

IN THE HIGH COURT OF LESOTHO

In the Application of :

SAM LILEMO PITSO Applicant

v

MALAKIA PHAKOA Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 19th day of August 1982

It is common cause that the Rev Walter Matita (hereinafter referred to as the prophet) was the founder of a religious movement that came to be known as the Moshoeshoe Berea Bible Readers Church. The prophet was born of ordinary stock in the year 1885. His parents had been allocated a site in the village of Ha Motsoene, Bethania area, in Berea district on which they built a house. On reaching manhood the prophet preached a special brand of the gospel travelling far and wide, in central and northern Lesotho and the eastern part of the Orange Free State including the land known as Qua Qua. He gained many adherents and they are now scattered in the above territories. Their total number have not been given to me and since records do not appear to be kept it is not possible to arrive at even an approximate figure. The reasons for the difficulty in estimating them will emerge during the course of this Judgment.

The prophet was married and had two daughters Marita and Maria. He had no sons.

Before his death at the age of fifty in 1935 he pointed out to his followers where he was to be buried and his rest place is said to have come to him through divine

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revelation. It was to be in the family "ash heap" some twenty or so yards from his parental home and not in the public cemetery. His own parents predeceased him! It is not very unusual, if I may say so, for Basotho families both the exalted and the humble, to bury their dead in the family yards more especially if the family home is situate in a rural area. A Chief Justice of Lesotho, the late Joas Mapetla, was buried in the family compound at Masianokehng just outside Maseru, and so was his driver, the late Joseph Melato, who was buried in a much smaller yard at his home in Thabong within Maseru reserve. Some witnesses attach significance to the prophet's choice of his resting place (the "ash heap") to propound the theory that he intended by that gesture to proclaim that place as belonging to the church he had founded and some maintain that this is supported by an inscription on one of the stones of the monument in which the prophet places his two daughters in the "trusteeship" of the church. A photocopy of a document, undated, (Exhibit A) was produced, allegedly from the archives of the church of the Koalabata faction (more about them later) that purports to cast some light on the prophet's wishes regarding his burial place, to indicate his commitment that his grave belongs to all his followers, i.e. the church, not his family. The document is not written by the prophet, but is supposed to be a report of what the prophet had allegedly expressed on the 9th March 1935, shortly before his death, to one of his disciples Libenyane Jobo. If this document is genuine, even if read with the inscriptions on some stones it is difficult for the Court to conclude, unequivocally, forty seven years after the event, that his wish was to exclude his family altogether. In any event, neither the then Basutoland Administration, or since independence, the Government of Lesotho, had officially allocated the site of the burial place to the Moshoeshoe Berea Bible Readers Church as they have done with other older missions like the Lesotho Evangelical Church, the Roman Catholic Church, the Anglican Church, etc.. though I have no doubt that the witnesses who claim either that it is purely church property or that it is purely family property hold their opinion honestly and conscientiously.

Very soon after his death the prophet's followers, then united, collected funds and built up his grave into

/a monument.

a monument. The grave is encased within a stone building and entry thereto can be gained through a door.

A major split, however, was emerging and by the end of the year 1936, it erupted and became permanent. It is common cause that the prophet appointed as his successor the Rev Matobako (since deceased) as moderator of the church. Some of the prophet's followers under the leadership of the Rev Mohono (also since deceased) felt that that was an unconstitutional nomination. They separated from the main body and went their own way. The majority are found in the Leribe district of Lesotho although some can be found in the Republic of South Africa. They kept the same name of the church but are known today as the Koalabata faction of the Moshoeshoe Berea Bible Readers Church. The Rev Mohono who gave evidence for the applicant is the son of the Rev Mohono who separated from the Rev Matobako and it was he who produced the document Exhibit A. The moderator of the Koalabata faction is now the Rev Abiah Molaba. Rev Mohono estimates the Koalabata followers at 700. He was born in 1920 and was therefore only a youth of 15 at the death of the prophet and admits that the history he gave to the Court was acquired through reading old papers or from his late father. He is now secretary general of the Koalabata faction. Those who recognised the Rev Matobako became known as the Bethania faction of the Moshoeshoe Berea Bible Readers Church. Most of the prophet's followers in the Orange Free State and Qua Qua followed the faction headed by the Rev Matobako, who subsequently to the prophet's death married into the prophet's family. I thought I heard one witness say that Rev Matobako married one of the prophet's daughters.

