ***nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy.*** *..."*[33]

42. The Court rejected the notion that the right to privacy, life and personal [34]liberty each had its own distinct attributes existing independently of

[33] Para 18, n30

3434

each other. The court noted that in as much as the Indian Constitution guaranteed the right to personal liberty and life, it did not explicitly mention the right to privacy.[35] The right to privacy was said to be an integral part of the right to personal liberty. It was an ingredient of the right to personal liberty.

43. The court discussed various decisions on the right to privacy. On the question of gender, the court referred to **K.S. Radhakrishnana J**[36] as follows:

> *"Gender identity, therefore lies at the core of one's personal identity, gender expression and presentation and therefore, it will have to be protected under article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behaviour and presentation. State cannot prohibit, or otherwise restrict or interfere with a transgender's expression of such personality due to ignorance or otherwise which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of*

[35] See para 25, n30
[36] In National Legal Services Authority v Union of India (2014) 5 SCC 438

the Constitution of India and the State is bound to protect and recognise those rights."

44. Their Lordships also referred to the case of **Suresh Kumar Koushal v NAZ Foundation**[37] where section 377 of the Indian Penal Code was challenged on the basis that it violated the applicants' rights to privacy and dignity. Section 377 criminalised same sex sexual intercourse or knowledge. The High Court, court of first instance, found in favour of the applicants in that it held the view that the legislative enactment resulted in discrimination on the ground of sexual orientation and thereby violated Article 14 of the Constitution. On appeal, however, the decision of the High Court was overturned on the grounds that lesbians, homosexuals and transgender were a mere miniscule portion of a large population. Justice could not be served by striking out section 377 based on such a minute fraction of society. Their Lordships (in **Justice K. S. Puttaswamy** case) launched a scathing attack on the reasons for overturning the High Court's decision. They pointed out that rights guaranteed by the Constitution do not depend on the opinion of the majority. They are not based on popularity. That they are claimed by a small fraction of society does not change their force and effect. These rights cannot further be diminished in status to be referred to as 'so called' rights as the Appeal Court had done. The Court proceeded:

[37] See para 124 page 121 of n30

"Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream.' Yet in a democratic Constitution founded upon the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform."[38]

45. The Court proceeded to hold the view that a broad and an all-encompassing interpretation of a right must be employed when giving meaning to the rights listed in the Constitution. Each right must be viewed as inclusive of other unexpressed rights. For instance, it mentioned that the right to life must implicitly also refer to the right to education which was not expressed in the Constitution. It declined to construe a constricted interpretation of the rights enlisted in the Constitution. In its opinion, the rights to life and personal liberty were fundamental rights encompassing a number of other incidental but not expressed rights. It enquired, "What is life without dignity?" The answer was that the right to dignity is intrinsic in the right to life.

[38] See para 126 pages 123-124 of n30

International Instruments

Universal Declaration of Human Rights

46. The Universal Declaration of Human Rights was chartered by all the regions of the world under the United Nations umbrella in the General Assembly on the 10th December, 1948 in France, Paris. Its preamble partly reads:

> *"Whereas recognition of the **inherent dignity** and of **the equal inalienable rights** of all members of the human family is the foundation of freedom, justice and peace in the world.*
>
> *Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.*
>
> *Whereas it is essential, if a man is not to be compelled to have recourse as a last resort rebellion against tyranny and oppression that human rights should be protected by the rule of law."*

47. Article 1 states: *"All human beings are **born free and equal in dignity and rights.** They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."* Article 2: *"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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3 postulates: "*Everyone has the right to* ***life, liberty*** *and security of a person.*" Article 12 points: "*No one shall be subjected to arbitrary interference with his* ***privacy, family, home*** *and correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*" Article 16 on the right to marry, postulates: *1)* ***Men*** *and* ***women*** *of full age, without limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2) Marriage shall be entered into only with the free and full consent of the intending spouses. 3) The family is* ***the natural*** *and fundamental group of society ad is entitled to protection by society and the State.* (My emphasis) Of note, in as much as the term 'sex' is mentioned, 'sexual orientation' is not.

International Covenant on Civil and Political Rights

48. Part 11 Article 2(1) expatiates: "*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, colour,* ***sex****, language, religion, political or other opinion, national or social origin, property, birth or other status.*" Part 111 Article 17(1) provides:

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." On the right to assembly, it espouses under Part 111, Article 21: *"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interest of national security or public safety, public order [ordre public], the protection of public health or morals or the protection of the rights and freedoms of others."* On the right to conclude a contract of marriage, Part 111, Article 23 expounds: *"1.The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized."*

49. **African Charter on the Human and Peoples' Rights**

July 1979 the Member States comprising of the nations of the African continent met in Liberia, Nonrovia and forged the African Charter on Human and Peoples' Rights which was adopted in Nairobi, Kenya in 1981. Article 2 reflects: *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised 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."* Article 10 reads: *"Everyone individual shall have the right to free association provided that he abides by the law."* Similarly on assembly under Article 11: *"Every individual shall have the right to assemble freely*

with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others." Article 27.2 however, reads: *"The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."* Notably, is that, there are restrictions or limitations on almost all the rights mentioned.

Comment on the International Instruments

50. Glaring from the above international instruments is that there is the use of the terminology, 'sex' without 'sexual orientation'. In fact, none of the nine existing core human rights treaties appear to prohibit *ex facie* discrimination on the ground of sexual orientation, gender identity or expression. They all prohibit discrimination on ground of sex, among others. It is not clear why the term 'sexual orientation,' 'gender identity or expression,' is not employed in these treaties. This is more so when taking into account that in 2021, under the ICCPR, a third category of gender was included in its forms. This third category was referred to as third gender. It is considered as non-binary and the emphasis here is that this third gender should not be confused with transgender, intersex gender or LGBTIs.[39]

[39] See also NSW Registrar of Births, Death & Marriages v Norrie [2014] HCA 11 (2 April, 2014)

51. Courts, nevertheless, both domestic and international, including international human rights' committees have interpreted the term 'sex' to include sexual orientation or gender identity or expression, so that discrimination based on sexual orientation is prohibited in terms of the existing core nine human rights treaties. This was the case, for instance in the cases **Smith & Grady v United Kingdom**[40] and **Lusting-Prean & Beckett v United Kingdom**[41] where the applicants claimed violation of their rights to privacy, liberty, dignity and expression. They also lamented that they were subjected to discriminatory treatment. This was following an enactment providing for administrative disqualification or discharge of a military officer on the ground of homosexuality. The European Court on Human Rights discussed Articles 3, 8, 10 and 14 of the ICCPR and found that the applicants' right to liberty was violated. Following this ruling, the United Kingdom then amended its policies to be in conformity with the decision. This was done after undergoing a research on the subject, not only within the Kingdom but across other countries as well, such as Australia.

Case at hand

Natural rights

52. A brief description of natural rights would be apposite in this application. Aristotle referred to two classes in his scholastic work. He named the first as *polis* and the second, *oikos*. The Greek philosopher espoused that *polis* referred to the public arena of political affairs while *oikos*, the personal realm of human being. The state's or government's

[40] Eur HR 493 (1999)
[41] Eur HR 548 (1999)

powers extended only in the public sphere and not beyond. The individual's authority pivoted around the personal or private sphere. So that activities involving personal affairs were a reserve of private realm. These concerned familial relations and self-determination. The state or government has no say or business in them. We therefore speak of the public and private zones. Writing on the two spheres, **John Stuart Mill**[42] eloquently stated:

> *"The only part of the conduct of any one, for which he is amenable to society is that which concerns others* [public]. *In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign* [private]" (My own)

53. In the private zone, we speak of liberty of the individual. Liberty incorporates civil rights such as the right to life, privacy, assembly and expression to mention but a few. These rights which are a preserve of *oikos* are inherent on a human being by virtue of his existence. They commence at birth and cease upon death of the individual. They are not endowed upon the individual by the state, government or society in as much as the state, government or society is obligated to uphold them and thus they are inviolable. That they are visible in various international conventions or treaties, constitutions, Acts and policies, does not mean that they are a creature of such enactments. For this reason, they are called natural rights. Since they are natural, they are inalienable from a human being. **James Madison** writing on the

[42] See his essay 'On Liberty' 1859

subject of *oikos*, referred to the right to property which he classified as tangible and intangible. He espoused on property:

> *"This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual " In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandize, or money is called his property.* [Tangible] *In the latter sense, a man has property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has property very dear to him in the safety and liberty of his person. [*Intangible*] He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties or his possessions. Where there is an excess of liberty, the effect is the same, tho' from an opposite cause*[43]*."*(My own)

