

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

CASE NO: **7072/07**

In the matter between:

MITTAL STEEL SOUTH AFRICA LIMITED T/A

VEREENIGING STEEL

Applicant/Plaintiff

and

PIPECHEM CC

Respondent/Defendant

JUDGMENT DELIVERED ON 16 OCTOBER 2007

DONEN AJ

- 1] The applicant, a registered company, has applied to set aside respondent's notice of intention to defend an action as an irregular step: and thereafter, for default judgment to be entered against respondent. For convenience I shall refer to the parties as plaintiff and defendant.
- 2] The defendant is a close corporation ("the corporation") incorporated in terms of the provisions of the Close Corporations Act 69 of 1984. Defendant has two members. The managing member is Firolama Alfredo Crabbia ("Crabbia"). He

holds an eighty per cent member's interest in the corporation. His wife, Marinella Crabbia, holds the remaining twenty per cent.

- 3] On 31 May 2007 the plaintiff instituted action against defendant for payment of the sum of R194 639,87, together with interest and costs of suit. Plaintiff's cause of action allegedly arose from the sale and delivery to defendant of two consignments of steel bars during November 2005.
- 4] On 7 June 2007 defendant filed and served the disputed notice of intention to defend. This had been signed by Crabbia in his capacity as managing member. In the body of this document it was stated that the defence would be "*conducted by Mr G A Crabbia, Managing Member*".
- 5] The address given in the document differed from the business address of the defendant alleged in the summons. Both addresses are located in Somerset West; that is, more than eight kilometres from the office of the registrar. No address for the service of documents in the action was appointed within the eight kilometre radius.
- 6] On 21 June 2007 plaintiff's attorneys responded by causing a written notice to be served on the defendant pursuant to the provisions of Uniform Rule 30(2)(b). It was alleged in this notice that the document that had been delivered at the offices of the plaintiff's attorneys, on 7 June 2007 had not complied with the requirements of Uniform Rule 19 for delivering a notice of intention to defend. The following reasons were stated:

- “1) *The defendant, being a juristic person, did not act through an attorney in delivering the notice of intention to defend, as it is required to do in terms of Uniform Rule 19(1); and*
- 2) *The defendant did not appoint an address within eight kilometres of the office of registrar of the honourable Court for the service on him of documents, as required in Uniform Rule 19(3).”*

Defendant was afforded ten days (i.e. until 5 July 2007), to remove the cause of complaint.

- 7] The relevant part of Uniform Rule 19(1), for present purposes, provides as follows:

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8] The word “*deliver*” is defined in Rule 1 as meaning, “*serve copies on all parties and file the original with the registrar*”.

9] As authority for the relief that it claims plaintiff relies on **Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic and Commercial Carpet Fittings (Pty) Ltd and Another**.¹ In that case a natural person and co-defendant who had bound himself as surety for payment of the debts of a South African registered company had signed a notice of intention to defend the action. It was held that the company could validly only give notice of intention to defend through an attorney. The notice was accordingly bad in law and was set aside. Judgment by default was then granted against the company. Neither the application in

¹ 1977 (3) 448 (W)

terms of Rule 30 (to set aside the notice), nor the application for default judgment was opposed.

10] With reference to Rule 19(1) Margo J held that the right to act in person cannot extend to an artificial person. Had the rule been intended to permit any person to represent a defendant in giving notice of intention to defend it would not have been necessary to refer to “*the defendant personally or through an attorney*”. The rule would then have referred to the “*defendant or his agent*”.²

11] The decisive factor in previous decisions³ (viz. the rights of audience of advocates in the Supreme Court and in the signing of pleadings respectively), did not arise in the issue of a notice of intention to defend. However, the principle appeared to Margo J to be the same: namely, that a litigant who did not appear in person had to be represented by an advocate, and in exceptional circumstances by an attorney⁴; but a company, being an artificial person was, not entitled to appear in person. At the time of the judgment pleadings had to be signed by an advocate and an attorney,⁵ or by a litigant in person: but on the decided authorities a corporation, being an artificial person, could not sign “*in*

² **Arma Carpet House** case *supra* at 451. See too the Interpretation of Uniform Rule 19(1) in **Volkscas Motor Bank Ltd v Leo Mining Raise Bone CC and Others** 1992 (2) SA 50 (WLD)

