

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MOPHATO OA MORIJA

Applicant

and

LESOTHO EVANGELICAL CHURCH  
REGISTRAR - GENERAL

1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent

JUDGEMENT

Delivered by the Hon. Justice S. N. Peete  
on the 27<sup>th</sup> January 2000.

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On the 14<sup>th</sup> day of January 1998, an urgent application was moved ex parte before Lehohla J. in which the Applicant sought an interim order coached in the following terms -

- “1. That Rule Nisi issue returnable on the date and time to be determined by the Honourable Court, calling upon the Respondents to show cause (if any) why-
  - (a) 1<sup>st</sup> Respondent shall not be interdicted forthwith from implementing the amendments and or alterations to the Constitution of the MOPHATO OA MORIJA passed by the General Conference of 1<sup>st</sup> Respondent in its meeting of the 27<sup>th</sup> - 28<sup>th</sup> November, 1997 pending

the outcome hereof;

- (b) The First Respondent shall not be interdicted forthwith from in any manner interfering with the administration of the Applicant herein pending the outcome hereof;
- (c) The 2<sup>nd</sup> Respondent shall not be interdicted forthwith from registering the constitution of MOPHATO OA MORIJA passed by the General Conference of the 1<sup>st</sup> Respondent in its meeting of the 27th-28th November, 1997 pending the outcome hereof;
- (d) The Constitution purporting to be the Constitution of MOPHATO OA MORIJA passed by the General Conference of the 1<sup>st</sup> Respondent in its meeting of the 27th-28th November, 1997, shall not be declared null and void of no legal force or effect;
- (e) 1<sup>st</sup> Respondent shall not be directed to observe and respect the independence of the Applicant herein as an ecumenical centre;
- (f) The normal forms and service provided for by the Rules of Court shall not be dispensed with on account of urgency;
- (g) The 1<sup>st</sup> Respondent shall not be directed to pay costs hereof at an attorney and client scale;
- (h) Applicant shall not be granted further and or alternative relief as this Honourable Court deems fit.

2. That prayers 1 (a), (b), (c) and (f) operate as an interim order with immediate effect.”

An interim order was duly made by the learned Judge upon the prayers as sought and made returnable on the 9<sup>th</sup> February, 1998 and has been extended from time to time as the proceedings went on.

I was informed that the court file in this application had probably burned along with other files when the Registry was incinerated during the political riots and looting on the 22<sup>nd</sup> September 1998. The counsel for both sides have kindly constructed a dummy court record from their own files. The Court appreciates this.

The record reveals that the 1<sup>st</sup> Respondent then filed his notice of intention to oppose along with his answering affidavit to which were annexed several documents. The Applicant filed replying affidavits dated 6<sup>th</sup> June, 1998.

On the 23<sup>rd</sup> October 1998 when the matter had to be argued before me Ms Thabane for the 1<sup>st</sup> Respondent filed an urgent application that the 1<sup>st</sup> Respondent be allowed to file further affidavit(s) in response to new facts or allegations raised in the Applicant's replying affidavits. In her affidavit in support of the application, Ms Thabane avers that "It had not been the applicant's case that the 1<sup>st</sup> Respondent's Executive Committee had authorized the registration of Annexure "MM2" as implied in paragraph 5 of Kabeli's (affidavit) nor was the then Executive Committee of Applicant aware of the registration."

She also prayed for a postponement on the ground that her prospective witness, a Mr Tente, was then out of the country on 1<sup>st</sup> Respondent's business in Nairobi, Kenya. Mr Mohau for the Applicant in reply contended that the filing of further affidavit should be refused because the registration (and legality thereof) of MM2 (Applicant's registered constitution) is not being challenged and hence will remain lawful until set aside by the court upon a formal application (or counterclaim) being made by the 1<sup>st</sup> Respondent. It appeared during argument

that a counter application (CIV/APN/301/98) was made but I have no papers in support of such. On the issue of filing further affidavits, our Rule 8 (12) states:-

“No further affidavit may be filed by any party unless the court in its discretion permits further affidavits to be filed”.

Erasmus - Superior Court Practice (Juta) - submits that the court will exercise this discretion against the backdrop of the fundamental consideration that a matter should be adjudicated upon all facts relevant to the issues in dispute (Bader v Westen, 1967 (1) SA 134; Dawood vs Mahomed, 1979 (2) SA 361) and that some flexibility should be permitted in the interests of the administration of justice. It is essentially a question of fairness to both sides as to whether further affidavits should be allowed (Milne vs Fabric House (Pty) Ltd 1957 (3) SA 63); another consideration, in my view, should be whether the permitting of further affidavit will obviate the need to call oral evidence under Rule 8 (14).

In the present application, the dispute arises as to the manner and circumstances under which (MM2) the constitution of the applicant was registered and the legality thereof; I am of the view that the affidavit of Mr Tente may be relevant to that issue and that the Applicant will suffer no material prejudice in that he will also be entitled to counter - reply the further affidavit. I have not been shown any mala fides or culpable remissness on the part of the 1<sup>st</sup> Respondent and after hearing argument on the 23<sup>rd</sup> October 1998 I permitted the affidavit of Mr Tente to<sup>be</sup> filed and also ordered that costs of the day be awarded to the respondent to remedy any possible prejudice.

