1897

JACOBSOHN v. EDWARDS AND EHRLICH.

Ameshoff, J.

to prove damages, the Judicial Commissioner was not wrong in his decision. With *Norden* v. *Rennie* before him, he should have ordered the production of further evidence in regard to damages, but in like manner the plaintiff, the present appellant, should on his own initiative have led such evidence. It therefore seems to me just that the case should be sent back to the Judicial Commissioner to take evidence with regard to damages and to decide thereon, while no costs of this appeal should be allowed.

Attorneys for appellant: *Stegmann* and *Esselen*.

Attorneys for respondent, Ehrlich: *Rooth* and *Wessels*.

Coram:
KOTZÉ, C.J.
MORICE, J.
JORISSEN, J.

S. A. TUCKER

v.

THE MIDDELVLEI BLACK REEF GOLD PROSPECTING AND DEVELOPING SYNDICATE.

1897

18 *June.*
9 *September.*

SHAREHOLDERS—*ULTRA VIRES* RESOLUTION—ARTICLES OF ASSOCIATION—ALTERATION OF—FORFEITURE—VENDORS' SHARES.

A syndicate was formed in which both vendors' shares and subscribers' shares were issued. The articles of association of the syndicate provided, inter alia, *that a majority of three-fourths could alter the articles, whereupon such alteration would be binding on all the shareholders, and that a majority of three-fifths of the shareholders should have the power of increasing the capital by means of new calls. The articles of association were subsequently altered by a majority of three-fourths. One of the alterations provided that on failure to pay new calls the shares of the defaulters would be declared forfeited, without the alteration making any distinction between ordinary and vendors' shares. It was resolved by a three-fourths majority to make new calls. The plaintiff refused to pay these calls, and her shares were thereupon declared by the board of directors to have been forfeited. She brought an action against the syndicate to issue the forfeited shares to her, and in the alternative she claimed damages, on the ground that both the resolutions of the shareholders were* ultra vires. Held, *that the resolutions were* intra vires, *and binding not only on holders of ordinary shares, but also of vendors' shares.*

THIS was an action for the delivery of shares and 1,500*l.* as damages, or in the alternative for 2,000*l.* damages. The facts are

fully set forth in the judgment of Morice, J. The complete text of the articles of association, as originally drawn up, is as follows :—

Articles of association made and entered into at Kimberley, Griqualand West, by and between the various parties, who have either personally or through their respective agents subscribed this deed.

Whereas it has been proposed and agreed to form and create a syndicate in order to purchase a certain portion of the farm "Middelvlei," situate on the Witwatersrand Goldfields, in the South African Republic, and to prospect thereon and mine for gold and other minerals, and in order to secure and acquire any further mining and other rights which the Syndicate may deem good and suitable :

And whereas it is desirable, for the sake of clearness and security, to reduce to writing the terms and conditions under and subject to which the necessary funds of the Syndicate shall be contributed by the members, and the concerns and business of the Syndicate managed and conducted,

These presents witness that the persons aforesaid have made, entered into, and concluded the following agreement, that is to say :—

1. The name of the Syndicate is Middelvlei Black Reef Gold Prospecting and Developing Syndicate.

2. The objects of the Syndicate are the purchase of the said portion of the farm Middelvlei, the prospecting, mining, and digging for gold, precious stones, and minerals on the said farm and elsewhere in the South African Republic, and the acquisition, obtaining, and securing of such other mining and other rights and concessions as the Syndicate may deem proper and suitable, and the flotation of any rights or properties into one or more anonymous companies.

3. The Syndicate shall be taken and considered to consist of one hundred and fifty (150) shares of the value of 100*l.*, fifty whereof shall be regarded as fully paid up, and shall be issued to the vendors of the rights acquired by the Syndicate on the said portion of the farm Middelvlei, in consideration of the sale by them of these rights to the Syndicate. For the remaining one hundred shares the holders thereof shall pay the sum of 50*l.* per share in cash, and the balance of 50*l.* per share in such calls or

instalments as the committee of management hereinafter mentioned shall deem fit to determine.

In case any shareholder shall fail to pay the whole of such call or instalment as shall be due in respect of his share and determined as above, for the period of thirty days after the same shall have become due and payable, it shall be lawful for the committee of management to declare one half of the interest then held in the Syndicate and paid for by such shareholder to be forfeited, together with the entire balance of the share not yet paid by him, and in regard to which such failure exists, and the committee shall thereupon have the right to deal with the interest so declared to be forfeited, and to dispose of it in such manner as it shall deem expedient.

