

## Ex parte Henning 1981:

- Voluntary surrender of estate for sequestration.
- Requirement of advantage to creditors at an application for the voluntary surrender of the estate.
- In this case, the debtor's wife, to whom he was married out of community of property, made a monthly contribution from her salary to pay his (the debtor's) creditors. The question was whether this fact should have been taken into account to determine whether sequestration would be to the advantage of the creditors.

Facts	<p>In an application for the surrender of the applicant's estate, it appeared that his wife, to whom he was married out of community of property, made a monthly contribution from her salary to pay his creditors. A creditor opposed based on the following grounds:</p> <ul style="list-style-type: none"> <li>(i) That the application didn't comply with the requirements of Section 6(1) because the applicant's assets didn't cover costs of sequestration payable from the free residue;</li> <li>(ii) That the respondent would be much better off if the application for voluntary surrender were refused and the applicant were compelled to continue paying the respondent for 9 years;</li> <li>(iii) That the applicant was approaching the court to avoid paying respondent's claim;</li> <li>(iv) That the statement of affairs that lay for inspection did not contain the personal information (Annexure VIII).</li> </ul>
Legal Question	<ul style="list-style-type: none"> <li>• Can failure to comply with any prescribed formalities be condoned.</li> <li>• Should the wife's contributions be taken into account to determine whether sequestration would be to the advantage of the creditors?</li> </ul>
Judgement	<ul style="list-style-type: none"> <li>• The voluntary surrender of the applicant's estate was accepted.</li> </ul>
<i>Ratio Decidendi</i>	<ul style="list-style-type: none"> <li>• That even if sequestration costs had to be available at the time of the application, the applicant's assets would probably fetch R 1,030 and would therefore cover the sequestration costs which the parties had agreed would run to about R 1,000. Where there are sufficient assets to cover costs of sequestration and administration at time of an application for voluntary sequestration, there's proper compliance with Section 6(1).</li> <li>• That the test was not to compare the respondent's position at the time of immediate voluntary surrender of the applicant's estate with the respondent's position if the monthly debt payments were continued for 9 years. The question was merely whether the court papers showed whether voluntary surrender would be to the advantage of all the creditors. Nobody could force the applicant's wife to work if she did not want to work and, if she stopped working there would scarcely be sufficient to meet the requirements of the family. Accordingly, this factor is too vague or uncertain to take into</li> </ul>

	<p>account in evaluating whether sequestration will be to the advantage of the creditors.</p> <ul style="list-style-type: none"> <li>• That, on the facts, the argument of applicant's avoidance lacked substance. If the applicant had wished to avoid paying the claim, it would have suited him and his spouse for her to stop working and sit back without paying anything, so that his creditors could sequester his estate.</li> <li>• It was clear that no creditor had been prejudiced by this defect in deciding whether to oppose the application. In the circumstances, court was prepared to condone the defect.</li> </ul>
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**The respondent (Rand Bank) opposed the application for voluntary surrender. One of the respondents grounds of opposition was that the application did not comply with the requirements of section 6(1) because the applicant's assets did not cover costs of seuestration payable from the free residue. Explain how the court resolved the issue.**

- ✓ The court decided that even if sequestration costs had to be available at the time of the application, the applicant's assets would probably fetch R 1,030 and would therefore cover the sequestration costs which the parties had agreed would run to about R 1,000. ( See p 847 of the law report).

As regards the requirement of advantage to creditors, the respondent argued that it would be much better off if thee application for voluntary surrender were refused and the applicant were compelled to continue paying the respondent for nine years. Describe which test the court laid down as the proper one to be applied in these circumstances.

- ✓ The court held that the question was merely whether the court papers showed that voluntary surrender would be to the advantage of all the creditors.
- ✓ The court held that the test was not to compare the respondent's position at the time of immediate voluntary surrender of the applicant's estate with the respondent's position if the monthly paymnts were continued for 9 years.

The respondent argued that the applicant was approaching the court to avoid paying the respondent's claim. Explain how the court disposed of this point.

- ✓ The court decided that, on the facts, this argument lacked substance.
- ✓ If the applicant had wished to avoid paying the claim, it would have suited him and his spouse for her to stop working and sit back without paying anything, so that his creditors could sequester his estate. (see p 848 of the law report.)

Alf applies for the voluntary surrender of his estate. It appears that his wife receives a good income

and that from this she contributes a substantial amount towards the payment of his debts, but that she will definitely not continue to do so if Alf's estate is sequestrated: Should the court dismiss the application merely because it would be more to the advantage of Alf's creditors if Alf's wife were to continue helping to pay his debts? Give reasons for your answer.

- ✓ This question relates to the decision of the court in *Ex parte Henning* 1981.
- ✓ In the *Henning* case it was decided that this factor is too vague or uncertain to take into account in evaluating whether sequestration will be to the advantage of the creditors.
- ✓ The court will therefore not dismiss the application merely because the creditors will be in a better position if Alf's wife continues to assist him in paying his debts.

In *Ex parte Henning* 1981 (3) SA 834 (O) the court decided that the monthly contribution made to the debtor's creditors by his (the debtor's) wife, to whom he was married out of community of property, should **not** be taken into account in order to determine whether sequestration of the debtor would be to the advantage of his creditors.

- ✓ True.

In *Ex parte Henning* 1981 (3) SA 834 (O) the court decided that the monthly contribution made to the debtor's creditors by his (the debtor's) wife, to whom he was married out of community of property, **should be** taken into account in order to determine whether sequestration of the debtor would be to the advantage of his creditors.

- ✓ False.

#### **Preparation and lodging of statement of affairs:**

- In *Ex parte Henning*, the statement of affairs that lay for inspection did not contain the personal information (Annexure VIII).
- But it was clear that no creditor had been prejudiced by this defect in deciding whether to oppose the application.
- In the circumstances, the court was prepared to condone the defect.