REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A83/04

In the matter between:

TONY CASTILLO RAMOS Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 19 JANUARY 2005

<u>YEKISO J et GESS AJ</u>

[1] The appellant was charged in the magistrate's court, Goodwood with contravening section 67(1)(c) of the Gambling and Racing Law (Western Cape) Law no 4 of 1996. We shall in the course of this judgment refer to this piece of legislation simply as "the Gambling Act".

[2] The allegation by the State at the time was that during the period 1998 upto and including 15 October 1998, and at or near Paradise

Entertainment Centre, Voortrekker Road, Goodwood, the appellant wrongfully and intentionally had in his possession 48 gambling devices without the appropriate licence.

[3] Possession of gambling devices, as defined, without a licence is prohibited in terms of section 67(1)(c) of the Gambling Act, unless such possession is for the sole purpose of demonstration, promotion within the industry or for such other purpose as the Gambling Board may authorise from time to time.

As is the case with any other legislation, the Gambling Act contains a number of definitions. The definitions pertinent to these proceedings are those relating to the terms "<u>gambling device</u>" and "<u>slot machine</u>".

[4] The term "<u>gambling device</u>" is defined in the Gambling Act as "any equipment or thing used, or designed to be used, irrespective of the actual use to which it is put at any time, directly or indirectly, in connection with gambling."

[5] The term "<u>slot machine</u>", on the other hand, is also defined in a rather lengthy definition, the material portion thereof being "… any mechanical, electrical, video, electronic or other device, contrivance or machine used in connection with a <u>gambling game</u> which, upon insertion of money, a token or a similar object

therein, or upon payment, whether directly or indirectly, by or on behalf of a player of any consideration whatsoever that is required, is available to be played or operated and the playing or operation of which, whether by reason of the skill of the player or operator or the application of the element of chance or both, may deliver to the person playing or operating the machine cash, tickets, receipts or tokens to be exchanged for cash or merchandise or <u>anything of value whatsoever</u>, other than <u>unredeemable free games</u>, or may entitle such person to receive such cash, tokens, merchandise or <u>thing of value</u>, whether the pay-off is made automatically from the machine or in any other manner whatsoever. ...” (Our emphasis)

It would seem the reference to the term “anything of value whatsoever” is deliberately intended to cover a wide range of activities in which monetary value is an element.

[6] At a criminal trial subsequently held on 16 November 1999, the appellant was acquitted of the charges preferred against him, such acquittal having been at the close of the defence case without any evidence having been led. An application for the acquittal of the appellant at the close of the State case was refused, the magistrate probably having been of the view that the defence had a case to answer. At the conclusion of the proceedings no order was made with regard to the disposal of the 48

gambling devices seized from the appellant by the S A Police Services.

[7] Prior to the commencement of trial, the defence served on the State a request for further particulars in terms of section 87(1) of the Criminal Procedure Act, 51 of 1977. The request for further particulars, the response to which was to become a decisive issue at trial, reads as follows:

[7.1] "Does the State allege that the gambling device which forms the subject of this charge relate to a game which permitted the person playing the game to receive money or property or cheques or credits or tokens to be exchanged for money or merchandise or anything of value whatsoever? If so, the State is required to state exactly what benefit was received by the person so playing the game."

[7.2] In response to this question, the State indicated that it did not allege that the charge related to the playing of a game as set out in any of the respects set out in the request for further particulars which, incidentally, was couched substantially in line with the wording of the provision in the Gambling Act which constitutes the basis of the offence with which the appellant was charged.

[7.3] The second leg of the request for further particulars reads as follows:

> "Does the State allege that the person playing the game received unredeemable free games."

[7.4] In response to this question the State contended that it alleged the person playing the game received unredeemable free games.

[7.5] The term "unredeemable free games" is similarly defined in the Act. The definition of the term which is also rather a lengthy one and for purposes of this judgment we propose citing the definition of the term concerned in full, which reads as follows:

> "**Unredeemable free game** means an opportunity, won by successfully playing a game, to play a further game without the payment of any consideration normally required to play such game, which cannot be redeemed by, distributed or transferred to the person who has won such opportunity or any other person for any other purpose than to use such opportunity, without interruption, to continue playing the type of game in respect of which the opportunity was won, on the same machine, device or apparatus as that on which the opportunity was won, and which excludes an opportunity which can, in any manner, be converted into money, property, cheques, credit, prizes, eligibility for other prizes or anything of

value."

