IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 34/2022**

In the matter between:

MELUSI SIMELANE N.O. (in his capacity as a Director of Eswatini Sexual & Gender Minorities) (a company in the course of formation)	**1ST APPELLANT**
SENELE MDLULI	**2ND APPELLANT**
MBALI NOKWANDA DLAMINI	**3RD APPELLANT**
THUTHU MAGAGULA	**4TH APPELLANT**
MARY DA SILVA	**5TH APPELLANT**
SIBONGILE NXUMALO	**6TH APPELLANT**
THANDEKILE MAZIYA	**7TH APPELLANT**

And

MINISTER OF COMMERCE AND INDUSTRY	**1ST RESPONDENT**
REGISTRAR OF COMPANIES	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

Neutral Citation: *Melusi Simelane N.O. and Six others vs The Minister of Commerce Industry and Trade, The Registrar of Companies and the Attorney General (34/2022) [2022] SZSC 23 (16 June, 2023)*

CORAM: **S. P. DLAMINI JA**
M. J. DLAMINI JA
S. B. MAPHALALA JA
R. J. CLOETE AJA
L. M. SIMELANE AJA

DATE HEARD: 05 May, 2023

DATE DELIVERED: 16 June, 2023

SUMMARY: *Civil Procedure; review of decision by the Registrar of Companies to decline the registration of an association; the decision by the Registrar to refer the issue to parties not referred to in the Act that only refers to the Registrar and on the Minister being empowered to take a decision over the matter was contrary to the spirit and the letter of the Act and rendered the process legally flawed and null and void* ***ab initio*** *– Held that the purported decision by the Registrar to decline the registration of the Association is null and void* ***ab initio*** *– Held that the Appeal*

succeeds – Held that since the Registrar has already purportedly made decision over matter it is referred to the Minister to consider the application afresh and that he must advise the Appellants of his decision in 60 days – Held that the rest of the issues raised in the matter fall away – Held that no Order as to costs is made.

JUDGMENT

S. P. DLAMINI - JA

INTRODUCTION

[1] This is an Appeal against a majority judgment delivered by the High Court on 29 April 2022. After hearing the matter the High Court rendered a split judgment with two Honourable Judges finding against the Appellants and one Judge finding in their favour.

PARTIES

[2] The Appellants were Applicants and the Respondents were Respondents before the High Court. The Parties are referred to as Appellants and Respondents throughout this judgment.

FACTS AND BACKGROUND

[3] The facts and background that can be gleaned from the papers filed of record are set out herein. In April 2019, the first Appellant lodged a letter with the second Respondent to reserve the Eswatini Sexual and Gender Minorities (the Association) in accordance with Section 37 of the Companies Act No.8 of 2009 ("the Act")

[4] The second Respondent duly reserved the name of the Association. Thereafter, the first Appellant through their attorney submitted to the second Respondent the Memorandum and Articles of the Association ("Memorandum of Association") together with supporting documents in terms of Section 17 of the Act for Registration of the Association.

[5] It appears that there was some undue delay on the second Respondent in taking a decision to exercise his powers to either register or refuse to register the Association in terms of the Act. The delay was due in part that the second Respondent had referred the matter to the third Respondent for a legal opinion and to the Principal Secretary of the Ministry for advice and guidance.

[6] The second Respondent was engaged by the Attorney for the Appellants on the delay of his decision. The engagements were unsuccessful.

[7] In August 2019 the Appellants approached the High Court by way of application essentially seeking to compel the Second Respondent to make a decision regarding the registration of the Association (First Application).

FIRST APPLICATION BEFORE THE HIGH COURT

[8] The First Application was abandoned by the Appellants before it was heard by the High Court. This was due to the fact that it was overtaken by events.

Before the pleadings were closed, in September 2019 the second Respondent communicated his decision in writing to the Appellants through a letter dated 9 September 2019 ("the Registrar's letter") to their attorneys in which he declined the registration of the Association and furnished his reasons.

SECOND APPLICATION BEFORE THE HIGH COURT

[9] The application was heard and dismissed before the High Court by the majority of two against one of the Learned Judges.