When the monument was completed in 1935 the key to the door was handed over to the prophet's wife Alice also known as Mamarita. Mamarita and her two daughters removed to Lindley in the eastern Orange Free State. We do not know in what year this removal took place. Both her daughters were married and lived there (as did the moderator the Rev Matobako) and the prophet's wife appears to have lived with them although she frequently visited her husband (the prophet's) monument at Ha Motsoene in Bethania accompanied by members of the congregation at

/Lindley.

Lindley. The faithful from Qua Qua and elsewhere also paid visits to the monument.

If I may digress for a moment here the parental home of the prophet which is close to the monument as I mentioned earlier fell into disrepair after his death and the removal of his wife and daughters and was described as in "ruins", but behind that ruined house and therefore at a longer distance from the monument itself a lady member of the prophet's family had (and still has) a small house in a poor state of repair. Scattered around the site today are a number of houses and rondavels mostly built or occupied by the Phakoa family. There are aloes surrounding the family site but there is a large gap from the road to the monument compound. The entrance to the door of the monument faces the ruined (but since 1981 restored as we shall see) the prophet's former parental home. The structure of the monument is perched on the edge of a shallow donga with large unbuilt open space to the rear thereof.

Neither of the two main factions (Koalabata and Bethania) appear to have had difficulties in visiting the monument (which is fenced but has an open gate) although there is a conflict in the evidence as to whether the respondent, the Rev. Malakia Phakoa's, permission was sought beforehand. I am fairly certain however that on balance of probabilities during the lifetime of the moderator the Rev Matobako it was unnecessary to seek the respondent's permission. First of all he was still in the establishment, he was a recognised priest, did not live on the site and was not the elder of the Phakoa family to have much say. I must emphasise that the key to the monument was taken by the prophet's wife Mamarita to Lindley and none of the visitors could have had automatic access to the inside. They confined themselves to praying in or around the compound.

The prophet's wife Mamarita and his two daughters are now dead, but the husband of one of them, the Rev Albert Mofokeng of Lindley is still alive. The applicant, the Rev Sam Lilemo Pitso, is a new convert and he says that the Rev Albert Mofokeng is the head and moderator of the Bethania faction comprising the faithful in the whole

of Lesotho, Qua Qua and the Orange Free State. Until recently the Rev Albert Mofokeng held the key to the monument of the prophet (at any rate after his mother-in-law Mamarita and his wife's death) allegedly "on behalf of the church" and not as a "family member" or in his "private capacity".

The respondent the Rev Malakia Phakoa describes himself as the "son" of the prophet. He is not actually a "son" properly so called. He is a son of the prophet's sister and thus his nephew. He testifies that in actual fact his mother was not lawfully married, and although he was born at Ha Motsoene in Bethania, Berea, he resided in Natal until the year 1934, when the prophet called on him to join him at Bethania and he did so. It should be noted, however, that the respondent does not seem to have held any high position in the church until January 1957 when the moderator of the Bethania faction then the Rev Matobako and the prophet's nominee appointed him as "elder and Nazareth" (see annexure A of respondent's replying affidavit) and he remained so for nearly twenty years. His house was originally within the compound of the parental home of the prophet at Ha Motsoene but it is gone though we have seen its foundations. In the 1940's he removed from the site of the prophet's parents compound and built himself a house on a plateau across a donga on the other side of Ha Motsoene, perhaps $\frac{3}{4}$ of a mile as the crow flies from the prophet's parental home. The respondent says that the "church", meaning by that Bethania faction, was allocated land for building a church, which was not in fact built to this day, but is marked by a stone, some 50 yards from his new house at the plateau. The respondent at one time was no doubt an undisputed elder and Bonazare at Ha Motsoene at Bethania. He was not, however, a moderator and did not hold the key to the monument.

In the late sixties or very early seventies two things happened within the Bethania group:

1. In Witsishoek, Qua Qua, Orange Free State, an early follower of the prophet, one the Rev Abel Lecheko, born in 1913, quarrelled with the establishment and assembled around him a group,

/which

which for convenience I shall call a congregation, and ceased to attend the establishment's meetings and services. He estimates his followers at 500.