## Main Application

The fundamental issue in this application is whether the 1<sup>st</sup> Respondent the Lesotho Evangelical Church is entitled to amend or alter the constitution of the Applicant “Mophato oa Morija” and be the ultimate controller of the affairs of the Applicant. It is important to give a brief historical survey of the Applicant in this whole context.

The Lesotho Evangelical Church -the First Respondent - is said to be - and this is not in dispute - a religious body corporate with capacity to sue and to be sued in its own name and is registered in terms of the Societies Act. I am not going to go into deeper annals of the 1<sup>st</sup> Respondent except to say that it is an evangelical church which began its missionary work in Lesotho in 1833 during the days of King Moshoeshoe I. It has to-day grown to be one of the biggest churches in Lesotho and it is alleged that it has a Constitution called Law of the Church; it has a supreme governing body (the Synod), the Executive Committee and other organs of administration. There are other institutions which have been established by the 1<sup>st</sup> Respondent and in this application, the 1<sup>st</sup> Respondent maintains that the Applicant is the “Morija Ecumenical Centre established by the Lesotho Evangelical Church in 1956 through assistance of other churches, Christian associations and friendly countries overseas.” It regards the applicant as one of its organs or institutions under its control.

In his founding affidavit, Elisha Nkoka, a chairman of the Applicant, having been duly authorized by a Resolution of the Executive Committee of the Applicant held at Sefika High School on 10<sup>th</sup> December 1997, states that the Applicant “Mophato oa Morija” is an independent organization and an ecumenical body which works in collaboration with the Lesotho Evangelical Church and is also open to other youth movements of other church denominations. According to (MM2) the constitution registered at the Law Office on the 9<sup>th</sup> January 1969 -

“6. The Mophato oa Morija has the following characteristics: It is

- (a) an association of youth leaders and Sunday school teachers;
- (b) the headquarters of the youth movements;
- (c) a training centre for the leaders;
- (d) a research station for all affairs pertaining to the youth;
- (e) a centre where young people may get to know each other, help one another and together prepare themselves for their service.”

What is of importance however is the respective powers of the General Assembly of the Applicant and the powers of the Synod of the 1<sup>st</sup> Respondent regarding the amendment of the Applicant’s constitution. “MM2” paragraph IX reads :

**“Alterations and Amendments to the Constitution**

The Constitution can be altered or amended by a special General Assembly

1. Alterations and amendments to the Constitution shall be passed by a three quarters (3/4) majority of the presentees at the General Assembly wherein they are moved
2. The laws appearing in this constitution cannot be discussed unless two thirds (2/3) of the members of the General Assembly are present

3. Administrative laws shall be altered or amended provided the General Assembly passes them by a majority of half ( $\frac{1}{2}$ ) or over half of the presentees.”

When the Constitution of Applicant “MM2” was registered Mr V. Tente appears as being a vice-chairman and Rev. J. Nyabela as being a member of the Executive Committee. Also annexed to the affidavit is MM3 which relates to amendment procedure. It reads as follows:

**MOPHATO OA MORIJA - ECUMENICAL YOUTH CENTRE  
CONSTITUTION.**

**XII AMENDMENT.**

1. These laws with the exception of those set out under NO.4 may be amended by a Special General Assembly of Mophato.
2. The Constitution may be amended by a three quarters ( $\frac{3}{4}$ ) majority of those present at the General Assembly wherein such amendments are moved.
3. These laws cannot be discussed unless two-thirds ( $\frac{2}{3}$ ) of the members of the Assembly are present. The notice of such an assembly should be issued at least two months before the holding of such an assembly.
4. The Constitution, No.XI (property), and the Regulation No. V, 5 (appointment of youth organizer) may be amended by the Lesotho Evangelical Church only after consultation with the Executive Committee of Mophato.

5. Regulations may be amended by a majority of more than half (½) of those present at the General Assembly.”

To the answering affidavit of Reverend Tseliso Silase Lentsoenyane, the Executive Secretary of the 1<sup>st</sup> Respondent is attached LEC I - The Law Book of the Lesotho Evangelical Church. This Law Book also contains what is termed the Constitution of the Morija Ecumenical Youth Centre and in affirming that the Morija Ecumenical Youth Centre was established by the Lesotho Evangelical Church through the assistance of other churches and Christian organizations, it also states that:

- “5. Morija Ecumenical Youth Centre is autonomous at the same time guarding the interests and religious affiliations of its members.”

It is the 1<sup>st</sup> Respondent’s case that the applicant has always been regarded as being one of the 1<sup>st</sup> Respondent’s organs and institutions and hence it is not an independent or ecumenical institution but that the applicant is also part and parcel of the church and as an institution it has voting rights at the Seboka (Synod). The first respondent contends that if it were an independent institution, it could enjoy only an “observer” status with no voting rights. This has not been denied by the Applicant.

In the founding affidavit of the Applicant, it is alleged that at a Special meeting of the Synod of the 27-28 November, 1997, the 1<sup>st</sup> Respondent “purported to amend and/or repeal the entire constitution of the Applicant and discarded its present organizational structure and manner of administration. The purported amended constitution is attached ... and marked “MM4”, and in terms of MM4 the Applicant is now to be administered by a Board of Governors appointed by the 1<sup>st</sup> Respondent’s Executive Committee.