But what is clear from the evidence is that a player can interrupt the game whilst the smart card is still loaded with credits won; once this happens a player is issued with handwritten voucher which would record credits not utilized; over and above the unutilized credits, a player could purchase further credits which would then be added on the existing credits and thereafter continue playing further games despite such interruption

Thus, an "unredeemable free game" would involve an "opportunity to play a further game, or to continue to play the type of game in respect of which the opportunity has been won , without interruption, on the same machine, device or apparatus as that on which the opportunity was won…..".

[8] The effect of the responses by the State to the request for further particulars was such that it placed the possession of the gambling devices seized from the appellant outside ambit of the prohibition provided for in the Gambling Act or the prohibition for use of such gambling devices without a licence as required in terms of the Gambling Act. These responses, in effect, rendered the charge sheet defective in that it lacked the essential averment necessary to constitute or sustain an offence. Despite this apparent defect the State did not, at any stage of the proceedings, apply for an amendment of the charge sheet to bring the particulars so supplied in

conformity with the essential elements of the charge nor did the defence object to the charge as not disclosing an offence as contemplated in section 85 of the Criminal Procedure Act.

[9] In the criminal trial the State led the evidence of an expert in the design, operation and use of gambling devices in the person of one Adriaan Gabriel Swart whose evidence, aptly summarised in the submissions by *Mr Jagga,* counsel for the appellant, is to the effect that he is a technical manager in the employ of Universal Distributors of Nevada SA; that he is fully knowledgeable in the operation of the gambling machines utilized in the gambling industry; that he inspected the machines seized from the appellant; that the machines he inspected were manufactured by his company and that they were manufactured for purposes of gambling only; once he had inspected the gambling machines he had found that they were exclusively designed to be used for gambling in the gambling industry and that they were altered in an attempt to circumvent the provisions of the Gambling Act. The evidence by this witness was at variance with the State's reply to the appellant's request for further particulars supplied to the defence.

[10] In the course of cross-examination several statements were put to this witness. These statements included stickers which it appears were placed on the machine devices indicating that the machine devices were for purposes of entertainment only and that possession thereof was not for purposes of gambling. The response by the witness was that the fact that such stickers could have been placed on these devices did not alter the nature of the machine devices, did not influence the outcome of the game played nor do such stickers render such machines less a gambling device as was intended by the manufacturer. Finally, on a statement put to the witness that the devices were incapable of giving any value whatsoever other than an unredeemable free game, the witness responded that nothing prevents the person from redeeming the credits transferred on the smartcard issued to him and thus giving value to such credit. Apart from a further statement put to this witness that the appellant had employed the services of the electronic engineer to adapt the machines so as to comply with the provisions of the Gambling Act, no further statement was put to this witness nor was his opinion challenged on basis of an opinion different from the one expressed by this witness.

These responses were elicited by questions and statements put to this witness and, as such, became part of the body of evidence tendered.

[11] Apart from the evidence of Swart, the State also tendered the evidence of one Rudolf Jasper Coetzee. Coetzee, so it appears on basis of evidence tendered, is a member of the SA Police Service attached to the Gambling Unit in the Western Cape; at the time he gave evidence he was the investigating officer in the matter; he testified that on few occasions prior to seizure of the gambling devices he visited the appellant's business premises at Paradise Entertainment Centre, Voortrekker Road, Goodwood.

[12] The evidence by Coetzee revealed that on payment of cash, the player is issued with a smart card loaded with credits equivalent to the amount paid; the player use this card to play games; once a player wins the game the smartcard issued is loaded with a credit; when the player ceases to play whilst the smart card is still loaded with credit or credits, the player is issued with a handwritten voucher which he could once again use in future to obtain valid credits entitling the player to play further games. There is no indication on basis of evidence whether this card is not

transferable or whether credit or credits on the smart card is not indicative of value given. But what clearly emerges from the evidence of Coetzee is that the handwritten voucher entitles the bearer thereof to be issued with credits enabling the player to play further games. If further payment is made when intending to play further games same is added to the existing credit or credits.

[13] What further emerges from the evidence of Coetzee is that it is possible for a player to win a game; once a game is won the smartcard is loaded with a credit or credits which obviously would afford a player an opportunity to play a further game or games. It is not clear on basis of evidence whether the opportunity to play a further game or games entails the opportunity to continue playing the type of game in respect of which the opportunity was won on the same machine or device from which the game was won. If this is not so this would *prima facie* run counter to an unredeemable free game as defined. An unredeemable free game, as defined, involves an opportunity, without interruption, to continue playing the type of game in respect of which the opportunity was won.

