

1897
 FRENCH
 NORTH RAND
 Co.
 v.
 PRETORIUS.
 Kotzé, C.J.

the written contract to the summons, according to Rule XI. The Court then intimated that this course was the logical result of what is prescribed by Rule XI. As the question now before us is virtually one of practice, we do not feel ourselves justified in departing from the rule laid down in 1888 in the case of *Taylor and Peel v. Zeederberg (a)*. The exception will accordingly be allowed with costs. The summons can be amended.

JORISSEN and ESSER, JJ., concurred.

Plaintiff's attorney : *J. H. L. Findlay*.

Defendant's attorney : *F. Kleyn*.

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

MATABELE SYNDICATE v. LIPPERT AND OTHERS.

PARTNERSHIP—FIDUCIARY RELATION—CONSTRUCTIVE
 TRUST—*UBERRIMA FIDES*.

1897
 17, 18, 19, 21,
 23, 25, 26
 August.
 4 December.

In determining the question whether, in certain dealings, a partner has acted in his own interest or that of the partnership, we should accept as a guiding principle the rule "in societatis contractibus fides exuberet," and inquire whether the conduct of such partner can be tested by the standard of uberrima fides.

Where, therefore, L., T. and B. were members of a partnership (subsequently changed into a syndicate), having for its object the obtaining of mineral concessions, &c. in Matabeleland and the acquiring of such other rights, whether mineral or otherwise, as may be possible in the native territories of Africa by means of concession, purchase, bargain, or lease, and where T. and B. had obtained a concession from King Lobengula, granting them certain land in Matabeleland, which concession was subsequently ceded to L. and sold by him :—Held, that L. had obtained the concession by virtue of his position as a member of the syndicate, and that there existed a fiduciary relation between L., T. and B. and the other members of the syndicate, in consequence of which L., T. and B. were obliged to share each and every benefit obtained by them with the rest of the members of the syndicate, and to account for the same to the latter.

In this action the plaintiff claimed that the defendants Lippert, Tailyour and Boyle should be declared to have acted as trustees of

(a) S. C. Transv. Rep. (1888) p. 255.

the Matabele Syndicate in the obtaining of certain rights from the Matabele king, Lobengula, and that they should be ordered to account for the profits made through the disposal of those rights, and condemned to pay 5,000*l.* by way of damages. The summons set forth: That in 1887, and at Barberton, a partnership was entered into between Boyle, Tailyour, Town Crewell & Co., P. A. Ogilvie, F. W. Forbes and E. Lippert, having for its object the obtaining of certain concessions of minerals and mining rights over ground situate in Matabeleland and in other territories adjoining, and further to acquire such other rights, mineral rights or otherwise, or to obtain benefits and secure such things as may be possible in native African territories by means of concession, purchase, bargain or lease: That in accordance with the objects of the partnership Tailyour and Boyle were sent to Matabeleland and the surrounding country, of which mission they from time to time made a report: That the partnership was altered into a syndicate on the 29th October, 1889, which took over the assets and liabilities of the partnership, and had for its object the acquisition of the rights set forth in the deed of partnership: That the syndicate was reconstructed at different times, and that the three defendants always continued to be members thereof: That Tailyour and Boyle sent reports from time to time to the syndicate, intimating that King Lobengula had promised a concession but that it appeared inadvisable to press the king: That on the 11th May, 1889, it was resolved by the members of the syndicate to give Tailyour and Lippert full power to sell, alienate and amalgamate, &c. any rights acquired by the syndicate: That on 31st January, 1890, Boyle was added to the aforesaid two persons: That Tailyour alone, or together with Boyle, while they were acting together in Matabeleland, obtained a power or a concession authorising them to acquire certain lands in Matabeleland, but that the plaintiff is ignorant of the nature of this concession, as the three defendants refuse to give any information in regard thereto: That the chairman of the syndicate, E. Lippert, left for Matabeleland in 1891, and there conspired with Tailyour and Boyle to obtain the power or concession in his own name, which had been promised by the king to Tailyour and Boyle, as agents of the Matabele Syndicate: That in consequence of this conspiracy the defendant obtained, in his own name, a certain document from the king, being a concession or promise of land, the true nature of which is unknown to the

1897
 MATABELE
 SYNDICATE
v.
 LIPPERT.
 —

1897
 MATABELE
 SYNDICATE
 v.
 LIPPERT.

plaintiff, as the three defendants refuse to give any information in regard to it: That the defendant Lippert obtained this concession as agent, or representative, or trustee of the plaintiff, and was bound to account to the plaintiff for all profits made by him: That the defendant Lippert sold the concession to Charles Dunnell Rudd for an amount unknown to plaintiff, but certainly for not less than 10,000*l.* in cash and 20,000 shares in the Chartered Company, and 10,000 shares in the United Concessions Company: That Tailyour and Boyle shared in these profits to an extent unknown to the plaintiff.