[43] See N[41] page 101 of

54. Following that these natural rights are inalienable by virtue of being an integral part of every living individual or, put differently, they co-exist with the individual and that they are inviolable, able jurists have referred to them as fundamental rights. Emphatic on their characteristic as fundamental, **Subba Rao CJ** of India wrote, "*To live is to live with dignity. ...Dignity is the core which unites the fundamental rights because the* ***fundamental rights seek to achieve for each individual the dignity of existence.***"[44] The learned Justice later asked, "*What is life without the right to dignity?* I think it is also safe to ask, "What is an individual without the right to life, liberty, equality, privacy, dignity, assembly or expression?" By their very nature, many writers on the subject of fundamental rights correctly opine that these rights cannot be amended out of existence. They cannot be repealed or abrogated in as much as they can be restated, fine-tuned, extended or restricted. The learned Chief Justice (**Subba Rao CJ**) neatly summed fundamental rights as follows:

> "*'Fundamental Rights' are the modern name for what have been traditionally known as 'natural rights'. As one author puts,* ***'they are moral rights which every human being everywhere all times ought to have simply because of the fact that in contradistinction with other things is rational and moral.' They are the primordial rights necessary for the development of human personality. They are the rights which enable a man***

[44] See para 107 of N[30]

to chalk out of his own life in the manner he likes best..."[45](My emphasis)

The Right to Privacy (Section 14(1)(c))

55. **Subba Rao C.J** wrote:

> *"**Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life** and liberty **is intended to achieve.**"*[46] (Emphasis)

56. He further highlighted:

> *"The right to privacy is an element of human dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. **Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life.** In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution."*[47]

57. The English maxim, 'What is whispered in the closet should not be heard in the streets,' resonates with the right to privacy. This right is

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[45] Golak Nath v State of Punjab (1967) 789
[46] *supra*
[47] Para 113 of N[30]

often said to be 'the right to be let alone'. It is a right that recognises that every individual has a right to dominance and autonomy in his private space without any intrusion either from the government or society. The individual is endowed with the right to take decisions on the affairs of his personal life and relationships with his family or loved ones.

58. Adverting to the present case and having at the backdrop of my mind the above discussed principles, it is apt to consider the applicant's case, firstly from their first prayer. They first sought:

> *"Reviewing and setting aside the decision of the Second Respondent in refusing to register Eswatini Sexual and Gender Minorities as an association not-for-gain in terms of section 17 of the Companies Act of 2009."*

59. It is trite that the applicants lodged an application before the Registrar of Companies for the registration of a company under the style, 'Eswatini Sexual and Gender Minorities'. According to the applicants, this company is not for profit. Its main objectives is to sell information that would advocate and sensitize the public about the rights of the lesbians, gays, bisexual and transgender (LGBT) persons in the Kingdom.

60. Now, the first port of call is to ask, as per the discussions by **Aristotle *et al,*** where does a company fall in the two spheres? The answer lies in the definition and activities of a company. A company is a fictitious

juristic *persona* with rights and duties in its own name. It is a distinct legal person from its shareholders. It can sue and be sued. It can acquire and dispose of property. It can enter into a contract. However, as it has neither limbs nor faculties, all its activities are performed by its agents or organs who are natural persons. Those transactions are however, said to be performed by the company itself. As often said, a company can neither eat nor sleep but it can conduct business. **Cilliers and Benad** stated of a company:

> *"A company cannot, however, be equated with a natural person of all purposes.* ***The company is primarily a business entity*** *and it can generally only acquire rights and duties and perform acts that are required for purposes* ***of economic activity.***[48]*"* [Emphasis]

61. It is clear from the above description of a company that the main object of a company is to conduct business. That its intention is to either make profits or not is neither here nor there and this therefore does not detract from its sole purpose of conducting a business. Now, what does conducting business entail? No doubt, it means inviting the public to engage in trade. In the language of the English maxim referred at para. 57 herein, it translates into, 'shouting at the mountain top.' The question then is, which zone is 'the mountain top' as defined by Aristotle? The answer is obvious. 'The mountain top' lies in the public realm (*polis*) and certainly not in the private (*oikos*).

[48] Corporate Law, 3rd ed., page 5 para 1.07

62. The second leg of the enquiry is to turn to the objects of the company sought to be registered. In other words, what is it that the company intends to sell to or trade with the public? From its objectives, it intends to sell information relating to affectionate or erotic matters of the LGBT. In the language of the respectable Dr. Muller, the company intends to sell information on the activities and affairs of 'men who have sex with men' (gays) or from the perspective of the applicants, information about same sex (gays and lesbians) or advocacy about those who have transformed to the opposite gender (transgender) or of those who prefer to have sex with both genders (bisexuals). The question then is, are these not matters of the bedroom? Are these not the preserve of the sanctity of the home? The answer must be in the positive. In law, the answer is that these are matters of privacy (*oikos*). It is wise to regurgitate the English maxim, 'What is spoken in the sanctity of the home, should not be shouted on the mountain top.' In our law, there is a distinct line of demarcation between *polis* (public) and *oikos* (private). The law does not countenance an intersection. An intertwine of the two realms would result in the intrusion or violation of the right to privacy, an act prohibited by law. This position of the law was well articulated by **O'Regan J** when she referred to **Ackerman J** that, "*held that the right to privacy in the interim Constitution must be understood as recognizing a continuum of privacy rights which may be regarded as* ***starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life, and ending in a***

public realm where privacy would only remotely be implicated, if at all."[49]

63. The Constitutional Court of South Africa's case of **S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae**[50] lends credence to the position of the law that private matters should not find their way into the public arena. The facts of the matter were briefly that, a police officer visited a brothel and was given a pelvic massage. He paid R250 for the services rendered. The owner of the brothel, the sex worker who rendered the massage and the employee who received the payment were all arrested and charged in terms of section 20(1) (aA) of the Sexual Offences Act 23 of 1957 for providing sex for a reward and keeping a brothel. They were all convicted. However, they then challenged the constitutionality of the Act, namely, that it was discriminatory as between the seller and the buyer as it penalized the sex worker and not the customer; it deprived them of their right to economy; and violated their right to privacy. The matter was referred to the High Court as the Magistrate lacked jurisdiction. The High Court held that there was discrimination but dismissed the other two grounds. It declined to declare sections 2, 3(b) and 3(c), which relate to keeping a brothel as unconstitutional. The High Court then referred its declaratory order to the Constitutional Court for confirmation and granted the applicants the right to appeal on the dismissed two grounds. **Ngcobo J** wrote the majority judgment.

[49]See S v Jordan and Others 2002 (6) SA 642 at 48, para 76 as stated in Bernstein and Others v Bester and Others NNO [1996(2) SA 751]CC

[50] 2002 (6) SA 642

64. On the gravamen that the Act violated their right to privacy, **Ngcobo J** noted:

> *"It was contended that the prohibition on prostitution infringes the right to privacy.* ***I have grave doubts as to whether the prohibition contained in section 20(1) (aA) implicates the right to privacy.*** *This case is different from National Coalition for Gay and Lesbian Equality and Another v Minister for Justice and Others. There the offence that was the subject of the constitutional challenge infringed the right of gay people not to be discriminated against unfairly, and also their right to dignity. It intruded into 'the sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community' and in doing so affected the sexuality of gay people 'at the core of the area of private intimacy.'*[51] ***None of those considerations are present here.*** *(My emphasis)*

65. The learned Justice hit the nail on the head when he authored: "*What compounds the difficulty is that the prostitute invites the public generally to come and engage in unlawful conduct in private.*"[52] I understand the apex court to be saying that matters of intimacy which are private in nature should remain in the sphere of privacy. Once the public is invited to engage in matters of privacy, then there is intrusion

[51] See page 13, para 27 of N[49]
[52] See page 14, para 28 of N[49]

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[52] See page 14, para 28 of N[49]

67. The learned Justice had prior quoted from **Bernstein's**[55] case:

> "***The truism that no right is to be considered absolute implies that from the onset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community.*** *This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society.* ***Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.***"[56] (My emphasis)

68. From the above, it is clear that business and social interaction are activities that fall outside the zone of privacy. These are matters falling within the public realm. The individual's right to claim a violation of the right to privacy therefore diminishes in the public sphere. On the same vein, in the present case, registration of applicants' company whose objective is to sell matters of sexual intimacy to the public is untenable in law by virtue of the fundamental principle of our law that recognises a demarcation between private and public spaces. I guess

[55] See N[49]
[56] See para 76, pages 48-49 of N[50]

Aristotle *et al* were correct in this regard, especially on matters of sexual gratification, as in the present case, in order to curtail the likelihood of pornographic materials, whose ramifications are far reaching, from finding their way into the market place. This position of the law holds irrespective of gender or sexual orientation. Similarly, for the reason that the right to privacy does not avail in a public zone, it cannot be said that the applicants' right to privacy was violated by the refusal to register the company. In brief, section 14(1) (c) of the Constitution is inapplicable in the circumstances of the case at hand. On this ground alone, the Registrar's decision cannot be impugned.