[14] This witness was not cross-examined by the defence nor was his evidence relating to the issue of a smart card, the loading of credits on the smart card, the exchange of a smart card for a handwritten voucher and what appears to be an interruption between winning the opportunity to play a further game or games and the actual playing of a further game or games challenged. Furthermore, it was not suggested to Coetzee that the handwritten voucher issued after a player has ceased playing games is not transferable nor was it suggested to Coetzee that such a handwritten voucher is not capable of being discounted for anything of value.

[15] After Coetzee had given evidence, the State closed its case whereafter the defence similarly closed its case without calling any witness, expert or otherwise.

Furthermore, no objection was raised by the defence to the evidence tendered by both Swart and Coetzee either on the basis that part of their evidence was inadmissible or irrelevant to any issue in dispute. Indeed, much of the evidence of how the gambling devices operate emerged in the course of cross-examination of Swart. The evidence led at trial was thus to become the only body of evidence on basis of which the magistrate had to determine the application brought by the appellant in terms of section 34 of the Criminal Procedure Act. However, the problem which the prosecution had was that whereas the particulars supplied by the State failed to sustain a charge, the evidence tendered tended to point toward the commission of the very offence with which the appellant was charged.

[16] We have already pointed out in paragraph [6] of this judgment that the appellant was acquitted of the charge against him. However, the magistrate did not make an order for the disposal of the goods seized once the proceedings were concluded as he is required to do in terms of section 34(1) of the Criminal Procedure Act. But the magistrate, and correctly in our view, ordered the acquittal of the appellant despite the evidence of Swart that the gambling devices seized from the appellant were exclusively designed to be used for gambling in the gambling industry and that the alterations effected on such gambling machines were effected purely and solely to circumvent the provisions of the Gambling Act. The magistrate correctly held that the State was bound by the particulars supplied to the defence the effect of which, as has already been pointed out, was to exclude the nature of the devices seized from the ambit of the prohibition in terms of section 67(1)(c) of the Gambling Act. The magistrate thus ordered the acquittal of the appellant despite a finding, based on the evidence by Swart and Coetzee, that the devices seized from the appellant were gambling devices as defined. The magistrate thus accepted the opinion evidence of Swart and the unchallenged evidence of Coetzee.

[17] The magistrate made the following observation in his judgment in arriving at the conclusion that the machine seized were gambling devices as defined and that the credits won, is a thing of value:

> "So it is with regard to the explanation in the Act itself quite simple to say that these credits, or points or tokens or whatever is placed on that particular smart card, is definitely a thing of value. So therefore, I will say through the wording of this particular Act, and specifically the wording "gambling game" that it is indeed a gambling device as defined in the Act……."

So the magistrate found, on basis of evidence, despite the response by the prosecution to the request for further particulars, that the credits given as a result of winning a game or games, is a thing of value and that the device or devices used in playing the game is a gambling device as defined.

[18] Milton & Cowling in their work *Statutory Offences: Volume III (Service Issue 6 of 1994* paragraph E10) make the following observation with regard to the meaning of the term "gambling game" which was initially defined in the Gambling Act, 51 of 1965, which has since been repealed but from which the meaning of the term "gambling game" in the Western Cape

Gambling Act has substantially been derived:

> "In order to be a gambling game, a game must be played for a prize in the form of 'money, property, cheques, credit or anything of value'. The Act qualifies this definition of a prize by adding the words 'other than an opportunity to play a further game'. The import of this qualification is that if the outcome of successfully playing a gambling game is no more than that the player obtains the opportunity to play again, then the game is not a prohibited gambling game and may lawfully be played." (Once again our emphasis)

What the authors emphasise in this observation is the need for continuity in the playing of the game after the opportunity has been won and playing a further game or games without any form of interruption.

[19] Jones J, made the following observation in *AK Entertainment CC v Minister of Justice and Minister of Law & Order 1994(1) SACR 362(E)* at 368 e-f in determining whether credits given is a thing of value:

> "The opportunity to play further games which may be won at the applicant's centre and the opportunity vouchers which are issued as credit notes for accumulated opportunities to play further games which have been won by the centre's customers obviously have a money value. Instead of having to pay for the opportunity to play games, the winner of the opportunities or the bearer of an

> opportunity voucher may play further games without having to pay the usual price."

The authorities cited in the two preceding paragraphs tend to support the magistrate's conclusion that the credit passed on to the smart card and for which a handwritten voucher is issued to a player once he ceases to play a game or games, is a thing of value.