³ See, *inter alia*, **Yates Investments (Pty) Ltd v Commissioner for Inland Revenue** 1956 (1) SA 364 (AD); **Dormehl's Garage (Pty) Ltd v Magagula** 1964 (1) SA 203 (T); **SA Cultivators (Pty) Ltd v Flange Engineering Co (Pty) Ltd** 1962 (3) SA 156 (T): see too **Hallowes v The Yacht “Sweet Waters”** 1995 (2) SA 270 (D & CLD)

⁴ Cf section 4 of The Right of Appearances in Courts Act, 62 of 1995

⁵ Cf **Fortune v Fortune** [1996] 2 All SA 128 (C) and the amended High Court Rules 18(1) and 21(3)

person".⁶

- 12] Margo J concluded that in referring to the defendant personally or his attorney the rule did not prescribe who had to make delivery, but rather to a notification of the person through whom the defence would be conducted. From this it follows that, should leave be granted to Crabbia to conduct the defence of the defendant, the object of the notice would be achieved. Since the approval by the Supreme Court of Appeal, in **Navy Two CC v Industrial Zone Ltd**;⁷ of the landmark decision in **California Spice and Marinade (Pty) Ltd & Others in re: Bankorp v California Spice & Marinade (Pty) Ltd and 5 Others; Fair O'Rama Property Investments CC and Others; Tsaperas; & Tsapera**⁸, South Africa's High Courts have, in exceptional circumstances, countenanced the representation of juristic persons by persons other than advocates. These circumstances are dealt with below.
- 13] Because the application in the **Arma Carpet** case was unopposed little consideration was given to the contradiction involved in denying access to ventilate a dispute to a corporate defendant on whose behalf notice of intention to defend had been given (albeit defectively). The learned judge concluded that because it had been open to the defendant to apply for a postponement to enable proper notice to be delivered, and because the applications had not been opposed, default judgment was appropriate.⁹

⁶ **Arma Carpet** case supra at 450F to 451 A

⁷ [2006] 3 All SA 263 (SCA) at 266

⁸ [1997] 4 All SA 317 (W)

⁹ **Arma Carpet** case at 451 C-E

14] At the time of that judgment courts were not bound, as they presently are, to interpret and apply the constellation of rules relating to notice of intention to defend, pleading and default judgment in a manner which promoted the spirit, purport and object of a defendant's right to have a dispute decided in a fair hearing before a court.¹⁰

15] This right is vested by section 34 of the Constitution which provides as follows:

“ACCESS TO COURTS - Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate another independent and impartial tribunal or forum”

16] Section 8(4) of the Constitution provides “*that juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of rights and the nature of that juristic person.*” Juristic persons are therefore entitled to the protection of Section 34 of the Constitution.

17] Furthermore, at the time of the judgment in the **Arma Carpet** case, Rule 31 confined the power to grant a default judgment to the Supreme Court, whenever a plaintiff's claim was for a debt or liquidated demand and a defendant was in

¹⁰ See sections 39(2) and 34 of the Constitution

default of delivery of a notice of intention to defend.¹¹ Since then this power has also been vested in the Registrar by Rule 31(5)¹². Consequently the setting aside of a notice of intention to defend by the High Court, in terms of Rule 30, exposes a corporation intending to defend an action to a potential denial of access to court by virtue of the registrar's separate power to grant default judgment.

18] Rule 31 was amended to alleviate the burden of default judgments on judges of

11 Prior to 21 January 1994, Rule 31(2)(a) provided as follows: *"Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub rule (4) for default judgment and the Court may, where the claim is for a debt or liquidated demand, without hearing evidence, and in the case of any other claim, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet."*

12 Rule 31(5)(a) provides as follows:

"(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment."

[Paragraph (a) substituted by GN R785 of 5 June 1998.]

(b) The registrar may -

(i) grant judgment as requested;

(ii) grant judgment for part of the claim only or on amended terms;

(iii) refuse judgment wholly or in part;

(iv) postpone the application for judgment on such terms as he may consider just;

(v) request or receive oral or written submissions;

(vi) require that the matter be set down for hearing in open court.