4. The proceeds arising from such cash payments and out of such calls or instalments aforesaid, shall be expended and used for the objects of the Syndicate in such manner as the Syndicate shall determine.

5. The members respectively are entitled to the property, the assets and funds of the Syndicate, and to the profits and winnings arising therefrom in proportion to the number of shares respectively held by them, and are liable in the same proportion for the debts and obligations of the Syndicate.

6. It shall be lawful for the Syndicate to increase its capital from time to time, by the issue of new shares or by the making of further calls on the then existing shares, provided such increase be decided upon by three-fifths of the votes of the members in person or by proxy, present at a special meeting of the Syndicate summoned for the purpose. Any increase of capital, however made, if decided upon by the said majority of three-fifths, shall be binding upon the members of the Syndicate.

6A. The committee of management of the Syndicate can, from time to time, borrow such sums of money from the members of the Syndicate or other persons as it may require from time to time for the purposes of the Syndicate and against the security of the property of the Syndicate, provided, however, that the sum or sums borrowed shall not exceed the sum of 2,000*l.* altogether, without the special sanction of the shareholders given at a meeting called together for that purpose.

7. The concerns and business of the Syndicate shall be conducted and carried on by a committee, consisting of seven members

of the Syndicate, to be called the committee of management, who shall have the power of collecting, receiving and expending all funds and moneys for and on behalf of the Syndicate, of carrying out and conducting the objects of the Syndicate, and in general of carrying out all such orders and instructions as the Syndicate may from time to time give. Three members of the committee shall form a quorum, and in case of an equality of votes the member acting for the time as chairman of the committee shall have a casting vote.

8. All matters and questions of whatever nature, which may be submitted or discussed at a meeting of the Syndicate, except as provided in clauses 6 and 12 of this agreement, shall be decided by a majority of votes of the members present in person or by proxy and voting at such meeting, but no one shall be allowed to attend any meeting or vote thereat, unless all instalments and calls due and payable on all his shares shall have been fully paid.

Each member shall have a vote for each share held by him, and in the event of an equality of votes the chairman of the meeting shall have a casting vote. Any resolution passed at a meeting of members shall be final and binding on all the members.

9. The committee may at any time summon a meeting of the Syndicate, and it will also on the receipt of a request signed by not less than five members, holding in all not less than five shares, call a meeting of the Syndicate.

Not less than seven days' prior notice of all meetings shall be given by letter or circular to each member. Notice will be deemed to have been duly given if handed personally to a member, or to one of his household, or if through the post addressed to his usual place of residence.

10. Seven persons present in person or by proxy shall constitute a quorum for a meeting of the Syndicate.

11. The Syndicate may from time to time make such improvements, alterations or additions in or to this deed, as it may deem fit, at a special meeting called together for the purpose, and any improvements, alterations or additions so made must be supported by three-fourths of the members present in person or by proxy, and shall be signed by the chairman of the meeting at which they were passed, and shall be binding upon all the members of the Syndicate.

12. All actions, suits and proceedings required by the Syndicate

1897

TUCKER v. THE MIDDELVLEI SYNDICATE.

to be instituted or defended, shall be effectual and valid against the Syndicate, if instituted or defended in the name of the chairman for the time being on behalf of the Syndicate; and in all actions, suits and other proceedings instituted, begun or prosecuted by the Syndicate against any of its members or officers or *vice versâ*, the partnership hereby formed shall be no objection to such action, suit or other procedure to be brought or prosecuted, and this clause shall be considered, and may be used and read at the trial of any such action, suit or other procedure as an admission to that effect by all the parties hereto:

For the due and faithful performance of which the parties hereby bind their persons and property, the one to the other according to law.

In witness whereof the said members, each having subscribed for and holding the number of shares placed opposite his respective signature, have placed their signatures hereto at Kimberley, in the Colony of the Cape of Good Hope, on the dates opposite to their signatures respectively.

