Case Review | November 11, 2022

A Review of the Employment and Labour Relations Court decision on the 2013 NSSF Act

Introduction

On 19 September 2022, the Employment and Labour Relations Court found the National Social Security Act, 2013 to be unconstitutional. The Court specifically held:

- The Act dealt with finance matters affecting county governments and therefore the Senate ought to have been involved in its enactment.
- Requiring people to register with the National Social Security Fund (NSSF) to access public services was unconstitutional.
- The role of the Cabinet Secretary for Labour and Social Protection in approving the remuneration of NSSF's Board of Trustees was unconstitutional as it conflicted with the constitutional mandate of the Salaries and Remuneration Commission.
- In so far as the Act gave NSSF a monopoly in providing pension and social security services in Kenya this was unconstitutional.
- Mandatory registration and contribution to NSSF was unconstitutional as it violated the right of employees to choose their pension arrangements.

The Court declared the Act unconstitutional and barred NSSF from enforcing the Act.

Salient matters

This is a significant decision in respect of labour matters and specifically in relation to pension and social security. The court made a number of findings that are key to the sector.

Firstly, the justification for introduction of mandatory contributions to NSSF to dispense with the state's constitutional obligation to provide social security was an overreach of NSSF's statutory mandate. The court found that resources to meet this obligation should come from the state. Coincidentally, this aligns with the Revised National Retirement Benefits Policy (the **Policy**) issued in June this year. The Policy clearly sets out the three pillars of social protection being:

i. Zero Pillar – state funded social assistance programme and old age pension.
ii. Pillar One – compulsory contributions to a Defined Contribution Scheme with an opt out for qualifying retirement benefits schemes covering mandatory contributions.
iii. Pillar Two – tax incentivized voluntary contributions to schemes which can also receive mandatory contributions.

Obviously, it appears the Act as currently structured is not in line with the Policy and conflates the pillars. As pointed out by the court a constitutionally compliant social assistance programme would have to be state funded.

Secondly, there is no constitutional justification to deny contributors their choice of pension scheme. This further anchors the conclusion that existing pension arrangements should be allowed to opt out. If the intention was to create a national Pillar One scheme, then existing schemes should have been allowed to opt out. This should include opting out of mandatory contributions as envisaged in the Policy. The Act only allows opt out for Tier II contributions. A national scheme created to provide Pillar One protection should provide for automatic opt out for qualifying schemes.

Lastly, the court disagreed with the assertion that the Act discriminated against private financial market operators by restricting investment of pension funds to government securities and infrastructure bonds. The court specifically found that funds not being applied to the purposes of NSSF as set out in the Act, can only be invested in government securities or infrastructure bonds. This will have a significant effect on the capital markets as NSSF is a key player.

Impact

The Court found that the 2013 Act should have been debated in the Senate meaning the entire Act has been abolished for not complying with the Constitution. Therefore, the old act remains in force as the statute repealing it has been invalidated. Media reports indicate NSSF has appealed the decision and the President is in discussions with Federation of Kenya Employers and the Central Organisation of Trade Unions. Until the decision is overturned, neither the NSSF nor the state can enforce the 2013 NSSF Act. We will keep you updated on any key developments on this.

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