IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter:

SELMA PATRICIA TODT Appellant

and

CLAUDE WALTER IPSER Respondent

CORAM : E M GROSSKOPF, MILNE, EKSTEEN, NIENABER, JJA, et VAN COLLER AJA.

HEARD: 9 March 1993

DELIVERED: 31 March 1993

JUDGMENT E M

GROSSKOPF, JA

The appellant unsuccessfully sued the respondent for damages allegedly arising from her arrest and imprisonment at the instance of the respondent pursuant to sec 65A et seq of the Magistrates' Courts Act, no. 32 of 1944 ("the Act"). With the leave of the court a quo (Howie J in the Cape Provincial Division) she now appeals to this court.

The respondent was at all relevant times an attorney in Bellville, Cape. The appellant and her husband were estate agents. They were on reasonably friendly terms with the respondent. The parties met socially and the respondent performed conveyancing work sent his way by the appellant and her husband.

At one stage the appellant's estate agency business was very successful. In her own words:

> "Our standard of living was very high, we did exceptionally well. Both of us drove Mercedes-Benz. We entertained, we lived the high life, I would say, and we maybe possibly over-extended our limits at certain stages ... At a certain

point in time

> suddenly the market seemed to collapse around us, the interest rates soared, everything just seemed to collapse around us and at this particular time both my husband and I seemed to be experiencing marital problems, and things went from bad to worse and eventually I decided to institute divorce proceedings."

The collapse occurred in 1985. The appellant consulted respondent (or his firm) to act for her in the divorce. Initially the matter was handled by a professional assistant, one Joubert, but he left the respondent's employ in April 1985, and thereafter the respondent dealt with it himself. By September 1985 the appellant and her husband had become reconciled. On 2 September 1985 the respondent wrote to the appellant telling her that he was closing the file and enclosing his final account. The amount was R296,34 which included interest.

At this time the appellant was in serious financial difficulties, and on the advice of an attorney, one De Braal, she applied for, and was granted, an administration order in terms of sec. 74 of the

Magistrates' Courts Act. That section

provides that, where a debtor is unable forthwith to pay the amount of any judgment obtained against him or to meet his financial obligations, and does not have sufficient assets available to satisfy such judgment or obligations, and the total amount of his debts does not exceed a specified amount (at present R20000), the court may make an administration order providing for the administration of the debtor's estate and for the payment of his debts in instalments or otherwise. Section 74E makes provision for the appointment of an administrator and his duties are set out in section 74J. They are mainly to collect payments made in terms of the administration order, to keep proper books, and to distribute the payments among the creditors. According to sec 74A(2)(e) an application for an administration order must contain a complete list of the debtor's creditors and their addresses, and particulars of their claims. After his appointment the administrator must draw up and lodge with the clerk of the court a complete list of

creditors. Provision is made for

creditors, who were not mentioned in the list accompanying the application, to be included in the list compiled by the administrator so as to share in any distribution.

The administration order in the present case was granted on 17 October 1985. The court ordered the appellant to pay R60 per month in respect of her debts. De Braal was appointed administrator.

In her application for the administration order the appellant did not include the respondent as one of her creditors. He found out about the administration order in October or November 1985 from Mrs. Brink, who managed his collections department. She became aware of it because they were collecting a debt from the appellant on behalf of a client, Kirchoff & Van Greunen.

On 9 December 1985 the respondent (through his clerk, one Botha) wrote to De Braal asking to be placed on the list of the appellant's creditors for an amount of R308,73 in respect of professional fees. This comprised

the

original capital amount plus interest. The letter concluded by stating that further interest at 20 percent per annum from 1 December 1985 to date of payment would be added. On 13 January 1986 De Braal replied, querying the claim for interest. Botha replied as follows on 28 January 1986:

> "Ons verwys na u brief gedateer 13 deser en wens u mee te deel dat ons op grond van 'n stilswyende ooreenkoms die rente van 20% per jaar eis. Ons verneem graag binne twee weke van u of u die eis aanvaar soos uiteengesit. Indian nie sal ons noodwendig aansoek ingevolge Artikel 74 P (1) doen om verlof om te dagvaar bloot met die doel om vonnis te kry om ons op 'n gelyke voet met ander skuldeisers te plaas wat betref rente."

