REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL APPEALS 913 & 930 OF 2003

1. **SHAH MUNGE & PARTNERS LIMITED**
2. **FRANKLIN KARIUKI KIRIGIA**
3. **ARTHUR RUNYENJE NAMU**
4. **JOHN PAUL MUNGE**
5. **PAUL ANTHONY SPENCE ………………………APPELLANTS**

V E R S U S

THE CAPITAL MARKETS AUTHORITY …………..RESPONDENT

JUDGMENT OF WAWERU, J

There has been considerable delay in the preparation and delivery of these judgments. Part of the delay has been caused by pressure of work and part by the sheer volume of the records of appeal and the lengthy submissions of the learned counsels for the parties. Delay has also been occasioned by the fact that one member of the bench was transferred out of Nairobi towards the end of the hearing, and it has been rather difficult to arrange convenient meetings for conferencing. All the same, the delay is regretted.

Because of the length of the appeals, rather than assigning one Judge to prepare one single draft, we divided the appeals into three sections, with each Judge preparing judgment on his or her segment.

These two appeals are second appeals. They arose in the following circumstances, briefly stated. S**hah Munge & Partners Limited** (hereinafter called the **1st Appellant**) was at all material times a licensed stockbroker under the **Capital Markets Act, Cap 485A** (hereinafter called the **Act**). All the other appellants (respectively referred to as the **2nd, 3rd, 4th** and **5th Appellant** as the case may be) were directors of the 1st Appellant. The 5th Appellant is the only appellant in Appeal No. 930 0f 2003. All the others are appellants in Appeal No. 913 of 2003.

The Respondent, the **Capital Markets Authority** (hereinafter called the **Authority**), established under the Act, took disciplinary action by way of sanctions, *inter alia*, against the Appellants pursuant to

provisions of the Act. Details of that action will appear later in this judgment. The Appellants appealed to the **Capital Markets Tribunal** (hereinafter called the **Tribunal**), also established under the Act. The appeals to the Tribunal were under **section 35** of the Act. The Tribunal by and large dismissed the Appellants' appeals. But it set aside one sanction and varied others imposed by the Authority. Details will appear later.

The Appellants then appealed to this court under **section 35A (22)** of the Act. That subsection provides:-

"**35A. (22) Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court."**

We can thus deal only with issues of law in these appeals. We must resist any temptation or invitation by counsel to re-open issues of fact that were settled by the Tribunal. There are many grounds of appeal that raise issues of fact.

The powers of the High Court in appeal are set out in **subsection (24)** of the same section. It provides:-

"**35A. (24) Upon the hearing of an appeal under this section, the High Court may:-**

(a) confirm, set aside or vary the decision or order in question;

(b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;

(c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or

(d) make such other order as it may deem just, including an order as to costs of the appeal of earlier proceedings in the matter before the Tribunal."

The following material facts, *inter alia*, were found by the Tribunal to have been proved to the required standard:-

1. The 1st Appellant was a limited liability company incorporated under the Companies Act, Cap 486, and carrying on business in Kenya.

2. The 1st Appellant was at all material times a stockbroker at the Nairobi Stock Exchange licensed under the Capital Markets Act, Cap 485A.

3. The 2nd, 3rd, 4th and 5th Appellants were at all material times directors of the 1st Appellant.

4. On 28th June, 2002 the **National Social Security Fund (NSSF)** forwarded to the 1st Appellant a cheque for KShs. 251,505,500/00 "**being the cost for purchase of Treasury Bond (FXT/1/2001/1) through the secondary market."**

5. The Appellants had represented to NSSF that an appropriate security was available from the secondary market for purchase when in fact no such security was available.

6. The Appellants then failed to give sound investment advice, or at all, to NSSF, thereby causing it to authorize putting the aforesaid funds, which were public monies, in a bank (**Euro Bank**) that was at that time publicly reputed to be experiencing financial difficulties.

7. The Appellants placed, or at any rate suffered to be placed, those NSSF monies in its office account contrary to the then applicable rules and/or regulations under the Act.

