

**TOPIC: An analysis of lifting of the corporate veil in light of  
s20(9) of the Companies Act 71 of 2008.**

**By**

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## **DECLARATION**

I, (Tamera Govender) 214534549 hereby declare that this dissertation was composed by myself, that the work contained therein is my own except where expressly stated otherwise. Further, that this work has not been submitted for any other degree at any other university.

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Introduction

A company is regarded as an artificial being and is subject to limited rights and liabilities as opposed to natural persons.<sup>1</sup> The precise nature of separate legal personality has been illustrated by many divergent theories.<sup>2</sup> A corporation is regarded as having no physical existence hence it has no mind or will and exists only in terms of the law.<sup>3</sup> With no physical existence or human attributes, a corporation has representatives to carry out its functions and duties and such representatives are treated as organic parts of the corporation with the thoughts and acts of such representatives regarded as that of the company.<sup>4</sup> A logical consequence is that any faults of the representatives are regarded as being those of the company, in order to prevent the company escaping liability on the basis of separate legal personality.<sup>5</sup>

However, the nature of companies are such that it is susceptible to being abused and manipulated by those who control it. Accordingly, the remedy of lifting of the corporate veil, is a consequence of disregarding the separate legal personality of a company which is a concept fundamental in company law.<sup>6</sup> This concept was recognised in *Salomon v Salomon & Co Ltd*<sup>7</sup> (*Salomon*) where Lord Macnaghten emphasized that: ... “the company is at law a different person altogether from its subscribers”.<sup>8</sup> Lord Halsbury clearly stated the importance attributed to the concept of separate corporate personality by saying that:

“... if the company was a real thing which had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it will follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered”.<sup>9</sup>

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<sup>1</sup> M Pickering ‘The Company as a Separate Legal Entity’ (1968) 31(5) *Modern Law Review* 484.

<sup>2</sup> L Mthembu *To Lift or Not to Lift the Corporate Veil- the Unfinished Story: A Critical Analysis of Common Law Principles in Lifting the Corporate Veil*, unpublished LLM thesis, University of KwaZulu-Natal (2002) 9-11.

<sup>3</sup> See *Suttons Hospital* 77 ER 937 960; 612 10 C Rep 1A 32 B which illustrates the fiction theory.

<sup>4</sup> See *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC (HL) 705.

<sup>5</sup> See *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC (HL) 705.

<sup>6</sup> See *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC (HL) 705.

<sup>7</sup> See *Salomon v Salomon & Co Ltd* [1897] AC 22.

<sup>8</sup> See *Salomon v Salomon & Co Ltd* [1897] AC 22 at 51.

<sup>9</sup> See *Salomon v Salomon & Co Ltd* [1897] AC 22 at 33.

South African as well as English courts have often rigidly applied this concept in order to keep the rule intact, which has at times resulted in undesirable results.<sup>10</sup> Despite trying to honour the principle of separate legal personality established in the *Salomon* case, the courts have not tolerated abuse of this principle as can be seen in the case of *United States v Milwaukee Refrigerator Transit*<sup>11</sup> where the court said that just as the court does not permit its process to be abused it should not permit the notion of legal entity to be used to justify wrongs, protect fraud or defend crime.<sup>12</sup> Thus, the principle laid down in the *Salomon* case is not absolute<sup>13</sup> and the court will in certain instances disregard the separate legal personality of a company and attach liability to where it truly lies to prevent the infringement of the corporate veil.<sup>14</sup> The instances giving rise to these consequences have been anything but certain which has often led to debates on how the remedy should be guided and interpreted.

A glimpse at the Companies Act 71 of 2008 (herein after the '2008 Act') clearly states that some of the purposes of the Act are to encourage transparency and high standards of corporate governance as well as to encourage the efficient and responsible management of companies.<sup>15</sup> It is therefore important to have in place a remedy to counter such abuse and mismanagement of the affairs. Thus, the rights flowing from the incorporation of a company is not without its limitations and can be curtailed to give effect to the purpose set out in s7 of the 2008 Act, such as the right to separate corporate personality.

Prior to the enactment of the 2008 Act, the remedy was interpreted and applied using common law principles. Many attempts have been made to rationalise the common law principles to justify when a court will disregard separate legal personality, however no such breakthrough had been made.<sup>16</sup> Foreign jurisdictions have however been a useful tool in aiding us make comparisons, by introducing improvement and development in the courts willingness to attach meaning to lifting the corporate veil.<sup>17</sup> Notwithstanding this, our courts are still faced with

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<sup>10</sup> W A Joubert 'The Law of South Africa' (2012) 4(1) *LAWSA* at para 63.

<sup>11</sup> See *United States v Milwaukee Refrigerator Transit* 142 Fed 247 (1905).

<sup>12</sup> See *United States v Milwaukee Refrigerator Transit* 142 Fed 247 (1905) 255.

<sup>13</sup> J Bourne 'Lifting the Corporate Veil' (2002) 10 (3) *Juta's Business Law Journal* 114.

<sup>14</sup> H Sher 'Piercing the Corporate Veil' (1996) 4 (2) *Juta's Business Law Journal* 51.

<sup>15</sup> See section 7 (b)(iii) and (j) of Act 71 of 2008.

<sup>16</sup> W Zingoda *Piercing the Corporate Veil in Terms of Gore: Section 20(9) of the New Companies Act 71 of 2008*, unpublished LLM thesis, University of Cape Town (2015) 6.

<sup>17</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179).

issues surrounding the implementation of this remedy. This leads us to the question, as to what guidelines should be adduced from case law to assist in applying this remedy.

## 1.2 Background

Since the *Salomon* case the complete separation of a company has been recognised owing to the public being familiar with the consequences posed by limited liability companies.<sup>18</sup> The instances in which the court will disregard the separate legal personality of a company have been divided between the common law and the current statutory approach. However neither of these approaches provides for a cohesive set of principles or guidelines that assist the court in reaching its decision. The courts have been very reluctant to depart from the *Salomon* principle.

Bourne, in an attempt to set out the common law approach<sup>19</sup>, examines the exceptional cases under which the court will lift the corporate veil. He/she (not sure) argues that as it appears from case law, courts will not readily disregard separate legal personality however the courts have failed to define the precise situations under which they will do so.<sup>19</sup> The courts have disregarded the separate legal personality where there has been fraud on the part of its shareholders, when it is in the public interest to lift the corporate veil and where it is fair to do so.<sup>20</sup> The common law approach to lifting of the corporate veil is that the separate corporate personality must be strictly adhered to with the court having no carte blanche to simply disregard the separate legal personality of a company whenever it considers it just and convenient to do so.<sup>21</sup> The case of *Hulse-Reutter v Godde*<sup>22</sup>(*Hulse*) clearly illustrated the uncertainty by saying:

“The circumstances in which a court will disregard the distinction between a corporate entity and those who control it are far from settled”.<sup>23</sup>

A dictum commonly referred to has been that of Gower’s, which states that the courts would lift the veil when the corporate entity is blatantly being used as a cloak for fraud or improper conduct.<sup>24</sup>

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<sup>18</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 36.

<sup>19</sup> J Bourne ‘Lifting the Corporate Veil’ (2002) 10(3) *Juta’s Business Law Journal* 114.

<sup>20</sup> J Bourne ‘Lifting the Corporate Veil’ (2002) 10(3) *Juta’s Business Law Journal* 114.

<sup>21</sup> J Bourne ‘Lifting the Corporate Veil’ (2002) 10(3) *Juta’s Business Law Journal* 115.

<sup>22</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA).

<sup>23</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) 1346.

<sup>24</sup> S Ottolengi ‘From Peeping behind the Corporate Veil to Ignoring it Completely’ (1990) 53 *MLR* 388.



In Bourne's view, the court will seek to uphold the principle of separate legal personality and will probably only disregard the separate legal personality where there is presence of fraud or improper conduct, such as the misuse or abuse of the corporate structure by those under whose control it would be.<sup>25</sup> *Hulse* displays the general attitude of the courts which shows that the courts are not easily convinced to disregard corporate personality and will only do so in rare circumstances.<sup>26</sup>

Sher notes that courts have failed to formulate a coherent principle on which they could base their decisions to disregard separate legal personality and have instead chosen to rely on a number of separate unrelated categories of conduct to justify their decisions. However *Cape Pacific v Lubner Controlling Investments (Pty) Ltd*<sup>27</sup> (*Cape Pacific*) did not try to fit the facts into an existing category or create a new category instead they took an approach that the facts or each case should be considered when the need to pierce the corporate veil arise.<sup>28</sup> This seems to accord with our current law.

In terms of foreign jurisdictions some countries are more developed than others when approaching this remedy, one such being the United States (US) where the motto of Sanborn J is often used, which states that when the corporate personality is used to defeat public convenience, justify wrong or protect fraud and defend crime then the law will regard the corporation as an association of persons.<sup>29</sup>

What sparks our current debate is the statutory position on lifting the corporate veil. As far as case law and the legislature is concerned, there has been a failure to expressly state the meaning of the term 'unconscionable abuse' and the necessary prerequisites required for this remedy to be used. To be more guided in its application, there needs to be some set principles advanced to steer this process which could result in the prevention of mismanagement and abuse on behalf of those who control the company.

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<sup>25</sup> J Bourne 'Lifting the Corporate Veil' (2002) 10(3) *Juta's Business Law Journal* 114.

<sup>26</sup> J Bourne 'Lifting the Corporate Veil' (2002) 10(3) *Juta's Business Law Journal* 114.

<sup>27</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A).

<sup>28</sup> H Sher 'Piercing the Corporate Veil' (1996) 4(2) *Juta's Business Law Journal* 51; 54.

<sup>29</sup> S Ottolenghi 'From Peeping behind the Corporate Veil to Ignoring it Completely' (1990) 53 *MLR* 339.

### **1.3 Aim**

The purpose of this dissertation is to first, ascertain the existing development of the principle of lifting of the corporate veil after the introduction of the s20(9) of the 2008 Act. Secondly, the thesis seeks to establish whether our courts have indeed made any progress regarding this principle, or has s20(9) increased the confusion of the application and interpretation of this principle. Thirdly, the principle of lifting of the corporate veil will be examined in light of foreign jurisdictions where appropriate and to what extent South African courts can adopt foreign court's interpretation and application of the principle.

Lastly, a conclusion will be drawn regarding whether South Africa should merely formulate guidelines that provide an open-ended, non-exhaustive list of instances for which the courts may pierce the corporate veil, where this could potentially result in our courts applying this remedy in a consistent and just manner that will give companies, directors, shareholders and members thereof clarity as to when certain acts could result in 'unconscionable abuse'.

## CHAPTER 2

### LEGAL PERSONALITY

#### 2.1 The concept of separate legal personality

It is a well-established principle of South African company law that a company has separate legal personality, which means that the rights and duties enjoyed by a company are not shared by its members.<sup>30</sup> Consequently, a company with limited liability is an independent legal person which is separate from its shareholders or directors.<sup>31</sup> This point is evident in the following passage which was illustrated in *Ebrahimi v Westbourne Galleries Ltd*<sup>32</sup>

“...a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure”.<sup>33</sup>

Hence, a company is capable of having legal rights and incurring legal obligations<sup>34</sup> and such rights and obligations vest in the company and not its members.<sup>35</sup> Moreover, the law determines what beings are accorded legal personality.<sup>36</sup> As such, it is important to take cognisance of the fact that, a company has no physical existence and exists only in the eyes of the law which means that a company acquires such legal personality when the Registrar of Companies issues it with a certificate of incorporation.<sup>37</sup>

A case fundamental to this principle is the case of *Salomon*.<sup>38</sup> This case involved a situation where Salomon, a prosperous boot and shoe merchant was trading as a sole proprietor and decided to form a company in which he was the majority shareholder (he held 20 001 of 20 007 shares) and his sons had one share each to which the court found was not contrary to the intention of the formation of a company in terms of the Companies Act 1862 and hence the

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<sup>30</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 33.

<sup>31</sup> See *Francis George Hill Family Trust v SA Reserve Bank* 1992 2 All SA 137 (A); 1992 3 SA 91 (A) 97.

<sup>32</sup> See *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 ALL ER 492.

<sup>33</sup> See *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 ALL ER 500.

<sup>34</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 36.

<sup>35</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 77.

<sup>36</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 73.

<sup>37</sup> See section 13(10) of Act 71 of 2008.

<sup>38</sup> See *Salomon v Salomon & Co Ltd* [1897] AC 22.

company was a separate legal person.<sup>39</sup> To this end Lord Halsbury following the argument of Vaughan Williams J remarked:<sup>40</sup>

“Either the limited company was a legal entity, or it was not. If it was, the business belongs to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not”.<sup>41</sup>

Gower remarks that this decision in the *Salomon* case created a new perspective in the world of commerce.<sup>42</sup> Salomon by virtue of his debentures was a secured creditor of the company and upon insolvency his claim for repayment of his debentures would be paid in preference of ordinary trade creditors, which functioned as a mechanism to allow him to avoid any serious risk, while still acquiring the benefit of being the sole shareholder.<sup>43</sup> Furthermore, there was found to be no fraud considering that all the shareholders knew what was going on and Salomon had not made a concealed profit. Had he done this the position would have been different.<sup>44</sup> Since this case, the complete separation of the company and its members have not been doubted and a partial justification for it is that the public deals with a limited liability company at their own risk and know or should know, what to expect.<sup>45</sup>

South African courts have endorsed the principle laid down in the *Salomon* case as illustrated in the case of *Dadoo*.<sup>46</sup> This case involved a situation where a company Dadoo Ltd was registered in the Transvaal with all its shares held by Asiatics. Statute prohibited Asiatics from owning immovable property in the Transvaal but was silent regarding companies controlled by Asiatics.<sup>47</sup> The company bought land in the Transvaal and it was held that the company had not contravened the statute.<sup>48</sup> It was held that a company is a separate legal entity from its shareholders and because property owned by a company does not belong to its members, the

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<sup>39</sup> See *Salomon v Salomon & Co Ltd* [1897] AC 22 at 23.

<sup>40</sup> See *Salomon v Salomon & Co Ltd* [1897] AC 22 at 31.

<sup>41</sup> See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550-551 (*Dadoo*) where Innes CJ after quoting this passage with approval said ‘The result follows from separate legal personality which is given to corporations by statute and accepted in our practice. This position remains unaffected even in circumstances where a single member holds the controlling interest’.

<sup>42</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 36.

<sup>43</sup> Davis *Principles of Modern Company Law* 8ed (2008) 35-36.

<sup>44</sup> See *Salomon v Salomon & Co Ltd* [1897] AC 22 at 22-23.

<sup>45</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 36.

<sup>46</sup> See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550-551.

<sup>47</sup> See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 540.

