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**The concept of separate legal personality in South African company law: A
critical examination of its origins, developments and current application**

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A mini dissertation submitted in partial fulfilment of the requirements for
the degree of Master of Laws in Business Law

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Declaration

I, **Siphosethu Myeni** (219017587) declare that:

The research reported in this dissertation, except where otherwise indicated, is my original research.

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Dedication

I dedicate my work to both my parents, Mr, and Mrs Myeni, who have showed me love and support throughout the journey of my studies. They motivated and encouraged me to achieve everything that I have desired. They forever support my dreams and respect my life decisions. Everything that I am today and everything that I will ever be is because of them. I am forever grateful to have them in my life.

Key terms

Separate legal personality

Juristic personality

Corporate personhood

Corporate personality

Distinctive personality

Corporate veil

Companies Act 71 of 2008

Companies Act 61 of 1973

Salomon v Salomon

Abstract

Section 19(1) of the current Companies Act 71 of 2008 states that once a company is incorporated in accordance with this Act, it is considered as a juristic person and exists indefinitely until its name is removed from the companies register. It exists independently from its shareholders and controllers. This effect grants the company with characteristics of a natural person. This analogy implies complete independence of the company. However, this concept finds refuge from the English legal system and was later adopted by South African company law.

This notion provides some legal protection to businesses and shields their owners from personal liability for the company's debts and commitments. Companies can use this to enter new markets, reduce their taxes, and take advantage of advantageous business environments. Furthermore, this doctrine promotes joint ventures and partnerships among enterprises from many countries, allowing them to share resources and risks. As a result, this allows international enterprises to benefit by conducting international transactions, expanding abroad, and entering contracts in foreign countries. However, like any other concept, it is susceptible to abuse. Individuals take advantage of it to benefit themselves.

This is detrimental to the significance of this doctrine. This dissertation aims to look deeply into this concept, by examining its origins and influence throughout the years and during its current application in the South African legal framework and highlight instances where this doctrine will be set aside. This will be conducted by fully analysing Salomon's case and the influence it has over current company law. More importantly, the author will further examine the significance of this doctrine in modern company law. This will be done by testing the application of this doctrine to modern corporations and challenges they face.

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Chapter One: Introduction

1.1 Introduction

During the Middle Ages, a question of the legal status and ownership of public corporations such as churches and universities was posed.¹ These institutions did not belong to any individual other than the community and were established solely for the benefit of the community itself.² As a result, years later, corporations and institutions were bestowed with persona.³ This was the earliest trace of the concept of corporate personality. Corporations and institutions were deemed to have existed independently and continued to operate and serve the community regardless of whether their incorporators were present or alive.⁴ This practice rapidly grew and was soon extended to apply to a wide range of institutions including companies.⁵ This effect, in relation to companies, is formally known today as separate legal personality.

The doctrine of separate legal personality entails that once a company is incorporated, it exists distinctively from its incorporators.⁶ Meaning that the company is considered to be a person with its own legal standing, with rights to acquire assets and incur liabilities of its own.⁷ A legal person from a legal point refers to a company or other entity which has legal rights and is subject to obligations.⁸ The fundamental distinction between a legal person and a human being is that the former is only a legal idea and neither exists physically and, as a result, the former, cannot engage in actions that are fundamentally human, such as getting married or taking on guardianship of a minor.⁹

The concept of juristic personality has long existed in our law and is fundamental to company law. According to the Companies Act,¹⁰ a company exists as a separate legal person from the

¹ D Cantoni & N Yuchtman 'Medieval Universities, Legal Institutions, and the Commercial Revolution' (2014) 129 (2) *The Quarterly Journal of Economics* 824.

² 'The History of Corporate personhood' available at <https://www.brennancenter.org/our-work/analysis-opinion/history-corporate-personhood> accessed on 12 January 2024.

³ M A Pickering 'The Company as A Separate Legal Entity' (1968) 31(5) *MLR* 350.

⁴ T Govender *An analysis of lifting of the corporate veil in light of s20 (9) of the Companies Act 71 of 2008* (unpublished LLM thesis, University of KwaZulu Natal, 2018) 18.

⁵ J Sakar & S Sakar 'Board Independence and Corporate Governance: Which Way Forward?' (2004) 39(48) *Economic and weekly journal* 5074.

⁶ Section 19 (1) (b) of the Companies Act 71 of 2008.

⁷ Section 19 (1) (b) of the Companies Act 71 of 2008.

⁸ Justin Ramages *Capacities and Rights of legal subjects* (unpublished lecture notes, Rhodes University, 2018).

⁹ H S Chillers *A Critical enquiry into the origin, development and the meaning of "limited liability" in Company law* (LLD thesis of the University of South Africa 1963) 48.

¹⁰ Section 19(1) of the Companies Act 71 of 2008.

date and time it has been incorporated.¹¹ Juristic personality results in several legal consequences for companies which affirm the position that the company and the directors and shareholders are distinguishable from one another.¹² It is said that there is an imaginary veil between the members of the company and the corporate entity itself. The corporate veil separates the identity of a company from that of its members and protects the members from being held personally liable for the company's obligations and debts, in other words, this veil creates a boundary of limited liability.¹³ The downfall of this is that, in some instances, the operators of a company would abuse this concept to pursue their own needs in the name of the company.

The common law and legislative developments have shown that this privilege of having distinct personalities between the company and its operators is not unqualified and will not be upheld in cases of abuse.¹⁴ However, it will be argued that the court's development of these exceptions has safeguarded against the threat of destroying this foundation of company law and is a necessary tool to ensure that separate legal personality is respected. Hiding behind the separate legal personality of a company to commit fraud, dishonesty, and improper conduct is not without repercussions.

1.2 Background of Separate Legal Personality

The origins of separate legal personality dates back to the United Kingdom, in the early 1800s when philosophers and scholars started to explore this concept.¹⁵ In the first half of the nineteenth century, amongst other writers, and authors such as Savigny began the scientific or metaphysical consideration of the doctrine of corporate personality.¹⁶ A significant question he posed to himself was "Who or what is the real owner of this property?".¹⁷ He noticed that property legally belonged to a business and not to any one person. Therefore, the answer to his question was that the corporate property did not belong to any actual person or entity, but rather to a fictional being.¹⁸ This was his starting point for the proposition that ownership involves

¹¹ Section 19 (1) (b) of the Companies Act 71 of 2008.

¹² J Gibson et al *South African Mercantile and Company Law* 8th ed (2003) 259.

¹³ P Davis *Principles of Modern Company Law* 8th ed (2008) 193.

¹⁴ T Govender *An analysis of lifting of the corporate veil in light of s20(9) of the Companies Act 71 of 2008*. (unpublished LLM thesis, University of KwaZulu Natal, 2018) 22.

¹⁵ S Willingston 'History of the Law of Business Corporations before 1800' (1888) 2(3) *Harvard law Review* 107 also see P I Blumberg 'The Corporate Personality in American law: A Summary Review (1990) 38 *The American Journal of Corporative Law* 49 and J Dewey 'The Historic Background of Corporate Legal Personality' (1926) 35 (6) *YALE law journal* 260.

¹⁶ W Machen Jr 'Corporate Personality' (1911) (24) 4 *Harvard Law Review* 255.

¹⁷ *Ibid* 256.

¹⁸ S Gerencser 'The corporate person and democratic politics' (2005) 58 (4) *Harvard Law Review* 626.

the possession of a will by the owner; and he concluded that since a corporation does not really possess a will, it must as a property owner be a fictitious person.¹⁹ This is how legal personality was established.

This theory by Savigny influenced a lot of authors, as a result, several schools of thought were developed in this regard. A school of thought led by Brintz taught that corporate property is not owned by a fictitious being created by the state but by no person at all.²⁰ This idea, like Savigny's, considered the personality of corporations to be fictitious; but, in the interim, a competing school led by Gierke emerged, contending that corporations are actual people.²¹ This personality is real and natural, acknowledged but not formed by the law; it is neither fake nor artificial nor manufactured by the state. When a company is formed by the union of natural persons, a new real person, a real corporate "organism," is brought into being.²²

John Dewey in his paper on the historical developments of corporations indicates that much of the difficulty attending the recent discussion of the real personality of corporate bodies is due to going outside the strict legal sphere.²³ Legal issues have got complicated with other theories, and with former states of scientific knowledge.²⁴ On the other hand, it suggests that law, at critical times and in dealing with critical issues, has found it difficult to grow in any other way than by taking over contemporary non-jural conception and doctrines.²⁵ In his opinion, he is of the view that for the purposes of law the conception of "person" is a legal conception; put roughly, "person" signifies what law makes it signify.²⁶

A corporation is an entity - not imaginary or fictitious, but real, not artificial but natural.²⁷ This is the element of truth in the reality theory of corporate personality, which has gained widespread recognition not just in Germany but also in France and Italy. The theory originated in Germany. German scholars also concluded that a corporation is a "person" not in the ordinary meaning of a layman, but because an entity acquires rights and bears duties. Maitland, who has done so much to bring the question of the nature of corporate legal personality to the

¹⁹ M A Pickering 'The Company as A Separate Legal Entity' (1968) 31 (5) *MLR* 366.

²⁰ 'Theories of corporate personality' available at <https://libertatem.in/blog/theories-of-corporate-personality/> accessed on 17 January 2024.

²¹ 'Corporate personality' available at <https://www5.austlii.edu.au/au/journals/UQLawJl/1964/2.pdf> accessed on 17 January 2024.

²² W Machen Jr 'Corporate Personality' (1911) (24)4 *Harvard Law Review* 257.

²³ J Dewey 'The Historic Background of Corporate Legal Personality' (1926) 35 (6) *YALE law journal* 260.

²⁴ *Ibid* 260.

²⁵ *Ibid* 260.

²⁶ *Ibid* 262.

²⁷ W Machen Jr 'Corporate Personality' (1911) (24) 4 *Harvard Law Review* 255.

attention of English readers states that a corporation is a unit granted with rights and duties.²⁸ However, not all the legal propositions that are true of a man will be true of a corporation.²⁹ After different scholars had established and accepted the concept of the legal personality of entities, English courts went on to further emphasise that corporations and entities bear a distinct personality from that of its corporators.

In *Salomon v Salomon & Co Ltd*³⁰, a case concerning the legitimacy of limited liability of a single beneficially owned company according to the company's legislation, created the concept of the separate legal personality of a company. The concept of the corporation as a separate legal personality is, as Farrar describes "essentially a metaphorical use of language, clothing the formal group with a single separate legal entity by analogy with a natural person".³¹ While obviously a fiction, the choice of metaphor or analogy is not entirely arbitrary and must respond to the organisational realities of the corporation as well as conform with and make intelligible the treatment of organisations as legal actors.³²

This metaphor was employed in *Salomon v Salomon* to convey the idea that since Salomon's corporation was legal under the law, he should be entitled to minimal liability. Particularly to argue this point against the first instance judge and court of appeal who held, respectively, that the corporation was Salomon's agent, and that Salomon was trustee for the firm, the separate legal person analogy/metaphor was useful.³³

1.3 Background of Separate legal personality in the context of South African law

Company law has been a formal part of the South African legal system since the earliest days of 1861.³⁴ The Joint Stock Companies Act³⁵ introduced a more simplified approach to incorporate companies and lower prices to accommodate a wider range of business customers but never mentioned legal personality and shareholder's limited liability.³⁶ The Cape Colony's

²⁸ J Dewey 'The Historic Background of Corporate Legal Personality' (1926) 35 (6) *YALE law journal* 258.

²⁹ *Ibid* 266.

³⁰ *Salomon v A Salomon and Co Ltd* (1897) AC 22.

³¹ 'The myth of corporate personality: A comparative analysis of the doctrine of corporate personality of Malaysian and Islamic laws' (2012) available at https://www.researchgate.net/publication/292898126_The_Myth_of_corporate_personality'_A_comparative_legal_analysis_of_the_doctrine_of_corporate_personality_of_Malaysian_and_Islamic_laws/link/596c8ae30f7e9b80919bd691/download?_tp=eyJjb250ZXh0Ijpb7ImZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19 accessed on 17 January 2024.

³² D M Cohen 'Rights, Persons, and Organisations: A Legal Theory for Bureaucratic Society' (1987) 44.

³³ *Salomon v. Salomon & Co Ltd* (1897) AC 22 at 336 Per Vaughan Williams J.

³⁴ Joint Stock Companies Limited Liabilities Act No 23 of 1861.

³⁵ The Joint Stock Companies Act of 1861.

³⁶ A P Cheong 'Corporate Liability: A Study in Principles Attribution' (2001) 13.

Joint Stock Companies Limited Liabilities was the introduction of English mirrored regulation. The Companies Act³⁷, which came into force on 10 December 1926, provided that "upon registration of the memorandum of association, members of the company form a body corporate with perpetual succession and that body will be able to exercise all functions of an incorporated company".³⁸ This was the first footprint of corporate personality in South African company law. During the reign of the 1973 Companies Act, no direct provision was made with regard to separate legal personality. However, this Act promoted the incorporation of "limited liability" companies in South Africa to minimise personal liability for directors and incorporators.

The 2008 Companies Act enacted this doctrine and according to section 19(1)(b), a company is a legal person with separate legal personality.³⁹ Section 19 of the South African Companies Act 2008 deals with the legal status of a company.⁴⁰ It states that once a company is incorporated, it exists separate from its members and once registered, has its own identity as a juristic person. It will continue to exist until its name is removed from the Companies Register in accordance with the Companies Act. During its existence, a company will possess all legal powers and capacity of an individual, limited to the extent that a juristic person is incapable of exercising such powers or having such capacity. The powers and capacity of a company may also be limited in terms of the memorandum of incorporation, which, is a document that sets out the responsibilities, rights, as well as the duties of the company. As a result, this may restrict purposes, powers or activities of the company. Because of this, the Act has recognized that a corporation has its own legal personality and can acquire rights and assume obligations apart from those of the directors and shareholders. This section will be discussed further and thoroughly in chapter 3.

Section 19 (2) states that the incorporator, shareholders, or any directors are not liable for the debts of the company, except to the extent provided for by the Act or the company's memorandum of incorporation.⁴¹ This is the general rule. However, the Act may provide for personal liability in certain circumstances, for example, where a director used the company's credit resource facilities to fund their lifestyle or used the company as a fraud,

³⁷ The Companies Act 46 of 1926.

³⁸ M Glazer *Piercing of The Corporate Veil: A Review of The Concept and Consideration of its Relevance in South African Tax Law* (unpublished Dissertation of the University of Cape Town 1994) 20.

³⁹ Section 19 of the Companies Act 71 of 2008.

⁴⁰ Section 19(1)(b) of the Companies Act 71 of 2008.

⁴¹ Section 19(2) of the Companies Act 71 of 2008.

money-making scheme or sham. Further, Section 14(4) of the Companies Act, states that a registration certificate issued, is conclusive evidence that all requirements for the incorporation of a company have been complied with and that the company is incorporated from the date and time stated in the certificate.⁴²

This doctrine then emerged to be an important one in corporate jurisprudence. The development of this doctrine is the basic tenet on which company law is premised. It is regarded as possibly the most comprehensive and consistent law of corporate jurisprudence since it lays the groundwork for how a corporation is created and operates.⁴³ In contrast, the rule of is one of the topics that is most frequently challenged both inside and between jurisdictions.

1.4 Problem Statement

There has been a drastic decline in the South African job and business market in the past recent years. Companies, mostly public and state-owned companies have tumbled to the ground due to negligence, fraud, resource exploitation, and gross incompetence on the part of the directors. All these negatives have somehow cost the companies more than the law has punished those responsible for the downfall of the companies. It is evident that the concept of separate legal personality is grossly abused by individuals knowing that whatever is done in the name of the company forever remains a liability of the company.