The summons further set forth that sixteen members of the syndicate had refused to become plaintiffs, and had consequently been sued as co-defendants. The syndicate, therefore, claimed from the three defendants that they should render an account of their dealings with King Lobengula and the profits arising therefrom, as they had acted as trustees of the syndicate, and that this account should be subsequently debated in Court, and further that the three defendants should pay 5,000*l.* by way of damages.

The defendants Lippert and Chaplin (in his capacity as executor of Tailyour, who had died in the meantime) traversed all the allegations contained in the summons; and the defendant Boyle denied the allegations regarding the obtaining and disposing of the concession, and specially any conspiracy with Lippert. Boyle further pleaded that Lippert sold the rights obtained from Lobengula to the Chartered Company for 10,000*l.* in cash, 30,000 shares in the Chartered Company, and 20,000 shares in the United Concessions Company, and that he (Boyle) had an eighth interest in the syndicate, and had obtained from Tailyour an amount of 522*l.* 4*s.* 4*d.*, together with 3,000 shares in the Chartered Company and 1,750 shares in the United Concessions Company, being less than the amount in cash and shares due to him as a shareholder in the syndicate.

The further facts appear fully from the judgment of Esser, J.

Wessels (with him *Esselen*), for the plaintiff, argued fully on the evidence laid before the Court and on the different documents. As to the law applicable to the case, he relied on *Lindley on Companies*, p. 118. This passage shows that the subsequent articles of association of the syndicate and the objects thereof must be construed

in connection with the original objects and the earlier memorandum of agreement.

Counsel further referred to *Hancock v. Heaton*, 30 L. T. 592; *Fisher's Common Law Digest*, V. 966; *Lindley on Partnership*, 5th ed. p. 303; *Featherstonehaugh v. Fenwick*, 2 Rev. Rep. 78; *Parr v. Crosby*, 5 E. D. C. 197—207. It was the duty of Lippert to have communicated all particulars to the syndicate, and then to have asked whether the syndicate desired to go into the matter.

1897
MATABELE
SYNDICATE
v.
LIPPERT.

Curlewis (with him *Coster*), for the defendant: The two questions on which the decision of the Court depends are these: (1) Was it within the intention of the syndicate to acquire such a concession as Lippert obtained? (2) Could Lippert ever, by his acts in 1891, have been able to bind the syndicate, and could he ever have recovered a penny of the expenses from the syndicate? After having answered both these questions in the negative by reference to the evidence and documents, counsel referred to *Lindley on Partnership* (6th ed.) and the case there cited of *Clegg v. Edmonson*, at p. 320; *Russell v. Austwick*, p. 322; and *Parr v. Crosby*, 5 E. D. C. p. 197. The syndicate now wishes only to share in the profits made, but otherwise it remained still. *Lindley on Partnership*, p. 476, 5th ed. The syndicate was aware of the concession in 1891, for it was matter of public talk; and only now, in 1897, does it take proceedings by means of a summons.

Wessels, in reply: The syndicate has not sat still, and the Court, in deciding the matter, will consider that the concession of Lippert was obtained through the influence of Shepstone, which formed part of the "goodwill" of the syndicate.

Cur. ad. vult.

Postea. 4th December, 1897.

ESSER, J.: This is an action for the rendering of an account and the payment of money. The plaintiff is the Matabele Syndicate, of which, however, only twelve members are the plaintiffs, while nineteen of the members have been summoned as defendants. Of these nineteen members, sixteen can be regarded as mere formal defendants, as they have either refused to become plaintiffs or the plaintiffs have neglected or failed to obtain their co-operation. But the real action is brought against the remaining three members

1897
 MATABELE
 SYNDICATE
 v.
 LIPPERT.
 —
 Esser, J.
 —

of the syndicate, viz., E. A. Lippert, E. R. Rennie Tailyour, and F. Boyle. One of these three has duly entered appearance and has been represented in Court by counsel. The summons sets forth that in May, 1887, at Barberton, a syndicate was formed, having for its object the obtaining of mineral concessions from the King of Matabeleland or of other adjoining native chiefs, and with that view the defendants Tailyour and Boyle were sent out on an expedition: That in 1889 a new syndicate was formed out of the first one, under the name of the "Matabele Syndicate," which syndicate first of all took over all the rights and interests of the old partnership, and was further reconstructed as laid down in the articles of association, and this syndicate was reconstructed from time to time: That the three defendants, members of the syndicate, obtained certain rights from the King of the Matabele in their own name, and have disposed of these rights in a fraudulent manner to the prejudice of the syndicate, whereas it was their duty, and still is, to share benefits obtained by them in this way with the syndicate.