<sup>48</sup> See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 556.

statutory provision was not contravened by the company even though the shares were held by Asian people.<sup>49</sup> Innes CJ asserted that:

“This conception of the existence of the company as a separate entity distinct from its founders is not merely an artificial technical thing. It is a matter of substance. Property vested in the company is not, and cannot be, regarded as vested in all or any of its members”.<sup>50</sup>

The courts uphold this principle to such an extent that it finds application even in one-man companies. The case of *Lee v Lee's Air Farming Ltd*<sup>51</sup> illustrates this point. This case concerned a situation where Lee carried on the business of aerial fertilization. He formed a company to take over his business and of 3000 shares he held 2999. He was the company's only director and he was employed by the company as a salaried pilot. Whilst flying the aircraft on company business he crashed and was killed. His widow claimed compensation under the Workmen's Compensation of New Zealand. The court stated to succeed in a claim she had to prove that Lee was both an employer and employee of the company, since it was a logical consequence from the *Salomon* decision that a person can function in a dual capacity then there was no reason why Lee could not have a contract of employment with the company, therefore his wife was entitled to claim for workmen's compensation.<sup>52</sup>

The importance attached to the principle of separate legal personality and the extent of its application has been clearly stated by our courts. The common law position was clearly emphasised in the case of *Hulse*<sup>53</sup> where Scott JA held that the separate legal personality of a company is to be recognised and disregarded in very limited instances.<sup>54</sup> The 2008 Act, has however widened this discretion and given courts discretionary power to invoke the remedy.<sup>55</sup>

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<sup>49</sup> See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 556 where Solomon JA remarked ... 'it is impossible to hold that the property of a corporation really belongs to the individual shareholders'. Moreover, Solomon JA quoted with approval the case of *Nation v Spratley* (24 L.J. Ex. 53) where Baron Parke said '...the individual shareholders are quite distinct from the corporation: they are entitled to no direct interest in the land of the corporation: no part of the realty is held in trust for them.'

<sup>50</sup> See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550.

<sup>51</sup> See *Lee v Lee's Air Farming Ltd* [1961] AC 12 (PC).

<sup>52</sup> See *Lee v Lee's Air Farming Ltd* [1961] AC 12 (PC) 426. See also *Inland Revenue Commissioners v Sansom* [1921] 2 KB 516 where the court looked at the fact that the deceased and company were separate legal entities so as to permit contractual obligations.

<sup>53</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA).

<sup>54</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) 1346.

<sup>55</sup> See section 20(9) of Act 71 of 2008.

It is therefore trite law in South Africa that once a company is incorporated it has a separate existence from its members<sup>56</sup> and such separate existence is to be upheld, unless common law or statute provide otherwise.<sup>57</sup> Moreover the abuse of separate legal personality is not tolerated by the courts just to uphold this principle as can be seen by case law. Accordingly, companies should take precaution to prevent abuse of separate legal personality.

## 2.2 The nature of separate legal personality

Many terms have been used to describe the concept of separate legal personality. First, a veil, mask or curtain between the members of the company and outsiders, which is lifted when the law goes behind the corporate personality to the individual members.<sup>58</sup> Secondly, a veil between the company and its members and thirdly, one economic entity divided by a corporate veil or several economic realities that may be joined.<sup>59</sup> This is important as the fundamental question which relates to separate legal personality is who will be liable for the wrongs or crimes committed by the company since the rights and obligations belong to the company, even though they lack physical attributes of human beings.

A company is a juristic person, also called a fictitious or artificial person.<sup>60</sup> Hence legal personality is not a natural phenomenon but a creature of law.<sup>61</sup> Companies differ from any natural person in that they only acquire restricted rights and liabilities than natural persons. Accordingly, company law first requires companies to state their objects on incorporation, thus restricting its capacity and secondly common law imposes limitations on corporate capacity.<sup>62</sup>

There have been several theories used to describe the nature of separate legal personality of which many have been criticised or rejected based on their logic and practicality<sup>63</sup>, namely the fiction, organic and concession theory.<sup>64</sup> The two rival theories which have received the most attention has been the fiction and organic theory.<sup>65</sup>

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<sup>56</sup> See *Francis George Hill Family Trust v SA Reserve Bank* 1992 2 All SA 137 (A); 1992 3 SA 91 (A) 97.

<sup>57</sup> J Bourne 'Lifting the Corporate Veil' (2002) 10(3) *Juta's Business Law Journal* 114.

<sup>58</sup> M Pickering 'The Company as a Separate Legal Entity' (1968) 31(5) *Modern Law Review* 488.

<sup>59</sup> M Pickering 'The Company as a Separate Legal Entity' (1968) 31(5) *Modern Law Review* 484.

<sup>60</sup> M Pickering 'The Company as a Separate Legal Entity' (1968) 31(5) *Modern Law Review* 481.

<sup>61</sup> See *Dartmouth College v Woodward* 17 US 629 659; 4 Wheat 518 (1819) 636.

<sup>62</sup> M Pickering 'The Company as a Separate Legal Entity' (1968) 31(5) *Modern Law Review* 484.

<sup>63</sup> L Mthembu op cit note 2. .

<sup>64</sup> WA Joubert 'The Law of South Africa' (2012) 4(1) *LAWSA* 64.

<sup>65</sup> *Ibid* at 63.

In terms of the fiction theory only human beings can be the subjects of rights and legal personality can only be attributed to natural persons.<sup>66</sup> This theory further states that a corporation is capable of having rights and duties although it has no physical existence, hence it has no mind or will and cannot act itself.<sup>67</sup> It must be represented by human beings and although it cannot commit wrongs or crimes, it can be vicariously liable for wrongs of its representatives which attempts to guarantee individual moral autonomy.<sup>68</sup> The theory that a corporation has no physical existence seems always to have been accepted by the courts see the case of *Suttons Hospital*<sup>69</sup> where Coke CJ said that the corporation is an abstraction and exists only in terms of the law.<sup>70</sup>

In terms of the organic theory, it provides that in certain circumstances the thoughts and acts of a particular person (usually a director of a company) are regarded in law as the thoughts and acts of the company itself.<sup>71</sup> Consequently, the intention and negligence (fault) of the person is regarded as that of the company to prevent the company from escaping liability.<sup>72</sup> Thus, the persons whose thoughts and acts are regarded as the thoughts and acts of the company itself are treated as organic parts of the company.<sup>73</sup> The organic theory was first articulated by the courts in the case of *Lennard's*<sup>74</sup> where Viscount Haldane said that a corporation is an abstraction, it has no mind, body or will of its own, its active and directing will must be sought by someone who is the agent, but who is really the directing will of the corporation.<sup>75</sup> This case concerned a situation where the ship and the cargo were lost due to unseaworthiness, in terms of the relevant Act the company was to be liable for loss if it was at fault and hence the directing mind of the ship was held to be the directing mind of the company.<sup>76</sup> The courts in the republic

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<sup>66</sup> WA Joubert 'The Law of South Africa' (2012) 4(1) *LAWSA* 64.

<sup>67</sup> WA Joubert 'The Law of South Africa' (2012) 4(1) *LAWSA* 64.

<sup>68</sup> WA Joubert 'The Law of South Africa' (2012) 4(1) *LAWSA* 64.

<sup>69</sup> See *Suttons Hospital* 77 ER 937 960; 612 10 C Rep 1A 32 B.

<sup>70</sup> See also *Darhmouth College v Woodward* 17 US 629 659; 4 Wheat 518 (1819) at 636 where Marshall CJ said that a corporation is an artificial being which is intangible and exists only in the contemplation of law.

<sup>71</sup> WA Joubert 'The Law of South Africa' (2012) 4(1) *LAWSA* 64.

<sup>72</sup> WA Joubert 'The Law of South Africa' (2012) 4(1) *LAWSA* 64.

<sup>73</sup> See *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC (HL) 705.

<sup>74</sup> See *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC (HL) 705.

<sup>75</sup> See also *Continental Tyre and Rubber Co. (G.B) Ltd v Daimler Co* [1915] K.B 893 at 916 (*Daimler*) where the court looked at the attributes of a corporation and where Buckley L.J said that the corporation has no physical existence and exists only in the eyes of the law. It has no body, parts nor passions. It cannot wear weapons or serve in wars. It cannot be loyal or disloyal. It cannot commit treason. It can neither be a friend nor enemy. It cannot have thoughts apart from its incorporators, nor intentions or mind other than minds of its incorporators.

<sup>76</sup> See *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC (HL) 606.

have recognised the organic theory. In *Commissioners of Inland Revenue v Richmond Estates (Pty) Ltd*<sup>77</sup> Centlivres said that:

“A company is an artificial person with no body to kick and no soul to damn and the only way of ascertaining its intention is to find out what its directors acting as such intended. Their formal acts in the form of resolutions [passed by a board of directors] constitute evidence as to the intentions of the company of which they are directors but where a company has only one director... it is perhaps not going too far to say that his mind is also the mind of the company”.

With regards to the concession theory it holds that corporations are legal fictions that are created by law and that corporations are the creation of the state.<sup>78</sup> The common law has accepted the concession theory as can be seen in the case of *Tripling v Pexall*<sup>79</sup> where Coke CJ said that corporations have no soul and cannot be subpoenaed, a corporation is a body aggregate and only God can create souls, but the king creates them, nor can they appear in person, but by attorney.<sup>80</sup>

It is therefore submitted that the best theory to be the organic theory. This is not because it is the most used theory but since it is a logical consequence flowing from the fact that a corporation does not have the attributes of a human being and needs representatives to carry out the functions of such corporation. Thus, in a case where such person is negligent it should be regarded as the negligence of the company to prevent companies from escaping liability based on separate legal personality as well as attaching consequences to the rights and obligations endowed on a company based on acquiring separate legal personality. Therefore, if the rights and obligations belong to a company so must the wrongs and crimes to prevent the abuse of separate corporate personality.

### **2.3 Exceptions to separate legal personality**

Our courts have tried to preserve the inviolability of the corporate veil.<sup>81</sup> Charlesworth however notes that:

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<sup>77</sup> See *Commissioners of Inland Revenue v Richmond Estates (Pty) Ltd* 1956 1 SA 602 (A).

<sup>78</sup> WA Joubert ‘The Law of South Africa’ (2012) 4(1) *LAWSA* 64.

<sup>79</sup> See *Tripling v Pexall* (1614) 80 ER 1085.

<sup>80</sup> WA Joubert ‘The Law of South Africa’ (2012) 4(1) *LAWSA* 64.

<sup>81</sup> H Sher ‘Piercing the Corporate Veil’ (1996) 4(2) *Juta’s Business Law Journal* 51.



“There are exceptions to the principle in *Salomon's* case, where the veil is lifted, and the law disregards the corporate entity and pays regard instead to the economic realities behind the legal facade. In these exceptional cases, the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated concerns”.<sup>82</sup>

The rule laid down in *Salomon*<sup>83</sup> establishes firstly that:

1. If a company is validly incorporated, all formalities are complied with even if it is a one-man company;<sup>84</sup>
2. Secondly, the courts will be reluctant to treat each shareholder as being personally liable for the debts of the company by piercing the corporate veil.<sup>85</sup>

The court went on to say that the company is not an agent of its members, nor are the members liable in any shape or form except to the extent provided by the Act.<sup>86</sup> This general rule is however, not without its exceptions and the court may disregard the separate corporate personality of a corporation in certain instances.<sup>87</sup> Common law and statute acknowledge that the separate corporate personality of a company may be abused and make exceptions to the concept of separate corporate personality.<sup>88</sup> There are no set category of instances in which a court will disregard the separate legal personality, there are merely instances in which the court will disregard separate legal personality.<sup>89</sup>

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<sup>82</sup> G Morse, S Girvin, Charlesworth *Company Law* 13ed (1987) 27. See also S Ottolenghi ‘From Peeping behind the Corporate Veil to Ignoring it completely’ (1990) 53 *MLR* 353.

<sup>83</sup> See *Salomon v Salomon & Co Ltd* [1897] AC 22.

<sup>84</sup> See *Lee v Lee's Air Farming Ltd* [1961] AC 12 (PC).

<sup>85</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 35. In other words, to disregard the separate legal personality of a company.

<sup>86</sup> See *Salomon v Salomon & Co Ltd* [1897] AC 22 at 51. However, see also M Pickering ‘The Company as a Separate Legal Entity’ (1968) 31(5) *Modern Law Review* at 490 where Pickering took an opposing view and said that when a company owns or deals in property, or enters into services, sale or other contracts it does not in its own right, as a natural person may do, but merely for or on behalf of its members and for their benefit. Thus, a company is an agent of its members, or as a trustee for them, of property and contractual rights and obligations which in a true sense, taking into account, the realities of the situation belong to those members.

<sup>87</sup> J Bourne ‘Lifting the Corporate Veil’ (2002) 10(3) *Juta's Business Law Journal* 114.

<sup>88</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 42.

<sup>89</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 43.

Undoubtedly the common law approach was restrictive in its application and implementation of disregarding a company's separate legal personality as can be seen in *Hulse*<sup>90</sup> in order to preserve the concept of separate legal personality as articulated in the case of *Salomon*.<sup>91</sup> Section 20(9) of the 2008 Act however, has relaxed the requirements for the application of this remedy. However, this section has not been without its challenges and unanswered questions.<sup>92</sup> Thus, our courts still have some work to do in clearing up the confusion that attaches to the exceptions under which separate corporate personality will be disregarded.

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<sup>90</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) 1346.

<sup>91</sup> See *Salomon v Salomon & Co Ltd* [1897] AC 22.

<sup>92</sup> Examples of such questions include what is the definition of 'unconscionable abuse' laid down in section 20(9) of the 2008 Act?

## CHAPTER 3

### THE BENEFIT OF FORMATION AND INCORPORATION OF A COMPANY

#### 3.1 The incorporation of a company

It is important to note that a company does not exist as a legal entity until it is incorporated.<sup>93</sup> Thus, a company becomes a juristic person from the time and date that it is registered.<sup>94</sup> Consequently, prior to the incorporation of a company a representative must act on behalf of the company.<sup>95</sup> The formalities of incorporation must be adhered to; professionals must be instructed and paid to prepare the necessary incorporation documents, namely; the memorandum of incorporation and the notice of incorporation.<sup>96</sup> In terms of a company's memorandum of incorporation it may be in a standard form or in a unique form specific to the company, as such it may deal with any issue not addressed in the 2008 Act and may alter any alterable provision.<sup>97</sup> The memorandum of incorporation must be consistent with the 2008 Act and is void to the extent that it contravenes or is inconsistent with the said Act.<sup>98</sup> Furthermore, the business proposal needs to be appraised and initial finances must be raised.<sup>99</sup>

The incorporation of a company is the legal beginning of a company that will ultimately lead to the company acquiring certain rights and duties and incurring certain liabilities. Section 13 of the Companies Act 71 of 2008 sets out the process and procedure to be followed in order to incorporate a company. This section provides that one or more persons or a juristic person may incorporate a profit company, or three or more persons may incorporate a non-profit company.<sup>100</sup> This is done by completing and each signing in person or by proxy a memorandum of incorporation, in the prescribed manner and form unique to the company<sup>101</sup> and filing a

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<sup>93</sup> A Nwafor 'Company Promoters and the Enforcement of Pre-Incorporation Contracts' (2010) 22 *SAMJ* 66; see also s19(1)(a) of Act 71 of 2008

<sup>94</sup> P Delpont, Q Vorster *Henochsberg on the Companies Act 71 of 1973* (2011) at 121.

<sup>95</sup> A Nwafor 'Company Promoters and the Enforcement of Pre-Incorporation Contracts' (2010) 22 *SAMJ* 66.

<sup>96</sup> A Nwafor 'Company Promoters and the Enforcement of Pre-Incorporation Contracts' (2010) 22 *SAMJ* 66; see also s14(1) – (2) of Act 71 of 2008. The incorporation of a company is the legal beginning of a company that will ultimately lead to the company acquiring certain rights and duties and incurring certain liabilities. Section 13 of the Companies Act 71 of 2008 sets out the process and procedure to be followed in order to incorporate a company. This section provides that one or more persons or a juristic person may incorporate a profit company, or three or more persons may incorporate a non-profit company.<sup>96</sup> This is done by completing and each signing in person or by proxy a memorandum of incorporation, in the prescribed manner and form unique to the company<sup>96</sup> and filing a notice of incorporation in the prescribed manner and form, together with a prescribed fee and accompanied by a copy of the memorandum of incorporation.

