THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 498/10

In the matter between:

ROSHAN MORAR NO Appellant

and

MAHOMED ASLAM OSMAN AKOO First Respondent

THE TRUSTEES OF THE MAHOMED

ASLAM AKOO FAMILY TRUST Second Respondent

Neutral citation: *Morar NO v Akoo* **(**498/10**) [**2011] ZASCA 130 (15 September 2011)

Coram: BRAND, MHLANTLA, MAJIEDT and WALLIS JJA and MEER AJA.

Heard: **26 August 2011**

Delivered: **15 September 2011**

Summary: Partnership – liquidator appointed by the court – powers to be conferred on liquidator – whether court may amplify powers originally given to liquidator.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (K Pillay J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

WALLIS JA (BRAND, MHLANTLA and MAJIEDT JJA and MEER AJA concurring)

[1] Ordinarily when a partnership is dissolved the partners themselves liquidate it, or cause it to be liquidated by one of their number or by a third party chosen by them. The basis upon which the liquidation is undertaken is agreed upon, whether in advance in a formal partnership agreement or at the time of dissolution. Sometimes it is not possible for the partners to reach such an agreement and one or more of the partners seek the intervention of a court to procure the appointment of a liquidator.[1] That happened in the present case and it resulted in Mr Morar's appointment as the liquidator of the partnership operating a business called Rollco. The order appointing him gave him detailed powers. Mr Morar's task has not been straightforward and accordingly he approached the high court asking for further powers to be given to him. The application was heard by K Pillay J and was dismissed. Mr Morar appeals with her leave to this court. The issues raised by the appeal are whether it is competent for the initial order to be varied and whether the

1 Invoking for that purpose the *actio pro socio* the nature of which was described by Joubert JA in *Robson v Theron* 1978 (1) SA 841 (A) at 855H-856G.

relief Mr Morar now seeks should be granted to him.

[2] In about 1986 the Osman family established the business known as Rollco, as manufacturers of roof sheeting and processors and suppliers of steel products. Mr Mohamed Aslam Osman Akoo, the first respondent, was actively engaged in the management of the business, ownership of which lay with a family trust. During 1987 the Moosa family became equal partners with the Osman family in the business, holding their 50 percent share through ten family trusts. There is a dispute whether the Moosa family's involvement was purely as financiers of the business or whether they were also to play an active role in managing the business. Be that as it may the business operated reasonably successfully and generated profits, which were shared equally between the Osman family trust and the Moosa family trusts.

[3] Problems started to emerge in 2002 or 2003 when Mr Akoo's brothers and father withdrew from the business. There is a dispute whether their interests in the business were taken over by Mr Akoo, either personally or through the medium of the second respondent, the Mohamed Aslam Osman Akoo Family Trust (the Akoo family trust), or whether a significant portion of their shares accrued to the various Moosa family trusts.[2] This appears to have marked the beginning of a breakdown in relations between Mr Akoo, on the one hand, and the representatives of the Moosa family on the other. It culminated on 24 February 2006 with Mr Akoo addressing a letter to each of the Moosa family trusts giving

2 This dispute may be affected by a further judgment by Msimang JP handed down on 22 June 2010 in which he held that the Akoo family trust could not legally have entered into the partnership agreement as on the relevant date its trustees (Mr Akoo and his wife) had not been issued with letters of authority to act as trustees of the trust in terms of s 6 of the Trust Property Control Act 57 of 1988. There is other litigation pending that may also have a material impact upon whether any such partnership ever existed, the identity of the partners and the effect of the order referred to in para 4. The present proceedings were brought and decided prior to the second order by Msimang JP and prior to the commencement of the other litigation and will be decided without reference to them.

them notice of the dissolution of the partnership with effect from 28 February 2006. In a case beset by disagreement the one point on which all the parties agree is that this notice was effective to terminate the Rollco partnership, however constituted, with effect from 28 February 2006.