A declaration is now asked of this Court to the effect that what the three defendants have done they did as trustees of the syndicate, and that, as such, they may be ordered to give an account of their dealings, such account to be subsequently debated before this Court. The sum of 5,000*l.* is also claimed by way of damages. The defendants confine themselves to a denial of the allegations made against them.

The following appears from the documents and evidence. On 14th May, 1887, the original syndicate was formed at Barberton, with the object of acquiring concessions in the native territories of South Africa in general. But very soon after, attention seems more particularly to have been given to Matabeleland, and I find only one letter, viz., from Renny Tailyour to Forbes, dated 29th November, 1887, in which concessions in Khama's country are mentioned, of which, however, so far as the syndicate is concerned, nothing seems to have come. As far back as the 9th April, 1888, we find that the syndicate bore the name of Umsila (Matabele) syndicate, and all the operations of the members (adventurers) sent out by the syndicate were confined to the kraal of Lobengula.

It is noteworthy that R. Tailyour in his letter to Forbes, which I have just mentioned, says: "There will mostly nothing be done

in concessions in Matabeleland this trip, and until Lobengula's men return to him, after having themselves seen the state of affairs in Swazieland." This altogether confirms the evidence of Theo. Shepstone, who says that the messengers from Lobengula visited him about that time. From the evidence contained in the letters put in by Shepstone from Tailyour and Lippert, it appears further that the original scheme of obtaining concessions from Lobengula originated between Tailyour and Shepstone in February, 1887, when Tailyour was in Swazieland. The latter thereupon left for Barberton, and upon his representations the syndicate was evidently formed. Tailyour then returned to Shepstone, and asked him to send a messenger to Lobengula. Shepstone sent Silas, a Swazie-induna, who had been employed by Sir Theophilus Shepstone on similar missions. The evidence of James Reilly shows that this same Silas, in company with Tailyour and Boyle, the joint representatives of the syndicate, arrived at the chief town of Lobengula in the same year, 1887, and Reilly acted as interpreter with the king. Silas, according to the letters of Tailyour and the statement of Reilly, accompanied them. They represented themselves to Lobengula as having been sent by Shepstone, whose name, or rather that of his father, was a household word with all native chiefs. A concession was then asked "in the name of Offy Shepstone." Nothing about a syndicate was communicated to the king. The king doubted whether they really came from Shepstone, and sent two indunas to inquire if such was really the case, and also to acquaint themselves with the true state of things in Swazieland, where many concessions were granted at that time. On the 21st February, 1888, these two indunas, with Tailyour, arrived in Swazieland. Then already these indunas appear to have conveyed a promise from the king to grant what he desired to Shepstone, for of the syndicate naturally nothing was said. It is clear that on this occasion mention was only made of "gold concessions," but, as this was used merely as an indication of what was wanted, as against a Kaffir chief, I do not think that these words, taken by themselves, must now be taken to exclude all other rights. As the witness Shepstone states that he kept no copies of his letters, and as nothing thereon appears in the minutes of the syndicate, it is impossible to say whether Shepstone told Lippert of this promise, and whether the latter in turn informed the syndicate. Probably not; for in the following year the same

1897
 MATABELE
 SYNDICATE
 v.
 LIPPERT.
 Esser, J.

1897
 MATABELLE
 SYNDICATE
 v.
 LIPPERT.
 ———
 Esser, J.
 ———

company left again with John Colenbrander, who during that year acted as interpreter, and was sent by Lobengula to England, in consequence of which his services were afterwards employed by the Rhodes party. Colenbrander interpreted in the presence of Reilly, and from his evidence and that of Reilly, and also from the letters of Renny Tailyour to Shepstone of 1st December, 1888, and 21st December, 1888, it appears that an attempt was again made to obtain a concession from Lobengula in the name of Shepstone, but that the king confined himself to promises, without signing any document. As a bait the sum of 1,000*l.* in cash and 3,000*l.* on the erection of machinery were offered him, after the manner of mineral concessions in Swazieland, and Tailyour says that it seemed to him as if the king was inclined, on account of the offer of the 3,000*l.*, to swallow the bait. At the same time he always spoke of “land,” so that here again we cannot infer from the use of this word that only the acquisition of a mineral concession was intended and a concession of land merely would have been refused. Meanwhile the capital of the syndicate was on 9th April, 1888, increased from 600*l.* to 2,500*l.*, while the division of capital was fixed on the 22nd May, 1888, whereby the sum of 5,000*l.*, above their 625 shares, would be paid to the adventurers in case of success.

On 23rd February, 1889, a total change took place, the existing arrangement with the adventurers was cancelled, and 2,500 shares were awarded them in a capital of 10,000*l.*, their quarter share, as secured by the original contract, remaining unaffected. They were also to receive 6,000*l.* as bonus, and, as the capital was now so much larger and the syndicate had materially extended itself, it was resolved to draw up proper Articles of Association, while the office of the syndicate was removed to Johannesburg. These Articles of Association are dated 29th October, 1889, and Clause *a* of sect. 2 thereof reads as follows:—

“The objects of the Syndicate shall be to acquire all right, title and interest in and under a certain agreement dated May 14th, 1887, and also to the assets, debts, and other matters and things of what nature soever pertaining or belonging to the partnership established under the said agreement.”