[20] On 18 December 2001 the appellant, ostensibly fortified by his acquittal of the charge against him, launched an application for an order for the release of the gambling machines seized by the police. The application was heard by the same magistrate who presided in the criminal trial. No evidence, either in the form of *viva voce* evidence or in the form of affidavit was tendered in the application so that the proceedings in the hearing of the application were limited to the argument presented in court by the parties concerned. After hearing argument the magistrate dismissed the application, ostensibly on the basis that it would not be lawful for the appellant to take possession of the gambling machines seized. In dismissing the application the magistrate had regard to the evidence of Swart and Coetzee tendered in the criminal trial. We have already made a

point in paragraph [13] of this judgment that the evidence by Swart was that the machines seized by the police from the appellant were exclusively designed to be used for gambling and that the alterations thereto were effected in an attempt to circumvent the prohibition in terms of the Gambling Act.

[21] It is worth noting at this stage of this judgment that the record of the proceedings relating to the application in terms of section 34(1) of the Criminal Procedure Act appears to have been lost and could not be found despite what appears to have been a diligent search therefor. The magistrate had had to have the record reconstructed and his finding, recorded on the reconstructed record, reads as follows:

REASONS FOR FINDING

"1. On pages 39 to 42 of the transcription of the proceedings on 16 November 1999 the court gave full reasons for the acquittal and the finding that the accused was illegally in possession of the gambling devices.

2. The application for the return of the gambling devices was dismissed for the same reasons as set out in the court's initial judgment. (Vide pages 39 to 42 of the transcription.)"

Thus, in the reconstructed record, the magistrate reaffirmed his reasons for the acquittal of the appellant in the earlier criminal proceedings; that the equipment seized from the appellant were gambling devices as defined and his finding that the appellant could not lawfully possess the gambling devices seized.

SECTION 34 OF THE CRIMINAL PROCEDURE ACT

[22] The relevant section of the Criminal procedure Act, in terms of which the appellant applied for an order for the release of the gambling machines seized, reads as follows under the heading "disposal of article after commencement of criminal proceedings":

> "(1) The judge or judicial officer presiding at criminal proceedings shall at the conclusion of such proceedings, but subject to the provisions of this Act or any other law under which any matter shall or may be forfeited, make an order that any article referred to in section 33 –
>
> (a) be returned to the person from whom it was seized, if such person may lawfully possess such article; or
>
> (b) if such person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or
>
> (c) if no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.
>
> (2) The court may, for the purpose of an order under subsection (1), hear

such additional evidence, whether by affidavit or orally, as it may deem fit.

(3) If the judge or judicial officer concerned does not, at the conclusion of the relevant proceedings, make an order under subsection (1), such judge or judicial officer or, if he is not available, any other judge or judicial officer of the court in question, may at any time after the conclusion of the proceedings make any such order, and for that purpose hear such additional evidence, whether by affidavit or orally, as may deem fit.

(4) An order made under subsection (1) or (3) may be suspended pending any appeal or review."

The appeal or review referred to in subsection (4) refers to the automatic review or appeal after conviction and not an appeal or review of the order for the disposal of the goods itself, the difference in the proceedings in the court *a quo* being that the appellant was acquitted and not convicted as contemplated in subsection (4).

[23] The provisions of section 34 of the Criminal Procedure Act are clearly peremptory. The judicial officer, based on evidence led at trial, will be aware of the goods seized which will have to be disposed of in terms of any of the three basis identified in section 34. Thus, the presiding judicial officer must, *suo motu,* make an order in terms of section 34 disposing of the goods seized in the absence of any other order declaring the goods forfeited to the State or which were not disposed of in terms of any other

provision of the Criminal Procedure Act. To the extent that the magistrate omitted to make an order disposing of the items seized at the conclusion of the criminal proceedings, such omission could well amount to a misdirection. But the omission by the magistrate to make the appropriate order at the conclusion of the proceedings could well have been occasioned, we would imagine, by failure by either of the parties to seek an order for the disposal of the goods. But the section clearly envisages the judicial officer playing a proactive role to ascertain the status of the goods seized with a view to making an appropriate disposal order.

[24] Section 34 contemplates three scenarios in regard to the disposal of the goods seized, these being: (1) the release of the goods seized to the person from whom such goods were seized in circumstances where such a person may lawfully possess such goods; (2) the release of goods to the person who may lawfully possess such goods, other than the person from whom such goods were seized and (3) the order declaring that such goods be forfeited to the state in circumstances where no person who may lawfully possess such goods cannot be traced or is unknown. (See Du Toit *et al*: *Commentary on the Criminal Procedure Act:* Chapter 2 pp 12-13)

[25] *Mr Jagga*, both in argument before the magistrate in the application in terms of section 34 and on appeal, relied heavily on the particulars supplied by the State. His argument is along the lines that since the State, and accordingly also the magistrate, so his argument goes, is bound by the particulars supplied by the State, it follows that for purposes of section 34 the State and the magistrate are still bound by the particulars and, in view thereof, the magistrate ought to have found that the devices are not gambling devices, as defined. *Mr Jagga* further argued that the magistrate erred in taking into account that part of the evidence tendered by the State which is at variance with the particulars supplied in dismissing the appellant's application. In our view there is no substance in this argument. We hold this view for the reasons which will follow later in this judgment.