8. The Appellants then immediately made various withdrawals of these funds and thereby utilized client monies (placed in the Appellants' office account) otherwise than for the benefit of the client.

9. The 3rd Appellant, ARTHUR RUNJENJE NAMU, was at all material times the chief executive officer of the 1st Appellant. He was the principal actor in the bulk of the correspondence emanating from the 1st Appellant.

10. The 2nd Appellant, FRANKLIN KARIUKI KIRIGIA, by his own sworn word, was at all material times the equities accounts manager of the 1st Appellant, and that he dealt exclusively with equities transactions. He was fully in the picture with regard to the NSSF transaction.

11. On 2nd, 3rd and 5th July, 2002 the 2nd and 3rd Appellants co-signed cheques for KShs. 50 million, 10 million, 130,324/05, and 14 million respectively drawn on the 1st Appellant's office account number 200000152 in which there were at the time only NSSF funds.

12. The 4th Appellant, JOHN PAUL MUNGE, was a director and shareholder in both the 1st Appellant and Euro Bank, and thus an interested party in both.

13. From as early as mid–July, 2002 public concern had been raised in relation to the deposit of NSSF funds in Euro Bank. The funds were public funds and were "colossal"**.** The bank was known to be experiencing "difficulties" at the time. Questions had been raised both in Parliament and in the media on the "NSSF/Shah Munge & Partners/Euro Bank" affair.

The Tribunal, as already seen, dismissed the appeals of all the Appellants. It found the 4th Appellant guilty of culpable negligence for not "taking any interest" in the NSSF transaction and maintaining "minimal" involvement in the same. The Tribunal also seems to have accepted that the 5th Appellant, PAUL ANTHONY SPENCE, who was a non-executive director of the 1st Appellant, took absolutely no part in the day-to-day operations and administration of the 1st Appellant, and that he was not aware of nor privy to the transaction between the 1st Appellant and NSSF. But the Tribunal did not think this was sufficient to exonerate him. For the Tribunal this was a "see no evil, hear no evil" approach and was irresponsible. It was "reckless inertia".

The Authority had imposed the following sanctions:-

1. Suspended the 1st Appellant from rendering services as a stockbroker (including trading at the Nairobi Stock Exchange) for a period of 30 days with effect from 18th October, 2002.

2. Penalized the 1st Appellant KShs. 1.5 million, the same to be paid to the **Capital Markets Authority Investor Compensation Fund** as required by the Act.

3. The 2nd, 3rd, 4th and 5th Appellants, as directors of the 1st Appellant, collectively to take responsibility for the violations by the 1st Appellant, and therefore be ineligible for directorship in the 1st Appellant or in any other licensee of the Authority or listed company for a period of one year.

4. The lifting of the suspension of the 1st Appellant's license be subject to full compliance with the requirements of the Act and the **Capital Markets (Licensing Requirements) (General) Regulations, 2002**, including the appointment of new directors and chief executive officer acceptable to the **Authority, and the fulfillment of the first three sanctions.**

The Tribunal held the penalty of KShs. 1.5 million imposed upon the 1st Appellant to be unlawful

and set it aside. It also varied the other sanctions as follows:-

1. It suspended the license of the 1st Appellant as a stockbroker issued by the Authority under the Act for 3 years with effect from 1st October, 2002.

2. It ordered the 2nd, 3rd, 4th and 5th Appellants to be ineligible for directorship, or any other position of management or control, of any licensee of the Authority, for a period of 5 years from 18th October, 2002.

3. It ordered that issuance of a license to the 1st Appellant after serving the suspension be subject to full compliance with the requirements of the Act, including all subsidiary legislation made thereunder.

The Tribunal also ordered that the Appellants, jointly and severally, do bear 75% of the costs of the appeals before it.

The memorandum in Appeal No. 913 of 2003 contains some 99(!) grounds of appeal. Many issues of fact are raised. The majority of the grounds of appeal contain arguments contrary to the provisions of Order 41, rule 1 (2) of the Civil Procedure Rules which states:-

"The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

They are also grossly repetitive. We were tempted to think that there was a conscious attempt to obfuscate issues and confuse the court by these numerous and argumentative grounds of appeal!