De Braal does not appear to have replied to this letter. On 19 February 1986 the respondent filed an application under section 74P(1) of the Act. This provision, in so far as it is relevant, reads as follows:

> "As long as any administration order is of force and effect in respect of the estate of

any debtor, no creditor shall have any remedy against the debtor or his property for collecting money owing, except ... by leave of the court and on such conditions as the court may impose."

The application was prepared by Botha, but the respondent signed the affidavit in its support. The affidavit set out the history of the matter, inter alia recording that the administrator had questioned the respondent's claim for interest, and that the respondent had, in the letter of 28 January 1986 called upon the administrator to accept the claim for interest, failing which the leave of the court would be sought "to institute action ... with a view to obtaining judgment for no other purpose than to qualify for interest". The affidavit then continued as follows:

> "It is important that interest accrues on the capital owing to me as it will be many years before my claim is settled and inflation is eroding the value thereof at the rate of approximately 18% p.a.
> at present.
>
> ...I therefore humbly request the Court for

leave to institute proceedings against the Respondent [i.e., the present appellant] so that I may be placed on an equal foot with other creditors who have judgments in their favour. I accept that such leave be limited to the institution of action and the taking of judgment, and that I will not be free to execute the judgment whilst the Administration Order is in existence."

The application was granted by the magistrate of Bellville. The magistrate recorded that the order was "in respect of the interest only as per affidavit attached to application."

In due course summons was issued, and, after some difficulty in getting hold of the appellant, personally served. The appellant did not defend, and on 17 July 1986 respondent obtained default judgment against her for R340,34 plus interest at 20% from 31 August 1985 to date of payment.

Having obtained judgment, the respondent renewed his efforts to be included in the list of the appellant's creditors so as to participate in the distribution. On 24 July 1986 he wrote to De Braal informing him of the judgment and requesting to be placed on the list of creditors. On 21 August the respondent received a dividend on behalf of Kerchhoff & Van Greunen, but the list of creditors accompanying the payment did not include the appellant's own claim. After

several further letters from the respondent, De

Braal eventually wrote on 29 October 1986 "to inform that we have included you in the distribution". However, matters continued as before. In April 1987 the respondent received a dividend on behalf of Kerchhoff & Van Greunen but he himself was not on the list accompanying the payment and he received nothing. Further letters to Van Braal evoked no reaction. Personal requests, either telephonic or face to face (they both practised in the Bellville area, and saw each other fairly often), fared no better. The respondent became increasingly frustrated. By June 1987 he came to the conclusion that, despite the letter from De Braal of 29 October 1986, he was not on the list of the appellant's creditors who would share in any contributions made by her. He stated in evidence that this conclusion was based not only on De Braal's failure to react to his claims but also on the results of (unspecified) enquiries made by a staff member. The respondent decided that the time had arrived for sterner measures.

In deciding what measures to adopt the respondent relied only on his own recollection of the legal position pertaining to administration orders. The respondent stated that in the early years of his practice (he started in 1973) he had been engaged in a couple of administration order matters. He did not like this type of work and avoided it afterwards. His recollection from those days was that a creditor, who was not included in the list of creditors compiled by the administrator, was entitled to execute against the debtor as if no administration order existed. Although he knew that the sections of the Act dealing with administration orders had been largely re-written by amendments in 1976 (he had in fact read the amendments at the time of their promulgation), he was firmly under the impression that the right of a creditor to execute if he did not appear on the list, had not been touched. Although he had signed the affidavit in the proceedings under sec 74P of the Act, he did not (he testified) consciously note that sec

74P

required the court's leave for proceedings against a debtor under administration even by creditors who were not on the list. Because of his view of the legal position he considered that he had been friendly and co-operative in trying to be included in the list of creditors when he might have proceeded to execution. He now decided to assert his rights.

The procedure chosen by the respondent was that provided by sections 65A et seg of the Act. This entailed, in a case like the present where the creditor relies on a default judgment, that the debtor first had to be "advised ... by registered letter of the terms of the judgment ... and the consequences of his failure to satisfy the judgment ... " (sec 65A(2) ). Ten days after posting this letter the creditor may proceed to the next step. He may then issue from the court of the district in which the debtor resides a notice calling upon the debtor to appear before the court in chambers on a date

specified in the notice to show cause why

he should not be committed for contempt of court and why he should not be ordered to pay the judgment debt in instalments or otherwise (sec 65A(1) ).