These words virtually include everything which had been acquired under the agreement of 1887, not only the movables, but

also the services of Boyle, Tailyour, and Colenbrander, for these words refer, even as under the old contract, also to the promises of King Lobengula, and especially also to what we might regard as the goodwill of the old syndicate—the name of Shepstone, in which the king was still continually being approached. Now Clause (b), indeed, definitely uses the terms “acquire, obtain, prospect, and develop concessions of mineral and mining rights in Matabeleland,” but this is, in any case, the second mentioned object of the syndicate, whereby it would be possible, later on, to develop into a gold mining company, and, moreover, this portion of the contract clearly relates to what, in the meantime, had been transacted with Rudd and Rhodes. These two persons had also, both personally and through Thompson and Maguire, opened negotiations with Lobengula for the obtaining of a concession, and in order to avoid as much as possible coming into conflict with the Matabele Syndicate, they, through the medium of E. A. Lippert, proposed that they should co-operate. (See Lippert’s evidence.) This proposal is contained in the letter of Rudd to Lippert, dated 15th April, 1889, and the answer of Lippert thereto, dated 10th May, 1889. Lippert asserts that thereupon Rudd replied to him on 16th May, 1889, accepting the proposal, but Rudd, in his letter of 7th January, 1891, repudiates this, and there is no proof of this alleged acceptance, although it is mentioned in the minutes of 6th September, 1890. Meanwhile, so far as Lippert and the syndicate are concerned, this proposal was always acted on, and Lippert subsequently managed to force Rudd and Rhodes to acknowledge the claims of the syndicate, and the members thereof received their *quid pro quo* for the same. The proposal was that the Matabele Syndicate should endeavour, with the assistance of Rudd and Rhodes, to obtain a concession “over as large a tract of country as can be got,” which would then be shared with Rudd and Rhodes. In return, the Matabele Syndicate was to support Rudd and Rhodes in the obtaining of their concession, which was not then quite in order. This object, therefore, was placed in the foreground on the reconstruction of the syndicate, and hence the insertion of Clause (b) in the articles of association; but, unless we are to ascribe to Clause (a) no meaning at all, we must arrive at the conclusion that the syndicate had by no means, in 1889, abandoned the idea of acquiring a concession for itself under the contract of 1887, besides the new one in connection with Rhodes

1897
 MATABELE
 SYNDICATE
 v.
 LIPPERT.
 Esser, J.

1897
 MATABELE
 SYNDICATE
 v.
 LIPPERT.
 Esser, J.

and Rudd. And this appears all through from the further dealings of the syndicate, and even the letter of Lippert to Tailyour of 6th October, 1889, shows this twofold purpose, for there he writes, "Should you, contrary to expectations, not succeed (to obtain the sub-concession), then both parties (*i.e.*, Rudd and Rhodes *and* the Matabele Syndicate) regain their liberty of action, and as to that I shall wire you fully next week." This telegram, it is to be regretted, was never produced. The letter of Tailyour to Lippert of 13th September, 1889, is also to be noticed, in which he says, "I can get the king to-morrow to sign me a concession, but am holding back, as in the long run it is folly to oppose the Royal Charter Co." The idea of an independent concession was, therefore, not abandoned by Lippert and Tailyour in 1889, although they now allege that this was then indeed done by the syndicate. It is not necessary to consider all the dealings of the syndicate in 1890 in detail. It seems that Rhodes and Rudd did not adhere to their agreement, and that the syndicate thereupon resolved to obtain a concession independently of them.

What is written in the minutes of September, 1890, is remarkable, where Lippert communicates that he instructed Tailyour to apply for a concession for "townships, &c.," which was confirmed by the meeting. This concession, apparently, had nothing to do with the mineral concession referred to in sect. 2 (b) of the articles of association, nor with the sub-concession of Rudd and Rhodes, and must, therefore, be considered to fall under sect. 2 (a) in connection with the contract of 1887. Moreover, it appears that at that time Lobengula had given Boyle a document, with the promise of a concession, and this document was shown to Rhodes in Cape Town. The members of the syndicate then considered their position, in 1890, as very strong against Rhodes, and this accounts for the prompt payment of the expenses of Boyle and Tailyour, although Lippert generally first advanced the money. On the 22nd December, 1890, Lippert wrote a letter on behalf of the syndicate to Rudd, pertinently asking him whether he intended to hold himself bound by his contract or not, and to this he, on the 4th January, 1891, received a direct repudiation of the entire contract. Thereupon the meeting of the 20th January, 1891, of which we have heard so much, took place. We must remember that the state of things in Matabeleland had become somewhat strained, that the syndicate had been toyed with by

