



The Two-pot Proposals

wish this snail had skates ...



Saving withdrawals – not as straightforward as we first thought

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Yaaay!

When the next version of the two-pot proposals finally came through on 9 June late-ish on a Friday afternoon (really?) I could not resist going through it to see what had changed. A twisted, but consuming, source of entertainment. Lucky us – as hoped, we got both an income tax amendment and an amendment to the Pension Funds Act to dissect.

A little enigmatic

My overall feeling, after a comprehensive and puzzled pondering of the amendments, is that Treasury had a good go at the drafting, but there is still lots to fix. I think we are all still re-re-re-re reading. I hope that Treasury will listen carefully to the industry's comments and make the necessary changes to ensure certainty and less puzzlement.

At the moment, the drafting is a bit of a scrambled egg, still a bit underdone between the income tax and Pension Fund Act amendments. Having said that, I thought the Explanatory Memorandum was a fairly useful, well-written doc (although a little light on information about deductions), so if you are going to read something, that's a good place to start.

Remember all of the below can change, as it is a draft.

A series

As there are many other publications that have done justice to a two-pot summary, I am, rather, going to choose some subjects that interest me and hopefully you too. I thought I would do a series of notes on different two-pot topics. This one is about savings withdrawals.

Savings withdrawals – not as simple as we first thought

Savings withdrawals became marginally more exciting because of the seeding from the vested pot (which holds everything a member has built up in a fund as at 29 February 2024) into the savings pot (which members can access without leaving employment) of 10 % of what is in the “vested component” capped at R25 000.

These savings withdrawals (although necessitating a lot of pesky and expensive changes to admin, systems, communication and other things) were going to be quite straightforward

- member once a year wants money for something; member goes to administrator of fund and requests money; administrator applies cap, asks for some details from the member, applies for tax (admittedly, not yet straightforward), deducts fee and pays member. Member is sort of happy.

However, savings withdrawals are getting more complicated by the minute – for some good reasons and some not-so-good reasons. (We will talk about the complications for 'older' members in another note.)

Second nibble at the cherry

Now the member can take one withdrawal every year of tax assessment (**rule 1**). Something to keep track of for each member, but not impossible. Plus, if the member is leaving employment and taking their withdrawal benefit, the member can take everything in cash out of their savings pot (and vested pot, but no cash from their retirement pot) if they have *not* taken their savings withdrawal that year (**rule 2**).

If the member has taken a savings withdrawal that year, then they can only take a second amount from their savings pot in cash, when they leave the fund, if they have R2 000 or less in that pot (**rule 3**). That is sensible, given we don't want small pots of cash left in various funds where members can forget they have them. If the member can't take their money out of the savings pot in cash - it must go with the other pots. So far – so sensible.

More rules, rules, rules – about deductions

But what about the effect that the savings withdrawal could have on all those deductions, like divorce orders, maintenance orders, housing loans and to compensate the employer for misconduct. This is where the runny scrambled egg comes into play in the interaction between the Income Tax Act and the Pension Funds Act.

No deductions from the savings pot

The first thing we notice is that these deductions may be made only from the vested pot and the retirement pot and not from the savings pot (**rule 4**). Some people think this is merely an oversight. Methinks not. This may need to change. It may be that the idea is to keep the savings pot intact for savings withdrawals by the member as needed, to the extent this does not adversely affect the fund, and other persons, like angry ex-spouses, hard-done-by employers (also angry) and children (not sure if they understand enough to be angry). Deductions affect many financially vulnerable people and must be dealt with correctly (in both the legislation and in real life). The legislative drafting required is complex.

The employer's consent - housing loans

The drafting for this section is extremely confusing, so I am guessing at the intention. I think it means that the fund may not allow the member to take a withdrawal savings, without the employer's consent, where the employer has granted the member a housing loan and the fund has stood guarantee for this (**rule 5**). The caveat for this may be, although not stated now, that the fund may pay the savings withdrawal if it will not compromise the amount of the guarantee.

I would like to see this requirement being extended to all housing loans or guarantees provided by the fund.

The employer's consent – misconduct judgment

The fund may not allow the member to take a withdrawal savings without the employer's consent where there is *a judgment already granted* in favour of the employer, but it has not been paid yet. If the fund is satisfied that the savings withdrawal will still leave enough money in the fund to comply with the judgment then it can allow the withdrawal savings and not ask for the employer's consent. (**rule 6**). I think this requirement is sensible.

This section is no doubt meant to refer only to judgments ordering compensation as a result of misconduct by the member at the employer as allowed for in section 37D. Not judgments for other debts, like study loans.

There is another section which allows funds to withhold payment of benefits (in misconduct circumstances) *pending a judgment*, if a court order is obtained allowing the fund to withhold (a new requirement) (**rule 7**). Where this court order is obtained, and the fund must withhold, this would include withholding any payment of benefits, including any saving withdrawal. This would cover the period between the misconduct and the obtaining of the judgment. The legislation should view the savings withdrawal as just another benefit payable by the fund and subject to withholding.

Consent of the member's spouse

A fund must get the consent of the member's spouse before giving the member a savings withdrawal if the retirement fund is aware that a *divorce action is pending* in respect of the member (**rule 8**). The Divorce Act provides that a divorce action is deemed to be “instituted”, among other circumstances, on the date that summons is issued or notice of motion is filed. I don't know if “pending” refers to this or not.

Something I am very concerned about is that the calculation of pension interest after 1 March 2024 *excludes the whole retirement pot* (and the savings pot in some circumstances), according to the current proposals. So, I am not sure why Treasury would want to protect what is in the savings pot from savings withdrawals (after 1 March 2024) as there will always be enough in the retirement pot and vested pot to do deductions of pension interest, if you exclude the retirement pot from the pension interest calculation. Let's hope the exclusion of the retirement pot is an oversight. Industry has made submissions on this before.

The only time you may need to protect pension interest from savings withdrawals is for divorce orders prior to 1 March 2024, paid after 1 March 2024 where the pension interest is large, e.g. 90 to 100%. Given the seeded amount, there may not be enough left in the vested pot and retirement pot to pay the pension interest. Remember I said the drafting is and will be complex...

In another note, I will discuss divorce deductions and the grueling definition of pension interest.

Maintenance orders

Again the wording of this section is opaque, but I have had a first stab at it.

Maintenance order already obtained: a retirement fund may not allow a member to take a savings withdrawal benefit where there is a *maintenance order already in place*, unless it is satisfied that maintenance order can still be fulfilled (**rule 9**).

Pending maintenance order: a retirement fund may refuse to allow a member to take a savings withdrawal where the fund is aware that a maintenance order action is 'pending', and the retirement fund is not satisfied that, if there is a savings withdrawal, there will be enough left in the fund to comply with a pending maintenance order (**rule 10**). I am not sure when a maintenance order is 'pending'. Also, I don't know how a fund could ever be satisfied of this if it doesn't know how much maintenance will be ordered, as the order is still pending.

Court order allowing refusal: if a *court has granted an order authorising the fund to refuse to pay a savings withdrawal*, then the fund can refuse to grant a savings withdrawal to the member until the maintenance order is granted or the action is otherwise concluded (a form of withholding) (**rule 11**).

Fund obligations

So I have counted 11 different “rules” that apply just when the member requests a savings withdrawal. Plus now, other parties are involved, not just the member. You may have noticed, across these sections about when a withdrawal savings may not be paid, many references to the fund not allowing it to happen and the fund being satisfied of things. This creates obligations and liability for the fund and its board as well as more administrative duties for the administrator.

Hmmm, not so simple after all.