On 17 August 1987 the respondent gave the following written instruction to Mrs Brink:

> "Indien ons nie ingesluit is in die lys van skuldeisers word ons nie deur die Administrasiebevel gebind nie. Gaan voort met a 65A stappe asb."

On 18 August 1987 a notice in terms of sec 65A(2) was sent by registered mail to the appellant at an address in Hout Bay. This was returned with the comment "Gone away - no address left". A further notice was sent by registered mail in December 1987 to the appellant's new address in Three Anchor Bay. This notice was returned in January 1988, marked

"unclaimed". On 10 February 1988 the respondent caused a notice in terms of sec 65A(1) to be issued calling upon the appellant to appear on 14 March to show cause why she should not be committed to gaol for contempt of court and ordered to pay the judgment debt which, with interest and ancillary

costs, had by then increased to more than R520. On 23 February 1988, the messenger of the court, Mr Bateman, who gave evidence at the trial, served this notice by affixing it to the main door of the appellant's flat. The appellant testified that she did not receive the notice. She did not appear at the hearing on 14 March 1988 and the court ordered, in terms of section 65F(1) of the Act, that she undergo a period of 30 days committal in Pollsmoor prison.

Sec 65H provides that a warrant for the arrest and detention of a judgment debtor shall be prepared by the judgment creditor or his attorney, shall be signed by the judgment creditor or his attorney and the clerk of the court and shall be executed by the messenger of the court. The respondent prepared and signed such a warrant for the arrest and detention of the appellant, had it signed by the clerk of the court, and sent it to the messenger of the court under cover of a letter dated 11 April 1988 reading:

> "We enclose a Warrant of Arrest and Detention for service on the above-named Debtor at given address.

Please endeavour to collect an amount of at least R250,00 from the Debtor".

It was explained in evidence that warrants of arrest and detention issued in terms of section 65H did not usually lead to the actual incarceration of the debtor. In most cases service of the notice was a sufficient inducement to the debtor to make some payment in order to retain his or her freedom. It was accordingly the usual practice for a creditor to inform the messenger of the court how much he was prepared to accept from his debtor to avoid execution of the warrant of arrest.

After an unsuccessful attempt to execute the warrant on 4 May 1988, Bateman served the warrant on 11 May at about 5 a m. In response the appellant's husband handed Bateman a cash cheque for R448. The trial judge accepted Bateman's evidence that he served two warrants on the appellant that morning, and that only R250 of this amount was to be, and was in fact, paid to the

respondent.

On 10 June the respondent wrote to the appellant as follows:

> "You must remit payment of not less than R50,00 per month, failing which we intend re-issuing the warrant for your arrest".

The appellant received this letter. She telephoned the respondent's office and spoke to a clerk whom she told that she considered the claim to have been paid in full. This message apparently never reached the respondent. There was no further communication between the parties. The appellant made no further payments. On 18 July the respondent again forwarded the warrant of arrest to Bateman under cover of a letter in which he requested Bateman to collect "the full outstanding balance of R394,21 together with your charges".

Bateman served the warrant at about midnight on 1 August 1988. The appellant and her husband were highly indignant, but the appellant's husband nevertheless offered to pay the amount. Bateman refused to take the money. There was an imbroglio between Bateman

and the appellant's husband

and Bateman fetched police support. Eventually the appellant was placed in the patrol van of the messengers of the court, and, after various other defaulting debtors had been picked up, deposited at Pollsmoor prison. The next morning her husband paid the amount owing at the office of the messenger of the court, and the appellant was released in terms of sec 65L (b) of the Act. In her evidence the appellant gave a graphic account of her odyssey in the patrol van and her stay in prison. I do not propose repeating it herein. Obviously it was a most unpleasant experience.

Arising from these events the appellant claimed damages from the respondent. In addition she claimed, by way of a condictio indebiti, return of the money paid by her husband. Both claims failed in the court a quo. The claim based on the condictio indebiti is not subject to appeal and no more need be said about it.

