CORPORATE VEIL IN SOUTH AFRICA:

A CRITICAL STUDY OF PIERCING THE CORPORATE VEIL IN SOUTH AFRICA WITH REFERENCE TO GROUPS OF COMPANIES

by

NONJABULO FORTUNATE NKABINDE

Submitted in partial fulfilment for the degree

Master of Laws in Business Law

In the College of Law and Management Studies

School of Law

At the

University of KwaZulu-Natal

Supervisor: Adv. S Phungula

September 2020

I certify that the whole research paper, unless specifically indicated to the contrary in the text, is my own work. It is submitted as part of research component in partial fulfilment for the degree of Masters in Business Law (LLM) in the School of Law, University of KwaZulu-Natal, 2020.

Student number: 991226693

Signature……………………………………
Date………………………………….

DEDICATION

This dissertation is dedicated to God Almighty and to my only son Lubanzi Ntimba

ACKNOWLEDGMENTS

My praise goes to God Almighty through whom all things are possible. I would not have accomplished this task on my own. I thank God for the strength, perseverance and the wisdom. I wish to express my sincere gratitude to my supervisor Mr Simphiwe Phungula for his guidance, comments, advice and being patient with me; without his support this work would not have been a success.

I would like to also extend my gratitude and appreciation to my mother Thulisile Nkabinde and to my sister Mbalenhle Nkabinde for the greatest support; the words of encouragement from my mother meant a lot, without whom I could not have continued with this task.

My friends Gugulethu Shange, Nonhlanhla Dlungwana, Hlengiwe Zuma, and Khule Nkabinde, thank you so much for your moral support and encouragement throughout. Lastly I would like to thank Robynne Louw from the School of Law, Pietermaritzburg, for her sense of humour, always being willing to assist and be patient with me; may God bless her abundantly.

ABSTRACT

Companies in South are protected by limited liability principle. When creditors are owed by a company and the company cannot honour its obligation, creditors cannot sue shareholders or directors in respect of such debt. The problem arises from tendency of those in control of the company to abuse and exploit the notion of a juristic personality to the detriment of innocent creditors. If this happens a common law and a statutory remedy under s20 (9) of piercing the corporate veil can be used by the courts to remedy the abuse of the corporate personality by directors or shareholders. The challenge is that s 20(9) of the Companies Act does not give meaning to the term 'unconscionable abuse' nor does it give any guidance on how the courts should interprets it. There is also an increased risk in burgeoning modern commerce of companies forming subsidiaries as a vehicle of fraudulent activity. These types of companies seek to enjoy the benefit of limited liability which was never designed for them but for single corporation. This dissertation seeks to establish if creditors, investors and the company identity are protected by the remedy of piercing the corporate veil provided under section 20(9) to expose the fallacy of limited liability. A reference will be made to Ex Parte Gore's case to attempt to provide meaning to the term 'unconscionable abuse' found in s20(9) of the companies act in the context of company groups. This dissertation will recommend for the benefit of creditors and investors that a set of rules on operation company groups be developed to curb the abuse and exploitation of creditors. A recommendation will be made that section 20(9) should be amended to stipulate the lists of circumstances which constitute 'unconscionable abuse' in generally and also with respect to company groups. The set of guidelines in the statutes would allow the court to follow and would be used in conjunction with common law principles where new set of facts arises.

TABLE OF CONTENTS

Table of Contents

CHAPTER 1: Introduction

1.1 Introduction 1

1.2 Rationale for the study 3

1.3 Research methodology 3

1.4 Structure of dissertation 4

CHAPTER 2: Doctrine of separate legal personality

2.1 Introduction 6

2.2 Separate legal personality principle 6

2.3 Rationale for limited liability 11

2.4 Conclusion 12

CHAPTER 3: Doctrine of piercing the corporate veil

3.1 Introduction 14

3.2 Piercing the corporate veil under common law 14

3.3 Piercing the corporate veil under statute 20

3.4 Conclusion 23

CHAPTER 4: Groups of Companies

4.1 Introduction 25

4.2 Nature of groups of companies 25

4.3 Limited liability in relation to groups of companies 26

4.4 Piercing the corporate veil in a group of companies 32

4.5 Analysis of case law:

4.5.1 Ex parte Gore NO and Others NNO [2013] 2 All SA 437 (WCC) 36

4.5.2 Prest v Petrodel Limited [2013] 2 AC 415 42

4.6 Conclusion 44

CHAPTER 5: Conclusion 46

BIBLIOGRAPHY… 50

CHAPTER 1: INTRODUCTION

1.1 Introduction

The decision of *Salomon v Salomon & Co*[1] established that a company is a legal person in its own right, separate from its members and directors. From this principle it follows that members and directors of a company are not liable for the company's debts. The shareholders of the company enjoy limited liability. It also means that on incorporation a company acquires an independent legal personality distinct from its shareholders.[2] The company has the capacity to acquire its own rights and incur its own duties and obligations.[3] Corporate obligation remains the liability of the company not the shareholder, directors or prescribed officers who own or act for the company.[4]

Notwithstanding the decision of *Salomon* v *Salomon* the courts and the legislators have recognised that the limited liability principle can be subject to abuse and manipulation by shareholders and directors of the company.[5] An example of manipulation by directors of the company is where they evade their fiduciary duties,[6] or where the company is used as a 'device' or stratagem to thwart a contractual duty owed by director of the company.[7]

Despite the principle of limited liability the court may in exceptional cases ignore the separate legal personality principle and pierce the veil of the company. This is a remedy available to creditors who were misled by the directors and or shareholders of the company in abuse of the separate legal personality of the company by those

[1] *Salomon v Salomon* [1897] AC 22 (HL).
[2] S 19(1) of the Companies Act 71 of 2008 (Companies Act).
[3] *Webb and Co Ltd v Northern Rifles* 190 TS 462.
[4] S 19(2) Companies Act supra (n2).
[5] *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (C) at 22.
[6] *Robinson v Randfontein Estate Gold Mining Co* 1921 AD 168.
[7] *Gilford Motor Co Ltd v Horne* [1933] Ch 935 (CA).

managing it. In such a case the court may on application by an affected individual impose liability on the shareholders or directors by granting an order piercing the corporate veil.[8] It is a common law remedy also invoked in *Hulse-Reutter v Godde.*[9] This establishes that, despite the general rule that a company has a separate legal personality from it members, the law recognises that the structure of a company can be abused to the extent that courts are prepared to pierce the corporate veil.

Further the Companies Act (1973) also contains a provision that empowers court to hold shareholders and /or directors of the company personally liable in certain circumstances. Importantly this provision does not give court discretion to pierce the corporate veil, but only to impose personal liability.[10] It is only in recent years that the company law has made a provision for the court to disregard the separate juristic personality of the company. In terms of section 20(9) of the Companies Act 71 of 2008 (the Companies Act (2008)) the court may pierce the veil of a company if it appears that there was an unconscionable abuse of the juristic personality of the company. This section however does not override the common law principle of corporate personality. There has been uncertainty about the interpretation and the meaning of the phrase 'unconscionable abuse', and the issue has been left in the hands of the court to interpret of what constitutes 'unconscionable abuse'. The court in *the Gore* case dealt with this provision for the very first time and proposed guidelines that maybe useful in applying section 20(9).

The dissertation will also analyse the separate legal personality principle as well as the notion of piercing the corporate veil in relation to groups of companies. It is recognised groups of companies may be abused by those who are in control. The problem arises when the parent company's action overrides the action of a subsidiary

[8] *Lategan and another NNO v Boyes and another* 1980 (4) SA 191 (T).
[9] *Hulse-Reutter and Others v Godde* 2001 (4) SA 1336 (SCA).
[10] FHI Cassim et al *Contemporary Company Law* 2 ed (2012) at 57.

company, such that there is no difference between a subsidiary and holding company.[11] Common law principle recognises that each company within a group of companies has a separate legal personality, each with a juristic personality.[12] This means each company within a group can be sued in its own capacity without involving other companies. The dissertation will explore the possible abuse of the limited liability principle and the unintended consequence of extending limited liability to companies operating within the group.

1.2 Rationale for this study

The reason for this study lies with the difficulties South African courts experience when they have to adjudicate matters involving groups of companies.[13] The law is not settled as to the circumstances in which the court can or should lift the corporate veil.[14]. So with the increase of commercial enterprise there stands a high increase and risk that companies form subsidiaries as a vehicle for fraudulent activity. There is still a little consistency and coherence in our Company Law when a claim to pierce the corporate veil is presented to court. Even with the enactment of section 20(9) of the Companies Act (2008) there is still uncertainty whether company groups should be treated as one entity or not.[15] This study seeks to consider and recommend that our law should be developed and the Companies Act amended to include provisions dealing with lifting the corporate veil where company groups are concerned.