Rhodes, and was consequently desirous of putting an end to matters. For this purpose, in the first place, the movables of the value of about 500*l.* had to be disposed of. As Boyle and Tailyour declared themselves prepared to take over these movables against the amount of their claims, and those of others, against the syndicate, to an amount of 357*l.* 0*s.* 5*d.*, this offer was accepted in the interests of both parties. For the rest things remained as they were. Boyle and Tailyour received instruction to obtain the much talked of concession for the syndicate in the manner they should deem best, but especially without any delay, for the matter had now become pressing, as war might at any moment break out. The words "a concession" were subsequently altered to "any concessions," but I cannot see that this makes any actual difference. If it had been "the mineral concession in order to oppose Rudd and Rhodes," or something similar, then, perhaps, the construction would have been narrowed. Now I cannot read the words otherwise than that a concession had to be obtained, of whatever kind it may be, so long as the syndicate could derive a benefit from it by using it in opposition to Rhodes, for now it was no longer desired, as contemplated in sect. 26 of the articles of association, to obtain a sub-concession by means of co-operation, but an entirely independent one, under the original contract of 1887, as laid down in sect. 2 (a), to which Lippert, in his letter of 6th October, 1889, to Tailyour, had already alluded. Both parties had now recovered their "liberty of action." And assuming that this alteration in the minutes constitutes an actual change, or that it was made improperly, as has been alleged, then Lippert, who, through his representative, Sydney Morris, initialed this alteration, and so approved it, cannot now rely thereon. Tailyour received a copy of these minutes, while Boyle left for England. Tailyour promptly answered, on 17th February, 1891, expressing his entire acquiescence in the resolution, only he wished, after three months, regard being had to the reduced risk of the syndicate, to give a reduced value to it. Apparently he wishes to limit, "at as early a date as possible," to three months, but is willing to give the syndicate a further interest, only, however, to a less extent. He is the first who openly says that there exists a chance of obtaining various concessions. This letter is addressed to Lippert, and the statement of Lippert is remarkable that just at this time the idea of other concessions besides mineral ones also occurred to him.

1897
 MATABELE
 SYNDICATE
 v.
 LIPPERT.
 Esser, J.

1897
 MATABELE
 SYNDICATE
 v.
 LIPPERT.
 Esser, J.

This is, however, incorrect, for he had himself, prior to this, already suggested the idea of township concessions.

Be it as it may, from this time Tailyour and Lippert evidently formed the idea of obtaining a concession for themselves independently of the syndicate. The letter of 17th February, 1891, was withdrawn on 29th May, 1891, and both letters were only received by the secretary on the 5th and 10th June respectively, and submitted to the syndicate on the 12th June, 1891. Lippert denied this at the meeting of 24th September, 1891, while the secretary insisted that it was so. The question was not then investigated, and the truth cannot now be ascertained. As it is, however, connected with the allegation of fraud in the summons against Lippert, I think he should have the benefit of the doubt, and we must take it that the letter of 17th February, 1891, was not kept back by Lippert, but was promptly handed over by him to the secretary. This being so, we must consider the reason for the withdrawal of this letter on 29th May, 1891.

In the beginning of May, 1891, Tailyour had already returned from Matabeleland to Pretoria. He then handed Lippert, as the latter states, two pieces of paper: the one signed in blank with the elephant seal of Lobengula, and signed by witnesses, together with a declaration by C. M. Acutt as interpreter; the other, which has not been produced, is said to have contained a power or concession, probably in the Kaffir language. Tailyour then told Lippert that the contents of the second document had to be written in proper form and in European language on the first document, and that he had taken this precaution in order to obtain a proper document. This agrees with what he had written to Shepstone on 5th January, 1891, and in which letter he also asked for a "rough draft" to serve as a guide to him. It thus appears as if Tailyour, in consequence of the telegram from Shepstone, to which the letter was an answer, began to conceive the idea of concessions other than mineral ones; and it further appears from his letter of 17th February, 1891, that he intended such concessions to be for the syndicate and not to obtain them for himself, although from both letters it would seem as if he had some doubt as to what would be his duty in the matter. Acutt says in his evidence that the blank document was given by the king to Tailyour in order to fill in thereon a power of attorney to act for him with Shepstone and Rhodes. I cannot attach much importance to the evidence of