Concerning the claim for damages, the trial court considered that the appellant's case as pleaded

was one of

malicious arrest and imprisonment. The appellant as plaintiff therefore had to prove animus injuriandi on the part of the respondent. This the appellant had failed to do. In particular, the appellant had failed to show that the respondent did not genuinely believe that he was entitled, despite the existence of the administration order and the qualified nature of the default judgment obtained against the appellant, to institute proceedings under sec 65A of the Act. Moreover, it was held, the appellant had not shown that the respondent foresaw that the appellant's arrest and detention might actually materialise in the circumstances of this case.

The trial court then dealt with an alternative basis of liability suggested by the appellant's counsel, namely wrongful or unlawful, as opposed to malicious, arrest and imprisonment. The distinction between these two causes of action was stated as follows by the trial judge on the authority of Newman v Prinsloo and Another 1973 (1) SA 125

(W) at 127H-128A:

> "In wrongful arrest the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose action he is vicariously liable. In malicious arrest the interposition of a judicial act between the defendant's act and the arrest makes the restraint the act of the law not the act of the defendant".

On the basis of this distinction, the learned judge a quo held that the suggested alternative cause of action could not succeed because the messenger did not act as the respondent's agent in arresting the appellant and the warrant was issued only after a magistrate had exercised his discretionary power to order the appellant's committal under sec 65F. In what follows I use the expressions wrongful arrest and unlawful arrest interchangeably

The appellant's main argument before us was that the alternative case based on unlawful arrest and detention should have succeeded in the court a quo. Before considering the merits of that contention I must, however, first deal with a problem of pleading. Before us

it was argued, as it

had been before the court a quo, that a claim in respect of wrongful arrest was not before the court because the appellant did not in her particulars of claim allege facts necessary for such a cause of action. I do not agree. The relevant paragraphs read as follows:

> "3. At all material times, Plaintiff was subject to an administration order issued by the Additional Magistrate, Bellville, and such order was of full force and effect.
>
> In terms of section 74P(1) of the Magistrate's Court Act (Act No 32 of 1944, as amended), no creditor has any remedy against a debtor under administration or against his property (save for debts secured by way of mortgage bond or referred to in terms of Section 74P(3) of the said Act) without the leave of the Court and on such conditions as the Court may impose.
>
> 4. On 10th March 1986, Defendant applied to the Additional Magistrate, Bellville, for leave to institute action against Plaintiff in terms of Section 74P(1) 'for no other purpose than to qualify for interest' on an amount of R296,34, alleged by Defendant at the time to have been owed to him by Plaintiff.
>
> Defendant moreover accepted that, should such leave to institute action (and in due course obtain judgment) be granted, Defendant would

'not be free to execute (upon) the judgment while the administration order (was) in existence'.

a) Leave was duly granted to defendant to institute action (and to obtain judgment), Defendant having restricted himself to obtaining such judgment for the aforesaid purposes and subject to the aforesaid restriction, pursuant to which Defendant obtained judgment against Plaintiff in the Bellville Magistrate's Court.

b) Notwithstanding the aforegoing, Defendant wrongfully, wilfully and with the intention to injure, obtained a judgment in the Cape Town Magistrate's Court (based on the aforesaid judgment in the Bellville Magistrate's Court), instituted proceedings against Plaintiff in terms of Section 65 of Act No 32 of 1944 (of which Plaintiff was at all material times unaware) and caused a warrant of arrest to be issued for Plaintiff's incarceration, pursuant to which Plaintiff was arrested by the Deputy Messenger, Cape Town, on 1st August 1988 and detained in prison on 2nd August 1988.

c) By virtue of the aforegoing, Plaintiff suffered grave distress and inconvenience, was severely humiliated and was gravely injured in her dignity."

The acts about which the appellant complains in para 6, are the following:

d) The obtaining of a judgment in the Cape Town Magistrates' Court;

e) The institution of proceedings in terms of

Section 65A of the Act; and

(c) The causing of a warrant of arrest to be issued for the appellant's incarceration pursuant to which she was arrested and detained in prison. The complaint in paragraph (a) may be ignored. The only proceedings instituted in the Cape Town Magistrates' Court were those mentioned in paragraph (b), namely the proceedings in terms of section 65A. Now the acts set out in paragraphs (b) and (c) were, so it is alleged in paragraph 6 of the particulars of claim, committed by the respondent "wrongfully, wilfully and with the intention to injure". The allegation of intention to injure (animus injuriandi, dolus) is necessary in an action for malicious arrest, (cf Moaki v Reckitt & Colman (Africa) Ltd and Another 1968 (3) SA 98 (A) at pp 103D to 104G and authorities there cited). However, an action for wrongful arrest does not require proof of animus injuriandi in the full sense of the term as including consciousness on the part of the defendant that he is acting

unlawfully. In the recent judgment in Minister of Justice v Hofmeyr (unreported case no 240/91 delivered on 26 March 1993) this court expressly approved the following passage from Smit v Meyerton Outfitters 1971 (1) SA 137 (T) at p 139D:

