BUSINESS LAW & TAX

Two-pot system no cash cow

Overeager withdrawals from retirement funds could substantially complicate post-retirement life

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Those hoping for a quick cash injection when SA formally switches on the "two-pot" pension system in September may need to tread warily.

While there was a delay in implementation from early 2024, come September 1 2024 your retirement savings will be split into a vested, savings and retirement component. Industry is gearing up for a sudden surge in withdrawal requests.

In a nutshell, in September you will be able to make partial withdrawals from your retirement funds before retirement, but must preserve a portion that can only be accessed at retirement to help improve retirement outcomes. New seed capital rules also give another option to withdraw from built-up funds.

While it may be tempting to make a withdrawal as soon as possible, keep in mind that you will be giving up the amount drawn plus all interest on that amount in retirement. Plus, if you wait to withdraw money from the savings component until retirement, it will attract less tax. The consequences of looking for quick cash to splurge are therefore less money available at retirement, a loss of compounding interest and paying more tax.

Remember only the "savings component" and "retirement component" can receive retirement contributions from implementation date onwards. The vested component will house retirement benefits you accumulated before the implementation date. Investment growth will still be credited to this component.

ONE POSITIVE IS THESE CHANGES SHOULD SLOW THE TREND OF PEOPLE RESIGNING TO ACCESS THEIR PENSION MONEY

How it works is from September 1 2024, retirement contributions will be split by your retirement fund into a savings component (or pot) and a retirement component. A ratio of one-third of total contributions will go into the savings component and two-thirds of total contributions into the retirement component. This example provided by Treasury clarifies how it works: Person A's retirement contribution in September 2024 is R900 per month, R300 will go to the savings component and R600 into the retirement component. Person A would be able to withdraw any amount from the savings component, but the withdrawal should not be less than R2,000 and a withdrawal can only be made once in a tax year.

It is important to understand that the retirement value accumulated at August 31 2024, referred to as the "vested component", will not take further contributions but will remain invested by the retirement fund. This means should you resign in future, your current right (vested right) to access this component or have it transferred to a preservation fund is maintained.

However, the savings component will be accessible at any time, with withdrawals limited a minimum of R2,000 (no maximum limit), with only one withdrawal allowed in a tax year.

GOLDEN YEARS

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But here is the major concern — this is taxed at your marginal tax rate, meaning you will pay far more tax than if you had retired, where much more beneficial rates apply. Also, while the savings component can be paid in cash when you retire or resign, this is only if you did not make a savings withdrawal in the preceding 12 months.

Remember you do not need to make a withdrawal from the savings component every tax year. Amounts in the account will still be available for withdrawal in future years and would benefit from tax-free growth within the account until a withdrawal is made.

There is no doubt changes set out in the 2023 Draft Revenue Laws Amendment Bill will also have far reaching consequences. Recent changes relate to seed capital where 10% of the value of the assets in your vested component, subject to a limit of R30,000, whichever is lesser, are added to the savings mix. To work this out, take the value of your fund on August 31 2024, take 10% or R30,000, whichever is lower, and this will be allocated to the savings component as seeding capital. This will be a once-off transfer at the start of the two-pot system and will not be repeated in the following years.

So if you have contributed to your retirement fund over several years, you may have access to a withdrawal from the seeding capital on implementation.

Note that pensioners and members of provident funds who were 55 years and older on March 1 2021 can opt not to be part of the two-pot system, meaning they only have the vested pot and can continue making contributions to the vested pot.

However, the key is to understand the rules, think through the consequences and not make hasty decisions to take a withdrawal, keeping in mind accessing savings may well be needed by those with high debt, or other emergencies.

One positive is these changes should slow the trend of people resigning to access their pension money. The two-pot system therefore strikes a careful balance and the new seeding capital rules are progressive. However, withdrawals may take time from a practical perspective if there is a major surge come September — members will have to be patient.