[4] On 15 October 2007, on the application of certain of the Moosa family trusts, Msimang J made an order declaring that the partnership relationship subsisting between ten Moosa family trusts and either Mr Akoo personally, or the Akoo family trust, under the name and style of Rollco Roofing Systems, to have been lawfully dissolved with effect from 28 February 2006. He ordered the appointment of Mr Morar as liquidator and that from the date of the order:

'… all partnership property and assets, of whatsoever form or nature, and regardless of the date of acquisition of such property or asset by the partnership or any of its partners, shall vest in the liquidator.'

[5] Mr Akoo was directed to furnish the liquidator and all the partners with a full and proper account of the partnership business and its assets and liabilities as at 28 February 2006 with supporting documents and vouchers. He and a company, Rollco Roofing Systems (Pty) Ltd, through which Mr Akoo had been conducting the business since 28 February 2006, were ordered to furnish the liquidator with an account of the income and expenditure arising from the operation of that business 'alternatively arising from the use of the assets of the partnership from 1 March 2006 to the date of account' including all supporting documents and vouchers, as well as an accounting of the assets and liabilities of the company. The liquidator was directed to effect a final liquidation of the partnership and make any distribution to the partners according to the

extent of their determined interests in the partnership.

[6] Mr Morar has endeavoured to carry out his task but has met with little success. Neither Mr Akoo nor Rollco Roofing Systems (Pty) Ltd have rendered a proper account as required by the order. There remains no clarity as to the whereabouts of the assets of the business or whether the business is still in the hands of the company or has in effect been transferred to another company. In those circumstances Mr Morar sought and obtained an order for the liquidation of Rollco Roofing Systems (Pty) Ltd. Thereafter an enquiry in terms of the provisions of s 417 of the Companies Act 61 of 1973 (the old Companies Act)) was convened before a retired judge. For reasons that are immaterial he raised a query whether such an enquiry was competent. That resulted in protracted litigation between the liquidator and the present respondents that was only resolved after the appeal before us had been lodged. There have been other legal proceedings involving the liquidator but with little advantage in terms of achieving finality with the liquidation.

[7] In the result Mr Morar ran short of the sinews of war. He accordingly wrote letters to the different potential partners of the Rollco partnership asking for contributions. An amount of R500 000 was forthcoming from the various Moosa family trusts but Mr Akoo and the Akoo family trust, without expressly refusing to do so, provided nothing. Their refusal is the subject of the first order sought by Mr Morar. In it he asks that they be ordered to pay him an amount of R500 000 ‘for the purposes of administering the estate of the partnership which conducted trade under the name and style of Rollco Roofing Systems’. To fortify the order in case of non-compliance he asks that if the money is not paid to him within ten days of the order the sheriff should be authorised to attach

property sufficient, once sold, to realise R500 000 and to pay that amount to him. Realising also that this may not prove to be sufficient if Mr Akoo and the Akoo family trust continue to resist his attempts to pursue the liquidation, he also asks for an order that he may in the future call upon the partners to make contributions to him as required in order to fund his work as liquidator and that they will be required to comply with those calls for additional funds.

[8] Together with the claim for that financial relief Mr Morar sought an order for a detailed account from Mr Akoo relating to the partnership's dealings with its major supplier. He also asked for more extensive powers of interrogation in relation to Mr Akoo and certain other individuals. The latter were said by his counsel to be the most important aspect of the order that he sought. What he seeks is the power to appoint a senior advocate to conduct an enquiry as if in terms of s 417 of the old Companies Act. Lastly he asked for authority to take out professional indemnity insurance as an expense of the liquidation.

[9] Counsel for Mr Morar did not point to any authority specifically supporting this relief. Instead he submitted that it is relief that can be granted by virtue of the general principles of the *actio pro socio* 'and "the wide equitable discretion" given to a liquidator of a partnership'. Reliance was placed upon the exposition of the *actio pro socio* by Joubert JA in *Robson v Theron*[3] and upon the judgment in *Brighton v Clift* (2)[4]. It is helpful to consider what was decided in these cases.