2. In Ha Motsoene in Lesotho the respondent, the Rev Malakia Phakoa, the "son" of the prophet also quarrelled with the establishment. We do not know the reasons for the quarrel in Witsishoek but in Ha Motsoene it would seem.
 - (a) that during a visit to Lindley in 1968 the respondent was accused by the moderator, then still the Rev Arone Matobako (who it should be remembered was the prophet's choice as successor) of misappropriation of (or not remitting) church funds and his position as elder and Bonazare at Ha Motsoene was allegedly terminated. The respondent did not deny this in his evidence.
 - (b) that soon afterwards (perhaps in 1969) the Rev Phenias Makhele (also since deceased) was asked to take over the respondent's job as priest in Ha Motsoene in Berea district, but his post was at Mpolelong in Leribe district. It is said that the Rev Makhele was officially transferred to Ha Motsoene but continued to visit Mpolelong to hold religious services and otherwise administer to his flock there as well. The respondent says that the Rev Makhele was of the Koalabata faction. I find as a fact this was not so.

Even though the respondent's appointment was allegedly terminated in 1968, he nevertheless had his own followers at Ha Motsoene as I said and held services near his home at the top of the plateau. In other words he ignored the Lindley (and Qua Qua) establishment and he too started his congregation but introduced into his own services the use of a drum. He did not say how many followers he had but apart from his family members they do not appear to be numerous.

Thus, from the early seventies, we see that the Rev Abel Lecheko in Witsishoek Qua Qua and the respondent the Rev Malakia Phakoa in Ha Motsoene in Berea in Lesotho had something in common. They were both outside the establishment and had their own congregations. I suppose they regarded themselves as the genuine Bethania faction of the church and continued to use the same name. In October 1976 the Rev Abel Lecheko, who split from the main stream in Qua Qua, (now himself a moderator perhaps self styled), conferred upon the respondent the title of moderator as well. What the Rev Lecheko and the respondent appear to have done was simply to print new stationery

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retaining the old format used by the Rev Matobako but acquired a new stamp, which was somewhat different from the Rev Matobako's. The Qua Qua - Lindley faction changed the format used by Rev Matobako in a substantial manner calling it the Moshoeshe Berea Bible Readers Church of South Africa - without inserting the whereabouts of their headquarters and removing any reference to the headquarters of the church being in Bethania Lesotho and they also changed their New Testament references from Timothy I Chapter 3 Verse 16 in the old format to Mathew Chapter 10 Verses 7 to 8, Mark Chapter 6 Verse 16, and Luke Chapter 10 Verse 19. They kept however the old stamp of the Rev Matobako. The Witsishoek Qua Qua people of Bethania have a different stamp. (See text and stamp of annexure A to replying affidavit and compare the text of and stamps of annexures B1 and B2 of replying affidavit and the stamp of annexure B to answering affidavit). It is explained in evidence that each priest can have his own stamp. It is clear then that we are not talking about a well established church hierarchy with a central power base. In fact the Bethania followers, as I said, are scattered in the three territories more so than the Koalabata group who are concentrated mostly at Leribe district. From the explanation above given we see that at Ha Motsoene the Bethania faction had the Rev Makhele's congregation following the establishment of Lindley/Qua Qua and also the respondent's congregation who were supporting, at least tacitly, the Rev Lecheko's pretensions at Qua Qua. Both congregations (as well as the Koalabatas) revere the prophet's grave situate in the Phakoa family compound.

The differences between the respondent and the Rev Makhele at Ha Motsoene which started upon his transfer ended up in two legal battles primarily because the Rev Makhele wanted to hold his Sunday services at the prophet's monument and the respondent would not allow him on the ground that the site was a private family's site to which the Rev Makhele did not have automatic access. The respondent had two brothers, one of whom, the youngest Michael, took the Rev Makhele's side, and the other brother, Tahello the eldest, who took the respondent's side. One Local Court gave judgment in favour of the Rev Makhele and ordered the respondent not to interfere with church