<sup>97</sup> P Delpont, Q Vorster *Henochsberg on the Companies Act 61 of 2008* (2017) at 71.

<sup>98</sup> P Delpont, Q Vorster *Henochsberg on the Companies Act 61 of 2008* (2017) at 71; see also s15(1)(a) - (b)\* of Act 71 of 2008.

<sup>99</sup> A Nwafor 'Company Promoters and the Enforcement of Pre-Incorporation Contracts' (2010) 22 *SAMJ* 66.

<sup>100</sup> See section 13(1) of Act 71 of 2008.

<sup>101</sup> See sections 13(a) (i) - (ii) of Act 71 of 2008.

notice of incorporation in the prescribed manner and form, together with a prescribed fee and accompanied by a copy of the memorandum of incorporation.<sup>102</sup> If the memorandum of incorporation includes any provision contemplated in s15(2),<sup>103</sup> the notice of incorporation filed must include a prominent statement drawing attention to each such provision, and its location in the memorandum of incorporation.<sup>104</sup> The commission may reject the notice of incorporation if the notice or anything to be filed with it is incomplete or improperly incomplete in any respect<sup>105</sup> and must reject the notice of incorporation if the initial directors of the company as set out in the notice are fewer than required,<sup>106</sup> or if the commission reasonably believes that any of the initial directors are disqualified and the remaining directors are fewer than required.<sup>107</sup>

Thereafter as soon as practicable after accepting a notice of incorporation in terms of section 13(1) the Commission must assign to the company a unique registration number;<sup>108</sup> and enter the prescribed information concerning the company in the companies register;<sup>109</sup> endorse the notice of incorporation and, if applicable, the copy of the memorandum of incorporation filed with it, in the prescribed manner;<sup>110</sup> and issue and deliver to the company a registration certificate in the prescribed manner and form, dated as of the later of- the date on, and time at, which the Commission issued the certificate;<sup>111</sup> or the date, if any, stated by the incorporators in the notice of incorporation.<sup>112</sup> A registration certificate is conclusive evidence that all requirements of incorporation of a company have been complied with and the company is incorporated under this Act from the date and time if any has been stated in the certificate.<sup>113</sup>

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<sup>102</sup> See sections 13(2) (a) - (b) of Act 71 of 2008.

<sup>103</sup> Section 15(2) of Act 71 of 2008 Act states that the Memorandum of Incorporation of any company may- (a) include any provision- (i) dealing with a matter that this Act does not address; (ii) altering the effect of any alterable provision of this Act; or (iii) imposing on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of this Act; (b) contain any restrictive conditions applicable to the company, and any requirement for the amendment of any such condition in addition to the requirements set out in section 16; (c) prohibit the amendment of any particular provision of the Memorandum of Incorporation; or (d) not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of this Act except to the extent contemplated in paragraph (a)(iii).

<sup>104</sup> See section 13(3) of Act 71 of 2008.

<sup>105</sup> See section 13(4) (a) of Act 71 of 2008.

<sup>106</sup> See section 13(4) (b) (i) of Act 71 of 2008.

<sup>107</sup> See section 13(4) (b) (ii) of Act 71 of 2008.

<sup>108</sup> See section 14(1) (a) of Act 71 of 2008.

<sup>109</sup> See section 14(b) (i) of Act 71 of 2008.

<sup>110</sup> See section 14(b) (ii) of Act 71 of 2008.

<sup>111</sup> See section 14(b) (ii) (aa) of Act 71 of 2008.

<sup>112</sup> See section 14(b) (iii) (bb) of Act 71 of 2008.

<sup>113</sup> See sections 14(4) (a)-(b) of At 71 of 2008.

The process and procedure of incorporation of a company depicted in s13 and s14 above, has certain consequences and benefits attached to it that encourages the formation of companies to enable persons to derive such benefits. As such the formation of companies are important as it facilitates access to capital which brings about commercial enterprise and the growth and development of the economy.<sup>114</sup> Moreover, the formation of a company is a right and not a privilege that is given by the state,<sup>115</sup> and can be seen as the exercise of a person's constitutional right to freedom of association and freedom to contract.<sup>116</sup>

### **3.2 The effect of incorporation**

The incorporation of a company gives rise to various rights that enable the company to among other things; sue and be sued, exist after the death or transfer of shares of a member, to own property and assets and to receive profits. The effect of incorporation of a company is that the subscribers and members of a company shall be deemed to be a corporation with a name ascribed to the company in its memorandum of incorporation and be capable of exercising all the functions and enjoying all the rights of an incorporated company with the consequence of being liable for debts of the company at the winding up of a company, to the extent provided for in the memorandum of incorporation.<sup>117</sup> Therefore, a company will be have all the powers of an individual, to the extent that it is capable of exercising such powers, example: entering into a marriage.<sup>118</sup>

#### **3.2.1 A company can sue or be sued in its own name**

At common law a corporation is an association of individuals that is capable of holding property and can sue or be sued in its own corporate name, it may enforce its own rights; and liabilities are enforced directly against the company.<sup>119</sup> In *Foss v Harbottle*<sup>120</sup> and *Mozley v Alston*<sup>121</sup> it was established that:

“ ...the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or association ...”

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<sup>114</sup> F Cassim ‘The Companies Act 2008: An Overview of a Few of its Core Provisions’ (2010) 22(2) *SAMJ* 159.

<sup>115</sup> F Cassim ‘The Companies Act 2008: An Overview of a Few of its Core Provisions’ (2010) 22(2) *SAMJ* 159.

<sup>116</sup> F Cassim ‘The Companies Act 2008: An Overview of a Few of its Core Provisions’ (2010) 22(2) *SAMJ* 159.

<sup>117</sup> P Delpont and Q Vorster *Henochsberg on the Companies Act 71 of 1973* (2011) at 123.

<sup>118</sup> P Delpont and Q Vorster *Henochsberg on the Companies Act 71 of 1973* (2011) at 73.

<sup>119</sup> WA Joubert ‘The Law of South Africa’ (2012) 4(1) *LAWSA* 76.

<sup>120</sup> See *Foss v Harbottle* 1843 2 Ha. 461.

<sup>121</sup> See *Mozley v Alston* 1847 1 Ph 790.

This case created legal standing for a company to be a party to an action either for or against it, enabling a company to assert and enforce the rights given to it by virtue of incorporation of the company and separate legal personality. This illustrates the advantage of forming a company and the protection and power incidental to such formation.

The exception to the general rule laid down in the cases above is found in terms of a derivative action in English law where the wrong complained of involves either fraudulent conduct or is ultra vires; or the wrong has been perpetrated by directors and shareholders who constitute a majority and therefore control the company.<sup>122</sup> Lord Denning gave a detailed explanation of this exception in *Moir v Wallersteiner and Others*<sup>123</sup> where he described the situation as follows:

“If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle*. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs by directors who hold a majority of shares who can then sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress”.

This reasoning is no detraction from the purpose of a company and the functions and powers given to a duly incorporated company. The mechanism that is endowed on a company, which is the ability to sue and be sued in their own name is important and, in the scenario, as demonstrated by Lord Denning it will prevent the abuse by directors who commit wrongs against the company in the hope that the company will have no right or capability to sue and enforce the appropriate legal action against them. Therefore, a company must act and be acted against to enforce its rights and obligations.<sup>124</sup> Consequently, a shareholder will not have a

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<sup>122</sup> See *Francis George Hill Family Trust v SA Reserve Bank* 1992 2 All SA 137 (A); 1992 3 SA 91 (A) 97 at 140.

<sup>123</sup> See *Moir v Wallersteiner and Others* (1975) 1 All ER 849 (CA) 857 D-F.

<sup>124</sup> M Pickering ‘The Company as a Separate Legal Entity’ (1968) 31(5) *Modern Law Review* 501.

right of action for a loss sustained by a company even though the loss may reduce a shareholders value in shares, the principle still holds that the company must itself institute action and is capable of doing so in its own name.<sup>125</sup> This has always been accepted as a fundamental characteristic of corporate personality.<sup>126</sup> Thus, once a corporation is duly incorporated, all other incidents are tacitly connected, one of which is to sue and be sued and to prosecute and be prosecuted.<sup>127</sup>

### **3.2.2 A company has perpetual succession**

Perpetual succession depends on whether the company in question will continue to exist even after the individual members have left or have died.<sup>128</sup> The significance of perpetual succession is when a member of a company dies or transfers their shares to another company; the existence of the company is neither changed nor affected at all.<sup>129</sup> As such the death of a member or change in membership will leave the company unmoved, with the result that members may come and go and the company will continue to live on forever.<sup>130</sup> Hence, death or transfer of shares merely terminates the deceased's or the transferor's membership, and the person on whom the shares devolve, or the transferee, becomes a member of the company in the former member's place.<sup>131</sup> As recognised, where there is a change in shareholding and control of a company, the existence and identity of the company remains unchanged.<sup>132</sup> The importance of this attribute has often been expressed by our courts, an example of this is where Marshall CJ said:<sup>133</sup>

“Being a mere creature of law, a corporation possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence... among the most important are immortality...”

What is apparent about such a characteristic is the convenience of not having to dissolve the company each time there is death or change in membership of the company, allowing the company to carry out its functions and responsibilities without having to concern itself with

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<sup>125</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 42.

<sup>126</sup> WA Joubert ‘The Law of South Africa’ (2012) 4(1) *LAWSA* 76.

<sup>127</sup> See *Suttons Hospital* 77 ER 937 960; 612 10 C Rep 1A 32 B.

<sup>128</sup> See *Malebjoe v Bantu Methodist Church of SA* 1957 4 ALL SA 90(W); 1957 45 A 465 (W) 466 as per Kuper J.

<sup>129</sup> WA Joubert ‘The Law of South Africa’ (2012) 4(1) *LAWSA* 66.

<sup>130</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 42.

<sup>131</sup> WA Joubert ‘The Law of South Africa’ (2012) 4(1) *LAWSA* 66.

<sup>132</sup> See *Stern v Vesta Industries (Pty) Ltd* 1976, 1 ALL SA 198 (W); 1976 1 SA 81 (W) 85 as per Colman J.

<sup>133</sup> See *Darhmouth College v Woodward* 17 US 629 659; 4 Wheat 518 (1819) 636.

when the company might dissolve due to death or transfer of any of its members.<sup>134</sup> In my view this a very practical and useful feature of a company that avoids unnecessary delay and expense in continuing business activities.

### 3.2.3 The profits, property and assets of a company belong to the company

The profits of a company belong to the company and not its shareholders or even sole shareholder.<sup>135</sup> What the shareholders do however have, is a right to profits when the company declares a dividend.<sup>136</sup> The advantage of incorporation is that it allows the property of a company to be clearly separated, distinguished and identified from that of its members.<sup>137</sup> Accordingly, the claims of the company creditors will lie against the property of the company and claims of members' personal creditors will lie against the personal property of the creditor, which in turn prevents competition amongst creditors.<sup>138</sup> Thus, the property and assets of a company, belong to the company and not the shareholders, but the shareholders have a right to the residue after the creditors have been paid. This is the shareholders financial interest in the dividends paid by the company.<sup>139</sup> This interest was clearly stated in the case of *Stellenbosch Farmer's Winery v Distillers Corporation Ltd and Another*<sup>140</sup> where the court said:

“The fact that the shareholder is entitled to an *aliquot* share in the distribution of the surplus assets when the company is wound up proves that he is financially interested in the success or failure of the company but not that he has any right or title to any assets of the company”.

It is evident that incorporation creates a separation between the property, profits and assets of the company and that of the shareholders to the extent that there is a difference between a pecuniary interest of a shareholder and an actual right to the property owned by the company.<sup>141</sup> Thus a shareholder will have no right to any piece of property belonging to a company.<sup>142</sup> This distinction definitely accords with the very nature of separate legal personality, that a company

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<sup>134</sup> WA Joubert 'The Law of South Africa' (2012) 4(1) *LAWSA* 66.

<sup>135</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 38.

<sup>136</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 38.

<sup>137</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 41; see also *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL) and *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd* 2013 (5) SA 42 (WCC).

<sup>138</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 42.

<sup>139</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 36.

<sup>140</sup> *Stellenbosch Farmer's Winery v Distillers Corporation Ltd and Another* 1962(1) SA 485 (A) 472A.

<sup>141</sup> See *Francis George Hill Family Trust v SA Reserve Bank* 1992 2 All SA 137 (A); 1992 3 SA 91 (A) 97 at 147.

<sup>142</sup> See *Francis George Hill Family Trust v SA Reserve Bank* 1992 2 All SA 137 (A); 1992 3 SA 91 (A) 97 at 147.



is capable of acquiring property in its own name and receiving profits which accrues to the company itself. The effect of this attribute is that it undoubtedly respects, recognises and upholds the division of a company and its members.

### **3.3 A company as a distinct legal person**

Once a corporation becomes duly registered it is recognised as a distinct legal person, which is a separate legal entity either individually or in terms of a body corporate.<sup>143</sup> In *Gas Lighting Improvements Co Ltd v Inland Revenue Commissioner*<sup>144</sup> Lord Sumner in emphasizing the company's separate existence said:

“Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial, the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or capital of the shareholders”.

This is a clear illustration that the property and affairs of the company are to be kept distinct with no overlap between the company and its shareholders. It is therefore submitted that this asserts the notion that a company, as provided by law, is a separate legal person and as such anything acquired by a company, belongs to the company and should not be muddled as belonging to the shareholders. In terms of the word ‘person’ it is used in the context to describe a human being, and in the legal sense any entity capable of acquiring rights and duties shall be considered a ‘person’.<sup>145</sup> However, a juristic person such as a company is not defined in the 2008 Act, but despite there being no definition, it is advanced that a company is clearly a juristic person in accordance with the ordinary meaning of the word.<sup>146</sup>

The concept of a company being a separate or distinct legal person is important as it determines to what extent a company is treated as a natural person with the attributes and rights of a natural person being almost the same for a company. That being said, being a fiction of law makes it impossible for a company to engage in certain activities or to be endowed with all the rights given to a natural person.<sup>147</sup> One of the first evident differences between a natural and a juristic person, is that a juristic person being a legal conception cannot be physically present

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<sup>143</sup> P Delpont, Q Vorster *Henochsberg on the Companies Act 71 of 1973* (2011) 121.

<sup>144</sup> See *Gas Lighting Improvements Co Ltd v Inland Revenue Commissioner* 1923 AC 723 (HL) 740.

<sup>145</sup> J Gibson et al *South African Mercantile and Company Law* 8ed (2003) 259. See also *Nathan's Estate v Commissioner for Inland Revenue* 1948 (3) SA 866 (N) 882.

<sup>146</sup> P Delpont, Q Vorster *Henochsberg on the Companies Act 71 of 1973* (2011) 83.