[10] The Appellants were dissatisfied with the majority judgment and launched an appeal before this Court.

PROCEEDINGS BEFORE THIS COURT

[11] The Appellants initiated the proceedings before this Court through a Notice of Appeal dated 27 May 2022.

[12] The Appellants advanced nine (9) grounds of appeal in the Notice of Appeal, namely that;

> *"1. The Honourable Court a quo erred in law and in fact that the Appellants sought to create a new breed of rights which are non-existent in as much as the Appellants' rights to equality, assembly and association, expression, privacy and dignity and guaranteed in the Constitution (Para 15 of the judgment).*
>
> *2. The Honourable Court a quo erred in law and in fact in holding that the conduct of the Appellants in seeking registration was prohibited by cultural values and morality inasmuch as basic human rights and fundamental freedoms are not subsumed by subjective cultural values and morality.*
>
> *3. The Honourable Court a quo erred in law and in fact in holding that the Appellants' rights to sexual orientation is not provided for in the Constitution inasmuch as the Constitution provides for non-discrimination and equality before the law.*
>
> *4. The Court a quo erred in law and in fact in holding that the purpose of the company is limited to the conducting of a business and therefore excludes the purpose of the Appellants (Para 16 of the judgment).*

5. ***The Honourable Court a quo erred in law and in fact in holding that the objects of the Appellants' association fall outside the objects of a company (Para 62 of a judgment).***

6. ***The Honourable Court a quo erred in law and in fact in holding that the objects of the Appellants' association are to sell information relating to affectionate and erotic matters of the LGBT and therefor fall exclusively within the private realm (Para 62-68 of the judgment).***

7. ***The Honourable Court a Quo erred in law and in fact in holding that the Appellants' association was intended to be formed for unlawful purpose or reason (Para 72-74 of the judgment).***

8. ***The Honourable Court a quo erred in law and in fact in holding that the Appellants intended to commit sodomy and indecency inasmuch as the Appellants sought registration to enjoy their rights as guaranteed in the Constitution.***

9. ***The Honourable Court a quo erred in law and in fact in holding that the Appellants' rights are limited inasmuch as the Constitution guarantees the rights to equality and equal protection under the law."***

[13] The appeal is opposed by the Respondents. The Parties have filed their Heads of Argument and Bundle of Authorities.

[14] It is apposite at this juncture to state Appellants' Heads of Argument and Bundle of Authorities were accepted by this Court pursuant to an application for the Court to condone their late filing which was heard and granted by this Court.

ISSUES FALLING FOR CONSIDERATION BY THIS COURT

[15] The issues to be considered by this Court are;

15.1 Did the High Court commit any misdirection in dismissing Applicants' application to review and set aside the decision of the Registrar;

15.2 Did the Registrar's actions comply with the elements of the law?

15.3 In the event this Court's answer is in the negative to one or both 15.1 and 15.2 above, what is the remedy that the High Court ought to have granted the Appellants.

APPELLANTS' CASE

[16] The Arguments for the Appellants are largely in line with the conclusions in the minority judgment.

[17] The slight apparent departure by the Appellants from the Minority judgment is that the Court concluded that since the decision of the Registrar stood to be reviewed and set aside in terms of the common law, there was no need to venture into possible constitutional infractions. It was contended for Appellants that the constitutional infraction on their rights were relevant and that indeed Maphanga J while stating that it was not necessary to make such a determination did venture into the constitutions infractions and determined in their favour.