[*Here follow the signatures.*]

Wessels (with him *Curlewis*), for the plaintiff: We admit we are bound by the articles of association, but we dispute the right of the Syndicate to declare our shares forfeited under it. As soon as the shares are fully paid up everything is clear and at an end, and if the Syndicate is in difficulties it cannot take up further capital in order to continue its existence. It must then go into liquidation. If three partners are together, and the capital is expended, then the two cannot compel the third to increase the capital. If they increase the capital they cannot say to the third that, because he does not consent, his share has been forfeited. The third partner would be entitled to his further share after deduction of a proportionate contribution. That is exactly Mrs. Tucker's position. Clause 3 of the articles only refers to forfeiture of the shares mentioned therein, and excludes vendors' shares. Clause 6 gives no right to forfeiture. That is *ultra vires*. It is a penalty, and is and may not be presumed. A majority cannot in this way penalise the minority. (*Lindley on Companies*, p. 528, 5th ed.)

Esselen (with him *Sauer*), for the defendant: Clause 6 is clear. The majority can increase the existing capital on the existing

vendors' shares by making calls. The right of declaring a forfeiture can be inserted afterwards, even although the original articles of association do not say so. (*Healy, Company Law, p.* 116, 3rd ed.; *Teasedale's Case*, 9 Chanc. App. 54.) Clause 11 gives the right to alter the articles as a subsequent meeting may decide. The Court will take it that the resolution of the meeting that the shares be forfeited was *bonâ fide* and in the interests of the company. We have also pleaded *lâches* on the part of the plaintiff. She has not done anything from 1891 until 1895; that is to say, from 12th August, 1891, when she again protested, until May, 1895, when the letter of demand was written.

Wessels, in reply: We have not to do in this instance with a properly formed company and a syndicate that is limited. The principle of forfeiture is far more stringent where the syndicate is unlimited. A partner cannot be turned out. (*Lindley on Partnership, p.* 574.) *Healy on Company Law, p.* 116, is not against us. He says that forfeiture must be taken *strictissimi juris*. (*Kelk's Case*, 9 Eq. *p.* 107; *Article* 75, *Association in that case, p.* 109.) The right to declare a forfeiture cannot be included under the powers given by clause 11 of the articles of association.

Cur. ad. vult.

Postea. 9th September, 1897.

MORICE, J.: The facts of this case, which was heard on 18th July last, are briefly as follow:—Certain persons, whom I will call "vendors," among whom the husband of the plaintiff was included, had an interest in the farm Middelvlei. In 1888 a syndicate, called the Middelvlei Black Reef Gold Prospecting and Developing Syndicate, was formed to take over the rights of the vendors and to prospect the farm. According to the articles of association of the Syndicate, it consisted of 150 shares of the value of 100*l.* each, 50 of which were regarded as fully paid up and issued to the vendors; of the other 100 shares the holders had to pay 50*l.* in cash, and the balance in such instalments as the committee of management should deem expedient to fix. In 1891 four of the vendors' shares were ceded to the plaintiff. In that year, the capital of the Syndicate being exhausted, and the Syndicate having incurred debts for more than 2,000*l.*, notice was given in terms of the articles of association that a special meeting of shareholders

1897

TUCKER v. THE MIDDELVLEI SYNDICATE.

Morice, J.

would be held on 5th February, 1891, for the following purposes :—

1. To decide upon the desirability of making a further call upon the original capital of the Syndicate of such amounts as may be found necessary.

2. To amend the articles of association by inserting a clause that shareholders would forfeit their shares in the event of non-payment of this or other calls.

3. To consider the advisability of registering the Syndicate under the law of limited liability in the Cape Colony.

This meeting was held, the plaintiff being represented by proxy. A letter from the plaintiff and other holders of vendors' shares was read, objecting to a call and especially against the proposed forfeiture clause. Notwithstanding this, however, a resolution was passed, by 105 votes against 35, that a call of 20*l.* per share on the original capital should be made, payable as the committee of management may decide. A resolution was also passed by the same majority that the articles of association should be amended by the insertion and omission of certain words. The result of this alteration was that the committee of management would be empowered to declare the shares of shareholders who did not pay the call forfeited. On the 5th March and 30th June the shareholders were called upon to pay the calls with a notice of forfeiture of shares in case of non-payment. The plaintiff having failed to pay the call on her four shares, these were on 1st August, 1891, declared to be forfeited by the committee of management. The Syndicate was subsequently changed into a company with limited liability, that is, into the present defendant company, in which every holder of a 100*l.* share in the Syndicate obtained 120 shares in the company. The plaintiff now sues for 480 shares in the defendant company, by virtue of her being the holder of four 100*l.* shares in the Syndicate, and also for 1,500*l.* by way of damages by reason of the refusal of the shares to her. She claims alternatively 2,000*l.* as damages, and alleges that the making of the call on the vendors' shares, the altering of the articles of association, and the forfeiture of the vendors' shares were *ultra vires* and invalid.