This being an application, oral evidence could only be allowed by the court under Rule 8 (14) with a view to ensuring a just and expeditious decision. In the exercise of my discretion I therefore granted leave to the applicant and respondent to subpoena certain officials in their respective constituencies give evidence on the pertinent issues raised by the papers before court. These were:

- (a) The authority of the Synod, if any, over the Mophato in the amendment process of the Constitution of Mophato.
- (b) The true position of MM2 Constitution registered at the Law Office on the 9<sup>th</sup> January 1969.
- (c) The validity of the Constitution for Mophato oa Morija (MM4) made by the Special Synod Meeting of the 27-28th November 1997.
- (d) Other related issues.

Mr James Masitha Tente gave oral evidence on behalf of the first respondent, and I will refer to the salient features of his lengthy testimony. He informed the court that he is a devout member of the Lesotho Evangelical Church and also one of the founding fathers of the Mophato oa Morija which he aptly described as “a baby and creature” of the mother church, the first respondent. He told the court that the Mophato oa Morija, the present applicant, was founded in 1956 and he has been a member of the applicant since then till 1969 during which period he was also a member of the Executive Committee of the Applicant. He described the status of the applicant as being an autonomous one but one subject to the ultimate direction and supervision by the Synod (Seboka) which was the supreme governing body of the Lesotho Evangelical Church. This supreme authority was vested in the Synod

by sections 24 and 139 of the main Constitution of the Church. According to him the Synod had power to review and amend, if necessary, any laws governing the institutions of the church and the applicant was one of these.

Regarding the registered constitution "MM2", Mr Tente expressed ignorance about its existence and registration and stated that it had not been blessed and allowed by the Synod. He told the court that in 1969, the then cordial relations between the Synod and the applicant became very strained and tensed. This was caused by a controversy over the issue whether Mr Abia Moletsane, the applicant's favourite, was to hold the office of Youth Organiser or Reverend Maraisane who was preferred by the Synod. It is clear from the Mophato Minutes of the 14th-16th March 1969 that the first respondent through the Sibolla delegation succeeded to assert its authority over the applicant whose committees were then disbanded. This was on the 3<sup>rd</sup> January 1970. Rev. Sibolla is reported to have declared to those present that the constitution of the Applicant embodied in the Green Book was a mere draft because it had not been approved and blessed by the Synod of the first respondent.

Under cross-examination by Mr Mohau for applicant, Mr Tente was emphatic and insisted that though autonomous in running its affairs, the applicant was still under the ultimate control of the Synod. According to him and since the Sibolla declaration, the applicant had no constitution but a draft as contained in the Green Book; he stated that the situation was normalised when the Synod finally approved and passed a new constitution for the Applicant in November 1997. Mr Mohau then referred him to the clause XII of the draft constitution whose fair translation would read:

“XII Amendment to Regulations

1. The regulations, except those under 4 below, may be amended by a special meeting of the Board of Mophato;
2. The Constitutions may only be amended by a 3/4 majority.
3. These regulations may only be discussed when 3/4 of the members are present. The invitations to this meeting should be sent at least 2 months before the meeting.
4. Constitution, No. XI dealing with Property, standing Order No.5 dealing with section of Administrator may be amended only by the Lesotho Evangelical Church after consultation with the committee of the Mophato.”
5. The Standing Orders may be amended by over half of the members present.”

and put it to him that the Synod had no authority whatsoever to alter, re-write or amend the Mophato Constitution and that only the General Conference of the Mophato enjoyed this prerogative under clause XII and that the first respondent could only amend or vary the provisions dealing with property and the selection of the Youth Organizer. To this Mr Tente responded by saying that the clause XII was part of a draft constitution which did not bind the Synod; the Synod, he went on, had ultimate authority to vary and amend even this clause.

He explained that the new Constitution MM4 approved by the Synod was the result of the work done by the Law Commission which was a body constituted by the Synod to deal with all matters legal within the Church. According to Mr Tente, proper consultations had taken place during which the Mophato even submitted its own submissions; he referred to the letter written by Mr A.S. Buti dated 15 September 1997. Its fair translation reads:-

“15<sup>th</sup> September 1997.

Executive Secretary,  
Lesotho Evangelical Church,  
P.O. Box 260,  
MASERU 100

Sir,

Greetings. It is now about two years since the General Conference of Mophato submitted amendments to the constitution and regulations of the Mophato oa Morija.

I hereby send to you the relevant copies in order that the Law Commission may examine the same so that the Synod may discuss them at its next sitting on the 28<sup>th</sup> September 1997.

I have been directed by the Executive Committee of the Mophato to send you these legal documents.

Peace,

Yours,

A.S. BUTI  
Youth Organizer.”

