

Tax & Legal Alert  
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## Tax Alert

### Court of Appeal reinstates the National Social Security Fund (NSSF) Act, 2013

The NSSF Act, 2013 (“the Act”) assented into law on 24 December 2013, gazetted on 27 December 2013, and intended to commence on 10 January 2014.

However, the intended commencement of the Act was stayed following the initiation of various petitions challenging its constitutionality or lack thereof before the High Court of Kenya (“HC”) and the Employment and Labour Relations Court of Kenya (“the ELRC”). The petitions were ultimately consolidated into Petition No. 38 of 2014, which was heard by the ELRC and determined vide judgement dated 19 September 2022 (“the ELRC decision”). The ELRC decision declared the Act unconstitutional and therefore null and void.

The Court of Appeal has exercised its appellate jurisdiction and overturned the ELRC decision vide judgment dated and delivered on 3 February 2023 (“the Judgement”) in effect reinstating the Act. Consequently, the Act is in force from 3 February 2023.

This publication summarizes our analysis of the Act’s key provisions as read together with supporting schedules and regulations thereunder and their consequent implications to employers.

## Introduction

The NSSF Act 2013, an act of Parliament to establish the NSSF (“the Fund”) – to provide for contributions to and the payment of benefits out of the Fund; and for matters connected therewith and incidental thereto, was intended to repeal and replace the NSSF Act, Chapter 258 of the Laws of Kenya, upon commencement on 10 January 2014.

However, its operationalization was stopped by the ELRC decision through which the Act was deemed unconstitutional and therefore null and void. We summarize the particulars of the dispute at the ELRC and the Court of Appeal (CoA) hereunder.

## Legal Background

### I. The ELRC Decision

The ELRC decision declared the Act unconstitutional on various grounds including, *inter alia*:

- The Act was not **tabled before the Senate** in contravention with Article 110 and 205 (1) of the Constitution of Kenya, 2010 (“the CoK”) despite having a tangible effect on county finances.
- The provisions of the Act were inconsistent with Article 10 (1) (b) and (c) of the CoK as read together with Section 4 of the **Competition Act** to the extent that it sought to create a monopoly in favour of the Fund as a pension provider.
- The Act, vide Section 19 (2), sought to restrict access to **public services** unless registered under the Fund in contravention with Articles 21 (1), 47 (1) and 232 (1) of the CoK as pertains access to public services.

### II. The Judgement

The CoA has resuscitated the Act vide the Judgement delivered on **3 February 2023**. Specifically, the Judgement overturned the ELRC decision with the effect being that the Act is constitutional and ultimately operational.

The salient issues arising from the Judgement include:

1. **Jurisdiction of the ELRC** to hear the original appeal. The CoA held that the ELRC can only consider constitutional matters where they arise directly resultant of an employer-employee relationship.
2. **Participation of the Senate in the enactment process.** The CoA determined that while the Act does have elements that touch on county finances, the main attributes of the Act fell under the prerogative of the National Assembly. As such there is no requirement for the Act to be tabled before the Senate.

The CoA held that the ELRC erred in the ELRC decision and consequently set the same aside. As such, the Act is now in force.