[18] The contention of the Appellants, therefore, is that the Registrar's decision was reviewable under both the common law and is being unconstitutional. In this regard it was submitted for the Appellants that;

18.1 the Appellants desired to associate within the parameters of the law;

18.2 the Appellants seek that the registration of their Association, ESGM, as a non-profit organization with object of protection of human rights that include the rights of lesbian, gay, bisexual, transgender and intersex persons (LEBTI);

18.3 the actions of the Registrar fell short of the elements of interpretation advocating for ***"a broad, generous and liberal interpretations"*** when it comes to sections pronouncing on human rights and freedoms and the converse ought to apply to sections that limit such rights. For this contention reliance was placed as;

ATTORNEY GENERAL V DOW [1992] BCR 119 (CA); SACOLO AND ANOTHER V SACOLO AND OTHERS (S402/16 [2019] SZHC 166 (30 AUGUST 2019); AND MHLANGA AND ANOTHER V THE COMMSSIONER OF POLICE AND OTHERS (12/08) 2008 SZSC 21 (23 MAY 2008)

18.4 the intersectional treaties are of important guidance as reliance was placed on the case of **LEGAL RESOURCES FOUNDATION V ZAMBIA COMM 211/98** (this is a decision of the African Commission on Human and People's Rights);

18.5 the Registrar abdicated his responsibilities as contained in Section 37 of the Company's Act by referring the matter the Principal Secretary and the Attorney General;

18.6 the Registrar's decision to refuse registration is irrational as he relied on the tags of promoting same –sex relations;

18.7 the ESGM objectives are not unlawful and do not encourage sodomy as concluded in the majority judgment; and

18.8 the refusal to register ESGM amounted to a violation of the fundamental rights of affected persons as enshrined in the Constitution namely; Freedom of Expression and Association, the right to dignity , the right to equality; and the prohibition against discrimination and;

18.9 there is no legitimate justification for the violation of the Appellants' rights and the Respondents failed before the High Court to discharge the onus that the limitations of the rights was justifiable.

RESPONDENTS' CASE

[19] While the Appellants favour the minority judgment, the Respondents favour the majority judgment.

[20] It was contended for the Respondents that;

20.1 the majority judgment is just and correct;

20.2 the name of association and the objectives of the Association in that the name of the association was calculated to mislead as it was not a lawful purpose in contravening Section 37;

20.3 that the constitution subjects the nation to God yet ESGM advocate for what is "***against the order of nature and their actions are traceable to the Bible; as depicted in the destruction of Sodom and Gomora by God; in the Book of Genesis***";

20.4 according to the Roman-Dutch common Law what ESGM is seeking through registration is morally unacceptable;

20.5 freedom of assembly and association in Section 25 is limited by the right of others and public interest found in Section 14(3);

20.6 the Appellants have not shown that the provisions of Section 37(3) of the Companies Act and Sections 14 (3), 24 (3) and 25(3 of the Constitution are not reasonably justified on an open and democratic society.

20.7 if there is a ***lacuna*** in the law, the appropriate organ to address such is the legislature and not the court. Therefore, the Appellants ought

not to "***use judicial craft***" to ***"legitimize gay and lesbian liaisons and such other indecent offences and create a new breed of rights which do not exist in the Constitution of the Kingdom of Eswatini";***

20.8 the Appellants advanced nine grounds of appeal. However, only one is a proper ground of appeal namely the ground on lawful purpose; and the rest are reasons for the majority judgment;

20.9 the minority judgment is fraught with a misdirection on two legal issues;

Firstly, the Court found that the refusal of registration was reviewable on the basis of being *ultra vires* in that it was taken by First Respondent yet it was not taken by Second Respondent and this had not been pleaded by the Respondent *a quo*.

Secondly, in the minority judgment the limitation clause in Section 25(3) is misstated by omitting the word ***"not"***. This resulted in shifting the burden of proof from the Appellants to the Respondent contrary to the law.

ANALYSIS AND FINDINGS

[21] At the outset, I wish to state that I fully agree with the conclusion of Maphanga J in the minority judgment regarding the Registrar's dereliction of duty. However, I respectfully disagree with how the Learned Judge proceeded with the matter after this finding. In my view the finding should have ended any further enquiry and the decision of the Registrar declared null and void ab ***initio*** as it was irretrievably and incurably tainted.

[22] The Registrar entrusted with administrative function when considering an application in terms of Section 37 of the Act.

Section 37 provides;

> ***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 60 days or much longer period, not exceeding in all 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 <u>otherwise ordered by the Minister, the Registrar shall not register</u> 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.