(c) The registrar shall record any judgment granted or direction given by him.

(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.

(e) The registrar shall grant judgment for costs in an amount of R200 plus the sheriff's fees if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court and, in other cases, unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs from the Court, R650 plus the sheriff's fees.

[Subrule 5 was inserted by GN R2365 of 10 January 1994 and substituted by GN R417 of 14 March 1997.]"

the High Court¹³. It has been held that the peremptory language of Rule 31(5) (a) limits a plaintiff claiming default judgment in respect of a debt or liquidated demand, in the first instance, to seeking relief from the registrar¹⁴. When evidence is required to prove the amount of the claim or the cause of action or where the registrar has a legitimate doubt as to whether judgment should be granted or not, the registrar is bound to refer the matter for hearing in open court in terms of the subrule¹⁵. The registrar does not exercise a judicial function, but simply makes a formal evaluation of whether the summons discloses a proper cause of action: that is, after establishing that all the administrative and formal steps have been taken to justify a judgment¹⁶.

19] Whenever a plaintiff seeks a default judgment arising from a notice of intention to defend a corporation that is irregular, in that it has been signed by a member of the corporation, the matter should be set down for hearing in open court in order to determine whether or not the corporation may be granted leave to defend the action.

20] If so, the application for default judgment would fall away. If not (and in any event), the High Court retains jurisdiction to dispose of the default judgment in

13 See Erasmus *Superior Court Practice Commentary on Uniform Rule 31(5)(b)*: Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* (1997) at 532

14 See **Entabeni Hospital Ltd v Van der Linde** 1994 (2) SA 422 (N); **Erf 1382 Sunnyside (Edms) Bpk v Chipi Bk** 1995 (3) SA 659 (T)

15 See **Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK** *supra* at 661 I-J; **Standard Bank of SA Ltd v Ngobeni** 1995 (3) SA 234 (V) at 235 D

16 See **Standard Bank of SA Ltd v Saunderson and Others** 2006 (2) SA 264 (SCA) at paragraph [24]

the interests of justice¹⁷. The power to determine the regularity of a notice of intention to defend is retained exclusively by the High Court.¹⁸ How a court exercises this power with reference to default judgment claimed against a corporation will depend on all the facts: *inter alia*, the possibility of default judgment being granted as a result.

21] I now proceed to deal with the facts in the present application. In the founding affidavit, plaintiff's attorney, Johan Hendrik Botes ("Botes"), alleges that defendant does not have a *bona fide* defence, that the document purporting to be a notice of intention to defend was delivered simply in order to delay the plaintiff's action, and that the matter may also be disposed of through the operation of Rule 32 relating to summary judgment.

22] Botes states further that, on 22 June 2007, and in response to plaintiff's notice of an irregular step, a second document was delivered to the offices of plaintiff's attorneys. (This was dated 21 June 2007.) It had been signed by Crabbia who made the following statements therein:

"1) *In terms of Uniform Rule 19(1) The defendant may be represented by a attorney or a person. G A Crabbia is a person who is also managing member of Pipechem CC.*

2) *The following*

17 See **Standard Bank of SA Ltd v Snyders and Eight Similar Cases** 2005 (5) SA 610 (C) paragraphs [9] to [16] at pp 614E to 616E

18 See Rules 30 and 30A

address is the defendants appointed address.

Roligh Grinrod Care off Pipechem CC represented by G A Crabbia

*on The 4th Floor, Four Trust Building, Martin Hammerschlag Way
Foreshore Cape Town.”*

(The last-mentioned address does fall within 8 kilometres of the office of the Registrar.)

- 23] As a courtesy, on 25 June 2007, plaintiff’s attorneys wrote to Crabbia. They quoted Uniform Rule 19(1), provided an excerpt from Erasmus’ Commentary on Uniform Rules (entitled “Superior Court Practice”), and explained the effect of Uniform Rule 19(1) as follows:

“In the instant matter the defendant is Pipechem CC, which is a separate legal entity or “juristic person”. However, the legal personality of Pipechem CC is a fiction, i.e. it is not a real person, and for that reason it cannot act “personally”, but always acts through its members and/or its agents.