[10] Joubert JA surveyed the development of the law from Roman times in regard to the *actio pro socio* and summarised his conclusions in the

3 At 855H-856G
4 *Brighton v Clift* (2) 1971 (2) SA 191 (R) at 193B-D.

following terms:

'The principles of the common law underlying the *actio pro socio* may be conveniently summarised as follows:

1. This action may be instituted by a partner against a co-partner during the existence of the partnership for specific performance in terms of the partnership agreement and/or fulfilment of personal obligations (*praestationes personales*) arising out of the partnership agreement and business.

2. Where the partnership agreement provides for (or the parties subsequently agree upon) the dissolution of the partnership and the manner in which the partnership is to be liquidated and wound-up specific performance thereof may be claimed by means of this action.

3. Where neither the partnership agreement nor a subsequent agreement between the partners provides for the dissolution of the partnership and the manner in which the partnership is to be liquidated and wound-up this action may in general (subject to any stipulation for the duration of the partnership or any other relevant stipulations) be brought by a partner to have the partnership liquidated and wound-up. The Court in the exercise of its wide equitable discretion may appoint a liquidator to realise the partnership assets for the purpose of liquidating partnership debts and to distribute the balance of the partnership assets or their proceeds among the partners. *Pothier, op. cit.,* sec. 136.

4. Where a partnership has been dissolved a partner may avail himself of this action against his co-partners to claim distribution of any undistributed partnership asset or assets. *Pothier, op. cit.*, sec. 162:

"Each of the former partners can alone demand a distribution of the effects which remain in common after the dissolution of the partnership."

This obviously covers the situation where, after dissolution of a partnership, a continuing partner retains possession of a partnership asset which has not been included in a distribution of the partnership assets. Hence a retiring partner may institute this action against the continuing partner to claim a distribution of the partnership asset in question.

5. A court has a wide equitable discretion in respect of the mode of distribution of partnership assets, having regard, *inter alia*, to the particular circumstances, what is most to the advantage of the partners and what they prefer.

6 The various modes of distribution of partnership assets are fully dealt with by *Pothier, op. cit.*, secs. 161 - 178.'

[11] Two points are noteworthy about this exposition of the general principles of the *actio pro socio*. The first is that according to the authorities the action is one that lies at the instance of one of the partners for relief against another partner, either during the subsistence of the partnership or after its dissolution. A detailed discussion is to be found in *Voet* 17.2.9 and 17.2.10[5] where it is said that the action is one in terms of which one partner may claim against another:

(a) an account and a debatement thereof, either during the subsistence of the partnership or after it has been terminated;

(b) delivery of a partnership asset to the partnership;

(c) the appointment of a liquidator to the partnership.

Other writers describe the *actio* in similar terms.[6] *Pothier*[7] says that:

'From the obligations which arise out of the contract of partnership arises the action *pro socio*, which each of the partners can maintain against his copartners, in order to compel their fulfilment.

This is a personal action: it passes to the heirs and other universal successors of each of the partners, who can maintain that action; and it may be brought against the heirs and other universal successors of the partners, who are bound by it.'

None of the writers suggest that the *actio* is available to a liquidator once appointed to liquidate a partnership. It is always available to the erstwhile partners, but that does not mean that the liquidator can invoke it. This undermines the attempt by Mr Morar to rely on it for the relief he seeks.

[12] The second point is that the references by Joubert JA to 'a wide

5 *The Selective Voet being the Commentary on the Pandects of Johannes Voet* (Gane's translation), Vol 3.

6 Van der Linden, *Institutes of Holland* (Juta's translation) 2.4.1.11; Van der Keesel, *Select Theses on the Laws of Holland and Zeeland* (Lorenz's translation), 700 and 701; Van Oven's *Leerboek van Romeinsch Privaatrecht* (3rd ed)(1948) at 280 *et seq*.