Mr Mohau then handed in from the bar a document ID “A” which seems to be the proposed amendments from the Mophato; and also handed from the bar by Ms Thabane was a document ID “B” which contained the proposals from the Law Commission. I may here interpolate and observe that the proposals in ID “B” were quite radical and indeed remove any vestige of autonomy the Mophato had hithertofore enjoyed; Mophato was to be placed under the control of a Board of Governors who are directly accountable to the Synod. In maintaining that proper consultation had taken place before this new constitution (MM4)

was approved by the Synod on the 28<sup>th</sup> November 1997, Mr Tente described the consultation procedure within the Church: the affected institution was entitled to forward its proposals to the Synod through the Executive Committee of the Synod; the Law Commission was free to communicate with the affected institution if it so wished. He stated that he did not know if the Law Commission had ever met with the Executive Committee of the Mophato before presenting its constitutional proposals to the Synod. He refuted the applicant's assertion that the November 1997 constitution was a nullity or passed **ultra vires**. Mr Tente went on to state that prior to the approval of the new constitution, the Synod and the Mophato had been using the so-called draft constitution in the Green Book since 1970. He goes further to state that the constitution (MM2) registered in 1969 is unknown to him; indeed he described it as a fraudulent document which had clandestinely been registered without the approval of the Church.

It seems correct to hold that in 1997 the Law Commission had decided that the Mophato or Morija was now getting out of control and the church was unable to exercise any measure of control over the Mophato which in its ecumenical path had permitted other churches to participate in its administration. The Mophato had to be brought to order and the only way feasible was to bring about drastic change to the provisions in the draft constitution. The provisions of the draft constitution embodied in the Constitution of the Church LEC I which had to be revised are the following:

- “5. Morija Ecumenical Youth Centre is autonomous, at the same time guarding the interests and religious affiliations of its members”

and XII Amendment to Regulations reads thus:-

- “1 These regulations, except those under 4 below, may be amended by a special meeting of the Board of Mophato;
2. The Constitution may only be amended by a 3/4 majority.
3. These regulations may only be discussed when 3/4 of the members are present. The invitations to this meeting should be sent at least 2 months before the meeting.
4. Constitution, No.XI dealing with Property, standing Order No.5 dealing with section of Administrator may be amended only by the Lesotho Evangelical Church after consultation with the committee of the Mophato.”
5. The Standing Orders may be amended by over half of the members present”

## XI. Property

1. The site of Morija Ecumenical Youth Centre together with the buildings and property belong to Lesotho Evangelical Church except property of a particular association.
2. Lesotho Evangelical Church together with associations mentioned in (1) places all property in the Council of the Centre to use it in the execution of the purpose of the Centre.”

Next called was Reverend Aaron Thebe who is a priest in the Lesotho Evangelical Church since 1976. He is also chairman of the Law Commission since 1997. He told the court that in April 1997 the Law Commission was instructed to look into the problems facing the Parish of Gauteng and the Mophato oa Morija. On the 30<sup>th</sup> April 1997 the Law Commission presented before the General Synod a proposal that a new constitution for Mophato oa Morija - Morija Ecumenical Centre - be drafted. In their report ID “C” it was categorically noted that Mophato oa Morija is one of the major institutions of the Church but it was evident that the Mophato seemed to be operating independently under the Mophato constitution as it stood and that the Mophato was also operating in collaboration with other

churches or denominations. The Commission then recommended that this constitution be altered to restore the authority of the Church over the Mophato. This was also confirmed in the Report of the Law Commission to the Special Meeting of the Synod of November 1997. In brief this Report contained several proposals for drastic amendments of the Mophato Constitution; these constitutional proposals were the subject of the crucial discussions of the Synod meeting of the 28<sup>th</sup> November 1997. Reverend Thebe states that these proposals were circulated in advance to the members of the Synod as required by the procedures and states that Mr A.S. Buti as member of the Synod and the Mophato Youth Organiser were also supplied with copies. He explains that the Mophato suggestions had previously been transmitted to the Law Commission but most of these had been rejected by the Commission's Executive Board. The Law Commission had then prepared a final draft for the new Mophato Constitution for consideration by the Synod "ID B". According to Rev. Thebe the so-called constitution of Mophato was but a draft and this had been made clear to the Mophato Executive Committee as far back as 1969 when Rev. Sibolla and his Executive Committee had dissolved the then General Assembly of Mophato and its committees. In its Report to the Synod, the Law Commission notes its grave concerns about the existing constitution of the Mophato and that the Synod of the Church was being sidelined and ignored by the Mophato in the running of its affairs and that the Synod no longer exercised direct control over Mophato, as one of main institutions of the church and that the Mophato was now collaborating with other churches in the general administration of the Centre and was describing itself as "Lesotho Ecumenical Youth Centre." The Law Commission proposed that the Mophato be controlled and administered by the Synod through its Executive Committee like was the case with other institutions. The Synod, he says, did not welcome the ecumenical route being followed by the Mophato.

According to Reverend Thebe when the Synod ultimately sat on the 27<sup>th</sup> November 1997, the Mophato had no legal constitution but a draft document (Green Book - page 41) and which

was not binding in its entirety on the Synod. He informed the court that the proposals of the Law Commission were duly present before the special Synod Meeting which Mr A.S. Buti also attended as Mophato Youth Organiser and the Synod member. The minutes of the Synod meeting ID "D" indicate that each proposal was voted upon separately and won approval of the Synod. This gave birth to the New Mophato Constitution "MM4."