In addition, the world has developed rapidly, and business structures now include corporations that are either automated, run by algorithm or by artificial intelligence. However, these forms of corporations have posed a question of accountability and responsibility on who bears the charges on instances of fault or misconduct. Therefore, it is essential for this study to examine the doctrine of separate legal personality and the extent to which it can be applied. By doing so, it is important to reflect to the origins and development of this doctrine.

1.5 Aims

For the purpose of this research, the author focuses on the characteristics of separate legal personality that have been granted to certain companies. This research aims to critically analyse the doctrine of separate legal personality from its roots to its current state and application in South African company law. The focus is particularly on its history and origins, development, and its current application in South Africa. This will be achieved by examining and comparing

⁴² Section 14(4) of the Companies Act 71 of 2008.

⁴³ R Becker *Disregarding the separate juristic personality of a company: an English Case Comparison* (Unpublished LLM Dissertation from the University of Pretoria 2014) 38.

principles of case law throughout the years. This research is important as it will also shed some light on why some entities are afforded separate legal personality and others are not. Furthermore, the author will examine the flexibility and application of this doctrine to modern developments.

1.6 Research Questions

As such, the following questions will be explored:

1. What are the origins of corporate personality and how have these influenced the development of the doctrine of separate legal personality?
2. Did the South African law regime adopt the doctrine into legislation as is, or alterations were made?
3. Why are other companies afforded separate legal personality while others are not?
4. What are the consequences to members who abuse the corporation's separate personality?
5. What is the legal status of separate legal personality regarding modern developments, technology and automated corporations and how can this be improved?

1.7 Research Methodology

This study is desktop research and therefore will employ a qualitative and analytical method of research. For the purpose of this study, the main sources consulted consist of company law legislations, case law, relevant textbooks, reports, and internet sources. Furthermore, the writings of scholars who have contributed significantly to the doctrine of separate legal personality will be consulted.

1.8 Structure of the mini dissertation

CHAPTER 1 – INTRODUCTION

The first chapter of the dissertation constitutes of the introduction, background, purpose and rationale of the study, issues to be examined, as well as the research methodology. This chapter will examine a brief overview of the background of the doctrine of separate legal personality and its origins.

CHAPTER 2 - THE ORIGINS AND RECEPTION OF LEGAL PERSONALITY IN SOUTH AFRICAN COMPANY LAW

In this chapter, the author explores the origins and history of separate personality in more detail. This chapter reflects back from when the concept of personhood was first founded, examining theories that influenced its development and when this concept was bestowed to corporations. The author will also discuss the influences that led to the development and enactment of the Companies Act 71 of 2008.

CHAPTER 3 - THE CURRENT APPLICATION OF SEPARATE LEGAL PERSONALITY IN TERMS OF THE COMPANIES ACT 71 OF 2008

With regard to this chapter, reference is made to the adoption of separate legal personality into the South African legal framework. This chapter examines both the common law and statutory provisions with regard to this doctrine. A timeline of how this doctrine has been part of our legal system prior to the 2008 Act will be explored.

CHAPTER 4 - MODERN ISSUES PERTAINING SEPARATE LEGAL PERSONALITY

In this chapter, the author highlights a few challenges that are faced by separate legal personality in the modern corporate world. Most of these issues stem from the development of technology and changing business structures.

CHAPTER 5 – CONCLUSION AND RECOMMENDATIONS

This chapter concludes that separate legal personality remains at the heart of company law but needs further development and flexibility to adapt to the ever-changing corporate world. In this chapter, the author further suggests a few recommendations to improve the doctrine in order to accommodate modern challenges.

Chapter 2: The Origins and Reception of Separate Legal Personality in South African Company Law

2.1 Introduction

As already outlined in chapter one, the origins of separate legal personality are traced back in the UK during the 1800's. Companies have always been and still are an important part of our economy. Throughout the years, laws and principles governing companies have been developed vigorously. These principles include the concept of separate legal personality. As stated in Chapter One, a company once registered and incorporated acquires its own personality and becomes a distinct separate legal entity.⁴⁴ This means that a company is an artificial person, distinct from its owners, and has a legal standing in its own name.⁴⁵ Many company law systems across the world, including South African company law have adopted the concept of separate legal personality in their legislation.⁴⁶ For instance, in Australia, a company business structure is a separate legal entity enjoying the rights of a corporate veil as compared to a sole trader or a partnership.⁴⁷ While also on the other hand, Canadian corporate law also caters for the principle of separate legal entity.⁴⁸ It is only natural to be curious about this worldwide concept. Companies across the world now appreciate limited liability because of the development of this concept or doctrine.

This chapter seeks to examine the historical origins of the doctrine of separate legal personality. It also seeks to examine the reception of this doctrine in South African law as well as its contemporary application in South African Company law. This examination will include a discussion of various cases that have had an impact in shaping this doctrine. In order to fully understand this doctrine as it is enacted in 21st-century company law, this chapter will further discuss the concept of corporate personhood, dating back to its history including why and how companies were first viewed as “persons/people” in terms of the law and the legal implications this has on companies.

2.2 Corporate Personhood

⁴⁴ Section 19 of the Companies Act 71 of 2008.

⁴⁵ T Govender *An analysis of lifting the corporate veil in light of section 20(9) of the Companies Act 71 of 2008* (unpublished LLM thesis, University of KwaZulu Natal, 2018) 16.

⁴⁶ *Ibid* 16.

⁴⁷ I M Ramsay and D B Noakes ‘Piercing the Corporate Veil in Australia’ (2001) 19 *CSLJ* 5.

⁴⁸ W N Jason ‘Canadian Corporate Law, Veil-Piercing, and the Private Law Model Corporation’ (2000) 50 (2) *The University of Toronto Law Journal* 177.

It is fundamental to first introduce the concept of corporate personhood, as this has a major impact on the development of the doctrine of separate legal personality as we know it in modern-day company law. Corporate personhood is a concept that encompasses the capacity of a corporation to have the characteristics of a person.⁴⁹ This concept is fundamental to what corporations are and what they can do.⁵⁰ This concept recognises that corporations should be subject to constitutional protection or holders of constitutional rights, and this longstanding notion has become known as the doctrine of corporate personhood.⁵¹ Consequently, an incorporation has a name of its own, *locus standi*, and has the right to own and hold its own assets and liabilities.⁵² Corporate personhood originated in ancient Rome and was later developed in Medieval Europe.⁵³ This notion vests the corporation with human capabilities and characteristics therefore implying independence, distinctiveness, and continuous succession of the corporation. However, during the Middle Ages, corporations owed their existence to the state because their authority to conduct business directly flowed from a charter granted by the state.

English law adopted and used this metaphor of a corporation as a person to describe the self-perpetuating nature of the corporation.⁵⁴ This concept has directly led to the introduction of separate legal personality whereby an entity is legally and morally recognised as independent from the humans associated with it, including those who have incorporated it.⁵⁵ The concept of separate legal personality arises from the concept of a legal person having its own legal personality to acquire rights and incur obligations that are distinct from those of the directors and shareholders of the company.⁵⁶

2.3 History and Development of Corporate Personhood

The rise and development of corporate personhood has a long history and research suggests that this notion was first introduced in Ancient Rome and later developed in Europe during the Middle Ages (500 AD to 1400). The introduction of this concept was influenced mainly by the

⁴⁹ M Margaret 'Corporate Personhood and the Corporate Persona' 2013 *University of Illinois Law Review* 785.

⁵⁰ E Pollman 'Corporate Personhood and Limited Sovereignty' (2021) 74(6) *VLR* 1728.

⁵¹ *Ibid* 1732.

⁵² West's Encyclopaedia of American Law 'Corporate Personality' available at <https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/corporate-personality> accessed on 15 August 2023.

⁵³ E Pollman 'Reconceiving Corporate Personhood' 2011 *ULR* 1632.

⁵⁴ *Ibid* 1632.

⁵⁵ C MacDonald and A Marcoux 'Corporate personhood' available at <https://conciseencyclopedia.org/entries/corporate-personhood/> accessed on 17 November 2023.

⁵⁶ F Cassim... et al *Contemporary Company Law* 2nd ed (2012) 31.

local royal authorities who sought to incorporate entities such as churches and universities for perpetual succession.⁵⁷ These institutions were said to have no owners and therefore they were granted charters by local kings, which then gave them authority to exist independently.⁵⁸ For instance, a Hindu temple was deemed to be a distinct legal body by the UK Court of Appeal in *Bumper Development Corp Ltd v. Commissioner of Police of the Metropolis*.⁵⁹

A charter refers to a document issued by the authority that grants certain rights to a particular person, group, or corporation.⁶⁰ Charters gave institutions the right to hold property in its own name and ensured that the property held by that institution was solely owned by that institution and not by the individuals or legal heirs who governed it.⁶¹ In the 16th century, a growth in the number of institutions was recorded, and the range of granting charters was further expanded to institutions such as a hospital, schools, and universities. These institutions were granted charters for them to acquire perpetual succession.⁶² During the 17th century, in England, charters were issued to trading companies for commercial purposes.⁶³ It was not until this stage that corporations were regarded as legal entities, meaning that, in the eyes of the law, corporations were considered legal persons with access to certain rights and duties under the law.⁶⁴ Corporations are considered as judicial persons and should therefore be treated as legal persons who are able to act and stand for themselves independently.

Jurists who have contributed to the discovery of this concept have developed theories that describe the nature of corporate personhood. These are the organic, fiction, purpose, and concession theories.⁶⁵ The most significant theories that caught the most attention are the fiction and organic theory.⁶⁶

2.3.1 Fiction Theory

⁵⁷ J D Donnell 'The Legitimacy of the Business Corporation in the law' (1971) 46 (3) *ILJ* 451.

⁵⁸ M Waqas and Z Rehman 'Separate legal entity of corporation: The corporate veil' (2016) 3 (1) *IJSSM* 1.

⁵⁹ *Bumper Development Corporation Ltd v Commissioner of Police of the Metropolis*: CA 1991.

⁶⁰ R Clemens and T Graham 'Introduction to Manuscript Studies: Charters and Cartularies' 2007 222–39.

⁶¹ R H George 'The Charters Granted to English Parliamentary Corporations in 1688' (1940) 55 (217) *EHR* 48.

⁶² R Harries 'Industrializing English Law: Entrepreneurship and Business Organization 1720-1844' (2000) 44 (3) *AJLH* 316.

⁶³ MM Blair 'The Four Functions of Corporate Personhood' (2012) 12 available at SSRN: <https://ssrn.com/abstract=2037356> accessed on 27 October 2023.

⁶⁴ A J Kurki 'A Theory of Legal Personhood' (2019) 4 available at <https://doi.org/10.1093/oso/9780198844037.003.0001> accessed on 05 October 2023.

⁶⁵ WA Joubert 'The Law of South Africa' (2012) 4 (1) *LAWSA* 64.

⁶⁶ *Ibid* 63.

The fiction theory is said to have been developed by Pope Innocent IV (1243-1254) and later supported by Savigny, Salmond, and Holland.⁶⁷ This theory states that an entity's existence is nothing other than a fiction. This theory states that a company should not be treated the same as its individuals. However, although it is not human and has no physical existence, companies should have the ability to have their own rights and duties.⁶⁸ Throughout its existence, it must be represented by humans although it cannot act on its own to commit wrongs and crimes, it shall be held liable for wrongs conducted by its representatives which attempts to guarantee individual moral autonomy.⁶⁹ Under this theory, rights, and duties attached to corporations as artificial persons totally depend on how much the law imputes to it by fiction.

In *Ochberg v Commissioner for Inland Revenue*,⁷⁰ a company called Airton Timber had an authorised share capital of £10 000 made up of 9 950 shares of £1 each and 1 000 1s shares. Ochberg held all but six of the 5 107 issued shares, the other six being held by “subordinates” and family members. *Ochberg* concluded an agreement with the company to provide certain services. The Memorandum of Agreement had been successfully lodged with the Registrar of Deeds as required by the then Companies Act.⁷¹ The agreement was that *Ochberg* provides the services in exchange for the remainder of the unissued shares (4 843 fully paid up £1 shares and 1 000 1s shares). The following were to be provided to the company:

- (i) the cession of a lease held by him with the South African Railways for land suitable for a siding and a receiving site for timber.
- (ii) financial assistance to be rendered to the company in connection with certain shipments of timber; and
- (iii) the appellant's goodwill relating to the continued pledge of his credit on behalf of the company.⁷²

During the year of assessment, the Commissioner assessed Ochberg on an amount of £4 893, being the face value of the shares. The question before the court was whether shares issued by a company to Ochberg (the sole shareholder), in regard to services rendered and an asset

⁶⁷ K Keshari and I Khanna ‘All you need to know about corporate personality and theories of corporate personality’ (2021) available at <https://blog.ipleaders.in/all-you-need-to-know-about-corporate-personality-and-theories-of-corporate-personality/> accessed on 28 September 2023.

⁶⁸ WA Joubert ‘The Law of South Africa’ (2012) 4(1) LAWSA 64.

⁶⁹ *Ibid* 64.

⁷⁰ *Ochberg v Commissioner for Inland Revenue* 1931 AD 215.

⁷¹ Section 92 of the Companies Act of the Cape Act 2 of 1892.

⁷² *Ochberg v Commissioner for Inland Revenue* 5 SATC 93 at 94.

provided to the company, constituted “income” in terms of the definition of “gross income” in section 7(1) of the Income Tax Act No. 40 of 1925.

The Special Court held that, as the company and the appellant were separate personae, the agreement was a real and substantial contract between the two parties in terms of which the appellant received the shares partly as consideration for the right of occupation of leased premises⁷³ and partly for rendering financial services.⁷⁴

In the Appellate Division, De Villiers, C.J handed out the judgement and held that a company is endowed with an artificial personality that only exists by way of law. The law births and regulates the company to a certain extent. He further stated that ordinary laws allow an individual to escape consequences of his commercial pins, therefore turning himself into a corporate entity with limited liability.⁷⁵

2.3.2 Organic Theory

The organic theory was first developed in the case of *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*.⁷⁶ This is a famous decision by the House of Lords on the ability to impose liability upon a corporation. The facts of the case were that Lennard's Carrying Co owned a ship and was transporting goods to the Asiatic Petroleum Company. Due to unseaworthiness, the ship sank, and the cargo was lost. 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. Viscount Haldane said that a corporation can be defined as an idea that has characteristics of a human but possess no mind, body, or even a will of its own. Its ability to exist depends on someone who is an agent but will also be responsible for directing the will of the corporation.⁷⁷

In essence, the organic theory states that a company is run by its representatives (directors and employees) and therefore the acts of its representatives are legally regarded as that of the company itself. Therefore, to prevent the company from escaping liability, the intention and negligence of its representative are also regarded as that of the company. As a result, the representatives of the company are therefore considered organic parts of the company.⁷⁸

⁷³ Section 7 (1) (d) of the Income Tax Act.

⁷⁴ *Ibid* 95.

⁷⁵ *Ochberg v Commissioner for Inland Revenue* 1931 AD 215 at 232.

⁷⁶ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC (HL) 705.

⁷⁷ *Continental Tyre and Rubber Co. (G.B) Ltd v Daimler Co* (1915) K.B 893 at 916.

⁷⁸ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC (HL) 705.

2.4 Separate legal personality

A company is considered to be a juristic person, also known as a fictitious or artificial person. This phenomenon of legal personality is not natural but a creature of law meaning that it exists because of the law.⁷⁹ Upon incorporation, the law requires companies to state their objectives in order to limit and restrict their corporate capacity. Therefore, companies only have limited rights and responsibilities.

The distinctive personality of a company can be described in many ways. Firstly, the most common metaphor used to describe the separateness of the company and its incorporators is a “veil”. A veil is considered a curtain between the company and those who are responsible for its daily operation.⁸⁰ It is also considered a curtain between the company and members or fellow other entities in cases of a joint venture.⁸¹ This is an important aspect of this concept as the question that arises is who will be held liable for all the crimes and wrongs committed by the company during the course of its operations since corporate personhood allows a company to hold its own rights and obligations despite its lack of physical existence.