<sup>147</sup> P Delpont, Q Vorster *Henochsberg on the Companies Act 71 of 1973* (2011) 83.

anywhere.<sup>148</sup> Another distinction is that a juristic person cannot be appointed as a guardian of a minor as the relationship between the minor and guardian is a personal one requiring personal contact and a human relationship.<sup>149</sup> On the more advantageous side a juristic person shares many similarities to a natural person regarding the rights that it possesses, namely; the right to privacy and the right to identity and if these rights are unlawfully infringed the court will protect against it.<sup>150</sup> Further, the company may sue for defamation that injures its reputation,<sup>151</sup> claim damages for actual loss as a result of defamation,<sup>152</sup> has the right to equality in terms of s9(1) of the Constitution<sup>153</sup> and should not be treated differently compared to a natural person with the result that a company can be discriminated against on the basis of race.<sup>154</sup> Section 8(4) of the Constitution therefore states that a juristic person is entitled to the same rights endowed on a natural person to the extent that it can exercised by such juristic person.<sup>155</sup> Section 8(4) of the Constitution states that:

“A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person”.

A company being recognised as a person in the eyes of the law attracts many valuable attributes and rights that essentially serves as a form of protection towards the company, preventing outsiders from abusing and infringing the rights endowed on a company. Although there is a limitation regarding the rights that a company can exercise or the activities that a company is permitted to engage in, in my view these limitations are justified as practically, a company cannot carry out certain functions such as those requiring physical participation, for example having a human relationship as described above.<sup>156</sup>

### **3.4 The concept of limited liability**

To understand the purpose and function of limited liability, it is important to first take cognisance of the rationale underlying the concept of limited liability. The rationale being that

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<sup>148</sup> See *Madrassa Anjuman Islamia v Johannesburg Municipal Council* 1919 AD 439; 449.

<sup>149</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 31. See *Ex Parte Donaldson* 1947 (3) SA 170 (T) 173.

<sup>150</sup> See *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) 461-463.

<sup>151</sup> See *Dhlomo NO v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A) 948-953.

<sup>152</sup> See *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) 560.

<sup>153</sup> The Constitution of the Republic of South Africa.

<sup>154</sup> See *Manang & Associates (Pty) Ltd v City of Cape Town* 2009 (1) SA 644 (EqC).

<sup>155</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 32.

<sup>156</sup> See *Ex Parte Donaldson* 1947 (3) SA 170 (T) 173.

limited liability is to encourage the economic expansion and access to capital and investment, without excluding less affluent investors from participating in the business market as was previously the case.<sup>157</sup> The vital question to be asked regarding a shareholder's contribution is, to what extent will a shareholder suffer a loss or incur a liability should the company go insolvent? As such one of the benefits that a company provides shareholders with, is the protection of limited liability.<sup>158</sup> This protection given to shareholder and directors is confirmed in legislation in terms s19(2)<sup>159</sup> and provides the following:

“A person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise”.

This essentially means that the liability of shareholders for the company's debts will be limited to the amount that they have paid or agreed to pay the company for its shares, and this amounts to their contribution.<sup>160</sup> Therefore, limited liability is now available to all members of a company regardless of their participation in management to the extent that the court can in certain instances lift the corporate veil.<sup>161</sup> So, should the company go insolvent, being the worst-case scenario, the loss that a shareholder will have to bare will be the entire value of their contribution or investment.<sup>162</sup> What will be protected during this process is a shareholder's personal assets such as their home, pension funds and domestic goods.<sup>163</sup> If there is a residual that remains after the payment of creditors, shareholders will stand to benefit from such residual.<sup>164</sup>

The loss that one has to succumb to or the liability they will incur in any business venture is always a fundamental consideration and ultimately a key factor, when deciding whether to make an investment in return for shares in a company. The protection of limited liability serves to create a safeguard to the extent of loss or liability. This in my opinion ensures that investors

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<sup>157</sup> E Fox 'Piercing the Veil of Limited Liability Companies' (1994) 62 *George Washington Law Review* 1154.

<sup>158</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 193.

<sup>159</sup> Act 71 of 2008.

<sup>160</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 193. See also W Kluwer *The Limited Liability Handbook* (2012) at 14 where it was recognised that the risk of loss is limited to the amount of capital invested in the business with the effect of protecting personal assets of shareholder, which will not be used to satisfy debts and obligations.

<sup>161</sup> E Fox 'Piercing the Veil of Limited Liability Companies' (1994) 62 *George Washington Law Review* 1148.

<sup>162</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 193. See also W Kluwer *The Limited Liability Handbook* (2012) at 14 where it was noted that there is an exception to this general rule, which allows the court to lift the corporate veil if a member disregards separate legal personality of a company to commit wrongs and injustices against the company.

<sup>163</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 193.

<sup>164</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 194.

are not easily deterred when investing their money in a specific company. Moreover, limited liability is now available to all investors and not just affluent investors<sup>165</sup> which may entice more people to invest their monies given the lower risk attached to them losing their personal assets.

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<sup>165</sup> E Fox 'Piercing the Veil of Limited Liability Companies' (1994) 62 *George Washington Law Review* 1154.

## CHAPTER 4

### LIFTING THE CORPORATE VEIL

#### 4.1 The concept of lifting of the corporate veil

The term ‘lifting the veil’ has often been described as a metaphor,<sup>166</sup> and has been derived from the usage in the United States.<sup>167</sup> There exist many different types of veil piercing; namely, legal veil piercing where a statute requires that the liability of the company to be imposed on shareholders or directors,<sup>168</sup> judicial veil piercing where the courts find that a dominating person behind the company is liable for company debts with no mandate provided by statute,<sup>169</sup> voluntary veil piercing where a third party agrees to be liable for the debts of the company and reverse piercing involves a situation whereby the court orders a third party to return an asset to the company against which a claim is made.<sup>170</sup>

The focus in this chapter will therefore mainly be directed at, but not restricted to, the former two types. According to Blackman, piercing the veil often takes two forms or has two results, first, where the court disregards the company and treats the members as if they have been acting in partnership with the consequence that they will be liable for the debts and liabilities incurred by the company, which is noted as a common consequence and second, where liabilities incurred in a shareholder’s personal capacity is treated as if it were incurred by the company.<sup>171</sup>

It is acknowledged that the use of metaphors to describe a set of legal procedures is uncommon, inaccurate and carries with it certain dangers.<sup>172</sup> Cassim supports this view by stating that avoiding the use of metaphors can create certainty and prevent confusion.<sup>173</sup> The meaning of

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<sup>166</sup> A Dbe ‘Piercing the Corporate Veil-Old Metaphor, Modern Practice?’ (2017) 3(1) *Journal of Corporate and Commercial Law and Practice* 1 where it was pointed out that lifting the corporate veil is indeed a metaphor. See also *Commissioner of Land Tax v Theosophical foundation (Pty) Ltd* (1966) 67 SR (NSW) 70 where the court described the phrase ‘lifting the corporate veil’ as an esoteric label. Notwithstanding that the corporation itself has often been described by words such as a mere fraud, agent, bubble, a name, an artificial thing, a legal abstraction, a sham or bogus, a cloak, a creature, and a screen, see M Pickering ‘The Company as a Separate Legal Entity’ (1968) 31(5) *Modern Law Review* 481 where such descriptions were displayed.

<sup>167</sup> M Pickering ‘The Company as a Separate Legal Entity’ (1968) 31(5) *Modern Law Review* Pickering 482.

<sup>168</sup> See section 20(9) of Act 71 of 2008.

<sup>169</sup> Typically, the common law approach.

<sup>170</sup> A Dbe ‘Piercing the Corporate Veil-Old Metaphor, Modern Practice?’ (2017) 3(1) *Journal of Corporate and Commercial Law and Practice* 2. See also as an example *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 which involved a case of reverse veil piercing.

<sup>171</sup> CF Blackman et al *Commentary on the Companies Act Vol 1* (2002, with loose-leaf updates Revision Service 1) at 4-133.

<sup>172</sup> A Dbe ‘Piercing the Corporate Veil-Old Metaphor, Modern Practice?’ (2017) 3(1) *Journal of Corporate and Commercial Law and Practice* 2.

<sup>173</sup> R Cassim ‘Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SAMJ* 331.

this phrase ‘lifting the veil’ and more accurately this procedure, can be said to describe a situation where a court disregards the separate legal personality of a company and attaches liability to where it truly lies, notwithstanding that the same person is not usually liable regarding such wrong a company has committed but will be liable in respect of that wrong.<sup>174</sup> Therefore, in terms of the doctrine of piercing the corporate veil it is premised on the notion that strict adherence to shareholder limited liability, would result in unjust results, with one such result being that the court disregards limited liability and imposes liability for corporate debts on the shareholders.<sup>175</sup> In *Cape Pacific*,<sup>176</sup> the court defined the term ‘lifting the corporate veil’ to mean a scenario of disregarding the distinction between a corporation and the natural persons who govern the activities and attaching liability to the person who has abused or misused the principle of distinct legal personality.<sup>177</sup>

This doctrine can be seen as the exception to the general principle of separate legal personality that will be invoked when this protection is abused. Danckwerts LJ in an attempt to sum up the position of disregarding the corporate veil emphasized:<sup>178</sup>

“...where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance”.

As shown by Hannigan one of the clearest statements of the position was articulated *Adams v Cape Industries Plc (Adams)*<sup>179</sup> where in terms of the device of the corporate structure a person in control attempts to evade limitations imposed on his conduct by the law.<sup>180</sup> This doctrine inevitably was developed to combat the inequities that resulted from

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<sup>174</sup> A Dbe ‘Piercing the Corporate Veil-Old Metaphor, Modern Practice?’ (2017) 3(1) *Journal of Corporate and Commercial Law and Practice* 1.

<sup>175</sup> E Fox ‘Piercing the Veil of Limited Liability Companies’ (1994) 62 *George Washington Law Review* Fox 1154. See *United States v Milwaukee Refrigerator Transit* 142 Fed 247 (1905)247; 255 as emphasized by Fox, where Judge Sanborn laid down the general rule regarding piercing the corporate veil. ‘... If any general rule can be laid down... it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of persons.’

<sup>176</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A).

<sup>177</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 790.

<sup>178</sup> *Merchandise Transport Ltd v British Transport Commission* [1961] 3 All ER 495 at 518, [1962] 2 QB 173 at 206–207.

<sup>179</sup> See *Adams v Cape Industries Plc (Adams)* [1990] BCLC 479.

<sup>180</sup> B Hannigan ‘Wedded to Salomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-Man Company’ (2013) 50 *IJNS* 17.

the legal fiction of limited liability companies.<sup>181</sup> The effect of this principle is to ultimately hold the company's shareholders or directors liable for the debts incurred by the company as a result of such members.<sup>182</sup>

One conclusion that can unambiguously be drawn, is that lifting of the corporate veil is a remedy that entails creating accountability and preventing abuse of the corporate structure, which may be used to conceal wrongs and be abused to gain a personal advantage and benefit from the company.<sup>183</sup> Despite this aim, the doctrine has unfortunately been labelled as one that is blurred in case law.<sup>184</sup>

#### **4.2 The difference between lifting and piercing the corporate veil**

It becomes apparent when dealing with disregarding a company's separate legal personality that many terms are used in an attempt to accurately describe this process;<sup>185</sup> two such terms being 'lifting' and 'piercing' the corporate veil. The question to be asked is whether there is a material difference between the words 'lifting' and 'piercing' the corporate veil or whether these terms are purely synonyms with no real impact on the effect of disregarding corporations' separate legal personality. Thus, can these words be used interchangeably for our purpose without each attaching a distinct and separate definition? The distinction between these two terms were succinctly described by Slaughter LJ who said:<sup>186</sup>

“To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose”.

It may be deduced from this paragraph that 'piercing' the corporate veil has a consequence and result attached to it regarding liabilities of the company being treated as those of the shareholders and directors, whereas 'lifting' the corporate veil is merely an act establishing the distinction between a corporation and those behind it with no real detrimental outcome for the

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<sup>181</sup> E Fox 'Piercing the Veil of Limited Liability Companies' (1994) 62 *George Washington Law Review* 1154.

<sup>182</sup> A Liew 'Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us nowhere' (2014) 5 *King's Student Law Review* 67.

<sup>183</sup> E Fox 'Piercing the Veil of Limited Liability Companies' (1994) 62 *George Washington Law Review* 1154.

<sup>184</sup> I Ramsay, B Noakes 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities Law Journal* 4.

<sup>185</sup> See example in *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 14 (*Amlin*), where the description of 'opening the curtains' is used.

<sup>186</sup> See *Atlas Maritime Co SA v Avalon Maritime Ltd, The Coral Rose (No 1)* [1991] 4 All ER 769 at 779.

shareholders, but merely being a process of identification and distinction of the juristic and natural person.<sup>187</sup> The *Daimler* case is an example of the court lifting the corporate veil to determine the residence of the company shareholders, to establish if the company was an alien or not.<sup>188</sup>

However, as pointed out by Becker, South Africa seems to employ these terms interchangeably<sup>189</sup> to the extent that it has been held to be synonyms.<sup>190</sup> In my view I feel no need to deviate from such reasoning as I see no detrimental difference evident in using both these words to describe the process of disregarding the corporate veil, not in the South African context anyway. The remedy itself is of importance and not the technicality of the words used to describe such remedy. This being said my focus will lean more towards the rationale of the remedy<sup>191</sup>, which as reiterated Hannigan, a wrongdoer cannot derive benefits from dishonest abuse and misuse of the corporate structure for improper purposes.<sup>192</sup> Moreover, establishing the instances when the remedy can be called upon, is more important.

#### **4.3 Instances when the court will lift the corporate veil**

The debate surrounding lifting the corporate veil has often been embedded around the instances under which the court will lift the corporate veil. No suggestion submitted thus far has been viable enough to create certainty revolving this issue. One understanding that was clearly present in terms of common law was that the law was not settled on this matter and that the instances in which a court could pierce the corporate veil involved an enquiry into the facts of each case which was to be regarded as decisive importance.<sup>193</sup> Cassim further recognises that the grounds for lifting the corporate veil have been difficult to state with certainty, owing to the fact that the courts have grappled with the correct approach in their determination of

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<sup>187</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 46. It was stated that lifting the corporate veil does not necessarily mean that the company's separate legal personality is disregarded and that the liabilities of the company are to be treated as those of the shareholders and directors.

<sup>188</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 46. See also *Continental Tyre and Rubber Co. (G.B) Ltd v Daimler Co* [1915] K.B 893 at 916.

<sup>189</sup> See *VTB Capital plc v Nutritek International Corporation* [2013] 2 WLR 398 (SC) at 118(VTB), where it was recognised that most courts to date have been inclined to treat these terms as interchangeable.

<sup>190</sup> R Becker *Disregarding the separate juristic personality of a company: An English case law comparison*, unpublished LLM thesis, University of Pretoria (2014) 15.

<sup>191</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 386 where the court emphasized that what will be looked at when disregarding separate legal personality is if the corporation as a legal fiction was used for purposes inconsistent with the rationale and creation of the maintenance of such entity.

<sup>192</sup> B Hannigan 'Wedded to Salomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-Man Company' (2013) 50 *IJNS* 17.