It came out in evidence that the Synod of the Lesotho Evangelical Church has a total membership of 114. Now Section 30 of the main Church Constitution reads:-

**“(a) Quorum**

30. Hore e tle e be Seboka se phuthehile e ka khona e be bonyane karolo tse peli ho tharo (2/3) tsa litho li teng. Ha ho buuoang litaba tse amang molao, qeto e ka etsoa ha halofo (1/2) ea litho e le teng.
31. Phetolo ea melao  
Ho ke ke ha buuoang ka melao ea kereke ea Evangeli Lesotho ha e se ha bonyane karolo tse peli ho tse tharo (2/3) tsa litho tsohle tsa Seboka li phuthehile.
32. Melao ea motheo e ka fetoloa ha likarolo tse tharo ho tse 'ne (3/4) tsa litho tse leng teng mohla e buuoang li rera joalo.

Fair Translation:

**(a) Quorum**

30. For the quorum of the Synod to be constituted at least two thirds (2/3) of the general membership must be present. When dealing with all matters legal, decision shall only be made if half (1/2) of the membership is present.
- (b) Amendment of the Law.



31. There shall be no discussion of the laws of the Lesotho Evangelical Church unless two thirds  $2/3$  of the membership of the Synod are present.
32. Constitutions can only be altered only when three quarters ( $3/4$ ) of the Synod are present during the discussion.”

Now assuming that the total membership of the Synod stands at 114,  $3/4$  of this number is 84 and  $2/3$  thereof is 76. Sections 32 and 31 are very important provisions in the constitution of the Church because they requires specific majorities in the amendment process of its Constitutions of the Church.. I am of the view therefore that the November meeting of the Synod had to observe the mandatory provisions of this section. From the Minutes of the Synod ID “D” exhibited before this court, it is noted that at 8:00 am the counting showed the quorum of 76 to be present. It is not clear whether the requisite quorum of 84 was present. The inspection of the minutes indicate that when the constitutional proposals of the Law Commission were being voted upon an average only 60 or 70 people were present and voting. This was below the requisite majority or **quorum**. It is therefore clear that section 32 of the Church constitution was not complied with and this affects the essential validity of the new Mophato Constitution. It is my view that the Secretary of the Synod ought to have assured that the proper quorum of 84 was maintained throughout the discussions and voting. During cross examination Reverend Thebe explained that on the morning of the 27<sup>th</sup> November 1997 a head-count showed that 83 members of the Synod were present and not 84, and he specifically stated that on the 28<sup>th</sup> November 1997, there was no head-count. There is indeed no convincing evidence that there was sufficient quorum when new constitution for the Mophato was purportedly passed by the Synod.

It is my view that the issue of quorum is both one of law and of fact. The constitution of an

institution may determine the number of members thereof which shall form a quorum before a valid decision or resolution may be taken; the numerical count on the other is a question purely one of fact. There is in my view either a quorum or no quorum. This cannot be assumed or estimated and it is the duty of the Secretary or Chairman of the meeting to ensure that the quorum is maintained at all crucial stages of the proceedings especially at the voting stages.

In my view, where a constitution confers powers on a specific majority present at a meeting, then unless the requisite number be present at the meeting, the powers in question cannot validly be exercised. (**Gerard Ramoreboli & others vs Ntsu Mokhehle & others** - 1991 -96 LLR 927 at 935; Arthur Lewin - The Law, Procedure and Conduct of Meetings in South Africa (4 Ed) Page 18). Although it may be true that whereas all members of the Synod had been summoned to the Special Constitutional Meeting, the numerical figures indicate that the requisite quorum was not maintained through out the voting process. (See also **Monyane & others vs Lesotho Bank** - CIV/APN/278/99 - Ruling on a Point of Law by Kheola C. J. p.6 where he says:-

“there was no quorum because only three directors took that resolution. It cannot be legally binding inasmuch as it was taken in breach of the statute governing the procedures of the respondent”.

According to Rev. Thebe, the draft constitution of the Mophato was only recognised as such by the Synod which considered itself as not bound by its provisions; it is however clear that the Synod sometimes invoked the provisions of the draft constitution as it did in its April sitting in 1990 (ID “E”). It is quite clear that when the Synod sat in November 1997 its relations with the Mophato were not cordial and the Synod had decided to bring the Mophato to order and curb its autonomous tendencies. The root of the controversy lay at the ecumenical philosophy of the Mophato which was also describing itself as “Lesotho

Ecumenical Youth Centre” and not “Morija Ecumenical Youth Centre.” It can be noted that in its constitution registered at the Law Office in 1969, the Mophato is described as “an independent organization respecting the rules and regulations of the Churches affiliated to it and those of the world-wide youth movements (Art 5); and it works in collaboration with the Lesotho Evangelical Church.” This was not acceptable to the Synod.

According to Rev. Thebe in the Lesotho Evangelical Church the Synod is the supreme governing body which exercises jurisdiction over other organs and institutions or associations of the church and this authority is based upon Section 24 and Section 139 of the Constitution of the Church.

Section 24 reads:

“Each and every Association is governed by its own regulations, which have been allowed by the Seboka.”

Section 139 reads:

“The following are duties and responsibilities of the Seboka:

- (a) to examine all matters relating to the life and service of the Church.
- (b) to review the rules (laws) of the church.”