The introduction of charters to firms that traded for commercial purposes in England in the 17th century opened a pathway for the concept of separate juristic personality. This concept was to be later developed by company law. For this reason, it is safe to say that the UK company law is the founder of this doctrine.

2.4.1 Separate legal personality before Salomon's case

Before discussing the milestone decision of the *Salomon* case, it is important to first discuss the early development of the concept of separate legal entity prior to this decision. The growth of commercial institutions in the 17th century meant that laws had to be developed and enforced in order to regulate the relationship between companies and most importantly the relationship between the company and shareholders behind it.

The early Roman Empire was the starting point of the idea that a collective group could act on its behalf, this was influenced by different types of associations such as collegia, corpora, societies, sodalitates, or sodalicia, that acted as a legal entity.⁸² The main aim of the

⁷⁹ *Dartmouth College v Woodward* 17 US 629 659; 4 Wheat 518 (1819) 636.

⁸⁰ M Pickering ‘The Company as a Separate Legal Entity’ (1968) 31 (5) *MLR* 488.

⁸¹ *Ibid* 484.

⁸² D Figueroa ‘Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America’ (2012) 50 (4) *DLR* 689.

establishment of these entities was to promote commercial and economic growth as well as control prices and markets.⁸³ The legal status of these institutions was not codified in the Roman laws and was however dependent on the whim of those in power.⁸⁴

In medieval England, commercial businesses made an appearance, but the system of company registration was not yet introduced. Individuals established trade organisations that were known as guilds. These organisations were an association of artisans and merchants who oversaw the practice of their trade in a particular territory.⁸⁵ The title “company” was first given to merchant traders who conducted trade abroad by virtue of charters granted by the Crown.⁸⁶ A company traded on behalf of its members, whereby each member was required to contribute towards the merchandise that was to be sold, and therefore in return, granted a share in the profits.⁸⁷

In the late 17th century, the only form of business organisation that existed was the “joint stock company”. From a commercial perspective, this form of business enterprise consists of a large pool of shares with a large number of shareholders who are not expected to have a role in management.⁸⁸ This form of enterprise was usually developed to carry out relatively large undertakings. Shareholders are free to transfer their shares to others without any effects on the continued existence of the company.⁸⁹ A joint stock company could either be incorporated or unincorporated. An “incorporated” company would have been granted authority either by Royal Charter or an Act of Parliament which further set out the company’s rules and reflected its joint stock character. It was usual for this type of corporation to be seen as a separate entity from its shareholders. On the other hand, an “unincorporated” company was considered a legal partnership as it was formed by a contractual agreement between two or more parties or individuals.⁹⁰ This form of company was relatively similar to an “incorporated” company as their nature both provided for transferrable shares. While largely, if not completely, replaced

⁸³ *Ibid* 689.

⁸⁴ *Ibid* 690.

⁸⁵ A Smit *Remedying Abuses of Limited Liability in Company Groups* (unpublished LLM thesis, University of Cape Town 2016) 12.

⁸⁶ R A Stevens *The External Relations of Company Groups in South African Law: A Critical Comparative Analysis* (LLD Thesis University of Stellenbosch 2011) 23.

⁸⁷ A Smit *Remedying Abuses of Limited Liability in Company Groups* (unpublished LLM thesis, University of Cape Town 2016) 13.

⁸⁸ D Figueroa ‘Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America’ (2012) Vol 50 (4) *DLR* 689.

⁸⁹ A B Du Bois ‘The English Business Company after the Bubble Act 1720–1800’ (1948) 58 (230) *EJ* 87.

⁹⁰ Nathaniel Lindley & Baron Lindley ‘A Treatise on the Law of Partnership: Including Its Application to Joint-Stock and Other Companies’ (1860) 125.

by modern corporate structures, the joint-stock company is the precursor to corporations as we know them today.⁹¹

The Bubble Act was passed by parliament in 1720. This Act prohibited the establishment of corporations except by way of parliament or royal charter. A clearer definition of what a corporation is, was provided by Steward Kyd in 1793 when he held that “it’s a group or collection of individuals united into one body.”⁹² This definition provided an implication that a corporation is nothing more than the members comprising it. In 1844 the Joint Stock Companies Act 23 was introduced and allowed for the incorporation of a company under legislation. However, still, no provision was made for the legal status and liability of a company.

Many years later after Kyd provided the definition of a corporation, it was noted that sufficient attention was not directed to its real characteristic in the eye of the law, which is its separate existence from the individuals comprising it.⁹³ Section 6 of the 1862 Companies Act provided for a registered company to be separate from its members by stating that “members may form an incorporated company”.⁹⁴ The development of the concept of separate legal entity and the ever-changing commercial practices such as unpaid capital, lower value shares, and capital investments such as shares and debentures strengthened the perception that a joint stock company was separate from its shareholders.⁹⁵ With this being said, it is evident that the concept of separate legal entity had already been developed by 1875.

2.4.2 *Salomon v Salomon*

In 1896, the *Salomon v Salomon*⁹⁶ case introduced this concept into English company law. Mr Salomon traded as a sole proprietor making leather boots and shoes in the nineteenth century. While his business was still solvent, he formed a new company “Aron Salomon & Company Limited” and sold his business to this company. The members of the family held the shares because the Companies Act required, at that time that there should be seven shareholders.

⁹¹ Eric Reed “Joint Stock Companies” available at <https://smartasset.com/investing/joint-stock-company> accessed on 20 March 2024.

⁹² S Kyd ‘A Treatise on the Law of Corporations’ (1793) 165.

⁹³ *Ibid* 165.

⁹⁴ Section 6 of the UK Companies Act 1862.

⁹⁵ P Lipton ‘The Mythology of Salomon’s case and the law dealing with the tort liabilities of corporate groups: A historical perspective’ 2014 *MULR* 457.

⁹⁶ *Salomon v A Salomon Co. Ltd* (1896) UKHL 1, (1987) AC 22.

Mr *Salomon* valued his business at 39,000 pounds. To fulfil the sale of his business, Mr. *Salomon* took 20,000 fully paid one-pound shares in addition to debentures to the value of 10,000 pounds. These debentures having a floating charge on the assets of the company. The company paid Mr. Salomon 20,001 fully paid shares and 8,781 pounds in cash, bringing the total amount paid by the company to Mr Salomon to 28,782 pounds (both in shares and cash), with 10,000 pounds remaining payable to *Salomon* by the company, remained as an unsecured debt.

When the business went bad and faced financial difficulties, Mr *Salomon* borrowed 5000 pounds from Broderip. Mr *Salomon* secured this loan with his debentures on condition that he should obtain a residual benefit after the debt has been discharged. Unfortunately, his payment went into arrears and Broderip enforced his security.

The court had to determine whether the secured loan of Mr Salomon would take precedence over the non-secured debt of another creditor in the sum of 11,000 pounds. If the court awarded the secured loan priority over the unsecured loan, the non-secured creditor would be left with nothing because the company's assets were so low.

The Chancery division held that because the corporation was Mr *Salomon's* agent, he was held liable for all of the creditor's obligations. Vaughan Williams J was of the opinion that Mr *Salomon's* debentures were invalid on the grounds of fraud. He further held that the signatories of the memorandum were mere "dummies" and that the company was really just Mr Salomon in another form, an alias or at least, his agent.⁹⁷

Appeal

The court of appeal confirmed the decision granted by the lower court against Mr. Salomon. The court was of the opinion that *Salomon* had misused the privileges of incorporation and he had exploited the rights of incorporation and limited liability, thus his appeal was dismissed.⁹⁸ The court of appeal described my Salomons company as a myth and a fiction that enabled him to carry on his business like he did, except with the benefit of limited liability.⁹⁹

The House of Lords overturned both the lower courts and the court of appeal's rulings,¹⁰⁰ establishing a cornerstone basis for current business law. The House of Lords agreed that a

⁹⁷ Supra at 40.

⁹⁸ Dhawan S; *A Separate entity: Salomon v Salomon*

⁹⁹ *Salomon v A Salomon Co. Ltd* (1897) AC 26.

¹⁰⁰ Supra at 40.

company is a different legal entity from its members and stockholders. Lord Macnaghten stated that once a company is incorporated under the relevant legislation, it is in law a different person altogether from the person who has incorporated and holds shares in it.¹⁰¹ The House of Lords found that Salomon Company was properly constituted in conformity with the law, that the company's obligations are its debts, and that the members are not accountable for the company's debts. This is the primary case that established the concept of the corporate veil. The Salomon case still represents the orthodox view of separate legal personality under English law, although several exceptions have since evolved.¹⁰²

It is a major decision in UK Company Law that firmly upholds the doctrine of corporate personality as a separate legal entity, implying that shareholders cannot be held personally accountable for the company's insolvency. By 1890, both the legislature and courts in England had accepted separate legal personality of a company and limited liability of its shareholders.

In the decades since the *Salomon* case, various exceptional circumstances have been delineated, both by legislatures and the judiciary, in England and elsewhere when courts can legitimately disregard a company's separate legal personality, such as where crime or fraud has been committed. English law also recognises legal entities which are accepted as legal entities in their country of formation. According to Indian law, where an entity was created, it possessed a legal personality. Similar to a limited liability partnership, a limited liability company is a distinct legal person and business in the United States.

Eventually, the legislative interventions and judicial precedents further contributed to the development of this concept. It is also completely justified to state that the decision in the Salomon is the one on which modern company law rests. That's why the courts in the UK and the USA have been keen to maintain the position despite growing clamour to deviate from it.¹⁰³

2.4.3 Significance of the Salomon case

It is important to note that before the Salomon case, the law was unclear with its position with regards to the doctrine of separate legal entity. It was not until the Salomon case was decided in 1897 that this doctrine gained recognition and direction. The decision of the House of Lords in the Salomon case has a significant contribution to modern-day company law as it created a

¹⁰¹ *Solomon v Solomon supra* (38) Lord Macnaghten at 51.

¹⁰² R Dahal 'Salomon v Salomon: Its Impact on Modern Laws on Corporations' (2018) 7 available at SSRN <https://ssrn.com/abstract=3169431> accessed on 25 October 2023.

¹⁰³ A Hutchinson and I Langlois. 'Salomon Redux: The Moralities of Business' (2012) 35 (4) *SULR* 1118.

solid foundation for the doctrines of separate legal personality and limited liability.¹⁰⁴ Therefore, it would not be an overstatement to accredit Solomon to have contributed to modern company law.

There are two significant aspects of the decision of Salomon's case that still play a major role in modern company law. The first significance of the Salomon case is that it cemented the doctrine of separate legal personality into the corporate world. By stating that the company is a distinctive person who exists independently with its own rights and liabilities provides protection to both the company and its shareholders. Furthermore, this decision narrowly legitimised the notion of a one-man company, whereby a business owned and controlled by a single person could be registered as a limited liability company, as a result, the individual, who is a shareholder, is protected from creditor's claims of the company.¹⁰⁵ In essence, this doctrine has acted as a shield to sole shareholders who face claims from creditors.¹⁰⁶

Another significant aspect that stems from the decision in *Salomon* is that of limited liability to shareholders. Liabilities incurred by the company remain that of the company and do not pass on to the shareholder(s) and vice versa. This grants shareholders and directors the ability to act freely and execute the objectives of the company without any fear of implicating themselves or being held responsible for bad business deals.¹⁰⁷

2.5 The Adoption of Separate legal personality in South African Company Law

The adoption of the concept of separate legal personality in South African law has been a significant prospect for the future of company law.¹⁰⁸ This doctrine has found room to evolve by way of common law developments and statutory enactment. The recognition of separate legal personality was founded by the roots of common law and is a fundamental principle in clarifying the legal status of a company and its shareholders.¹⁰⁹

The significance of the acquisition of the doctrine of separate legal personality in South African company law was to create a legislative framework that recognises the nature of companies that are separate from its directors and shareholders as provided for by the decision in *Salomon*

¹⁰⁴ D Rajib 'Salomon v Salomon: Its Impact on Modern Laws on Corporations' (2018) Available at SSRN: <https://ssrn.com/abstract=3169431> or <http://dx.doi.org/10.2139/ssrn.3169431> accessed on 12 November 2023.

¹⁰⁵ P Lipton 'The Mythology of Salomon's case and the law dealing with the tort liabilities of corporate groups: A historical perspective' 2014 *MULR* 453.

¹⁰⁶ *Ibid* 453.

¹⁰⁷ *Ibid* 453.

¹⁰⁸ MA Pickering 'The Company as a Separate Legal entity' (1968) 31 (5) *MLR* 483.

¹⁰⁹ *Ibid* 485.

v Salomon.¹¹⁰ This doctrine enables a transparent corporate framework regarding the rights and responsibilities of a company and therefore protecting both the company and shareholders.¹¹¹

Before the growth of South African company law and the introduction of legislation, companies were regulated by the common law. The Common law applicable to South African companies is a direct reflection of English common law.¹¹² The introduction of English law elements into the South African legal system was widespread during the 19th century and is still evident in the 20th century.¹¹³ A large number of English precedents were adopted in South Africa with little or no modification, these include the division of power amongst the directors and shareholders, the ultra vires doctrine, and the doctrine of separate legal personality.¹¹⁴

From a historical point of view, the concept of separate legal personality was mainly for religious institutions, but recently became the most prominent contribution to companies and the economy. This is due to its ability to provide security for creditors in order for the company to be able to raise capital.¹¹⁵ This doctrine has grown tremendously throughout the ages and become an integral part of South African company law.

2.5.1 English Law Influence

South African common law is a body of rules from the Roman-Dutch law and the English law. A discussion of English law is important in order to determine the current position. English law began its profound influence in the early 19th century when the development and influence of English law became irresistible.¹¹⁶ This impact led to the appointment of English Judges in the Cape.¹¹⁷ This meant that company law principles were to be influenced by the English law. The Joint Stock Companies Act 23 of 1861 was introduced and was a mere reflection of the English Limited liability Act 19 of 1855. While on the other hand, the English Companies Act 26 of 1862 was the father of the Cape Companies Act.¹¹⁸ This was evidence that the English company legislation was continuously injected into South African company law.

¹¹⁰ J Dine & M Koutsisas *Company law* (2020) 22.

¹¹¹ *Ibid* 22.

¹¹² HS Cilliers & ML Benade et al *Corporate Law* (2000) 19.

¹¹³ Schreiner Oliver Deneys 'The Contribution of English Law to South African Law and the role of the Rule of Law in South Africa' (Hamlyn lectures, 1967) 7.

¹¹⁴ HS Cilliers and ML Benade et al *Corporate Law* (2000) 19.

¹¹⁵ C Nyombi 'Lifting the veil of incorporation under common law and statute' (2014) 56 (1) *IJLM* 67.

¹¹⁶ S D Girvin 'The antecedents of South African company law' (1992) 13 (1) *JLH* 70.

¹¹⁷ *Ibid* 70.

¹¹⁸ *Ibid* 70.

The laws adopted in the Cape influenced other colonies to follow these laws, for example, both the Transvaal and the Natal inherited these laws. This birthed the 1926 Unions Companies Act, which by itself was a reproduction of the English Companies Act of 1908.¹¹⁹ During the 20th century, it can be said that South African company legislation was a direct result of certain socio-economic advances and developments in the United Kingdom. South African legislation will need to keep up with that of its influencers and major trading partners such as Germany, the USA, and the UK.¹²⁰

The 1973 Companies Act however, swerved direction and has a few departures from English law.¹²¹ These include section 36 of the Act which is the ultra vires doctrine, where the Act held that it can no longer be averred that a company's act is void by reason that it did not have the proper capacity or power to act; the institution of standing advisory committee on company law; and the institution of a system of no par value shares.¹²² Other new developments have emerged overtime throughout the introduction of new legislature. This includes the introduction of the Tarquand Rule which existed through common law but now provided for in section 20(7) of the 2008 Companies Act.¹²³ This doctrine prevents individuals from been negatively affected by a company's failure to follow internal procedures on the power of their representatives.

