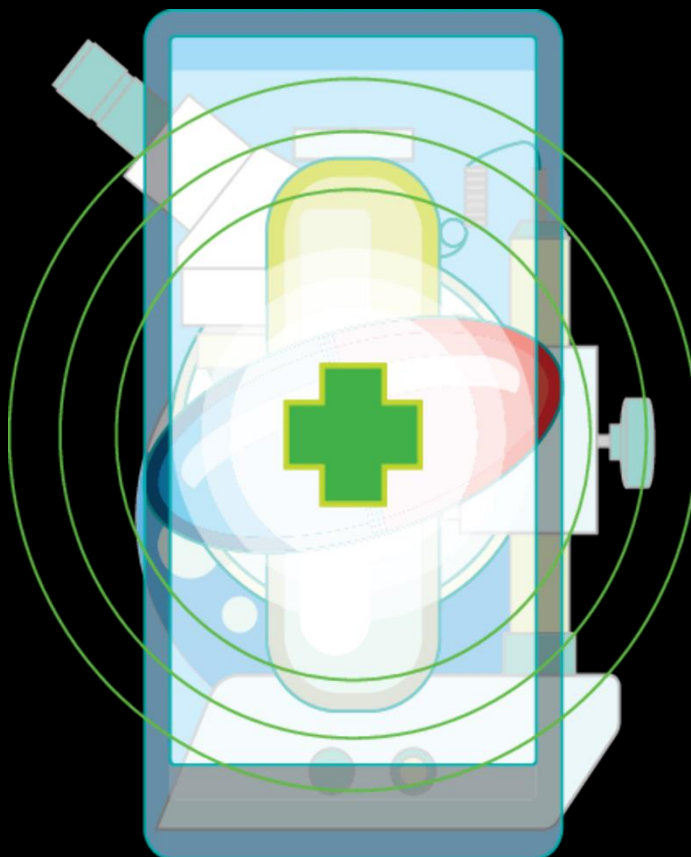


Tax & Legal Alert
October 2024



Tax Alert

Court of Appeal stays High Court judgement which declared the Social Health Insurance Act (SHIA) and related legislation unconstitutional

The Court of Appeal of Kenya (“CoA”) vide its ruling delivered on 20 September 2024 (“the Ruling”), granted a stay of execution of the judgment delivered by the High Court on July 12, 2024, which declared the Social Health Insurance Act (SHIA), the Digital Health Act, and the Primary Health Care Act unconstitutional.

In their appeal, the Cabinet Secretary for Health, deposes that *inter alia*, the three statutes rendered unconstitutional by the High Court are the main pillars of universal health care and in their absence, health services shall be in jeopardy or collapse altogether.

In this alert, we provide a brief background of the Social Health Insurance Act, the parties’ arguments, and our view on what the COA’s ruling means for employers and the employees.

Background

On 19th October 2023, the Parliament enacted the Social Health Insurance Act, the Digital Health Act, and the Primary Health Act (jointly “three Acts/Statutes”). The Government contended that these laws are fundamental to Kenya’s healthcare system and aims to actualize the right to health under Article 43(1)(a) of the Constitution. [You can read more on the Acts in our earlier alert under this [link](#)]

The High Court of Kenya, in its judgement in **Joseph Enock Aura v Cabinet Secretary, Ministry of Health & others** delivered on 12 July 2024, found the three Acts unconstitutional due to *inter alia* lack of adequate public participation. Further, the High Court directed Parliament to undertake sensitization, public participation, and to amend the unconstitutional provisions within a period of 120 days from the judgment date.