Acutt. He is the person who fraudulently signed the blank document as interpreter. It appears to me, regard being also had to the letter of 5th January, 1891, to Shepstone, and the fact that the king throughout was under the impression that a concession had been asked of him on behalf of Shepstone, that the king did in fact give a blank document, with instruction to Tailyour to take it to Shepstone, so that the latter, whom the king evidently fully trusted, could himself fill in the form in which he desired to obtain his concession, sending him at the same time a kind of memorandum in the Kaffir language with regard to the nature of the concession. Whatever may be the true version, Tailyour brought the document to Lippert, and this again proves that it was still his intention at the time to hand over the concession to the syndicate, otherwise he might simply have taken it to Shepstone, for whom the king had intended it, and these two would then have been able to have settled the matter between them. The blank paper was thereupon filled in, and contains the concession of 22nd April, 1891. What further took place between Lippert and Tailyour on that occasion can naturally only be guessed from the facts which now occurred. Lippert allows the document to be ceded to him on the 9th June, 1891, and in the cession he safeguards Tailyour against any claim by the syndicate. Tailyour withdraws his letter of 17th February, 1891, and Lippert proceeds to Capetown, where he at once opens negotiations with Rudd, and now no longer about one but two concessions: the first on the footing of the old agreement of 10th May, 1899, with this difference, that now there is no longer any mention of an independent concession to be obtained by the syndicate with the permission of Rudd and Rhodes, but only of a sub-concession, which was actually obtained and subsequently sold by the syndicate. The second concession in regard to which he treated with Rudd was the land concession obtained by him from Tailyour. Counsel for the plaintiff has rightly observed that a dark veil covers these transactions, and it is a puzzle to know how Rudd and Rhodes allowed themselves to be hoodwinked, and eventually paid for two concessions instead of one, for which alone they had bound themselves, more especially as they had information from Moffat that the king now repudiated this concession. But it does not lie within the compass of this case to solve this riddle. It is clear that Lippert represented that this concession had nothing to do with his syndicate, and that

1897
 MATABELE
 SYNDICATE
 v.
 LIPPERT.
 —
 Esser, J.
 —

1897
 MATABELE
 SYNDICATE
 v.
 LIPPERT.
 Esser, J.

Rudd and others believed this. Lippert succeeded on 14th September, 1891, to obtain the sub-concession for the syndicate, while about the same time (12th September, 1891) he concluded a contract on favourable terms in regard to the land concession. According to that contract he bound himself to proceed to Matabeleland, in order to obtain a confirmation of his contract from the king. This he did, and on 17th November, 1891, he received a concession in his own name from the king, ratifying, and at the same time replacing, the contract of 22nd April. Both these, although somewhat differently worded, must be considered as identical. In order to be properly introduced, he wrote a letter on 15th August, 1891, to Shepstone, who states that he gave him an introduction, while all the witnesses who saw Lippert with the king are agreed that he represented himself to the king as having come from Shepstone. It cannot be denied that the recommendation by Shepstone, if not conclusive, was, at any rate, of very great influence in the obtaining of the concession. Shepstone says, and the letter of 15th August proves it, that he was not brought under the impression that this was a private speculation on the part of Lippert, but that, just as on former occasions, he allowed his name to be used in the interests of all the parties concerned; in other words, in the interests of the Matabele Syndicate. An attempt was made by the plaintiff to prove, from the letters of Lippert during 1891 to the syndicate and to his representative at Johannesburg, as well as from Lippert's conduct and communications to the syndicate, that he and Tailyour conspired together to defraud the syndicate of its rights. I can, however, not share this view. In the first place, it was impossible for Lippert to conceal the transaction from the syndicate, for the obtaining of a concession by Renny Tailyour was a matter of common knowledge, and had been publicly mentioned in the newspapers. The syndicate has, therefore, itself to blame that it did not earlier discover the true state of matters. At any rate, the minutes show that Lippert could have been more pertinently questioned than he was. Lippert gives as a reason for his silence that two of the members, viz., Leslie and Crewell, were connected with Rhodes, and that it was consequently inadvisable for him to make communications with regard to the circumstances of the concession in their presence. This reason is quite acceptable, for it does not matter whether his fear was well founded so long as we are able

to recognize this fear as a motive for his conduct. And from this point of view he can in no way be blamed for this caution, and the result, viz., the favourable transaction with Rudd, shows that it was necessary, in order that Lippert might succeed in his object. It is true that, in his letter of 7th September, 1891, he represented the land concession as of small value, and this when he was on the point of disposing of it at a considerable figure, but the fact that he mentions it at all serves to show his honest belief that he was entitled to keep this concession for himself, coupled with the caution and habit of the business man to divert the attention of the public when he is about to make a good speculation. Such are the principal facts established by the evidence, in so far as they are necessary for the decision of this case.

The following questions have now to be answered :—

- 1st. Was the concession obtained by Tailyour on 22nd April, 1891, and confirmed on 17th November in the name of Lippert, one which was comprised within the objects of the Matabele Syndicate? This must be answered in the affirmative.
- 2nd. Was Lippert entitled to acquire this concession for himself and to retain the benefits thereof? This must be answered in the negative.
- 3rd. Does it appear from the evidence that Lippert fraudulently conspired with Renny Tailyour in the obtaining and negotiating of the concession? This question must likewise be answered in the negative.