2.5.2 Statutory developments and Separate legal personality

South African modern company law finds its roots from the Joint Stock Companies Act of 1844 as well as an influence from the Salomon case.¹²⁴ The Joint Stock Companies Act of 1844 provided for a much easier process of incorporation with time-effective procedures and much-reduced costs to allow for an extended variety of corporate users.¹²⁵ However, throughout its regime, the Joint Stock Companies Act was fairly limited and made no provision to separate legal personality and shareholder's limited liability.¹²⁶

Company law was formally introduced in South Africa since 1861. This existence began with the Joint Stock Companies Limited Liabilities Act No. 23 of 1861 and the Special Partnerships

¹¹⁹ *Ibid* 70.

¹²⁰ *Ibid* 71.

¹²¹ Companies Act 61 of 1973.

¹²² S D Girvin 'The antecedents of South African company law' (1992) 13 (1) *JLH* 71.

¹²³ Section 20(7) of the Companies Act 71 of 2008.

¹²⁴ *Salomon v Salomon and Co Ltd* (1897) AC 22 (HL).

¹²⁵ A P Cheong 'Corporate Liability: A Study in Principles Attribution' (2001) 3.

¹²⁶ M Glazer *Piercing of The Corporate Veil: A Review of The Concept and Consideration of its Relevance in South African Tax Law* (Unpublished LLM Dissertation of the University of Cape Town 1994) 44.

Limited Liability Act No. 24 of 1861 of the Cape Colony,¹²⁷ which, along with other provincial company legislation, was a mirror image of English legislation.

The first national company law was introduced in 1926 with the Union Companies Act,¹²⁸ which was then amended from time to time along the lines of the latest English legislation. The Companies Act of 1926 held that members of a company are considered a corporate body with perpetual succession and has the ability to perform the functions of an incorporated company, this effect is bestowed upon approval of the corporation's memorandum of association.¹²⁹ This Act made no specific provision to the protection of directors or shareholders, except in instances where the company was initially incorporated as a limited liability company.¹³⁰ In addition, this Act introduced a lot of new concepts, including the concept of judicial management. The main reason behind the introduction of this concept was to provide support to failing companies and grant them the opportunity to restructure. Even though this was a relatively new concept, it had a few short-comings, for instance, many enterprises who sought for judicial administration had no realistic chance of rehabilitation and were just doing so to escape liquidation under the 1926 Act's winding-up provisions.¹³¹

The 1926 Act was formally replaced in 1973 by the Companies Act No 61 of 1973,¹³² which, despite efforts to innovate and develop a direction more appropriate for South Africa, remains much in the mould of English law. The 1973 Act encouraged the incorporation of limited liability companies by providing for the conversion of unlimited companies into limited companies.¹³³ However, this Act lacked modern requirements and has not been thoroughly reviewed to reflect recent developments in South African company law and internationally, hence why it was repealed.¹³⁴

2.5.3 Companies Act 71 of 2008

Its successor, the 2008 Companies Act adopted separate legal personality and specifically states that once a company is incorporated, the company exists as a separate juristic person and its

¹²⁷ Joint Stock Companies Limited Liabilities Act No 23 of 1861.

¹²⁸ Union Companies Act of 1926.

¹²⁹ Section 18(2) of the Companies Act 46 of 1926.

¹³⁰ R A Stevens *The External Relations of Company Groups in South African Law* (Unpublished LLD Dissertation of the University of Stellenbosch 2011) 62.

¹³¹ F I Ofwano *Suggested Reasons for the failure of Judicial Management as a Business rescue Mechanism in South African Law* (Unpublished post graduate diploma of the University of Cape Town 2014) 8.

¹³² Companies Act No 61 of 1973.

¹³³ Section 25 of the Companies Act 61 of 1973.

¹³⁴ South Africa Department of Trade and Industry: *South African Company Law for the 21st Century Guidelines for Corporate Law Reform* (2004) 14.

directors and shareholders are not liable for the company's debts.¹³⁵ This principle is provided for in section 19(1) and (2) of the Act, which reads as follows:

“19(1) From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company -

(a) is a juristic person, who exists continuously until its name is removed from the company's register in accordance with this Act;

(b) has all the legal power and capacity of an individual, except to the extent that-

(i) a juristic person is incapable of exercising any such power, or having any such capacity; ...

(2) A person is not, solely by reason of being an incorporate, 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.”

The current framework of company law in South Africa is therefore essentially built on foundations, which were put in place by the British in the middle of the 19th century.¹³⁶ National company law legislation first began with the 1926 Companies Act. After a while new company law legislation was introduced in 1973, this was referred to as The Companies Act 61 of 1973. This Act adopted many of the principles and provisions of the 1926 Act and still relied heavily on the principles of English law.¹³⁷ The latest extensive reform of company law occurred in South Africa in 2008 with the enactment of the existing company law.¹³⁸

2.6 Conclusion

As far as the origins of Separate legal personality are concerned, it seems that although English law was the first common-law jurisdiction to introduce legislation on legal personality, it was unpopular and relatively unknown outside its home jurisdiction, which makes it highly improbable that the very same doctrine enacted in South African company law was derived directly from the English legislation. Although this doctrine was developed in England, its

¹³⁵ Section 19 (2) of the Companies Act of 2008.

¹³⁶ M Tong's *Review of Company Law in South Africa: Should South Africa Follow the British Example in Corporate Governance Matters This Time?* (unpublished LLM dissertation, University of Natal, Durban 2003) 27.

¹³⁷ *Ibid.*

¹³⁸ Companies Act 71 of 2008.

logical effectiveness has led it to be adopted by many jurisdictions across the world. It forms the bases of many company law legislations, including South African Company law. Its application has been spread throughout the world.

Chapter 3: The Current Application of Separate Legal Personality in terms of the Companies Act 71 of 2008

3.1 Introduction

The concept of separate legal personality is an important aspect of our current company law. As already noted in Chapter 2, this concept also plays a prominent role in many other jurisdictions across the world.¹³⁹ Due to the clarity offered in the well-known *Salomon v. Salomon* case, the distinction between shareholders and the company is maintained in South Africa. The Companies Act 71 of 2008 states that upon registration a company assumes a distinction position independent of its shareholders and incorporators.¹⁴⁰ The company is to be treated as a distinctive juristic person with its own rights and liabilities.

The purpose of this chapter is to discuss the current application of the concept of separate legal personality in South African Company law. The common law and the Companies Act of 2008 are both considered.

3.2 Common law development and application of Separate legal entity

The common law played a significant role in developing and grooming this doctrine by applying this doctrine consistently throughout the cases. It is through court precedents that this doctrine found its solid foundation in South African company law. It is important to refer to some English decisions that have had an impact on the uprising of this doctrine.

In the case of *Foss v Harbottle*,¹⁴¹ Mr. Edward Starkie Turton and Richard Foss were the minority shareholders of a company called “Victoria Park Company”. The company was developed for the sole purpose of buying 180 acres of land near Manchester and transform the land into “Victoria Park Manchester”. The initial plan was to plant in a park-like manner, erecting houses thereon with attached gardens and pleasure grounds, and selling, letting, and or otherwise disposing thereof. The matter before the court was that the claimants complained that the company's property was misapplied and wasted and that numerous mortgages were given improperly over the company's property.

With this lawsuit filed in court, the court had to consider whether it was possible for the shareholders to bring a suit on behalf of the company and whether or not the defendants could

¹³⁹ P Davis *Principles of Modern Company Law* 8th ed (2008) 33.

¹⁴⁰ *Francis George Hill Family Trust v SA Reserve Bank* 1992 2 All SA 137 (A).

¹⁴¹ *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

be held liable for their actions. In deciding the matter, the court was of the opinion that when a company is wronged, legal standing is vested upon it to sue. As a company is a separate legal entity, a member cannot sue for damage done to the company. The court consequently established two principles that now play a major role in modern company law. The first rule is the “proper plaintiff rule” which states that harm done to the company may only be vindicated by the company alone. The second rule is the “majority rule principle” which states that if the alleged wrong can be confirmed or ratified by a simple majority of members in a general meeting, then the court will not interfere (legal term).¹⁴²

This is a landmark English law decision that influenced the development of this doctrine during the 18th century. A clearer position has been adopted with regard to the legal position of a company in legal disputes. The *Foss v Harbottle* case upholds the principle of the company's legal capacity in court and the eyes of the law. As an influence of this judgment the “proper plaintiff rule” was reconstructed and codified in the 2008 Companies Act.¹⁴³

Another case is that of *Lee v Lee's Air Farming Company*.¹⁴⁴ In this case, Mr. Lee formed a company called Lee's Air Farming Ltd in 1954 for the purpose of conducting an arial crop spraying business. Mr Lee owned 2,999 of the company's 3000 shares, making him the governing director in terms of section 32 of the articles of association. Mr Lee was further employed as a chief pilot of the company. in 1956, while on duty (piloting an aircraft owned by the company equipped for crop spraying) he was killed in an accident. The appellant, Mrs Lee then claimed for compensation under the Workers Compensation Act, based on the contention that Mr Lee was entitled to compensation as he was an employee of Lee's Air Farming Ltd.

The issue before the court was whether Mr Lee, a sole director and shareholder of the company was an employee of the company and could be regarded as an “employee” to benefit under the Workers Compensation Legislation.¹⁴⁵

The compensation court dismissed the matter holding that the deceased could not hold office of governing director of the company and also be a servant of the company.¹⁴⁶

¹⁴² KW Wedderburn ‘Shareholders Rights and the Rule in *Foss v. Harbottle*’ (1957) 15 (3) TCLJ 194.

¹⁴³ Section 165 of the Companies Act 71 of 2008.

¹⁴⁴ *Lee v Lee's Air Farming Ltd* (1960) UKPC 33.

¹⁴⁵ A Wilson ‘Salomon's Case deters Attempts to lift the Veil: Lee v. Lee's Air Farming Ltd’ (1961) 3(1) *MLR* 116.

¹⁴⁶ *Ibid* 116.

On appeal, the court laid the following principles:

- (a) The separate identity of a company follows contractual obligations arising from both the company and its employee's including sole governing director and the majority shareholders who might also be employees.
- (b) Sole directors who are employees and have control of the company are no fetter on the capacity of the "legal entity" to contract with the employee, who in thus contracting is also the agent of the company.
- (c) Such contractual transactions cover a contract of service, and the dual capacity of the governing director as a servant of the company cannot be validly objected to, because the fact that so long as the deceased continued to be governing director, with amplitude of powers, it would be for him to act as the agent of the respondent company to give the orders does not alter the fact that the respondent co two separate and distinct legal persons."¹⁴⁷

All though this is a New Zealand case, it forms an important part of our common law as its principles were adopted by UK company law. The significance of this case is that it established the principle of companies having the ability to contract with their own directors, including hiring them as employees.¹⁴⁸ South African courts have adopted these principles and applied them in resolving company law disputes, below I have discussed some of South African decisions that were influenced by these principles and have laid a bedrock foundation for this doctrine.

In *Dadoo Ltd v Krugersdorp Municipal Council*,¹⁴⁹ a private joint stock company called Dadoo Ltd with a share capital of £15,000 and 150 shares was duly registered in Pretoria in February 1915. 149 of these shares were held by Asian appellants Dadoo and Dindar, each of whom possessed one. In March 1915, Dadoo Ltd acquired Stand 340 in the Krugersdorp township, the firm further acquired Stand 171 in the same municipality in May 1916. The company immediately leased them to the appellant Dadoo, who operates a general dealer and grocery store on Stand 340. The Krugersdorp Municipal Council claimed that these transactions were contrary to the laws placed at that time preventing the native races of Asia from owing fixed property and therefore applied for an order setting aside both transfers.¹⁵⁰

¹⁴⁷ *Lee v Lee's Air Farming Ltd* (1960) 3 All E.R. at 426.

¹⁴⁸ *Lee v Lee's Air Farming* (1961) AC 12 available at <https://lawprof.co/company/corporate-personality-cases/lee-v-lees-air-farming-1961-ac-12/> accessed 1 December 2023.

¹⁴⁹ *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.

¹⁵⁰ *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.

The question before the court was whether the shareholders actually owned the corporation, as claimed. The court ruled that it is obvious from the statute that the assets owned by Dadoo Ltd are distinct from those owned by the shareholders.

Innes CJ in handing down his judgement in relation to whether ownership by Dadoo Ltd, is in substance ownership by the Asiatic shareholders. He held that a registered corporation a juristic person distinct from the members who compose it. This concept cannot be regarded as just an artificial or technical thing. In fact, property vested in the company is not, and cannot be, regarded as vested in all or any of its members.¹⁵¹

This outcome is a result of the separate legal existence that such corporations are bestowed with by the common law, a theory that has been accepted in our practice.¹⁵² Additionally, even in other areas of law, South African courts are still rigorous in maintaining the distinct personality of a company.

In *Itzikowitz v Absa Bank Ltd*,¹⁵³ Absa bank offered lending facilities to a certain property development corporate group. Mr *Itzikowitz* stood surety for those debts as he was an indirect shareholder of the companies. One company had some financial struggles and was declared insolvent. The bank pursued Mr *Itzikowitz*, for the maximum amount under the deed of suretyship. Mr. *Itzikowitz* countered that the company's financial troubles were evident and that the bank erred in continuing to extend loans to the company. The company's excessive debt was caused by the bank's actions. As a result, the surety suffered a loss because the value of his shares and loan claims practically vanished.¹⁵⁴ *Itzikowitz* sought to recover from Absa Bank the amount of the reduction in the value of his shareholding in Compass Projects (Pty) Ltd.

In reaching a decision, the court concurred that the conduct in question that has caused loss was not prima facie wrongful. Company law states that only those who have incurred harm have the right to make a claim, in other words, if no wrong is committed against the plaintiff, there can be no claim. In reaching this argument, the court relied on company law principles, more specifically the nature of the company as a distinct juristic personality, separate from its members. As a result, assets of the company are that of the company and not of its shareholders.

¹⁵¹ *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550

¹⁵² *Ibid* 550.

¹⁵³ *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.

¹⁵⁴ A Crotty 'Grim news for Steinhoff shareholder's available at <https://www.businesslive.co.za/fm/money-and-investing/2018-10-18-grim-news-for-steinhoff-shareholders/> accessed on 10 October 2023.

The only right a shareholder has in connection to the company is the right to take part in it under the conditions of the articles of association.¹⁵⁵

Due to these fundamental principles, the court emphasised the importance of determining whether the shareholder has a claim against the wrongdoer which is separate and distinct from any claim that the company may have against such wrongdoer. This determination turns on whether a wrong was committed against the shareholder, the company, or both the shareholder and the company. In essence, if no wrong was committed against the shareholder, then they are not entitled to recover damages from the wrongdoer. Thus, the shareholder in the *Itzikowitz* matter could not go after Absa for the alleged wrongdoing.

Another case that is similar to that of *Salomon v Salomon* is that of *SARS v Professional Contract Administration*.¹⁵⁶ This has similar aspects to that of *Salomon* as it pertained to a one-man company. The facts of this case include a written agreement between Gencor and the respondent (a close corporation owned by Mr Spaan). On 16 June 1993 Gencor concluded a written contract with Mr Spaan in terms of which he was appointed a civil contract supervisor to render services to Gencor. However, this contract was cancelled on 1 March 1994 consequent upon the conclusion of a written contract between Gencor and the respondent (close corporation) which was signed on 17 February 1994; Mr. Spaan was and is the sole member of the respondent.

The question before the court was whether the money paid to the respondent by Gencor forms part of the respondent's gross income or whether it forms part of the gross income of Mr Spaan. The commissioner argued that income paid to the respondent should be taxed at the hands of Mr Spaan and not of the company because the income earned by the respondent was in fact income earned by its member.