It is common cause that since its early beginnings the Mophato was created under the auspices of the Church which has always regarded it as its own organ and institution over which it had ultimate authority. The Mophato however enjoyed a large measure of autonomy. I have not been shown any convincing evidence to demonstrate the termination of this state of affairs, though Clause XII dealing with amendments seems to vest the authority to amend the Mophato constitution on the Assembly of the Mophato and not on

the Synod; sub-article 4 thereof goes to state that clauses dealing with property and election of the Youth Organizer can only be effected by the Church only after consultation with the Committee of the Mophato. Certainly, these provisions cannot be reconciled with the section 24 and section 139 of the Constitution of the Church. Rev. Thebe concluded his evidence by stating that the Mophato was autonomous and runs its own affairs but does so under the general supervision of the Church (Section 24).

Mr Lehlohonolo Kabeli then gave his evidence in which he told the court that he was one of the founders of the Mophato oa Morija in 1956. He described its main mission as being to tutor and train the youth of the Church in the Word of God and in discipline. He went on to state that in 1964 the then President of Seboka Rev. Phakisi declared that the Mophato Constitution MM3 was operative and this was approved by the Synod. In his view, the said Constitution was not a draft document. He goes on to state that in 1969 the Mophato Committee was paid a surprise visit by Rev. Sibolla and his delegation which informed them that the Mophato Constitution was only a draft. As pointed out earlier, the relations between the Synod and the Mophato were at the time not cordial over the competing claims of Mr Moletsane and of Reverend Maraisane, the latter wanting to hold both portfolios of Youth Chaplain and Youth Organizer. It is not in dispute that over this wrangling the Synod asserted its authority and disbanded the Mophato Committee. He agrees that registered constitution MM2 does not tally with MM3. He explained that MM2 was drafted in order to transform the character of the Mophato into a more ecumenical one and collaborate with other organizations and denominations. He stated that whilst the Synod knew about this new constitution MM2 he could not claim that it had obtained the formal approval of the Synod. It is common cause that since its registration at the Law Office in 1969, this new constitution (MM2) had never been used in the running of the affairs of the Mophato, which continued using MM3 - the so-called draft constitution.

Under cross examination, Mr Kabeli concedes that their Mophato Committee did not question the authority of the Executive Committee of the Synod. He also candidly admitted that the Synod is the supreme body of the Church and had authority to review all the laws of the Church (Section 139). He also admitted that Mophato is a branch institution of the Church and it enjoys its autonomy under Section 24. It receives orders from the Church though it governs its internal affairs. He admitted that MM2 was never blessed or approved by the Synod under Section 24 and that it contains many provisions which are different in many aspects from the draft constitution. But, as already pointed out, whether a draft or not, the Mophato Constitution in the Green Book seems to have been an operating document whose provisions were used by the Synod in its dealing with the Mophato. It was not a dead letter.

Mr Senekane Azael Buti then gave his evidence as the Mophato Youth Organizer. He informed the court that he has held this portfolio since 1974 having been nominated by the Lesotho Evangelical Church after consultation with the Committee of Mophato. He has also been a youth leader since 1962. Mr Buti in narrating the events that precipitated the 1969 crisis, informed the court that after Mr Zimmermann who was a Boys Scout pioneer and a founding leader of the Mophato had departed from Lesotho, an acrimonious dispute arose between the Synod and the Mophato over who should be the youth organizer. The Synod preferred Reverend Maraisane and the Mophato favoured Mr Moletsane. He went on to say when the Annual General Conference in January 1970 could not resolve the deadlock, the Executive Committee of the Mophato decided to resign along with Mr Moletsane. The Synod Executive Standing Committee consisting of Rev. Sibolla, Rev. Thakholi, Rev. Mandoro and Mr Tiheli arrived in Moriija and ultimately disbanded the Mophato Committee. The Mophato continued to function after a new compliant committee was elected consisting of Mr Buti as chairman, Mr Nzeku, Miss Mapetla, Mr Ratsiu and Mrs Nkaota. Mr Nzeku was an Anglican who was then a scout field commissioner and had been coopted on

ecumenical grounds.

His evidence then came to the November 1997 Meeting of the Synod in which the new Mophato Constitution was discussed and passed. The evidence goes on like this :

“Question: Regarding the 1997 re-writing of the Constitution of Mophato, was the General Conference of the Mophato oa Morija consulted?

Answer: No.

Question: It was suggested you were consulted and even made submissions?

Answer: It was a matter of routine. I was not consulted, we of the Mophato also had a draft constitution containing proposals done some time in 1995 in readiness for submission to the Synod. On 15<sup>th</sup> September 1997 I indeed wrote a letter to the Executive Secretary attaching the amended constitution for transmission to the Synod and for perusal by the Law Commission. It was not on invitation of the Law Commission to submit those counter proposals.”

He goes on to say that he attended the November meeting of the Synod as the delegate of the Mophato. Prior to this meeting he had not seen the proposals being presented by Rev. Thebe who was then the Executive Secretary of the Synod and a member of the Law Commission.

“Question: Mophato oa Morija had nothing to do with it (Constitution)?

Answer: It had the right because the Constitution was going to bind us and this was in violation of XII 4.

Question: In terms of the Constitution, does the Synod have the right to redraw the Mophato Constitution?

Answer: No, they don't. That is why I raised an objection ..... I told the Synod that I objected because Clause XII did not allow this; secondly because there had been no consultation; and because the Synod also wanted to do away with Clause XII.”

