



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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Citation: Simba (Re), 2018 ONSEC 41

Date: 2018-08-08

File No. 2018-6

**IN THE MATTER OF
MUCHOKI FUNGAI SIMBA
(also previously known as Henderson MacDonald Alexander Butcher)**

REASONS AND DECISION

Hearing: In writing

Decision: August 8, 2018

Panel: D. Grant Vingoe Vice-Chair and Chair of the Panel

Appearances: Alvin Qian For Staff

No one appeared on behalf of
Muchoki Fungai Simba

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REASONS AND DECISION

I. OVERVIEW

- [1] This is a hearing before the Ontario Securities Commission (the **Commission**) pursuant to sections 127 and 127.1 of the *Securities Act*¹ (the **Act**) to determine whether it is in the public interest to make an order against Muchoki Fungai Simba (**Simba**).
- [2] The proceeding arose from a Notice of Hearing issued by the Commission on February 12, 2018, as amended April 4, 2018, and a Statement of Allegations filed by Staff of the Commission (**Staff**) on February 8, 2018 and amended on March 29, 2018 (the **Amended Statement of Allegations**).
- [3] In the Amended Statement of Allegations, Staff alleges that Simba engaged in unregistered trading and advising in securities in the account of a retired person, incurring total losses of \$56,009.26.
- [4] The hearing on the merits in this proceeding was converted to a hearing in writing by Order of the Commission dated April 23, 2018.
- [5] The written record is comprised of the Affidavit of Bridget Simard, sworn May 30, 2018² and the Affidavit of John Humphreys, sworn May 30, 2018³, each with accompanying exhibits.
- [6] Simba has not appeared or made submissions and indicated to Staff that he did not intend to participate in the hearing process.⁴
- [7] Pursuant to subsection 7(2) of the *Statutory Powers Procedure Act*⁵, the Commission has jurisdiction to proceed with a hearing in the absence of the respondent when they have been given notice but have not appeared.

II. FACTS

- [8] Simba was a resident of Ontario during the Material Time. He has a degree in accounting and finance and has taken the Canadian Securities Course in connection with his past securities licence.⁶
- [9] Simba was a former registrant under the Act and had been registered as a salesperson or Dealing Representative of Canfin Magellan Investments Inc. (**Canfin**), a mutual fund dealer, in various categories between 1998 and 2009.⁷ He was terminated from his position at Canfin in 2009.⁸
- [10] On February 20, 2012, the Mutual Fund Deals Association of Canada (**MFDA**) permanently prohibited Simba from “conducting securities related business in any capacity while in the employ of or associated with any Member of the MFDA”, amongst other penalties⁹, for engaging in personal financial dealings with

¹ RSO 1990, c S.5.

² Exhibit 3, Affidavit of Bridget Simard sworn May 30, 2018 [*Simard Affidavit*].

³ Exhibit 4, Affidavit of John Humphreys sworn May 30, 2018 [*Humphreys Affidavit*].

⁴ Exhibit 5, Affidavit of Sharon Nicolaides sworn June 8, 2018, Tab 5.

⁵ RSO 1990, c S.22.

⁶ Exhibit 4, Humphreys Affidavit, Tab H.

⁷ Exhibit 4, Humphreys Affidavit, Tab L.

⁸ Exhibit 3, Simard Affidavit, Tab B at p 2.

⁹ Exhibit 3, Simard Affidavit, Tab C.

a client by borrowing money and failing to repay or otherwise account for the money, failing to return all client files to Canfin, and failing to provide information or produce document as requested by Staff of the MFDA.¹⁰