4) Without the consent of the Minister, no company shall be registered by a name which include the words "Commonwealth" ""crown", Government", "Royal" "Prime Minister", "State" or the combined words "United Nations" or any other word or words, abbreviation or initial which import or suggest that it enjoys or will enjoy the patronage of the King or Ngwenyama, or of the Government of any other country or of any department of any such Government or of the General Assembly of the United Nations.

(5) Where a company through inadvertence or otherwise is registered, whether originally or by reason of a change of name, by a name which would not, under the provisions of this section, be permitted to be used for the registration of a company, the Registrar within five years of the registration, may, in writing, order the company to change its name and the company shall thereupon do so within a period of six weeks from the date of the written order or such longer period as the Registrar may allow". *(my emphasis).*

[23] Clearly Section 37 only makes mention of only two functionaries where the registration of a company or an association is concerned namely; the Registrar and the Minister.

[24] Therefore, it was not legally permissible for the Registrar to either perform this function in conjunction with persons not so empowered by the Act or delegate his powers to such persons.

[25] In this regard, one does not have to look any further than what is argued for the Respondents in their papers. The Respondents state in paragraph 8 of their Heads of Arguments;

> ***"The office of the Registrar of Companies is created by the Companies Act No: 8 of 2009. That means the Registrar is only required by law to exercise the powers given to the office by the creating statute. Any actions or duties that can be exercised by the Registrar outside the provisions of the creating statute can amount to invalidity on his part."***

[26] I agree with Maphanga J. in his minority judgment that such amounted to a dereliction of duty on the part of the Registrar and in my view legally fatal to the entire process in the determination of the Appellants' application.

[27] This is more so in consideration of the fact that the two government officials that were enlisted by the Registrar are senior to him in terms of the hierarchy of the Government. The Registrar does not take the Court into confidence as to the advice and an assistance sought and /or given.

On the one hand, the Attorney General is the principal legal representative and advisor of the State. On the other hand, the Principal Secretary is the administrative head of the Ministry.

[28] This is complicated by the fact that the Attorney General whose advice was solicited and admitted by the Registrar is now representing the Registrar and the Minister in Court in defence of a process he was invited to participate in.

[29] The Registrar's qualifications are prescribed such that he is expected to be conversant with the law. Sections 4 and 5 of the Act provide that;

> ***"4. (1) There shall be an office of the Registrar consisting of the Registrar, Deputy Registrar and such other officers who shall be responsible for the administration of this Act and who shall perform such functions and exercise such powers as may be conferred on them by this Act or any other enactment.***
>
> ***(2) The Registrar shall hold at least an LLB qualification and his staff shall be appointed in accordance with the civil Service Order, 1973 or its successor thereto.***
>
> ***(3) Deputy Registrar shall hold an LL.B qualification.***
>
> ***(4) The Registrar and his staff shall be appointed by the Civil Service Commission.***

Functions of Registrar

5. The Registrar is responsible for-

(a) taking charge of and be responsible for the safe custody of all documents lodged with him under this Act;

(b) examining and registering all returns and other documents lodged with him;

(c) registering any alteration in the share capital of a company provided that such alteration is in accordance with this Act;

(d) registering amendments to the memorandum and articles of association of any company;

(e) registering the changes in the name of any company;

(f) registering all transfer of shares in respect of any company registered in Swaziland;

(g) exercising any other powers which the Minister may, by regulations, prescribe; and

(h) performing such other things that are incidental or related to the exercise of his functions." (my emphasis).

[30] In addition, Section 14 provides for Standing Advisory Committee to the Minister;

"14. (1) (a) The Minister shall appoint a standing advisory committee on company law consisting of a chairman and such ex officio and other members as he may from time to time determine.

(b) A member of the standing advisory committee shall hold office for a period not exceeding three (3) years and shall be eligible for re-appointment upon the expiration of the period of his office.

(2) The standing advisory committee may from time, to time make recommendations to the Minister in regard to any amendments to this Act and shall advise the Minister on any matter referred to it by the Minister.

(3) The standing advisory committee may call to its assistance such person or persons as it may deem necessary to assist it or to investigate matters relating to company law.