Non-trial resolution sets out new standards

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The National Prosecuting Authority (NPA) recently published its Corporate Alternative Dispute Resolution (C-ADR) Policy, which allows the use of an alternative mechanism to resolve criminal cases against companies, as opposed to only relying on normal criminal court proceedings. Therefore, companies implicated in corruption may, in certain circumstances, avoid criminal conviction at a cost.

The policy does not apply to individuals as directors (former or current), employees or other individuals involved in wrongdoing can still be prosecuted independently.

The NPA's adoption of the C-ADR follows a recommendation from the Zondo commission of inquiry into state capture and brings SA in line with international best practices. These best practices highlight the importance of "non-trial resolutions" to combat corruption.

As the world becomes more advanced and interconnected, conventional rules and regulations fall short in effectively combating corruption. This calls for a collective approach, including public-private partnerships and innovative tools and mechanisms such as non-trial resolutions.

These mechanisms have been effective in combating corruption in several countries including Brazil, Britain, Canada, France, Germany, Kenya, Malaysia and the Netherlands. The US and the UK both use deferred prosecution agreements, which suspend prosecution for a defined period, provided the company meets certain specified conditions.

In 2007, a novel approach to the fight against corruption emerged when Prof Johann Graf Lambsdorff proposed the "invisible foot" principle. This theory recognises that the unreliability of corrupt actors and the risk of betrayal among corrupt counterparts is something that can be used to induce honesty and good governance in corrupt networks.

The strategy targets the vulnerabilities of corrupt networks, which typically operate on weak trust, as corrupt deals cannot rely on legal enforcement and members are wary of their untrustworthy associates. By exploiting this weakness, law enforcement can incentivise individuals to step forward with crucial information, crippling the network from within.

This approach is endorsed by the UN, which recognises it as a powerful tool against corruption, similar to fighting organised crime.

Both rely on hidden networks, often necessitating inside information obtained through leniency incentives for effective investigation and prosecution.

CONVENTIONAL RULES AND REGULATIONS FALL SHORT IN EFFECTIVELY COMBATING CORRUPTION

C-ADR sets out four guiding principles and 10 criteria prosecutors should consider when determining whether C-ADR will apply. The four guiding principles include:

(i) A legality and rationality principle commits the NPA to making decisions that uphold the rule of law.

(ii) A public interest principle requires that decisions are taken in line with objectively justifiable public interest considerations.

(iii) A transparency principle requires the NPA to record and publish its decisions to ensure transparency and accountability.

(iv) A guided discretion principle sets out the principles and practical considerations that should guide the NPA in exercising its discretion on whether to use C-ADR.

The guided discretion principle states that a prosecutor's discretion should be guided by whether there is:

(i) Voluntary and effective disclosure of wrongdoing by the company and proactive remediation including, where appropriate, compensating victims;

(ii) Full cooperation by the company with current and future investigations, asset forfeiture proceedings in terms of the Prevention of Organised Crime Act and prosecution of individuals and/or other implicated companies;

(iii) Willingness and capacity on the part of the company to implement and monitor an effective compliance programme and internal controls;

(iv) Pervasive wrongdoing within the company; and

(v) A likelihood that conviction might result in significant adverse collateral effects on the company's employees, shareholders, creditors, the economy, how investigations are conducted and co-operation with law.

For the government, the C-ADR policy offers significant cost and time savings compared to lengthy trials which require it to prove its case beyond reasonable doubt. Importantly, where C ADR is used, the company must bear the cost of the investigation, the cost of co-operating with authorities, the disgorgement of its profits and the compensation of victims.

This policy sets out a new standard for corporate behaviour. It assumes companies have effective compliance programmes that outline and dictate how internal investigations should be conducted.

The responsibility for anti-corruption is now shared but the private sector is incentivised to maintain high standards of corporate governance and corporate accountability. This policy could be a key step towards greater accountability.

THE PRIVATE SECTOR IS INCENTIVISED TO MAINTAIN HIGH STANDARDS OF CORPORATE GOVERNANCE