SOCIAL HEALTH INSURANCE ACT: THE CURE TO AFFORDABLE MEDICAL COVERAGE?

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WAMAITHA GICHAMBA

& Co. Advocates

A) Introduction

Affordable healthcare has been an elusive target for successive governments despite the right to healthcare being enshrined in the Constitution of Kenya. The current Kenya Kwanza Government (the "***Government***") has developed its own strategy to realize this elusive goal and the Social Health Insurance Act, No.16 of 2023 ("**SHIA**" or the "**Act**") is one of the key highlights of this strategy.

SHIA repeals and replaces the National Health and Insurance Fund Act which established the National Health Insurance Fund (the "**NHIF**") and it primarily seeks to address the issue of cost of healthcare. According to the Ministry of Health, the cost of healthcare has been a major hurdle towards the realization of a positive socio-economic transformation in the country. In fact, out of pocket payments for medical treatments has been described as a contributing factor towards the slip into poverty for many Kenyan households. SHIA is being promoted as the solution to the high cost of healthcare and beneficial to all Kenyans especially low-income earners.

It is important to state that SHIA has been declared unconstitutional in High Court Constitutional Petition E473 of 2023 in its judgment delivered on the 12th of July 2024. The High Court (the "**Court**") faulted Parliament for among others; failing to conduct proper and meaningful public participation, violation of legislative procedures and the Act hampering the right to access emergency healthcare services. The Court, however, allowed Parliament 120 days to rectify the deficiencies in the Act.

This article provides a brief overview of the provisions of the SHIA and a comparison of the difference in the rates under the SHIA and the NHIF Act.

B) Creation of the Social Health Authority (SHA)

The Act establishes the SHA as the statutory body with the function of administering the Act. The SHA's core responsibility shall include, among others, the registration of contributors and beneficiaries and receiving all contributions described in the Act.

The SHA shall serve as the intermediary between the patient and the healthcare provider. In this role the SHA will be concerned with the cost of the treatment while the patient and doctor concentrate on the treatment itself. It will be responsible for building trust with the healthcare providers by giving them the guarantee that the cost of healthcare services shall be fully paid for in a timely manner.

C) Funds established

A fund can be described as a pool of monies that is collected and allocated for a specified purpose/objective. The Act establishes three types of funds each with its own unique purpose. These funds are; the Social Health Insurance Fund (the "**SHIF**"), Primary Healthcare Fund (the "**PHF**"), Emergency, Chronic and Critical Illness Fund (the "**ECCIF**").

I. The SHIF

The purpose of this fund is to pool the resources of all households in Kenya in order to realize the provision of affordable healthcare. This fund replaces the current NHIF.

The primary sources of funds for the SHIF shall be;

a) Contributions by members;
b) Monies allocated by the National Assembly for the indigent (extremely poor) and vulnerable; and

c) Gifts, grants, innovative financing mechanisms or donations.

Registration to SHIF is mandatory to the following;

1) Every Kenyan whether in employment or not;
2) Every non-Kenyan who is ordinarily resident in Kenya; and
3) Children born after the commencement of the Act.

In addition to the above, registration under the SHIF is separate from registration under the NHIF. This means that those who are presently registered under the NHIF will be required to register a fresh under the SHIF.

The Act requires that new born children are to be registered and be issued with a Minor Social Health Insurance Number. The parents of the child are to make an application to the SHA within 14 days of the child's birth for registration. The application is to be accompanied by either the birth certificate or the birth notification of the child. Upon attaining the age of 18, the child is then required to make an application to SHIF to update his/her registration details and to be issued with a new social health insurance number as a contributor separate from their parents or guardian's household.

Payment of contributions

The draft Social Health Insurance (General) Regulations, 2024 (the "***Draft Regulations***") sets the minimum monthly contribution to of Kshs.300 regardless of employment status but it does not set a maximum limit. This is a departure from the present NHIF which had set a maximum premium contribution of Kshs.1,700 per month. This, according to the President required adjustments as it is an injustice to the low income earners. He gave an example of a self-employed boda boda rider earning about Kshs.5,000 monthly paying Kshs.500 which was equivalent to 10% of the gross income whereas he, the President, earning about Kshs.1,000,000 per month paid Kshs.1,700 which is equivalent to 0.17% of the gross income as NHIF contributions. The removal of a maximum cap in contributions is designed to ensure that every household pays an equitable amount to the SHIF. The following groups will be required to make contributions to the fund:

1) Every Kenyan household whether salaried or not;
2) Every non-Kenyan resident ordinarily residing in Kenya for a period exceeding twelve (12) months;
3) The National Government;
4) The County Government; and
5) Any other employer.

i. *Salaried Kenyan household*

A household primarily consists of a contributor(s) and their beneficiaries. In order for a beneficiary to enjoy the cover provided by a contributor, the contributor shall be required to register the beneficiary. A household includes the non-Kenyan residents residing in Kenya for a period exceeding twelve (12) months.

For a salaried household, the contribution is deducted on a monthly basis at the rate of 2.75% of the gross monthly income and is to be remitted on or before the 9^{th} of each month. The obligation to deduct and remit the contribution is placed on the employer.

Comparison of contributions

Gross salary	NHIF (Kshs.)	SHIF (Kshs.)
10,000	400	300
50,000	1,200	1,375
100,000	1,700	2,750
500,000	1,700	13,750
1,000,000	1,700	27,500

ii. non-salaried households

The draft regulations have set the rate at 2.75% of the gross annual income provided that the amount payable cannot be lower than the Kshs.300 per month.