Right to life (Section 14(1)(a))

69. The right to life forms part of the fundamental rights inherent in every human being. No doubt, a right to life entails the right to earn a livelihood, namely, the right to access means of living. This may include the right to employ and be employed (employment) and to engage or be engaged in business (including the right to form a company). The South African Constitution refers to the right to economic activity. This right to life is gender neutral. It applies across the board without regard to the gender or gender preference of the individual. So that LGBTIs are equally entitled to the right to life as are the heterosexuals or the genderless. **Chandrachud CJ**[57] stated on the same point:

[57] Oga Tellis v Bombay Municipal Corporation (1985) 3 SCC 545

"The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. ***That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation."***

70. In declaring the right to life (economic activity) to a litigant, the courts would consider the impugned provision of the law. In the present case, the applicants have prayed that the court declare that registration of the company is consistent with section 17 of the Act. Section 17(1) whose title is "*Incorporation of association not for gain*" partly reads: *Any association-*

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

may be incorporated as a company limited by guarantee.

71. There is also section 27 which similarly reads:

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.

72. The above provisions dictate that individuals intending to form a company should do so for lawful reasons. I have already highlighted above the purpose of the applicants' company as deduced from its objectives in the Memorandum of Articles and the founding affidavit. I have further demonstrated that their endevour is not supported by the common law legal principles. **O'Regan** pointed out on the legal principle:

> *"O'Connor J too distinguished in a similar manner between zones of protected activity and others. Central to the reasoning of both Brennan J and O'Connor J is the* ***concept of a zone of privacy that diminishes as the activity becomes more public in character. <u>This notion has been foundational to this Court's jurisprudence on privacy</u>.*** *"*[58] (My emphasis)

73. To seek to bring to the public zone matters belonging to the private zone is not supported by the common law principle, let alone legislative enactment. Then there is the legislative enactment mentioned by the applicants in their founding papers. They pointed out in this regard: "*[C]onsensual same-sex sexual acts are criminalized.*"[59] They further deposed: "*Eswatini's criminal law in this respect extends only to sexual*

[58] See para 79 at pages 51-52 of N[50]
[59] See para 61.4, page 34 of Book A

acts committed between persons of the same sex. If someone is found to be in contravention of that criminal law, then the law can take its course in that regard."[60]

74. Glaring from the applicants' assertions is that they raise no qualms on the Crown's criminalisation of the same sex intercourse. This is surprising as the objectives of their intended company seeks to sell to the public a social change ideology on people who practice same sex. How is that possible without inviting the wrath of the law not only against those who would buy their wares but also against themselves as the law would consider them as *socius criminis*? To attest, *"If someone is found to be in contravention of that law, then the law can take its course in that regard,"* is destructive to the *very* objectives of the intended company as reflected in the Memorandum of Association and the founding affidavit. It is in law untenable. To allow for the registration of their company would be to directly and indirectly perpetuate the contravention of the very law which the applicants themselves hold as justifiable in this society.

75. The other viewpoint in this regard is of course that the applicants themselves appreciate that a person found to be violating the law by having same sex sexual intercourse should face the wrath of the law. In other words, applicants accede to the contention that to allow them to carry on with the business of promoting same sex activities would be an unlawful course. This no doubt is contrary to section 17 and 27 of the Act which compels a company to carry on a business that is lawful.

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[60] *supra*

This was the view in **De Reuck v Director of Public Prosecutions (Witwatersrand Local Division).**[61] The facts of the case were that appellant was a film producer who was charged for importing and possession of child pornography in contravention of section 27(1) of the Film and Publication Act 65 of 1996. He objected to the charges on the ground that they violated his constitutional rights to privacy, freedom of expression and equality. The constitutional court dismissed all the grounds on the basis that the limitation to his rights imposed by section 27(1) was justifiable in a democratic society. Now in the present case, there is no need for this court to make an enquiry on whether the common law offences prohibiting same sex sexual intercourse is justifiable vis-a-vis the right to privacy or life for the applicants following that these common law offences (sodomy and indecency) are not challenged. In fact the applicants appear to welcome the subsistence of such laws as evident in their para. 61.4 of the founding affidavit.

76. It is apposite to sum up the right to life in so far as the applicants or LGBTIs are concerned. I draw an analogy from **Ngcobo J** who espoused: "*Otherwise the prostitutes are entitled to engage in sex, to use their bodies in any manner whatsoever and to engage in any trade as long as this does not involve the sale of sex and breaking of the law validly made. What is limited is the commercial interest of the prostitute But that limitation is not absolute. They may pursue their commercial interest but not in the manner that involves the sale of sex.*"[62] Similarly, the applicants or LGBTIs have a right to life. They are entitled to

[61] 2004(1) SA 406
[62] See para 29 at page 14 of N[50]

formulate a company provided its objects are not in contravention of the law. They may pursue their economic interest in whatsoever manner but subject to the confines of the law of the land which they have not challenged by the way.

Protection from inhuman and degrading treatment (the right to dignity) (Section 14(1) (c))

77. The right to dignity is one of the cornerstone of a democratic society. **Ackerman J**[63] defined it as the acknowledgement of value and worth accorded to individuals. Life becomes worthless once the right to dignity is denied to an individual. In **Khedat Mazdoor Chetna Sangath v State of MP**[64] the Court stated: "*If dignity or honour vanishes what remains of life?*" An infringement of the right to dignity results in discrimination and stigmatisation. An affront to dignity happens when a person's life, physical or mental state is alarmed. Torture, defamation, forced labour, arbitrary arrest, search and seizure without warrants, denial of access to health, education, recreation facilities and unclassified information are all examples of violation of the right to dignity. Section 18 of our Constitution reinforces the right to dignity as follows:

> "*(1) The dignity of every person is inviolable.*
>
> *(2) A person shall not be subjected to torture or to inhuman or degrading treatment or punishment.*"

[63] See para 28 of The National Coalition of Gay and Lesbian Equality and Another v The Minister for Justice and Others (CCT 11/98) [1998] ZACC 15

[64] (1994) 6 SCC 260 at 271 para 37

78. From section 18, it is clear that by reason that it is inviolable, it is also inalienable. It can neither be conferred nor taken away. It is there by virtue of the existence of the individual. It is ever present as an intrinsic value of the individual. Governments or States are expected to facilitate, promote and protect this right which forms part of the fundamental rights. In its endevour to uphold this right, as correctly pointed out by the applicants herein, the Government of this Kingdom mapped out the National Multi-sectoral HIV and AIDS Strategic Framework (NFS) 2018-2023. The document reads:

> *"**Programme objective:** To increase consistent and correct condom use among all sexually active persons.*
>
> ***Target population:** All sexually-active people targeting young people and adolescents, adult men and women engaged in high risk sex, female sex workers and their clients, **men who have sex with other men**, STI patients, family planning clients, and pregnant and lactating women."*[65]

79. Recalling that the right to dignity is intertwined with the right to life, the Government in its rollout of programmes and antiretroviral drugs to curb the spread of HIV/AIDS considered men who have sex with other men as part of the targeted group. Sex-workers whose conduct is prohibited by law as prostitution were also targeted. Correctly so, because the law rarely sanctions an individual, no matter the name-tag

[65] See page 15 para 2.1.2 of the NFS document

behind[66] but the unlawful conduct. It is therefore correct as contended on behalf of applicants that LGBTs are not prohibited by law as such but it is their conduct under sodomy and indecency that is criminalised. The upshot of the Government's FNS, which this court aligns with, was that the right to dignity applied to all, irrespective of gender, sex, or sexual preference or identity for that matter. In this regard, the Government acted in compliance with section 14(2) of the Constitution which reads:

> *"The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the* ***Executive,*** *the* ***Legislature*** *and the* ***Judiciary*** *and* ***other organs or agencies of the Government*** *and where applicable to them, by* ***all natural*** *and* ***legal persons*** *in Swaziland and shall be enforceable by the courts as provided in this Constitution."* [My emphasis]