- 4) *Uniform Rule 19(1) states that a defendant can only deliver the notice of intention to defend personally or through an attorney. Since Pipechem CC cannot deliver the notice “personally”, the only other manner provided for by Uniform Rule 19(1) is to deliver the notice through an attorney. The Rule does not provide for delivery of the notice through a member or an agent.”*

In the light of this approach to the interpretation and application of the rule quoted above defendant was informed that, should it “*fail to give notice of its intention to defend through an attorney as requested in the notice served on it on 21 June 2007,*” plaintiff would proceed with an application in terms of Rule 30 and defendant would run the risk that the Court might, upon plaintiff’s application, enter default judgment against defendant.

- 24] The content of this letter highlights the limitation that Rule 19(1) places upon the capacity of a close corporation to protect its interests. By virtue of the provisions of the Close Corporations Act a member of a corporation is its agent in relation to a person who is not a member and is dealing with the corporation¹⁹. As between defendant and plaintiff this authority would include the power of Crabbia to conclude both the sales agreement giving rise to the dispute and any settlement agreement resolving the dispute²⁰. Save for the traditional interpretation of Rule 19(1), as expressed in the **Arma Carpet** case, no reason exists in principle why a corporation should have to enter a separate contract with an attorney (and create a relationship with some features peculiar to the law of agency)²¹ in order to note its intended opposition to an action. The differential treatment meted out to natural and juristic persons by this rule leads to unequal protection and benefit of the law.

¹⁹ See section 54(1) of the Close Corporations Act

²⁰ See **J & K Timbers (Pty) Ltd t/a Tegn Timbers v GL & S Furniture Enterprises CC** 2005 (3) SA 223 (NPD)

²¹ As to the nature of the relationship between an attorney and client See **Goodricke & Son v Auto Protection Insurance Co.** 1968 (1) SA 717 (A) 722 H

25] The relevant policy considerations giving rise to the differential treatment are more pertinent to the conduct of trials than the delivery of notice of opposition.

They include the following: -

- a. The courts are best served by legal practitioners who observe the rules of their profession, who are subject to a disciplinary code, and who are familiar with the methods and scope of advocacy which are followed in presenting argument.²²
- b. Qualified practitioners can assist the court by advancing meaningful arguments, founded on legal principles and up-to-date authority,²³ and the absence of such a qualified practitioner will cause a court inconvenience and difficulty.²⁴
- c. A person who has not achieved a certain minimum standard of education and experience in the art of advocacy is most unlikely to be able to: (i) adopt an approach and attitude which is not exclusively subjective; (ii) discuss the matter with the representative of the other side with a view to limiting the issues and compromising where possible; and (iii) dealing frankly and candidly with the Court.²⁵

22 See **California Spice** supra at 325h: **Lees Import and Export (Pty) Ltd v Zimbabwe Banking Corporation Ltd** 1999 (4) SA 1119 (ZSC) at 1124 H

23 **California Spice** case at 326gh

24 **California Spice** case at 336h

25 **Hallowes v The Yacht "Sweet Waters"** 1995 (2) SA 270 (D) at 276l -277D

d. Litigants in person are not usually the most effective advocate for themselves – from lack partly of knowledge of the law, partly at time of perspective.²⁶ It is possible that they will do more harm than good to the companies they assist.²⁷

26] The rule that a juristic person has to be represented in the High Court by a duly certified attorney had its origins in the English common law. It was not rendered applicable to South African High Courts by any statute.²⁸ In South Africa the rule is not inflexible. A court is entitled in an appropriate case and to avoid injustice to allow at least a one person company to be represented at a court hearing by its alter ego. The test to be applied involves weighing up of the inconvenience caused to the court as a result of an unqualified person appearing before it against the injustice of a juristic person being denied access to the courts.²⁹

27] The Courts have stated that the discretion to depart from a rule of this kind should only be exercised “*sparingly*”, “*where there are exceptional features*”, in “*uitsonderlik gevalle*” and “*as a reserve or occasional expedient*”³⁰