<sup>193</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific) 1994 (4) SA 790 (A) 790*.



whether to lift the corporate veil or not.<sup>194</sup> In addition, there was no general discretion bestowed on a court to simply lift the corporate veil whenever it was just to do so.<sup>195</sup> The lack of formulation of such instances is said to be a result of a court choosing to rely on accepted categories such as fraud, agency, evasion of legal obligations and abuse of the corporate form.<sup>196</sup>

#### **4.3.1 The common law position regarding lifting the corporate veil**

The common law position pertaining to lifting of the corporate veil, is mainly articulated in case law with many cases advancing different instances as to when a court can lift the corporate veil. In terms of the prerequisites required before the corporate veil will be pierced in common law, there existed two necessary but not sufficient conditions.<sup>197</sup> First, that veil piercing is an exceptional procedure and special or exceptional conditions must exist preceding lifting the corporate veil; and second, the members of the company must possess complete ownership and control of the company as well as control finances, policies and practices of the company that will allow no separate mind, will or existence of its own.<sup>198</sup> A shared reality between the United States, England and South Africa was that there was no single, coherent principle which justified courts to disregard the separate legal personality of a company.<sup>199</sup> It therefore become apparent as seen by Rogers AJA, that there was no common unifying principle which justified the courts disregarding the corporate veil and moreover, no such principled approach could be adduced from the authorities.<sup>200</sup>

Our courts have instead chosen to rely on various unrelated categories to justify their decisions.<sup>201</sup> Domanski in an attempt to describe the position, supported Gower's view, which states that the reason for the absence of instances rests solely on the court's refusal to apply the logic and principle put forward in *Salomon's* decision where it is blatantly opposed to justice,

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<sup>194</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 42.

<sup>195</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific) 1994 (4) SA 790 (A) 791*.

<sup>196</sup> LC Davids 'The Lingering Question: Some Perspectives on Lifting the Corporate Veil' (1994) *TSAR* 155.

<sup>197</sup> WA Joubert 'The Law of South Africa' (2012) 4(1) *LAWSA* 87. See also *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 14 where the court made clear that only special or exceptional circumstances will warrant invoking the remedy of piercing of the veil.

<sup>198</sup> WA Joubert 'The Law of South Africa' (2012) 4(1) *LAWSA* 87.

<sup>199</sup> See also *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 14. See also J Farrar, 'Fraud, Fairness and Piercing the Corporate Veil' (1990) 16 *Canadian Business Law Journal* 474; 478 regarding the position in the Australian Jurisdiction where the court emphasized that the authorities on lifting the corporate veil have been uncoherent and unprincipled.

<sup>200</sup> See *Briggs v James Hardie & Co (Pty) Ltd* (1998) 15 *NSWLR* 549.

<sup>201</sup> H Sher 'Piercing the Corporate Veil' (1996) 4(2) *Juta's Business Law Journal* 51.

convenience or the interests of justice.<sup>202</sup> The approach followed in terms of common law was often coupled with the courts lack of effort to define the precise circumstances under which the corporate veil will be lifted. A clear example is provided by Corbett CJ where he said:<sup>203</sup>

“I do not find it necessary to consider, or attempt to define, the circumstances under which the court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words 'device', 'stratagem' 'cloak' and 'sham' have been used...”

The above paragraph is problematic to the extent that the court indirectly suggests instances as to when it will be likely that the corporate veil will be lifted by mentioning the words ‘would generally have to include’ which proposes that certain acts have to be present before the remedy can be relied upon. It can hardly be denied that the court was prone to lifting the corporate veil when the presence of fraud or other improper conduct was detected, which ultimately draws the conclusion that certain guidelines can possibly be extracted from case law. The first step is to set out cases commonly referred to when lifting the corporate veil in terms of common law, to establish such said instances as to when the corporate veil will be disregarded.

Our courts have avoided a categorising approach.<sup>204</sup> As mentioned by Cassim this approach is plausible as categorisation would lead to uncertainties in our law, moreover justice or equity may require disregarding the separate legal personality and due to the particular instance not conforming to a certain category, the court may refuse to do so which could lead to undesirable results.<sup>205</sup> The danger of categorising was illustrated by Domanski who stated:

“...a situation may arise in which considerations of fairness or public policy would call for a decision to pierce the veil, but the court on the facts, is unable to allocate the case to an established pigeonhole”.<sup>206</sup>

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<sup>202</sup> A Domanski ‘Piercing the Corporate Veil- A New Direction’ (1986) 103 *SALJ* 224.

<sup>203</sup> See *Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994(1) S A 550(A) 566C-F. (*Shipping corporation*)

<sup>204</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 43. As pointed out in *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 802.

<sup>205</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 43.

<sup>206</sup> A Domanski ‘Piercing the Corporate Veil- A New Direction’ (1986) 103 *SALJ* 225.

In the *Shipping Corporation* case<sup>207</sup> Corbett said that it is not necessary to define the instances under which the court will pierce the corporate veil, generally there would need to include an element of fraud or improper conduct in the establishment or use of the company or the conduct of its affairs.<sup>208</sup> This became quite a popular response by the courts as asserted in *Cape Pacific* that it is neither essential nor advisable to formulate general principles as to when the corporate veil will be lifted, but rather to apply the appropriate legal principles to the facts of the present matter.<sup>209</sup> The courts accordingly showed content in the lack of consistency in the common law approach.

As pointed out in the case of *Adams*<sup>210</sup> the courts will pierce the veil in instances when corporate personality is used as a means or a device to conceal wrong doing or to avoid obligations. In *Gilford Motor Co Ltd v Horne*<sup>211</sup> the defendant attempted to evade his contractual obligations by forming a company to compete with his former employer to gain its customers and the court found that the company was a façade and sham which operated to engage in business that it knew was not prohibited by the plaintiffs.<sup>212</sup>

Further in the case of *Hulse*<sup>213</sup> the court said that one needs to look at the facts of each case, policy and judicial judgement; moreover, a prerequisite to piercing the corporate veil would need to entail some abuse or misuse between the corporate identity and those who control it which results in an unfair advantage being afforded to the latter.<sup>214</sup> This case also acknowledges that some prerequisite should exist, which correlates with cases addressed above that certain acts constitute abuse of legal personality.

In addition, the *Cape Pacific*<sup>215</sup> case held that instances of fraud, dishonesty and improper conduct could be grounds for piercing the corporate veil.<sup>216</sup> In the case of *Amlin*,<sup>217</sup> the court

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<sup>207</sup> See *Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994(1) S A 550(A) 566C-F (*Shipping corporation*).

<sup>208</sup> See *Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994(1) S A 550(A) at 566 (*Shipping corporation*).

<sup>209</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 803.

<sup>210</sup> See *Adams v Cape Industries Plc (Adams)* [1990] BCLC 479.

<sup>211</sup> See *Gilford Motor Co Ltd v Horne Gilford Motor* [1933] Ch. 935 (C.A).

<sup>212</sup> See *Gilford Motor Co Ltd v Horne Gilford Motor* [1933] Ch. 935 (C.A) 965.

<sup>213</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA).

<sup>214</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) 219.

<sup>215</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A).

<sup>216</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 804.

<sup>217</sup> See *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 14.

echoed the attitude in preceding cases by acknowledging the general criteria that is relied upon in determining whether to lift the corporate veil or not is the existence fraud, agency, evasion, abuse of corporate form and where the company is a mere façade concealing the real state of affairs.<sup>218</sup>

A general observation from these cases is that an element of fraud,<sup>219</sup> dishonesty or improper conduct could be a determining factor as to when a court would disregard the corporate personality of a company in terms of common law.<sup>220</sup> Drawing from this determination, a pattern can be formed which could inform when a court will be inclined to lift the corporate veil. What then follows is that if closely examined a cohesive and comprehensive yet not restrictive set of guidelines can be formulated to make the process of implementing such remedy, more uniform.

#### **4.3.2 The statutory position regarding lifting the corporate veil in terms of s20 (9) of the Companies Act 71 of 2008**

The 2008 Act has brought with it many long-awaited changes, one such being the statutory remedy of lifting the corporate veil which is laid down in s20 (9). The current approach to this remedy is that it should not ‘be regarded as exceptional, drastic and one of last resort’.<sup>221</sup> This interpretation is contrary to the common law approach.<sup>222</sup> To understand this change requires dissecting s20(9), which provides the following:

“If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may –

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

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<sup>218</sup> See *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 16.

<sup>219</sup> See *Lategan v Boyes* 1980 (4) SA 191 (T) (*Lategan*) where the judge said that our courts will overlook the corporate veil where fraudulent use is made of the fiction of legal personality.

<sup>220</sup> See *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 16 where the court said that fraud, improper conduct and dishonesty has come to be accepted as grounds for piercing the corporate veil.

<sup>221</sup> See *Ex Parte Gore and Others NNO 2013 (3) SA 382 (WCC) 399*.

<sup>222</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) 217.

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)”.<sup>223</sup>

The 2008 Act can be contrasted to the 1973 Act,<sup>224</sup> where the latter did not provide the courts with direct discretion to lift the corporate veil,<sup>225</sup> clearly showing development on the part of the legislature. Section 20(9) has definitely reflected progress and although it is to be welcomed, it has not been without its challenges.<sup>226</sup> What is required in terms of s20(9) is that there must be an ‘...unconscionable abuse of the juristic personality of the company as a separate entity...’ for this remedy to find application. No guidance has been given as to the facts and circumstances that would constitute ‘unconscionable abuse’.<sup>227</sup> A commonly used method is to compare a section that comes very close and is very similar to but is not the same as s20(9),<sup>228</sup> which is s65 of the Close Corporations Act 69 of 1984( herein after the ‘1984 Act’)<sup>229</sup> The salient and comparable term to be analysed in s65 is ‘gross abuse’ which could aid in ascribing a meaning to the words ‘unconscionable abuse’. A case fundamental to this determination is the case of *Ex Parte Gore*<sup>230</sup> which was the first case to deal with s20(9) and where the court established that ‘unconscionable abuse’ is something less extreme than ‘gross abuse’ owing to the express availability of the remedy when the facts of the case justify it.<sup>231</sup>

An appropriate meaning can be attached to ‘unconscionable abuse’ by looking at the difference and similarities between ‘unconscionable abuse’ and ‘gross abuse’. A case dealing with the

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<sup>223</sup> Act 71 of 2008.

<sup>224</sup> Act 61 of 1973.

<sup>225</sup> PT Mashiri *A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law, with Special Reference to the Position in Groups of Companies*, unpublished LLM thesis, University of KwaZulu-Natal (2016) 20.

<sup>226</sup> R Cassim ‘Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SAMJ* 307. An example is the failure to define the term ‘unconscionable abuse’ which has proven problematic.

<sup>227</sup> R Cassim ‘Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SAMJ* 307.

<sup>228</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 398.

<sup>229</sup> Which provides the following: ‘Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a *gross abuse* of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration’.

<sup>230</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 399.

<sup>231</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 399. See R Cassim ‘Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SAMJ* 318, where it was recognised that a lower standard of abuse is required when compared to section 20(9), a possible explanation would be to increase accountability and reduce abuse by company controllers.

phrase ‘gross abuse’ is the case of *Ebrahim v Airport Cold Storage Pty Ltd (Airport Cold Storage)*<sup>232</sup> where s65 of the 1984 Act was used to find the defendants personally liable as a result of the use and formation of the close corporation amounting to a ‘gross abuse’ of the separate legal personality of the close corporation, for which the defendants had scant regard.<sup>233</sup> The court stated that special circumstances had to exist before the court could disregard the corporate veil.<sup>234</sup>

A similarity between the two terms is that ‘gross abuse’ like ‘unconscionable abuse’ has no definition, but what the court in the present case went on to explain is that the principles and categories developed in relation to piercing the corporate veil in the context of company law also serves as useful guidelines in this context.<sup>235</sup> Consequently in terms of the 1984 Act, there has been no attempt to indicate guidelines that would aid in assisting the courts as to what would constitute an abuse of the juristic person of the corporation, the intention being that the court is free to determine on the facts of each case whether such abuse is present or not.<sup>236</sup> It is however suggested that the ‘gross abuse’ which is relevant relates to the rights, obligations and liabilities whether it is that of the corporation, members or others.<sup>237</sup>

The court in *Airport Cold Storage* went further to state that what would constitute ‘gross abuse’ included; if the close corporation or company was a mere façade concealing the true facts, the controlling shareholders do not treat the company as a separate entity but instead treat it as their ‘alter-ego’ for their own personal and corporate interests; moreover fraud could also qualify as a special instance but is not to be regarded as essential.<sup>238</sup> It is also important to take cognisance of the fact that the court emphasized that it will not lightly disregard a corporations separate

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<sup>232</sup> See *Ebrahim v Airport Cold Storage Pty Ltd (Airport Cold Storage)* (485/2007) [2008] ZASCA 113 (25 September 2008).

<sup>233</sup> See *Ebrahim v Airport Cold Storage Pty Ltd (Airport Cold Storage)* (485/2007) [2008] ZASCA 113 (25 September 2008) at par 2; 38.

<sup>234</sup> See *Ebrahim v Airport Cold Storage Pty Ltd (Airport Cold Storage)* (485/2007) [2008] ZASCA 113 (25 September 2008) at par 24-25, where the court stated that the remedy created by the Close Corporations Act is equivalent to remedy of lifting of the corporate veil canvassed in the common law, which in my view explains why the remedy in terms of the Close Corporations Act is exceptional which is synonymous with the common law position that the remedy is to be regarded as ‘drastic’. See *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) at 18.

<sup>235</sup> See *Ebrahim v Airport Cold Storage Pty Ltd (Airport Cold Storage)* (485/2007) [2008] ZASCA 113 (25 September 2008) at par 24.

<sup>236</sup> PM Meskin *Henochsberg on the Close Corporations c 69 of 1984 and Commentary* (2017) at par 65.

<sup>237</sup> PM Meskin *Henochsberg on the Close Corporations c 69 of 1984 and Commentary* (2017) at par 65

<sup>238</sup> See *Ebrahim v Airport Cold Storage Pty Ltd (Airport Cold Storage)* (485/2007) [2008] ZASCA 113 (25 September 2008) at par 24.

legal personality, nor will it readily find such recklessness.<sup>239</sup> It may therefore be submitted that this description supports the notion that ‘gross abuse’ entails a higher standard of abuse as compared to ‘unconscionable abuse’ which the court does not easily find and further, the presence of similarity that almost mirrors the common law approach.<sup>240</sup>

In *Haygro Catering BK v Van der Merwe en andere*<sup>241</sup> members of a close corporation were held personally liable due to the failure of the corporation to state its name on the premises or any written orders, further there was no sign that the business was a close corporation because no abbreviation stating ‘CC’ appeared.<sup>242</sup> Van Niekerk held that a wide discretion was given to the court in this provision and that a just interpretation of s65 accords with the protection the Act affords to the public.<sup>243</sup> For these reasons, the approach adopted in terms of the 1984 Act, makes it apparent that the remedy set out in s 20(9) warrants more lenient application, making ‘unconscionable abuse’ a lower standard of abuse needed to invoke the said remedy.

In *Ex Parte Gore*<sup>244</sup> the court went further to emphasise that ‘unconscionable abuse’ suggests conduct in relation to the formation and use of companies which is wide enough to cover all descriptive terms such as ‘sham’, ‘device’, ‘stratagem’ and the like employed in earlier cases and much more,<sup>245</sup> which closely correlates with the common law instances; and further whenever the illegitimate use of the concept of separate legal personality is used which adversely affects a third party in a way that it should reasonably not be tolerated.<sup>246</sup> However, the involvement of fraud or other improper conduct has generally been present in cases which the court will pierce the corporate veil, notwithstanding that there is an established stance against categorisation.<sup>247</sup>

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<sup>239</sup> See *Ebrahim v Airport Cold Storage Pty Ltd (Airport Cold Storage)* (485/2007) [2008] ZASCA 113 (25 September 2008) at par 2.