Limitations

80. It is with certainty that all the inherent rights, fundamental as they are, are subject to limitations. None is absolute. Aristotle drew up the two zones to demonstrate their limitations. International conventions or instruments use selective words to provide for limitations. As demonstrated above, the term 'sexual orientation' is lacking in many of the international instruments. In fact, none of these international instruments surprisingly sanction discrimination based on sexual orientation *strict sensu* as does the South African Constitution under its

[66] With few exceptions such as in pedophiles and prostitutions

section 9(3). Only international and some domestic courts have extended the meaning of 'sex' to include 'sexual orientation'. Sometimes a limitation would be evident by a corresponding duty. For instance, the African Charter on Human and Peoples Rights. Chapter I deals with the rights while Chapter II with the corresponding duties. Article 19(2) of the ICCPR on the right to freedom of expression, Article 19(3) reads: *"The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputation of others; (b) For the protection of national security or of public order (ordre public) or of public health or morals."* In some instances, the right would be qualified. For instance Article 17 of the CCPR on the right to privacy, family, home or correspondence, the right is qualified by the use of 'unlawful' so that it reads, *"No one shall be subjected to* ***unlawful*** *interference with privacy, family, home or correspondence..."*. In other jurisdictions, the exercise of the right is explicitly subjected to domestic and/or international laws. In some instances a limitation clause is provided. Our Constitution provides for a limitation clause under section 14(3) as follows:

> *"A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedom of others and for the public interest."*

81. There is also the various sections addressing each right enshrined under section 14 of the Constitution. Each section guarantees the exercise of each right but subject to the provisions of the law.

Conclusion

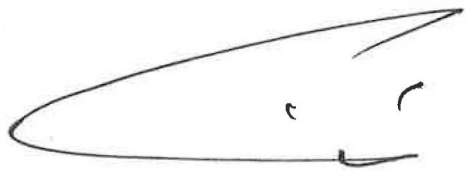
82. Having alluded to the fundamental rights, it is clear that our Constitution guarantees the rights irrespective of gender or sex. So that it is safe to say that LGBTs have the rights conferred by section 14 of the Constitution. They have a right to life, liberty, privacy or dignity. They have a right not to be discriminated against or be subjected to inhumane and degrading treatment. They have a right to associate. They have a right to form a company. They have a right to freedom of expression. These rights are inherent in them not by reason of their sexual preferences as LGBTs but as human beings. These rights are however subject to the laws as prevailing in the Kingdom and which have not been challenged anywhere.

Order

83. For the above, I enter as following:

83.1 The review application is dismissed;

83.2 No order as to costs.



M. DLAMINI J

M. FAKUDZE J

MAPHANGA J. (dissenting)

[1] I have read and considered the judgment penned by my sister, her Ladyship, Mrs Justice M Dlamini with which my brother Fakudze J concurs. For the reasons I set out in the following opinion, I dissent with both the reasoning and the disposition set out in the orders in that judgment.

[2] This matter comes before this court primarily for relief under judicial review from a decision of the Registrar of Companies made pursuant to an application laws before that office by the applicants under Section 17 of the Companies Act of 2009 on the basis that the latter decision was unreasonable and irrational; thus *ultra vires* – in regard to the enabling Act (section 17 of the Companies Act). The review application has been brought on notice of motion ostensibly filed under the ordinary procedure for review in terms of the high courts on specific grounds. In furtherance of their challenge to the registrar's decision, the applicants also rely on specified constitutional grounds in invoking certain provisions of the Constitution of Eswatini of 2005 and accordingly indicate they also seek constitutional relief. In this regard reference is had to Sections 14, 18(1), 20, 24, 25 and 33 of the Constitution.

[3] The prayers for relief in this application, especially in so far as the constitutional relief goes, are tersely stated in the notice of motion. This is done in a manner whereby the grounds are articulated in a rather truncated without elaboration of the basis in its fullness. In their Notice of Motion the Applicants have contented themselves with simply cataloguing various sections of the Constitution relied upon. I think this is a regrettable practice which must be decried especially in view of the matter being one which is as unprecedented and as weighty as this one is.

[4] I shall return to the procedural aspects momentarily. Suffice to mention at this stage that indication has been given in the applicants papers that they approach this court in part in terms of Sections 33 and 35 read with §151 and (2) of the Constitution – these being invoked as provisions of relevance on the jurisdiction of this court to grant the sought relief.

[5] Although Section 35(7) of the Constitution envisages the existence of rules regulating the practice and procedure on constitutional litigation and applications for constitional relief, this Court operates from a somewhat hamstrung position in that presently no such rules are in place. As a result in practice weighty constitutional points are often raised by litigants casually and often on an *ad hoc* basis.

[6] In application proceedings, litigants are best advised to make out and set out fully the legal grounds for the cause in the notice of application and cannot resort or fall back on affidavits and on their heads of argument for this purpose. In this regard, I hasten to add that rule 53 of the High Court rules, regulates the procedure for the filing and conduct of review proceedings. That rule stipulates the form of the process to be followed including the conduct of intermediate steps depending on the nature of the decision sought to be impugned so that it may or may not entail the filing of the record of the proceedings, of the hearing in the lead up to the application for review. Some of these prescribed procedures may be inapplicable thus dispensing with the need for a formal record other than the documentary trail of notices and or relevant correspondence.

The Parties

[7] The applicants (who are 7 in number) self-identify as members of an association under the moniker Eswatini Sexual and Gender Minorities. By no stretch they can be described as founders of this organisation.

Although this is not expressly stated it is implicit that their common interest is to represent and advance the interests of persons who identify as lesbians, gay and other non-binary sexual orientation (in other words the LGBTI) community. It is trite that the acronym stands for 'Lesbian, Gay, Bisexual, Transexual and Intersex (an umbrella term which has many variants essentially representing terms of sexuality and gender identity). I must add however that none of the Applicants have indicated that they individually self-identify under any of these categories.

[8] The First Respondent has been cited as the Minister of Commerce, Trade and Industry in his capacity as the Minister under whose line of responsibility the regulation of companies fall. His citation is also of pertinence herein as shall emerge further in this judgment. The Second Respondent is the Registrar of Companies whose decision it is that is sought to be reviewed in these proceedings with the Attorney Generally cited nominally as State Counsel.

[9] It is common cause in the second quarter of 2019 the Applicants initiated an application for the registration and incorporation of a not for profit association in terms of Section 17 of the Companies Act. In this regard in April 2019 the Applicants succesfully sought the reservation of the name ESWATINI SEXUAL AND GENDER MINORITIES (ESGM) from the 2nd Respondent. It is also common cause that the application was done pursuant to the regulations under the Act upon submission of the requisite form and payment of the prescribed fee. This was granted on the 11th August 2019; this being the date of the Registrars notice to that effect.

[10] Shortly after the grant of reservation of the name the Applicants proceeded to file the associations statutes in the form of a Memorandum and Articles of Association and complied with all the technical formalities for the registration of the association as a not-for-

profit company. In the Memorandum of Association the purpose clause lists the objects of the Association as follows:

(i) To advance protection of the rights of lesbian, gay, bisexuall, transgender and intersex (LGBTI) in Eswatini and reduce harm that affect their well being based on their sexual orientation and gender identity (SOGI);

(ii) To research the issues that make the LGBTI vulnerable to HIV and AIDS, and further reduce the 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 our any activitities necessary and incidental or conducive to achieving its aims and objectives or any one of them;

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

[11] From the undisputed facts it is apparent that there was a lag after the lodging of the application when no formal decision was made in regard to the application; this being despite several enquiries and entreaties by the Applicants or their agents to the Registrar office. Consequently the Applicants resorted to bringing an application in the High Court on the 9th August 2019 against the 2nd Respondent to interdict the Registrar into making a decision. In the aftermath of initiating the said proceedings the latter then issued the decision dismissing the registration application. It is that decision from which this present application for review has been brought. The Registrar's decision was communicated to the Applicants by letter dated 9th September 2019.

[12] The contents of that letter are crucial and of utmost relevance in the application presently. For this reason the key elements there bear setting out herein (albeit in summary). He states the foremost reasons in paragraph 2 of that letter to be:

12.1 The office of the Registrar of Companies has rejected the application for registration of the association in issue in view of the fact that all companies and associations in Eswatini will be registered for a lawful purpose as provided by section 17 and 27 of the Companies Act.

12.2 The purpose of the Act in its entirety is to regulate business through the constitution, incorporation, registration, management, administration and winding up of companies and non-profit making associations that are meant to promote particular objectives that are business oriented. This is aligned to the regulation of investment and value edition to the economy and community development in the country.