7 Pothier, *A Treatise on the Law of Partnership* (translated by Owen Davies Tudor, 1854) section 134.

discretion' are not references to a discretion vested in the liquidator nor are they references to a discretion enjoyed by the court to invest the liquidator with broad-ranging powers. They refer to the discretion enjoyed by a court either to appoint a liquidator or to order a distribution of the partnership property among the partners in some other fashion. The discussion in the passage that follows of the *actio communi dividundo* refers to a similar discretion. The learned judge said only that, when former partners approach the court for relief under either of these *actiones*, the court has a wide discretion to determine whether to appoint a liquidator, or to order a division of the partnership property, or to order one partner to take over that property at a valuation with payment of the appropriate share to the other or others. That is something very different from saying that the liquidator appointed by the court has a wide discretion in regard to the manner in which the liquidation is carried out or from saying that the court has a wide discretion to afford extensive powers to the liquidator of a partnership.

[13] The other authority on which reliance is placed in support of the proposition that a liquidator has a 'wide equitable discretion' is the decision in *Brighton v Clift* (2), supra. That concerned the dissolution and winding-up of a firm of attorneys and the issue before the court was whether a liquidator should be appointed in the face of opposition from the one partner. The judgment was accordingly not concerned with the powers to be granted to the liquidator, if appointed, save in a passing fashion. Having decided that a liquidator should be appointed Macauley J dealt with his powers in these terms:

'With regard to the powers to be conferred on the liquidator, it seems to me that it is not this Court's function to act as a liquidator and to anticipate problems which may present themselves to the liquidator at a later stage. Doubtless, these will arise in any

liquidation, but they are matters for the liquidator to decide and, in doing so, he may seek the parties' concurrence in any course he takes. Failing their agreement, his decisions are open to objection by either party with recourse to the Courts. *I decline, therefore, to direct the liquidator in the manner sought in paras. 2-6 inclusive of the amended draft order*.' [8] (Emphasis added.)

In the result the order the court made was confined to one appointing the liquidator to wind up the partnership, realise its assets, collect the debts due to it, prepare a final account and divide the assets between the partners after paying the debts and the costs of liquidation.

[14] That judgment does not assist Mr Morar. The judge was asked to make an order in very detailed terms, the particulars of which do not emerge from his judgment. He refused to grant that order and instead granted an order appointing the liquidator and leaving it to the liquidator to determine how to go about his task. He did so on the basis that it would be sensible for the liquidator to seek the concurrence of the parties to any particular course of action in the knowledge that if they did not agree with any particular decision they might have recourse to the court to challenge it. He did not suggest that a liquidator could come back to the court to seek additional powers of the type claimed in these proceedings.

[15] In *Robson v Theron* Joubert JA did not address in detail the situation of a liquidator, no doubt because he decided that such an appointment would not be appropriate. His concern was whether the *actio pro socio* or the *actio communi dividundo* is the appropriate remedy to resolve issues around the liquidation of a partnership, or whether either one could be used.[9] The only passage in his judgment dealing with liquidators reads:

8 At 193B-D.

9 See the discussion at 850C-854D. His conclusion following *Pothier*, was that both remedies are available to be invoked in appropriate circumstances.

'*Van der Linden*, 2.4.1.14, deals in some detail with the liquidation or winding-up of a partnership. In doing so he relies heavily on the authority of the great French jurist, *Pothier*, whose treatise on the law of partnership was regarded towards the end of the eighteenth century as an authority of great weight in the Netherlands. This is not surprising since the French and Roman-Dutch law of partnership are both founded on Roman law. See Wessels, *History of the Roman-Dutch Law*, p. 652. His treatise was translated by *Van der Linden* into Dutch: *Verhandeling van het Recht omtrent Sociëteiten of Compagnieschappen* and has been regarded by our Courts as an important authority in this branch of the law. In order to obviate repetition I intend to follow up what *Pothier* has to say on the subject.

Pothier in his *Treatise on the Contract of Partnership* (translated by *Owen Davies Tudor*) affirms the twofold purpose of the *actio pro socio*, viz. to implement the terms of the partnership agreement and to dissolve it.'[10]

This only deals in passing with the process of liquidation and provides no support for the contentions on behalf of Mr Morar. The learned judge was simply not concerned with the powers to be afforded a liquidator appointed to liquidate the partnership.