The prayer of the Appellants in this appeal is that the award of the Tribunal dated 18th November 2003, together with the sanctions imposed therein, be set aside with costs.

The memorandum in Appeal No. 930 of 2003 contains 18 grounds of appeal. They are also rather repetitive and argumentative. Similarly, the Appellant here seeks an order to set aside the award of the Tribunal and the lifting of the sanctions and penalties imposed.

The appeals raise three broad issues for determination as follows:-

A. Jurisdiction of the Authority under the Act in disciplinary matters over licensed persons.

B. The disciplinary procedures of the Authority under the Act.

C. The disciplinary powers of the Authority to impose sanctions on licensed persons and directors of licensed persons, with particular reference to the sanctions imposed upon each Appellant.

Lady Justice Kasango will deal with the issues involving sanctions as imposed upon the Appellants. Mr. Justice Kubo will deal with the issues involving disciplinary procedures, and I will deal with the issues of jurisdiction. It is expected that there will be some overlap.

The Act, according to the preamble, was enacted to

"…establish a Capital Markets Authority for the purposes of promoting, regulating and facilitating the development of an orderly, fair and efficient Capital Markets in Kenya and for connected purposes".

The objectives of the Authority are set out in section 11(1) of the Act which provides:-

“11. (1) The principle objectives of the Authority shall be:-

(a) the development of all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for, longer term investments in productive enterprises;

(b) to facilitate the existence of a nationwide system of stock market and brokerage services so as to enable wider participation of the general public in the stock market;

(c) the creation, maintenance and regulation of a market in which securities can be issued and traded in an orderly, fair and efficient manner, through the implementation of a system in which the market participants are self-regulatory to the maximum practicable extent;

(d) the protection of investor interests;

(e) the operation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations; and

(f) the development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya.”

It seems that the Act is intended to insulate the Capital Markets from the normal legalistic interventions through courts of law. The Act therefore sets up appropriate mechanisms for this purpose.

The powers of the Authority are to be found in section 11(3) and sections 12, 13 and 14 of the Act. Sections 11(3)(e), (h), (i), (k) and (w) are of particular relevance to these appeals. They provide:-

“11. (3) For the purpose of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions;-

(e) grant a license to any person to operate as a stockbroker, dealer or investment adviser, fund manager, investment bank or authorized securities dealer, and ensure the proper conduct of that business;

(h) inquire, either on its own motion or at the request of any other person, into the affairs of any person whom the Authority has approved or to whom it has granted a license and any public company the securities of which are traded on an approved securities exchange;

(i) give directions to any person whom the Authority has approved or to whom it has granted a license and any public company the securities of which are traded on an approved securities exchange;

(j) conduct inspection of the activities, books and records of any person approved or licensed by the Authority;

(k) publish findings of malfeasance by any person approved or licensed by he Authority, or any public company the securities of which are traded on a securities exchange;

(w) do all such other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act.”

There is at present only one stock exchange in Kenya – the Nairobi Stock Exchange. We were informed during hearing of these appeals that the capital markets in this country have recently grown expotentially, and that there were at that time some 24 brokers trading at the Nairobi Stock Exchange. We were also informed that the capital markets transact business worth KShs. 820

billion annually. So, it is a huge market whose importance to the economy of this country cannot be underestimated. It also cannot be gainsaid that the capital markets depend heavily on the confidence reposed in them by the public and other investors, especially concerning the orderliness, fairness and efficiency of trading in the stock markets. During the pendency of this judgment that confidence has been shaken somewhat following the collapse of two or three brokerage firms as reported in the information media.

We were also informed that these appeals are the first of their kind and that they are important, in that they will settle the law with regard to the disciplinary jurisdiction of the Authority and the correct disciplinary procedures under the Act. We shall do our best. We take this early opportunity to thank the learned counsels who appeared for their undoubted industry in research and skill in presentation of argument. We are indeed indebted to them. They were Senior Counsel Mutula Kilonzo and Miss Kilonzo for the 1st, 2nd, 3rd and 4th Appellants, Senior Counsel Satish Gautama for the 5th Appellant and Mr. George Oraro for the Respondent.