1.3 Research methodology

[11] *Van Zyl v Kaye* 2014 (4) SA 452.
[12] *Airport Cold Storage (Pty) Limited v Ebrahim and Others* 2008 (2) SA 303.
[13] C*ape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995 (4)SA 790 (A) at 802-804; Botha v Van Niekerk 1983 (3) SA 513 (W) at 519-524; The Shipping Corporation of India Ltd v Evdomo Corporation 1994 (1) SA 550 (A) at 566;*
[14] *Cape Pacific Ltd* supra (n13) at 802.
[15] R Cassim 'Piercing the Veil under s20 (9) of the Companies Act 71 of 2008: A new Direction' (2014) 26(2) *SA Merc Law Journal*.

The proposed dissertation will be a desktop study. Legal literature such as journal articles, textbooks, theses, statutes, and articles from the internet are employed to identify the legal principle behind the doctrine of limited liability and piercing the corporate veil. Decides cases in South Africa and internationally are also been consulted in order to ascertain the *rationes* of particular decisions. As the doctrine of limited liability and corporate veil originate from case law, these sources are of prime importance in understanding of these two principles. The method chosen will best explain the theoretical underpinning of these two important common law principles.

1.4 Structure of dissertation

The dissertation will be divided into five chapters; each chapter is set out as follows:

Chapter 1: This chapter provides an outline on the research topic, and it touches on the rationale and the purpose of the study.

Chapter2: This chapter touches on the principle of separate legal personality, discussing the common law and background of this principle. The chapter also discusses the economic advantages and benefits associated with the principle of separate legal personality.

Chapter 3: This chapter deals with the common law principle of piercing the corporate veil in relation to an individual company. It shows how this principle was incoherently and inconsistently applied at common law. It also deals with the statutory remedy in terms of section 20(9) of the Companies Act (2008) and will demonstrate the changes that necessitated this section and the fact that it is not a substitution, but a supplement, to the common law remedy.

Chapter 4: This chapter discusses the remedy of piercing the corporate veil in relation to company groups, including some background and history of limited

liability in the context of company groups. The chapter will further discuss the case of *Ex Parte Gore NO and Others NNO* dealing with section 20(9) and the guidelines proposed in this case which assist in the interpretation of the phrase ‘unconscionable abuse’ and ‘interested person’. This chapter further looks at foreign cases which deal with the issue piercing the veil of corporate personality. The English case *of Prest v Petrodel Limited* will also be studied to compare and contrast English judicial reasoning and possibly provide guidance.

Chapter 5: This chapter offers a conclusion and recommendations for the questions and dilemmas raised in the earlier chapters on piercing the veil of corporate personality; where groups of companies are concerned.

CHAPTER 2

SEPARATE LEGAL PERSONALITY

2.1 Introduction

The principle of separate legal personality forms the foundation of South African Company Law. Its effect is that those who are owed money by or have a claim against a company may only sue the company for the fulfilment of their claim. This chapter discusses the origin of this principle and its subsequent codification in section 19(1)(b) of the Companies Act (2008) which affirms that from when the company is incorporated it acquires all the legal powers and capacity of an individual, except if the memorandum of incorporation provides otherwise. The chapter discusses limited liability from an economic perspective.

2.2 Separate legal personality at common law

The principle of separate legal personality means that on incorporation the company has the same capacity natural person,[16] including the right to sue or be sued and capability of incurring legal obligations.[17] This principle is at the core of company law and companies are formed on this understanding.[18] This principle applies even to those companies controlled by one person..[19] Because a company is a separate legal entity, its members and shareholders enjoy limited liability. This basically means that members of a company are not personally liable for the debts of the company.[20]Shareholders have no duty to the company or its creditors beside their duty with regard to the value of their shares or under a guarantee in the case of a

[16] PA Delport & Q Vorster, *Henochsberg on the Companies Act71 of 2008* (2011) LexisNexis 10
[17] RC William *Concise Corporate Law* (1992) at 21
[18] PA Delport 'Shareholder protection philosophy in terms of the Companies Act 71 of 2008' (with I M Esser) (2016) *Journal of Contemporary Roman Dutch Law* 1-29.
[19] *Salomon v Salomon* supra (n1) at 44-45
[20] Ciro T *Corporation Law: in Principle* (2013) 66

company by guarantee.[21] If the company fails to honour its debt, shareholders are only liable to the amount invested in the company, with no effect on their personal assets and private life.[22]

The leading case of *Salomon v Salomon and Co*[23] case established the principle that a company is a legal person in its own right, separate from its members and directors. The brief facts of this case were that Mr Salomon managed a company of which he was the majority shareholder, and the other shareholders were his family members. When the company was liquidated, Mr Salomon and other secured creditors were paid what was due to them and leaving the unsecured creditors with nothing. The liquidator claimed that the company was incorporated by Mr Salomon with fraud and intent to avoid liability. The High Court, on the law of principal and agent found that Mr Salomon was in effect a principal for the company and therefore liable for the debts of the unsecured creditors. The decision was upheld in the 'Court of Appeal, but on further appeal to the House of Lords, the decision was reversed with Lord Halsbury holding that 'It seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motive of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.'[24] The House of Lords decided that the business belonged to the company and not to Salomon and therefore he was not liable for the debts of the company. The principle laid down in *Salomon* was adopted in *Dadoo Ltd v Krugersdorp Municipal Council*[25]where the Appellant Division held that this

[21] Pretorius JT et al *South Africa's Company Law through the Cases* (1999) 14
[22] FHI Cassim et al *Contemporary Company Law* 2 ed (2012) at 35.
[23] *Salomon* supra (n1).
[24] *Salomon* supra (n1) at 30.
[25] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550-551.

conception of the existence of a company as a separate entity distinct from its shareholders was not merely artificial and technical thing, but a matter of substance.

It is clear from both decisions (*Salomon* and *Dadoo)* that once the company is registered and incorporated in accordance with the law, the company is an entity on its own, separate from it members and shareholders and that the property of the company belongs to the company not in its members.[26] Despite the decision of *Salomon and Salomon*[27], some writers argue that limited liability can be subject to abuse by manipulation.[28] Others favour strict application of the of limited liability principle. Gower asserts that limited liability encourages members of the public who are not professional investors to invest their surplus funds in large capital projects.[29] Also Cheffins argues that limited liability has a positive effect in encouraging people to invest knowing that the risk will be borne by creditors who are better equipped to deal with insolvency of the debtor company.[30]

Because of the privilege of limited liability, business people are able to limit the risk of investing funds into business ventures. It also encourages the growth and expansion of companies.[31] According to Cassim limited liability boosts company growth which is important to the economy, wealth and employment opportunities.[32]Henry Manne argues that the public corporations with many small shareholders could not survive without limited liability.[33] Whilst limited liability is supported on the basis that it limits risks, Henry Manne makes an important note that limited liability does not eliminate the risks of business failure but rather shifts some

---

[26] Pretorius J T et al *Hahlo's Company Law through the Cases* (1999) 13. See also *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL) at 50
[27] *Salomon* supra (n1).
[28] D van Huyssteen, '*Piercing the corporate veil: A critical analysis of s20(9) of the Companies Act* 71 of 2008 2017 at 17. Van Huyssteens attorneys (Johannesburg*).*
[29] Gower, *Principles of Modern Company Law*, 6 ed (1997).
[30] Cheffins *Company Law* supra at 500
[31] FHI Cassim et al op cit (n11) at 35.
[32] FHI Cassim Contemporary Company Law supra at 11.
[33] H Manne, '*Our Two Corporation System: Law and Economics'* (1967) 53 *VA L. Rev*. 259

risks of creditors[34] − someone is bound to bear the risk of a business failure; limited liability is an arrangement by which loss largely lies where it falls. Each investor has a guaranteed maximum on the loss he/she will bear.[35]

Easterbrook and Fiscel who favour of the limited liability principle submit a number of reasons for limited liability minimising capital requirements of running a business:

- First, a limited liability company is more efficient in that it increases the transferability of shares (compared with an unlimited liability scenario).[36] This encourages directors to manage a company more efficiently without having to carry risks should their managerial decision goes wrong. Even shareholders of the company would be more willing to trade without having to worry about unlimited liability.
- Secondly, limited liability gives directors security to take investment decisions without fear of the unfortunate consequences.[37] Managers of the company are able to invest in any project which they genuinely believe will bring profit into the company and even if such a projects holds a high risk.
- Thirdly, limited liability supports diversification of investment portfolios.[38] This gives shareholders courage to invest in different companies and different portfolios. If a shareholder were to carry unlimited liability for their shareholdings they would not want to invest, but would limit their investments to reduce risks by monitoring their investment in the few companies they have invested in.

[34] H Manne op cit at 119.
[35] H Manne op cit (n35).
[36] Easterbrook & Fischel '*Limited Liability and the Corporation'* (1985) 52 *University of Chicago Law Review* 89 at 95.
[37] Easterbrook & Fischel op cit (n38), see also discussion in RJ Huss 'Revamping Veil Piercing for all Limited Liability Entities: Forcing the Common Law Doctrine in the Statutory Age' (2001) 70(1) *Cincinnati Law Review* 10.
[38] Easterbrook & Fischel op cit (n38) at 95.