He states that he nevertheless took part in the voting on the 28<sup>th</sup> November 1997 when the proposals of the Law Commission were being discussed and voted upon. He agreed that since 1974 as a Youth Organizer he had been using the Mophato Constitution in the Green book (and not MM2). He insisted however that the Synod does not have the right to re-write or even to amend the constitution of the Mophato, whose General Assembly enjoyed that prerogative. He says “this constitution can only be amended or re-written by a special general Conference of the Mophato consultation with the Synod of the Church.”

He further agrees that the Synod under Section 139(b) of the Law of the Church has power to review all laws of the Church but only after consulting the affected organization or institution (Section 24). He says that no meaningful consultation occurred prior to the November meeting of the Synod.

During cross examination, Mr Buti was taxed about the founding affidavit of Nkoka in which reliance is made upon MM2 and not MM3 in the Green book; he insisted that he never used MM2 in his dealings as Youth Organiser. He stated that he tried to consult with the Executive Secretary of the Synod concerning the constitutional proposals of the Mophato (EX. B”) and that on the other hand the constitutional proposals of the Law Commission were never formally presented to the General Conference of Mophato for discussion.

Mr. Buti then stated clearly that the Synod in fact knew about MM2 whose existence they merely chose to ignore. He further explained that the purpose for drafting MM2 in its

present form was

“to impress foreign donors. It was not for local use. I never used MM2 in my official dealings as the Youth Organizer.”

He accepted that the Synod was the supreme body of the Lesotho Evangelical Church, and that it had power and authority to make decision on behalf of the Church; and that Section 24 and 139 of the Law of the Church give the Synod the ultimate right to review all laws of the church and even amend the laws of the associations or institutions after having consulted with them.

#### **Autonomy of the Mophato.**

The nature and the extent of the autonomy of the Mophato is a very pivotal issues one in these proceedings and to determine this autonomy we have to look at the founding documents or constitutions contained in the Green Book. The English translation annexed to the first respondent’s affidavit is headed “Morija Ecumenical Youth Centre .. Constitution.

“5. Morija Ecumenical Youth Centre is autonomous at the same time guarding the interests and religious affiliations of its members”.

This should be contrasted with Section 5 of MM2 - the constitution registered at the Law Office in 1969; it reads:

“5. The Mophato oa Morija is an independent organization respecting the rules and regulations of the Churches affiliated to it and those of the world-wide youth



movements.

XI. Alterations and amendments to the constitution.

The Constitution can be altered or amended by a special General Assembly.

- (a) Alterations and amendments to the constitution shall be passed by a three - quarters ( $3/4$ ) majority of the presentees at the General Assembly wherein they are moved.
- (b) The laws appearing in this constitution cannot be discussed unless two-thirds ( $2/3$ ) of the members of the General Assembly are present.
- (c) Administrative Laws shall be altered or amended provided the General Assembly passes them by a majority of half ( $1/2$ ) or over half of the presentees

GOD BLESS THE MOPHATO.”

It is quite clear that MM2 excludes the authority and supervision of the Synod and allows participation of the Lesotho Evangelical Church only to the extent of mutual collaboration; I may here add that whilst Mr Mohau submitted that Mophato oa Morija is autonomous, he did not go to the length of saying it was independent and not subject to the authority and control of the Church. The extent of applicant's autonomy as clearly demonstrated in 1969 when the Synod through its Standing Committee effectively asserted its control and authority over the Mophato. This has never been relinquished; and no convincing evidence

has been led to show that Mophato ever formally left the supervision of the Synod after 1970. In fact, the evidence of Mr A. S. Buti clearly demonstrates that the Mophato is still an organ and institution of the Lesotho Evangelical Church and that the so called draft constitution and not MM2 was always used by him in his dealings with the Synod and Executive Committee of the Synod. His only complaint is that he and the Mophato Committee and the General Assembly were sidetracked and brushed aside; he says there was no proper and meaningful consultation between the Mophato and the Synod over the proposed new constitution for the Mophato. He stated that on the 15<sup>th</sup> September 1997 he dispatched their own constitutional proposals for transmission to the Synod and for perusal by the Law Commission. If at all the General Assembly of the Mophato had the sole authority to amend and approve such new constitution under XII (1), indeed I fail to understand why Mr Buti's draft had to be sent to the Executive Secretary of the Synod. This only demonstrates the reality-namely, that the Synod still wielded the ultimate authority in the constitutional amendment process. He also says consultation was necessary between the Mophato and the Synod over the proposed constitution "because it was going to bind us." He goes on to say that the Mophato Constitution can only be varied by the special conference of the Mophato in consultation with the Synod of the Church. Mr Kabeli also admits that "nothing can be dealt without being presented before the Synod - which is the supreme and highest body in the Lesotho Evangelical Church. It can refuse anything;" and he goes on "... we did not question the authority of the Executive Committee of the Synod ..." and "it had the authority to disband the Mophato Committee ..." According to Mr Kabeli the Mophato is a branch and an institution of the Lesotho Evangelical Church under Section 24 of the Law of the Church and it is autonomous but receives orders from the Church. He explains further that MM2 was made unilaterally by the Mophato and had never been blessed by the Church under section 24.