With regard to the disciplinary jurisdiction of the Authority, the 1st, 2nd, 3rd and 4th Appellants' complaints are as follows as set out in their memorandum of appeal:-

<u>Ground 1:</u>

"The Tribunal erred and misdirected itself in law in failing to address the jurisdictional difference provided under section 11(3)(b) and sections 25 and 26 of the Act, and in particular:-

(a) The Tribunal erred in law in failing to find that the jurisdiction of the Respondent to inquire under section 11(3)(h) was fundamentally different from the jurisdiction of the Respondent to impose sanctions under section 26 of the Act.

(b) The Tribunal erred in law in failing to find that the Respondent was aware that this was neither a Capital Markets instrument nor a security, nor a capital markets transaction. Further, the Tribunal erred in law in openly ignoring page 4 of the minutes of the Respondent's sub-committee meeting held on 7th October, 2002….

<u>Ground 3:</u>

"The Tribunal erred in law in failing to find that the requirements for the application of the rules of natural justice to be accorded to the Appellants under section 11(3) (h) and sections 25 and 26 of the Act differed fundamentally."

<u>Ground 11:</u>

"The Tribunal misdirected itself in law by confusing the disciplinary mandate of the Authority with the legal definition of "a capital market transaction". By interpreting the law as it did, the Tribunal caused a miscarriage of justice by clutching at the Appellants as culprits while driven by the populism and public outcry then prevalent and only then looking for the wrongdoing of the Appellants."

<u>Ground 46:</u>

"The Tribunal erred and misdirected itself in law in finding that the Respondent had jurisdiction over the transaction subject of the appeals before the Tribunal, and in particular:-

(a) The Tribunal erred in law in failing to find that the cheque dated 1st July 2002 for KShs. 252,505,500/00 and fixed deposit No. 001414 dated 1st July, 2002 was neither a capital markets instrument nor security within the meaning of section 2 of the Act.

(b) The Tribunal erred and misdirected itself in law in failing to find that fixed deposit receipt number 001720, value dated 1st July, 2002 for KShs. 251,505,500/00, was neither a capital markets instrument nor a security within the meaning of section 2 of the Act.

(c) It was not open in law for the Tribunal not to find that a cheque and a fixed deposit receipt were expressly excluded from the definition of either a capital markets instrument or security under section 2 of the Act.

(d) The Tribunal erred and misdirected itself in law in failing to find that the 1st Appellant did not deal in and/or deal with the said cheque dated 1st July, 2002 and fixed deposit receipt number 001720 value dated 1st July, 2002, and fixed deposit receipt number 001714 dated 1st July, 2002, *qua* stockbrokers within the meaning of the Act so as to bring them under the realm of or within the jurisdiction of the Respondent.

(e) ………….

(f) The Tribunal erred in failing to find that the Respondent acted without jurisdiction and *ultra vires* the Act."

Ground 47:

"The Tribunal twisted, misunderstood and misapplied the meaning of the word "order" within the provisions of Rule 16A (7) of the Capital Markets Authority Rules, 1994, and in particular:-

(a) ………

(b) It was not open in law for the Tribunal to find (that) Rule 16A (7) of the Capital Markets Authority Rules, 1994 conferred jurisdiction on the Authority when the Act conferred no such jurisdiction."

Ground 48:

"The findings of the Tribunal on the issue of jurisdiction are a flagrant disregard of the law on the subject. The Tribunal trivialized the appeals of the Appellants in this regard and went to great lengths to justify, rationalize and accommodate the wrongful acts of the Respondent to the detriment of the Appellants. In the process the Tribunal has misapplied, distorted and twisted the rule in R Vs Fulham *ex parte* Zerek causing a miscarriage of justice."

Ground 56:

"In finding that the Respondent acted within its powers in publishing the findings of its subcommittee the Tribunal misunderstood and misapplied section 11(3) (k) of the Act."