28] The obtaining of a default judgment against a defendant corporation simply

26 **California Spice** case at 326a

27 Lees Import at 1124I; See also Annual Survey (1999) at 409

28 See **California Spice** *supra* at pp 322 c to 340 f: See too **Lees Import and Export** *supra* at 1125Ej

29 See **Navy Two CC v Industrial Zone Ltd** [2006] 3 ALL SA 263 (SCA) paragraph [13] at 266 e-g

30 See the **California Spice case** *supra* at 338e, 331a, 336d and 33 h-i

because its alter ego-rather than an attorney-delivers a notice of intention to defend is tantamount to a denial of the right of access to court. Such a severe limitation upon the constitutional right of a corporation could hardly ever be justified in relation to the convenience of the court and the other policy considerations referred to above. The ultimate relief sought by the plaintiff on the facts of the present application would amount to the unfair resolution of the dispute between the parties³¹. It would arise from an unfair differentiation that Rule 19(1) makes between a natural person and a close corporation in relation to the serving and filing of a notice.

29] In applying the principles above to this matter certain other developments also become relevant. On 25 June 2007, in response to the threat of the present applications, Crabbia directed a letter to plaintiff's attorneys in which he gave notice that he intended to seek the opinion of this court in regard to defendant's rights.

30] *Inter alia*, he stated the following:³²

"1) .. it is stated that defence will be conducted by Mr G A Crabbia the managing member Of Pipechem CC.80 %.

2) We do comply to the requirements of the act. Mr Dreyer the Sheriff is of the same Opinion.³³

31 In regard to the need for express constitutional recognition of the importance of fair resolution by a court see **Zondi v MEC for Traditional and Local Government Affairs** 2005 (3) SA 589 (CC)

32 The spelling quoted follows the original.

33 Upon enquiry by plaintiff's attorney, the Sheriff denied that he had expressed the opinion attributed to him in the lastmentioned quote.

- 4) *We wish to give notice should Shepstone and Wiley not accept Mr G A Crabbia as the defendant's representative. We will take the matter to the Honourable court at the High court Keerom street Cape Town for there Opinion.*
- 5) *As stated on you point 3 Pipechem can only act through its members and in this instance is acting through G A Crabbia. As per the Rule the defendant is only able to act through its members. Therefore it may be represented by its members or attorney."*

31] On 29 June 2007 Crabbia delivered a further notice. *Inter alia*, he stated the following in relation to the alleged irregular steps:

"We ask the Honourabel court for a concessesion if possible for Mr G Crabbia to represent Pipechem CC

- 1) *Rule 19 G A Crabbia is not a Agent but Pipechem CC ... A agent acts on behave of and is not part of Crabbia is 80 % of Pipechem CC and is part of Pipechem and not a Agent.*
- 2) *G A Crabbia signed a personal guarantee as 80% owner.*
- 3) *If the above is not acceptable to the Honourabel court the plaintiff whishes to ask for a state attorney who will not be rewarded financially for using his or her privileged position and knowledge."*

32] In the introduction to this notice Crabbia alleged the following:

“4) Private Law dose not have justice as its main objective and is financially driven. And they have the privileged advantage of using their know-how and client’s money or lack of money to influence the case between themselves.

5) G A Crabbia also a member of Pipeforge CC have only had one other case case no 2092/97. The Supreme Court Nigel Dastek/Pipeforge was represented by attorneys.”

33] On 29 June 2007, a further document, signed by Crabbia, and purporting to be a declaration was delivered to plaintiff’s attorneys. An answer to the merits of plaintiff’s claim appears to be raised therein, albeit cryptically.

34] On 12 July 2007 plaintiff launched the threatened application in terms of Rule 30 and alleged that the defendant, being a juristic person, had failed to give notice of its intention to defend through an attorney as it is required to do by reason of Uniform Rule 19(1).

35] In his supporting affidavit Botes alleged that the plaintiff was suffering prejudice. It was unable to take any further steps until the defendant had either delivered a notice of intention to defend in compliance with Rule 19 or the court had been persuaded by the defendant that Crabbia was entitled to represent the defendant; and the documents signed and delivered to plaintiff’s attorney on 7 June 2007 (or some other document), could stand as a notice of intention to defend. Plaintiff expressed its desire to bring an application for summary judgment as an alternative to default judgment. The defective notice was

“accordingly a hinderance to the further conduct of the matter”.

