



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue Queen Ouest
Toronto ON M5H 3S8

Citation: Simba (Re), 2018 ONSEC 56

Date: 2018-11-27

File No. 2018-6

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

**REASONS AND DECISION ON SANCTIONS AND COSTS
(Subsection 127(1) and Section 127.1 of the *Securities Act*, RSO 1990, c S.5)**

Hearing: In Writing

Decision: November 27, 2018

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

Appearances: Alvin Qian For Staff of the Commission

No one appearing on behalf of
Muchoki Fungai Simba

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. INTRODUCTION AND OVERVIEW

- [1] In its decision on August 8, 2018¹ (the **Merits Decision**), the Ontario Securities Commission (the **Commission**) found that Muchoki Fungai Simba (**Simba** or the **Respondent**) engaged in unregistered trading and unregistered advising in securities and acted contrary to the public interest.
- [2] Simba did not appear or make submissions in the hearing on the merits in this matter, which was converted into a written hearing, and indicated to Staff of the Commission (**Staff**) that he did not intend to participate in the hearing process.
- [3] Between January 6, 2014 and March 16, 2015, Simba placed over 440 buy/sell orders for equities and options in an investor's locked-in retirement account (**LIRA**), incurring a loss of \$56,009.26. Simba had unfettered access to the LIRA and executed all purchases and sales of securities in the account at his discretion. During this time, Simba was not registered in any capacity under Ontario securities law.
- [4] Simba had previously been sanctioned by the Mutual Fund Dealers Association of Canada (**MFDA**) and permanently prohibited from conducting securities related business in any capacity while in the employ of or associated with any member of the MFDA.
- [5] Prior to the hearing on the merits, Simba paid the investor \$5,000 as partial compensation for his losses.

II. SANCTIONS AND COSTS HEARING

- [6] This is a hearing to consider the sanctions and costs that the Commission should impose on Simba as a result of the findings in the Merits Decision.
- [7] Following a motion by Staff, this Panel ordered on August 27, 2018 that the sanctions and costs hearing be conducted in writing. Staff delivered its written submissions and provided an affidavit supporting its request for costs. Simba did not participate in this sanctions hearing.
- [8] Staff submit the following sanctions and costs against Simba are appropriate and in the public interest in the circumstances of this case:
 - a. that he be prohibited from trading in any securities or derivatives for a period of 10 years;
 - b. that he be prohibited from acquiring any securities or derivatives for a period of 10 years;
 - c. that any exemptions contained in Ontario securities law not apply to Simba for a period of 10 years;
 - d. that he be prohibited from becoming or acting as a registrant, an investment fund manager, or promoted for a period of 15 years;
 - e. that he pay an administrative penalty of \$100,000;

¹ *Simba (Re)*, 2018 ONSEC 41, (2018), 41 OSCB 6487.

- f. that he be reprimanded; and
 - g. that he be ordered to pay costs in the amount of \$35,871.51.
- [9] Staff submit that exceptions for any registered retirement savings plan (**RRSP**) and/or registered retirement income funds (**RRIF**) in which the Respondent has sole and legal beneficial ownership be permitted for the trading and acquisition prohibitions upon payment of the administrative penalty and costs, if ordered.
- [10] Staff further submit that if the administrative penalty and costs are not paid before the expiration of the market bans and restrictions as requested above, the market bans and restrictions continue to be in force, without limitation as to time period, until the penalty and costs have been paid.

III. LEGAL FRAMEWORK

- [11] Section 127 of the Act establishes the sanctions the Commission may impose, which include administrative penalties, disgorgement and various prohibitions.
- [12] In determining the appropriate sanctions to be imposed, I am guided by the purposes of the Act, which include protecting investors from unfair, improper or fraudulent practices and fostering fair and efficient capital markets and confidence in those markets.
- [13] The sanctions imposed must be preventative and protective, with a view to preventing likely future harm to Ontario capital markets. They are not intended to be punitive.²
- [14] The Commission has considered a non-exhaustive list of factors in determining which sanctions are appropriate, including the following:
- a. the seriousness of the conduct;
 - b. the respondents' experience in the marketplace;
 - c. the level of the respondents' activity in the marketplace;
 - d. any mitigating factors;
 - e. the restraint any sanctions may have on the ability of the respondents to participate without check in the capital markets; and
 - k. whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets (specific and general deterrence).
- [15] The Supreme Court of Canada has recognized that it is appropriate for the Commission to consider general deterrence in making orders in the public interest that are both protective and preventative.³ The weight given to general deterrence will "vary from case to case and is a matter within the discretion of the Commission."⁴

² *Mithras Management Ltd (Re)* (1990), 13 OSCB 1600 at 1610-1611; *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 (CanLII), [2001] 2 SCR 132 at paras 42-43.

³ *Cartaway Resources Corp (Re)*, 2004 SCC 26, [2004] 1 SCR 672 at para 60 (**Cartaway**).

⁴ *Cartaway* at para 64.

[16] In addition, the Supreme Court of Canada emphasized that “[n]o one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by the Commission in crafting an order in the public interest.”⁵

IV. ANALYSIS ON SANCTIONS

[17] Simba’s participation in cashing out a retiree from a guaranteed pension and then effecting trades, resulting in substantial losses, without the required registration and during the continuation of the MFDA ban is egregious conduct requiring significant sanctions to deter him from future misconduct.