The 5th Appellant's grounds of appeal do not raise any jurisdictional issues except in regard to the sanctions imposed against him. The issue of sanctions, as already stated, will be addressed in the judgment of Kasango, J.

The complaints of the first four Appellants with regard to the disciplinary jurisdiction of the Authority under the Act can be re-phrased as follows for clarity:-

1. What is the jurisdiction of the Authority under section 11(3) (h) of the Act on the one hand and under sections 25 and 26 of the Act on the other hand? Is there any jurisdictional difference between the two?

2. Was the transaction between the 1st Appellant and the NSSF a "capital markets instrument or

transaction"? Did the authority have disciplinary jurisdiction over the transaction?

3. Did the Authority's disciplinary jurisdiction extend to the 2nd, 3rd, 4th and 5th Appellants, who were directors of the licensed person?

The Tribunal found:-

(a) That the Authority had jurisdiction under section 11(3) (h) of the Act to inquire into the affairs of the 1st Appellant (a licensed stockbroker) either of its own motion or at the request of any other person.

(b) The tribunal also found that the Authority had jurisdiction under section 14(1) of the Act to delegate the inquiry into the conduct of the Appellants to a committee of its own. (This is an issue that will be dealt with substantively by Kubo, J.)

(c) The Tribunal also held that the transaction between the 1st Appellant and the NSSF was indeed a "capital markets transaction".

(d) The Tribunal found that the Authority acted within the mandate of section 11(3) (k) of the Act in publishing the sanctions it imposed upon the Appellants.

The submissions made before us in respect to jurisdiction are the same as had been advanced before the Tribunal. I have given them careful consideration, including the authorities cited.

1. Jurisdiction of the Authority under section 11(3)(h) <u>and under sections 25 and 26 of the Act.</u>

Under section 11(3) (h) the Authority may:-

"**Inquire, either of its own motion or at the request of any other person, into the affairs of any person whom the Authority has approved, or to whom it has granted a licence, and any public company the securities of which are traded on an approved securities exchange".**

The 1st Appellant was at all material times a licensed stockbroker. The Authority clearly had jurisdiction under the aforesaid provision to inquire into its affairs.

Section 25 of the act provides for renewal of licenses. It states:-

"**25. (1) In granting the renewal of a license, the Authority shall satisfy itself that the licensed person is in compliance with the provisions of this Act and the rules and regulations made thereunder.**

(2) In considering an application for a license renewal, the Authority may extend an existing license for a period of three months in order to permit an applicant to take such action as the Authority deems necessary to come into compliance with the Act and rules and regulations made thereunder.

(3) In granting an extension to any person under subsection (2), the Authority may impose any conditions or restrictions it deems appropriate on the activities of such person.

(4) Where the Authority is satisfied that a licensed person has:-

(a) acted in contravention of any provision of this act, or any rules or regulations made thereunder; or

(b) has since the grant of a license, ceased to qualify for such a license; or

(c) is guilty of malpractice or irregularity in the management of his affairs, the Authority may-

(i) direct the person to take whatever action the Authority deems necessary:-

(A) to correct the conditions resulting from any contravention of any provisions of this Act or any rules or regulations made thereunder; and

(B) to come into compliance with the provisions of this Act or any rules or regulations made thereunder; or

(ii) suspend or impose restrictions or limitations on the license granted to the person."

Under this section, the Authority must satisfy itself before it renews a license that the licensed person is in compliance with the provisions of the Act as well as the rules and regulations made under the Act. The Authority has power to renew the license provisionally to permit the licensed person to take such action as the Authority may deem necessary to come into compliance with the Act, rules and regulations. The Authority may also impose any conditions or restrictions it may deem necessary on the activities of a licensed person when renewing the license.

There are additional powers to deal with a licensed person who has acted in contravention of the Act, rules or regulations, or one who, since grant of the license, has ceased to qualify for such license, or one who is guilty of malpractice or irregularity in the management of his affairs. In such case the Authority may, *inter alia*, suspend or impose restrictions or limitations on the license granted to the person.