The court was of the decision that there is no way that the money paid to the respondent be taxed at the hands of Mr Spaan as this would defeat the purpose of separate legal entity.¹⁵⁷ The close corporation owned by Mr Spaan was a different legal entity on its own and Mr Spaan was entitled to a salary under the company as a member of the body corporate.¹⁵⁸ The contract

¹⁵⁵ H Laing and M Hill 'Whose loss is it anyway – the shareholder's or the company's?' available at <https://www.cliffedekkerhofmeyr.com/news/publications/2016/dispute/dispute-resolution-alert-4-may-whose-loss-is-it-anyway-the-shareholders-or-the-companys-.html> accessed on 10 October 2023.

¹⁵⁶ *COMMISSIONER, South African Revenue Services v Professional Contract Administration* CC 2002 (1) SA 179 (T).

¹⁵⁷ *Ibid* 180.

¹⁵⁸ *Ibid* 182.

between Gencor and the respondent was not aimed at acquiring the services of Mr Spaan personally, but the services of his company as an independent contractor.

Corporate personality defines a company as a separate legal entity and its sole owner, shareholder, and director can also be an employee of the company who has entered into a contract with it as owner, director, or shareholder.¹⁵⁹

Courts in delivering their judgments have been upholding the common law position of separate legal entity, ensuring that the imaginary veil is recognised and upheld. This has successfully developed this doctrine by providing consistent application in judgements.

The principle in *Salomon's Case* that a company is a legally different person from those who control it represents the current law in South Africa. If one forms a company in which they own 100% of the shares and in addition is a director and an employee, legally speaking the company and that particular individual are two distinct people.¹⁶⁰ The “corporate veil” separates the company and the individual. However, although the principle of separation is central to company law, there are a number of situations when the company and its members can be identified together and treated as the same. These are the exceptions to the rule in *Salomon's Case*, when the corporate veil is lifted, and the reality of the situation is examined. This position will be discussed later in this chapter.

3.3 Analysis of section 19 and its link to the Constitution

The introduction of the 2008 Companies Act was motivated by the transition from a strict and oppressive past to a new free and open modern society. The adoption of the 1996 Constitution brought about significant change in the Republic including change in legislation.¹⁶¹ Therefore, company law legislation also had to follow this transition in order to provide company law provisions that are in line with the current constitutional dispensation. One of the main aims of this piece of legislation is to simply administration, update corporate law, and improve the shareholder's rights. This Act was established to make room for the ever-changing market by providing flexibility and adaption in the commercial world.¹⁶²

¹⁵⁹ Lawjure ‘Case Analysis: Lee vs. *Lee's Air Farming Ltd 1960*’ available at <https://www.lawjure.com/case-analysis-lee-vs-lees-air-farming-ltd-1960/> accessed on 03 December 2023.

¹⁶⁰ Section 19(1)(b) of the Companies Act 71 of 2008.

¹⁶¹ South Africa Department of Trade and Industry: South African Company Law for the 21st Century Guidelines for Corporate Law Reform (2004) 15.

¹⁶² ‘What you need to know about the Companies Act of 2008’ available at <http://ptycompanyregistration.co.za/the-companies-act-of-2008/> accessed on 03 December 2023.

The enactment of this Act brought about change in corporate law as it was designed to revamp South Africa's company law regime. For instance, a general discussion of the act includes its significant character of being user-friendly and drafted in plain and easy to understand language. The modernisation of the business world has influenced the alteration of the Companies Act to be in line with the new economic improvements. Besides the economic influence, the Companies Act now gives recognition to the constitution and aims to align company law within the context of the new constitutional framework.¹⁶³ This was a totally different position in the past as the previous Act did not fully recognise and enforce the constitution, which made it seem like these were totally different disciplines with no overlap at all.¹⁶⁴ The reference to the Bill of Rights makes it impossible for one to provide an interpretation of the Companies Act without making reference to the Constitution.¹⁶⁵

Section 2 of the Constitution confirms that the Constitution is the supreme law in the country and no conduct should be in violation of any of this law.¹⁶⁶ The 2008 Companies Act is the current regulator of corporate law in South Africa. This Act is the successor of the 1973 Act¹⁶⁷ which was enacted before the new constitutional regime. This means that the Act had to be revised to ensure that it incorporated principles of the new transformative constitutionalism.¹⁶⁸ Section 7a of the Companies Act states that one of its objectives in the application of company law, is to encourage obedience with The Bill of Rights as provided for in the Constitution.¹⁶⁹ This passage implies that the Companies Act ought to mould company law to fit within the constitutional paradigm by complying, promoting, and fulfilling the purposes of the Bill of Rights¹⁷⁰ as provided by section 8 of the constitution which states that the Bill of Rights applies to all laws and binds the legislature.¹⁷¹

Section 11 of the Constitution provides for the right to life to all individuals of the Republic as an unqualified right.¹⁷² In terms of natural persons, the right to life commences at birth and

¹⁶³ Section 7 of the Companies Act 71 of 2008.

¹⁶⁴ D Bilchitz 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (2008) 137 (4) *SALJ* 774.

¹⁶⁵ *Ibid* 686.

¹⁶⁶ Section 2 of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁶⁷ Companies Act 61 of 1973.

¹⁶⁸ S Phiri 'Companies and the Constitutional 'Right to Life': A Critical Analysis of the Companies Act 71 of 2008' (2021) 12 (6) *MJSS* 108.

¹⁶⁹ Section 7 of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁷⁰ S Phiri 'Companies and the Constitutional 'Right to Life: A Critical Analysis of the Companies Act 71 of 2008' (2021) 12 (6) *MJSS* 109.

¹⁷¹ Section 8(1) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁷² Section 11 of the Constitution of the Republic of South Africa Act 108 of 1996.

runs until death.¹⁷³ However, I contend that since the introduction of the 2008 Companies Act, companies have been enjoying this right. Although companies lack physical existence and human characteristics, the law recognises companies as juristic persons entitled to constitutional rights.¹⁷⁴ A company's legal status of being a juristic person automatically commences upon registration of the company, therefore, marking the "birth" of the company.¹⁷⁵

The doctrine of separate legal personality codified in section 19(1)(b) of the Companies Act entails that a company exists independently and has the ability to hold its own rights and incur liabilities¹⁷⁶ means that a company is entitled, in a fictitious world, to some of the constitutional rights, such as that to life.

However, a lot of power is bestowed upon section 19. Section 19 confirms the birth of a company as a juristic person in the corporate world.¹⁷⁷ A company becomes recognisable in the corporate world once its registration certificate gets issued by the Companies and Intellectual Property Commission. Unlike natural persons, section 19 further holds the ability to deregister the company, which marks the "death" of the company.¹⁷⁸

Section 19(1) is in line with section 8(4) of the Constitution which provides for the extension of the Bill of Rights to juristic persons. Consequently, this means that companies are entitled to certain constitutional rights. The Constitution requires every type of legislation in South Africa to promote its values and principles as it is the Supreme law on the land.¹⁷⁹ One of the consequences of section 19 is perpetual succession, this allows the company to retain its legal identity despite change in management and shareholding.¹⁸⁰ The existence of a company runs until the company is removed from the register of companies. Perpetual succession is an indication that a company enjoys the right to life as provided in the constitution.¹⁸¹

There are other aspects that contribute to the phenomenon of a company enjoying the right to life. The manner in which it is incorporated, and the requirements of incorporation are amongst

¹⁷³ D Giles 'Relationships Always Matter: Findings from a Phenomenological Research Inquiry' (2011) 36 (6) *AJTE* 83.

¹⁷⁴ S Phiri 'Companies and the Constitutional 'Right to Life: A Critical Analysis of the Companies Act 71 of 2008' (2021) 12 (6) *MJSS* 109.

¹⁷⁵ *Ibid* 110.

¹⁷⁶ Section 19 of the Companies Act 71 of 2008.

¹⁷⁷ *Ibid* 110.

¹⁷⁸ Section 19 (1) (a) of the Companies Act.

¹⁷⁹ Section 2 of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁸⁰ FHI Cassim...et al *Contemporary Company Law* (2012) 36.

¹⁸¹ Section 11 of the Constitution of the Republic of South Africa Act 108 of 1996.

them. The 2008 Companies Act provides for a much-simplified process of incorporation than the 1973 Companies Act.¹⁸² As one of the requirements, upon registration, a company is to be given a suitable name that will link to its legal identity throughout its existence.¹⁸³ If this is not done properly, this will affect the company and delay it from being “born” and therefore hindering its “right to life”. However, in cases of any complications with the name of the company, the CIPC allows the company to register and operate on its registration number.¹⁸⁴ Therefore, ensuring that there are no barriers that could deprive the company of its constitutional right to life.¹⁸⁵

The constitutional right to life of natural persons comes with no attachments and limitations.¹⁸⁶ A natural person’s right to life is naturally terminated at death, termination by murder or culpable homicide is an offence and is punishable by law. However, with regard to companies, this right is not absolute. The Companies Act provides for the termination of the legal status of a company by allowing for the deregistering and removal of the company name on the register of companies. Even though separate legal personality promotes independence of the company, a company lacks the ability to act on its own, and therefore its right to life is dependent on its incorporators and controllers.

There is no doubt that the 2008 Act did create a sense of uncertainty surrounding its application. Its aims and purposes are well communicated especially with regard to the novel provisions added to our company law and utilisation of unfamiliar language, the purpose of clarifying the old 1973 Act and bringing the existing law in line with the Act and Constitution were largely fulfilled.¹⁸⁷ As a result, the 2008 Act is a modernised piece of legislation that enacts and promotes constitutional values in company law.

3.4 Exceptions to Separate Legal Personality

South African law recognises that a company acquires a distinctive personality from its shareholders at incorporation.¹⁸⁸ Duties and obligations are considered that of a company and

¹⁸² Section 7 (b) (ii) of the Companies Act 71 of 2008.

¹⁸³ Section 11 of the Companies Act 71 of 2008

¹⁸⁴ Section 11 (1) (b) of the Companies Act 71 of 2008.

¹⁸⁵ S Phiri ‘Companies and the Constitutional ‘Right to Life: A Critical Analysis of the Companies Act 71 of 2008’ (2021) 12 (6) *MJSS* 111.

¹⁸⁶ Section 37 (5) (c) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁸⁷ M Kühne ‘The Legal Status of Companies and the Validity of Company Actions’ (2023) available at <https://www.lexisnexis.co.za/lexis-digest/legal/the-legal-status-of-companies-and-the-validity-of-company-actions> accessed on 01 December 2023.

¹⁸⁸ Section 19 (1) of the Companies Act 71 of 2008.

not of its representatives.¹⁸⁹ The company shall remain liable for all its acts, misconducts, and crimes. In *Salomon v Salomon*¹⁹⁰ and *Dadoo Ltd v Krugersdorp Municipality Council*¹⁹¹ the courts emphasised the principle that a company is a separate entity distinct from its shareholders and refused to disregard the separate juristic personality of the entity. However, this doctrine of distinctive personality is not absolute. Due to the high level of abuse in corporate structures of entities, the courts have, on occasion, been forced to disregard the distinctive personality of an entity and hold those behind it personally liable for their misconducts. This is done to protect the company and its interests from being abused by its relatives.

The court has the power to “pierce” the corporate veil in certain exceptional circumstances where it will ignore the company as a separate entity and deal with its representatives as if they were conducting business in their own personal capacity.¹⁹² The main purpose of piercing the veil is for the court to be able to hand down a judgement on the rights and liabilities of the parties before it.¹⁹³ Therefore, the consequence of this is that someone else will bear the liability instead of the company.

3.5 Piercing the Corporate Veil: A Brief History

The case of *Foss v Harbottle* developed the “proper plaintiff rule”. The rule in this case was developed in 1843 and has played a prominent role in shedding some light on the law that a company is a separate person with its own legal standing.¹⁹⁴ This rule was further underpinned in the *Salomon* case, where the court declared for the first time that a company exists as a separate juristic personality.¹⁹⁵ In the *Salomon* case, Lord Macnaghten held that:

“The company is at law a different person altogether from the subscribers to the memorandum: and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons and managers, and the same hands receive the profits, the company is not in the law the agent of the subscriber...”

¹⁸⁹ *Webb & Co Ltd v Northern Rifles* 1908 TS 462.

¹⁹⁰ *Salomon v Salomon* (1897) AC 22 (HL).

¹⁹¹ *Dadoo Ltd v Krugersdorp Municipality Council* 1920 AD 530.

¹⁹² R Becker *Disregarding the separate juristic personality of a company: an English Case Comparison* (Unpublished LLM Dissertation from the University of Pretoria 2014).

¹⁹³ Kanj A Companies in Joubert WA (founding ed) *The Law of South Africa Volume 4 (1)* 2nd edition 2011.

¹⁹⁴ *Foss v Harbottle* (1843) 67 ER 189.

¹⁹⁵ *Salomon v Salomon and Co Ltd* (1897) AC 22 (HL).

The exception to this general rule is that the court has the discretion to disregard the separateness of a company. this occurs on 2 occasions:

- (1) The court exercises its power at common law to pierce the corporate veil; or
- (2) The court exercises its power conferred to it by legislature to vest liability on the company's representatives and hold them liable.¹⁹⁶

The doctrine of disregarding the company's separate personality is a common law principle that made an introduction into South African law during the 1980's. The court has no general discretion to disregard the company's personality unless it finds that there are grounds that create the need in the interest of justice.¹⁹⁷ However, determining when the court will or will not pierce the veil is the most challenging issue, as there is no standard procedure as to when the veil must be pierced, simply because the courts have not been consistent with the application of this doctrine.

3.5.1 Purpose of piercing the corporate veil

For as much as South African law recognises that a company acquires a distinctive personality at incorporation, the courts have gradually adopted the concept of disregarding the distinctive personality of a company, where in certain circumstances, it would be justifiable for the court to do so.¹⁹⁸ The court may pierce the veil to redress liability of any act conducted in the name of the company.¹⁹⁹ In these instances, the purpose would be to give effect to the reality behind the curtain and the result of this is that the liability would then be directed to the individual who exploits the juristic personality of the company.²⁰⁰

In essence, South African law's position to piercing the corporate veil is an exception to the limited liability principle that flows directly when a company is incorporated.²⁰¹ It is concluded that the court may either “pierce or lift” the corporate veil.

3.5.2 Common law approach

The case of *Hulse-Reutter v Godde*²⁰² provides the authority that the court does not hold a general discretion to pierce the corporate veil but can only do so in circumstances it deems

¹⁹⁶ M L Cilliers and H S Benade *Company law* (1982) 13-14.

¹⁹⁷ *Botha v Van Niekerk* 1983 (3) SA 513 (W).

¹⁹⁸ *Dadoo v Krugersdorp Municipality Council* 1920 AD 530.

¹⁹⁹ H Sher 'Piercing the Corporate Veil' (1996) 4(2) *JBLJ* 51 & 54.

²⁰⁰ *Deputy Sheriff Harare v Trinpac Investments (Private) Ltd and another* (2012) JOL 28241 (ZH).

²⁰¹ P Delpont 'Henochsberg on the Companies Act 71 of 2008' 55.

²⁰² *Hulse-Reutter v Godde* 2001 (4) SA 136 (SCA).

necessary. At common law, there are at least two approaches used by the courts to determine when to pierce the veil. The first approach is that the court attempts to list all the unwanted behaviours and group them into categories. In *Botha v Van Niekerk*,²⁰³ the ruling of the court held that where there is “unconscionable injustice” that leads to abuse of the company’s separate juristic personality, that’s when the corporate veil must be pierced.²⁰⁴ In *Lategen v Boyes*,²⁰⁵ the court was of the opinion that South African courts follow the footsteps of Canadian courts, and “fraud” is also a determining factor that leads to piercing of the corporate veil. the court held that in cases where the juristic personality of a company is used for fraudulent purposes, the court is authorised to pierce through the corporate veil.²⁰⁶ Both the *Botha* and the *Lategen* rulings suggest that the courts identified a category of actions that a valid enough for the court to pierce the veil.