[26] Section 34 contemplates the disposal of the goods seized at the conclusion of the proceedings. The conviction of the accused is not necessarily a jurisdictional factor for the disposal order contemplated. In the instance of this matter the appellant was acquitted of charges against

him. The appellant was acquitted because the magistrate correctly considered that the State was bound by the particulars supplied to the defence. The acquittal was not based on a finding on the nature of the devices as the appellant seeks to contend in his submissions. The fact that the accused, (the appellant in the instance of this matter) was acquitted of the charge against him, does not place the goods seized outside the sphere of application of section 34.

[27] The proceedings relating to the disposal of the goods in terms of section 34 is an entirely separate process from the criminal proceedings which precede the contemplated disposal order. A judge or magistrate, other than the one who presided in the trial, may make such a disposal order. In doing so, the judge or magistrate making such an order may take into account evidence tendered during trial or may hear new evidence, either in the form of *viva voce* evidence or evidence in the form of an affidavit.

1. [28] In considering the present matter, it appears that the following questions require to be answered:

2. [28.1] The status of a charge sheet or further particulars furnished in the criminal matter, and the extent to which, and circumstances in which, the State may be said to be bound thereby;
3. [28.2] Which party bears the onus of proving (or disproving), in proceedings in terms of section 34 of the Criminal Procedure Act, whether the person may lawfully possess a seized article and is therefore entitled to its return; and
4. [28.3] Whether the Appellant was entitled the return of the devices in the present matter, or whether they were correctly forfeited to the State.
5.

6. THE FURTHER PARTICULARS

7. [29] It was argued on behalf of the Appellant that the State, through the furnishing of the further particulars to the charge sheet, "*admitted*" that the machines were not slot machines (or gambling machines) and that they did not entitle a player thereof to "*anything other than unredeemable free games*". In support of this submission various authorities were relied upon, including *State v Nathaniel and Others 1987 (2) SA 225 (SWA)* at 235; *State v Mandela and Another 1974 (4) SA 878 (A)* at 882; *Rex v Wilken 1945 EDL 246 253*; *Rex v Verity-Amm 1934 TPD 416* at 422; *R v Els 1949 (3) SA 89 (W)* and *State v Rosenthal 1980 (1) SA 65 (A)* at 89 F. On the basis of these authorities, so it was argued, the evidence led at the trial relating to the actual nature of the devices (being inconsistent with the particulars)

was to be disregarded by the Presiding Officer who considered how to thereafter deal with the items in terms of section 34.

8.

9. [30] It was argued on behalf of the State that the Magistrate was entitled to have regard, in the section 34 proceedings, to the evidence tendered at the trial with regard to the nature of the devices (and in respect of which no objection was made at the time), notwithstanding the statements to the contrary in the further particulars to the charge sheet.

10.

11. [31] Particulars to a charge sheet are furnished in terms of section 87 of the Criminal Procedure Act. Du Toit *et al* in *Commentary on the Criminal Procedure Act* discuss Particulars at pages 14-25 to 14-27 and describe the purpose thereof as being to inform the accused of the State's case against him. Once such particulars have been furnished, the charge is amended (*State v Cooper and Others 1976 (2) SA 875 (T)* at 885 H). Where, however, the further particulars are not consistent with the allegations in the charge, the charge remains unaltered (*Rex v Van Zyl 1958 (2) SA 190 (O)* at 196 H to 194. It is

also significant that the State may apply for an amendment of the particulars to the indictment which were previously furnished to the accused (see *State v Ndevu and Others 1991 (1) SACR 416 (E)* at 419 where the relevant authorities are also set out). A consideration of the authorities referred to by Du Toit *et al* in *Commentary on the Criminal Procedure Act*, commencing with the more recent cases cited, reveals the manner in which particulars have been dealt with:

12. [31.1] In *State v Mandela and Another 1974 (4) SA 878 (A)* at 882 E-F the Court stated (in circumstances where the particulars were entirely at variance with the evidence):

13. "The State, being bound by the particulars alleged by it (see R v Bruins 1944 AD 131 at p. 165), and having failed to prove its case as alleged, the convictions cannot stand because of the potential prejudice caused to the appellants by the defective form of the charge."

14.