[16] I have found nothing in the old authorities to justify the notion that the court has a discretion to grant wide-ranging powers of administration to the liquidator of a partnership to be exercised in the course of liquidating the partnership. The leading writers on the topic of partnership among the old authorities barely mention the topic of the appointment of liquidators and their powers. The reason appears to be that in many places local ordinances provided that disputes about liquidation should be referred to arbitrators. By way of example, in the passage cited by Joubert JA in support of paragraph 3 of his summary of the elements of the *actio pro socio*, *Pothier* refers to the applicable French ordinance when he says;

'For this end, the Ordonnance of 1673, *tit* 4. art 9., provides that all contracts of

10 At 852D-G.

partnership should contain the clause of submission to arbitration upon all disputes which may arise amongst partners on account of the partnership, and that where that clause has been omitted, it should be supplied.'

[17] It would be unwise, in the absence of full argument on the source of the court's power to appoint a liquidator to a partnership, to make a definitive finding as to the full extent of the powers that a court may vest in the liquidator of a partnership. It is sufficient to deal with certain basic principles and in the light of those to assess the specific powers that the liquidator seeks in this case and determine whether they can or should be granted.

[18] When the court appoints a liquidator for a partnership it is remedying the failure of the partners to attend to the liquidation of the partnership by agreement. Such failure may arise from disagreement over the need to appoint a liquidator, or over the identity of the liquidator or the powers that the liquidator should enjoy. That being so it is logical to take as one's starting point the powers that the partners could themselves confer by agreement, if they were not in a state of hostilities. The court is then asked to do no more than resolve a dispute between the partners over the appointment of the liquidator or over the liquidator's powers. It does so in a way that the parties themselves could have done. The disagreement arises in consequence of the one partner refusing to agree to the liquidator being appointed or the liquidator having a particular power and that can be characterised as a breach of the obligations of co-operation and good faith that are central to all partnerships. The court is then merely enforcing the contractual obligations of the partners themselves.

[19] Once the court is asked to go beyond this it is necessary to identify a source of its power to do so. That is central to the rule of law that underpins our constitutional order. Courts are not free to do whatever they wish to resolve the cases that come before them. The boundary between judicial exposition and interpretation of legal sources, which is the judicial function, and legislation, which is not, must be observed and respected. In this case no such source was identified.

[20] In argument it was submitted that the appointment and functions of the liquidator of a partnership are largely equivalent to those of the liquidator of a company under the old Companies Act. However the analogy is false. Unlike partnerships, companies only exist under the legislation under which they are constituted, which governs their creation, operation and liquidation. Although in some jurisdictions partnerships are regulated by statute[11] that is not the case in South Africa. In our law the general approach to partnerships is that their creation, operation and dissolution depends upon the terms of the agreement concluded by the partners. If there are disputes at any stage of the relationship those are resolved by the courts under the general rules governing contracts and in terms of the *actio pro socio*. Whatever policy reasons might exist for bringing about some degree of equivalence between partnerships and companies, the legislature has not done so.

[21] Turning specifically to the relief claimed by Mr Morar, in para 7.19 of the original order granted by Msimang J, he had been authorised to direct any of the partners to attend on him at his offices in order to answer such questions as he might raise in relation to any of the affairs and assets of the partnership.[12] In these proceedings he seeks an order authorising

11 As in the United Kingdom.
12 I leave aside any consideration of whether this order was itself competent or how it would operate if

him to employ attorneys and counsel for the purpose of examining any of the partners, their servants or representatives suspected of being in possession of property of the partnership or of being indebted to the partnership or who is deemed capable of giving information concerning the trade, dealings, affairs or property of the partnership. To that end he also sought an order authorising him to engage the services of a senior advocate to preside over 'such examination or interrogation' with the same powers *mutatis mutandis* as a person appointed to conduct an enquiry in terms of s 417 of the old Companies Act. Some of those powers were spelled out in the draft order and they included the power to summon witnesses, compel discovery, administer an oath and both question and allow such person to be interrogated. There are legal difficulties in regard to the power of the court to grant such orders and, if granted, there would be practical difficulties in enforcing them.

