

Tax & Exchange Control

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An analysis of the Affordable Housing Act, 2024: Will this act survive the legal onslaught?

After what may seem like an eternal wait for the Government, the President finally put pen to paper on the Affordable Housing Bill, 2023 (Bill) to enact it into law on 19 March 2024. The Affordable Housing Act, 2024 (Act) is intended to cure the pitfalls that were raised by the High Court in the case of *Okiya Omtatah Okoiti and 51 Others v The Cabinet Secretary for the National Treasury and Planning and Six Others, Constitutional Petition No. E181 of 2023*.

Through an article and a podcast analysing the Affordable Housing Bill, 2023 vis-à-vis the decisions of Kenya's courts, we were able to speak on the issues that led to the drafting of the Bill and also got to critique the Bill before it was passed in the National Assembly. The article can be accessed [here](#), and the podcast [here](#).

In this alert, we look at the salient features of the Bill, discuss our involvement as CDH when the Bill was presented to the Senate, and offer a critique on the salient features of the Act.

National Assembly final draft

The National Assembly published the Bill on 4 December 2023 and passed it with amendments on 21 February 2024. Among the provisions of the Bill after amendments from the National Assembly included a proposal at section 7 for the recovery of any due levies, in accordance with the Tax Procedures Act, Cap 469B.

Further, section 38 of the Bill from the National Assembly proposed that a person or body corporate was eligible to be allocated a unit subject to the requirements of section 31. Notwithstanding the opposition to there being a mandatory deposit, section 39(2)(a) still held that the application must be accompanied by proof of the deposit.

Lastly, the penalty limits for misappropriation of the housing levy funds were capped at KES 10 million and a five-year term for imprisonment.

Our role at the Senate

As it affects counties, the Bill was forwarded to the Senate for its input. CDH was fortunate to have a hand in the formulation of the Act through an invitation by the Senate to submit memoranda on the Affordable Housing Bill, 2023. We presented a number of proposals after carefully reviewing the Bill from the National Assembly and are glad that the points below were taken into account and incorporated into the Act:

- Section 7 initially stated that the levy shall be a debt due to the Government and shall be recovered in accordance with the Tax Procedures Act, 2015. We successfully managed to convince the house to amend it to read that it should be a civil debt that should be recovered summarily.

Our primary reason for suggesting that was that the Bill was not envisaged as a tax law under the Tax Procedures Act, and therefore it would have been illegal to adopt enforcement procedures under the Tax Procedures Act.

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- Section 38 initially stated that a person or body corporate shall be eligible to be allocated an affordable housing unit subject to the requirements under section 31. We successfully managed to convince the house to amend the eligibility criteria and the Act's section 48 now reads that a natural person is eligible for allocation of one affordable housing unit if they meet the criteria.

Our main reasoning was that there should be a limit to the number of units for purchase by natural people so that we close the loophole of people using body corporates to purchase more than one unit and end up cheating the programme. However, from our reading of section 49(2)(c), it seems that one can provide a certificate of incorporation as part of the application documents.

- Section 44(2) of the Bill initially stated that, a person who contravenes the provisions of subsection (1) shall be liable, on conviction to a fine not exceeding KES 10 million or imprisonment of a term not exceeding five years, or both. We encouraged the house to amend the penalties and now section 56(2) of the Act reads that a person who contravenes the provisions of subsection (1) shall be liable, on conviction to a fine not exceeding KES 20 million shillings or imprisonment of a term not exceeding 10 years, or to both.

Our reasoning for the amendment was that the imposition of a hefty fine leads to deterrence while at the same time setting a maximum and not a lower imprisonment term limit, allows for judicial discretion to apply.

Analysis of the Act

The Act is set to come into force in two ways. Firstly, sections 4 and 5 on the day of assent and all the other sections will come into force on the date of gazettelement. So, what is special about sections 4 and 5?

Section 4 is about the imposition of the levy and it states that there imposition of the levy at the rate of 1.5 % of the gross salary of an employee; or the gross income of a person received or accrued which is not subject to the levy. Further, the section adds that the levy shall be payable to the collector on or before the ninth of the month in which the salary is received or accrued.

Section 5, on the other hand, is about the imposition of an obligation on the employer. It mandates the employer to deduct and remit the 1.5% from the gross salary of the employee and match it so that every person can be said to have contributed 3%.

From the reading of these sections, and taking into account the nature of commencement, we note that unless the Act is challenged in court and conservatory orders issued, employers will be forced to deduct the levy from salaries for of the month of March and remit the same on or before 9 April 2024. However, employers and employees alike have a right to question why the Government would collect the levy from March salaries when the Act was not in force between 1 and 19 March.

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It is common knowledge that the current Government has been pushing hard on the affordable housing agenda and it therefore comes as no surprise that these sections were made to commence immediately, to aid in prompt collection of the housing levy.

It is noteworthy that the Act does not affect the period from July 2023 to February 2024 (period), when contributions were temporarily halted by the High Court and the Court of Appeal. It is still too early to demand that the Government refund the levies that were contributed during the period as the Court of Appeal is yet to make a final determination on the validity of the levy as per the Finance Act, 2023.