15. [31.2] In *State v Nathaniel and Others 1987 (2) SA 225(SWA)* at 235 D-E the Court stated:

16. "The law is that, where the State provides further particulars, it nails its colours to that mast and at this stage of the proceedings is bound by such particulars."

17.

18. [31.3] In *Rex v Verity-Amm 1934 TPD 416 at p. 422* (referred

to by the Court in *State v Nathaniel* for the aforegoing proposition), the Court held that the particulars, once given:

19. "… form part of the summons or charge, and the trial then proceeds in all respects as if the indictment, summons or charge had been amended in conformity with such particulars. The prosecution is then bound by such particulars, and is not entitled to rely on and prove particular acts of recklessness or negligence other than those of which particulars have been supplied, without applying for an amendment of the indictment, summons or charge (see Rex v Kroukamp: 1927 TPD 412)."

20.

21. [31.4] In *Rex v Anthony 1938 TPD 602* at 604 (another case relied upon by the Court in *State v Nathaniel*) it was pointed out that the purpose of particulars was to advise the accused of the particular nature of the offence with which he was charged and the case he had to meet, and therefore that the State must, in seeking a conviction, prove the charge as particularised and not some other form of conduct;

22.

23. [31.5 In *Rex v Wilken 1945 EDL 246* at p. 253 the Court repeated the brief statement that, on the authorities:

24. "… it is quite plain that the Crown is bound by the particulars given, which … are

regarded as if inserted in the charge, and if these particulars are not proved the accused is entitled to an acquittal … here the failure to keep a proper lookout was particularised, and it formed part of the charge."

25.

26. [31.6] In *Rex v Els 1949 (3) SA 849 (W)* the Court dealt with an objection to evidence as to what a stolen package had in fact contained, where the State had stated, in particulars, that it had no knowledge of the content. Unlike in the instant matter, counsel objected to the presentation of the evidence before it was led and the objection was upheld on the ground that:

27. "The giving of that evidence, besides being in the form of the indictment irrelevant, would be calculated to prejudice the accused in his defence."

28.

29. [31.7] It is of note that in the present matter no objection was raised to the leading of the evidence regarding the nature of the devices. Furthermore, the ground for excluding the evidence in *Rex v Els* was not because the State was "*bound*" by some form of admission which the accused was entitled to take advantage of but rather that it was irrelevant to the indictment as it stood, and would occasion him prejudice in his defence; and

30.

31. [31.8] Finally, in *State v Rosenthal 1980 (1) SA 65 (A)* at 89 E-G, the Appeal Court held that (particularly in that context of a complex fraud trial), the State should ordinarily adhere strictly to the case of fraud as pleaded and not be allowed to depart from it and set up a different case should the accused be prejudiced thereby.

32.

33. [32] In conclusion it appears that, although the further particulars form part of the charge against the accused, there is no authority for the proposition that further particulars amount to an "*admission*" by the State in favour of the accused, which has the effect of causing unlawful goods to be deemed to be something otherwise, or which binds the State for purposes other than the criminal proceedings relating to the charge itself. This is borne out by the fact that the particulars can be amended during the course of the trial (subject to the prejudice of the accused). Their purpose is to supplement the charge and inform the accused of the case which the State requires him to meet. The enquiry under section 34 is in any event a separate enquiry to the criminal trial, where further evidence may be led.

Furthermore, anomalies would result if the State was bound in respect of an accused that the articles seized were of one nature or quality as set out in the particulars, but in a possible application by a third party (other than the accused) that the goods should be returned to him in terms of section 34(1)(b), such enquiry in respect of that person would proceed on the basis that the goods are of the actual nature.

34.

35. ONUS

36. [33] There further appears to be some uncertainty as to which party bears the *onus* in the section 34 proceedings. Counsel for the State submitted (on the authority of *Minister van Wet en Orde en 'n Ander v Datnis Motors (Midlands) (Edms) Bpk 1989 (1) SA 926 (A) at 935* and *Erasmus en 'n Ander v Minister van Wet en Orde 1991 (1) SA 453 (O)* at 455, that the *onus* is on a State to prove, on a balance of probabilities, that the person from whom the objects were seized was unlawfully in possession thereof, and therefore not entitled to their return. Counsel for the Appellant in his Heads of Argument submitted that for an Appellant to succeed with an application in terms of section 34 he has, on a balance of probabilities, to show that he may lawfully

possess such articles. He cited *State v Campbell en 'n Andere 1985 (2) SA 612 (SWA)* as authority for this proposition. Of the textbook writers, Hiemstra (*Hiemstra Suid Afrikaanse Strafproses*, Sixth Edition, page 58) supports the view that the *onus* is on the State to prove that the Appellant is not entitled to the return of the goods and relies upon such authority such as *Meyers and Another v Triegaardt N.O. 1948 (4) SA 208 (W)* and *Minister van Wet en Orde v Datnis (supra)*. Du Toit *et al* at page 2-13 (para 5) suggest that:

37. "The onus will be on a person who applies for an Order under section 34, although there is no onus on an owner of an article to place evidence of his innocence before the Court where there is no suggestion to the contrary by the State (*State v Mbeta and Another (supra)*; see also *Meyers v Triegaardt N.O 1948 (4) SA 208 (W)*)."