<sup>240</sup> See *Ebrahim v Airport Cold Storage Pty Ltd (Airport Cold Storage)* (485/2007) [2008] ZASCA 113 (25 September 2008) at par 24.

<sup>241</sup> See *Haygro Catering BK v Van der Merwe en andere* (CPD 25 October 1993 (case 7485/92)).

<sup>242</sup> M Bodley ‘Abuse of Juristic Personality of a Close Corporation’ (1995)112 *SALJ* 9-11.

<sup>243</sup> M Bodley ‘Abuse of Juristic Personality of a Close Corporation’ (1995)112 *SALJ* 11.

<sup>244</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC).

<sup>245</sup> See *Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994(1) S A550 (A) at 566C-F. (*Shipping corporation*) as per Corbett CJ where such descriptive terms were mentioned.

<sup>246</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 399.

<sup>247</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 396; 399.

Another category to be adduced from the *Ex Parte Gore* case is that of ‘group enterprises’ being a factor that the court will consider when deciding to pierce the corporate veil.<sup>248</sup> The illustration was clearly provided by Ramsay and Noakes who stated that:

“... [there are] circumstances [where] a corporate group is operating in such a manner as to make each individual entity indistinguishable, and therefore it is proper to pierce the corporate veil to treat the parent company as liable for the acts of the subsidiary”.<sup>249</sup>

What creates uneasiness is the lack of meaning attached to the words ‘unconscionable abuse’ and the absence of guidelines or instances as to when a court will be permitted to lift the corporate veil. What the determination of ‘unconscionable abuse’ indicates is that judges need to make a value judgement.<sup>250</sup> As seen above there are a host of instances that have been the product of case law, which is to be depended upon when making a determination as to when the corporate veil will be disregarded.

One would be led to think that s 20(9) would have created certainty and reflected more guidance on when and how the remedy should be applied and implemented. However, the courts still, notwithstanding the statutory inclusion of the remedy, have to scramble through case law in an attempt to source out circumstances under which to lift the corporate veil. This is a view expressly supported by the court stating that s 20(9) is supplemental, rather than substitutive of common law.<sup>251</sup>

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<sup>248</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 394.

<sup>249</sup> I Ramsay, B Noakes ‘Piercing the Corporate Veil in Australia’ (2001) 19 *Company and Securities Law Journal* at 14 as emphasized in *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 395.

<sup>250</sup> A Dbe ‘Piercing the Corporate Veil-Old Metaphor, Modern Practice?’ (2017) 3(1) *Journal of Corporate and Commercial Law and Practice* 3.

<sup>251</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 399.



## CHAPTER 5

### DEVELOPMENTS IN CASE LAW

#### 5.1 The common law

What was often noticeable in terms of the common law was that the corporate veil was to be respected and not readily interfered with, consequently, general discretion did not exist, and exceptional factual circumstances needed to be present.<sup>252</sup> Common law exceptions to the principle of separate legal personality are described as been formulated on grounds of general reasons,<sup>253</sup> with the primary aim of achieving justice in cases before them rather than developing a coherent doctrine as to when legal personality could be disregarded.<sup>254</sup>

In the case of *Hulse*<sup>255</sup> the court took a strict approach. It involved a situation whereby the third appellant was a company in which the two appellants were shareholders.<sup>256</sup> The respondent ceded his claim in the insolvent estate and was to be paid a sum of money by the company. When the money was not paid it was alleged that this was a fraudulent act of collusion on the part of the appellants, to receive a breathing period during insolvency and the respondent sought to hold the appellants personally liable. The court remarked that it should not delve into the merits of the case or examine probabilities of lifting the corporate veil as it could have serious consequences for the owner and thus this remedy is to be applied with caution.<sup>257</sup> Such consequences, include, looking at the controllers interests in the company to meet personal obligations or imposing personal liability.<sup>258</sup> The court affirmed that separate legal personality is to be recognised and adhered to except in the most compelling circumstances.<sup>259</sup> *Hulse* showed support for *Cape Pacific* by recognising that there is no general discretion to disregard the separate legal personality on the basis that it is just and convenient to do so.<sup>260</sup>

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<sup>252</sup> H Hahlo *South African Company Law through the Cases* 6ed (1999) 34.

<sup>253</sup> The examples of these are fraud, a company being a sham or façade, a company being an agent of its shareholders or the interest of justice requires this result. See also P Davis *Principles of Modern Company Law* 8ed (2008) 202.

<sup>254</sup> A Liew 'Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us nowhere' (2014) 5 *King's Student Law Review* 67.

<sup>255</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA).

<sup>256</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) 212.

<sup>257</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) 212.

<sup>258</sup> B Smith 'Statutory Discretion or Common Law Power? Some Reflections on Veil Piercing, and the Consideration of (the value of) Trust Assets in Dividing Matrimonial Property at Divorce-Part one' (2016) 41(2) *Journal for Juridical Science* 72-73.

<sup>259</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) 219.

<sup>260</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) 219.

The court found that the respondent was not unfairly prejudiced by the distinction of the company and those who control it.<sup>261</sup> There was no abuse or advantage, and the respondent merely sought to ignore the party with whom he contracted to enforce his rights against a more convenient defendant.<sup>262</sup>

The case of *Amlin*,<sup>263</sup> echoed the strict application of corporate personality displayed in *Hulse*. The issue, was whether an amount paid by the appellant to the respondent was a loan or whether it sufficed as a discharge of debt owed to the latter.<sup>264</sup> The appellant argued that the holding company owed this money and that they were both distinct legal personalities, however the contrary was found as the same person was found to be in control of both companies.<sup>265</sup> *Amlin* looked at the drastic nature of the remedy. The court said this remedy is to be used sparingly and as one of last resort, not to be used as an alternative remedy which gives the applicant an election, accordingly there is no general discretion conferred on the court to invoke this remedy.<sup>266</sup> By the court expressly saying the ‘guiding principle’ is that this remedy is to be used in exceptional circumstances,<sup>267</sup> is useful as it can be adduced that the common law was not all that undirected and unprincipled in its application of the remedy. But just what constituted those exceptional circumstances, stumps most academics and scholars.

The case of *Adams*<sup>268</sup> involved the defendants, two United Kingdom (UK) companies owned by South African companies, which mined asbestos and a United States (US) company through which the asbestos was marketed in the US.<sup>269</sup> The plaintiffs brought an action against the defendants for damages due to injury caused by the asbestos. It was found that the subsidiary and independent company was a façade to enable the defendants to continue selling asbestos in the US.<sup>270</sup> The court however found, that there was nothing illegal in the defendants using their corporate structure to limit future liability to third parties, which would fall on another member of the group instead on the defendants and as a result did not lift the corporate veil. The court recognised the principle laid down in *Salomon*, which our courts will not easily

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<sup>261</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) 219.

<sup>262</sup> See *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) 219.

<sup>263</sup> See *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C).

<sup>264</sup> See *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 1.

<sup>265</sup> See *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 1.

<sup>266</sup> See *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 16.

<sup>267</sup> See *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 16.

<sup>268</sup> See *Adams v Cape Industries Plc (Adams)* [1990] BCLC 479.

<sup>269</sup> See *Adams v Cape Industries Plc (Adams)* [1990] BCLC 479 at 930.

<sup>270</sup> See *Adams v Cape Industries Plc (Adams)* [1990] BCLC 479 at 930.

depart from, simply because justice requires it.<sup>271</sup> As put forward in this case, our law acknowledges the creation of subsidiary companies for better or for worse.<sup>272</sup> This decision was however criticised by Lord Keith, who with reference to the case of *DHN Food Distributors Ltd v Tower Hamlets London Borough*<sup>273</sup> emphasized his doubts as to whether the appeal court had properly applied the exception to the principle of lifting the corporate veil which in appropriate circumstances, such as the presence of special circumstances which indicate a mere façade concealing true facts.<sup>274</sup> Therefore, exceptional circumstances were present and the court failed to take steps to implement the remedy.

In *Botha v Van Niekerk(Botha)*<sup>275</sup> involved a contract of sale which described Van Niekerk or nominee as the purchaser.<sup>276</sup> Accordingly, upon failure to furnish the guarantee it was argued that the second respondent replaced the first respondent and a contract was formed.<sup>277</sup> It was argued that the second respondent was the first respondent in another guise and the court ought to lift the corporate veil, but the application was dismissed.<sup>278</sup> *Botha* formulated the unconscionable injustice test.<sup>279</sup> This test entails a two stage process as pointed out by Becker, the first being to determine if the conduct of those using the company's juristic personality was improper or not; and the second being if the conduct was improper, did the prejudiced party suffer an unconscionable injustice.<sup>280</sup> This test was not favoured in *Cape Pacific* and was described as too rigid to which the court felt that a more flexible approach is needed, one that allows the facts of the case to be a determining factor.<sup>281</sup> The courts failure to give guidelines as to what would constitute 'improper conduct' was certainly a shortcoming, as the court could have created a multi- factor approach to determine 'improper conduct'.<sup>282</sup> Similarly, in *Lategan*<sup>283</sup> the court introduced a prerequisite by stating that courts would ignore the corporate

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<sup>271</sup> See *Adams v Cape Industries Plc (Adams)* [1990] BCLC 479 at 1019.

<sup>272</sup> See *Adams v Cape Industries Plc (Adams)* [1990] BCLC 479 at 1019.

<sup>273</sup> *DHN Food Distributors Ltd v Tower Hamlets London Borough* [1976] 3 ALL ER 462, [1976], WLR 852, CA 161.

<sup>274</sup> See *Adams v Cape Industries Plc (Adams)* [1990] BCLC 479 at 1022.

<sup>275</sup> See *Botha v Van Niekerk (Botha)* 1983 (3) SA 513 (W).

<sup>276</sup> H Hahlo *South African Company Law through the Cases* 6ed (1999) 26.

<sup>277</sup> H Hahlo *South African Company Law through the Cases* 6ed (1999) 26.

<sup>278</sup> H Hahlo *South African Company Law through the Cases* 6ed (1999) 26.

<sup>279</sup> See *Botha v Van Niekerk (Botha)* 1983 (3) SA 513 (W) 525F.

<sup>280</sup> R Becker *Disregarding the separate juristic personality of a company: An English case law comparison*, unpublished LLM thesis, University of Pretoria (2014) 33.

<sup>281</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 790.

<sup>282</sup> LC Davids 'The Lingering Question: Some Perspectives on Lifting the Corporate Veil' (1994) TSAR 157.

See also *Pioneer Laundry v Minister of National Revenue* 1939 4 All ER 254 (PC) 259 where this term was also used.

<sup>283</sup> See *Lategan v Boyes* 1980 (4) SA 191 (T) (*Lategan*).

veil where fraudulent use is made of corporate personality.<sup>284</sup> This reasoning was adopted following the approach of the Canadian courts, where fraud had to be present before the corporate veil could be lifted; the court accordingly imported that rationale into our law, save where statute provides otherwise.<sup>285</sup> It has however been submitted that the tests in *Lategan* and *Botha* are obiter and South African courts are at liberty to consider alternative approaches when lifting the corporate veil.<sup>286</sup>

In *Cape Pacific*, the third respondent, Lubner conducted his business through a consortium of companies, collectively known as ‘the Lubner group’. Various companies were owned by ‘the children’s trusts’ of which Lubner was a trustee.<sup>287</sup> The first respondent who was Lubner Controlling Investments (LCI) was at all material times owned by children’s trust through Wencor and Gerald Lubner Family Trust, the latter owned all the shares in LCI.<sup>288</sup> Lubner was never a shareholder or director of either of these companies, Swersky was at all material times the sole director.<sup>289</sup> In 1979, Lubner owned all issued shares of GLI. In 1985 the Gerald Lubner Trust acquired a minority shareholding in GLI.<sup>290</sup> LCI was also the owner of certain Findon shares which allowed Lubner to occupy a flat in Cape Town. Subsequently, in 1976 Lubner became a resident overseas. In 1979 Swersky with the assistance of an estate agent sold the Findon shares to the appellant. Lubner with the knowledge of the appellants’ rights and in fraud of those rights, did not transfer the shares to the appellant to enable him to continue occupying the flat in Cape Town.<sup>291</sup> The court with regard to all the relevant circumstances, to disregard the separate corporate personalities of LCI and GLI in order to give effect to the action for delivery of the Findon shares to the appellant i.e. lift the corporate veil. Ownership was found to be of convenience, as LCI was never debited with expenses for the flat, thereby showing no substance.<sup>292</sup> The court accordingly found that; Lubner exercised complete control of LCI and regarded the Cape Town flat as one of his homes,<sup>293</sup> Lubner exercised effective control over the affairs of GLI at the relevant time by exercising complete voting control he had in relation

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<sup>284</sup> See *Lategan v Boyes* 1980 (4) SA 191 (T) (*Lategan*) 648.

<sup>285</sup> See *Lategan v Boyes* 1980 (4) SA 191 (T) (*Lategan*) 648. See also *Clarkson Co Ltd v Zhelka* (1967) 64 DLR (2a) 457 for the Canadian courts view.

<sup>286</sup> See *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 16.

<sup>287</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 795.

<sup>288</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 796.

<sup>289</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 796-797.

<sup>290</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 797.

<sup>291</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 797.

<sup>292</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 799.

<sup>293</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 799.

to GLI and all matters relating to Findon were in fact transferred to Lubner.<sup>294</sup> Therefore, the transfer of shares equated to the evasion of obligations i.e. the appellants claim/ rights as put forward as more appropriate in this case.<sup>295</sup>

What is significant in *Cape Pacific* is the law set out as reflecting the current position of common law. Our starting point in the present case refers to the courts approval to lift the corporate veil. The court recognises the sanctity of the principle of separate legal personality, but of equal importance is that in certain circumstances the court will be justified to disregard the separate legal personality of a company.<sup>296</sup> This view is supported by Cilliers who remarks that '[i]n certain instances the courts are prepared to peer through the veil'.<sup>297</sup> The court however contradicts itself by saying that the law is not resolved regarding the circumstances that would permit courts to lift the corporate veil.<sup>298</sup> What the court does hold firm is that there is no general discretion to disregard the separate legal personality whenever it is just to do so.<sup>299</sup> Separate legal personality is a 'salutary principle', not to be lightly disregarded, and requires the court to give effect to it so as to avoid undermining policy and principles that underlie it.<sup>300</sup> The court emphasized that the facts of the case may function as a decisive factor, moreover, the remedy must be legally appropriate in the circumstances.<sup>301</sup> In addition, the court will be inclined to look at the substance rather than the form of things.<sup>302</sup> This logic is in line with the common law principles that if a factual enquiry reveals that the acts of the company are actually the acts of those who control the company, liability will be imposed on those individuals.<sup>303</sup> Fraudulent or improper conduct may reveal that the company is merely the alter ego of those who control it.<sup>304</sup> However, '[t]he need to preserve the separate corporate identity would in

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<sup>294</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 800.

<sup>295</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 800.

<sup>296</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 803.

<sup>297</sup> H S Cilliers et al *Corporate Law* 3ed (2000) 13.

<sup>298</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 803. See also F Cassim et al *Contemporary Company Law* 2ed (2012) at 48, where this contradiction was drawn.

<sup>299</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 804.

<sup>300</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 804.

<sup>301</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 803.

<sup>302</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 803.

<sup>303</sup> B Smith 'Statutory Discretion or Common Law Power? Some Reflections on Veil Piercing, and the Consideration of (the value of) Trust Assets in Dividing Matrimonial Property at Divorce-Part one' (2016) 41(2) *Journal for Juridical Science* 71.