- Fourthly, limited liability minimises costs of monitoring the operation of the company. If shareholders and investors had unlimited liability they would strictly and meticulously monitor the actions of directors of the company. This would consume time and money. They would also want to know who the other shareholders were as they would not want to be solely responsible to creditors in the event of bankruptcy.
- Fifth, in a limited liability company creditors of the company and not shareholders would have to worry about monitoring the business transactions of the company and attachable assets on bankruptcy.

With all these economic advantages of limited liability, it should also be borne in mind that the theory put forward by Fischel in support of limited liability may not make economic sense when the law of delict is concerned and when a company group is an issue; however it may be applicable when the law of contract law is concerned.[39] Cheffins expressed the same concerns about limited liability in the field of delictual law, citing the costs involved for an individual who has to institute legal action against shareholders who could be spread across the world.[40]

In the same breath, courts and Parliament have recognised that the corporate identity can be abused by shareholders and directors.[41] In theory, companies with limited liability have greater opportunity not to maintain enough funds or assets to satisfy creditors' claims.[42]In the event of the company failing, the creditors are the ones who stand to lose, especially in those companies that were undercapitalised and were nothing but an empty shell.

---

[39] Easterbrook & Fischel '*The economic structure of corporation law* (1991) 51.
[40] Cheffins *Company Law: Theory, Structure and Operation* (1997) 506-507.
[41] *Amlin v Van Koori* supra (n5) at 226.
[42] RJ Huss '*Revamping Veil Piercing for all limited liability Entities*: Forcing the Common Law Doctrine in the Statutory Age' (2001) 107. See also H Anderson 'Piercing *the Corporate Veil on Corporate Groups* (2009) 33 Melbourne University Law Review 338.

A counter argument from the economic perspective holds that the difficulties for shareholders with unlimited liability regime exceed the difficulties for creditors with a limited liability regime.[43] Creditors can protect themselves against the risk of loss; they can always price-in the risks of non-payment and can always enforce a high interest rate on their services to the company. They can always ask for security and suretyship from the company for worst situation. On this basis creditors are capable of protecting themselves against the risks of non-payment.[44] To adjudicate abuse and guard against any ulterior motives by the directors of the company the court would have to ignore the separate juristic personality of a company by what it referred to as 'piercing the corporate veil'.[45]

Anderson on the other hand dismisses the economic efficiency argument on the ground that such argument is based on the assumption that all the relevant information is available for the market to balance and digest as it becomes available.[46]

2.3 Rationale for limited liability

First, Halpern, Trebilcock and Turnbull[47] argue that limited liability is necessary for the existence of an organised securities market. If equity investors were required to contribute additional capital, the value of shares, would not be the same to every investor. The greater a particular investor's wealth in relation to that of other investors in the same firm, the higher the probability that the investor's personal wealth would be affected in the event of corporate default. The greater the

---

[43] H Anderson, Piercing *the Corporate Veil on Corporate Groups in Australia* (2009) 339-341.
[44] H.Anderson op cit (n 44).
[45] Cases where courts have pierced the corporate veil are*: Daimler Co Ltd v Continental Tyre and Rubber* Co [1916] 2 AC 3017, *Robinson v Randfontein Estate Gold Mining Co Ltd* 1921 AD 168; *Lategan v Boyes* 1980 (4) SA 191 (T) and *Southern v Watson* [1940] 3 All ER 439.
[46] H Anderson, 'Creditors Rights of Recovery: Economic Theory, Corporate Jurisprudence and the Role of Fairness' (2006) *Melbourne University Law Review* 30 1 8
[47] Halpern, Trebilcock, and Turnbull '*An Economic Analysis of Limited Liability in Corporation Law,* (1980) 30 *U. Toronto LJ*. 117.

anticipated costs of this additional capital contribution the less these investors would be willing to pay for shares because different investors would attach different values for shares depending on the investor's wealth, it would be impossible to conduct an organised market. Limited liability according to Halpern makes the market possible.

Secondly, limited liability decreases the need to monitor other shareholders;[48] no shareholder need worry about the identity of other shareholders and their activities as a risk factor involved in the running of a business. The contrary would be the case in a situation of unlimited liability.

Thirdly, limited liability makes diversification and passivity a more rational strategy and so potentially reduces the cost of operating the corporation.[49] A shareholder in a limited liability company would be able to diversify his portfolio by holding shares in different companies, investing for growth without fear of liability should the company fail.

Fourthly, Henry Manne[50] emphasises that limited liability allows more efficiency diversification. Investors can minimise risks by investing in a broader portfolio.

2.4 Conclusion

The principle of limited liability as established in *Salomon's* is still at the core of South African company law. Our courts are bound by the principle that the company is a separate legal *persona* from its members and shareholders, and will not divert from it except in exceptional circumstances. The principle encourages shareholders and investors to support limited liability companies, and encourages entrepreneurial risk-taking which boosts economic growth. Although it has disadvantages for creditors and may be open to abuse, both the common law and statute entitle courts

---

[48] Halpern, Trebilcock and Turnbull supra (n49).
[49] Easterbrook & Fischel supra (n38).
[50] Henry Manne supra (n35).

to pierce the corporate veil if it appears that directors and shareholders have engaged in an excessive risk-taking with fraudulent intent. It remains to consider the role of limited liability where groups of companies are concerned and where improper conduct by a company in a group is established. This issue shall be discussed and unpacked in chapter 4.

CHAPTER 3: DOCTRINE OF PIERCING THE CORPORATE VEIL

3.1 Introduction

This chapter will indicate that there are problems associated with the limited liability principle, in that it is open to abuse by those in control, and will discuss the common law remedy available to those individuals who suffer loss as a result of the abuse of limited liability principle. The common law remedy of piercing the veil and its codification in South Africa will be examined. First, A brief discussion of statutory provision in the Companies act of 1973 will be made. The chapter will also touch on a statutory remedy of the piercing of veil found in section 65 of the Close Corporation Act of 1984, and deliberate on the statutory remedy found under section 20(9) of the Companies Act (2008). The chapter will demonstrate that the changes brought about by section 20(9) provide a court with a wide discretion to pierce the veil where it is appears that there has been an 'unconscionable abuse' of the juristic personality of a company.

3.2 Piercing the corporate veil at common law

When a company is incorporated becomes a separate legal entity,[51] and the assets and liabilities belong to the company.[52] It is a separate legal person from the people who formed it, and from the directors.[53] It can therefore sue or be sued in its own name. The shareholders of the company are not liable for the debts of the company.[54] When the company is sued by creditors for debt incurred by the company it is the company and not the shareholders or directors against whom the claim may be brought.[55] This follows *Salomon* dictum that shareholders and directors have limited

---

[51] S*alomon* supra (n1).
[52] *Salomon* supra (n1).
[53] FHI Cassim et al *Contemporary Company Law* op cit (n11) at 53.
[54] *Airport Cold Storage* supra (n13).
[55] *Airport Cold Storage* supra (n13) para 6.

liability in the event the company is liquidated; they only lose their claim to the return of their contribution to the amount shared.[56]

However, if it appears that the separate legal existence of shareholders or directors has been abused, the court on application by an aggrieved party may ignore the legal personality principle and pierce the corporate veil.[57] This means that the responsible member could be found to be personally liable for the debts of the company. The remedy afforded to the aggrieved party is based on the principle that the company should not be incorporated for the purposes of committing fraud.[58] A court will ignore the principle of separate legal personality if it established that the company is being used contrary to the purpose for which it was incorporated.[59] The remedy of piercing the corporate veil was aimed not only at protecting the creditors and third parties but also at addressing the injustice which may have resulted from the abuse of a corporate identity.[60]The remedy allows the court to treat shareholders and directors as if they were conducting the business affairs of the company in their own personal capacities.[61]

At common law courts have been reluctant to pierce the corporate veil, and in South Africa courts have ignored the separate legal personality of a company in very few cases. In *Botha v Van Nierkerk,*[62] Flemming J held that there should be an unconscionable injustice before a court could pierce the veil, and Smalberger JA held that the court should avoid a too rigid test but should opt for a more flexible approach which allowed the facts of each case to determine whether disregarding of the corporate veil was justified. The application in that case was dismissed as it was

---

[56] Salomon supra (n1).
[57]PA Delport *Henochsberg Company Law though the Cases* (2011) at 18.
[58] *Lazarus Estate Ltd v Beasley* [1956] 1 QB 702.
[59] *Ex parte* Gore (2013) (3) SA 382 (WCC) at 441.
[60] *Airport Cold Storage* supra (n13) para 19.
[61] *Airport Cold Storage* supra (n12) para 20.
[62] *Botha v Van Niekerk* 1983 (3) SA 513.

found that there was no unconscionable injustice. In *Cape Pacific Ltd v Lubner Controlling Investment*[63] the court rejected the unconscionable injustice test spelt out in *Botha v Van Niekerk*[64], holding that the test was too rigid and a more flexible approach was required, which would allow the courts to look at the facts of each case.[65] A rigid application of the piercing of veil doctrine has been widely criticised as sacrificing substance for form.[66]