[22] The legal difficulties arise because it is debatable whether and to what extent it is competent contractually to invest an individual with certain of the powers conferred upon a functionary by statute.[13] The practice of conferring upon receivers under offers of compromise in terms of s 311 of the Companies Act 61 of 1973 the powers of a liquidator *mutatis mutandis* was described by Milne JA as 'indiscriminate borrowing *mutatis mutandis* of a liquidator's general armoury' which led to "unforeseen problems and disputes'.[14] In *Gunn & another NNO v Victory Upholsters (Pty) Ltd*[15] Didcott J dealt with a similar clause and

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all the partners were trusts, as might have been the case on one of the factual scenarios before the learned judge.

13 *South African Fabrics Limited v Millman NO & another* 1972 (4) SA 592 (A) at 600E-G, citing *South African Board of Executors & Trust Co. (In Liquidation) v Gluckman* 1967 (1) SA 534 (A) at 541F-H.

14 *Morris NO v Airomatic (Pty) Ltd t/a Barlows Airconditioning Co.* 1990 (4) SA 376 (A) at 401F-G. This was a slight alteration of what Didcott J had said in *Ex parte Trakman NO: In re Dumbe Motel (Pty) Ltd* 1978 (1) SA 1082 (N) at 1084 C-D.

15 *Gunn & another NNO v Victory Upholsters (Pty) Ltd* 1976 (1) SA 127 (D) at 135B-D

said that it could not mean that literally all the powers of a liquidator were included. Among those he specifically said were excluded[16] was the power to interrogate the directors of the company about their management of it prior to liquidation.

[23] The practical difficulties reinforce the legal ones. They are illustrated by certain questions posed to counsel in the course of argument. What if a person does not attend in response to a summons to appear at such an interrogation? What happens if they decline to take an oath or make an affirmation? Can they refuse to answer questions? What are the consequences if they do so? If they lie in the course of such an interrogation does that make them liable for the penalties attaching to the crime of statutory perjury? No satisfactory answer was forthcoming. In the case of companies the answers are reasonably clear and flow from the terms of the statute. The questions are important because the successful conduct of an interrogation depends upon there being answers that govern these situations. It is also necessary that there be answers to them because the conduct of such an interrogation raises constitutional issues in view of its potential to infringe constitutionally protected rights such as the right to dignity and the right to privacy.[17] In my view there is no satisfactory answer to these questions and that poses insuperable practical problems to the grant of these powers.

[24] If the court were to give these powers to the liquidator a curious and untenable situation would result. It is illustrated by the following example. Assume that a partnership business has closed because of financial difficulties without any rift between the partners. They believe

16 Approving counsel's concession to this effect.
17 *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (2) SA 621 (CC); *Bernstein & others v Bester & others NNO* 1996 (2) SA 751 (CC).

that the source of their financial difficulties was the dishonesty or negligence of a former employee. They wish to interrogate the employee in order to confirm their suspicions. They cannot by agreement appoint a liquidator with the power to conduct an interrogation and if they do the employee can disregard such an appointment. Nor can they ask the court to conduct an interrogation on their behalf. Courts in this country do not have a general power to interrogate people. Yet, if the proposition on behalf of Mr Morar is correct, the partners can overcome these difficulties by applying to the court for the appointment of a liquidator and asking the court to vest the liquidator with the power to conduct an interrogation. That cannot be correct. It would mean that although neither the court nor the partners are entitled to conduct an interrogation, they are able to bring one about by the simple expedient of the court appointing the liquidator and granting an order such as that sought in this case.

[25] For those reasons K Pillay J was correct to refuse to grant Mr Morar the powers of interrogation that he seeks. The power to order an interrogation is an exceptional power[18] and I can find no basis upon which it is one that courts can confer upon liquidators of partnerships. If that is a shortcoming the remedy must lie in legislation.