After perusing the original articles of association of the Syndicate, I have not the least doubt that the contention of the plaintiff is quite untenable. With regard to the making of further calls on

the original capital, that was done under clause 6 of the articles of association, which prescribes that the Syndicate can increase its capital by making further calls upon the then existing shares, provided that such be resolved upon by the votes of three-fifths of the members present in person or by proxy at a special meeting of the Syndicate called for that purpose. The then existing shares mean, of course, the fully paid up shares, whether vendors' shares or otherwise. And the resolution hereon at the meeting of the 5th February, 1891, was taken by the required majority.

The contention, however, on which Mr. Wessels, for the plaintiff, laid the greatest stress was that the majority of the Syndicate had no power to alter the articles of association in order that the vendors' shares might be declared forfeited. No authority has, however, been cited in support of this, and in my opinion there is no weight in the arguments which have been advanced thereon. There is indeed authority to show that the majority of a partnership cannot alter the articles of the partnership. (*Vide, inter alios, Story on Partnership*, § 125.) But that, of course, refers to cases where the power of alteration is not given by the articles themselves. In the articles of association at present before us it is expressly provided that the Syndicate can alter the articles of association—"Make such amendments, alterations, or additions as it may deem fit," provided the alterations are approved by three-fourths of the members present in person or by proxy at a special meeting called for the purpose, and provided they are signed by the chairman. The plaintiff admits that the resolution with regard to the alteration of the articles of association taken at the meeting of 5th February, 1891, complied with these requirements. It would be quite absurd to maintain that, wher persons form a syndicate or partnership, under conditions, amongst others, that the articles of association can be altered by a majority of three-fourths, the Court will refuse to recognize these conditions, in case of subsequent opposition against the carrying out of them. That would be to protect persons, who are majors, against the consequences of their own acts; in other words, the Court would be playing a grandmotherly part.

But it is alleged that although the articles of association of the Syndicate could be altered by a three-fourths majority, this could not be done in such a way as to declare vendors' shares forfeited on account of non-payment of calls, for the declaring shares to be

1897

TUCKER v. THE MIDDELVLEI SYNDICATE.

Morice, J.

forfeited was a proceeding of a very exceptional and oppressive character. I do not, however, consider that the power to declare shares forfeited on the ground of non-payment of lawfully-made calls is anything exceptional or oppressive. Such a power appears to me to be a practical necessity to a company with many shareholders, upon whom calls have to be made, for in many instances an action for payment of the call would entail more costs and trouble than the call would be worth. Moreover, so far as concerns the shareholders, the giving of a reasonable notice of the intention to declare a forfeiture is equally as good as the institution of an action. If the shares be of value, the holder can sell a portion of them and pay the call on the rest. If they be of no value, they will fetch nothing by a sale in execution in satisfaction of a judgment. But even if the power to declare a forfeiture be something exceptional or oppressive, there can be no doubt that such a power may lawfully be given by the articles of association. And if the power can be conferred in original articles of association, there is no reason why it may not be inserted in amended articles of association, where the power to alter the articles of association is expressly given.

It would be another matter if it were proved that the majority of three-fourths had not acted in good faith, or desired to benefit themselves to the prejudice of the minority. But in the present instance the operation of the declaration of forfeiture was the same for the holders of both kinds of shares. In case of non-payment of the call, the ordinary shareholders lose the money they had already paid, and the vendors the share in the property which they brought in. Moreover, the vendors' shares, if they were sold in execution, would probably have realised little or nothing. It was because they were held a considerable time after forfeiture that they fetched a good price for the benefit of the company.

I am therefore of opinion that the articles of association were legally altered, and that the shares of the plaintiff were legally declared forfeited. There must accordingly be judgment for the defendant company, with costs.

KOTZÉ, C. J., intimated that he agreed with this judgment.