In *Shipping Corporation of India v Evdomon Corporation and Another,*[67] the court held that deviation from the principle of separate personality of the company should only happen in exceptional circumstances ie where fraud and improper conduct had been proved.[68] Courts do not have discretion to generally disregard company's separate legal personality whenever they consider it just or convenient to do so,[69] but only when fraud, dishonesty or improper conduct exist. The separate legal personality of the company should be balanced against policy considerations favouring the piercing of the corporate veil.[70]

In *Hulse-Reutter & Others v Godde*[71] the court adopted a stricter approach and suggested that piercing the corporate veil should be used as a last resort[72] where improper or fraudulent conduct from those in control of the company had resulted in an unfair advantage being afforded to them.[73] The court in *Amlin (SA) Pty Ltd v*

---

[63] *Cape Pacific* supra (n14).
[64] *Botha v Van Niekerk* 1983 (3) SA 513 (W).
[65] Cape Pacific supra (n14) at 803.
[66] Cape Pacific supra (n14) at 802-803.
[67] *Shipping Corporation of India v Evdomon Corporation and Another* 1994 (1) SA 550 (A).
[68] *Shipping Corporation of India* supra (n71) at 566.
[69] *Cape Pacific* supra (n14) at 803.
[70] *Die Dros (Pty) Ltd v Telefone Beverages CC* (2003) 1 All SA 164 (C) at 170; *Cape Pacific* supra at 803; *Nel v Metequity* Ltd 2007 (3) SA 34 SCA at para 11; *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (CPD) at para22.
[71] *Hulse-Reutter v Godder* 2001 (4) SA 1336 (SCA).
[72] *Hulse-Reutter supra (n10)*.
[73] *Hulse-Reutter* supra (n10) 2.

Van Kooij[74] agreed with the approach in *Hulse-Reutter*[75] that only in the presence of exceptional circumstances would the court pierce the veil of the corporation.

The cases cited above are an indication that our courts still struggle with the correct approach to be employed when they have to decide on whether to pierce the veil. Our courts have applied different tests depending on the particular facts of the case. The doctrine lacks clear principle and is incoherent, except for the vague notion that our courts would pierce the veil where exceptional circumstances exist.[76] Control or ownership over the company is not decisive. The uncertainty is still not resolved in South African company law as the courts have courts have consistently refrained from giving lists of circumstances in which the veil could be pierced, indicating that the law is far from settled in this regard.[77]

While the courts have at times looked behind the separate legal personality principle, Smalberger JA remarked in the *Cape Pacific case* that courts should not lightly disregard a company's separate legal personality but should strive to give effect to it, because to do otherwise would undermine the policy and principle. The judge stated that whilst fraud, dishonesty or improper conduct could be considered as grounds for piercing the corporate veil,[78] fraud alone was not a sufficient in itself for courts to pierce the corporate veil.[79]

The doctrine has been criticised for being 'incoherent and unprincipled', on the evidence of the cases cited above. The courts are blamed for having relied on different categories of conduct to justify the decisions.[80] Sher notes that the courts have not constructed one coherent principle for deciding whether to pierce the

[74] *Amlin SA* supra (n74).
[75] *Hulse-Reutter* supra (n10).
[76] *Botha v Van Niekerk* 1983 (3) SA 513 (W), Cape *Pacific* supra (n14).
[77] *Cape Pacific* supra (n14) at 802 and *Hulse-Reutter* supra (n10).
[78] *Cape Pacific* at 804.
[79] A Domanski 'Piercing the Corporate Veil – A New Direction' (1986) 103(2) *SALJ* 224 at 230.
[80] Hulse-Reutter supra (n75) 1336

corporate veil.[81] Domanski argues that the decisions focus on categories of situations when piercing the veil would be allowed, maintaining that the problem of categorising is that it does not always cover circumstances which justify the piercing of the corporate veil on the basis of public policy or fairness.[82] He argues for a more balanced approach, recommending that when veil is to be pierced there should be a balance between the policy grounds mitigating the separate identity against those which mitigate piercing of the corporate veil.[83] He further emphasises that separate corporate legal personality is still the foundation of our company law and courts should be cautious of disturbing the principle.[84]

Blackman[85] on the other hand suggests that before the court pierces the veil of incorporation there should be special circumstances which show that the company is a mere façade, concealing the true facts i.e. where the company has been incorporated to evade certain laws.

Based on the unanimity of academic criticism of the doctrine as being unprincipled and unpredictable[86], a call has been made for replacement of the present law with a better approach. The court should be entitled to look to substance rather than form to assess whether the directors of the company are acting in the best interests of the company and for the benefit of the company and not themselves. South African courts seem to have adopted a balancing approach. Thus, where it appears that shareholders have acted as if there are acting for the company, meanwhile in reality they were not, the court has power to ignore the separate legal *persona* principle and impose liability on the natural person who attempted to abuse the company's

[81] H Sher 'Piercing the Corporate Veil' (1996) (1996) 4 *Juta's Business Law* 51.
[82] A Domanski, *Piercing the corporate ve*il – a new direction supra (n84) 230-231.
[83] A Domanski supra at 231.
[84] A Domanski supra at 231.
[85] MS Blackman, '*The Law of South Africa's Companies'* part I vol.4 LAWSA (ed) W A Joubert 1995.
[86] SM Bainbridge, 'Abolishing Veil Piercing' (2001) 26 *Journal of Corporate Law* 479, SM Bainbridge, 'Abolishing Veil Piercing' 2005 *University of Illinois Law Review* 77.

separate existence[87], or to find such persons to be the true owners of the property apparently owned by the company[88].

The cases presented above demonstrate that there is no uniformity or common principle expounded by the courts on the issue of whether to pierce the veil. These cases simply provide instances where courts have refused to be bound by the fact or form of incorporation when the interest of justice requires the substance to be investigated.[89] The approach has been criticised for potential to give rise to inconsistency and uncertainty. There might be a unique set of facts which require consideration based on fairness, public policy and equity but the courts would be unable to find that the specific issue fell into one of the defined categories.[90] This may result in injustice.[91]

Despite the different views on the application of the corporate veil, courts tend to adopt a fact-based approach ie the decision would depend on the facts of each case. This approach may be supported as allowing the kind of flexibility encouraged in *Cape Pacific v Lubner*[92], and not allowing a wrongdoer unfair advantage. The court cannot ignore the principle of separate legal personality and pierce the veil only on the basis that it is in the best interest of justice to do so;[93] however it should be based on the circumstances of the case and the conduct of the wrongdoer.[94]An argument in favour of the approach is that the court should consider substance rather than

[87] *Cape Pacific* supra at 802H (n14).
[88] *Airport Cold Storage* supra (n13), RC Williams *Companies* 2ed (2012) 86.
[89] IM Rams & B Noakes 'Piercing the corporate veil in Australia' (2001) 19 *Company and Security Law Journal* 250 at 54.
[90] A Domanski 'op cit (n84).
[91] D van Huyssteen '*Piercing the Corporate Veil: A Critical Analysis of section 20(9) of the Companies Act* 71 of 2008 (2014) *LLM* 17.
[92] *Cape Pacific* supra (n14).
[93] *Cape Pacific* supra at 803.
[94] Ibid.

form,[95] in that each case presents different facts which need to be considered. On the other hand a strict categorisation approach may give rise to inconsistency.

The court in *Cape Pacific* emphasised that an ulterior motive of the person driving the incorporation of the company was not necessary; the fact that the company may have been incorporated for a deceitful purpose is irrelevant. The question which needs to be asked is whether the separate legal personality of the company was abused to commit fraud and dishonesty.[96] A corporate veil may be pierced even if another remedy exists.[97] An alternative remedy does not prevent an affected party from applying for the court to pierce the veil. The reasoning in *Cape Pacific* is convincing as it allows for more balanced and flexible approach. The court is not confined by a specific set of categories, but is at large to decide the issue based on the surrounding circumstances of each case.

3.3 Piercing the corporate veil under (section 20(9) of the 2008 Companies Act

The Companies Act 71 of 2008 introduced a statutory provision under section 20(9) allowing the judiciary to disregard the separate legal personality of the company and pierce the veil of the incorporation if it appeared that there had been an 'unconscionable abuse' of the company. The legislature considered it necessary for this principle to be codified because of the criticism above that the common law remedy was 'unprincipled and unpredictable'.[98] Section 20(9) allows the aggrieved party, in most cases a creditor, to apply to court to pierce the corporate veil of incorporation. [99] The court has discretionary power, based on evidence of 'unconscionable abuse' to order the veil to be pierced.

[95] *Ex parte Gore* supra (n63) at 34.
[96] *Cape Pacific* supra (n14) at 804B.
[97] *Cape Pacific* supra at 805.
[98] *Amlin SA* supra (n74) at 15.
[99] R Cassim, 'Hiding behind the veil' (2013) 535 *De Rebus* 35.