> "In die geval van die actio injuriarum het die skuldbegrip met twee oorwegings te make. Die eerste is dat die verweerder opsetlik (intentionally) gehandel het en die tweede is dat hy geweet het dat die handeling onregmatig is. In die geval van onregmatige arrestasie, hoewel dit uit die actio injuriarum ontwikkel het, is die tweede oorweging nie 'n vereiste vir aanspreeklikheid nie."

It follows that the allegation in the particulars of claim of an intention to injure (which would include consciousness of unlawfulness) went beyond what was required to disclose a cause of action for unlawful arrest. In respect of such a cause of action, this allegation may be regarded as surplusage. However, this does not detract

from

the fact that the remainder of the paragraph does allege,

inter alia, that the respondent wrongfully and wilfully

caused the appellant's arrest. No doubt it would have been

better pleading to allege malicious arrest and wrongful arrest in the alternative, but, except for the respondent's state of mind, the same issues arose in respect of both causes of action, and the same evidence was relevant. It is not suggested that any question relating to the case of wrongful arrest was not fully canvassed in the court a quo, or that the respondent would in any way be prejudiced if a decision on that ground were to be given. In these circumstances I consider that we are entitled, and in fact obliged, to consider whether the proven facts establish liability on the ground of wrongful arrest and imprisonment. See, in this regard, e g, Robinson v Randfontein Estates G.M. Co., Ltd 1925 AD 173 at 198 and Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at pp 44H to 45B. I now turn to this enquiry.

The commencement of the chain of events which culminated in the appellant's imprisonment was the application under sec 74P of the Act. This application

was

granted conditionally. The respondent was given leave to issue summons and obtain judgment but "for no other purpose than to qualify for interest" - in particular the respondent "would not be free to execute" while the administration order was in existence. The effect of these conditions was, in my view, that the respondent did not have a judgment which could sustain a valid execution or valid proceedings under sec 65A of the Act. Before sec 65A can be invoked there must be a judgment debt which is payable by the debtor and has remained unpaid for ten days or more. In this case the debtor's estate was under administration. In terms of sec 74J (14) of the Act a payment by the appellant of the judgment debt would have been invalid. The manner in which the appellant was required to pay her debts was by making regular payments to the administrator of the amounts ordered by the court so as to enable the administrator to distribute them among her creditors generally. And the conditions imposed in the application granted under sec 74P were devised to

ensure that

any judgment granted would not interfere with this regime. In short, there was no enforceable judgment debt and there was accordingly no basis for the proceedings under sec 65A. The court had no power to entertain such proceedings.

The institution of sec 65A proceedings in the absence of an enforceable judgment constituted, in my view, an unlawful act on the part of the respondent. In Sliom v Wallach's Printing & Publishing Co Ltd 1925 TPD 650 the defendant had issued a summons against a partnership of which the plaintiff was a member. A default judgment was taken on this summons against the plaintiff personally. In a subsequent action the plaintiff sued, inter alia, for damages on the ground that the defendant had unlawfully taken judgment against him. The court deciding (on appeal) an exception to the damages claim held that the plaintiff had not been legally cited before the court in the earlier proceedings, and that the judgment obtained against him

was a nullity (at p 656). Regarding the defendant's liability in

these circumstances, the court said (at p 657):

> "The summons alleged that what the respondent [defendant] company did was to obtain this judgment against the plaintiff wrongfully and unlawfully and maliciously, and as the judgment itself was a nullity, as the respondents [defendant] had no right to apply for and obtain that judgment against the appellant [plaintiff] personally, it follows that the procedure adopted by the respondents was an illegal procedure, and it is quite unnecessary for the plaintiff in this case to allege any absence of reasonable and probable cause".