Despite the other sections lacking the immediate operational powers, they are just as important. It is noteworthy that, under section 6, the Cabinet Secretary in charge of National Treasury may exempt, through a notice in the Gazette, a class of persons from contributing to the fund. Being a mandatory contribution, defaulting is not an option as defaulters will be expected to pay a 3% penalty on the unpaid amount and this shall be summarily recovered as a civil debt. In essence what this means is that unless they can prove exemption by the Cabinet Secretary, the court shall issue orders compelling a defaulter to pay up and no other defence can be used to lift the liability.

The Act establishes the Affordable Housing Fund under section 10, which monies collected shall be remitted into. This fund shall be used for the design, development and maintenance of affordable housing, institutional housing and associated social and physical infrastructure. Nevertheless, section 12 provides that the board may, with the approval of the Cabinet Secretary in charge of Treasury, invest any income that is not immediately required.

This provision raises eyebrows because the monies that are being collected are supposed to be used as per section 10. By investing the income not in use, there is danger of losing the money if the investment fails to materialise.

The Act establishes a board, known as the Affordable Housing Board, which shall oversee the development of the affordable housing, institutional housing and associated social and physical infrastructure. It shall comprise of:

- a non-executive chairperson appointed by the President;
- the Principal Secretary to the National Treasury or their representative in writing;
- the Principal Secretary to the State Department in charge of Affordable Housing or their representative in writing;
- three people appointed by the Cabinet Secretary, of whom one shall be a nominee of the Council of County Governors, one shall be a nominee of the Central Organization of Trade Unions and one shall be a nominee of the Federation of Kenya Employers;
- three people, who are not public officers, appointed by the Cabinet Secretary in a competitive process; and
- the CEO of the board, (who shall have no voting rights).

Moreover, under section 34, there is the establishment of the County Rural and Urban Affordable Housing Committee, from which the members of the committee, shall be appointed within 30 days of the commencement of the Act. The committees are expected to assist the board meet its objectives at the county level.

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Chambers Global 2024 Results

Tax & Exchange Control

Chambers Global 2018–2024 ranked our Tax & Exchange Control practice in:

Band 1: Tax.

Emil Brincker ranked by Chambers Global 2003–2024 in **Band 1:** Tax.

Gerhard Badenhorst was awarded an individual spotlight table ranking in Chambers Global 2022–2024 for Tax: Indirect Tax.

Stephan Spamer ranked by Chambers Global 2019–2024 in **Band 3:** Tax.

Jerome Brink ranked by Chambers Global 2024 as an **“Up & Coming”** tax lawyer.



Having considered the contribution to the fund, the next question that arises is how the benefit will be received. It is noteworthy that, as per sections 48 and 49, a natural person is eligible for allocation if the person meets the criteria prescribed in the regulations. This application shall be accompanied by proof of requisite deposit, a copy of their National ID, a copy of their Kenya Revenue Authority Pin Certificate and such other information as may be required by the board. It is not clear why a certificate of incorporation can be used during the application when houses are meant for natural persons. In addition, section 48 which speaks about eligibility for an *“affordable housing unit”* seems to have left out eligibility for other housing units under the Act, such as the *“social housing unit”* for those earning below KES 20,000 per month, *“the affordable middle class housing unit”* for those earning above KES 149,000 per month and the *“rural affordable housing unit”* for houses in rural areas.

It is also important to note that the Act prohibits the owner of a housing unit from selling it without the prior written consent of the board. This is particularly important as one of the objectives of the project is to assist many Kenyans to own houses and therefore to curb the sale of units to a few wealthy individuals.

Seeing that this is a public project where a lot of money is being handled, it is important to curb misappropriation of funds and prescribe for offences. Section 56 sets the penalty for misappropriation of funds to a maximum of KES 20 million or to imprisonment of a term not exceeding 10 years. Moreover, the section adds that an additional mandatory fine shall be imposed if the person received a quantifiable benefit, or another person suffered a quantifiable loss and it is capped at two times the amount of the benefit or the loss or, both the benefit and the loss.

In addition to that, section 57 prescribes other offences, such as failing to give accurate information or having unauthorised access to documents that relate to the applications. Under this section, the penalty is set at a maximum fine of KES 10 million or a prison term not exceeding five years, or both.

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**Conclusion**

The Act is an improvement on what was initially envisaged under the Finance Act, 2023. The Act attempts to address some of the issues raised in courts, such as discrimination by subjecting those in informal employment or business to the levy and management of funds by establishing a board.

There are still some gaps in the Act that will certainly be tested in the courts. The Act lacks a definition of the term gross salary, and this is an issue because the 1.5% levy is based on the gross salary. Unfortunately, our push for the Senate to amend the law to state that the levy applies to basic salary did not go through. The other gap which we noted in our submissions to the Senate was the criteria

to be used to determine the amount that is subject to the levy for those in informal employment or business. We suggested that the means testing instruments under the Social Health Insurance Act, 2023 be adopted, but this has been left open. Lastly, the Act is not clear on how to apply for the social housing unit, the affordable middle class housing unit and the rural affordable housing unit.

At the time of writing this alert, there is a case that has been lodged at the High Court to challenge the Act. We will wait to see if the Act will survive the legal onslaught.

Mike Ogutu and Alex Kanyi

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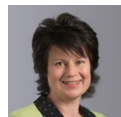
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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