The statutory provision in section 20(9) is not a substitution of the common law remedy; rather it is supplementary to the common law,[100] which may still be applied in a case where section 20(9) requirements are not met,[101] affording creditors further protection. Section 20(9) allows for the court to pierce the veil on application by an 'interested party' and where there is an 'unconscionable abuse' of the separate legal personality of the company. The provision is vague and lacks definition; the section only refers to an element of 'unconscionable abuse' which has given rise to a number of theories and uncertainty in the interpretation and the meaning of 'unconscionable abuse'.

A similar provision can be found in section 65 of the Close Corporation Act 69 of 1984, which provides that the court may pierce the corporate veil if it appears that there was 'gross abuse' of its juristic personality. Section 20(9) of the Companies act refers to an 'unconscionable abuse' and section 65 of the Close Corporation refers to a 'gross abuse'. It has been noted that though the provisions are similar, the word 'gross abuse' signifies more severe wrongdoing than 'unconscionable abuse'.[102] The 'unconscionable' test was also mentioned under common law in *Botha v Van Niekerk*[103]case where the court the court held that it would pierce the veil of the incorporation and ignore the separate legal personality if there was an 'unconscionable injustice' suffered by plaintiff.[104]

Contrary to *Botha* case, in *Cape Pacific Ltd v Lubner*[105] the court remarked that the test formulated in *Botha* was 'too rigid' and suggested for a more flexible approach which would allow the court to look at the facts of the case in isolation. It would

---

[100] R Cassim, 'Piercing the corporate veil under section 20(9) of the companies Act 71 of 2008: A new direction (2014) 26 *SA Merc LJ* 307 at 323 and *Ex Parte Gore and others NNO* 2013 (3) (WCC) at 34.
[101] R Cassim supra.
[102] *Ex parte Gore* supra (n63) para 34.
[103] Botha supra (n66).
[104] Ibid.
[105] *Cape Pacific* supra (n14).

appear that the 'reasonable man' test as applied in *Ex Parte Gore*[106] case may also have been applied in *Botha v Van Niekerk*[107] in deciding what constituted an 'unconscionable abuse'. The interpretation of 'unconscionable abuse' in *Gore* provides that if it appears that the illegitimate use of separate legal personality adversely affecting a third party is unreasonable, then it should not be accepted. *Gore* further confirms that section 20(9) had broadened the circumstances and /or basis in which courts had been prepared to pierce the corporate veil under common law. *Gore* states that section 20(9) is cast in wide terms, from which it might be construed that it was the intention of the legislature that the provision should find application in widely differing situations.[108]

The court in *Gore* indicated when deciding whether the conduct of the wrongdoer amounted to an 'unconscionable abuse' the court should consider all the surrounding the circumstances and ask if a reasonable man in the same position would have acted the same way given the same situation. *Gore*, held that the reasonable man test should be taken into account when interpreting the conduct of the wrongdoer. The test is supported because it allows for a flexible approach, which gives a benefit of the doubt to the wrongdoer in the circumstances and facts surrounding each case. The court could also go further to consider whether another man in the same position as the wrongdoer would have acted in the same manner. This test lacks the rigidity and accompanying risk involved in the court having to rely on a specific category of wrongdoing.

Section 20(9) is not a remedy of last resort; the plaintiff can opt to use it even if there is another remedy available for him. The plaintiff only has to prove that there has been an 'unconscionable abuse' of the separate legal personality of the company.

---

[106] *Ex parte Gore* supra (n63).
[107] *Botha* supra (n66).
[108] *Ex parte Gore* supra (n63) para 32.

This was spelt out in *Cape Pacific v Lubner*[109] that the existence of another remedy should not act as a restriction to court piercing the veil.[110] In contrast however *Hulse-Reutter v Godde*[111] remarked *obiter* that the applicant could only apply to have the veil pierced if there was no other remedy available. In *Amlin v Van Kooij*[112] however, the court maintained that remedy of piercing the corporate veil must be used as a remedy of last resort, Dlodlo J stated:

> 'I accept that 'opening the curtains' or piercing the veil is a rather a drastic remedy. For that reason alone it must be resorted to rather sparingly and indeed as the very last resort in circumstances where justice will not otherwise be done between two litigants. It cannot, for example, be resorted to as an alternative remedy if another remedy on the same facts can successfully be employed in order to administer justice between the parties.'[113]

Section 20(9) has brought added advantage for the aggrieved party in that, despite the remedy being is available at common law, an aggrieved party can opt for the relief which is suitable to him in term of section 20(9) even though there might be another remedy available.

3.4 Conclusion

This chapter demonstrates the problems in the application of the remedy of piercing the corporate veil at common law. Although the courts have power at common law to pierce the corporate veil if it appears that the conduct amounts to an abuse of a justice, the case law indicates that the remedy lacks coherence principle. In fact very few cases have been reported where veil has been pierced. Courts have been prepared to pierce the corporate veil only if appears that there was dishonesty and improper conduct in balancing the interests of the parties.

---

[109] *Cape Pacific* supra (n14).
[110] *Cape Pacific* supra at 805.
[111] *Hulse-Reutter* supra (n75).
[112] *Amlin* supra (n74).
[113] *Amlin* supra para 23.

The remedy under section 20(9) of the Companies Act of 2008 has widened the basis for piercing the corporate veil, based on the concept of 'unconscionable abuse' of the separate legal personality of the company, on a flexible case-by-case approach taking into account the facts of each case. Unlike at common law, the statutory relief is not a remedy of last resort. Section 20(9) has shifted the grounds on which the court may pierce the veil, even in the face of other remedies. Importantly, the courts have now been given wider discretion.

The test of 'unconscionable injustice' pronounced in *Botha* case which was found to be too rigid, and that the phrase 'unconscionable abuse' was less extreme compared to the phrase 'gross abuse' in section 65of the Close Corporation act of 1984.

The introduction of section 20(9) to the Companies Act 2008), introducing the concept of 'unconscionable abuse' constitutes a positive development in Company Law, especially when compared to the previous regime when there was no coherent principle covering the application of the remedy of piercing the corporate veil

CHAPTER 4: GROUPS OF COMPANIES

4.1 Introduction

In the previous chapter courts' ability and propensity to look behind the concept of limited liability was discussed with reference to individual companies. This chapter will deal with the principle of limited liability in relation to groups of companies. An important reason for the formation of company groups is to reduce the risk to which a holding company is exposed. This protection is derived from the notion that companies within the group are separate entities and liable for their debts.[114] This chapter will explore the origin of limited liability in respect of groups of companies and demonstrate the possible abuse of the strategy and the unintended consequences of extending limited liability to each and all companies operating within the group. Chapter 4 will also discuss how section 20(9) affects groups and whether creditors may approach the court and request that an order be made against holding company for the debt of a subsidiary.

4.2 Nature of groups of companies

Corporate groups emerged in the United States with the liberalisation of state corporation law that authorised incorporation.[115] Because business practices which have changed over the years a number of factors such as globalisation have triggered the emergence of corporate groups. They play an important role on the world economic stage and also within nation states which embrace a capitalistic economic and business system.[116] It is important to emphasise that the main purpose for formation of groups of companies is to reduce risks to which the holding company

[114] Easterbrook & Fischel, 'Limited Liability and the Corporation' (1985) 52 *University of Chicago Law Review* 89 at 97.
[115] PI Blumberg, 'Limited liability and Corporate Groups' (1985-1986) 11 *Journal of Corporate Law* at 605.
[116] RA Stevens *The external Relations of Company Groups in South African Law: A critical comparative analysis* (2011) at 1.

may be exposed. The Companies Act (2008) defines a group of companies as a holding company and all its subsidiaries.[117]

4.3 Limited liability in relation to groups of companies

In the context of company groups the idea of separate legal personality evolved historically[118] according to the formalist approach, also known as the entity theory.[119] Limited liability took shape in the 19th century arising from the political and economic struggle to stimulate economic activity by encouraging widespread investment in corporate shares.[120] Limited liability was first discussed in England, and the courts accepted the ability of a company to own shares in another company in 1867.[121]

The corporate power to acquire and own shares of another corporation could arise from provision in the memorandum of incorporation by promoter.[122] Once it was established that the company's memorandum empowered it to hold shares in another company, the courts acknowledged the limited liability of a juristic shareholder in relation to its subsidiaries without apparent awareness that the holding company would in effect now have two layers of limited liability sheltering it from claims against its subsidiaries.[123]

Blumberg argues that the limited liability for corporate groups is a historical accident rather than a deliberate choice.[124] It was established at a time when corporations generally lacked the power to acquire and own shares of another corporation.[125]

---

[117] S1 of the Companies Act 71 of 2008.
[118] RA Steven supra (n125)
[119] PI Blumberg *The Multinational Challenge to Corporate Law* (1993) Oxford University Press.
[120] PI Blumberg 'Limited Liability and Corporate Groups' (1985-1986) Journal of Corporate Law at 604.
[121] PI Blumberg op cit at 608.
[122] Ibid.
[123] Ibid.
[124] PI Blumberg at 610.
[125] Ibid.

