

ASAP

Legal and Technical Update

Access to retirement funds upon emigration or the cessation of a visa

Retirement annuities

The Pension Fund Act and the Income Tax Act allows for the withdrawal from a retirement annuity fund if:

- the member is in the process of emigrating, or
- the member has already emigrated from South Africa, or
- the member's Visa has expired.

Emigration clarified

It is important to understand what is defined as emigration by the SA Reserve Bank (SARB) and SARS. The Exchange Control Handbook determines that all SA residents are able to emigrate insofar they leave the country to reside in any other country outside the CMA (includes Namibia, Lesotho, Swaziland).

The definition of resident refers to someone (a natural person) that is permanently resident in SA or domiciled here. Permanent residency for this purpose is not directly linked to a permanent residence permit or citizenship. Therefore, a foreign national that is permanently resident in SA can also be seen to emigrate when leaving the country on a permanent basis. This is a subjective test and circumstances and duration spent in the country will be considered.

If a foreign national enters the country on a temporary basis (for example on a temporary working visa) and that person makes a declaration to the authorized dealer that he/she is in SA for a limited period of time and intends to return to the country of origin when the contract is terminated, that individual will not be able to emigrate – in this instance the cessation of the Visa can result in access to the retirement annuity.

(Note all major banks are authorized dealers that act as agents of the SARB for the purposes of exchange control and clients should consult with their banks to gain clarity on their specific circumstances.)

When advising a foreign national on an investment in a retirement annuity it is important to determine the future access to the funds prior to making the recommendation. If it is found that the person cannot emigrate from SA as shown above or there is no Visa that will expire, it is important to explain that access to the retirement annuity will be restricted until retirement, disability or death (or if the retirement annuity is made paid up and the value in that fund is less than R7 000).

Important note:

Access to a retirement annuity due to emigration or the cessation of a Visa is restricted to any time **prior** to the retirement date being reached. No withdrawal due to emigration or the expiry of a Visa will be allowed after the retirement date. If a person has reached the retirement date as defined in the rules of the fund, they will only be entitled to a maximum 1/3 cash lump sum.

Each retirement annuity fund rules are unique. The Momentum fund rules define the retirement date as the date on which the member has formally requested retirement from the fund and all the administrative requirements necessary to give effect to the instruction has been met - provided that the member is eligible to retire on that date in terms of the Income Tax Act.

Therefore, if a client is older than 55 and the member has not yet informed the fund of the wish to retire, the retirement date has not been reached and withdrawal due to emigration or the cessation of a Visa will be possible.

Administrative requirements to access funds due to EMIGRATION:

The fund will complete a manual Form C, and

if the member is in the process of emigrating the following supporting documents will be required:

- Tax clearance certificate (IT21(a)) - "Application Form for Tax Clearance Certificate", and
- A signed and bank stamped MP336 (b) form (Request for settling in allowance) that was submitted to the authorized dealer.

if the member has already emigrated, the following supporting documents will be required:

- The member's certificate of residency obtained from the relevant Tax Authority of the country in which the member now resides. It will only be accepted if it is issued in accordance with the double taxation agreement (DTA) between SA and that country or residence.

An Immigration and Citizenship Certificate can only be accepted if there is no DTA between SA and that country. It will not be accepted in any other instance, and

- Copy of Tax Clearance Certificate in respect of emigration issued by SARS;

If a member emigrated more than 5 years ago and cannot produce the Tax Clearance Certificate, an affidavit must be provided wherein the taxpayer declares under oath that the certificate was lost.

Administrative requirements to access funds due to EXPIRY OF VISA:

The fund will complete a manual Form C, and

the following supporting documents will be required:

- A copy of the Certificate of residency obtained from the relevant Tax Authority of the country where the member permanently resides;
- A copy of the passport validating the exit from SA;
- A copy of the Visa indicating the expiry date and the applicable paragraph in the definition of 'Visa' in S1 of The Immigration Act in terms of which the Visa was issued.

Note:

Where a person belongs to more than one retirement annuity fund, nothing prescribes that a withdrawal must be made from all of the funds at the same time. The member can action the withdrawals as and when they deem it appropriate, as long as the abovementioned requirements are met.

This can be useful where an emigrant has already used the emigration allowance in the given year and where all excess funds are paid into a blocked rand account. The retirement annuity may provide a better net return than the blocked rand account due to the fact that there is no income tax payable on the returns generated in the fund. However, each case must be evaluated based on its own merits.

Other retirement funds

Where a member of a pension or provident fund leaves SA due to emigration or the expiry of a Visa, or for any other reason, the member will resign from their employment and the fund and will be entitled to withdraw the resignation benefit. The administrative process will be exactly the same as if the member resigned from the fund to join another employer and made the election to make a withdrawal.

Where a person is a member of a preservation fund, the member is entitled to one withdrawal prior to retirement. If the member emigrates or the member's Visa expires and the one withdrawal has NOT been utilized, the full fund value can be withdrawn.

Currently, if the one withdrawal has been utilized, the member will not be able to access the funds until retirement. .

Note:

A request has been made to Treasury to allow for access due to emigration or Visa expiry where the one withdrawal has already been used. Mention was made in the 2018 Budget that this will be reviewed and hopefully amended soon.

Living annuities

No access to a living annuity is possible due to the emigration or visa expiry of an annuitant.

Income tax implications

The SA tax system is based on residency meaning that all SA tax residents are taxed on their worldwide income in SA.

Where a person is no longer a SA tax resident, the tax system becomes source based, meaning that income tax is payable in SA on all income from a SA source. The result is that the withdrawal amount will be subject to income tax in SA either way – irrespective of whether the person is a SA tax resident or not at the time of making the withdrawal.

The lump sum withdrawal amount will be subject to income tax in accordance with the Second Schedule to the Income Tax Act and the tax table applicable to withdrawals will apply. The normal aggregation rules apply.

If the person resides in a country where the amount is also taxable, the double taxation agreement that exist between SA and that country will dictate which jurisdiction has the authority to tax – in general it will be where the source is. If, however, tax is still payable on the same amount in that other country, a tax credit is generally allowed for the income tax paid in the country of source.

The net amount will be remitted offshore where the withdrawal was due to Visa expiry.

Where it was due to emigration, the net amount will form part of the overall emigration allowance limits.