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services at the monument and the second court case was in favour of respondent's elder brother Tahello (then the family elder) which apparently forbade the Rev Makhele to hold services there. Neither of these judgments have been produced for my perusal or inspection and the records if they did exist at all are probably lost. To compound the situation Michael and Tahello the respondent's brothers are now dead so no first hand information is really available to me. The position was obviously not satisfactory and it continued like this until the year 1979. Let me add that the respondent, though not allowing Rev Makhele's services to be conducted on the monument on Sundays, he himself did not conduct services there either but on the plateau and he did not deny access to the monument compound absolutely: - all what he wanted to establish was that his permission had to be sought on the basis that the prophet's monument is family property. The key to the inside was however at Lindley for all those years. When all the prophet's immediate family (his wife and two daughters) died, it was left with the Rev Albert Mofokeng at Lindley.

In 1979, an elderly man of the established Bethania faction resident in Witsishoek Qua Qua, the Rev Naphthali Mohale, an early companion or disciple of the prophet, and one of the original builders of the monument also had a divine revelation viz. that he should, before his death, renovate the monument at Ha Motsoene. The roof of the monument (which was of corrugated iron sheets) left much to be desired and he thought it should be replaced by proper tiles. He started a campaign to raise funds and collected over M2200 mostly, if not entirely, from the faithful in Qua Qua. He had the blessings, or so it seems, of the establishment at Lindley. The Koalabata faction resident at Leribe were not officially approached for donations nor were the Bethania faction resident in Ha Motsoene or elsewhere in Lesotho although many of them, in their personal capacities, had heard of the project, and some did make small contributions.

To assist him in the renovations the Rev Naphthali Mohale recruited for the project some of the followers of the prophet who were still alive at Qua Qua. Amongst these were two of the artisans who built the original monument, the Rev Arone Nchabeng and one Simon Maboya. The Rev

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Abel Lecheko also an early follower and companion of the prophet who it should be recollected had left or boycotted the establishment in Qua Qua and had his own congregation was given the task of keeping the books of account. The key to the monument was of course in Lindley with the Rev Albert Mofokeng but the Rev Naphthali Mohale procured the key (it matters not whether the Rev Lecheko or the Rev Nchabeng had brought it: Lecheko says the Rev Mohale did and he was with him, whilst the Rev Nchabeng says he was personally sent to get it) and the work started. It was not however continuous: the group consisting of the Rev Naphthali Mohale, the Rev Arone Nchabeng, Simon Maboya, and Rev Abel Lecheko would come down from Qua Qua, work on the monument at Ha Motsoene, then go back home for a while and then return to Ha Motsoene and so on. The Rev Mohale when in Ha Motsoene stayed at respondent's home at the plateau and the key to the monument was also left with him for there was no point of course in the Rev Mohale having to keep the key in his pocket when he and his group were travelling to and from from Qua Qua.

Two months or so before the work was completed (and it was in the late stages), the Rev Naphthali Mohale unfortunately died. This occurred in May 1981. The monument was finally completed in early July 1981. The lock to the door of the monument had to be changed in this process for some reason or the other.

An informal private ceremony for the benefit of the workers who finished the work and were about to return home to Qua Qua was held at the monument at the end of which the Rev Abel Lecheko is reported to have made a "strange speech" the upshot of which was his solemnly declaring that the key of the monument was now in possession of the respondent.

The Rev Makhele the respondent's adversary in Ha Motsoene had also died before the renovations were finished. His successor is the applicant, the Rev Sam Eilemo Pitso, a convert from Roman Catholic Church, who was baptised into the Moshoeshoe church in 1974, who was appointed by the Rev moderator Albert Mofokeng of Lindley to succeed the Rev Makhele in charge of some villages in

Lesotho, which included, inter alia, Ha Motsoene. This was in 1980. The applicant is a young man of 35 and cannot give me first hand knowledge of the prophet's wishes, but he maintains the monument is church property, and he should hold the key.

I was anxious to discover if the Bethania faction has any system of accounting but it seems they have not. Priests do not receive a fixed salary or a stipend from a central organisation. They receive, of course, offerings and donations from members of their congregations and presumably some of this may have had to be remitted to Lindley. The result is that any priest, if he feels aggrieved, can gather a group of supporters, become independent and go his own way without having to declare a split or alter or change the name of the church. All what a priest had to do is to print stationery and acquire a stamp. There were no sanctions or discipline attached and certainly no ex-communication. The priest made his living from offerings by those who support him. The Rev Lecheko and the respondent did just that and unless some order is achieved splinter groups will in due course mushroom.