<sup>304</sup> B Smith 'Statutory Discretion or Common Law Power? Some Reflections on Veil Piercing, and the Consideration of (the value of) Trust Assets in Dividing Matrimonial Property at Divorce-Part one' (2016) 41(2) *Journal for Juridical Science* 72.

such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil.<sup>305</sup> To this end the court found that:

‘It is not necessary that a company should have been conceived and founded in deceit, and never have been intended to function genuinely as a company, before its corporate personality can be disregarded...’<sup>306</sup>

Moreover, the court recognised that:

‘... if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question...’<sup>307</sup>

The court found that the remedy of lifting the corporate veil should not be precluded due the existence of an alternative remedy, as such failure to pursue the alternative remedy does not prevent a court from granting the relief of disregarding the separate legal personality of a company.<sup>308</sup> The existence of an alternative remedy is merely a factor that will be considered relating to policy considerations but will not be regarded as decisive importance.<sup>309</sup>

The common law often underlined the attitude to keep intact the sanctity of separate legal personality, and to only deviate in limited circumstances, with the courts possessing no discretionary powers to do so when they deemed it just. The courts as seen in chapter 4 and 5 cumulatively often lifted the veil when fraud, improper conduct or dishonesty arose. *Cape Pacific* introduced a very commendable attitude, whilst upholding the principle laid down in *Salomon*, it acknowledges that the facts should be the ultimate determining factor. As explained by Smith, common law created a ‘flexible and self-contained remedy’ which allowed the outcome of the case to be based on the merits of the case.<sup>310</sup>

There are situations where it could result in companies and controllers outright abuse in their corporate entity, if the courts refuse to look behind it and attach liability where it truly lies. Thus, the rationale of disregarding the corporate entity is to essentially prevent injustice, what

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<sup>305</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 791.

<sup>306</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 805.

<sup>307</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 805.

<sup>308</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 806.

<sup>309</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 806.

<sup>310</sup> B Smith ‘Statutory Discretion or Common Law Power? Some Reflections on Veil Piercing, and the Consideration of (the value of) Trust Assets in Dividing Matrimonial Property at Divorce-Part one’ (2016) 41(2) *Journal for Juridical Science* 74.

this entails is looking into the merits of the case and does not require the presence of every factor.<sup>311</sup>

## 5.2 Statutory law: The current position

Prior to the enactment of s20(9), our law reflected a formal approach which was restricted in its application; Australia, England and SA were all recipients to this formalism.<sup>312</sup> The case to first apply this section was *Ex Parte Gore*.<sup>313</sup> The facts giving rise to this case involved three king brothers who managed the overall holding company which was king financial holdings Ltd (KFH) which together with the other subsidiary companies in the group was in liquidation. The brothers were the directors of KFH and most of its subsidiaries and at all material times held majority shares and were in control of the group.<sup>314</sup> The companies were conducted with no regard to the separate legal personality between the holding company and the subsidiary companies.<sup>315</sup>

What this section provides as discussed above, is that the conduct in question must amount to ‘unconscionable abuse’ before the corporate veil may be lifted. The meaning and scope of this term has been vested entirely in the courts discretion.<sup>316</sup> This term however, should be distinguished from ‘unconscionable injustice’ as developed in the *Botha* case above; the former relates to the act that triggers the implementation of the remedy and the latter describes the consequences suffered by the plaintiff in question.<sup>317</sup>

The court indicated that s 20(9) is cast in very wide terms and affords a firm and very flexible basis for the remedy and detracts from the notion that it is a drastic and exceptional remedy that is to be approached with caution.<sup>318</sup> The flexibility of this provision is expressly provided for, which allows a court on its own accord to pierce the corporate veil, absent the applicants request to do so.<sup>319</sup> This directly confers upon the court discretionary powers regarding

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<sup>311</sup> G Ashe ‘Lifting the corporate veil: corporate entity in the modern-day court’ 78 (1973) *Commercial Law Journal* 123.

<sup>312</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 394.

<sup>313</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC).

<sup>314</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 387-388.

<sup>315</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 385.

<sup>316</sup> R Cassim ‘Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SAMJ* 316.

<sup>317</sup> R Cassim ‘Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SAMJ* 317.

<sup>318</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 398-399.

<sup>319</sup> R Cassim ‘Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SAMJ* 309. See section 20(9) ... ‘if on application by an interested person or in any proceedings...’

invoking the remedy, which was not present in the common law.<sup>320</sup> South African authorities have shown that there is no general discretion to lift the veil because it would be just and equitable, however courts will lift the corporate veil where justice requires it and not only where there is no alternative remedy.<sup>321</sup> Essentially the basis to grant relief has been expanded, with the intention of the legislature being to apply this provision to varying factual circumstances.<sup>322</sup>

The determination ultimately involves a policy-based enquiry; weighing the sanctity of legal personality and material practical and legal considerations underlying the legal fiction against the moral and economic effects of imposing liability on members of a company.<sup>323</sup> This is consistent with the common law approach.<sup>324</sup> Moreover, no alternative remedy needs to be present.<sup>325</sup> It was accordingly held that investors funds were used in an inconsistent manner, which was to pay off debts, than what had been represented, which amounted to an unconscionable abuse as a result this led to the company being wound up.<sup>326</sup> All investors were entitled to the residual assets as the relief sought and the company was deemed not to be a juristic person.<sup>327</sup>

Section 20(9) is said to lie between the middle and maximalist approach for two reasons; first, the terms of this provision are wide and the operation depends on the courts finding of unconscionability and not on fraud or deception; secondly, this provision accords with the principle that where a person has more than one remedy, the law permits him to choose which to pursue and not make an election for him.<sup>328</sup> Further, there is greater flexibility regarding the remedies possible in terms of s20(9) in comparison to the judicial doctrine of veil piercing i.e. different remedies for different creditors or there could be an order of subordination of particular debts.<sup>329</sup>

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<sup>320</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 804.

<sup>321</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 396.

<sup>322</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 382.

<sup>323</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 397.

<sup>324</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) at 791; 806.

<sup>325</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 399.

<sup>326</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 399.

<sup>327</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 398; 400.3

<sup>328</sup> A Dbe 'Piercing the Corporate Veil-Old Metaphor, Modern Practice?' (2017) 3(1) *Journal of Corporate and Commercial Law and Practice* Dbe 14; 15.

<sup>329</sup> A Dbe 'Piercing the Corporate Veil-Old Metaphor, Modern Practice?' (2017) 3(1) *Journal of Corporate and Commercial Law and Practice* 15.



But just how receptive have the courts been towards s 20(9) given that the scope and application of the remedy has been broadened coupled with the discretionary powers of the court. In *Van Zyl v Kaye*<sup>330</sup> the applicants invoked s 20(9) to ask the court to lift the corporate veil of the trust.<sup>331</sup> The trust was a family trust that was founded for acquiring and holding property, however, Kaye one of the beneficiaries of the trust used the properties as his personal assets and the applicants contended that the trust was an alter-ego of Kaye.<sup>332</sup> The court however, came to the conclusion that no unconscionable abuse has taken place even if property was used to secure obligations of other companies.<sup>333</sup> Binns J in relation to ‘unconscionability’ emphasized that the remedy of ‘piercing its veneer’ s described in this case, represents an equitable remedy to the affected third party and is afforded in suitable or appropriate cases.<sup>334</sup> Essentially, it lends itself to a flexible approach to fairly and justly address the consequences of an unconscionable abuse in the given circumstances.<sup>335</sup> It is a remedy that is generally used when the [corporate] form is used in dishonest or unconscionable manner to evade liability or avoid an obligation.<sup>336</sup>

Thus, the advantage of statutory provisions is that it gives more certainty and visibility.<sup>337</sup> The danger however, is that it may result in rigidity if applied in a highly technical manner.<sup>338</sup>

### 5.3 Foreign case law

When interpreting our current law, the court in *Ex Parte Gore* stated that the 2008 Act must be interpreted and applied in a manner that gives effect to s7.<sup>339</sup> Section 5(2) of the 2008 Act allows foreign law to be considered, which is relevant to this discussion as the court in *Ex Parte Gore* relied on foreign jurisdictions to reach its decision.<sup>340</sup> This is particularly important as cases relied upon are deemed to reflect our current position and will enable a viable conclusion

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<sup>330</sup> See *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) (15 April 2014).

<sup>331</sup> See *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) (15 April 2014) at par 1.

<sup>332</sup> See *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) (15 April 2014).at par 7; 14.

<sup>333</sup> See *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) (15 April 2014). 341 par 33.

<sup>334</sup> *Kaye* supra note 341 See *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) (15 April 2014) at par 22.

<sup>335</sup> *Kaye* supra note 341 See *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) (15 April 2014) at par 22.

<sup>336</sup> See *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) (15 April 2014) at par 22.

<sup>337</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 58.

<sup>338</sup> F Cassim et al *Contemporary Company Law* 2ed (2012) 58.

<sup>339</sup> Section 7(a)-(k) deals with the purpose of the Act, looking at accountability and developing the economy.

<sup>340</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 383-384.

to be drawn regarding the development of the remedy and what can be amended to bring it in line with what our courts need.

It was aptly described by the New Zealand court that:

‘...to lift the corporate veil...is not a principle. It describes the process but provides no guidance as to when it can be used.’<sup>341</sup>

In Australian jurisdiction, the courts had a tendency to take a facts-based approach to the issue of piercing the corporate veil and the difficulties were said to be attributed to; the factual nature of issues on piercing the corporate veil and the courts wanting to reserve the discretionary powers for themselves.<sup>342</sup> In the case of *AGC (Investments) Ltd v Commissioner of Taxation (Cth)*<sup>343</sup> the court acknowledged that the circumstances in which the veil may be lifted is indeed circumscribed.<sup>344</sup> A rigid approach was criticised for preferring substance over form.<sup>345</sup> In *Gorton v Federal Commissioner of Taxation*<sup>346</sup> it was concluded that this approach led the law into ‘unreality and formalism’<sup>347</sup> There has been an improvement in Australian law, where the courts now recognise discrete factors which are grouped into categories such as agency, fraud, sham or façade, group enterprises and justice, which is not an exhaustive list.<sup>348</sup>

In the English decision of *Ben Hashem v Al Shayif*<sup>349</sup> the marriage broke down and the wife sought relief from her husband.<sup>350</sup> A dispute arose as to the true ownership of the companies and properties, resulting in the wife asking the court to lift the corporate veil contending that the company was the alter ego of the husband and the shareholders were his nominees as they

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<sup>341</sup> See *Attorney-General v Equiticorp Industries Group Ltd* [1996] 1 NZLR 528. See also R Cassim ‘Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SAMJ* 309 where this quote was used.

<sup>342</sup> I Ramsay, B Noakes ‘Piercing the Corporate Veil in Australia’ (2001) 19 *Company and Securities Law Journal* at 14 as emphasized in *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 5.

<sup>343</sup> See *AGC (Investments) Ltd v Commissioner of Taxation (Cth)* (Unreported case, Federal Court, Hill J, 22 February 1991).

<sup>344</sup> See *AGC (Investments) Ltd v Commissioner of Taxation (Cth)* (Unreported case, Federal Court, Hill J, 22 February 1991) 44.

<sup>345</sup> I Ramsay, B Noakes ‘Piercing the Corporate Veil in Australia’ (2001) 19 *Company and Securities Law Journal* at 14 as emphasized in *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 5.

<sup>346</sup> *Gorton v Federal Commissioner of Taxation* (1965) 113 CLR 604.

<sup>347</sup> See *Gorton v Federal Commissioner of Taxation* (1965) 113 CLR 604 at 627.

<sup>348</sup> I Ramsay, B Noakes ‘Piercing the Corporate Veil in Australia’ (2001) 19 *Company and Securities Law Journal* at 14 as emphasized in *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 8.

<sup>349</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179).

<sup>350</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 4; 12.

did not purchase the shares in the company.<sup>351</sup> A valuable part of the court's judgement was the formulation of principles to guide the implementation of lifting the corporate veil. The court recognised the circumstances that needed to precede the decision to lift the corporate veil.<sup>352</sup> The following principles were then advanced:

1. Ownership and control of a company are not of themselves sufficient to justify piercing the veil.<sup>353</sup>
2. The court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice.<sup>354</sup>
3. The corporate veil can be pierced only if there is some 'impropriety'.<sup>355</sup>
4. The court cannot pierce the corporate veil merely because the company is involved in some impropriety; such impropriety must be linked to the use of the company structure to avoid or conceal liability.<sup>356</sup>
5. If the court is to pierce the veil it is necessary to show both control of the company by the wrongdoers and impropriety, that is, misuse of the company by them as a device or façade to conceal their wrongdoing.<sup>357</sup>
6. A company can be a façade even though it was not originally incorporated with any deceptive intent. The question is whether it is being used as a façade at the time of the relevant transactions<sup>358</sup>

*Ben Hashem* is important as in *Ex Parte Gore* the court makes mention that this case is now the current position in our law except to the extent that 'the court will pierce the veil only so

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<sup>351</sup> *Ben Hashem* supra note 17 See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 12; 73.

<sup>352</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 151.

<sup>353</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 159.

<sup>354</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 160.

<sup>355</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 161.

<sup>356</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 162.

<sup>357</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 163.

<sup>358</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 164.

far as is necessary to provide a remedy for the particular wrong which those controlling the company have done', is incorrect.<sup>359</sup> This formulation is of great assistance in visually putting forward guidelines as to what implementing the remedy entails and just what our current law should reflect.

In another English decision, in the case of *VTB*<sup>360</sup> the issue of piercing the corporate veil arose as a secondary issue.<sup>361</sup> The court stated that the unprincipled approach was supported by the fact that the nature, basis and meaning of the principle are somewhat obscure and so are the circumstances justifying the court to lift the corporate veil.<sup>362</sup> However, it is right for the law to pierce the corporate veil in certain circumstances in order to combat injustice.<sup>363</sup> It is open to the court in the jurisdiction to pierce the corporate veil.<sup>364</sup> The façade may often be regarded as the cornerstone in cases.<sup>365</sup> The court found it unnecessary to decide whether without the express or implied authority of statute, the court could pierce the corporate veil.<sup>366</sup> The Supreme Court of Appeal has been described as putting 'a cautious toe in the water'.<sup>367</sup> This could possibly lead us to conclude that s20(9) provides an indisputable basis to lift the corporate veil.

In *Prest v Petrodel*<sup>368</sup> the question before the court was whether the court could give company assets to the wife without the necessary abuse taking place.<sup>369</sup> The court recognised that there are circumstances that warrant the corporate veil to be lifted, as such limited power to pierce the veil in defined circumstances will prevent abuse.<sup>370</sup> The court found that the problem lies in, exactly what constitutes wrong doing because the terms 'façade' and 'sham' raise more uncertainty.<sup>371</sup> The court advanced the concealment and evasion principle; the former does not involve imposing liability but rather to discover the facts being hidden by the corporate structure and the latter allows the court to pierce the corporate veil when they have a legal right

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<sup>359</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 393.

<sup>360</sup> See *VTB Capital plc v Nutritek International Corporation* [2013] 2 WLR 398 (SC) 118(*VTB*).

<sup>361</sup> See *VTB Capital plc v Nutritek International Corporation* [2013] 2 WLR 398 (SC) 118(*VTB*) at par 75.

<sup>362</sup> *VTB* supra note 189 See *VTB Capital plc v Nutritek International Corporation* [2013] 2 WLR 398 (SC) 118(*VTB*) par 123.