12.3 The registration of associations not for gain is provided for by section 17 of the Act which provides that *'Any association – (a) formed or to be formed for any lawful purpose; (b) having the main (sic) 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"*

12.4 That the association whose registration is sought under section 17 of the Act does not meet the statutory definition of 'communal or group interest"; and finally

12.5 That Section 37(3) of the Act provides that "... unless ordered by the Minister, The Registrar of Companies shall not register a company by a name in which in his opinion is calculated to mislead the public or to cause annoyance or any offence to any person or class of persons or is suggestive of blasphemy or indecency, or a name representing an occupation for which personal qualification are required".

[13] In that letter the Registrar launches into a range of constitutional contentions turning on what appears to be his interpretation of certain excerpts of the constitutions of the Kingdom and the Republic of South Africa. These legal submissions appear in the body of that letter to be tendered by the Registrar in support of a contention that more fully appears in the penultimate paragraph (para 11) of the rejection letter as follows:

"11. From the foregoing, it is clear that discrimination on the basis of sexual orientation and sex is not protected by our

Constitution, or in any of the country's domestic laws. The Constitution in section 20 demonstrates or lists the grounds or rights which are protected by the section against discrimination. The Companies Act is not the relevant legal authority to address the objectives of the ESWATINI SEXUAL AND GENDER MINORITIES"

I am charry to reproduce these legal arguments in fullness partly because they have been reiterated by the Respondents Counsel in his heads of argument to which I intend to advert further in this judgment. I understand these to be, by their nature argumentative, advanced as further (albeit constitutional) justification and amplification to supplement the stated main reasons for the rejection of the application which I have already summarised. I deal with these contentions elsewhere. I now turn to the proceedings and the procudural aspects

THIS APPLICATION

[14] The Notice of Application is set in the standard form for ordinary application proceedings under Rule 6 of the Rules of High Court. It certainly does not conform to the format prescribed in rule 53 in respect to review applications. However for the reasons I have alluded to I do not believe that serves as an impediment to the proper adjudication of the applicants cause. The Applicants urge for an orders as follows:

14.1 Reviewing and setting aside the decision of the Second Respondent in refusing to register Eswatini Sexual and Gender Minorities as an association not-for-gain in terms of section 17 of the Companies Act of 2009 ('Companies Act");

14.2 Declaring that the Second Respondent's decision was unlawful, unreasonable and irrational as it is in breach of the rights in

terms section 14, 18(1), 20, 24, 25 and 33 of the Constitution of the Kingdom of Swaziland, as well as section 17 of the Companies Act;

14.3 Declaring that the registration of an association that promotes the interests and aspirations of lesbian, gay, bisexual and transgender persons in Eswatini is not unlawful or incompatible with section 17 of the Companies Act;

14.4 Further and/or alternative relief; and

14.5 That the Respondents be ordered to pay the costs of this application.

[15] The application is supported by the founding affidavit of the First Applicant to which is appended the confirmatory affidavits of the rest of the applicants together with the various annnexures that have been appended as part of the evidence and record pertaining to this matter. These documents comprise fairly substantial evidential material that the Applicants tender as evidence of the facts illustrating the special interests health and social justice challenges faced by persons belonging to the community of sexual and gender minorities (including gay, lesbians and transgender persons in the country.

[16] As part of this body of evidence the Applicants have also included key public health national policy and strategy instruments that have been published by the Government of Eswatini recognising the risk environment as well as studies and findings highlighting issues of marginalisation, discrimination and cultural stigmatisation of persons who identify within these groups. That document appears under the title MULTI-SECTOR HIV AND AIDS STRATEGIC FRAMEWORK (NSF).

[17] Further the Applicants have appended an affidavit tendered as expert evidence. Again no special application has been made by the

Applicants in this regard under the rules for this purpose. I note however that there has been no objection to the inclusion of such expert evidence. That evidence comes in the form of an affidavit deposed to a medicall sociaologist, Dr Alexander Muller whose credentials have been presented as an Adjunct Associate Professor at Gender, Health and Justice Research Unit in the Division of Forensic Medicine, Depatment of Pathology of the Faculty of Health Sciences at the University of Cape Town in the Republic of South Africa. His professional input is given in the area pertaining to the investigation and commentary on the I and lived experiences of people who identify among the sexual and gender minorities as well as the role of civic organisations in supportingt the special interests and concerns of such persons (referred to as negative lived experiences). I do not propose to canvass the content and merits of the evidence save to give an insight of the record that forms part of the Applicants case. These aspects which are no doubt invaluable insight do not have a bearing on the issues I identify to be of paramount relevance in this review application.

[18] The Respondents in opposing the application have filed an aswering affidavit in response. I have dealt with aspects in the detail of that affidavit as relates to the proceedings and internal processes followed by the Respondents leading to the dismissal of the appplication for registration of the Applicants' association. These pertain to the facts and reasons advanced which turn on the construction of the relevant portions of the Companies Act. To a large extent the content of the First respondents affidavit is a rehash of the legal contentions articulated in the 2nd Respondents letter to the Applicant when he declined the application, coupled with the deponents moral arguments on cultural and religious grounds. I need only summarise and advert to the constitutional arguments that he has repeated and these can be summarised as follows. The Respondents contends firstly:

a) that Section 27(1) of the Constitution provides that "men and women of marriageable age have a right to marry and found

a family".... Whereas this association wants to promote same-sex relationships which is explicitly prohibited by our Constitution;

b) the Marriage Act of 1964 recognises marriage between men and women;

c) even though the common law criminalisation of same-sex relations between men is not enforced in practice, our laws have not yet decriminalised it;

d) The Constitution of the republic of South Africa, 1996, deals with equality in section 9 where it clearly prohibits discrimination on the basis of sexual orientation in no uncertain terms.Our Constitution does not include either sex or sexual orientation;

e) That discrimination on basis of sexual orientation is not protected by our Constitution or in any of the country's domestic laws. The Constitution in section 20 demonstrates or list the grounds and rights which are protected by the section against discrimination; and

f) The Companies Act is not the relevant legal authority to address the objectives of Eswatini Sexual and Gender Minorities

Both Counsel for Applicants and the Respondents, Messrs Thulani Maseko et M. Dlamini both filed their heads of argument for which this Court is indebted setting out and amplifying their respective submissions.

PROCEDURAL AND JURISDICTIONAL ASPECTS

[19] This matter calls for a clear head on the correct perspective to take in the adjudication of the application before us – this concerns consideration and location of the propriety of an appliation for constitutional relief from a procedural point of view especially when this remedy is juxtaposed against the availability of alternative relief under the general and statutory law and when it resort to the provisions of the section 35 remedy is appropriate. In this case that primary relief is judicial review of the Registrars decision.

[20] This Court has dealt with this question in a recent judgment when Mlangeni J (writing for the majority decision) when it characterised it as consideration of the doctrine of avoidance) in ***Godfrey Exalto v Royal Eswatini National Airways and Another*** **(2258/21) [2022] SZHC (40)**[1]. I incline towards the opinion of the Court that we should be cautious in taking a rigid *non possimus* stance on keen constitutional questions that inclines towards the doctrine of avoidance, especially in light of the absence of procedural rules regulating litigation for constitutional relief in this country.

[21] It is common cause that the in this Application for the relief they seek, the Applicants rely, in part, on section 35 as read with Section 151 of the Constitution in a manner suggesting that they primarily seek constitutional relief. I think the correct approach to adopt regarding this application is the one that was followed by the Botswana Court of Appeal in ***The Attorney General of Botswana v Rammoge and 19 Others*** **Civil Case No. MAHGB-000175-13** which I shall highlight momentarily.

[22] Section 35 of the Constitution confers a discretion on this court to determine whether to grant constitutional relief. It provides as follows:

[1] At paragraph 14 of the Courts judgment.

"Enforcement of protective provisions.

35. (1) Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction —

> *(a) to hear and determine any application made in pursuance of subsection (1);*
>
> *(b) to determine any question which is referred to it in pursuance of subsection (3);*

and may make such orders, issue such writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Chapter.

(3) If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of this Chapter, the person presiding in that court may, and shall where a party to the proceedings so requests, stay the proceedings and refer the question to the High Court unless, in the judgment of that person, which shall be final, the raising of the question is merely frivolous or vexatious.

(4) Where any question is referred to the High Court in pursuance of subsection (3) the High Court shall give its decision upon the question and the court in which the question

arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal to the Supreme Court, in accordance with the decision of the Supreme Court.

(5) An appeal shall not lie, without the leave of the Supreme Court, from any determination by the High Court that an application made in pursuance of subsection (1) is merely frivolous or vexatious.

(6) Provision may be made by or under an Act of Parliament for conferring upon the High Court such powers in addition to those conferred by this section as may appear to be necessary or expedient for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section.