The key to the renovated monument having been given to the respondent by the Rev Lecheko in July 1981 brought about extremely bad feelings from those who continued to owe allegiance or received their appointments from Lindley. The applicant, the Rev Pitso, attempted in December 1981, to patch up the differences in the church of Moshoeshoe and he approached the Koalabata faction, who were responsive to a dialogue on unification, and he also approached the respondent, who ignored the invitation entirely and charged the others of impeding the work of "Gods elect" (see annexure D of founding affidavit) presumably himself. In the meantime the respondent was organising an official opening of the renovated monument to coincide with Good Friday 9th April 1982, the holiest day in the Moshoeshoe church calendar, which also happened to be the anniversary of the death of the prophet. The respondent publicised the proposed opening ceremony in the press, over the radio, invited some members of the Government and the Principal Chief of Berea. This was done in his capacity as "son"

of the prophet and current head of the Phakoa family.

An urgent ex-parte application was launched on the 8th April 1982 by the applicant Rev Pitso who averred that he was a member of the Moshoeshoe Berea Bible Readers church and since he was the chairman of the committee that governs its affairs he is entitled to bring the application. As we have seen from the history of this church which I have endeavoured to outline the matter was not as simple, with respect, as the applicant had originally put it in his founding affidavit. I do accept, however, that he does represent somebody of the Bethania followers of the church in Lesotho. His complaint is that the respondent is now attempting to undermine the whole established Bethania facade by stealing the limelight of the renovated monument (and hence no doubt offerings and donations for his own aggrandisement) in Lesotho, Qua Qua and the Orange Free State. If this was the case, the proper applicant, as I see it, should have been the Rev Moderator Albert Mofokong of Lindley the person who was, on the face of things, despoiled of the key to the monument. From him however we have no affidavit, and more importantly, although I have given leave to both parties to call witnesses for viva voce evidence, made no appearance at all. The Rev Pitso sought the following, or other alternative relief:

- "(1) Interdicting and restraining the respondent from holding any opening ceremony on the Monument of the late Reverend Walter Matlita Phakoa at Motsoane's Village, Bethania Berea on the 9th April, 1982.
- (2) Directing the respondent to return the key of the monument to the applicant.
- (3) That a rule nisi do hereby issue calling upon the respondent to appear and show cause if any, to this Honourable Court on the 4th day of May, 1982 at 10.00 a.m in the forenoon or as soon as the matter may be heard why the respondent should not stop interfering with the MOSHESH BEREAN READERS CHURCH and that the interdict against the respondent be confirmed and made absolute.
- (4) Directing the respondent to pay the costs of this application."

A rule nisi was issued with an immediate interdict only in respect of prayer 1. That interdict on respondent was not, however obeyed and the ceremony proceeded as

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scheduled. No action by applicant has been made to commit the respondent for contempt. The respondent, however, swore that he did not intend to defy the Court's order, and that he was served with the papers on the evening of the 8th April but did not understand, or did not appreciate, their purport. His stand is that this monument is the grave "of his father" the prophet, it is on "a family plot", it is "private property", and does not "belong to the church" although, with his permission only, members may have access. The key should by right be with him as the family elder. The applicant maintains it is church property, but which group of it? The key has thus become a symbol of the right to possession. The respondent soon after, or during the period that the monument was being renovated, caused repairs to be made to the ruins of the prophet's parental home and there now stands a brand new well painted structure only a few yards away from the entrance to the monument and both front doors face each other. The allegation is that the respondent by this manoeuvre wanted to put the whole church under a fait accompli because with this newly renovated premises access is bound to cause more disturbance to occupants than previously was the case.

