

The Supreme Court Restores the Unconstitutionality of the NSSF Act 2013

What It Means for Employers and Employees

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INTRODUCTION

Further to our article <https://wamaeallen.com/the-employment-and-labour-relations-court-declares-mandatory-contributions-to-nssf-unconstitutional/>, we wish to apprise you of the latest developments.

PROCEEDINGS AT THE EMPLOYMENT AND LABOUR RELATIONS COURT AND THE COURT OF APPEAL

On 19th September 2022, in **Petition No. 38 of 2014 – Kenya Tea Growers Association & 8 others v. National Social Security Fund Board & Others**, a three Judge Bench of the Employment and Labour Relations Court (ELRC) held that the National Social Security Fund Act, 2013 (the NSSF Act) was unconstitutional. In their Judgment, the judges concluded that the NSSF Act did not align with the principles outlined in the Constitution, primarily due to several reasons including: **(i) inconsistency and contravention with the Competition Act; (ii) mandatory contributions to the National Social Security Fund (the Fund) for both employees and employers, regardless of membership in alternative and more beneficial social security schemes; (iii) improper enactment procedures that disregarded legislative protocols, among other issues.**

Ostensibly, the NSSF Board of Trustees was aggrieved and filed **Nairobi Civil Appeal No. 656 of 2022** challenging the entire decision.

The main issue was whether the ELRC wrongfully assumed jurisdiction over a matter falling within the High Court's domain under Article 165(3)(d)(i) of the Constitution.

The Court of Appeal overturned the ELRC Judgment **on grounds that the dispute at the ELRC concerned the constitutionality of the NSSF Act 2013 and did not disclose any employer-employee relationship to trigger the jurisdiction of the ELRC.**

THE SUPREME COURT DECISION

The matter was further appealed to the Supreme Court by various Trade Unions. The main issue was whether the ELRC had jurisdiction to determine the constitutionality of the NSSF Act.

The Supreme Court has held that the ELRC has the jurisdiction of determining the constitutionality of a statute where the statute in question lies at the centre of an employer-employee dispute. Further, the Supreme Court has clarified that the ELRC cannot declare a statute unconstitutional in circumstances where the dispute in question **has nothing or little to do with employment and labour relations within the context of the ELRC Act. According to the Supreme Court, the dispute concerning NSSF was an employer-employee dispute because it entailed social security and mandatory NSSF contributions, all of which entail labour relations.**

However, the Supreme Court has held that the ELRC has no jurisdiction over disputes between pensioners and trustees of a specific pension scheme as the latter is governed by dedicated statutes and applicable common law.

The case has been remitted to the Court of Appeal to determine the substantive merits of the ELRC Judgment on an urgent basis. Therefore,

IMPLICATIONS OF THE RULING

In light of the judgement of the Supreme Court, reinstating the unconstitutional status of the NSSF Act, the implementation and enforcement of the Act is illegal.

Secondly, as a result of the judgement, no employer or employee should be compelled to register with or contribute to the NSSF under the provisions of the 2013 Act, neither can anyone be denied public services for refusing or failing to enrol with NSSF.

Thirdly, the 6% employer-employee contributions (**tier I and tier II**) are in essence inapplicable, null and void by virtue of unconstitutionality of the Act. In a nutshell, any deductions made by an employer pursuant to the NSSF Act 2013 is Illegal. This also has ramifications on the opt-out option that had affected an already existing pension scheme managed by other entities other than NSSF.

However, we note that with the matter being remitted back to the Court Appeal, the NSSF Board or any aggrieved party may seek stay of execution of the Judgment of the ELRC, which may alter the legal status of implementation of the Act and deductions thereunder.

We will continue monitoring further developments and note to update on any further changes and their implications.

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