



Legal Alert | February 27, 2024

What the Supreme Court 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. In 2023, the Court of Appeal [reversed](#) this decision after finding the Labour Court lacked jurisdiction to hear the original case. Pursuant to the 2023 decision, implementation of the 2013 NSSF Act began in February 2023.

The 2023 decision was appealed to the Supreme Court of Kenya. On 21 February 2024, the Supreme Court overturned the Court of Appeal's finding.

The Supreme Court's Findings

The Supreme Court allowed the appeal after it found:

- the Labour Court had authority to hear the case because the key issue in dispute was the validity of a pension law which directly touched on the employer-employee relationship.
- the Labour Court has authority to determine the constitutional validity of any law which touches on or affects employment or labour relations.
- once the Court of Appeal determines a trial court lacked authority to hear a case, it must send the case back to a court with authority. A decision made by a court lacking authority is a nullity, and once this is established there is nothing left for the Court of Appeal to consider.

Implications of the Supreme Court Decision

As the Supreme Court allowed the appeal, the current position is the judgment delivered by the Labour Court in 2022 invalidating the 2013 NSSF Act remains in force. You can read our analysis of the 2022 decision [here](#).

As the 2023 decision was informed by legal technicalities, the Supreme Court asked the Court of Appeal to urgently hear the appeal on its actual merits.

Currently, the 2013 NSSF Act remains unconstitutional. As the Act is invalid, no deductions or contributions can be made under it. This may change if the 2022 decision is set aside.

Accordingly, NSSF deductions and contributions have gone back to the pre-2023 position. That is, deductions and contributions should be made under the 1965 NSSF Act.

NSSF Directive

By a notice dated 22 February 2024, NSSF advised employers to continue making contributions in accordance with the 2013 NSSF Act. In NSSF's view the Supreme Court did not lift the Court of Appeal's orders of 03 February 2023.

We do not agree with this interpretation of the Supreme Court's judgement. Any affected employer may seek clarification from the courts, protection from undue enforcement action, and a determination of the legality and validity of NSSF's directive.

Conclusion

Employers should make deductions and remit NSSF contributions in accordance with the previous rates specified by the 1965 NSSF Act. We expect NSSF will make compliance with this difficult as in its view the 2013 NSSF Act remains in force.

We are monitoring this case, and will update you on any key developments. In case of any queries, please contact us through info@kn.co.ke and we will gladly assist.

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