When corporations received such power and a parent-subsidiary structure for the first time became possible, the crucial question arose of whether the doctrine of limited liability should protect a parent corporation from liability for the debts of its subsidiary. When the question of intra-group liability arose, the issue was resolved without serious discussion by reference to the entity concept to which limited liability had become inseparable annexed.[126] Blumberg finds that there was neither academic nor political debate or perspective on the question of the application of limited liability to company groups.[127] It appears that the extension of limited liability to holding companies in company groups occurred as a matter of convenience,[128]oblivious of the extensive arguments that followed that corporate groups should not enjoy the privilege of limited liability.[129]

In spite of the commercial role that limited liability plays in corporate affairs, it always has been a subject of heated academic debate.[130] The principle of *Salomon* has been extended to cover scenarios where a controlling company operates its business through a number of smaller companies (subsidiaries). The extension of *Salomon,* however, is without controversy. The issue with company groups is the legal problems raised by these groups of companies, namely an obvious gab between commercial reality and legal regulation, disclosing a serious shortcoming of the law.[131] The problem is accentuated by the insistence of courts in most countries on treating each company within the corporate group as a separate legal entity rather than seeing the group as one commercial entity.[132]

[126] Ibid.
[127] PI Blumberg op cit at 608.
[128] RA Stevens op cit (n125) at 60.
[129] A I Malin 'Rethinking Limited Liability' (2011) *Cambridge Student Law Review* at 91.
[130] A I Malin op cit (n138) at 90.
[131] Clive Schmithoff, & F Wooldridge, (eds) *Groups of Companies* (1991) Sweet and Maxwell.
[132] Alison Mccourt *A Comparative study of doctrine of corporate group with special emphasis on insolvency,* Oxford Business and Economics Conference (2007).

The issue of liability of a group of companies is not extensively addressed in the Companies Act. Although a group of companies forms a single economic entity, the separate personality of each member in the group is a legal reality that cannot be ignored.[133] The basic principle of company law is that each company in the group structure is an independent entity with separate legal rights, duties, liabilities and obligations distinct from the other members of the group, and the court is not entitled to disregard this principle and pierce the veil simple because it considers it just to do so.[134] This basically means that the acts of a subsidiary company are not necessarily the acts of the holding company or vice versa and the creditors of each company will have claims to recover the debt only against the specific company that incurred debt, and the insolvency and liquidation of the subsidiary will not necessary affect the solvency and liquidity of the holding company and its other subsidiaries.[135] Again, the rights of a company in a company group cannot be exercised by another company in the same group despite the fact that such company or the company group may ultimately benefit from the exercise of those rights notwithstanding the relationship with the company or body in whom those rights are vested.[136]

The extension of *Salomon's* principle to include company groups enables a group to be structured so as to minimise the risk liability of the holding company. This was also confirmed in *Adams v Cape Industries Plc*[137] by Slade LJ, who held that the court was not as a matter of principle entitled to lift the corporate veil as against a subsidiary of a corporate group merely on a finding that the corporate group has been arranged to ensure that another member of corporate group, rather than the litigant

[133] *Adams v Cape Industries plc* [1990] Ch 433,479, 513.
[134] *Adams* supra (n142) at 532,536-537 and 544.
[135] Haup & Mlange *Corporate Law for Commercial Student: Partnership, Companies and Close Corporations* (2010) 10-12.
[136] *Ritz Hotel Ltd v Charles of the Ritz* Ltd 1988 (3) SA 29 (A) 314.
[137] A*dams* supra.

subsidiary company, would be legally liable for some or other future activities of the group.[138]

The controversy created by the extension of *Salomon's* principle has extended into the ethical dimension. A number of writers argue that parent corporations obtain numerous benefits from actions of subsidiaries, and so parent companies should be held liable for the acts of their subsidiaries.[139] Whilst they receive numerous financial benefits through the use of subsidiary, a wronged individual has no remedy against parent company.[140] Another concern is that the group structure can be created intentionally or unintentionally to camouflage the economic reality of risk and this may lead to economic abuse.[141] These inherent economic pitfalls necessitated legislative intervention because the common law was inadequate to regulate the 'economic realities' and problems of group structure.[142] Bhama explains that such inadequacy was due to the fact that the common law was mainly founded on the principle of separate legal personality of single entities and did not anticipate the emergence of corporate groups.[143]

Due to this unfairness, some scholars have argued for unlimited liability of shareholders in all situations, or at least of corporate parents.[144] Others have advocated, quite persuasively, for an 'an enterprise theory' of liability where the

---

[138] *Adams* supra at 544.
[139] G Skinner 'Rethinking limited liability of parent corporation for foreign subsidiaries' violations of international human rights law' 2015 17(4) *Washington and Lee Law Review* at 1807.
[140] G Skinner op cit 1809.
[141] A Smith *Remedying Abuses of Limited Liability in Company Group* University of Cape Town minor dissertation (2016) at 28.
[142] IL Mukhova *The Liability of Corporate Groups* (Thesis University of Johannesburg (2016) at 14.
[143] M Bhama 'The company law implications of cornering a power on a subsidiary to acquire the shares of its holding company*'* (2006) *Stellenbosch Law Review* 232-233.
[144] Hansmann & Kraakman, 'Towards Unlimited Shareholder Liability for Corporation for Corporation for Corporate Torts' *100 Yale L.J* 1879 at 1892-1894.

parent should be liable for a subsidiary's actions when it functionally controls that subsidiary.[145]

There have been numerous reasons advanced in favour of a company choosing to create a new or subsidiary company; mainly economic to minimise transaction costs and achieve maximum profit for the group, or at least for the holding company.[146] Because the holding company in general is not responsible for the debts of the subsidiary, this allows holding company, by means of its control of the subsidiary company, to engage in high-risk business projects.[147] In the event of the venture failing, the holding company would only suffer shareholder loss.

Murphy advances several reasons from an economic or business perspective explaining the creation of groups of companies.[148] These are as follows:

> 1. Separate companies may enhance decentralisation of decision-making in large corporate groups;
>
> 2. Flexibility so as to isolate separate entities so from uniform regulatory controls;
>
> 3. Particular foreign jurisdictions may insist on a locally incorporated subsidiary
>
> 4. The ability to sell the entire company or business through the sale of shares, whether for tax or operational reasons

---

[145] Hansmann & Kraakman supra at 1916-1919 ; Blumberg P.I 'The Corporate Entity in an Era of Multinational Corporations', (1990) 15(2) *Delaware Journal of Corporate Law* 283, 298.
[146] RA Stevens op cit (n125) at 74.
[147] Ibid.
[148] D Murphy 'Holding Company Liability for Debts of its Subsidiaries: Corporate Governance Implications' 1998 10 *Bond Law Review* 241-272.

5. Maintaining the goodwill and loyalty of employees, or 'brand' name after a takeover which would otherwise be threatened through a complete integration;

6. A separate company may well facilitate a convenient unit for management and accounting, and

7. The costs of formally and finally transferring assets, services, employees, contracts with third parties may be prohibitive because of the size of administrative costs, financial imposts or tax consequences.[149]

The most prominent reason for creating subsidiaries remains reducing the risk to which the holding company is exposed. Since every company within the group is separate from the other, with limited liability, the commercial risk of the group structure is effectively reduced. This means that if a business venture fails, the holding company only loses its investment made in the subsidiary.

Blumberg[150] dismisses the economic theories advanced in support of limited liability subsidiaries in company groups. He argues as follows:

1. The justification that limited liability decreases the need for shareholders to monitor managers does not apply.[151]
2. The justification that limited liability encourages managers to manage the company at utmost efficiency to the benefit of the shareholders as it promotes the free transfer of shares has less application to holding companies and wholly-owned subsidiaries.[152]

[149] Murphy op cit at 250.
[150] PI Blumberg '*Limited Liability and Corporate Groups'* (1985-1986) 624-626.
[151] PI Blumberg op cit at 624.
[152] Ibid.

3. The fact that limited liability is pertinent to the operation of the securities market is largely irrelevant in the case of wholly-owned subsidiary, where the structure of the group is of such that all the shares are owned by the holding company and trade in shares therefore is rendered irrelevant.[153] This justification is still relevant in the case of partially-owned subsidiary, where there is a market for the trade of shares in the subsidiary.[154] This is however limited to the trading of the minority shares.
4. Lastly the fact that limited liability permits efficient diversification by shareholders, which in turn allows shareholders to reduce their individual risk, is less applicable to holding companies.[155] Companies are less risk averse than individuals. The ultimate investors in the subsidiary are, through their shareholding in the holding company, the investors in the holding company. These investors are still capable of diversifying their investments independent of the holding company if the risk of the subsidiaries were to be assumed by the holding company.[156]

4.4 Piercing the corporate veil in groups of companies

The important question that remains to be answered is whether the separate legal personality of each company in a group should always exist. As discussed in chapter 3, courts are very reluctant to lift the corporate veil. There is also no broad unifying legal principle which the courts apply to justify the 'piercing of the corporate veil'.[157]

[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] D Murphy 'Holding Company Liability for Debts of its Subsidiaries: Corporate Governance Implications' (1998) 10 *Bond Law Review* at 253.