[26] The second aspect of the application is the prayer for a contribution to the costs of administration of the liquidation of the partnership in an amount of R500 000, together with the power to call upon the partners in future to make further contributions if that is needed. The primary reason for seeking these funds is that Mr Morar contemplates litigation that will be both 'complex and controversial' and 'time consuming and expensive'. It is apparent from the founding affidavit that the primary

18 *In re North Australian Territory Company* (1890) 45 Ch D 87 at 93 per Bowen LJ.

target of this litigation will be Mr Akoo or entities controlled by him, such as the Akoo family trust.

[27] Once again no authority was proffered for this order beyond the suggested wide equitable discretion, the existence of which I have already rejected. Apart from the provisions in rule 43 for the court to order a contribution towards costs in relation to pending matrimonial proceedings, I am not aware of any circumstance in which our law permits a party to proposed litigation to obtain from the intended other party a contribution towards the costs of that litigation.[19]

[28] This case illustrates how inappropriate it would be for such an order to be granted. The liquidator seeks a contribution on the basis that Mr Akoo and the Akoo family trust are partners to the extent of 50 per cent in Rollco. However that is disputed by the Moosa trusts, which claim that the Akoo family trust is not a partner at all and that Mr Akoo's share is limited to an approximately 20 per cent share, whilst they hold the balance. Plainly some at least of the intended litigation will be directed at this issue. If the assertion by the Moosa trusts is rejected then Mr Akoo and the Akoo family trust will have had to pay half the costs of running litigation against themselves in which they have been successful. What is more there is then little likelihood that they will be able to recover their costs from Mr Morar. If it transpires that the Moosa trusts are correct and Mr Akoo's interest is only 20 per cent, on what basis will he have had to provide half the costs of establishing that?

[29] At this point the analogy between the liquidator of a partnership

19 Cases where security for costs may be ordered are different because they are merely cases of providing security against the possibility of the party furnishing such security having an adverse costs order made against it.

and the liquidator of a company is abandoned. In the case of a company the liquidator must go to the creditors if financial assistance is needed in order to pursue litigation and obtain contributions from them. Here the beneficiaries of the proposed litigation would be the Moosa family trusts. Why then should they not be required to provide the finances for litigation if they wish to assert rights against their erstwhile partner? Indeed one wonders why they do not institute the proceedings themselves instead of leaving it to Mr Morar. The question of the identity of the partners and the extent of their respective interests in the partnership is pre-eminently an issue to be resolved among the partners by way of proceedings under the *actio pro socio*.

[30] To multiply examples of the problems with this claim would be to heap Pelion upon Ossa. The court does not have the power to make such an order and it was rightly refused by K Pillay J.

[31] The next issue relates to the prayer for a detailed account in respect of Rollco's dealings with its principal supplier. It can be disposed of simply. Firstly such an obligation already exists under the order granted by Msimang J. Secondly a corresponding order was made against the supplier without opposition and there is no reason to believe that it will not be complied with. Such an order is accordingly unnecessary.

[32] That leaves only the prayer in relation to procuring professional indemnity insurance. There is no need for such an order to be made. If Mr Morar reasonably requires professional indemnity insurance in order to carry out the liquidation of the Rollco partnership then he is entitled to take out such insurance and in due course recover the premium as a cost of administration. If he does not reasonably require such insurance for the

purposes of administration then the costs of his taking out such insurance are a personal expense and cannot be debited to the partnership or its members. The court cannot alter that situation. Mr Morar must make up his own mind on this question and act accordingly. He does not need an order of court to do so.

[33] For those reasons the high court was correct to dismiss the application and the appeal must be dismissed. Although two counsel appeared in the appeal the costs of two counsel were not sought in the heads of argument and only one counsel appeared in the high court. The matter was not so complicated as to warrant the employment of two counsel. The appeal is dismissed with costs.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	A J Dickson SC Instructed by Schoerie & Sewgoolam Inc, Pietermaritzburg McIntyre & Van der Post, Bloemfontein
For respondent:	N A Cassim SC (with him D Rhamdani) Instructed by Abbas Latib & Co, Pietermaritzburg Honey Attorneys Inc, Bloemfontein.