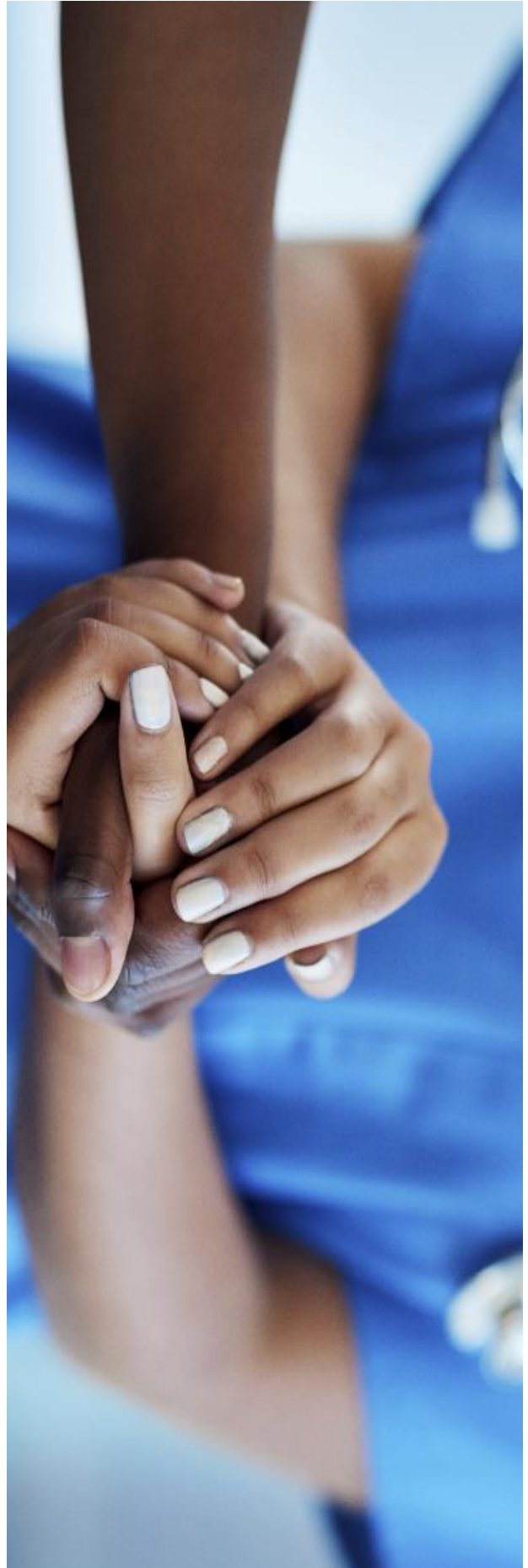
On request from the Cabinet Secretary for Health & others, the High Court of Kenya allowed a temporary stay of 45 days in appreciation that the suspension of the three statutes may create a lacuna on health matters in the country thus creating a potential risk of loss of lives.

Aggrieved by the decision of the High Court, the Cabinet Secretary (CS) for Health lodged a notice of appeal dated 23 July 2024.

Basis of the CS for Health’s appeal

The CS for Health sought an order for stay of execution and implementation of the Judgement of the High Court pending the hearing and determination of the Appeal on the following grounds:

- **Public participation and sensitization prior to enactment of statutes:** The CS for Health contends that it is not feasible to enact statutes that are already enacted. In addition, the High Court adjudged a standard of public participation that is not within the Constitution since such public participation is akin to civic education which is appropriate in the conduct of a referendum.
- **Right to Emergency Healthcare Treatment:** The High Court faulted sections 26(5) and 27 of the SHIA for infringing on the right of access to emergency services. The CS for Health avers that the High Court erred since Section 28 of the SHIA establishes an Emergency, Chronic, and Critical Illness Fund under which everyone is entitled to emergency treatment funded by the National Government, where prior registration or contribution from individuals is not required.
- **Introduction of clause not subjected to public participation:** The High Court asserts that Section 38 of the SHIA was introduced during parliamentary debate and not subjected to public participation. The CS for Health contends that this Section was deleted during parliamentary debate, and Section 39 renumbered Section 38, suggesting misapprehension of evidence by the High Court.



The Respondent's Case

Joseph Enock Aura, the first respondent, asserts that *inter alia*:

- **The motion by the CS for Health is grossly incompetent** because the three statutes had already been declared unconstitutional by the High Court on specific grounds and cannot be rendered constitutional at an interlocutory hearing. Further, the motion is an abuse of the Court process because the CS for Health lodged a similar oral plea upon which a stay of 45 days was granted.
- **Public Participation:** The respondent defended the High Court's ruling that proper public participation was not conducted before the enactment of SHIA. He faulted the appellant's selection of stakeholders for the public participation and none of the sessions were held in Kiswahili, contrary to existing laws.
- **Access to emergency health:** Services offered at a fee by the National and Country governments will become inaccessible to any person who is not digitally registered or who is not compliant with remittances. Consequently, there will be no access to emergency health contrary to the submission by the CS for Health.
- **Public interest:** Ultimately, public interest tilts in favour of not granting a stay.



The Court of Appeal’s stay order

On 20th September 2024, the CoA granted the stay sought by the CS for Health pending the hearing and determination of the appeal. Further, the CoA directed that the appeal be heard on a priority basis.

The impact of the stay orders is that the three Statutes can be operationalized pending determination of the Appeal at the Court of Appeal.