(4) The chairman shall be responsible for the administration of the standing advisory committee.

(5) The chairman of the Standing Advisory Committee shall be a person who has the qualifications of being appointed a Judge of the High Court.

(6) The other members other than the ex officio members must be persons who have experience in commerce, industry, labour and other relevant occupations.

(7) The Minister shall from time to time determine the remuneration of the chairman and of the members of the Standing Advisory Committee." *(my emphasis).*

[31] Sections 4, 5 and 14 above clearly demonstrate the intention of the legislature that the offices of the Registrar and the Minister should be properly capacitated in order to properly perform their functions under the Act.

[32] In my view the Registrar is not vested with a simple administrative function under Section 37 but with one that has judicial attributes as the case with the Advisory Panel to the Minister.

In **WIECHER ADMINISTRATIVE LAW, BUTTERWORTHS, DURBAN 1985,** the learned author states in page 123 that;

> ***"Steyn refers to a quasi-judicial discretion throughout; our courts often speak of a quasi-judicial act, function or discretion. While not wanting to appear pedantic, one must distinguish clearly here: it is impossible to speak of a quasi-discretion, since that would mean a discretion almost like that exercised by the courts or judicial bodies. A discretion that is exercised by an organ is a power to act in a certain way, taking into account the existence and nature of surrounding circumstances. The efficacy or desirability of legally permitted surrounding circumstances. The efficacy or desirability of legally permitted actions is assessed by the organ. This freedom to judge is what makes up the organ's discretion. However, in some circumstances there is nothing to distinguish the discretion exercised by the courts from the discretion exercised by other administrative organs. For example, a court's discretion to impose a sentence is in no way different in character from the discretion exercised by a minister who decides to take disciplinary action against an official. Both are options which are permitted by the law in specific circumstances.***
>
> ***What is true is that the courts have, in the exercise of their discretion or any other power, created a certain model of conduct. Thus a quasi-judicial act will be an act performed by a non-judicial organ which resembles this model of conduct of the courts. The actions of courts are ascertainable actions. The acts of other administrative bodies may therefore be validly compared with those of the courts and it may consequently be said that a certain non-judicial act resembles an act performed by a judicial body. However, because the act in question is not performed by a judicial organ, it remains a quasi-judicial act. A quasi-judicial discretion is something which is incapable of determination. A quasi-judicial act is simply an act which resembles a judicial act but is not a judicial act because the organ performing it is not a judicial organ and therefore does not perform judicial acts…"***

Even more relevant to the Registrar, the Deputy Registrar and the chairman of the Advisory Panel, the learned author states further at page 94 that;

> ***"A useful test is to examine the procedure and composition of an organ. If the procedure resembles that which is used in a judicial process and the members of the organ are schooled in the law, it may be a strong indication that the organ is performing a judicial act. However, these tests are not decisive, since a judicial administrative organ may adopt a fairly informal procedure and it may also happen that the members of an administrative tribunal have no formal legal qualifications. It is, of course, most desirable that members of such bodies should have legal qualifications, but practical considerations may stand in the way of this without necessarily altering the nature of the tribunal's acts. On the other hand, it may happen, as in the case of a commission of enquiry, that the chairman is a judge, but the commission does not thereby acquire the character of a court."***

[33] There is no evidence that the matter was referred to the Minister nor that the Minister delegated the Principal Secretary to deal with the matter. Instead, the papers of the Respondent are awash with this nebulous concept of the Ministry having something to do with matter. In this instance what does the term Ministry mean; Principal Secretary, Under Secretary or any other officer.

[34] Additionally, on the one hand the Registrar does not state in his letter which one of the objects of ESGM he found to be offensive. On the

other hand, the Registrar did not enquire if all or only some of the Appellants' existence entitled him to decline the registration. It was not denied by the Counsel for the Respondents that the issue of concern was sodomy but not all of the Appellants would be able to perform such acts even if they wanted.

The approach undertaken by the Registrar in this regard does not meet the legal requirements contained in Section 33 of the Constitution.