The income of the non-salaried household is to be estimated by using the means testing. The means test is to be developed by the Ministry of Health in conjunction with the Ministry of Labour and Social Protection and is to be based on a number of factors which include; the household's characteristics, the accessibility of basic needs, among others.

In the event that the non-salaried households are unable to pay the annual premiums, the SHA in collaboration with financing institutions and the Ministry of Co-operatives, Micro, Small and Medium Enterprises development are to provide the required finances for the payment of the premiums. The money paid on behalf of the contributor are to be paid directly to the SHA. The SHA is required to inform the members of the available financing products.

In contrast with the NHIF rates, the self-employed or non-salaried were paying a base rate of Kshs.500 per month.

For beneficiaries above the age of 25 who do not have an income and/or are living with a contributor, the Act provides that they shall be treated as a separate household from the contributor and will be required to pay Kshs.300 per month.

iii. Impoverished

The Act takes into account households that due to their financial status, they are incapable/unable to meet their basic needs. The determination of whether a household is impoverished shall be based on the means test developed by the Ministry of Health. The Ministry of Health, the Ministry of Labour and Social Protection and the County Governments will be required to identify and submit a list of the impoverished to the SHA.

If one is listed by the National Government, then it is the Ministry of Labour and Social Protection that shall be liable as the contributor and the National Treasury shall be responsible for the deductions and payment of the premiums. If one is listed under the County Government, then the contributor shall be the County Executive Committee member responsible for matters relating to social protection while the County Executive Committee member responsible for the County Treasury shall pay the premiums.

iv. Prisoners and children in conflict with the law

The Ministry responsible for correctional services is to be set as the contributor. The National Treasury will be required to deduct and remit the premiums to the SHA.

It is evident that the SHIF net has been cast so wide in order to ensure that most if not all people residing in Kenya make a contribution one way or another to the fund regardless of their status. This is a departure from the NHIF which predominantly relied on salaried individuals to make the contributions. The SHIF is made to cure this imbalance by making contributions mandatory for all residents of Kenya in a bid to make healthcare financing sustainable.

Furthermore, in the event of any default in making contributions, then a penalty of 2% of the amount due is imposed for the period of the default. Apart from that in order to access healthcare under the SHIF, the person's contributions must be up to date and active (presently this requirement stands suspended as per the Court of Appeal ruling). This includes the payment of the penalties where there was default. As it stands deductions to the SHIF is intended to begin upon the publishing the Regulations in the Kenya Gazette which is yet to happen.

II. Primary Healthcare Fund (PHF)

The purpose of this fund is to enable access primary healthcare services primarily offered in community health centres, Level 2 and Level 3 health centres. The sources of funds for the PHF are from allocations by the National Assembly, grants, gifts, bequests or donations and monies from fees or levies.

Members of the public are not required to make any payments to the fund as it is the obligation of the government through Parliament to allocate the monies for the Fund. Being a contributor and/or a beneficiary under the SHIF does not prevent an individual from receiving healthcare under this fund.

III. Emergency, Chronic and Critical Illness Fund (ECCIF)

The purpose of this fund is to ensure that individual access quality emergency services and treatment for chronic and critical illness. Emergency treatment is defined as the immediate health care required to preserve the life of an individual and/or to prevent the worsening of a medical situation while critical illness is a medical condition that requires urgent medical attention with potentially causing a lasting impact on a person's health. Emergency medical situations include access to ambulance services, cardiac and pulmonary arrests and major trauma (severe burns, severe wounds and multiple fractures) that are common in accidents. Chronic illness has been defined as conditions that last more than a year and require ongoing medical attention and/or limits the activities of person's daily life.

Monies in the fund are provided for by Parliament and from donations, grants and gifts from donors. Individuals would not be required to make any contributions towards the fund.

D) Access to healthcare

The Act makes it mandatory for any person wishing to gain access to healthcare under the Act to be up to date in contributions. In fact, the Act takes a step further by requiring any person who wishes to access government services both at the national and county level to produce proof of registration with the SHIF.

These provisions have however been declared unconstitutional as their blanket application would hinder the right to life and access to emergency health services. The Court recommended amendments to the provisions to ensure that the right to emergency health services is not infringed.

E) Conclusion

The Case is definitely a setback for the Government but the fact that Parliament has been given time to rationalize the Act is in itself saving grace.

The newly appointed Cabinet Secretary for Health, Dr. Deborah Mulongo Barasa will face her first challenge in ensuring that the Government's health plan succeeds.

The alert is based on the Social Health Insurance Act and the Draft Social Health Insurance (General) Regulations, 2024. The draft Regulations are subject to change and the final Regulations could vary significantly from the draft.

**This legal alert is for information purposes only. Legal advice should be sought on the views expressed herein. Please do not hesitate to contact us in case of any questions.*

Wamaitha Gichamba & Co. Advocates

Cool Breeze Gardens, Office No. F, Muthaiga
Thika Superhighway

P.O. BOX 11622-00400, NAIROBI

TEL: +254 731 965 951/ +254719 311 563

Email:
wamaitha@wamaithagichambaadvocates.com

Website: https://wamaithagichambaadvocates.com/

Dorcas Wamaitha
Managing Partner