The nature and extent of this autonomy enjoyed by the Mophato can therefore be perceived

from the standpoint of the constitutional provisions, and from the day-to-day dealings between the Mophato and the Synod. The correspondence between Mr A. S. Buti and the Executive Committee of the Synod demonstrates clearly that Mophato could not act unilaterally in varying or amending its constitutions. It is clear therefore that the Mophato is not an independent institution but one which enjoys a large measure of autonomy under the general supervision of the Synod of the Lesotho Evangelical Church. This has been amply demonstrated, and it is proper to come to the conclusion that the Synod indeed has authority to amend or review the laws of the Mophato because Section 24 and Section 139 seem to endow the Synod with ultimate power to approve or review the laws of the church organs and institutions.

The only pernicious question is whether the supreme Synod when approving the new constitution for Mophato (MM4) complied with the mandatory provisions of the quorum of the laws of the Church in the Green Book. Without revisiting the evidence unnecessarily, I am of the view that the Synod proceedings of the 28<sup>th</sup> November 1997 were highly irregular and indeed the important provisions of Sections 31 and 32 were violated. They read:-

- “31. The laws/rules of the Lesotho Evangelical Church shall not be debated upon unless at least two thirds (2/3) of all members of the Seboka are present at a meeting.
32. Changes to the constitution may be effected if three quarters (3/4) of the members present at the meeting of the Seboka when it (constitution) is discussed so decide.

The official quorum of the Synod is 76 (this being 2/3 of 114). The totality of the votes in the minutes on the 28<sup>th</sup> November 1997 indicate that less than 76 members participated in the Synod on the 28<sup>th</sup> November 1997. This, I regret to say, renders the whole proceedings

on that day a complete nullity. To hold otherwise and say the quorum can be assumed when the numerical votes in the minutes explicitly indicate to the contrary would indeed render mockery to these mandatory quorum provisions. When a Synod meeting lacks the requisite quorum or where the numbers get reduced and fall below during the conduct of such a meeting, the Chairman or Secretary has the duty to postpone or adjourn the proceedings till the quorum is restored. I therefore hold that whilst the Synod had authority to review the laws of the Mophato, its proceedings on the 28<sup>th</sup> November 1997 were irregular in that they did not comply with the provisions of the Section 31 and Section 32 of the constitution of the Church.

It is not necessary therefore to decide definitely whether proper and meaningful consultation between the Synod's Executive committee and its Law Commission on one hand and the Mophato and its organs on the other hand had taken place. The Mophato as an organ or institution of the Lesotho Evangelical Church had a legitimate right or expectation to be consulted concerning the proposed constitution which would bind it; indeed, as it has turned out, MM4 is a somewhat drastic document that reorganises the Mophato and limits its original autonomy. Fairness and natural justice required that Mophato as an affected institution be consulted meaningfully about the proposed changes even if the ultimate Synod's decision might disregard Mophato's proposals. It is my view that one aspect of the Mophato's autonomy is the right to be consulted in matters involving amendment or changes to its constitution so that it could have a fair opportunity to submit objections or suggestions. Consultation does not mean agreement or consent but means a fair and full opportunity for views to be stated - **R. v Mbete** 1954 (4) SA 491. Once **bona fide** communication of proposals on a reciprocal basis had truly taken place, the Synod could lawfully review and amend the constitution of the applicant at its properly constituted meeting and in accordance with the laws and procedures contained in the Green Book.

I therefore make the following findings:-

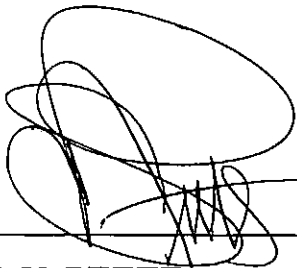
- (a) The applicant Mophato oa Morija was created by the Lesotho Evangelical Church in 1956 to spread the Word of God amongst the Youth of the Church being, the first respondent; it is therefore one of the main organs and institutions of the Church.
- (b) The applicant enjoys a large measure of autonomy to run its own affairs but it is subject to the ultimate supervision and control by the Synod of the Church.
- (c) the first respondent does in law and in fact possess authority through its Synod to review the laws of the Church and its institutions one of which is the applicant.
- (d) The Constitution registered at the Law Office in 1969 "MM2" had not obtained the formal approval of the Synod.
- (e) The new Constitution "MM4" purportedly passed by the Synod on the 28<sup>th</sup> November 1997 is null and void because requisite quorum was not present at the said November meeting.

I also make the following directives:-

1. The Executive Secretary of the Synod is hereby ordered and directed to fulfil the following:
  - (a) to circulate the printed English and Sesotho draft Constitution MM4 to all members of the Synod and to all members of the General Assembly of the Mophato and its Executive Committee for written comments thereon.
  - (b) to convene a Special Meeting of the Synod within three months or before end of April 2000 in terms of the provisions of the Law of the Church.

- (c) to ensure that the Special Synod Meeting observes during its deliberations the mandatory quorum provisions under sections 30,31, and 32 of the Law of the Church.
  - (d) to ensure and guarantee a free, full and fair discussion of all proposals for and against any amendment of the present Constitution of the Mophato.
2. The Constitution "MM2" to be tabled on the Agenda of the Synod for discussion and decision thereon.
  3. The Executive Secretary submit a written Report to the Registrar of this Court about the final decisions of the Synod within two weeks.

The question of costs is deferred until after the above directives have been complied with.



**S. N. PEETE**

**JUDGE**

**For Applicant : Mr Mohau**

**For Respondent: Ms Thabane**