- [11] Between January 6, 2014 and March 16, 2015 (the **Material Time**), Simba placed over 440 buy/sell orders in a locked-in retirement account for H.B. (the **LIRA Account**).
- [12] H.B. was a former client of Simba's from Simba's time at Canfin.¹¹ H.B. approached Simba to help him make investments and withdraw locked-in retirement funds that he had received from a pension.¹² On October 29, 2013, Simba helped H.B. set up the LIRA Account and transfer money from another account into the LIRA Account¹³, which contained the entirety of H.B.'s savings¹⁴.
- [13] H.B. was born in 1950, was not working during the Material Time and had very limited investment experience.¹⁵ Simba did not believe that H.B. qualified as an accredited investor.¹⁶
- [14] During the Material Time, H.B. relied on Simba to make and execute all decisions in the LIRA Account. Simba and H.B. had a verbal agreement that Simba had unfettered access to and complete discretionary trading authority over the LIRA Account through the password that Simba and H.B. had set up together for the account.¹⁷
- [15] The LIRA Account incurred total losses during the Material Time of \$56,009.26 as a result of Simba's purchases and sales of equities and options in the account. Simba has paid H.B. \$5,000.00 as compensation for his losses.¹⁸
- [16] Simba and H.B. agreed that Simba would be compensated for his services, with the amount in H.B.'s recollection dependent on results.¹⁹ In fact, Simba did not receive any compensation.²⁰
- [17] During the Material Time, Simba was not registered in any capacity under Ontario securities law.

III. ISSUES

- [18] The issues that must be addressed in this matter are as follows:
- a. Did Simba engage in unregistered trading contrary to subsection 25(1) of the Act?
 - b. Did Simba engage in unregistered advising contrary to subsection 25(3) of the Act?

¹⁰ Exhibit 3, Simard Affidavit, Tab B.

¹¹ Exhibit 4, Humphreys Affidavit, Tab H.

¹² Exhibit 4, Humphreys Affidavit, Tab J.

¹³ Exhibit 4, Humphreys Affidavit, Tab H and Tab J.

¹⁴ Exhibit 4, Humphreys Affidavit, Tab J.

¹⁵ Exhibit 4, Humphreys Affidavit, Tab J.

¹⁶ Exhibit 4, Humphreys Affidavit, Tab H.

¹⁷ Exhibit 4, Humphreys Affidavit, Tab J.

¹⁸ Exhibit 4, Humphreys Affidavit, Tab H and Tab J.

¹⁹ Exhibit 4, Humphreys Affidavit, Tab H and Tab J.

²⁰ Exhibit 4, Humphreys Affidavit, Tab H and Tab J.

IV. ANALYSIS

A. Standard of Proof

- [19] Staff bears the burden of proof in this proceeding. For any factual finding that this Panel makes, whether Staff's evidence is disputed or not, the civil standard of proof of "balance of probabilities" is applied. This requires the trier of fact to decide "whether it is more likely than not that the event occurred."²¹

B. Unregistered Trading in Securities

- [20] Subsection 25(1) of the Act prohibits a person or company from "engaging in the business of trading in securities", or from holding themselves out as doing so, unless the person or company is properly registered or is exempt under Ontario securities law.
- [21] Registration is a cornerstone of Ontario securities law and the regulatory framework of the Act. Registration serves as an important gate-keeping function by ensuring that only properly qualified and suitable persons are permitted to be registrants and to trade with or on behalf of the public.²²
- [22] The Commission has adopted Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations (31-103CP)*, which sets out factors to be considered in determining whether a person or company is engaged in a business when trading or advising in securities. The "business purpose" test in section 1.3 of 31-103CP includes the following factors:
- i. Directly or indirectly carrying on the activity with repetition, regularity, and continuity
 - ii. Being, or expecting to be remunerated or compensated
- [23] Although Simba is alleged to have traded for only one account, he effected over 440 buy/sell orders on an apparently discretionary basis. Although Simba did not ultimately receive any compensation, he had an agreement with H.B. that he would be compensated for his services on some basis. In considering the above factors, I find that Simba satisfies the business purpose trigger for registration.
- [24] "Trade" or "trading" is defined in subsection 1(1) of the Act to include:
- (a) any sale or disposition of a security for valuable consideration ...
 - ...
 - (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing.
- [25] Simba's online trading of equities and options in the LIRA Account resulted in 56 completed purchases and at least 62 completed sales during the Material Time, with each sale constituting a trade in securities.²³
- [26] In determining whether a person or company has engaged in acts in furtherance of a trade, the Commission has taken a contextual approach, examining the totality of the conduct and the setting in which the acts have occurred, with the

²¹ *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41 at para 44.

²² *Gregory & Co v Quebec (Securities Commission)*, [1961] SCR 584 at 588 (SCC); *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3 at para 77.