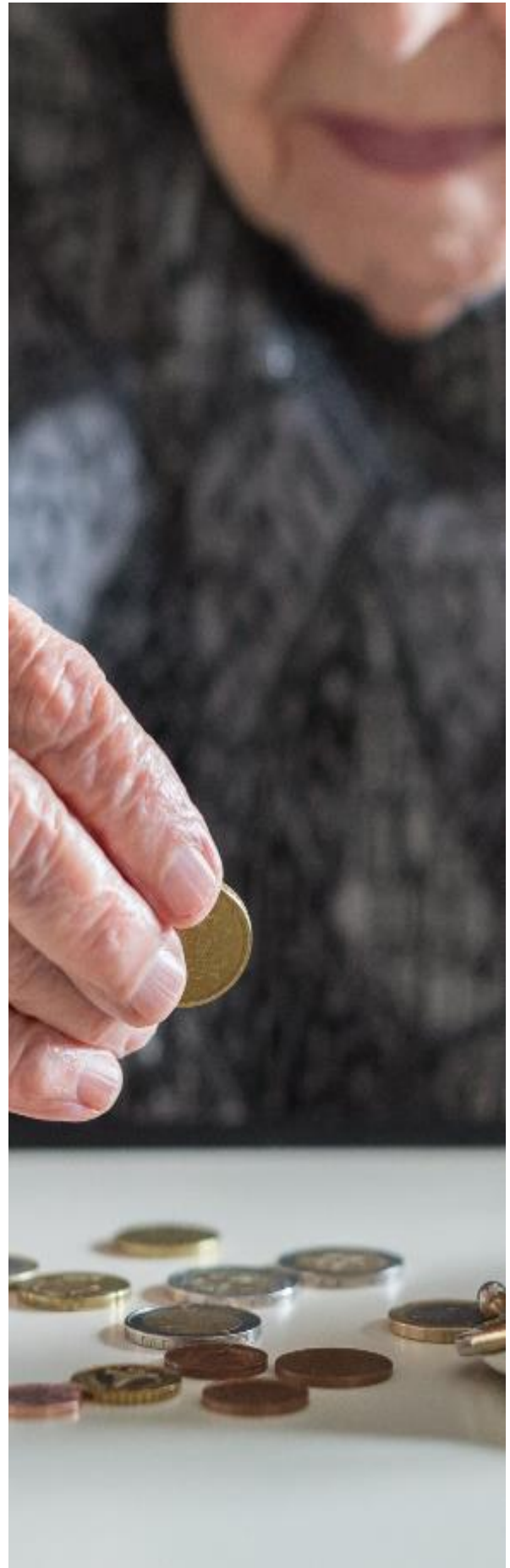


## Key provisions introduced by the Act

### I. Changes in monthly contributions

- The minimum monthly contributions have increased from a maximum of **KES 200 per month to 6%** of the monthly pensionable earnings of the employee. The contribution is matched by the employer at 6% of the employee’s pensionable earnings.
- The contribution rates for NSSF are now divided into Tier I and Tier II categories. Tier I contributions are capped to the Lower Earnings Limit (“LEL”) (KES 6,000 per month), while Tier II contributions are capped to the Upper Earnings Limit (“UEL”) (KES 18,000 per month).
- The contributions in the first four years of operation of the Fund shall be in accordance with the table provided in the Third Schedule to the Act, available [here](#). From the fifth year onwards, the LEL shall be as gazetted by the Cabinet Secretary while the UEL shall be equal to four times the National Average Earnings.
- Vide Public Notice dated 9 February 2023, the Fund provided computation guidelines (“the Guidelines”) in view of and in accordance with the Act. Per the same, contributions to the Fund will be 12% of the pensionable wages, comprising of two equal portions of 6% each from the employer and the employee, but subject to an upper limit of KES 18,000 for employees earning above KES 6,000 per month in the first year of contributions.

Tier	Employer contribution (KES)	Employee contribution (KES)
Tier I	360	360
Tier II	720	720



## II. Restrictions on employers

- Every employer is required to register with the Fund as a contributing employer. The registered employer is required to provide proof of registration with the Fund as a precondition of dealing with or accessing public services.
- An employer is entitled to deduct the employee's contributions from the employee's earnings but is not permitted to deduct the employer's contribution from the employee's earnings. They should instead pay from their own resources.
- However, where a contract of service provides for gratuity, the employer may deduct its portion of the contribution from the gratuity amount payable to the employee.
- An employer who fails to deduct contributions from an employee's wages shall be required to pay both the employee and employer contributions from its own resources.
- Where a member is concurrently employed by more than one employer, each individual employer shall be responsible only for its obligations.

## III. Contracting out by employer

- Participation in Tier I of the fund is mandatory. An employer may opt to pay Tier II contributions into a **contracted-scheme** it participates in or opts to establish or to participate in.
- A contracted-out scheme is an alternative pension scheme to TIER II contributions established or contracted by the employer that passes the **reference scheme test** outlined under the Fourth Schedule of the Act. This is a test that ensures the new scheme provides similar or better benefits than those available under TIER II of the Fund.
- The contracting-out modalities are detailed in the NSSF (contracting out by employers) Regulations, 2014 given legislative effect vide Legal Notice No. 85 of 10 June 2014 accessible [here](#) for ease of reference.
- The application for the issue of a contracting-out certificate should be submitted at least 60 days prior to the intended date of contracting out.

## IV. Introduction of powerful compliance officers

- The Act introduced **Compliance Officers** ("the COs") appointed by the NSSF Board of Trustees ("the Trustees") to enforce the provisions of the Act.
- The COs shall be empowered to access premises liable for inspection and interview any person they find in order to ascertain compliance.



## V. Penalties for non-compliance

- Any employer who fails to register commits an offense and shall be liable to a fine not exceeding KES 50,000.
- Any person who fails to answer questions or provide documents required by a compliance officer shall be liable on conviction to a fine not exceeding KES 100,000 and an additional KES 1,000 for every day the offence continues.
- If a contribution due to the Fund is not paid within a month after the last day of the month it relates to, **5%** of the contribution shall be charged for each month or part thereof that the amount remains unpaid.
- A general penalty of a fine not exceeding KES 100,000 applies in case of an offense or contravention of the provisions of the Act where no specific penalty is provided.

## Conclusion and way forward

The CoA Judgement declaring the Act constitutional and in effect overturning the ELRC Decision marks the conclusion of a protracted legal battle subject to an appeal being proffered before the Supreme Court of Kenya (“the SC”).

By way of determining its constitutionality, the Judgement renders the Act ‘in force’ with effect from 3 February 2023. It is on this basis that we hold the view that the application of the

Act ought to commence from the February 2023 payroll that is due by **9 March 2023**. Conversely, with respect to employers who opted to comply with the provisions of the Act, they should continue to do so.

Unfortunately, employers who will be implementing the provisions of the Act for the first time are not given a window period within which to make the necessary financial adjustments. The absence of a transitional period notwithstanding, employers are cautioned that punitive penalties would be applied where non-compliance with the provisions of the Act is ascertained.

In recognition of the additional financial burden imposed on employers under the Act, one would have hoped that the Act would contain sufficient transitional provisions perhaps considering a phased approach. In addition, future amendments to the Act ought to address uncertainties under the new regime, for instance with respect to employees in receipt of variable pay.

Given the public interest nature of the CoA Judgement on this matter, it is feasible that where an appeal is proffered before the SC, the same may be admitted. We shall closely monitor any developments relating to the Act and provide timely updates on the same.

*Should you wish to discuss this further, kindly feel free to contact any of the contacts below.*



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