JORISSEN, J.: In this case the decision depends upon the two following points:—(1) Are the holders of the fully paid up shares of the Syndicate, received as purchase price for the ceded rights to minerals on the farm Middelvlei, subject to the same obligations as

the other holders of shares, who have become members of the Syndicate by subscription? (2) If so, is then a certain resolution, taken by the majority of shareholders, binding on the minority, and not *ultra vires?* With regard to the first question, Mr. Tucker, owner of mineral rights on Middelvlei, found it convenient to sell these rights to the Middelvlei Syndicate, and to receive by way of purchase price fifty fully paid up shares of 100*l.* each in the Syndicate. Four of these shares have become the property of the plaintiff. The question is now, Do the articles of association of the Syndicate give any special rights to these holders of shares, who have received them as purchase price? It was so contended by Mr. Wessels, and this, because it is said in clause 3 of the articles that the holders of the other shares shall immediately upon subscription pay 50*l.* in cash, and the balance of 50*l.* in instalments according to calls made thereon by the managers. Each payment must be made within thirty days after the call, and on failure to do so the managers shall be able to declare the already paid portion of the share as well as the portion still payable to be forfeited. Inasmuch as, says the learned counsel, forfeiture in this clause is only made applicable to the holders of shares not yet fully paid up, and not to the holders of fully paid up shares (the original vendors of the mineral rights), it is plain that there exists a great distinction between these different holders of shares, and that the shares of the latter cannot be declared forfeited. *Acutius quam verius.* It goes without saying that where there is mention made in this article of the payment of the first 100 per cent. on each share, persons who have already paid their 100 per cent., not indeed in cash, but in value, before the articles of association were framed, cannot be threatened with a penalty on account of non-payment of their 100 per cent. However, although the inference drawn by counsel is unsound, the possibility remains that there may be a difference between these two classes of shareholders, and that the shares paid for in value are not subject to any forfeiture. The articles of association can alone determine that. There is not a single sentence in them which creates such a distinction. All the shares are expressly and directly treated on the same footing or subjected to the same obligations. Clause 6 is conclusive. It provides that it will be lawful for the Syndicate *inter alia* to make further calls (of capital) on all existing shares, and that every resolution, taken by a majority of three-fifths of the shareholders, for the purpose of increasing the

1897

TUCKER v. THE MIDDELVLEI SYNDICATE.

Jorissen, J.

capital of the Syndicate, shall be binding on the Syndicate. There is, therefore, no distinction drawn, and a resolution of forfeiture of shares, the holders of which do not comply with the call for further payments, affects all the shareholders equally, provided it has been legally passed.

With regard to point 2. Is it so *in casu?* The negative has been asserted, and it has been contended that the meeting of 5th February, 1891, where the prescribed majority of three-fifths decided to make an extra call of capital at the rate of 20*l.* per share, and attached to their resolution the penalty of forfeiture, is not binding on the minority, inasmuch as the majority possessed no such power and acted *ultra vires.* I cannot assent to this, but deem it unnecessary to enter into a discussion in the abstract as to what lies within the competency of a majority of a syndicate. Clause 6 of the articles has *expressis verbis* given the power objected to, with the express addition that such a resolution to increase the capital, taken by a majority of three-fifths, shall be binding on the members of the Syndicate. In order to give a binding force to that resolution, the threat of forfeiture, if not the only means, was at all events the best, and quite in accordance with the spirit of the articles, which in clause 3 already had prescribed the same threat of forfeiture on non-payment of the first 100 per cent.

The claim of Mrs. S. A. Tucker with regard to the shares, which were declared forfeited in 1891, must be dismissed, with costs. The resolution with respect to forfeiture was legally taken. The plaintiff is equally bound thereby with every other member of the Syndicate. All the requirements of the law have been observed. She was duly notified of the holding of the meeting and of the nature of the proposed alterations, and through the failure to pay the 20*l.* on each share she has herself to thank for the forfeiture. This is not to be wondered at, for practically the shares were worthless in 1891. She then decided not to throw good money after bad, and must now submit to the consequences of the election which she made at that time. Nevertheless it is quite intelligible that, now that the shares have materially altered, she is desirous of getting back these valuable shares or damages. But desire creates no right.

Attorney for the plaintiff: *J. H. L. Findlay.*

Attorneys for the defendant: *Roux* and *Ballot.*