The learned counsels for the Appellants, if I understood them correctly, seemed to argue that the jurisdiction under section 25 must be exercised exclusively when renewing a license, and cannot be exercised by the Authority as a result of an inquiry under section 11(3) (h). I respectfully differ. How would the Authority be satisfied that a licensed person has acted in contravention of the Act, rules or regulations, or has since the grant of a license, ceased to qualify for such a license, or is guilty of malpractice or irregularity in the management of his affairs, without conducting an inquiry under section 11(3) (h)? The Authority would certainly be within its mandate to exercise the powers conferred by section 25 after an inquiry under section 11(3) (h). It does not have to wait until the licensed person's license is due for renewal in order to act under section 25.

Section 26(1) of the Act provides for revocation of licenses. The Authority may under that subsection revoke a license or approval if it is satisfied that the licensed person:-

"(a) has contravened or failed to comply with any provisions of this Act or any rules or regulations made thereunder; or

(c) has ceased to be in good financial standing; or

(d) has since the grant of the license, ceased to qualify for such a license; or

(e) is guilty of malpractice or irregularity in the management of his business; or

(f) is adjudged bankrupt,

PROVIDED that the Authority shall not revoke a license or approval, other than an approval to operate as a credit rating agency, without first exercising its powers under section 33A."

Again here, it appears to me, the Authority would have to conduct an inquiry under section 11(3) (h) of the Act in order to be satisfied of any of these matters. Subsection (2) of section 26 requires that in all cases where action under sections 25 and 26 is taken, the Authority must give the person affected by such action an opportunity to be heard.

Section 33A of the Act mentioned in the proviso to section 26(1) empowers the Authority in subsection (1) thereof to intervene in the management of a licensee in the following circumstances:-

"**(a) if a person's license or approval is suspended under subsection (1) of section 26;**

(b) if a petition is filed, or a resolution proposed, for the winding up of a licensed person or if any receiver or receiver manager or similar officer is appointed in respect of the licensed person or in respect of all or any part of its assets;

(c) if the Authority discovers (whether on an inspection or otherwise) or becomes aware of any fact or circumstances which, in the opinion of the Authority, warrants the exercise of the relevant power in the interests of investors:

Provided that the Authority shall give the licensed person an opportunity to be heard prior to the exercise of this power."

Such intervention, notwithstanding the provisions of any other written law, may be as provided in section 33A (2) (b), to -

"**Remove any officer or employee of the licensed person who, in the opinion of the Authority, has caused or contributed to any contravention of any provision of this Act or any regulations made thereunder, or to any deterioration in the financial stability of the licensed person, or has been guilty of conduct detrimental to the interests of investors."**

It appears to me that when this jurisdiction is exercised upon the suspension of a person's license under subsection (1) of section 26, ultimately it will be as a consequence of an inquiry under section 11(3) (h). Therefore the jurisdictions provided for under these separate sections of the Act are not exclusive of each other. Rather, they complement each other.

2. Was the transaction between the 1st Appellant and NSSF a "capital markets instrument"? Did the Authority have disciplinary jurisdiction over the transaction?

To deal with the issue whether the transaction between the 1st Appellant and NSSF was a capital "market transaction", it is necessary to look at a few definitions under section 2 of the Act:-

"**capital market instrument" is defined as-**

"**any long-term financial instrument whether in the form of debt or equity developed or traded on a securities exchange or directly between two or more parties for the purpose of raising funds for investment."**

"**dealer" is defined as-**

" **a person who carries on the business of buying, selling, dealing, trading, underwriting or retailing of securities, whether or not he carries on any other business."**

"**dealing in securities" is defined as-**

"**making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to enter into:-**

(a) any agreement for or with a view to acquiring, disposing or subscribing for or underwriting securities; or

(b) any

(c) agreement the purpose or intended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the price of securities."

"**securities" is defined as-**

"**(a) debentures or bonds issued or proposed to be issued by a government; or**

(b) debentures, shares, bonds, commercial paper or notes issued or proposed to be issued by a body corporate; or

(c) any right, warrant, option or futures in respect of any debenture, shares, bonds, notes or in respect of commodities; or

(d) any unit, interest or share offered under a collective investment scheme; or

(e) any instruments commonly known as securities but does not include:-

(i) bills of exchange;

(ii) promissory notes; or

(iii) certificates of deposits issued

by a bank or financial institutions licensed under the Banking Act."