Subsidiary legislation and public notices for operationalization of SHIF

Pursuant to the stay order by the CoA, the Social Health Authority issued a **public notice** indicating that;

- The National Health Insurance Fund shall fully transition to Social Health Authority (SHA) effective **01 October 2024**.
- SHA benefits to commence on **01 October 2024**.
- Last payments under NHIF will be for September payroll and should be remitted by **09 October 2024**.
- New contribution **rate of 2.75% of the gross salary** under SHA to commence with October payroll and will be due by **09 November 2024**.
- Employers and employees not previously registered for NHIF to register as members of SHA.
- The CS for Health through **Legal notice No. 146** has released tariffs for healthcare services commencing on 01 October 2024. Some of the services with their respective limits include the following:

Service	Limit (KES)
Oral health care	2,000 per household per year
Dispensing eyeglasses	1,000 per household per year
Accident & emergency services	No limit, but restricted to 24 hours of medical care
Critical illness package & palliative care services	Within the inpatient annual limit of 180 days per household per year
Chronic illnesses	To be covered comprehensively subject to budgetary allocation provided one is a fully paid up SHIF member
Outpatient consultation	900 per person per year
Prescribed outpatient laboratory investigations	900 per person per year

- The services can only be accessed in government approved hospitals and, in our view, this may turn out to be a major issue for this scheme considering under the NHIF arrangement, over 24,000 patients used privately run hospitals. For more information on the health care services under SHA, [please click here](#) to see the full legal notice.

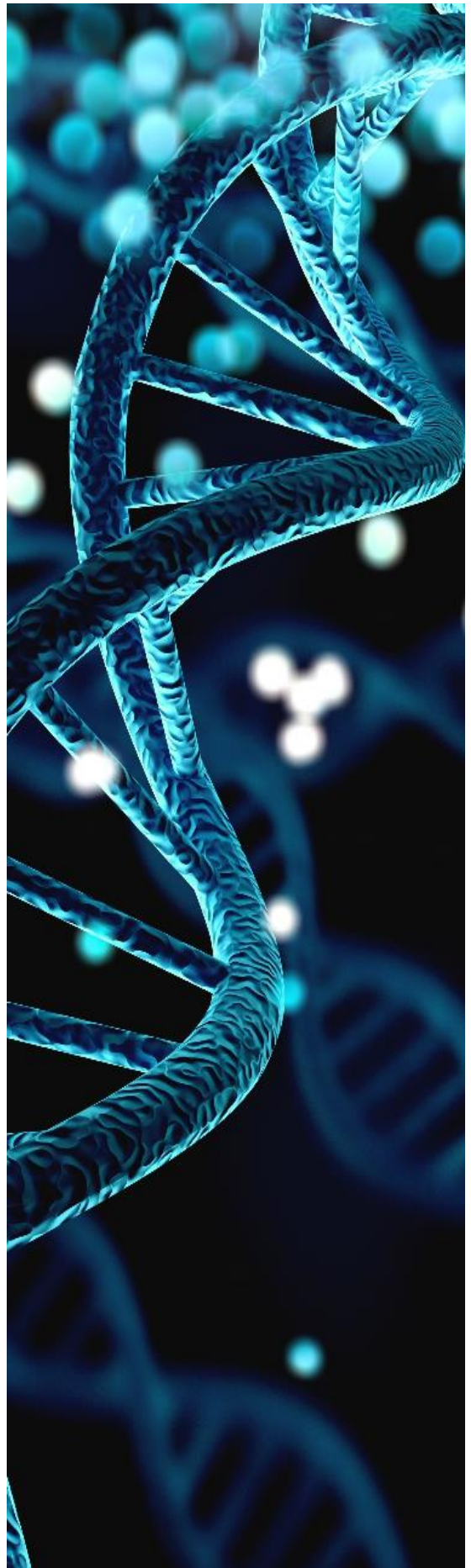


- In addition, the CS for Health through **Legal notice No. 147** has introduced an amendment to SHIA regulations 2024 which inter alia highlights the following:
 - **The deadline to register with the SHIF is 30 September 2024**(now past). However, considering the legal challenges, registration is ongoing past the deadline date.
 - The starting date for payments and access to healthcare services shall be **1st October 2024**.
 - NHIF members will be automatically transitioned to SHIF upon verification of their data. This will be done using existing government databases.
 - Conversely, non-members of NHIF should register with the SHIF.

Our view and conclusion

- Employers should note to register with the SHA to ensure timely remittance of deductions from employees. Remittances for the month of October 2024 are due by 9th November 2024.
- Pending determination of the case at the CoA, contributions under SHA should commence in October payroll for employees.
- If the CoA upholds the High Court's decision, the NHIF Act which was repealed by Section 54 of the Social Health Insurance Act (2023) would be restored and the old NHIF rates to apply. However, should this be the outcome at the COA, we expect that the government will appeal at the Supreme Court.
- Judging from the tone set by the CoA in its stay order, if the CoA upholds the ruling of the High Court, the judgement is likely to be caveated to give the Cabinet Secretary for Health, Parliament, the Social Health Authority, and other parties to the Appeal time to remedy the unconstitutionality through legislative and other interventions. We shall monitor the progress of the appeal and continue to provide updates on the same.
- Please note Senator Okiya Omtatah has filed a case in court for SHIF implementation to be halted. We will provide updates as and when they become available.

Should you wish to discuss this further, kindly reach out to any of the contacts below or your usual Deloitte contact who will guide and assist you as required.



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