[35] Be that as it may, having concluded that the action of the Registrar was void ***ab initio*** and stands to be reviewed and set aside on that account and the Appellants' application to be referred to the Minister to be considered ***de novo***; the rest of issues including the constitutional aspects whether traversed or not in both the majority and the minority judgments fall away.

[36] In referring the matter to the Minister, I am persuaded by what is stated in **HOEXTER AND PENFORD, ADMINISTRATIVE LAW IN SOUTH AFRICA 3ed, JUTA 2022** (reprinted) at page 69 that;

"Context is another essential guide: the provision must be read 'in the light of the [legislation] as a whole and the circumstances attendant upon its coming into existence'. Importantly, too, the court will avoid an interpretation 'that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation'. If the provision is a mere technicality there is little point in requiring strict compliance with it, and it may be asked whether the legislature would seriously have intended invalidity to result from a breach of it. The same is true where strict application of the provision would lead to fraud or injustice. Thus in Intertrade Two the court reasoned that to interpret a particular provision as mandatory 'would render the public procurement process unworkable, would often result in unfairness, would encourage unscrupulous conduct and would without justification elevate form over substance'."

As already stated this is a matter that is highly charged with strong policy consideration. In this regard, in my view the ideal approach is to allow those whose primary responsibility is to implement policy to have the first say before Courts are involved. This is not in contradiction to the approach the contended in the Act and/or any applicable law. Hoexter et al (supra) states at the following at page 33;

"Traditional constitutional theory holds that policy-making is primarily the task of the highest –ranking political officials in government – these being Cabinet Ministers at the national level in our case, and Members of the Executive Council at the provincial level. Legislative organs give effect to that

policy by enacting legislation in accordance with the parliamentary procedures prescribed by the Constitution, and judicial bodies, the courts, resolve any disputes as to the meaning or effect of the law. The primary job of the administration, then, is to implement and administer the policy that has been translated into legislative form. In SARFU the constitutional Court confirmed that the administration is 'that part of government which is primarily concerned with the implementation of legislation', and indicated that such implementation is the hallmark of administrative action. It is by implementing legislation that the public service performs its constitutional duty loyally to execute 'the lawful policies of the government of the day'."

COSTS

[37] Normally costs follow the result. However, I am not inclined to make an order but to consider regard being heard to the issues raised and the circumstances that are giving rise to the proceedings not least of which is that Respondents' opposition was not spurious. Therefore, the parties are to shoulder their respective costs.

COURT ORDER

[38] In view of the aforegoing, the Court makes the following order that;

1. The purported decision by the Registrar to decline the registration of the Association is null and void ***ab initio;***

2. The Appeal succeeds and the impugned judgment is hereby set aside.

3. Since the Registrar has already purportedly made a decision over the matter, it is referred to the Minister to consider the Appellants' application ***de novo***;

4. The Minister must advise the Appellants of his decision in writing within 60 days of this judgment.

5. No order as to costs is made.

S. P. DLAMINI

JUSTICE OF APPEAL

I agree

M. J. DLAMINI

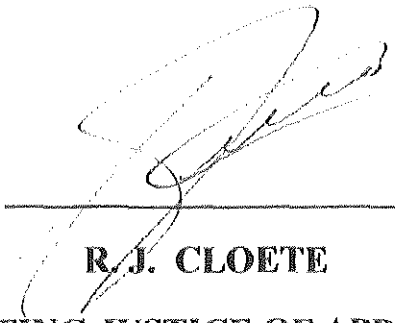
JUSTICE OF APPEAL

I agree

S. B. MAPHALALA

JUSTICE OF APPEAL

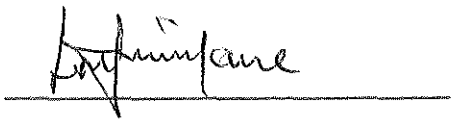
I agree



R. J. CLOETE

ACTING JUSTICE OF APPEAL

I agree



L. M. SIMELANE

ACTING JUSTICE OF APPEAL

FOR THE APPLICANT: S. M. NHLABATSI

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