In support of these three answers, I refer in addition to what I have already stated in regard to the facts disclosed in evidence; to the following authorities: *Story on Contracts*, 5th ed. § 287; *Lindley on Partnership*, 6th ed. p. 319 *et seq.*, and the cases there cited of *Featherstonhaugh v. Fenwick*, *Clegg v. Fishwick*, *Clegg v. Edmonson*, and especially *Russell v. Austwick*; and also to *Parr v. Crosby* (5 E. D. C. p. 197 *et seq.*), where all the above authorities are fully considered. The principle *in societatis contractibus fides exuberet* has been applied in many cases in America and England as well as in the Cape Colony, and in this country likewise we should expect it of a partner that his conduct can be tested “by the highest standard of honour.” Lippert was, therefore, obliged, as soon as he had obtained the concession, to render a full account of his dealings to the syndicate, and that he has failed to do.

1897
 MATABELE
 SYNDICATE
 v.
 LIPPERT.
 Esser, J.

(*Dunne v. English, ubi cit.*) He obtained the concession solely by virtue of his relation with the syndicate, for he never stood towards Shepstone in any other relation than that which Shepstone occupied towards him at the commencement of the syndicate in 1887. This is especially so in regard to his position towards Lobengula, who looked upon him as an induna of Shepstone. It does not matter that Shepstone himself was not a member of the syndicate. His influence and name were evidently one of the chief assets of the syndicate, and these were, as it were, bestowed by Lippert on the syndicate with the consent and knowledge of Shepstone; and although Shepstone can only obtain his share direct from Lippert, it remains an open question whether, if need be, he will not be able to hold the syndicate liable for the same. But that it is not now necessary to enter upon. In the case of *Russell v. Austwick* (Lindley, p. 323), this is clearly laid down: "It was contended and held that the second agreement ought to be considered as made on account of all the persons interested in the first agreement, because, although the common concern had no connection with the provincial roads, which were the occasion of the second agreement, yet this agreement was entered into by the officers of the Mint, as connected with, and in continuation of, the first agreement, and in confidence of the responsibilities of the parties to it." *Mutatis mutandis*, these words are likewise literally applicable to the present case. There must, therefore, be judgment in favour of the plaintiff with costs. Lippert, the estate of Tailyour, and Boyle are declared to have been trustees for the Matabele Syndicate in the obtaining and negotiation of the concession dated 17th November, 1891, and are ordered, as such, to render to the plaintiff an account of their dealings within four months from the date of this judgment, such account, if necessary, to be subsequently debated in Court. With regard to the claim for damages, the Court cannot now award any, as no damages have been proved.

It will be unnecessary to make any order in respect of the formal defendants.

MORICE, J.: I am of opinion that, as against Lippert and the executor of Renny Tailyour, the plaintiff is entitled to an account in regard to the land concession mentioned in the summons, with costs. I am, however, of opinion that no fraud has been proved,

and that, in framing the account, remuneration should be allowed to Lippert for the special services rendered by him in obtaining the concession.

KOTZÉ, C. J. : This is an action for the rendering of an account. The facts have been fully mentioned in the judgment of my brother, Esser, and I do not deem it necessary to repeat them in detail. It appears that on the 14th May, 1889, an agreement was entered into between Boyle, Tailyour, Crewell & Co., Ogilvie, Forbes, and Edward Lippert, as partners in a concern, having for its object "the obtaining of certain concessions of minerals and mining rights in Matabeleland and adjoining territories, and the acquiring of such other rights, mineral or otherwise, profits, and things as may be possible in the native territories of Africa, by way of concession, purchase, bargain, or lease." It was also provided by the agreement that Boyle and Tailyour, also styled "the adventurers," should proceed into the interior to carry out the objects of the partnership, and the other partners, called "the supporters," had to find and provide the necessary funds for the purpose. In October, 1889, the partnership was changed into the Matabele Syndicate, with a capital of 10,000*l.*, in 10,000 shares of 1*l.* each, and the office of the syndicate was established at Johannesburg. The syndicate acquired all the rights of, and interests in, the partnership, under and by virtue of the contract of 14th May, 1887, and had, moreover, as a further object, "to acquire, obtain, prospect, and develop concessions of mineral and mining rights in Matabeleland or otherwise in the countries adjacent thereto, upon such terms and in such manner as may be advisable and necessary."