The cases suggest an ad hoc approach to situations as they arise.[158] In *Briggs v James Hardier & Co Pty Ltd*[159], Roger AJA said:

> 'The threshold problem arises from the fact that there is no common, unifying principle, which underlies the occasional decision of courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no principled approached to be derived from the authorities.'

The reluctance of the courts to lift the corporate veil is evident in the comment by Lord Wilberforce in *Ford & Carter Ltd v Midland Bank Ltd*[160]: 'When creditors become involved, as they do in the present case, the separate legal existence of the constituent companies of the group has to be respected.'

This is so because companies in a group are perceived as separate legal entities. However, in recent years there has been a more relaxed approach to the application of the basic principle that a holding company and its subsidiary are separate legal entities.[161] When the corporate veil is pierced in a group of companies, the courts treat the group as single entity as opposed to a collection of different corporate entities.[162] In *DHN Food Distributors*[163] the Court of Appeal stated that there was evidence of a tendency by courts to ignore the separate legal entities of various companies within the group, and look instead at the economic entity of the whole group. The court held:

> 'This is especially the case when a parent company owns all the shares of the subsidiaries, so much that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says.'[164]

---

[158] Ibid.
[159] *Briggs v James Hardier & Co Pty Ltd s* [1989] 16 NSWLR 549 CA (NSW).
[160] *Ford & Carter Ltd v Midland Bank Ltd* (1979) 129 NLJ 543 at 544.
[161] *Ritz Hotel* Ltd supra (n145) at314-415.
[162] FHI Cassim et al Contemporary Company Law supra (n11) at 54.
[163] *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3All ER 462 at 467.
[164] Ibid..

A leading authority for lifting the corporate veil in the context of group is *Adams v Cape Industries Plc,*[165] in which the Court of Appeal adopted a stricter approach and asserted that courts are not entitled to disregard the separate legal personality of a company in a group simply because it is just to do so. Slade L.J. stressed that:

> 'The court is not free to disregard the principle of Salomon v Salomon & Co Ltd merely because it considers that justice so requires. Our law for better or worse recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.'[166]

The stricter approach holds that the courts are not entitled to disregard the separate legal personality of a company in a group simply because it would be just to do so. This conservative or stricter approach by the English court in *Adams,* in which the court decided against viewing a group of companies as single economic unit, has also been adopted in the South African judgment of *Wembach v Maizer Industries (Edms) Bpk*[167] in which the court refused to pierce the veil and to view the companies in the group as one economic unity. The claims advanced in the case of *Adams v Cape Industries Plc* that its structure was a façade or sham exception. Slade L.J. in the *Adams held* that the mere fact that the parent company controlled the business of the group was not *per se* sufficient reason to pierce the veil of a group.

Cassim asserts while South Africa jurisprudence initially adopted a liberal approach, in recent years the country has leaned towards a more conservative approach when considering whether the veil should be pierced when groups of companies were involved.[168]This is evident in *Ex parte Gore* case where the court held:

> 'Our own jurisprudence contains an *en passant* acknowledgment of the apparent trend during the 1960s and 70s towards an readier willingness to ignore the separate personality of the individual companies in the group context (see *Ritz Hotel Ltd v Charls of the Ritz Ltd and*

[165] *Adams* supra (n142).
[166] *Adams* supra (n142) at 1019.
[167] *Wembach v Maizer Industries (Edms) Bpk* 1993 (2) SA 669 (A.
[168] R Cassim 'Hiding *behind the* veil*'* (2013) 51 *De Rebus* 35 at 36.

> *Another* 1988 (3) SA 290 (A), at 314h-316B), but the more recent conservative trend by the English courts evidenced in *Adams* has been endorsed in subsequent South African judgments: see *Wanbach v Maizecord Industries (Edms) Bpk* 1993 (2) SA 669 (A), at 675D-E and *Macadamia Finance BK en 'n Ander v De Wet en andere NNO* 1993 (2) SA 745 (A), at 748B-D).'[169]

Even though the court pierced the corporate veil in *Gore*, the court still adopted the conservative approach, since it only pierced the veil on the basis that the King Group was a sham to the extent that this had brought the activities of the group within the meaning of 'unconscionable abuse' under section 20(9) of the Companies Act.

The pertinent question remains whether corporate groups should continue to enjoy an undisputed special right and an additional layer of protection or whether the holding company should be responsible for the actions of a subsidiary. Blumberg challenges the application of limited liability in the parent-subsidiary context, arguing that the principal justification for limited liability, namely 'encouraging investors to provide capital for new business ventures' does not hold in this context.[170] He argues that the parent corporation is generally the sole shareholder, providing all of the capital investment for the subsidiary, and as such limited liability serves no role in facilitating investment, and that[171] it could not be said that investment by the holding company would be discouraged without the protection of limited liability, as the holding company's shareholders were still protected by the limited liability of the holding company itself.[172] Blumberg further argues that courts place too much emphasis on the rights of the corporation when they should focus on its duties.[173] According to Blumberg, courts should look to the control, economic integration, administrative and financial interdependence, and the use of group

---

[169] *Ex Parte Gore* supra (n63) at 27.
[170] PI Blumberg '*Limited Liability and Corporate Groups'* op cit (n128).
[171] PI Blumberg '*Limited Liability and Corporate Groups'* supra (n128) at 624.
[172] A Smith '*Remedying Abuses of Limited Liability in Company Groups'(* Dissertation University of Cape Town) at 42.
[173] PI Blumberg '*The Corporate Entity in an Era of Multinational Corporations*, (1990) *15 Del. J . COR. L* 283,328, 372.

persona in deciding the liability of corporate shareholders and owners, rather than applying a blanket of limited liability for parent corporations.[174]

On the other hand Professor Bainbridge argues that courts should apply enterprise liability in the parent-subsidiary context, instead of using a 'piercing' theory.[175] He posits that enterprise liability analysis would allow courts to 'acknowledge the important conceptual distinctions between holding an individual company liable and holding a larger corporate enterprise liable.'[176]Bainbridge argues that the main issue in the parent-subsidiary context is whether a parent has established groups of subsidiaries to externalise risk that the parent would otherwise be forced to absorb.[177] For Bainbridge, he would retain limited liability in the parent-subsidiary context, but he would allow corporate creditors of subsidiary to collect against the parent corporation where the creditor could show that the parent formed the subsidiary solely to externalise risks.[178]

4.5 Analysis of case law:

4.5.1 Ex parte Gore NO and Others NNO [2013] 2 All SA 437(WCC)

Ex parte Gore[179] is the first South African case that deals with the issue of piercing the corporate veil in the context of company groups. The court applied section 20(9) of the Companies Act (2008) and gave some guidelines for its interpretation. The liquidators of 41 companies had applied for an order to permit certain assets of the companies controlled by holding company to be dealt with as if they were the property of the holding company. The three King brothers were directors of a holding company called King Financial Holding Limited (KFH) and held majority

---

[174] Ibid.
[175] SM Bainbridge '*Abolishing Veil Piercing'* (2001) 26 *Journal of Corporate Law*. 534.
[176] Ibid.
[177] SM Bainbridge op cit.
[178] Ibid.
[179] *Ex Parte Gore* supra (n63).

of shares in KFH, and also held most shares in the subsidiary companies, which enabled them to have control over King Group. The duties of the subsidiaries were to provide financial services by marketing investments in commercial and residential immovable properties. The investments obtained by the subsidiaries by way of purchase prices were structured and reflected by an investment of shares. The chaos and dishonesty in the administration of the King Group rendered the liquidators of the company unable to identify the relevant corporate entities against which an individual investor/creditor had claims. The application was based on the fact that the conduct of the holding company showed no regard for the distinction between the holding company's legal personality and that of its subsidiary. The issue before court was whether the court should disregard the separate personality of different subsidiary companies and pierce the corporate veil so that the assets of the subsidiary could be treated as the assets of the holding company.

The application was brought under common law, alternatively in terms of section 20(9) of the Companies Act, 2008. The court found that the entire group had operated as one entity and there was no distinction when dealing with the investors' fund between KFH and the subsidiaries. The court pierced the veil on the ground that the King Group was a sham that had brought the activities of the group within the meaning of 'unconscionable abuse' in terms of section 20(9). It is important to examine in detail the guidelines provided by court in *Gore*.

(i) Interested person under section 20(9) of the companies act 2008

In terms of section 20(9) an application to have the company declared not to be a juristic person may be brought by an 'interested person'.[180] The Act however does not define the term 'interested person'. In terms of a general rule a person who brings

[180] R Cassim, '*Piercing the Corporate veil'*: *A new direction* at (n11) at 311.

an application and claims relief from court must prove that he or she has a direct interest in the matter (*locus standi*).[181] In *Jacob v Wakes*[182] it was stated that direct interest should not be remote, it must be a real interest and not an abstract, academic or hypothetical interest.[183] It could be argued that every individual has an interest in every matter that is pending as he/she may land up as either plaintiff or defendant in a matter involving the same principle.[184] However the legal test requires a direct interest; whether it is too remote would depend on the facts of each case.[185] In applying this definition to an application under section 20(9) each applicant would have to satisfy the court of a direct interest that is not too remote, abstract or academic. The court's decision is discretionary, exercised on a case-by-case basis,[186] and determined by the facts of each particular case.