36] It was contended further by Botes that, if Crabbia were allowed to represent the defendant, plaintiff would be substantially prejudiced in that defendant's case would be presented by an unqualified person, the defence would be disorganised and unsystematic and would result in undue delays and legal costs because of Crabbia's lack of expertise. He could require indulgences from the court and from the plaintiff. Should the defendant turn out to be impecunious (the facts of which plaintiff had no knowledge), then the possibility existed that Crabbia would cause the defendant to litigate hopeless causes without fear of personal liability, and the plaintiff would be unable to recover its costs. It was also contended that Crabbia could have difficulty in obtaining authority to make decisions during the course of the proceedings. However, plaintiff is unlikely to suffer prejudice of this kind should it be successful in the proposed application for summary judgment.

37] Finally, it was contended by Botes that the defendant had not brought a proper application requesting the court to permit Crabbia to act for the defendant. The court had no evidence in terms of which it could exercise its discretion.

38] In conclusion the plaintiff prayed for an order setting aside the purported notice of intention to defend as an irregular step and sought judgment by default in terms of the draft order that had been attached to the notice of application.

39] On 17 July 2007 defendant delivered a notice of opposition to the relief claimed by the plaintiff. To this was attached a comprehensive affidavit deposed to by Crabbia, who had also signed the notice on behalf of the defendant. *Inter alia*, he repeated certain allegations to the effect that defendant has a defence to plaintiff's claim and that the situation is "*a repeat*" of a previous case between the parties. Due to his past experience of the dispute and events leading to the present application Crabbia believed that it would be in the best interests of defendant for him to defend the action as he was involved in the matter from its inception. He was supported in this conclusion by the content of an annexed letter emanating from Marinella Crabbia. She also confirmed that she held a twenty per cent member's interest in the defendant.

40] The matter was fully argued before me by counsel for the plaintiff, Mr Cooke, who also provided the court with comprehensive and helpful written argument. No objection was raised to the appearance before me of Crabbia who argued on behalf of the defendant. Plaintiff persisted in seeking a default judgment. In its written argument plaintiff gave notice that, should the court find that the notice was not defective, the plaintiff would apply in terms of the Rule 27(1), for an extension of time within which to file a summary judgment application.

41] By virtue of the several opportunities that the plaintiff had afforded defendant to reconsider its position counsel argued that the defendant and/or Crabbia should be ordered to pay the costs incurred by the present application.

- 42] To accommodate any further conduct of these proceedings I shall not deal with the alleged defences and other technical points raised by Crabbia in the documentation and oral argument, although these were argued before me.
- 43] In all of the circumstances above it is apparent that the plaintiff seeks to avoid a trial of the action - whether by default judgment or summary judgment - depending on how the court responds to the application in terms of Rule 30. Plaintiff as a litigant enjoys a right to make the fullest use of the Uniform Rules. Both parties are vested with the constitutional right to have the dispute decided in a fair public hearing³⁴. The defendant's right of access binds the judiciary when the High Court exercises its inherent power to regulate its own process in the exercise of the court's power to grant default judgment³⁵. This right informs the coherent interpretation and application of Rules 30, 31(5) and Rule 32 in their entire context.
- 44] The Uniform Rules are silent as to their cumulative effect in the present circumstances: that is where defendant (after delivering an irregular notice of intention to defend), has failed to make formal application to be represented by Crabbia in the action and plaintiff seeks a default judgment without reference to the Registrar, or alternatively seeks to apply for summary judgment in the future. The court is therefore constrained to exercise its inherent power to regulate its own process taking into account the interests of justice³⁶.