The court referred to the case of Cohen Lazar & Co v Gibbs

1922 TPD 142 in which a defendant was held liable for causing

a debtor's property to be attached in execution when

there

was no judgment to support it, and quoted the following

passage from the judgment (p 145 of the Cohen Lazar case,

quoted at p 657 of Sliom's case):

> "When a person sues out a warrant of execution with us and he has no right to do so, because he has no judgment to support it, we say he is guilty of a delict and he is liable in damages. The delict lies in the wrong he has done by asking for a writ of execution when he is not entitled to do so and not in the fact that he acts maliciously".

After quoting this passage, the court in Sliom's

case continued:

> "That seems to apply with equal force in the present case. The delict committed in this case was to apply for a judgment against a person who has not been properly cited before the Court..."

In the instant case, by a parity of reasoning, it would seem that the respondent acted unlawfully when he instituted proceedings under sec 65A without a supporting judgment. Whether the unlawful institution of the proceedings would, by itself and without proof of animus injuriandi, have rendered the respondent liable for damages (see, in this regard Cohen Lazar's case and Sliom's case, supra) need not be considered now since the respondent did not stop there. He continued by issuing warrants of arrest - and detention which ultimately led to the appellant's arrest and imprisonment. This whole process (which was in effect

one

of civil imprisonment - see Quentin's v Komane 1983 (2) SA

775 (T) at p 778 D-E) - suffered from the basic defect that

there was no judgment to support it. And we now have firm

authority in Minister of Justice v Hofmeyr (supra) for the

proposition that the conscious unlawfulness which is normally an element of animus injuriandi is not required for liability on the grounds of unlawful deprivation of liberty. It therefore would not matter if the respondent thought he was entitled in law to act as he did.

There is, however, one respect in which the present case possibly differs from the Cohen Lazar case and Sliom's case. In both these cases the courts emphasized that the purported legal acts (the writ in the former case and the judgment in the latter) were completely void. In the instant case the questions consequently arise whether the order of the magistrate under sec 65F was equally void and, if not, whether it would make a difference to the respondent's liability. In Sliom's case, following (apparently) Voet, Commentarius ad Pandectas 2.4.14 and 66, the court held (at p 656) that a judgment given against a person who had not been duly cited before the court is of no effect whatsoever. It is a nullity and can be disregarded. In logic the same

argument

should apply here. If there was no valid executable judgment against the appellant, then the notices under sec 65A and everything that followed thereon should in logic be void. And the mere fact that one of the succeeding events was an order of the court should make as little difference as it did in Sliom's case. Similarly the following passage from the Cohen Lazar case (at p 145), relating to execution against the property of a debtor, would seem to be wholly apposite, mutatis mutandis, to the present case, which is in effect one of execution against the person of the debtor:

> "It is revolting to one's common sense to think that a person unsupported by any judgment could induce a clerk to issue to him a writ, seize a person's property, and escape liability merely because he acted without malice and under the impression that no judgment was required."

This passage was quoted with approval in Minister of Justice v. Hofmeyr (supra).

> The difficulty is that in our law the tendency is

against holding that judgments are void. According to our common law authorities judgments are void in only three types

of cases - where there has been no proper service, where there is no proper mandate or where the court lacks jurisdiction. See Minister of Agricultural Economics and Marketing v Virginia Cheese and Food Co (1941) (Pty) Ltd 1961 (4) SA 415 (T) at p 422E to 424H; S v Absalom 1989 (3) SA 154 (A) at p 163C and 164E - G; and the earlier authorities cited in these cases. In the present case the court was not entitled to issue a committal order because there was no enforceable judgment against the appellant, but this is possibly not a lack of jurisdiction in the sense in which the term was used by our authorities. However, I do not think the old authorities quoted in the cases above are of decisive importance for present purposes. They deal with judgments generally. In the present case we are concerned, not with a judgment settling a substantive lis between the parties, but with an order made in the course and for the purpose of execution. It seems inconceivable to me that such an order can have any validity where there is no judgment

capable of

being executed. Even if it were to be that there is no lack of jurisdiction in the strict sense in such a case, I consider that such an order must be wholly void. There is, accordingly, in my view no distinction between the present case and those of Sliom and Cohen Lazar (both supra) and it was unlawful on the part of the respondent to institute and carry through the proceedings under sec 65A et seq. of the Act. Because the purported order of court was void, there was no "interposition of a judicial act" which, according to the passage quoted from Newman's case supra, would have rendered the appellant's arrest and detention "the act of the law not the act of the defendant". For this reason I consider that the court a quo erred in holding that there could not be liability for unlawful arrest in the present case.