(7) The Chief Justice may make rules for purposes of this section with respect to the practice and procedure of the High Court (including rules with respect to the time within which applications to that court may be made)."

[23] In the *Rammoge* case after a careful examination and analysis of relevant judicial authorities in that country in consideration of the dichotomy between administrative review and constitutional relief under Section 18 of the Constitution of Botswana (worded in a similar fashion as our Section 35) the Court made the following remarks which are most apposite to the matter at hand at paragraphs 35 and 36 of the Court's judgment:

"35. The ground of illegality encompasses the doctrine of ultra vires and the principle of constitutionality, so tha an adminstrative or quasi-judicial decision may be reviewed and set asider as illegal where it is shown to be unconstitutional. Thus an unconstitutional applcation of any provision of an Act will be ultra vires that Act. This is so because Parliament is empowered to make laws by

Section 86 of the Constitution, but only where these are made 'for the peace, order and good Government of Botswana', and provided that such laws are 'subject to the constitution'

36. I agree with Rannowane J. when he held that:

> ***'The Constitution is the supreme law of the land and any administrative acts, that contravene any of its provisions are legally invalid',***

although I would add the words 'and may be liable to be set aside on review'. I say 'may be' because review is a discretionary remedy. (See Bergstan (Pty) Ltd vs Botswana Development Corporation Ltd (2012) 1 BLR 858 CA at 867, where Oudekraal Estates (PTY) Ltd v City of Cape Town and Others 2004 (6) SA 222 SCA at 246, was approved and applied). Constitutional relief is also discretionary (See OATILE's case (supra)). There will be many constitutional infractions during administrative action where justice does not demand the setting asider of the decision in question. But where, as here, a major and substantive breach of the Constitution is alleged in the application of an Act of Parliament then, if that allegation is proven the decision will be reviewed and set aside as being ultra vires its governing Act".

[24] This case calls for the application of this broader and expanded remedy of review in the sense that the impugned decision is challenged beyond the narrow confines of the premise of unreasonableness and irrationality grounds incorporating a dimension of constitutional relief. This however does not transform the essence of the relief being one of judicial review of administrative action or decision.

[25] The remedy of judicial review is a mechanism that provides a check on the regularity on the exercise of administrative power against the scourge of illegality and irrationality that may afflict such power whilst promoting the ideals of fairness and transparency. In a Zimbabwean case of *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) the Supreme Court of that country described the review powers of courts of law upholding the role of the courts as umpires and arbiters ensuring that administrative action conforms to principles of fairness and transparency. It held that transparency connotes openness, frankness, honesty and absence of bias, collusion, favouritism, bribery, corruption or underhand dealings and considerations of that sort so that administrative bodies make decisions that are legal, rational, procedurally proper and justifiable and subject to the cardinal principle of rule of law. Legal in the sense that the decision must be made within the framework of the enabling law that confers that decision-making power; rational in that the decision must not have been reached by failing to apply the right considerations, factors or criteria; procedurally correct and proper in the sense that in reaching the decision the appropriate procedures set out in the statute must have been followed; the principles of natural justice observed but most importantly justifiable in that the decision must be founded on sound reasons that indicates the deliberate application of the mind of the decision maker to the matter at hand.

[26] In review applications the enquiry more often than not typically presents itself as an enquiry as to whether a decision-maker whether deliberately or inadvertently has not so misconstrued the empowering statutory provision in terms of which his decision has to be given as to come to a conclusion that, objectively speaking, is so erroneous that it can be said he failed to apply his mind to the relevant issues in accordance with the behests of the statute; whether he can be said to have misconceived the nature of the discretion conferred upon him and

taken into account irrelevant considerations or ignored relevant ones (See ***Hira and Another v Booysen and Another*** **(308/90) [1992] ZASCA 112; 1992 (4) SA 69 (AD); [1992] 2 All SA 344 (A) (3 June 1992).**

[27] In the similar vein Corbett CJ in ***Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd. and Another*** **(18/1988) [1988] ZASCA 18; [1988] 2 All SA 308 (A) (22 March 1988)** described the inference of a failure to apply his mind on the part of a decision-maker as an instance of irrationality or unreasonableness as:

> *"Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the (decision-maker) was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner afore stated.*
> *"*

[28] I think that is the primary premis on which the Applicants proceed on the review – the grounds of irrationality and unreasonableness in relation to the empowering provisions of the Companies Act.

[29] Without diminishing the importance of some of the Constitutional provisions that have been cited and relied upon by the Applicants as basis for challenging the legality of the 2nd Respondents impugned action, it appears to me that the most eminent provision directly bearing on the matter relate to the alleged infringement or interference with the Applicants' rights to free association and assembly. After all this matter is concerned squarely with the applicants access to the

statutory framework for incorporation of association not for gain in the Kingdom. It is now trite that the rights to freedom of expression and that of association and assembly are not only interdependent but can be regarded as kindred rights which form a bundle of fundamental freedoms of the person. I deal with the remedial and jurisdictional constitutional provisions elsewhere.

Freedom of Association and Assembly

[30] The Constitution of Eswatini guarantees freedom of association and assembly in Section 25 as follows:

> **Protection of freedom of assembly and association.**
>
> **25. (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.**
>
> **(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision —**
>
> > **(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; □**
> >
> > **(b) that is reasonably required for the purpose of protecting the rights or free- doms of other persons; or □**
> >
> > **(c) that imposes reasonable restrictions upon public officers, □**
>
> **except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society. "**
>
> (my emphasis)

[31] I place emphasis on the provisions as pertains exceptions because form the basis or a foil to the purported justifications for the Respondents decision on this matter. Further on the limitations Section 25 (4) further provides:

> **"4. Without prejudice to the generality of subsection (2), nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision —**
>
> **(a) for the registration of trade unions, employers' organisations, companies, partnerships or co-operative societies and other associations including provision relating to the procedure for registration, prescribing qualifications for registration and authorising refusal of registration on the grounds that the prescribed qualifications are not fulfilled; or**
>
> **(b) for prohibiting or restricting the performance of any function or the carrying on of any business by any such association as is mentioned in paragraph (a) which is not registered.**
>
> **(5) A person shall not be compelled to join or belong to an association.**

[32] These provisions must be construed against international norms as pertains to the legal standards on the protection of human rights and in particular the rights to freedom of association and assembly to which Eswatini has subscribed and made commitments to. For purposes presently I shall refer to the African Charter on Human and Peoples Rights which in Article 10 (1) provide that an individual has a right to free association "provided that he abides by the law"[2]. The proviso adverts to the notion of permissible limitations to the right to freedom of association and assembly. It is however vaguely stated in so far as it subject to wide interpretation which may adversely water down constitutional guarantees.

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[2] The Kingdom has signed and ratified the Charter in 1991 and 1995 respectively.

[33] The scope of permissible derogations under international and regional standard setting instruments has evolved to a narrowly defined field that entails a three-part test the effect of which restricts such limitations to three criteria, namely that:

a) the limitations have to be provided by or prescribed in the form of laws;
b) designed to serve a legitimate purpose; and
c) be necessary in a democratic society.[3]

[35] Implicit in the last element of the test is the concept of proportionality that was postulated in the now well known Canadian decision of R v Oakes I have referred to elsewhere in this judgment. The first of the parts in the above test (legality or basis in law) leads me to set out the relevant statutory framework to this matter – This is in the Companies Act of 2009 under which the application and the enabling provisions that the Registrar has relied on can be ascertained and examined.

Statutory Framework

[36] It is critical to point out that unlike other African jurisdictions in Eswatini besides the common law rules for formation of voluntary associations under constitutions and specific statutory provisions for registration of some societies, associations and co-operatives, there exists no dedicated legislation enabling formal registration of non-governmental or civic organisations. The only viable avenue is through the incorporation of associations not-for-gain (also known as not for profit associations (NPO's). The Respondent's contention that the Companies Act is an inappropriate framework for the Applicants intended incorporation of the association not for gain cannot be correct

[3] These principles embodied in the three-part-test are reflected in Declaration of Principles on Freedom of Expression in Africa, of the African Commission on Human and Peoples Rights, adopted in the 32nd Session of the Commission in Banjul in October 2002

nor is the notion that such associations are established for business in the sense of a trading or commercial entity.

[37] That provision is in Section 17 (the section in terms of which the Applicants presently made their application):

Incorporation of associations not for gain.

17. (1) 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 other 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.