38.

39. [34] A review of the relevant authorities makes the position more clear:

40. [34.1] In *State v Campbell en 'n Ander 1985 (2) SA 612 (SWA)* at 619 E-G, the Court (in relation to money) held that the State failed to prove that the Appellant was not entitled to the money, and same had to be returned to him;

41. [34.2] *Meyers v Triegaardt NO 1948(4)(SA) 208(W)*, which followed *Rex v Tutu 1943 EDL 49*, was decided under the differently

worded section 366(1) of the then Criminal Procedure Code, which provided that the property was to be returned to the person from whose possession it was obtained "unless it was proved during the trial that he was not entitled to such property". In terms of section 366(1) the Court held that the *onus* was on the person holding the property which had been taken for the purposes of trial to show that the person from whose possession it was taken was not entitled to have it back. The above quoted phrase is not, however, included in section 34(1) of the Criminal Procedure Act, 51 of 1977 which simply states that the goods are to be returned to the person "*if such person may lawfully possess same*".

42.

43. [34.3] *State v Mbeta and Another 1984 (3) SA 279 (Ck)* is to be distinguished because it dealt with a vehicle allegedly used for the conveyance of dagga, and the forfeiture clauses contained in the Abuse of the Dependence-Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 were applicable. Such a vehicle was normally to be forfeit to the State. An owner could however recover such a vehicle, which would not then be subject to forfeiture, in circumstances of section 8(2) of that Act if "*it is proved*" that the owner had no knowledge that the vehicle was being so used. In the context of section 8(2) the Court stated at 282 C that "the last mentioned requirement of SS(2) cannot place, in the absence of the slightest suggestion to the contrary by the State, the onus on the owner to place evidence before the Court to establish that requirement".

44.

45. [35] In the other relevant cases the onus is similarly placed on the State:

46. [35.1] In *Minister van Wet en Orde en 'n Ander v Datnis Motors (Midlands) (Edms) Bpk 1989 (1) SA 926 (A)* (with regard to section 31(1) of the Criminal Procedure Act, the Court held at 935 F-G that:

47. "Dit kom my daarom voor dat die Wetgewer beoog het dat die Staat moet bewys dat die persoon wat voor die beslaglegging in ongestoorde besit van die voorwerp was vanweë die kwalifikasie nie op teruglewering daarvan geregtig is nie."

48.

49. [35.2] This decision was followed in *Erasmus en 'n Andere v Minister van Wet en Orde 1991 (1) SA 453 (O)* at 455 G-H and in *Dookie v Minister of Law and Order and Others 1991 (2) SA SACR 153 (B)* at 156 j to 157 b.

50.

51. [36] The relevant parts of the wording of section 31(1)(a) of the Criminal Procedure Act are in the same terms as those contained in section 34(1)(a). In the circumstances, we are of the view that section 34(1)(a) of the Criminal Procedure Act is also to be interpreted to the effect that the Legislature intended that the State bear the *onus*, on a

balance of probabilities, of showing that the person from whom the item was seized would not be entitled to lawfully possess such article.

52.

53. [37] In conclusion, care must be taken in considering each individual instance where application is made in terms of section 34 of the Act, in particular where other relevant statutes such as the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 (see *State v Mbeta en 'n Andere 1984 (3) SA 279 (Ck)* and the Customs and Excise Act, Act 91 of 1964 (see *Fazenda N.O v Commissioner of Customs and Excise 1999 (3) SA 452 (T)*) are also applicable. In such instances provisions of that legislation specifically place the *onus* on the Applicant (e.g. to the effect that he had no knowledge of his vehicle being used for the conveyance of an unlawful substance) which must be acquitted by the Applicant prior to the seized goods being returned to him.

54.

55. THE QUESTION OF PREJUDICE

56. [38] Subsequent to the acquittal of the Appellant, he later applied for the return of the seized items and submitted Heads of Argument in

support thereof (record page 50 to 70). A further issue that may, in a case such as the present, require some consideration is whether in these circumstances the Appellant was possibly prejudiced in the section 34 proceedings because he might allege that he did not have the opportunity to lead evidence in regard to the nature of the devices, or was unaware of the fact that the State would rely upon the evidence of the two expert witnesses at the trial. It does not, however, appear that in the present instance there is any such prejudice, certain of the relevant considerations relied upon in reaching this conclusion being:

57.