34 See section 34 of the Constitution of the Republic of South Africa, 1996.

35 See sections 8(1) and 173 of the Constitution

36 See section 179 of the Constitution

- 45] Counsel's argument on behalf of plaintiff has failed to accommodate the right of the defendant, in terms of section 34 of the Constitution, to have a dispute that can be resolved by the application of law decided in a fair public hearing before an impartial court. Counsel did not address four allegations contained in the "*purported notice of intention to defend*", which conclude with the statement; "*The plaintiff did not act in a manner that may have resolved this claim*". These statements suggest the nature of the defence that defendant proposes to raise.
- 46] For purposes of argument it was conceded by Counsel that Crabbia is effectively the alter ego of the defendant. It was further conceded that the defendant "*had a negative experience*" when it relied on a firm of attorneys in Nigel to represent the defendant in a previous matter.
- 47] During argument Crabbia acknowledged his awareness of one possible consequence of his conduct in defence of the defendant viz. that he might be held personally liable for the plaintiff's legal costs, when the court eventually exercises its discretion in the proceedings.³⁷
- 48] From the documentation it appears that the written English language is not Crabbia's strongest suit. However, it also appears that he reached the second year of an engineering degree at the University of the Witwatersrand. He employs forty-three people in the defendant's business. From the letterhead of the defendant it appears to operate its business at three geographically

³⁷ Compare in this regard the provisions of section 50(3) of the Act which augments the discretion of the court to order a member of a plaintiff corporation to pay costs of the corporation whenever it unsuccessfully institutes proceedings without *prima facie* grounds.

dispersed branches located at Somerset West, Durban and Nigel.

49] In presenting the defence on behalf of the defendant Crabbia would be subject to the discipline of the court presiding over the proceedings as well as the acknowledged financial consequences of his own dilatoriness or any egregiously unethical behaviour. By virtue of his role in the defendant there should be no difficulty in Crabbia obtaining further authority to make decisions during the course of the proceedings.

50] In my view an injustice would arise should a default judgment flow from the failure of the defendant to deliver a “*regular*” notice of intention to defend, in accordance with the principles set out in the **Arma Carpet** case.

51] As already stated, the interpretation and application of Rule 19(1) in a manner that prohibits a close corporation from validly delivering a notice of intention to defend through its *alter ego* (by requiring such notice to be given through an attorney), limits the corporation’s right of access protected by Section 34 by placing an obstacle in the way of such access³⁸. To permit default judgment solely because notice has not been given by an attorney amounts to a denial of access.

52] For purposes of exercising my discretion my foremost consideration is that the plaintiff is seeking to deny the defendant access to this court unless it acts through an attorney, despite the fact that the defendant has notified the plaintiff

38 Compare the argument raised by the *amicus curiae* in the **California Spice** case *supra* at p 341 g to 343 h.

and the court that it intends to defend and that it has a defence. Such a defence ought not to be suppressed even before the summary judgment stage of proceedings has been reached. The prejudice to the defendant which would be caused by a default judgment at this stage remains incalculable. The interest of the plaintiff in the litigation, as well as the public interest in the expedition of the conclusion of any trial that may follow an unsuccessful summary judgment application and the inconvenience to the court that has been suggested by plaintiff cannot reasonably and justifiably limit the defendant's right of access.

53] In all the circumstances I make the following order: -

- 1) Subject to the condition in paragraph 2 below, and for so long as he holds an 80% members interest and continues to be the managing member of the defendant, Mr G A Crabbia is granted permission to represent the defendant in legal proceedings instituted by Mittal Steel SA Ltd (plaintiff) against Pipechem CC (defendant), under case number 7072/07;
- 2) The defendant shall, within ten court days of this order, file with the Registrar and serve on the plaintiff's attorneys a resolution, signed by all the registered members of the defendant, authorising Mr G A Crabbia to represent the defendant in the legal proceedings described above and to take whatever steps and decisions may be necessary for defendant to defend the action until final judgment is granted by this court;
- 3) Should defendant fail to file the resolution referred to in paragraph 2 above timeously or at all, plaintiff is authorised to apply to this court for default

judgment, upon forty eight hours notice to defendant, care of Roligh Grinrod,
4th Floor, 4 Trust Building, Martin Hammerschlag Way, Foreshore, Cape
Town, on the papers filed to date (duly supplemented where necessary),
together with costs;

- 4) For purposes of further proceedings in this matter, including any application
for summary judgment, the date on which the aforementioned resolution is
delivered shall be deemed to be the date upon which delivery of defendant's
notice of intention to defend was effected;
- 5) The application for default judgment is refused;
- 6) In the event of the defendant filing the resolution as aforesaid the costs
incurred by the present applications will become costs in the cause, failing
which the defendant is ordered to pay such costs.

DONEN AJ