In view of my conclusion on this part of the case it is not necessary to consider whether the respondent's position would have been any better if the committal order had not been void but merely voidable. I express no view on

had not been void but merely voidable. I express no view on this point.

The respondent's counsel argued that, even if the committal order is void, the respondent cannot be held liable for the appellant's arrest and detention because this resulted from an act of the messenger of the court over whom the respondent had no control - in fact, the messenger acted contrary to the instructions of the respondent in not accepting money from the appellant or her husband.

I do not think this argument is sound. The respondent unlawfully obtained an order for the appellant's committal, he unlawfully had a warrant issued for her arrest and imprisonment and he sent it to the messenger for execution. The messenger gave effect to the warrant by arresting the appellant and causing her to be imprisoned. If these were the only facts the respondent would clearly be liable. See the Cohen Lazar case, supra, and Carter & Co (Pty) Ltd v McDonald 1955

(1) SA 202 (A) at p 210C. In the

present case we have the further circumstances that the respondent requested the messenger to collect the full outstanding balance and that the respondent thought that the appellant would be able to pay this money, thereby forestalling an arrest. These circumstances did not, however, detract from the authority which the appellant had bestowed on the messenger. The warrant remained unimpaired. The respondent knew that it would be executed if the appellant was unable to raise the money in a form acceptable to the messenger (hardly an unlikely event in view of the appellant's parlous financial position). He also must have known that the messenger could comply with his request to collect the outstanding amount by simply arresting the appellant and thereafter obtaining the money. This is in

fact

what happened. The true position, it seems to me, is that the

respondent authorised and instructed the appellant's arrest

and imprisonment but that he expected supervening events beyond his control to prevent it at the last moment. This did

not happen and the appellant was duly arrested and imprisoned in terms of the unlawful authority and instructions given to the messenger by the respondent. The respondent cannot,in my view, escape liability for this.

In the circumstances, and for the reasons stated, I consider that the respondent is liable in damages for the appellant's unlawful arrest and imprisonment. It is accordingly unnecessary to consider whether the court a quo was correct in holding that a case of malicious arrest and imprisonment had not been established.

I turn now to the amount of damages. Both parties to the appeal requested that this be fixed by us rather than having the case remitted to the court a quo. In the course of his thorough judgment the trial judge (commendably) considered what amount he would have awarded had malicious arrest and imprisonment been proved. It was argued before us that animus injuriandi

was a factor justifying an increased award of damages, and that therefore, if the respondent were

held liable for wrongful arrest only, this court should reduce the amount suggested by the trial court. However, in assessing the quantum of damages, the trial court concentrated on the nature of the ordeal suffered by the appellant, and the extent to which she was herself the authoress of her misfortunes. As far as the respondent's attitude was concerned, the court mentioned only that he had offered an apology in his plea, and did not expressly have regard to the postulated presence of animus injuriandi. Of course, this must have been present to the court's mind because it was basic to the assumption on which the court fixed damages. However, it does not seem to have been accorded much weight. Moreover, since the respondent was at least grossly negligent in instituting and carrying through the sec 65A proceedings, and the amount fixed by the court was in any event a relatively modest one, I consider that we should accept the court's suggestion as a proper award in the present case.

As far as costs in the court a quo are concerned, the effect of this judgment is that the appellant should have been successful in her claim for damages, but she failed in respect of her condictio indebiti which is not on appeal before us. I think that that amounts to substantial success in the trial court, particularly as the condictio indebiti did not require any additional evidence. She is accordingly, in my view, entitled to her costs in the court a quo.

In the result the appeal is allowed with costs. The order of the court a quo is set aside and replaced by the following:

f) The defendant is ordered to pay damages in the amount of R4000,00;

g) Claim c) in the particulars of claim is dismissed;

h) The defendant is ordered to pay the costs of suit.

E M GROSSKOPF, JA

MILNE, JA EKSTEEN, JA NIENABER, JA VAN COLLER, AJA Concur