(2) The memorandum of such association shall comply with the requirements of this Act and shall, in addition, contain the following provisions—

(*a*) the income and property of the association wheresoever derived shall be applied solely towards the promotion of its main object, and no portion thereof shall be paid or transferred, directly or indirectly by way of dividend, bonus, or otherwise, to the members of the association:

Provided that nothing shall prevent the payment in good faith of reasonable remuneration to any officer or servant of the association or to any member thereof in return for any services actually rendered to the association;

(*b*) upon its winding-up, deregistration or dissolution the assets of the association remaining after the satisfaction of all its liabilities shall be given or transferred to some other association or institution having objects similar to its main object, to be determined by the members of the association at or before the time of its dissolution or, failing such determination, by the court.

(3) Existing associations incorporated under section 21 of the repealed Act shall be deemed to have been formed and incorporated under this section."

[38] As concerns the procedure and technical requirements to be followed in setting about registration these are in part set out in Section 37 of the Act which deals with the requirements as pertains to the reservation and attributes of a name that an association proposes to be registered by.

This is again of pertinence herein as it was invoked by the 2nd Respondent as basis for his foremost reason for refusing the Applicants application. The section provides:

Name of a company.

37. (1) The Registrar may, on written application on the prescribed form and on payment of the prescribed fee, reserve a name pending registration of a company or a change of name by an existing company; and such reservation shall be for a period of sixty (60) days or much longer period, not exceeding in all ninety (90) days, as the Registrar may, for special reasons, allow.

(2) No name shall be reserved and no company shall be registered by a name which is identical with that for which a reservation is current or with that of a registered company or a registered foreign company, which so nearly resembles any such name as to be calculated to deceive unless the registered company or registered foreign company is in liquidation and signified its consent to the registration in such manner as the Registrar may require.

(3) Unless otherwise ordered by the Minister, the Registrar shall not register a company by a name which in his opinion is calculated to mislead the public or to cause annoyance or an offence to any person or class of person or is suggestive of blasphemy or indecency, or a name representing an occupation for which personal qualifications are required."

[39] This forms a necessary legal framework and backdrop to considering the application for review and in turn dealing with the front-of-mind question whether the Registrar's decision is susceptible to review and setting aside on the grounds of unreasonableness and irrationality. A useful starting point is the *onus*.

Onus of Proof

[40] One important question that merits particular attention in this matter relates to the incidence of the onus in applications for review in general but more so in applications where the legality of the decision of a statutory official is challenged on constitutional grounds. I do so on account of an assertion in the submissions contained in the Respondents' Counsel's heads of argument (ad paras 59 and 60). There Mr Dlamini contends as follows:

> ***" .....In Eswatini the relevant limitations clauses in relation to the rights to freedom of expession and freedom of association are conteined in sections 14 (3), 24(3) and 25(3)***

of the Constitution, and they require the person challenging the legislative measure to show that it is not reasonably justified.

To have succeeded on this basis Applicants would have needed to show firstly that the impugned sections limit the rights to freedom of expression and association as those rights have been defined in the Swazi Constitution (put differently,they do not have as of right an untrammelled freedom of expression and association); and secondly, only if such limitation is established, that the limitation is not reasonably justified"

[41] I cannot agree. It appears to me that learned Counsel misconceives and inverts the logic and principle as to the application and operation of the entrenchment in the Bill of Rights of the Constitution. Where the Applicants in asserting their constitutionally guaranteed rights allege the infringement of or interference of those rights as they do instantly, it defies logic that they would have to show that the offending actions do not fall within the permissible derogations.

[42] The proper approach is to say where there is no gainsaying that the Applicants rights to freedom of association have been hindered such as in this case, it follows that the onus of justifying that limitation or interference with the applicants rights under the limitation clause of section 25 falls on the Registrar. It is not for the Applicants to prove the negative – that would be reversal of the logic of the section and the words '.....*shall not be hindered except so far as that provision or, as the case may be, the thing done under the authority of that law is shown to be reasonably justifiable in a democratic society"*

[43] In a recently decided case uncannily the circumstances and trenchant principles as in the matter instantly, *The Attorney General of Botswana v Thutho Rammoge*[4] Kirby JP having clarified the operation of the appropriate test for application of constitutional limitations endorsed the approach that where the administrative official invokes a limitation to a protected right the onus falls upon him to prove firstly that it squarely applies to the law or action taken under that law in question; an onus that is not easily discharged on account of the narrow construction to be given such derogations. Quoting a passage from the hallmark Canadian case of *R v Oakes* succinctly addresses this question at para 74 of that judgment where he said:

"74. To discharge that onus, the Minister must first identify the social which he regards as being of sufficient importance to justify the derogation, or against the dangers of which he considers that it is sufficiently important to safeguard the rights and freedoms of others. Having identified that social ill, the action he takes to counter such social ill must be subjected to what has become known as the proportionality test, to ensure that it passes constitutional muster. That test has well been described by Dickson C.J. in the Canadian case of R v Oakes (1986) SCR 103. After holding at p. 105 D that:

> "the onus of proving that a limit on a right to freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation'

[4] *The Attorney General of Botswana v Rammoge and 19 Others* Civil Case No. MAHGB-000175-13

[44] These principles hold equally valid and true on the matter at hand and I am fortified in my confidence of the correctness and logic of that approach in the construction of the relevant provisions of the section 25 of the Constitution including its limitations and the conditions attendant thereon. The upshot of the application of this interpretative tool is that where an administrative official relies on legislation restricting the right to freedom of association and assembly the empowering provision must be given a restrictive interpretation that accords with minimal interference with those rights and meets stringent conditions.

Review on Grounds of Unreasonableness and Irrationality in relation to Section 17 of the Companies Act

[45] The crisp and primary issue to be determined on the review premised on the relief of judicial review of administrative action is this: whether the Registrar's decision is reviewable thus liable to be set aside on grounds of irrationality or for illegality.

[46] At the heart of the administrative review doctrine is the notion that there is no such thing as unfettered discretion. It is also a trite principle that the legality or lawfulness of the decision makers discretion is often the law that confers the decision making powers. Policy-making and legislation is the preserve of the elected government and Parliament respectively. It is not for the public official to surmise and determine policy.

[47] As **Lord Bingham** in ***Patrick Reyes v The Queen*** **(2002) WLR 1034 (PC)** put it:

> ***'In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what***

conduct should be treated as criminal, so as to attract penal consequences"

and further to that effect:

"In making such a decision Parliament must inevitably take a moral position in tune with what it perceives to be the public mood. It is fettered in this only by the confines of the Constitution"

Discretion

[48] In the matter presently it the above leads us to ask: what is the nature of the discretion conferred by Section 37 of the Companies Act as the enabling legislation and the purported provision relied on in the decision to refuse the Applicants registration under the Act. To determine this regard must be had to the text of the provision?

[49] Section 37 is prefaced by the title "Name of a Company". It contains generic procedural provisions for the reservation and registration of the name proposed by the promoters for the incorporation of an under that name[5]and is not exclusively dedicated for not-for-gain entities. The wording of subsection (1) is the most telling in so far as it makes it a condition that the reservation of the name of the proposed company be in the prescribed form and upon payment of a fee. It is to be read in conjunction with the following subsections as to compliance with the further conditions that no name identical or deceptively similar to a registered company or one whose reservation is pending or one whose intent is to pass off the name. Most importantly Section 37(3) with which this case is directly concerned itself also linked to the reservation of the name of the association whose incorporation is proposed as the singular focal point qualifying the section. It adverts to the Registrar's

[5] Generic on account of the procedure being of general application for trading and not for profit associations.

power to refuse the registration of a company if 'in his opinion" (the Registrar's opinion) that name is 'calculated to deceive or mislead the public or to cause annoyance or offence to any person or a class of persons or is suggestive of blasphemy or indecency"[6].

[50] From a reading of these sections in context it is apparent that the purpose of the sub-section defines the nature of the discretion conferred on the Registrar which in my view is confined or attendant on registration of a name proposed for the intended registration. The reference to the appellation 'offensive' names or names calculated to mislead, or suggestive of blasphemy or indecency is but one of considerations as to an acceptable name guiding the Registrar's discretion including misleading names or words calculated to mislead. A *eusdem generis* interpretation suggests these are all to do with the reserved name – all these attendant on intellectual property or trade name rules or criteria upon reservation and registration of a 'name'[7].