The second approach is that supported by the court in the case of *Cape Pacific Ltd v Lubner controlling investments* where the court held that it is only reasonable to judge a case based on its own facts.²⁰⁷ This approach provides flexibility to the courts to let every decision be made based on the facts of each different case therefore discouraging the approach employed in *Botha* and *Lategen*. This approach has gained more popularity and is supported by the courts and most authors who have shared their opinions on this topic.

3.5.3 Statutory piercing of the corporate veil

Prior to the introduction of the doctrine of piercing the veil into the Companies Act, the doctrine only existed as a remedy of the common law. This remedy was further codified and enacted into the legislature as section 20(9) of the Companies Act 71 of 2008.

The statutory provision of piercing the corporate veil does not replace the common law position, instead, it expands the common law principles of piecing the corporate veil. Cassim states that section 20(9) does not overrule the common law principle,²⁰⁸ the author further states that when the statutory provisions fail to find way, the common law principles will apply.²⁰⁹ In *Ex Parte Gore* the court held that statutory provision has been introduced to provide

²⁰³ *Botha v Van Niekerk en n’ Ander* 1983 (3) SA 513 (W).

²⁰⁴ *Amlin (SA) Pty Ltd v Van Kooij* (2008) (2) SA 558 at 21.

²⁰⁵ *Lategen v Boyes* 1980 (4) SA 191 (T).

²⁰⁶ *Ibid* 201.

²⁰⁷ *Cape Pacific Ltd v Lubner Controlling Investments* 1995 (4) SA 790 (A) at 201.

²⁰⁸ FH Cassim and MF Cassim *Contemporary Company law* (2012).

²⁰⁹ *Ibid*

assistance and support to the common law. There was no intention to replace the common law on piercing the corporate veil.²¹⁰

Section 20(9) provides that upon application of a concerned individual, should the court find that any action conducted on behalf of the corporation constitutes an unconscionable abuse of the juristic personality of a company as a separate entity, the court has the discretion to either declare the company not to be a juristic person in respect to its rights and obligations; and the court is also allowed to make any further order the court deems appropriate.²¹¹

3.6 Interpretation of S20(9) of the Companies Act

3.6.1 Application by an “Interested Person”

A definition of an “interested person” or a list of what exactly qualifies as an interested person is not provided in the Companies Act or section 20(9)'s provisions. However, case law decided in accordance with Section 65 of the Close Corporations Act may be cited as reference to the interpretation of such terms.²¹² In the case of *TJ Jonck BK h/a Bothaville Vleismark v. Du Plessis NO*, the court held that the Close Corporations Act's definition of an interested person should not be interpreted narrowly or expanded to include an indirect party to the corporation.²¹³ A person who has a mere financial or monetary interest in the corporation suffices as an “interested person”.²¹⁴

3.6.2 Constitutes “unconscionable abuse”

The legislature also does not define the term “unconscionable abuse”. However, section 65 of the Close Corporations Act made provision for “gross abuse” therefore it is not clear whether these terms should be given the same interpretation or should be considered to have the same meaning. The term “unconscionable injustice” was introduced by the court in *Botha v Van Niekerk*²¹⁵ as an underlying reason for the court to pierce the corporate veil.²¹⁶ In this case, the court had to determine if the act conducted by the perpetrators was improper. And if so, whether the detrimental party had suffered unconscionable injustice.

²¹⁰ *Ex Parte Gore* (2013) 2 All SA 437 (WCC) at 451.

²¹¹ Section 20(9) of the Companies Act 71 of 2008.

²¹² Closed Corporations Act 69 of 1984.

²¹³ *TJ Jonck BK h/a Bothaville Vleismark v. Du Plessis NO* 1998 (1) SA 971 (O).

²¹⁴ *Ibid* 55.

²¹⁵ *Botha v Van Niekerk* 1983 (3) SA 513 (W).

²¹⁶ *Ibid* 56.

In *Ex Parte Gore*, the court had to make a decision in line with section 20(9) of the Companies Act. The court interpreted ‘unconscionable abuse’ wide enough to include words such as “device”, “sham”, “stratagem”, and “conceivably much more”. The court justified its reason by holding that “unconscionable abuse” of the juristic personality of a company postulates conducts in relation to the formation and use of companies diverse enough to cover all the descriptive terms like sham, device, stratagem, and conceivably much more.²¹⁷

3.6.3 Company deemed not to be a juristic person

When a court has collected all required evidence and proof that a company’s separate personality is used in a wrong manner, it has the ability to pierce the corporate veil by deeming a company not to be a juristic person with regard to certain rights and obligations of the company and that of the shareholders as well. The company is deemed not to be a juristic person anymore so liability can be directed where it rightfully lies.

3.7 Insider reverse piercing of the corporate veil

For many years piercing the corporate veil has become an integral part of our company law. This doctrine has been successfully applied by both common law and its statutory provisions. The traditional approach of this doctrine is that it is a remedy available to “outsiders” when they seek justice by holding those “inside” the company responsible for their actions, more especially in cases of fraud or dishonesty.²¹⁸ However, a twist has been evident in the recent case of *The Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust*²¹⁹ where the Supreme Court of Appeal had to consider if the doctrine of piercing the corporate veil was broad enough to employ an “inside out” approach in order to be used as a remedy by shareholders seeking to disregard the corporate identity of a company in order to advance the rights which accrue to the company, as theirs.

The facts of this case were as follows, the appellant, Butcher Shop and Grill CC (Butcher Shop), as lessee, and the respondent, the trustees for the time being of the Bymyam Trust, as lessor, entered into a lease agreement in respect of premises owned by the Trust. At the beginning of the lease agreement, Butcher Shop sublet the premises to Apoldo Trading (Pty)

²¹⁷ *Ex Parte Gore and others* NNO 2013 (3) SA 982 (WCC) para 34.

²¹⁸ Inside out? A discussion on the case of *The Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust* available at <https://www.cliffedekkerhofmeyr.com/news/publications/2023/Practice/Corporate/corporate-and-commercial-law-alert-11-october-inside-out-a-discussion-on-the-case-of-the-butcher-shop-and-grill-cc-v-trustees-for-the-time-being-of-the-bymyam-trust> accessed on 05 December 2023.

²¹⁹ *The Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust* (2023) (5) SA 68 (SCA).

Ltd (the Trust), which operated a restaurant business there. Mr Pick was the sole shareholder for both Apoldo and the Butcher Shop. The Butcher Shop agreed to remain responsible for all the terms and conditions of the lease and Apoldo agreed to be “jointly and severally equally responsible”.

Due to Covid 19 and the declaration of the National State of Disaster in terms of the Disaster Management Act 57 of 2002²²⁰, the operation of restaurants was restricted and as a result, the Butcher shop decided to withhold the payment of rent to the Trust.²²¹ The trust filed an application claiming payment of all the amounts due. Butcher Shop responded with a counter-application in which it sought a declaration that it was entitled to remission of the base rental payable in a specific amount. It justified its argument by stating that its loss of the use and enjoyment of the premises in the light of the trading restrictions had caused it a significant loss of turnover in its business, which entitled it to remission of rent.²²²

The Butcher Shop based its counterclaim on the following arguments:

- a) The common law provides that a lessee is entitled to claim remission of rental arising from the loss of a sub-lessee’s beneficial occupation on account of vis major or casus fortuitus; and
- b) They further argued that the Butcher Shop and Apoldo were just the same person, their sole shareholder, in corporate guise and therefore one business entity. The common law either recognises or ought to recognise as a remedy in equity the entitlement of the Butcher Shop to claim rental remission due to the loss of beneficial occupation suffered by Apoldo.

In reaching a decision, with regard to the first issue, the court held that the common law, provided for the general principle that remission of rent was available to a lessee or tenant who suffered loss consequent upon the interference with its use and enjoyment of the leased property.²²³

The court made reference to the case of *Hansen, Schrader & Co v Kopelowitz* where this principle was developed. In this case, the court provided that in general laws of contract, a

²²⁰ Disaster Management Act 57 of 2002.

²²¹ *Butcher Shop and Grill v Trustees for the Time Being of the Bymyam Trust* 2023 (5) SA 68 (SCA) at 68.

²²² *Ibid* 68.

²²³ Inside out? A discussion on the case of *The Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust* available at <https://www.cliffedekkerhofmeyr.com/news/publications/2023/Practice/Corporate/corporate-and-commercial-law-alert-11-october-inside-out-a-discussion-on-the-case-of-the-butcher-shop-and-grill-cc-v-trustees-for-the-time-being-of-the-bymyam-trust> accessed on 05 December 2023.

lessee is entitled to remission of their rent either wholly or in part where he has been prevented either entirely or to a considerable extent in making use of the property for the purposes for which it was let. This might be due to vis major or casus fortuitus, provided always that the loss of enjoyment of the property is the direct and immediate result of the vis major or casus fortuitus and is not merely indirectly or remotely connected therewith.²²⁴

With regard to the second issue, the court outlines that the principle of separate legal status of an entity must be applied in the traditional way. The court further referred to the judgement of De Villiers CJ in *Ochberg v Commissioner for Inland Revenue* where he held that arguing that a company is bestowed separate persona and yet also arguing that the person holding all the shares in the company, is an attempt to have it both ways, which cannot be allowed.²²⁵

The court further cited an English case of *Tunstall v Steigmann*²²⁶ where the concept of reverse piercing was rejected, and the court emphasised that the common law does not countenance disregarding corporate identities to allow this to be done.²²⁷

Even though the doctrine of separate legal personality and the corporate veil have been part of our company law for decades, the law has not developed this doctrine to adapt to the ever-changing complex economic realities. It is evident that our courts are still reluctant to broaden this doctrine and offer the “inside out” approach.

3.8 Conclusion

Separate juristic personality is embedded in the heart of South African company law, with the 2008 Companies Act being the administrator and the courts being the enforcer of this doctrine in instances of unclarity. This doctrine is triggered automatically after a company is incorporated and runs throughout until a company is deregistered. As highlighted above, this doctrine can be lifted or pierced in order to direct liability to the individuals behind the company.

²²⁴ *Hansen, Schrader & Co v Kopelowitz* 1903 TS 707 at 718 – 719

²²⁵ *Ochberg v Commissioner for Inland Revenue* 1931 AD 215 (5 SATC 93) at 232.

²²⁶ *Tunstall v Steigmann* [1962] 2 All ER 417 (CA).

²²⁷ *Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust* 2023 (5) SA 68 (SCA) at 86.

Chapter 4: Modern Issues Pertaining Separate Legal Personality

4.1 Introduction

The consequence of a company being considered as having a distinctive personality has effects and certain outcomes on the nature of the company. Separate legal personality gives effect to certain rights that enable the company to own assets and also incur liabilities.²²⁸ In terms of section 19(1)(b) of the Companies Act, upon registration, a company acquires legal powers and capacity of an individual.²²⁹ Once a company is registered, it becomes a person of its own, meaning that its members and subscribers are deemed to be a corporation with a name and that has a mind of its own. A company is then formed and then exists as a fictional person. This effect then allows the company to be entitled to certain rights provided for by the legislation.²³⁰

In the previous chapter, this paper discussed the application of this doctrine in terms of the South African company law context and also examined situations whereby this doctrine would be disregarded in order to achieve a certain outcome. This chapter will focus on certain modern issues pertaining to Separate legal personality in the modern world.

4.2 Multinational Corporations

There are various reasons why different types of corporations are established. For instance, it might be to provide certain services or fill in a gap in the market. As a result, some corporations grow rapidly, and they end up operating in multiple nations. These are called Multinational corporations and have developed to be a well-accepted part of the global economy.²³¹ Multinational corporations have a significant impact on developing countries by creating job opportunities and improving their economy as a whole. These forms of corporations have the ability to generate a significant amount of revenue from abroad as well.²³²

A more formally recognised definition of multinational corporations is that it refers to the type of enterprises that have developed and established entities in various countries. As a result,

²²⁸ T Govender *An analysis of lifting of the corporate veil in light of s20 (9) of the Companies Act 71 of 2008* (unpublished LLM thesis, University of KwaZulu Natal, 2018) 16.

²²⁹ Section 19(1)(b) of the Companies Act 71 of 2008.

²³⁰ T Govender *An analysis of lifting of the corporate veil in light of s20 (9) of the Companies Act 71 of 2008* (unpublished LLM thesis, University of KwaZulu Natal, 2018) 14.

²³¹ P Noble 'Social Responsibility of Corporations' (1999) 84 (5) *Conell Law Review* 1256.

²³² S Kim and H V Milner 'Multinational Corporations and their Influence Through Lobbying on Foreign Policy' (2019) 2 available at https://www.brookings.edu/wpcontent/uploads/2019/12/Kim_Milner_manuscript.pdf accessed on 06 January 2024.

they have the ability to coordinate some of their operations and their management structure allows for one corporation to exercise certain amount of power and influence over another.²³³

Even if a multinational enterprise may have hundreds of subsidiaries worldwide, each of them may follow the regulatory framework of the host nation, in actuality, they all follow the group's primary economic and managerial policies.

Attention has to be directed to their management in link with the doctrine of separate legal personality. As both provided by the common law and the statute, separate legal personality remains at the heart of company law. Like any other corporation, multinational corporations are also bestowed with a distinctive personality. They are considered economic units that exist independently from their members.²³⁴ This doctrine is bestowed upon one-man companies and wholly owned subsidiaries of multinational corporations. Thus, enforcement of this doctrine on multinational corporations is a matter of jurisdictional and substantive issues.²³⁵ Perspective needs to be shifted to separate legal personality as it applies to groups.

Because the law has given little recognition to the essential differences between subsidiaries and freestanding companies, the combination of legal personality and limited liability allows its controller to separate an area of activity, or specific assets, and control the subsidiary's legal relationship with the larger organization. Therefore, leading to the transfer of risk from the owners and controllers to the creditors.²³⁶ Due to limited liability, company creditor's interests are not protected. Creditors need to bear the risks inherent when dealing with limited company. Shareholders are discouraged from monitoring and controlling the business due to the benefits of limited liability.²³⁷

Furthermore, the doctrine of separate legal personality and limited liability when applied to corporate groups interposes the distinctive legal entities between each company of a corporate

²³³ OECD (2011), OECD Guidelines for Multinational Enterprises p18 available at <http://dx.doi.org/10.1787/9789264115415-en> accessed on 6 January 2024.

²³⁴ S Kim and H V Milner 'Multinational Corporations and their Influence Through Lobbying on Foreign Policy' (2019) 4 available at https://www.brookings.edu/wpcontent/uploads/2019/12/Kim_Milner_manuscript.pdf accessed on 06 January 2024.

²³⁵ E Muzaffer Modern Organisation of Multinational Enterprises and Liability Discussions: Critical Analysis of Control Theory (2008) Available at SSRN: <https://ssrn.com/abstract=1319733> or <http://dx.doi.org/10.2139/ssrn.1319733> accessed on 05 January 2024.

²³⁶ A Nolan 'The Position of Unsecured Creditors Of Corporate Groups; Towards A Group Responsibility Solution Which Gives Fairness And Equity A Role' (1993) 11 *CSLJ* 461.