"**stockbroker" is defined as-**

"**a person who carries on the business of buying or selling of securities as an agent for investors in return for a commission."**

The Tribunal found as a matter of fact that the intention, and indeed the instructions of NSSF to the 1st Appellant, and the understanding of the 1st Appellant, was that the 1st Appellant should act as stockbroker for NSSF in the purchase of an appropriate treasury bond from the secondary market. For this purpose NSSF had its Treasury bill issue No. 1471 for KShs. 256 million held by the Central Bank of Kenya (CBK) rediscounted. NSSF then forwarded to the 1st Appellant a cheque for the sum of KShs. 251,505,500/00 for that purpose. The fact that no treasury bond was ultimately purchased by the 1st Appellant, or that the money ended up in the 1st Appellant's office account in a bank that was going under, cannot oust the disciplinary jurisdiction of the Authority. If this were so, then, as the Tribunal so succinctly put it:-

"…**there would be no recourse against a stockbroker for any professional misconduct prior to purchase or sale of an instrument, including misconduct that is the cause of the non-purchase or the failure to sell the instrument, such as misappropriation of clients' funds. A stockbroker who without reasonable cause occasions his clients loss by refusal and/or neglect to purchase or sell an instrument would safely hide behind this argument. In short, a stockbroker would be rewarded for successful misconduct."**

I respectfully agree that this would be an absurdity not intended by Parliament.

There is no doubt that there existed an order from the NSSF to the 1st Appellant to purchase for it an appropriate treasury bond from the secondary market. The Tribunal so found. The money NSSF gave to the 1st Appellant was clearly for this purpose. A treasury bond, as is well known, is a long-term financial instrument traded on a securities exchange, *inter alia*. This brings it within the meaning of "capital market instrument" as defined in section 2 of the Act.

The fact that NSSF paid to the 1st Appellant the money by cheque did not make the transaction a "bill of exchange"; it was only the mode of payment that was by way of a bill of exchange. The money ended up as a deposit in a bank that was going under because it turned out that there was not, after all, any appropriate treasury bond available in the secondary market for purchase as NSSF had been made to believe by the 1st Appellant, and the Appellants failed to properly advise NSSF as to its investment. And it should not be forgotten that the deposit ended up in the office account of the 1st Appellant!

I do not find any fault with the Tribunal's finding that the transaction between the 1st Appellant and NSSF was a capital market transaction.

3. Did the Authority have disciplinary jurisdiction over the 2nd to 5th Appellants who were directors of the licensed person, the 1st Appellant?

I have already set out section 33(1) (c) of the Act elsewhere in this judgment. It empowers the Authority to:-

"remove any officer or employee of the licensed person who, in the opinion of the Authority, has caused or contributed to any contravention of any provision of this Act or any regulations made thereunder, or to any deterioration in the financial stability of the licensed person, or has been guilty of conduct detrimental to the interests of the investors."

This power is exercisable:-

"…if the Authority discovers (whether on an inspection or otherwise) or becomes aware of any fact or circumstance which, in the opinion of the Authority, warrants the exercise of the relevant power in the interest of the investors".

Like the Tribunal, I hold that the above provision applies to directors of a company that is a licensed stockbroker. It cannot be expected that the Tribunal can remove the management of such company but not touch its policy makers, the directors. Surely, it must have been intended by the statute that the provision should apply to all persons concerned in the affairs of a licensed person.

By the same argument, if the Authority can remove errant directors from the management of a company that is a licensed stockbroker, it ought also to be able to bar such directors from the management of any other licensee or listed company. The Authority, as already seen, is enjoined under section 11(3) (w) of the Act to:-

"do all such other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act."

These objectives, as seen in the preamble to the Act, are

"…to promote, regulate and facilitate the development of an orderly, fair and efficient Capital Markets in Kenya and for connected purposes".