The defendants, Tailyour, Lippert, and Boyle, were members of the syndicate. Tailyour and Boyle left for Matabeleland, and negotiated there with King Lobengula, in order to obtain concessions for the syndicate. The syndicate held several meetings, and in the minutes of 21st February, 1890, I find the following:—
"The secretary submitted and read a letter from Mr. Frank Boyle, also a copy of a cablegram from Mr. E. Lippert. It was resolved that a copy of the cablegram be sent to Mr. F. Boyle, with instructions to see Mr. C. Rhodes once more finally, and, failing any settlement with him, within twenty-four hours from date of interview to proceed up and join Mr. Renny Tailyour, and to

1897

MATABELE
SYNDICATE

v.

LIPPERT.

Morice, J.

1897
 MATABELE
 SYNDICATE
 v.
 LIPPERT.
 KOTZÉ, C. J.

use every endeavour to get a concession for the syndicate, independently of Mr. C. Rhodes and his party, and as opposed to them." At the meeting of the members of the syndicate on the 20th January, 1891, I find, according to the minutes, that the following was resolved upon:—"That Boyle and Tailyour take over the assets of the syndicate (*i.e.*, in Matabeleland), and be allowed to trade on their own account, and be given a free hand to take whatever steps they deem advisable for the purpose of obtaining any concessions at as early a date as possible, and such concessions to be the property of the syndicate on the terms of the original agreement."

After this Boyle and Tailyour obtained a concession from the Matabele king, Lobengula, granting them certain land, and this was subsequently ceded to Lippert, who sold or transferred it to Messrs. Rudd and Rhodes for a certain consideration. I have no doubt on the evidence that Lippert is entirely wrong in his contention that concessions of land are not included in the transactions and objects of the syndicate, and that the syndicate permitted him to acquire such a concession for himself. The concession which Lippert obtained, and which was transferred to Rudd and Rhodes, he acquired through his position as a member of the syndicate. There existed between him, Tailyour, and Boyle, and the rest of the members of the syndicate, a fiduciary relation, by virtue of which the defendants are obliged to share each and every benefit obtained by them with their fellow partners, or, rather, with the other members of the syndicate. They are nothing else than trustees or *fiduciarii* for their fellow members, and must render an account to them. The law applicable to the facts is clearly expounded in *Story*, *Lindley*, and in *Parr v. Crosby*. I agree with the conclusion at which my brothers, Morice and Esser, have arrived, but I cannot share the view of my brother Morice, that Lippert is entitled to remuneration for special services rendered by him. A partner, says Lindley on Partnership (p. 393, 6th ed.) is, as a rule, in the absence of special agreement, not entitled for trouble taken and services rendered. It is not necessary that I should inquire into the question whether Lippert has been guilty of direct fraud. My brothers have answered this question in the negative, and I do not wish it understood that I differ from them on this point. It is sufficient for me to observe that Lippert, Tailyour, and Boyle have acted towards their fellow

members in a manner which the law will not countenance. They have, through their acts, virtually called a constructive trust into being, and, by reason thereof, they must account to the plaintiffs. The three defendants, whom I have mentioned, will accordingly be ordered to render a full statement and account to the plaintiffs of all the benefits and profits received and made by them out of the concession or concessions obtained from the Matabele king, Lobengula. The account is to be rendered within four months from date, and, if necessary, to be afterwards debated in Court. The plaintiffs are entitled to the costs of this action.

Attorney for the plaintiff: *H. L. Scholtz.*

Attorneys for defendant: *Rooth and Wessels.*

C. V. J. J. PLATTEAU v. S. P. GROBLER.

MAINTENANCE—CHAMPERTY—PECUNIARY ASSISTANCE IN
LAW-SUITS.

P. sued G. for an account in regard to the sale of a certain farm. At the trial P. stated that he had entered into an agreement with his brother-in-law, H., by which the latter undertook to repay P. the costs of the action in the event of his losing it, and in the event of P. being successful H. was to share the profits of the suit with him. Held (per Ameshoff and Esser, JJ.: Jorissen, J., diss.), that this constituted maintenance or champerty, and that consequently absolution from the instance should be granted in the suit of P. against G.

(*Hugo and Moller N.O. v. The Transvaal Loan, Mortgage and Finance Co.*, 1 Off. Rep. p. 336; *Green v. De Villiers*, 2 Off. Rep. p. 289; *Schwitzer's Claimholders' Rights Syndicate v. Rand Exploring Syndicate*, 3 Off. Rep. p. 140, referred to.)

THIS was an action for an account and other purposes. The summons set forth that the plaintiff was the lawful owner of the farm Bellevue, in the district of Zoutpansberg: That in September, 1896, the plaintiff verbally agreed with the defendant that the latter should sell the said farm and pay over to the plaintiff the half of the purchase price, and retain the other half as commission for his trouble and services, after having paid out of it the transfer

1897
MATABELE
SYNDICATE
v.
LIPPERT.
Kotzé, C.J.

Coram:
AMES-
HOFF, J.
JORIS-
SEN, J.
ESSER, J.

1897
22 September.
1 December.