



Legal Alert | March 16, 2023

## What the Court of Appeal decision on the 2013 NSSF Act means for employers

In 2022, the Employment and Labour Relations Court invalidated the 2013 National Social Security Fund Act for being unconstitutional. You can find our analysis of the judgement [here](#). This decision was appealed to the Court of Appeal which on February 03, 2023 found that:

- The Labour Court lacked authority to hear the case because the key issue in question was the validity of a legislative process rather than an employment dispute.
- The Labour Court was wrong in finding that passing the Act required the Senate's involvement. The provisions of the Act did not fall under county government functions, therefore the Senate was not required to be involved.

Following the decision employers have been racing to comply with the 2013 NSSF Act, which as recently as September last year appeared to be dead legislation.

At the time of writing, the County Pensioners Association has appealed to the Supreme Court against the Court of Appeal decision. We are not aware of any orders staying implementation of the 2013 Act at the moment. Accordingly, many employers have remitted Tier I & II contributions in line with the 2013 Act.

We highlight some key findings by the Courts and examine what the decision means for employers.

### *Overturned findings*

The Court of Appeal found that once the Labour Court found the entire 2013 Act unconstitutional, there was no need to also find specific sections unconstitutional.

Unfortunately, the Court of Appeal focused on the Labour Court's authority to hear the case, and failed to address the following pertinent issues:

- Requiring people to register with the NSSF to access public services was unconstitutional.

- Attempting through the Act to give NSSF a monopoly in providing retirement benefits in Kenya was unconstitutional.
- Mandatory registration and contribution to NSSF was unconstitutional as it violated the right of employees to choose their pension arrangements.

These very valid issues remain at the core of the question no one is answering – whether or not the 2013 Act can be implemented in its current form.

### *Implications of the Court of Appeal decision*

Away from its social protection objectives, the 2013 Act is likely to have many employers rethinking their employee retirement benefits arrangements. The Government's drive to overhaul the old NSSF Act was mainly driven by concerns on the adequacy of the structure and contributions to ensuring retirees have adequate financial resources in their old age.

Previously, an employee and their employer contributed a total of KES 400 per month to NSSF. Assuming, someone worked for 40 years before retiring, their total contributions to pension would only amount to KES 192,000. This is too low to guarantee a decent quality of life of life after retirement.

This obvious gap led to many employers providing their employees with additional pension arrangements beyond NSSF. This birthed a growing private pensions sector but Government policy has since changed. The most immediate question many employers are grappling with is the economic viability of contributing to both NSSF and private retirement benefits schemes.

In tackling this question, it is important for employers to get legal advice on how to make changes to benefits currently offered to employees. Employers cannot simply do away with contributions to private schemes,

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where these benefits are written into employment contracts and secured by Kenyan labour laws.

Depending on the structure of private pension schemes, employers may offset NSSF contributions against contributions to private pension schemes. This will allow employers to maintain the same level of benefits to employees without increasing costs.

Additionally, employers may elect to opt out of remitting Tier II contributions to NSSF in favour of their private pension schemes. This will require the private pension scheme to be approved to receive Tier II contributions. The application for opting out will be made to and approved by the Retirement Benefits Authority.

#### Conclusion

As employers decide how to deal with the additional costs of complying with the 2013 NSSF Act, it is important they keep in mind two cardinal rules on employee benefits and rights. These rules are:

- benefits once granted can only be withdrawn through mutual agreement; and
- an accrued right cannot be invalidated or taken away.

Employers must therefore be careful and seek professional advice even as they seek to address the increased costs, the 2013 NSSF Act signifies. We will keep you updated on any key developments in the Supreme Court case.

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