58. [38.1] The Appellant was apparently aware, from the commencement of the trial itself, that the State had made a grave error in the furnishing of further particulars. This notwithstanding, he did not choose (although represented by counsel and an attorney) to object to the charge sheet as not disclosing an offence, nor object (as was the case in *Rex v Els* (*supra*)) to the leading of that evidence in respect of matters contrary to the further particulars. Had this been done, the State would in all probability have launched an application to amend the particulars so that the charge disclosed an offence;

59.

60. [38.2] The Appellant was no doubt well aware of the error on the part of the prosecutor, and elected not to give evidence and was acquitted;

61.

62. [38.3] The Magistrate made it clear in his judgment that he considered the seized devices to be unlawful gambling machines – and so found – but was unable to convict the Appellant because of the particulars to the contrary, which rendered the charge not to disclose an offence at all. His dissatisfaction with the nature of the particulars furnished is clear from his judgment;

63.

64. [38.4] The Appellant was entitled, in the section 34 proceedings, in terms of section 34(2) of the Criminal Procedure Act, to present further evidence, either orally or on Affidavit. He however elected not to do so; and

65.

66. [38.5] Finally, it is clear that the Appellant was aware, when he launched the application in terms of section 34, that the State would in

fact contend that it was not bound by the trial particulars in the section 34 proceedings, and that it would seek to rely upon the expert evidence led at the trial to the effect that the machines were gambling devices which the Appellant was not lawfully entitled to possess. The fact that the Appellant's counsel was well aware of this risk, but chose not to take the precaution of presenting evidence (but rather to argue the matter on the law) is apparent from Appellant's Heads of Argument.

67.

68. [39] In conclusion, we are unable to find in this particular matter that the State's reliance, during the section 34 proceedings, upon the evidence of the experts, either took the Appellant by surprise or caused him any prejudice.

69.

70. CONCLUSION

71. [40] In view of the above, and our finding that the State was not bound in the section 34 proceedings by the particulars, and accordingly also that evidence of the two experts was admissible in section 34 proceedings, the further question remains whether the State

acquitted itself of the *onus* of proving, on a balance of probabilities, that the Appellant was not entitled to lawfully possess the devices. If it failed to acquit itself of the *onus*, the Appellant is entitled to their return.

72.

73. [41] In this matter, the only evidence available in the section 34 proceedings was the evidence of the two technical experts called by the State. Their evidence, for which they gave full reasons (and in respect of which they were cross-examined on behalf of the Appellant) was that the machines were unlawful gambling devices and that the Smart Card on which the "*free games*" or "*points*" were recorded, was capable of being exchanged for value. This therefore brought the machines within the ambit of the prohibition contained in the Gambling Act. No evidence at all was presented by the Appellant.

74.

75. [42] In the circumstances, we find that the State acquitted itself of the *onus* of proving, on a balance of probabilities, that the Appellant (who at no stage alleged that he had any permit or licence to possess any form of gambling machine) might not lawfully possess the devices,

and same were therefore correctly forfeited to the State.

[43] And then there is a matter of the appealability or otherwise of the order by the magistrate in refusing to order the release of the gambling machines to the appellant. *Mr Badenhorst*, counsel for the State, contends that the order by the magistrate is not appealable, and that the procedure which the appellant ought to have followed is that by way of review instead of the procedure by way of appeal citing such authority as *S v Ngubenkomo 1968(2) SA 109(E)* and Hiemstra, *supra,* at p160. Whilst we note the authorities relied upon by *Mr Badenhorst,* however, we have grave doubts about the merits of this contention in the light of the provisions of section 34 and 35(3)(o) of the Constitution of the Republic of South Africa, 1996. As to whether the proceedings ought to have been brought by way of review, in any event, the court has powers in terms of section 173 of the Constitution to regulate its process, taking into account the interests of justice. And whilst we are mindful of the Court's inherent review jurisdiction, we have nonetheless considered the merits of this appeal in the interest of justice without necessarily expressing any view on *Mr Badenhorst's* submission in this regard.

[44] In view of what we have said in the preceding paragraphs, it is our view that the appellant's appeal cannot succeed.

[45] In the result, we make the following order:

[45.1] The appeal is dismissed

[45.2] The gambling machines seized by the SA Police Service from the appellant are hereby declared forfeited to the State.

N J YEKISO, J

D W GESS, AJ