²³ Exhibit 3, Simard Affidavit, Exhibit I.

primary considerations being the effects the acts had on those to whom they were directed²⁴, and on the proximity of the act to an actual or potential trade in securities.²⁵

- [27] I find that the following conduct by Simba constituted acts in furtherance of trade:
- a. helping H.B. open the LIRA Account²⁶;
 - b. helping H.B. transfer his pension funds to the LIRA Account, including by calling Standard Life with H.B. at H.B.'s home²⁷;
 - c. placing 214 online orders to buy or sell shares held in the LIRA Account on H.B.'s behalf²⁸; and
 - d. placing 229 online orders to buy or sell options held in the LIRA Account on H.B.'s behalf²⁹.
- [28] Once Staff establishes that a respondent has contravened a registration requirement under the Act, the onus is on the respondent to prove that an exemption was available.³⁰ Simba provided no evidence that that an exemption was available and there is nothing to suggest that an exemption would have been available to him.

C. Unregistered Advising in Securities

- [29] Subsection 25(3) of the Act provides that unless an exemption is available, or the person or company is properly registered, no person or company shall "engage in the business of, or hold himself, herself or itself out as engaging in the business of, advising anyone with respect to investing in, buying or selling securities."
- [30] The term "advisor" is defined in subsection 1(1) of the Act as "a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to the investing in or the buying or selling of securities."
- [31] Providing an opinion on the wisdom or value or desirability of investing in specific securities can constitute "advising" in securities.³¹
- [32] Simba had unfettered access to the LIRA Account and could purchase and sell securities at his own discretion during the Material Time, using the password that H.B. agreed to share with him. Simba executed all purchases and sales of securities in the LIRA Account on H.B.'s behalf. During Staff's examination with Simba, Simba stated that he gave H.B. specific advice as to which securities to invest in. By engaging in this conduct, Simba was providing services similar to that of a "Portfolio Manager", a registration category under subsection 26(6) of the Act.

²⁴ *Sabourin (Re)*, 2009 ONSEC 11, (2009), 32 OSCB 2707 at para 59.

²⁵ *Costello (Re)* (2003), 26 OSCB 1617 at para 47.

²⁶ Exhibit 3, Simard Affidavit, para 10(g) – (h); Exhibit 4, Humphreys Affidavit, Exhibit H.

²⁷ Exhibit 4, Humphreys Affidavit, Exhibit J.

²⁸ Exhibit 3, Simard Affidavit, para 13.

²⁹ Exhibit 3, Simard Affidavit, para 14.

³⁰ *Morgan Dragon Development Corp (Re)*, 2014 ONSEC 10, (2014), 37 OSCB 4141 at para 91.

³¹ *Doulis (Re)*, 2014 ONSEC 31, (2014), 37 ONCB 8911.

[33] The business purpose test described above with respect to trading equally applies to advising and includes the additional factor of “engaging in activities similar to a registrant” as listed in 31-103CP. During the Material Time, Simba acted as a *de facto* portfolio manager. All final decision with respect to the investments of H.B.’s money in the LIRA Account were made by Simba. In considering this and the factors as listed above, I find that Simba satisfies the business purpose trigger for registration.

[34] Simba provided no evidence that an exemption was available and there is nothing to suggest that an exemption was available to him.

V. CONCLUSION

[35] Both unregistered trading and advising is serious conduct contrary to the public interest. Simba’s conduct was particularly egregious as he is a former registrant that has been permanently prohibited by the MFDA from conducting securities related business in any capacity, a ban which he has flouted through the conduct described above.

[36] For the reasons set out above, I find that:

- a. Simba engaged in the business of trading in securities without being registered to do so, and where no exemption to the registration requirement of Ontario securities law was available, contrary to subsection 25(1) of the Act;
- b. Simba engaged in the business of advising with respect to investing in, buying or selling securities without being registered to do so, and where no exemption to the registration requirement of Ontario securities law was available, contrary to subsection 25(3) of the Act; and
- c. Simba acted contrary to the public interest.

[37] Staff shall contact the Office of the Secretary within 15 days of these Reasons and Decision to arrange dates for a hearing regarding sanctions.

Dated at Toronto this 8th day of August, 2018.

“D. Grant Vingoe”

D. Grant Vingoe