<sup>363</sup> See *VTB Capital plc v Nutritek International Corporation* [2013] 2 WLR 398 (SC) at 118(*VTB*) at par 127.

<sup>364</sup> See *VTB Capital plc v Nutritek International Corporation* [2013] 2 WLR 398 (SC) at 118(*VTB*) at par 129.

<sup>365</sup> See *VTB Capital plc v Nutritek International Corporation* [2013] 2 WLR 398 (SC) at 118(*VTB*) at par 124.

<sup>366</sup> See *VTB Capital plc v Nutritek International Corporation* [2013] 2 WLR 398 (SC) at 118(*VTB*) at par 130.

<sup>367</sup> A Dbe 'Piercing the Corporate Veil-Old Metaphor, Modern Practice?' (2017) 3(1) *Journal of Corporate and Commercial Law and Practice* 7.

<sup>368</sup> See *Prest v Petrodel Resources Ltd* [2013] 3 WLR.

<sup>369</sup> See *Prest v Petrodel Resources Ltd* [2013] 3 WLR at par 6.

<sup>370</sup> See *Prest v Petrodel Resources Ltd* [2013] 3 WLR at par 27.

<sup>371</sup> See *Prest v Petrodel Resources Ltd* [2013] 3 WLR at par 28.

against the person who controls the company.<sup>372</sup> This negates the position, that the terms lifting and piercing the corporate veil are pure synonyms.<sup>373</sup> The court found that if a person is under a legal obligation, liability or subject to a restriction and deliberately evades or whose enforcement he frustrates by disrupting a company under his control; the court may pierce the corporate veil for the purpose only to deprive the controller of an advantage he would normally receive.<sup>374</sup> In agreement with *Ben Hashem* if it is unnecessary to pierce the corporate veil, it is not appropriate to do so, hence public policy does not justify it, which is consistent with the long standing principles of legal policy.<sup>375</sup> There was no evidence that the husband was seeking to avoid any obligations.<sup>376</sup>

The court disagreed with *VTB* and said that you can pierce the corporate veil when all more conventional remedies have proved to be of no assistance.<sup>377</sup> It is done usually in the case of evasion rather than concealment, an exception in addition to the evasion principle will be hard to establish.<sup>378</sup> Only true exceptions to the *Salomon* case warrant piercing the corporate veil i.e. where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control.<sup>379</sup> Bull submits that other circumstances where a legal rule may attach acts or assets of a corporation to its controller may have the effect of creating personal liability or beneficial ownership in the controller, but these are not regarded as veil-piercing in the true and strict sense.<sup>380</sup>

The decision in *Prest v Petrodel* has been criticised in comparison to *Ben Hashem*.<sup>381</sup> In *Ben Hashem* the court looks at necessity rather than a remedy of last resort.<sup>382</sup> As such, the test for necessity does not require the remedy to be one of last resort, the latter demands more stringent requirements than necessity.<sup>383</sup> *Ben Hashem* solely concerned establishing the principles that

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<sup>372</sup> *Prest v Petrodel Resources Ltd* [2013] 3 WLR at par 28.

<sup>373</sup> A Liew 'Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us nowhere' (2014) 5 *King's Student Law Review* 68.

<sup>374</sup> See *Prest v Petrodel Resources Ltd* [2013] 3 WLR at par 35.

<sup>375</sup> See *Prest v Petrodel Resources Ltd* [2013] 3 WLR at par 35.

<sup>376</sup> See *Prest v Petrodel Resources Ltd* [2013] 3 WLR at par 36.

<sup>377</sup> See *Prest v Petrodel Resources Ltd* [2013] 3 WLR at par 62.

<sup>378</sup> See *Prest v Petrodel Resources Ltd* [2013] 3 WLR at par 103.

<sup>379</sup> See *Prest v Petrodel Resources Ltd* [2013] 3 WLR at par 16.

<sup>380</sup> S Bull 'Piercing the corporate veil- In England and Singapore' (2014) 24(40) *Singapore Journal of Legal Studies* 28.

<sup>381</sup> A Liew 'Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us nowhere' (2014) 5 *King's Student Law Review* 76.

<sup>382</sup> A Liew 'Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us nowhere' (2014) 5 *King's Student Law Review* 76.

<sup>383</sup> A Liew 'Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us nowhere' (2014) 5 *King's Student Law Review* 76. See also *R v Secretary of state for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579 (HC).

would give rise to grounds that enabled the court to pierce the corporate veil.<sup>384</sup> Whilst *Prest v Petrodel* recognised the lack of a coherent principle when applying the doctrine and has been applauded for limiting piercing the corporate veil to cases of evasion, which should be approached with caution.<sup>385</sup> Dbe advances that *Prest v Petrodel* was a minimalist approach, as the court restricted veil piercing by submitting that it always involves or almost always involves the evasion of an existing legal obligation, however it left open the question as to whether this was an exhaustive statement of law.<sup>386</sup> Despite this, Lord Mance has been quite realistic by acknowledging that disregarding the corporate veil must be a tailored remedy, fitted to the circumstances giving rise to it.<sup>387</sup> However, the court rejected categories warranting piercing the corporate veil due to the danger that it may fail to accommodate future situations.<sup>388</sup>

Foreign law is useful in our current determination due to the progress the courts have made. This encourages our courts and legislature to develop and create certainty regarding what triggers this remedy. The hesitation of our courts in dealing with the circumstances giving rise to this remedy is clearly present in most cases, however foreign law, is certainly a step closer towards development and unambiguity.

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<sup>384</sup> A Liew ‘Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us nowhere’ (2014) 5 *King’s Student Law Review* 76.

<sup>385</sup> A Liew ‘Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us nowhere’ (2014) 5 *King’s Student Law Review* 77; 81.

<sup>386</sup> A Dbe ‘Piercing the Corporate Veil-Old Metaphor, Modern Practice?’ (2017) 3(1) *Journal of Corporate and Commercial Law and Practice* 10-11.

<sup>387</sup> A Dbe ‘Piercing the Corporate Veil-Old Metaphor, Modern Practice?’ (2017) 3(1) *Journal of Corporate and Commercial Law and Practice* 10.

<sup>388</sup> A Liew ‘Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us nowhere’ (2014) 5 *King’s Student Law Review* 78.

## CHAPTER 6

### CONCLUSION

#### 6.1 Conclusion

At the time of incorporation, the company is recognised as having separate legal existence from its members and directors, known as separate legal personality.<sup>389</sup> However, given the nature of a company, specifically that it has only legal and not physical existence, the acts and rights bestowed on a company is essentially carried out by designated representatives.<sup>390</sup>

As created by *Salomon* this principle is the cornerstone of company law and is to be relaxed in very few circumstances.<sup>391</sup> The common law followed an approach of sheer reluctance and hesitation, given that the consequences could be extreme.<sup>392</sup> But, as seen, adopting a rigid approach poses a threat to the commercial world. Even though it upholds a long-standing principle, it does so at the expense of policy considerations which prohibit such acts.

The need for the remedy of lifting the corporate veil has proved to be one that is required to rectify wrongs and abuse.<sup>393</sup> What became apparent was the lack of formulation of guidelines in the implementation of the remedy.<sup>394</sup> Notwithstanding this, categorisation has been submitted to be an undesired route due to injustice that could result in the absence of an available category in relation to a particular set of facts.<sup>395</sup>

The 2008 Act providing a statutory basis for lifting the corporate veil is undeniably a development, and although it has been a move towards change, it is not as complete and final in the certainty it brings or the aim it seeks to achieve. The flexibility and discretion of this provision is a step towards combatting abuse of the corporate structure, however if not properly assisted it could result in the floodgates of this remedy being opened and the sanctity of the *Salomon* principle being lost. On the flip side, if the *Salomon* principle is rigidly upheld companies will succumb to their controllers' mishandling and abusing the company and its corporate structure. In order to keep the Salomon principle intact and achieve justice, a balance has to be struck as to when the court is permitted to lift the corporate veil. The thesis thus

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<sup>389</sup> P Davis *Principles of Modern Company Law* 8ed (2008) 33.

<sup>390</sup> WA Joubert 'The Law of South Africa' (2012) 4(1) *LAWSA* 64.

<sup>391</sup> J Bourne 'Lifting the Corporate Veil' (2002) 10(3) *Juta's Business Law Journal* 114.

<sup>392</sup> B Smith 'Statutory Discretion or Common Law Power? Some Reflections on Veil Piercing, and the Consideration of (the Value of) Trust Assets in Dividing Matrimonial Property at Divorce-Part One' (2016) 41(2) *Journal for Juridical Science* 72-73.

<sup>393</sup> See *United States v Milwaukee Refrigerator Transit* 142 Fed 247 (1905) at 255.

<sup>394</sup> LC Davids 'The Lingering Question: Some Perspectives on Lifting the Corporate Veil' (1994) *TSAR* 155.

<sup>395</sup> A Liew 'Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads us nowhere' (2014) 5 *King's Student Law Review* 78.

recommends that such balance be achieved through implementing a guidance system of factors and principles required to invoke this remedy.

Foreign law illustrates a move away from strict adherence to the *Salomon* principle to achieve justice.<sup>396</sup> However, there still seems to be some reluctance in unnecessary circumstances or where evasion of obligations is not present to pierce the corporate veil.<sup>397</sup> On the other hand, some jurisdictions recognise categories that could be a factor considered when lifting the corporate veil, which indicates direction and confidence in how they apply this remedy,<sup>398</sup> to the extent that certain principles have been advanced to guide this remedy.<sup>399</sup>

Between the common law, foreign law and statute there seems to be a few similarities that when put together form certain patterns that correlate to what the courts are usually inclined to do. The courts have failed to link these general observations due to the lack of effort or in fear of destroying the sanctity of the *Salomon* principle. Section 20(9) itself leaves room for the legislature to explain the concept of ‘unconscionable abuse’ and what conduct would constitute such abuse. This could be done by remaining flexible and unrestricted but also providing clarity as to what the intention of the legislature precisely is.

## 6.2 Recommendations

It is recommended that the courts ought to refrain from relying heavily on case law that has preceded the cases before in an attempt to unpack and apply relevant principles but should rather have a set of principles that they can apply their mind to in addition to the discretion they have been given. Although every case factually differs, there might be injustice to parties if the courts do not follow a consistent approach or the floodgates to invoking the remedy can be increased.

In furtherance of the aim of the thesis, hopefully the courts or the legislature will soon fill this gap to encourage certainty and provide a viable solution to this problem. The formulation of such guiding principles will essentially function as such solution and bring about the clarity as to what conduct can fall within the ambit of this remedy.

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<sup>396</sup> See *VTB Capital plc v Nutritek International Corporation* [2013] 2 WLR 398 (SC) at par 127.

<sup>397</sup> See *Prest v Petrodel Resources Ltd* [2013] 3 WLR at 27; 35.

<sup>398</sup> I Ramsay, B Noakes ‘Piercing the Corporate Veil in Australia’ (2001) 19 *Company and Securities Law Journal* 8.

<sup>399</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 151.



In the formulation of these guidelines, it would be essential to ensure that they are not exhaustive or restrictive, but rather aim to provide a cohesive and uniform approach. Using the framework of *Ben Hashem* and the description of the remedy as a ‘process’ in the case of *Equiticorp Industries*<sup>400</sup>, the guiding process should include the following:

*a) Approach and attitude*

This remedy has developed and requires a flexible approach coupled with discretionary powers to give effect to the purpose of the remedy and moves away from the conservative and strict approach prior to the 2008 Act.<sup>401</sup> Recognition to the importance of the *Salomon* principle must be given, but cognisance should be taken that certain instances require you to detract from this principle.<sup>402</sup> Therefore, acknowledging that this is a ‘salutary principle’.<sup>403</sup>

There is no need proceed with caution or analyse alternative remedies prior to lifting the corporate veil.<sup>404</sup> However, this remedy may be selected on the courts’ own accord in the absence of being requested to invoke such remedy.<sup>405</sup> The basis of granting such relief is applicable to varying factual scenarios, hence categorisation should be avoided.<sup>406</sup>

*b) Factors and considerations*

Complete ownership or control is not a necessary prerequisite to lifting the corporate veil.<sup>407</sup> This is an equitable remedy to be afforded in suitable or appropriate cases.<sup>408</sup> Abuse of the corporate form in disregarding the distinction between the holding company and its subsidiaries, could be a factor.<sup>409</sup> Generally, dishonesty, improper conduct and fraud would

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<sup>400</sup> See *Attorney-General v Equiticorp Industries Group Ltd* [1996] 1 NZLR 528.

<sup>401</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 791. See also *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 398.

<sup>402</sup> H S Cilliers et al *Corporate Law* 3ed (2000) 13.

<sup>403</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 804.

<sup>404</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 806. See also *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) 399.

<sup>405</sup> R Cassim ‘Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SAMJ* 309.

<sup>406</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) at 382; 399.

<sup>407</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179)159.

<sup>408</sup> See *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) (15 April 2014) at par 22.

<sup>409</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC)395.

need to be present.<sup>410</sup> A link between the said conduct and use of the corporate structure to evade obligations needs also to be present.<sup>411</sup> It would also be necessary to establish whether the company was used for improper purposes at the time of the transaction, where the company need not be founded in such deceit.<sup>412</sup>

The intention rather than the form of things is most important,<sup>413</sup> and the facts of the case are ultimately a determining factor.<sup>414</sup> The statutory provision provides a wider basis to lift the corporate veil, and the legislature should add to the provision by stating that ‘unconscionable abuse’ constitutes but is not restricted to the following:

- Something less than gross abuse;<sup>415</sup>
- A lower standard of abuse, therefore encompassing various types of conduct, including terms such as a device, stratagem, sham, and cloak and including an element of fraud and improper conduct in the formation and use or conduct of its affairs, but does not provide an exhaustive list;<sup>416</sup>
- Evading or avoiding legal obligations;<sup>417</sup> and
- This is an act and not a consequence.<sup>418</sup>

*c) Balancing and weighing up*

The need to preserve the veil must be balanced against policy considerations relating to piercing the corporate veil.<sup>419</sup>

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<sup>410</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 804. See also *Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994(1) S A 550 (A) at 566C-F. (*Shipping corporation*). See also *Amlin SA (Pty) Ltd v Van Kooij* (2007) JOL 21010 (C) 16.

<sup>411</sup> See *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) (15 April 2014) at par 22. See also *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 162.

<sup>412</sup> See *Ben Hashem v Al Shayif and Another* [2008] EWHC 2380 (Fam) ([2009] 1 FLR 115; [2008] Fam Law 1179) at par 162.

<sup>413</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 803.

<sup>414</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 803.

<sup>415</sup> See *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) at 399. See also R Cassim ‘Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SAMJ* 318.

<sup>416</sup> See *Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994(1) S A 550 (A) at 566C-F. (*Shipping corporation*). See also *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) at 399.

<sup>417</sup> See *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) (15 April 2014) at par 22.

<sup>418</sup> R Cassim ‘Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SAMJ* 317.

<sup>419</sup> See *Pacific v Lubner Controlling Investments (Pty) Ltd (Cape Pacific)* 1994 (4) SA 790 (A) 791.

This determination involves a policy-based enquiry which should take into consideration the sanctity of the legal fiction and the legal considerations underpinning it, versus the impact and of imposing liability on the members.<sup>420</sup>

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<sup>420</sup> See *Ex Parte Gore and Others* NNO 2013 (3) SA 382 (WCC) 397.

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