The Principal Chief of Berea, Chief Leshoboro Majara, gave evidence. Whilst he concedes that the plot was originally allocated as a site to the prophet's parents, after the prophet's death and burial therein, it became, church property. But we have seen that there was no formal allocation of the plot as such by any organ of the administration or the Government. Chief Leshoboro was born in 1914 and in 1935, as a young man on home vacation from a school in Cape Town, he testifies that he represented his sick father at the laying of the foundation stone to the first monument. There is an inscribed stone to this effect. He recollects that even from that early date everyone regarded the monument as belonging to the church in spite of its proximity to the parental house of the prophet. Chief Leshoboro is not the only person, apart from the applicant, who testifies that his understanding was that the monument belongs to the church with all its factions. So does the Rev Mohono

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from the Koalabata faction, and the Rev Arone Nchabeng from Witsishoek Qua Qua. The Rev Abel Lecheko, born in 1913, however, testifies otherwise. He too was a companion of the prophet. I asked him, how, if the key was actually fetched from the Rev moderator Mofokeng at Lindley for the renovations, it should be handed to the respondent who never held it at all since the death of the prophet. His reply was that he was doing no more than following the instructions of the Rev Naphthali Mohale who left the key with the respondent during the renovations. Now I do not think that this was a forthright or candid answer because firstly the Rev Naphthali Mohale is dead and this assertion cannot be checked and secondly because for many years since the early seventies the Rev Lecheko in Witsishoek Qua Qua and the respondent in Ha Motsoene in Lesotho have ceased to recognise the leadership either at Lindley or Witsishoek. Both have an interest and therefore an axe to grind.

The Court cannot of course resolve the dispute once and for all. It is incapable of resolution on a permanent basis. These are my findings on facts :-

1. The applicant himself has not been able to make out a case for an order that the key of the monument (now with the respondent) be handed over to him personally.
2. The expense of renovations of the monument was borne, by and large, by members of the establishment of the Bethania faction resident in Qua Qua. The applicant, the respondent, and the Koalabata faction in Lesotho have not contributed any sums of real substance to the project.
3. - The site on which the monument was built was originally allocated as a residential site to the prophet's parents, but nevertheless after the prophet's death and his recognition as a founder of a christian sect with many followers, his burial place, ought to belong to the Moshoeshoe church as a whole and not privately or exclusively to the family. As far as one can ascertain the prophet's feeling, I think that on balance of probabilities he intended to bequeath his grave to the church he founded.
4. It is not however the function of the Court to make an allocation of land or to regularise or to alter a previous allocation or to excise

a portion thereof. This is an administrative function which can be done, and always could have been done, under the land laws of Lesotho.

5. The church is divided and it may be the administrative or Government authorities are in difficulty over the problem.
6. Until unity is achieved or there is an agreed settlement of the various factions about the key, I can only make interim orders to prevent or minimize friction or violence with two objects in view: firstly that the faithful of all factions must have at certain times unimpeded access, and secondly that such access should cause the minimum of disturbance to the Phakoa family living nearby. Therefore :
 - (a) No group, of whatever faction, including the respondent's, will hold church services or assemble congregations at the monument or in its compound on Sundays or at any other day except on the following dates when all members of the church will have free, unrestricted, and unimpeded access without anyone's permission and no fees will be charged:
 - (i) the 24th, 25th and 26th December (between the hours of 7 a.m. and 7 p.m.) of the year coinciding with the Christmas festivities (3 days).
 - (ii) the Thursday before Easter, Good Friday, the following day Saturday, Easter Sunday and Easter Monday (between 7 a.m. and 6 p.m.) whenever these holy days fall in any calendar year (5 days).
 - (b) Visitors not exceeding four in number may visit the monument's compound on other days during the year (between 7 a.m. and 5 p.m.) but only with the permission of the Phakoa family resident at the site such permission not to be unreasonably withheld. Since there are many members of the family with homes near the site, and since the respondent lives on the plateau some distance away the family should agree on the name of the person or persons whose permission is to be sought before hand. The name of the person or persons should be given to the local headman at Ha Motsoene and to the Principal Chief.
 - (c) The key to the monument, in the absence of a person with a better title, will remain for the time being with the respondent, who will act as a trustee for the whole church and not anyone's faction or congregation thereof including his own and will open the monument and make it available to worshippers as

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directed in (a)(1) and (11) above.

- (d) Any abuse by respondent of his privilege as interim trustee will entitle an aggrieved person or a group to approach the Court for variation of this order.
- (e) Each party to pay its own costs.

CHIEF JUSTICE
19th August, 1982

For Applicant: Mr. Mlonzi

For Respondent: Mr. Matsau