²³⁷ 'Disadvantages of Separate legal entity' available at <https://www.bartleby.com/essay/Disadvantages-Of-Separate-Legal-Entity-PC9YWXLN6> accessed on 08 January 2024.

group, consequently leading to lack of legal accountability, responsibility, and injustice.²³⁸ The only exception to distinctive personality is the ability of the court to pierce the corporate veil and hold those behind it accountable. The general way a court will go about undertaking this exception is by holding the individual member(s) responsible for their wrongdoing and exploitation of the company's legal capacity. However, due to the development of different types of corporate structures, this exception is challenging to apply to Multinational corporations. For instance, Multinational corporations employ a modern horizontal complicated approach whereby control has been spread over subsidiaries.²³⁹ This corporate structure portrays two ideas, firstly, it gives the impression that there are more self-dependent and self-operated subsidiaries. Secondly, there is a change in control and influence within the group.²⁴⁰

The significant issue with the theory of piercing the corporate veil is its reliance on control, one must have control over a certain corporation in order to be able to take advantage of it. The control theory is inapplicable to multinational corporations because these types of corporations employ the horizontal corporate theory. As a result, the control theory is much more suited to vertically organized business organizations in which the divides between subsidiaries and parent are more obvious and the company exercises some kind of control over its subsidiaries.²⁴¹

4.3 Legal Personality of Automated Corporations

Due to technology playing a major role in the corporate sector, there has been a rapid increase in the number of corporations formed every year including automated corporations and those run solely by artificial intelligence. Artificial intelligence has become part of the modern world, has become more sophisticated, and currently plays a larger role in society.²⁴² Legal personality carries with it rights and obligations, however, these need not be similar and applicable to every individual within a legal system.²⁴³

²³⁸ M Holder 'Reflecting on Salomon v Salomon: The Modern-day Approaches to the Separate Legal Personality Doctrine' (2022) available at https://www.researchgate.net/publication/358190923_Reflecting_on_Salomon_v_Salomon_The_Modern-day_Approaches_to_the_Separate_Legal_Personality_Doctrine accessed on 09 January 2024.

²³⁹ *Ibid* 10.

²⁴⁰ *Ibid* 11.

²⁴¹ *Ibid* 12.

²⁴² S Chesterman 'Artificial Intelligence and the Limits of Legal Personality' (2020) 822 available at www.researchgate.net/publication/346719980_Artificial_intelligence_and_the_limits_of_legal_personality accessed on 07 January 2024.

²⁴³ *Ibid* 824.

A lot of authors have already developed theories about the legal status of artificial intelligence. According to developed theories, AIs that are truly valuable could only exist as entirely passive legal entities, with legal standing akin to that of a newborn or a person in a vegetative state.²⁴⁴ Naturally, if such an AI could, for example, enter into contracts, manage its property, and so on, it could likewise be granted active legal personhood.²⁴⁵ AI's behaviour can only be viewed as the result of independent deliberate states only by adopting an "intentional stance" can we predict and explain their behaviour.²⁴⁶ From the legal point of view, this has consequences on the way third parties deal with AIs, they must rely on the system's intended attitudes, regardless of the human controller's upstream intents.²⁴⁷

The quality and the effectiveness of separate legal personality becomes a question when it comes to entities that are auto operated or operated by artificial intelligence. The gap that needs to be filled by the law is that of identity. The question that arises today is whether for instance autonomous combat drones, self-driving cars, or commercial artificial intelligence might be held morally and/or legally responsible for their actions.²⁴⁸ The traditional approach towards accountability is by holding one responsible for their action or is the instances whereby the distinctive personality of a company has to be put aside, a member of the company has to be held responsible for his wrongdoing, however, this becomes a challenge when the company is automated, programmed or runs solely on algorithm.²⁴⁹

This position has significant implications for legal capacity and responsibility, excluding damages produced by obvious programming or manufacturing flaws and focusing solely on those caused by the appropriate operation of AIs or the interplay of data, inference models, and human parties.²⁵⁰ Despite the fact that the nature of a "thing" may need a different level of care, tortious and criminal culpability for damages produced by things often rests on the custodian

²⁴⁴ C Novelli and G Sartor 'A Conceptual Framework for Legal Personality and its Application to AI' (2022) 13 (2) *MLR* 194.

²⁴⁵ A J Kurki 'The Legal Personhood of Artificial Intelligences' available at <https://doi.org/10.1093/oso/9780198844037.003.0007> accessed on 09 January 2024.

²⁴⁶ G Sartor 'Cognitive Automata and the Law: Electronic Contracting and the Intentionality of Software Agents' (2009) 17 *Artificial Intelligence and Law* 253.

²⁴⁷ C Novelli and G Sartor 'A Conceptual Framework for Legal Personality and its Application to AI' (2022) 13 (2) *MLR* 199.

²⁴⁸ C Novelli and G Sartor 'A Conceptual Framework for Legal Personality and its Application to AI' (2022) 13 (2) *MLR* 195.

²⁴⁹ 'Automation And Customer Self-Service Go Together Like A Horse And Carriage' available at <https://blog.soliditech.com/blog/automation-and-customer-self-service-go-together-like-a-horse-and-carriage> accessed on 06 January 2024.

²⁵⁰ C Novelli and G Sartor 'A Conceptual Framework for Legal Personality and its Application to AI' (2022) 13 (2) *MLR* 199.

(who may be the owner or another controller) or producers (designers-developers). This approach may result in inadequate legal conclusions in circumstances where adverse consequences are created by an Artificial system that was not flawed when it was placed on the market and was managed with care by its users and guardians.²⁵¹

This then poses a question on the relevance and effectiveness of the doctrine of separate legal personality in the modern age. Whether this doctrine shall remain at the heart of company law or whether this doctrine will slowly fade away in due time when global standards come to accept technology.

4.4 Conclusion

The principle provided for by *Salomon v Salomon* continued to prove effectiveness as it granted corporations with a practical utility.²⁵² A corporation serves many economically and socially beneficial functions as a separate legal entity subject to limited liability and defined by share transferability and perpetual existence.²⁵³ However, it seems as if the doctrine of separate legal personality cannot stand the test of time due to rapid growth in modernisation and technology. The move towards the fourth industrial revolution whereby technology is dominating our business sector could lead to the perish of the effectiveness of distinctive personality.

²⁵¹ *Ibid* 200.

²⁵² G V Puig 'A Two-Edged Sword: Salomon and the Separate Legal Entity Doctrine' (2000) 7 (3) *Murdoch University Electronic Journal of Law* 32.

²⁵³ R E Meiners, J S Mofsky & R D Tollinson 'Piercing the Veil of Limited Liability' (1979) 4 *Delaware Journal of Corporate Law* 351.

Chapter 5: Recommendations and Conclusion

5.1 Introduction

The test of time requires resilience, relevance and effectiveness. Modern problems require modern solutions, same applies to the doctrine of separate legal personality.²⁵⁴ This doctrine has been around since the 1800's,²⁵⁵ however, the world has drastically evolved over the centuries. More complex business structures have been introduced and therefore require a new modernised application of separate legal personality.²⁵⁶ This doctrine plays an integral part in company law and therefore needs to be further developed or modernised in order to adapt to new challenges.²⁵⁷

5.2 Recommendations

The doctrine of distinctive personality has indeed stood the test of time and is still relevant in the 21st century. However, I believe that this doctrine needs to be altered or developed further to accommodate modern challenges. In the previous chapter, the author highlighted a few modern issues that challenge the effectiveness of separate legal personality and its effective application. Below I have discussed a few recommendations that will improve the doctrine of separate legal personality. Improving this doctrine involves addressing some key fundamental issues and ensuring effectiveness and accountability in the framework pertaining to distinctive personality.²⁵⁸

5.2.1 Piercing of the Corporate veil

Piercing the corporate veil is the most known and effective remedy for the abuse of distinctive personality. The courts have developed clear guidelines on when and how the veil can be pierced.²⁵⁹ However, there has been a new approach towards piercing the corporate veil that I believe needs attention from the law and needs to be developed further. This method is called the “Reverse insider piercing of the corporate veil”. this method of piercing the veil is triggered

²⁵⁴ K Meller ‘The Making of the Modern Corporation’ (1976) 21 (4) *The Wilson Quarterly* 61.

²⁵⁵ S Willingston ‘History of the Law of Business Corporations before 1800’ (1888) 2 (3) *Harvard law Review* 107.

²⁵⁶ ‘The evolution of Modern Corporation’ available at <https://open.oregonstate.edu/strategicmanagement/chapter/2-the-evolution-of-the-modern-corporation/> accessed on 23 January 2024.

²⁵⁷ P Das ‘Corporate Personality is the laws greatest invention’ (2019) Social Science Research Network Available at: <https://ssrn.com/abstract=3373137> or <http://dx.doi.org/10.2139/ssrn.3373137> accessed on 18 January 2024.

²⁵⁸ ‘Companies and Accounting’ available at <https://www.open.edu/openlearn/money-business/companies-and-financial-accounting/content-section-0?intro=1> accessed on 10 January 2024.

²⁵⁹ *Ex Parte Gore and others NNO* 2013 (3) SA 982 (WCC) at para 34.

when shareholders seek to disregard the corporate identity of a company in order to advance the rights which accrue to the company, as theirs.²⁶⁰

The courts have been sceptical about applying this approach, this is evident in the English case of *Tunstall v Steigmann* where the court refused to apply this doctrine by stating that the common law does not countenance piercing the corporate veil to allow shareholders or members to claim the company's rights as theirs.²⁶¹

5.2.2 Automated Corporations and Development in Technology

The growth in innovation and technology has forced the developments in most areas of law, that should also be the case in company law and specifically the doctrine of separate personality.²⁶² The legal framework ought to develop and address the implications of the employment of technology and artificial intelligence in business corporations. The law needs to develop a framework that is concerned with the unique challenges that stem from the use of technological advancements in the corporate world and in the context of legal personality.²⁶³

Technological developments and operations that relate to corporations need to be developed by company law. In cases of automated machines like self-driving cars, service robots, combat drones, or even systematic artificial intelligence software that might be used by corporations to conduct their operations. The law needs to develop a clear position on the stance of accountability. This is of paramount importance in determining who should be held responsible for the actions of automated corporations or devices in order to bring justice for those affected negatively as a result of such.

5.2.3 Universal standards for Multinational companies

The legal framework should develop and promote universally accepted standards pertaining to separate legal personality and its relation to multinational corporations.²⁶⁴ The distinctive personality of a company is designed to promote accountability and transparency while at the

²⁶⁰ *The Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust* (2023) (5) SA 68 (SCA).

²⁶¹ *Tunstall v Steigmann* (1962) 2 All ER 417 (CA).

²⁶² M Holder 'Reflecting on Salomon v Salomon: The Modern-day Approaches to the Separate Legal Personality Doctrine' (2022) available at https://www.researchgate.net/publication/358190923_Reflecting_on_Salomon_v_Salomon_The_Modern-day_Approaches_to_the_Separate_Legal_Personality_Doctrine accessed on 09 January 2024.

²⁶³ 'Companies and Accounting' available at <https://www.open.edu/openlearn/money-business/companies-and-financial-accounting/content-section-0?intro=1> accessed on 10 January 2024.

²⁶⁴ S Kim and H V Milner 'Multinational Corporations and their Influence Through Lobbying on Foreign Policy' (2019) 2 available at https://www.brookings.edu/wpcontent/uploads/2019/12/Kim_Milner_manuscript.pdf accessed on 10 January 2024.

same time protecting both the company and the shareholders/directors.²⁶⁵ The same benefits and advantages should be enjoyed by multinational corporations with no hassle or limitations. The law should be able to develop guidelines and instructions that will provide insight and procedure when it comes to the accountability of subsidiaries and their principal companies. Consequently, the same also has to be done regarding their managerial structures and operational system.

A company having a distinctive personality and a sense of independence promotes a smooth operation of the daily business of the company, while also creating a safeguard for its incorporators, shareholders, directors, and most importantly investors. This doctrine shall remain relevant to company law, however, needs to be constantly improved in order to adapt to the ever-changing corporate world. In the words of Prithvijoy Das “corporate personality is the law's greatest invention”.

5.3 Conclusion

The principle of corporate personality bestows a corporation to a certain extent with the qualities of a human being. This concept further confers the corporation with numerous rights and responsibilities and a sense of independence and perpetual succession.²⁶⁶ This doctrine has been an integral part of our company law system ever since it was founded and adopted. The *Salomon* case is still considered a milestone case in company law. The concept of legal personhood dates back to the early years of the Middle Ages, it has developed throughout the years to what it is today.²⁶⁷

In essence, by forming subsidiaries, participating in cross-border operations, and signing contracts in foreign jurisdictions, international enterprises can benefit from this principle. According to this theory, businesses have certain legal protection, and their owners are not held personally liable for the debts and liabilities the business incurs. This gives businesses the opportunity to enter new markets, cut taxes, and benefit from advantageous business environments.²⁶⁸

²⁶⁵ ‘Separate Legal Personality: Dissecting the Concept, its Limits & its Implications on Businesses’ available at <https://www.debeerattorneys.com/post/separate-legal-personality-dissecting-the-concept-its-limits-its-implications-onbusinesses> accessed on 11 January 2024.

²⁶⁶ P Das ‘Corporate Personality is the laws greatest invention’ (2019) Available at SSRN: <https://ssrn.com/abstract=3373137> or <http://dx.doi.org/10.2139/ssrn.3373137> accessed on 18 January 2024.

²⁶⁷ M Margaret ‘Corporate Personhood and the Corporate Persona’ 2013 *University of Illinois Law Review* 785.

²⁶⁸ Budustour, Yasmine & Budustour, Leen “The Doctrine of Separate Legal Personality and Its Significance in International Business” (2023). Available at SSRN: <https://ssrn.com/abstract=4384050> or <http://dx.doi.org/10.2139/ssrn.4384050> accessed on 07 January 2024.

Furthermore, corporate personality has proven to be an important topic in business law over the decades. The *Salomon v Salomon & Co Ltd*²⁶⁹ the case represents a watershed moment in the history of corporate law, and it is still referenced as a precedent in courts today. Despite the numerous favourable effects of corporate personality in Company Law, it also has a number of drawbacks, one of which is the mess associated with the members of the corporation taking advantage of the corporation's separate personality and utilize it to perpetrate fraud or other economic crimes. This therefore leads to the most known method of correction, which is the lifting and piercing of the corporate veil. This principle is not absolute and can be relaxed at times.²⁷⁰

²⁶⁹ *Salomon v A Salomon & Co Ltd* (1896) UKHL 1, (1897) AC 22.

²⁷⁰ J Bourne 'Lifting the Corporate Veil' (2002) 10 (3) *Juta's Business Law Journal* 114.

Bibliography

LEGISLATION.

Local statute:

Closed Corporations Act 69 of 1984.

Companies Act 46 of 1926.

Companies Act 61 of 1973.

Companies Act 71 of 2008.

Constitution of the Republic of South Africa Act 108 of 1996.

Disaster Management Act 57 of 2002.

Joint Stock Companies Act 1844.

Joint Stock Companies Limited Liability Act 23 of 1861.

Union Companies Act of 1926.

Special Partnerships Limited Liability Act 24 of 1861.

CASE LAW.

Local cases:

Amlin (SA) Pty Ltd v Van Kooij (2008 (2) SA 558.

Botha v Van Niekerk 1983(3) SA 513 (W).

Bumper Development Corporation Ltd v Commissioner of Police of the Metropolis: CA 1991.

Cape Pacific Ltd v Lubner Controlling Investments 1995 (4) SA 790 (A).

Commissioner, South African Revenue Services v Professional Contract Administration CC
2002 (1) SA 179 (T).

Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530.

Ex Parte Gore [2013] 2 All SA 437 (WCC).

Francis George Hill Family Trust v SA Reserve Bank 1992 2 All SA 137 (A).

Hulse-Reutter v Godde 2001 (4) SA 136 (SCA).

Itzikowitz v Absa Bank Ltd (20729/2014) [2016] ZASCA 43.

Lategen v Boyes 1980 (4) SA 191 (T).

Ochberg v Commissioner for Inland Revenue 1931 AD 215.

The Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust [2023] (5) SA 68 (SCA).

Foreign case law:

Continental Tyre and Rubber Co. (G.B) Ltd v Daimler Co [1915] K.B 893.

Darhmouth College v Woodward 17 US 629 659; 4 Wheat 518 (1819) 636.

Deputy Sheriff Harare v Trinpac Investments (Private) Ltd and another [2012] JOL 28241 (ZH).

Hansen, Schrader & Co v Kopelowitz 1903 TS 707.

Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC (HL) 705.

Foss v Harbottle (1843) 2 Hare 461, 67 ER 189.

Lee v Lee's Air Farming Ltd [1960] UKPC 33.

Salomon v A Salomon Co. Ltd [1896] UKHL 1, [1987] AC 22.

Tunstall v Steigmann [1962] 2 All ER 417 (CA).

TJ Jonck BK h/a Bothaville Vleismark v. Du Plessis NO 1998 (1) SA 971 (O).

Webb & Co Ltd v Northern Rifles 1908 TS 462.

BOOKS.

Cassim F... et al *Contemporary Company Law* 2ed Cape Town: Juta (2012).

Cheong A P *Corporate Liability: A Study in Principles Attribution* London: Kluwer law international (2001).

Cilliers HS, Benade ML and Henning JJ et al. *Corporate law* 3ed Durban:

Butterworths (2000).

Cilliers M L and Benade H S *Company law* Butterworths (1982).

Davis P 'Principles of Modern Company Law' 8ed UK: Sweet & Maxwell (2008).

Delport P *Henochsberg on the Companies Act 71 of 2008* Durban: LexisNexis South Africa (2011).

Dine J and Koutsias M *Company law* 9th Edition Macmillan Law Masters (2020).

Joubert W A *The Law of South Africa* volume 4(1) 2nd edition (2011).

Deneys S O *The Contribution of English Law to South African Law and the role of the Rule of Law in South Africa: Hamlyn lectures* Juta Publications (1967).

LECTURE NOTES.

Justin Ramages *Capacities and Rights of legal subjects* (unpublished lecture notes, Rhodes University, 2018).

THESES.

Becker R *Disregarding the separate juristic personality of a company: an English Case Comparison* (Unpublished LLM Dissertation from the University of Pretoria 2014).

Glazer M *Piercing of The Corporate Veil: A Review of The Concept and Consideration of its Relevance in South African Tax Law* (unpublished Dissertation of the University of Cape Town 1994).

Govender T *An analysis of lifting the corporate veil in light of section 20(9) of the Companies Act 71 of 2008* (unpublished LLM thesis, university of KwaZulu Natal, 2018).

Ofwano F I *Suggested Reasons for the failure of Judicial Management as a Business rescue Mechanism in South African Law* (Unpublished post graduate diploma of the University of Cape Town 2014).

Smit A *Remedying Abuses of Limited Liability in Company Groups* (unpublished LLM thesis, University of Cape Town 2016).

Stevens R A *The External Relations of Company Groups in South African Law: A Critical Comparative Analysis* (LLD Thesis University of Stellenbosch 2011).

Tong M *Review of Company Law in South Africa: Should South Africa Follow the British Example in Corporate Governance Matters This Time?* (unpublished LLM dissertation, University of Natal, Durban 2003).

JOURNAL ARTICLES.

Bent F 'Meir Dan-Cohen: Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society' (1987) 10(2) *UNSW Law Journal* 295 – 302.

Bilchitz D 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (2008) 137(4) *SALJ* 770 – 803.

Bourne J 'Lifting the Corporate Veil' (2002) 10(3) *Juta's Business Law Journal* 112 - 136.

Blumberg P I 'The Corporate Personality in American law: A Summary Review (1990) 38 *The American Journal of Corporative Law* 49 – 69.

Cantoni D & Yuchtman N 'Medieval Universities, Legal Institutions, and the Commercial Revolution' (2014) 129(2) *The Quarterly Journal of Economics* 823 – 888.

Dewey J 'The Historic Background of Corporate Legal Personality' (1926) 35(6) *YALE law journal* 655 - 673.

Donnell J D 'The Legitimacy of the Business Corporation in the law' (1971) 46(3) *Indiana Law Journal* 449 - 453.

Du Bois A B 'The English Business Company after the Bubble Act 1720–1800' (1948) 58(230) *Economic Journal* 271 - 275.

Figueroa D 'Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America' (2012) Vol 50(4) *Duquesne Law Review* 683 - 797.

George R H 'The Charters Granted to English Parliamentary Corporations in 1688' (1940) 55(217) *Modern Law Review* 29 - 48.

Gerencser S 'The corporate person and democratic politics' (2005) 58(4) *Harvard Law Review* 625 - 635.

Giles D 'Relationships Always Matter: Findings from a Phenomenological Research Inquiry' (2011) 36(6) *Australian Journal of Teacher Education* 80 - 91.

Harries R 'Industrializing English Law: Entrepreneurship and Business Organization 1720-1844' (2000) 44(3) *Journal of Economic History and Economic History Law Review* 14 - 36.

Hutchinson A and Langlois I 'Salomon Redux: The Moralities of Business' (2012) 35(4) *Seattle University Law Review* 1109 – 1134.

Jason W N 'Canadian Corporate Law, Veil-Piercing, and the Private Law Model Corporation' (2000) 50(2) *The University of Toronto Law Journal* 173 - 240.

Lipton P 'The Mythology of Salomon's case and the law dealing with the tort liabilities of corporate groups: A historical perspective' 2014 *Monash University Law Review* 453 - 483.

Machen Jr W 'Corporate Personality' (1911) (24)4 *Harvard Law Review* 253 – 267.

Margaret M 'Corporate Personhood and the Corporate Persona' 2013 *University of Illinois Law Review* 785 - 820.

Meiners R E, Mofsky J S and Tollinson R D 'Piercing the Veil of Limited Liability' (1979) 4(2) *Delaware Journal of Corporate Law* 351 - 367.

Noble P 'Social Responsibility of Corporations' (1999) 84(5) *Conell Law Review* 1255 - 1265.

Novelli C and Sartor G 'A Conceptual Framework for Legal Personality and its Application to AI' (2022) 13(2) *Modern Law Review* 194 - 219.

Nyombi C 'Lifting the veil of incorporation under common law and statute' (2014) 56(1) *International Journal of Law and Management* 66 - 81.

Pollman E 'Corporate Personhood and Limited Sovereignty' (2021) 74(6) *Vanderbilt Law Review* 1727 - 1753.

Pickering M 'The Company as a Separate Legal Entity' (1968) 31(5) *Modern Law Review* 481 - 511.

Phiri S 'Companies and the Constitutional 'Right to Life': A Critical Analysis of the Companies Act 71 of 2008' (2021) 12(6) *Mediterranean Journal of Social Sciences* 107 - 115.

Puig G V 'A Two-Edged Sword: Salomon and the Separate Legal Entity Doctrine' (2000) 7(3) Murdoch University Electronic Journal of Law 28 - 67.

Ramsay I M and Noakes D B 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Security Law Journal* 250 - 271.

Sartor G 'Cognitive Automata and the Law: Electronic Contracting and the Intentionality of Software Agents' (2009) 17(4) *Artificial Intelligence and Law* 253 - 290.

Sakar J & Sakar S 'Board Independence and Corporate Governance: Which Way Forward?' (2004) 39(48) *Economic and Weekly Journal* 5074 – 5076.

Waqas M and Rehman Z 'Separate legal entity of corporation: The corporate veil' (2016) 3(1) *International Journal of Social Society and Management* 1- 4.

Willington S 'History of the Law of Business Corporations before 1800' (1888) 2(3) *Harvard law Review* 104 – 124.

Wilson A 'Salomon's Case deters Attempts to lift the Veil: Lee v. Lee's Air Farming Ltd' (1961) 3(1) *Modern Law Review* 115 - 118.

ARTICLES.

Clemens R and Graham T 'Introduction to Manuscript Studies: Charters and Cartularies' (2007).

Girvin S D 'The antecedents of South African company law' (1992).

South Africa Dept. of Trade and Industry: South African Company Law for the 21st Century Guidelines for Corporate Law Reform (2004).

Sher H 'Piercing the Corporate Veil' (1996).

Wedderburn K W 'Shareholders Rights and the Rule in Foss v. Harbottle' (1957).

INTERNET SOURCES.

‘Automation And Customer Self-Service Go Together Like A Horse And Carriage’ available at <https://blog.soliditech.com/blog/automation-and-customer-self-service-go-together-like-a-horse-and-carriage> accessed on 06 January 2024.

Blair MM ‘The Four Functions of Corporate Personhood’ (2012) *Social Science Research Network* available at: <https://ssrn.com/abstract=2037356> accessed on 27 October 2023.

Budustour, Y and Budustour, L ‘The Doctrine of Separate Legal Personality and It’s Significance in International Business” (2023) *Social Science Research Network* Available at: <https://ssrn.com/abstract=4384050> or <http://dx.doi.org/10.2139/ssrn.4384050> accessed on 07 January 2024.

‘Case Analysis: Lee vs. Lee’s Air Farming Ltd 1960’ *Lawjure* available at <https://www.lawjure.com/case-analysis-lee-vs-lees-air-farming-ltd-1960/> accessed on 03 December 2023.

‘Companies and Accounting’ available at <https://www.open.edu/openlearn/money-business/companies-and-financial-accounting/content-section-0?intro=1> accessed on 10 January 2024.

‘Corporate Personality’ *Encyclopaedia.com* available at <https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/corporate-personality> accessed on 15 August 2023.

‘Corporate personality’ available at <https://www5.austlii.edu.au/au/journals/UQLawJl/1964/2.pdf> accessed on 17 January 2024.

Chesterman S ‘Artificial Intelligence and the Limits of legal Personality’ (2020) 822 available at www.researchgate.net/publication/346719980_Artificial_intelligence_and_the_limits_of_legal_personality accessed on 07 January 2024.

Crotty A ‘Grim news for Steinhoff shareholder’s available at <https://www.businesslive.co.za/fm/money-and-investing/2018-10-18-grim-news-for-steinhoff-shareholders/> accessed on 10 October 2023.

Dahal R ‘Salomon v Salomon: Its Impact on Modern Laws on Corporations’ (2018) *Social Science Research Network* available at: <https://ssrn.com/abstract=3169431> accessed on 25 October 2023.

Das P ‘Corporate Personality is the laws greatest invention’ (2019) Social Science Research Network Available at: <https://ssrn.com/abstract=3373137> or <http://dx.doi.org/10.2139/ssrn.3373137> accessed on 18 January 2024.

‘Disadvantages of Separate legal entity’ available at <https://www.bartleby.com/essay/Disadvantages-Of-Separate-Legal-Entity-PC9YWXLN6> accessed on 08 January 2024.

Eric Reed ‘Joint Stock Companies’ available at <https://smartasset.com/investing/joint-stock-company> accessed on 20 March 2024.

Holder M ‘Reflecting on Salomon v Salomon: The Modern-day Approaches to the Separate Legal Personality Doctrine’ (2022) available at https://www.researchgate.net/publication/358190923_Reflecting_on_Salomon_v_Salomon_The_Modern-day_Approaches_to_the_Separate_Legal_Personality_Doctrine accessed on 09 January 2024.

‘Inside out? A discussion on the case of The Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust’ available at <https://www.cliffedekkerhofmeyr.com/news/publications/2023/Practice/Corporate/corporate-and-commercial-law-alert-11-october-inside-out-a-discussion-on-the-case-of-the-butcher-shop-and-grill-cc-v-trustees-for-the-time-being-of-the-bymyam-trust> accessed on 05 December 2023.

Keshari K and Khanna I ‘All you need to know about corporate personality and theories of corporate personality’ (2021) available at <https://blog.ipleaders.in/all-you-need-to-know-about-corporate-personality-and-theories-of-corporate-personality/> accessed on 28 September 2023.

Kim S and Milner H ‘Multinational Corporations and their Influence Through Lobbying on Foreign Policy’ (2019) 2 available at https://www.brookings.edu/wpcontent/uploads/2019/12/Kim_Milner_manuscript.pdf accessed on 06 January 2024.

Kühne M ‘The Legal Status of Companies and the Validity of Company Actions’ (2023) available at <https://www.lexisnexis.co.za/lexis-digest/legal/the-legal-status-of-companies-and-the-validity-of-company-actions> accessed on 01 December 2023.

Kurki A J ‘A Theory of Legal Personhood’ (2019) 4 available at <https://doi.org/10.1093/oso/9780198844037.003.0001> accessed on 05 October 2023.

Laing H and Hill M ‘Whose loss is it anyway – the shareholder’s or the company’s?’ available at <https://www.cliffedekkerhofmeyr.com/news/publications/2016/dispute/dispute-resolution-alert-4-may-whose-loss-is-it-anyway-the-shareholders-or-the-companys-.html> accessed on 10 October 2023.

‘Lee v Lee’s Air Farming [1961] AC’ available at <https://lawprof.co/company/corporate-personality-cases/lee-v-lees-air-farming-1961-ac-12/> accessed 1 December 2023.

MacDonald C and Marcoux A ‘Corporate personhood’ available at <https://conciseencyclopedia.org/entries/corporate-personhood/> accessed on 17 November 2023.

Mehta P ‘Theories of corporate personality’ available at <https://libertatem.in/blog/theories-of-corporate-personality/> accessed on 17 January 2024.

Muzaffer E ‘Modern Organisation of Multinational Enterprises and Liability Discussions: Critical Analysis of Control Theory’ (2008) Social Science Research Network available: <https://ssrn.com/abstract=1319733> or <http://dx.doi.org/10.2139/ssrn.1319733> accessed on 05 January 2024.

Nolan A ‘The Position of Unsecured Creditors of Corporate Groups; Towards A Group Responsibility Solution Which Gives Fairness and Equity A Role’ Social Science Research Network Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319733 accessed on 5 January 2024.

OECD (2011), OECD Guidelines for Multinational Enterprises p18 available at <http://dx.doi.org/10.1787/9789264115415-en> accessed on 6 January 2024.

Rajib D ‘Salomon v Salomon: Its Impact on Modern Laws on Corporations’ (2018) *Social Science Research Network* available at: <https://ssrn.com/abstract=3169431> or <http://dx.doi.org/10.2139/ssrn.3169431> accessed on 12 November 2023.

‘Separate Legal Personality: Dissecting the Concept, its Limits & its Implications on Businesses’ available at <https://www.debeerattorneys.com/post/separate-legal-personality-dissecting-the-concept-its-limits-its-implications-onbusinesses> accessed on 11 January 2024.

‘The evolution of Modern Corporation’ available at <https://open.oregonstate.education/strategicmanagement/chapter/2-the-evolution-of-the-modern-corporation/> accessed on 23 January 2024.

‘The myth of corporate personality: A comparative analysis of the doctrine of corporate personality of Malaysian and Islamic laws’ (2012) available at [https://www.researchgate.net/publication/292898126_The_Myth_of_corporate_personality'_A_comparative_legal_analysis_of_the_doctrine_of_corporate_personality_of_Malaysian_and_Islamic_laws/link/596c8ae30f7e9b80919bd691/download?_tp=eyJjb250ZXh0Ijp7ImZpcnNOUGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19](https://www.researchgate.net/publication/292898126_The_Myth_of_corporate_personality_A_comparative_legal_analysis_of_the_doctrine_of_corporate_personality_of_Malaysian_and_Islamic_laws/link/596c8ae30f7e9b80919bd691/download?_tp=eyJjb250ZXh0Ijp7ImZpcnNOUGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19) accessed on 17 January 2024.

‘What you need to know about the Companies Act of 2008’ available at <http://ptycompanyregistration.co.za/the-companies-act-of-2008/> accessed on 03 December 2023.

Mr Siphosethu Myeni (219017587)
School Of Law
Pietermaritzburg

Dear Mr Siphosethu Myeni,

Original application number: 00022251

Project title: The concept of separate legal personality in South African company law. A critical examination of its origins, developments and current application.

Exemption from Ethics Review

In response to your application received on 17 August 2023, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Matthew Blain Kimble
obo Academic Leader Research
School Of Law

UKZN Research Ethics Office
Westville Campus, Govan Mbeki Building
Postal Address: Private Bag X54001, Durban 4000
Website: <http://research.ukzn.ac.za/Research-Ethics/>