[51] By invoking this section as the foremost ground for the 'decision' communicated to the applicants in his letter it occurs to me that the Registrar totally misconceived the nature and purport of the provision and the discretion conferred thereby in the sub-section. Firstly it begs the question how, having considered and approved the name proposed for reservation, he could in a *volte face* find it objectionable and to be basis for the decision for refusal of the registration of the Applicants' association. Secondly he does so by travelling beyond and misconstruing the manifest purpose of the section of regulating the reservation and registration of a name and wrongly expands it to a perceived discretion to infer an improper inference as basis for his

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[6] The language used in the ss is reminiscent of and appears to be modeled on the wording of a short South African Act known as the Business Names Act of 1960 (sections 3,4 and 5); In particular section 37(3) of the Eswatini act is identical to the wording of section 5 of this old South African Act; similar wording is to be found in the Botswana Companies Act on reservation criteria and conditions of the latter act.

[7] Section 32(3) of the Companies Act No.13 of Botswana is worded slightly differents but to similar effect where it provides: "The Registrar may not reserve a name and no company shall be registered by a name-

(d) that in the opinion of the Registrar is calculated to mislead the public or cause offence to a person or class of persons or is suggestive of blasphemy or indecency"

adverse inference as to the intended objects of the association. This he does without so much as even a cursory reference to any of the stated objects in the purpose (objects) clause of the Memorandum and Articles of Association submitted to him. The wording of the subsection does not confer a mandate to determine or assess eligibility criteria for the registration of an association on the grounds stated in the said letter. On the contrary the sub-section makes plain that the discretion is qualified to apply to 'registration by a name'.

[51] Further there is nothing in the 2nd Respondent's letter to indicate on what wording of the reserved name he had come to infer or conclude it was 'offensive or objectionable in the sense of being designed or calculated to mislead, cause offence or being suggestive of either blasphemy or indecency – the prescribed criteria delimiting the discretion conferred by the section.

[52] What is the proverbial elephant in the room is what I see as the most fatal disclosure in the Respondent's papers which belies their true failure to abide by the behests of the statute, emerges in the content of the 2nd Respondent's own confirmatory affidavit when read against the corresponding reference to his action in the matter in the answering affidavit tendered on behalf of the First Respondent by one Mr Siboniso Nkambule, who describes himself as the Principal Secretary to the Ministry of Commerce and Trade. This disclosure is couched in paragraph 2 of the Registrar's letter where he says:

> ***'I have read the Affidavit ot the 1st Respondent and confirm its contents in so far as it relate (sic) to me <u>in particular the fact that I am the one who issued the reasons for the refusal of registration of Eswatini Sexual and Gender Minorities Association to the Applicants which decision was taken by the Ministry</u>"***

(My emphasis)

[53] Curiously in reference to the Principal Secretary's answering affidavit the 2nd Respondent makes a telling admission of consequence to this application; for he thereby confirms the Principal Secretary's own disclosure that the Ministry usurped the Registrar's powers and that the decision to refuse the registration was in fact made by the 'Ministry" and not the Registrar with the latter merely 'rubber-stamping' it by putting it under his letter-head and imprimatur. This emerges from paragraph 5 of Mr Siboniso Nkabule's answering affidavit where he states:

> ***".....I agree that the Ministry refused the registration of eSwatini Sexual and Gender Minorities on the grounds that the organisations name was declared as one that will mislead the society and its primary aim and vision seeks to promote and protect the rights and freedoms of lesbians, gay, bisexual and transgender persons in Eswatini which means if it can be registered as a section 17 company that will presuppose the legality of their organisation in terms of the law"***

[54] That the source of the decision to refuse the registration of the applicants' association was the Ministry and not the Registrar is consistent with the curious circumstance of the answering affidavit opposing the review application was tendered by the Principal Secretary. It is reasonable to infer that what informed the Registrar's ostensible reasons for refusing the application was an instruction from a person in the Ministry. From these material consequential disclosures it is clear also that the Registrar again misconceived the incidence and purpose of the discretion conferred on him by the Act by his abdication of his function to an unnamed official in the Ministry; which statutory power resides exclusively in the office of the Registrar.

[55] The power or decision whether to grant a reservation and to grant or refuse the registration of an association by a designated name under Section 37(3) lies in the Respondent alone and cannot be outsource or deferred to another person or authority. On this ground alone the said decision which was issued by and attributable on its face to the 2nd Respondent by virtue of his passing it off as his own is riven with or tainted by a gross irregularity and is on its face ultra vires the enabling Act.

A Decision as Prerequisite for Justiciability

[56] Does the fact that on the Respondent's own admission, the 'decision' to refuse the registration of the Applicant's association was escalated to and substantially made by the Ministry negate that a decision was communicated by the Registrar and held out to be his own.

[57] An insight into the principles involved may be gained from consideration of the concept of a flawed decision as basis for justicability of administrive action in judicial opinion from the following South African case law. Nugent JA in ***Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 sa 313 (SCA) , 2005 (10) BCLR 931;[2005] 3 All SA 333** at par 22 expands on the concept as follows:

> ***"[A]t the core of the definition of administrative action is the idea of action (decision) of an administrative nature taken by an public body or functionary"***

[58] Then in ***Bhugwan v JSE* Ltd 2010 3 SA 335 (GSJ)** the High Court citing the *Gamevest* decision with approval adverted to Olivier JA's remarks in that case saying:

> "the words administrative action ...emphasise the very first question to be asked and answered in any review proceedings:

what is the administrative act which is sought to e reviewed and set aside? Absent such an act, the application for review is still-born"

[59] Closer to the enquiry herein and most apposite still can be found upon return to the remarks of Olivier JA in ***Bhugwan*** in reference to Corbett CJ from one of the leading cases on the province of the administrative review remedy. Olivier JA said:

> *"What is an administrative act for the purpose of justiciability? There is no neat, ready-made definition in our case law, but in* ***Hira and Another v Booysen and Another 1992 (4) SA 69 (A) Corbett CJ at 93 A-B*** *required, for common-law review, the non-performance of a statutory duty or power; where the duty or power is essentially a decision-making one and the person or body concerned has taken a decision a review is available"*

[60] I align myself fully with these views and the principles expressed are equally valid and applicable in this jurisdiction to the relief of judicial review of administrate functionaries and justiciability of administrative actions under both the common law or section 35 of the Constitution of this country.

[61] I am also satisfied that, notwithstanding the latter-day albeit revealing disclosure or admission that the source of the decision to refuse the application emanated from the Ministry, that decision was nonetheless transmitted and issued, adopted and communicated by the Registrar to the Applicants in such unequivocal terms as a decision as his own and one which he (the Registrar) had reached. On the face of the contents of that letter he was quite firm in the determination of the outcome concluding the process.

[62] In the words of Baxter that threshold criterion whether or not a sufficiently 'ripe' action had been taken to constitute a reviewable

decision being whether prejudice had already resulted or was inevitable, irrespective of whether the action was complete or not had been crossed[8].

CONCLUSION

[63] Having said the foregoing the fact that the Registrar went about his decision-making and the action in the manner he did cannot detract from the existence of sufficient ground to place his action under scrutiny in terms of the traditional remedy or relief of judicial review. In circumstances I have referred to as to the improper exercise of the discretion in the section of the Act relied on as well as the substance of the purported reasons I find that the Respondents acted in a manner outside the parameters and mode contemplated under the Companies Act. The first respondents' assumption of power coupled with the 2nd Respondent's dereliction or abdication of a discretion conferred on him, fits into a classic illustration of the *ultra vires* doctrine in action. I can think of no clearer example of an irregularity of administrative power contrary to the letter of the enabling statute conferring it.

[64] For these reasons I find it unnecessary to venture beyond these threshold issues into the other grounds for constitutional relief as I believe the matter lends itself for determination and disposition on these foremost grounds for relief founded squarely on the remedy of judicial review of administrative action. It is also unnecessary for the above reasons to delve into and address the sought relief for the raft of declarators the Applicants pray for.

[65] On these bases alone I find that on the evidence before us, the decision to refuse the Applicants' application for registration of the association as a not-for-profit organisation (under Section 17 of the Companies Act) was reached in a grossly irregular manner, without

[8] Baxter, Administrative Law.

legal merit or basis; that irregularity rendering it *ultra vires* the Act and thus liable to be a set aside as null and void. Accordingly the following orders follow:

ORDER:

a) The decision of he 2nd Respondent of the 9th September 2021 refusing the Application for the registration of the Applicants' association is hereby set aside.

b) The 2nd Respondent is ordered to do all that is necessary to register the Applicant as a not-for- profit company in terms of Section 17 of the Companies Act; and

c) The 1st and 2nd Respondents are ordered to pay the Applicants' costs.

MAPHANGA J
JUDGE OF THE HIGH COURT.

For the applicants : **T.R Maseko from T.R Maseko Attorneys**
For the respondents: **M.E Simelane from the Attorney General Chambers**