And among the principle objectives of the Authority under section 11(1) (d) of the Act is the protection of investor interests.

There was thus a sound legal basis under the Act for the Authority's and the Tribunal's jurisdiction to impose sanctions upon the 2nd to 5th Appellants. Kasango, J. will more specifically deal with the sanctions as imposed on each Appellant in her judgment.

I wish to say something about the nature of the proceedings before the Tribunal. This issue, though not raised directly in the grounds of appeal, nevertheless featured prominently in the

submissions of the learned counsels for the 1st to 4th Appellants. Under section 35A (4) of the Act, the Tribunal shall:-

"Upon an appeal made to it in writing by any party or a reference made to it by the Authority or by any committee or officer of the Authority, on any matter relating to this Act, inquire into the matter and make an award thereon, and every award, made shall be notified by the Tribunal to the parties concerned, the Authority or any committee or officer thereof, as the case may be".

And subsections (5), (6), (7), (13) and (16) of the same section provide:-

"(5) For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.

(6) Where the Tribunal considers it desirable for the purposes of avoiding expenses or delay or any other special reasons so to do, it may receive evidence by affidavit and administer interrogatories within the time specified by the Tribunal.

(7) In its determination of any matter the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that such evidence would not otherwise be admissible under the law relating to evidence.

(13) Except as expressly provided in this Act or any rules made thereunder, the Tribunal shall regulate its own procedure.

(16) Upon any appeal, the Tribunal may:-

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority or any of its committees in the proceedings in connection with which the appeal is brought: or

(c) make such other order, including an order for costs, as it may deem just."

It is thus clear that the proceedings of the Tribunal on appeal are a re-hearing of the matter, not a mere review of the evidence taken or decision made by the Authority. The Tribunal regulates its own procedures; so it is not like a hearing in a regular court of law. The Tribunal is even empowered to take into consideration any evidence which it considers relevant, notwithstanding that such evidence would not otherwise be admissible under the law of evidence.

It is therefore expected that any procedural inadequacies before the Authority were rectified by the re-hearing before the Tribunal. There is no direct complaint in the grounds of appeal about the procedure before the Tribunal. What are raised are jurisdictional and procedural issues with regard to the inquiry by the Authority, and the Tribunal's jurisdiction to impose the sanctions that it did.

To sum up, I would dismiss the appeals in so far as they relate to the disciplinary jurisdiction of the Authority and the Tribunal.

I have read in draft the judgment of Kubo, J. I entirely agree with the conclusions the learned Judge has arrived at with regard to the procedure adopted by the Authority in conducting the inquiry into the transaction between the 1st Appellant and the NSSF. I agree that the appeals, as far as they concern that issue, should be dismissed. Kubo, J also agrees with the conclusions reached by Kasango, J and myself in our respective judgments.

I have also read in draft the judgment of Kasango, J. The learned Judge agrees with the

conclusions reached by Kubo, J. and by myself, in our respective judgments.

I agree, for the reasons given by Kasango, J, that the appeals of the 1st, 2nd, 3rd and 4th Appellants concerning the sanctions imposed upon them ought to be dismissed. I also agree that the sanctions imposed upon the 5th Appellant, PAUL ANTHONY SPENCE, ought to be set aside. Further, I agree, as proposed by Kasango, J, that the 5th Appellant and the Respondent in Appeal No. 930 of 2003 should bear their own costs of that appeal. That means that the appeal of the 5th Appellant, in so far as it concerns the sanctions imposed upon him, will be allowed.

The upshot is that the appeals of the 1st, 2nd, 3rd and 4th Appellants (Appeal No. 913 of 2003) are hereby dismissed in their entirety with costs to the Respondent. The sanctions imposed upon them by the Tribunal are hereby confirmed. The appeal of the 5th Appellant (Appeal No. 930 of 2003) is partly allowed and the sanctions imposed upon him lifted. The parties in that appeal shall bear their own costs of the appeal. As Kubo and Kasango, JJ agree, those will be the orders of the court. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY, 2009

H. P. G. WAWERU

J U D G E