[18] This misconduct diminished the financial wellbeing of the harmed investor during the investor’s retirement. The payment of \$5,000 by Simba to this investor provided minor compensation in relation to the losses of \$56,009.26 incurred.

[19] In terms of the applicable sanctioning factors, misconduct involving a senior retiree is particularly serious. Simba’s prior experience in the industry and presumed awareness of its registration requirements must also be taken into account. Deterring an individual, who has already been sanctioned by the MFDA, from engaging in future misconduct, as well as sending a message of general deterrence to others who have left the industry following bans from self-regulatory organizations or other securities authorities, are also important considerations in this case.

[20] On the basis of these factors, I agree that Staff’s recommended sanctions are appropriate and proportionate to the wrongdoing.

[21] I agree with Staff that since the harm that Simba has inflicted relates directly to the retirement investments of a harmed investor, I do not believe that Simba should be entitled to trade in RRSP and RRIF accounts until his penalty and costs are paid in full without regard to the time periods otherwise applicable to the market bans and restrictions that are imposed. The ability to trade in RRSP and RRIF accounts may otherwise enable Simba to trade quite extensively when his conduct has contributed to the financial insecurity of a senior retiree, who, through misplaced trust and lack of investment experience, was vulnerable to Simba’s misconduct.

[22] Providing that Simba’s ability to trade in RRSP and RRIF accounts do not apply until the full amount of the administrative penalty and costs are paid, regardless of the passage of time, should provide an incentive to Simba to satisfy this sanction and costs. I will therefore order, as requested by Staff, that Simba’s ability to trade in such accounts be available only after the full amount of the administrative penalty and costs have been paid, regardless of the passage of time.

[23] The administrative penalty shall, pursuant to paragraph 9 of subsection 127(1) of the Act, be designated for allocation or for use by the Commission in accordance with subsections 3.4(2)(b)(i) or (ii) of the Act.

V. CONCLUSION AS TO SANCTIONS

[24] The sanctions that have been ordered are necessary to deter Simba from further violations of the registration requirements of Ontario securities laws. The

⁵ *Cartaway* at para 64.

treatment of the retirement account carve-out will have a specific deterrent effect when the misconduct involves serious harm to vulnerable investors, in this case a senior retiree whose retirement investments have been significantly diminished.

VI. COSTS

- [25] Section 127.1 of the Act gives the Commission the discretion to order a person or company to pay costs of an investigation and/or hearing if the Commission is satisfied that the person or company has not complied with Ontario securities law or has not acted in the public interest. A costs order is not a sanction but rather a means to recover the costs of an investigation and/or hearing.
- [26] In support of its claims for costs, Staff submitted a bill of costs for one Staff member, Litigation Counsel, which includes the total number of hours worked accompanied by copies of weekly document summaries supporting the number of hours claimed. Staff advised that the bill of costs excludes any time spent by law clerks, students-at-law, and assistants and reduces time claimed to account for inefficiencies and mentoring or training of new Staff members. Staff seeks a total of \$31,980.00 for Staff fees. Staff further seeks \$3,891.51 in disbursements for a process server, court reporter and witness fees, for total costs of \$35,871.51.
- [27] I conclude that the amount sought for costs is reasonable in the circumstances.

VII. CONCLUSION

- [28] For the reasons above, I will issue an order as follows:
- a. Pursuant to paragraph 2 of subsection 127(1) of the Act, Simba is prohibited from trading in any securities or derivatives for 10 years, with the exception that he may trade in RRSP and RRIF accounts in which Simba has sole and legal beneficial ownership after the administrative penalty and costs at subparagraphs (f) and (g) ordered against him are paid in full;
 - b. Pursuant to paragraph 2.1 of subsection 127(1) of the Act, Simba is prohibited from acquiring any securities for 10 years, with the exception that he may acquire securities in RRSP and RRIF accounts in which Simba has sole and legal beneficial ownership after the administrative penalty and costs at subparagraphs (f) and (g) ordered against him are paid in full;
 - c. Pursuant to paragraph 3 of subsection 127(1) of the Act, all exemptions contained in Ontario securities law do not apply to Simba for 10 years;
 - d. Pursuant to paragraph 6 of subsection 127(1) of the Act, Simba is reprimanded;
 - e. Pursuant to paragraph 8.5 of subsection 127(1) of the Act, Simba is prohibited from becoming or acting as a registrant, an investment fund manager or a promoter for 15 years;
 - f. Pursuant to paragraph 9 of subsection 127(1) of the Act, Simba shall pay an administrative penalty in the amount of \$100,000 for allocation or use by the Commission in accordance with section 3.4(2)(b) of the Act;

- g. Pursuant to section 127.1 of the Act, Simba shall pay costs in the amount of \$35,871.51;
- h. Notwithstanding any other provision in this Order, in the event that any of the payments set out in paragraphs (f) or (g) are not made in full, the provisions of paragraphs (a), (b), (c), and (e) shall continue in force until such payments are made in full without any limitation as to time period.

Dated at Toronto this 27th day of November, 2018.

"D. Grant Vingoe"

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