The similar provision in section 65 of the Close Corporation Act provides guidance in deciding who would be regarded as an interested person for the purposes of section 20(9). The court in *TJ Junck BK h/a Bothaville Vleismark v DuPlessis*[187] remarked that the term interested person in terms of section 65 of the Close Corporation Act was not to be interpreted too restrictively but at the same time it is not to be interpreted too widely so as to include an indirect person.[188] The interest must be relevant or direct and limited to financial or monetary interest.

In the *Gore* case the court did not actively interpret the term 'interested person' but simply approved and adopted the principle set forth in *Jacobs v Waks,*[189] stating that no mystique attached to the meaning of the term 'interested person'. The standing

---

181 *Cabinet of Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) 388.
182 *Jacob v Wakes* 1992 (1) SA 521 (A).
183 Jacob v Wakes supra at 533-4.
184 *Dalrymple v Colonial Treasure* 1910 TS 372 at 390.
185 Cape Pacific (n14) at 534.
186 R Cassim op cit (n178) 313.
187 *TJ Junck BK h/a Bothaville Vleismark* 1998(1) SA 971 (O).
188 *TJ Junck BK h/a Bothaville Vleismark* supra at 986.
189 Blumberg op cit (n184).

of a person to seek a remedy in terms of section 20(9) should be determined on the basis of well established principle,[190] and also on whether the facts implied a section 38 constitutional right in the Bill of Rights. In the circumstances the court found that the liquidators had a direct interest in the relief sought so as to qualify as 'interested persons'. The court in the process extended the scope of section 20(9) to the extent that in that the term 'interested person' did not only refer to financial or monetary interest but a direct interest of the applicant, which could be determined a perusal of the facts.

(ii) 'Unconscionable abuse'

The term 'unconscionable abuse' is not defined in section 20(9) or anywhere in the Act; and the Act also does not give any guidance on its meaning and scope.[191] The term in the context of piercing the corporate veil was first dealt with in *Botha v Van Niekerk*[192] in which the court held that it would pierce the corporate veil if the plaintiff had suffered 'unconscionable injustice' as a result of inappropriate conduct of the defendant.[193] As discussed above, the Appellate Division in *Cape Pacific* rejected this test on the basis that it was too rigid and held that a more flexible approach was required based on the facts of each case. The court would look at the conduct, and decide whether such conduct amounted to 'unconscionable abuse'.

The similar term 'gross abuse; in section 65 of the Close Corporation Act provides a useful comparative touchstone to the term 'unconscionable abuse' in section 20(9) of the Companies Act. In the *Gore* case Binns Ward J, found that 'gross abuse' had a more extreme meaning then the term 'unconscionable abuse'.[194] In order for the corporate veil to be pierced under section 20(9) a lower standard of abuse was

---

[190] *Ex parte Gore* supra (n63) at 35.
[191] FHI Cassim et al *Contemporary Company Law (*2012) at 60.
[192] B*otha* supra (n66).
[193] Ibid
[194] *Ex parte Gore* supra (n63) at 34.

required than in the case of a Close Corporation.[195] This meant that the court in *Gore* adopted a wider interpretation of the word 'unconscionable abuse' based on a reasonableness test; if the illegitimate use of the companies' separate legal personality was not reasonable it would not be countenanced and the piercing of the veil should be allowed. The court further held that unconscionable abuse would be present if the conduct associated with the formation of company was a sham, a devise and a nefarious stratagem.

It can be argued that the interpretation of the term 'unconscionable abuse' in *Gore* is similar to the position that applied before the Act, in that it simply give the court discretion to decide the issue based on the fact of each case.

(iii) Not a remedy last resort

As discussed in chapter 4 the remedy of piercing the veil at common law is fraught with uncertainty and confusion. The instances when veil could be pierced differ from time to time depending on the judicial thinking of the time.[196] The position was also not clear whether an application for piercing the veil lay only in the absence of other remedies. The dilemma was whether piercing the veil was a remedy of last resort? In *Cape Pacific v Lubner*[197] the Appellant Division remarked that the existence of another remedy should not bar the claim.[198] The availability of another remedy was not a relevant factor when policy considerations come into play, but it was a factor of overriding importance.[199] The court in *Holes-Reutter v Godden*[200] did not follow the reasoning and finding in C*ape Pacific*, adopting a stricter approach to the effect

[195] R Cassim supra (n178) at 318.
[196] JacquiCohen *Veil piercing a necessary evil? A critical study on the doctrine* of *limited liability and the corporate veil'* (LLM dissertation University of Cape Town, 2007) at 7.
[197] *Cape Pacific* supra (n14).
[198] *Cape Pacific* op cit 805
[199] Ibid
[200] *Hulse-Reutter* supra (n75).

the court would only pierce the corporate veil if there was no other remedy available to the applicant. Similarly, in *Amlin SA Ltd v Van Kooij*[201] the court held that remedy of piercing the corporate veil was a remedy of last resort.[202] It is safe to conclude that at common law the remedy of piercing the veil is a remedy of last resort.

E*x Parte Gore,*[203] decided in 2013, was the first case to pronounce on the principles under section 20(9) of the Act; in particular having to decide whether section 20(9) could be invoked even if there are other remedies available to applicant. The judgment in G*ore* is authority for the view that an unqualified availability of remedy in terms of section 20(9) militates against the principle of piercing the corporate veil and should only be granted in absence of an alternative remedy.[204] The court then shifted direction and remarked that the court should not be detracted from piercing the veil in appropriate circumstances by regarding the remedy as exceptional or drastic.[205] In *Gore*, Bins-Ward J held:

> 'The newly introduced statutory provision affords a firm, albeit very flexibly defined, basis for the remedy, which will inevitably operate, I think, to erode the foundation of the philosophy that piercing the corporate veil should be approached with an *à priori* diffidence. By expressly establishing its availability simply when the facts of a case justify it, the provision detracts from the notion that the remedy should be regarded as exceptional, or "drastic".'
>
> 'Having regard to the established predisposition against categorisation in this area of the law[37] and the elusiveness of a convincing definition of the pertinent common law principles, it seems that it would be appropriate to regard s 20(9) of the Companies Act [as] supplemental to the common law, rather than substitutive. The unqualified availability of the remedy in terms of the statutory provision also militates against an approach that it should be granted only in the absence of any alternative remedy. Paragraph (b) of the subsection affords the court the very widest of powers to grant consequential relief.'

[201] *Amlin SA* supra (n74).
[202] *Amlin SA* supra at 23.
[203] *Ex parte Gore* supra (n63).
[204] *Ex parte Gore* supra at 34.
[205] *Ex parte Gore* supra at 58.

The *Gore* judgment is an important authority in that it extends the basis on which court may disregard the corporate veil. An aggrieved applicant's claim is not limited to 'exceptional cases'. It is important to mention that the decision of *Gore* is in line with that in *Cape Pacific v Lubber*[206] in which it was held that lifting the corporate veil was no longer the remedy of last resort.

4.5.2 Prest v Petrodel Resources Limited [2013] 2 AC 415

Discussion of this is a leading United Kingdom case dealing with the doctrine of piercing the corporate veil is valuable in possibly offering a persuasive guideline for the South African interpretation of the provision.

This case involved a wealthy couple who were divorcing. They owned a matrimonial home and other properties which were held by several companies. Mrs Prest argued that the properties held by several companies of which Mr. Prest was the sole owner and controller were in reality owned by him and therefore should form part of the assets to be divided on divorce. The application was brought before court to decide whether the corporate veil could and should be pierced. The court was asked to decide if properties belonging to the Petrodel Group could be transferred to Mrs. Prest for purposes of her share of the assets on the basis that such property legally belonged to Mr Prest and not his companies.

The court found that piercing the veil was not to be applicable to the facts before court. Mr. Prest had not concealed the properties nor evaded any legal obligation to his wife,[207] and Mr Presto's interest in the properties vested long before marriage dissolved.[208] In the Supreme Court on appeal Lord Sumption adopted two principles and held that veil could be pierced in the presence of concealment and the evasion.

---

[206] *Cape Pacific* supra (n14).

[207] *Prest v Petrodel Resources Limited* [2013] 2 AC 415 at 52.

[208] R Cassim op cit (n178)at 326.

He argued that in the presence of concealment there won't be a need to pierce the corporate veil, all which is required is to look behind the veil to establish the true actors.[209] Whereas evasion applies in a situation where a person is under an existing legal obligation which he intentionally evades by interposing corporate structure under his control.[210] Lord Sumption therefore confirmed that in *Prest's* case there has not been an avoidance of an existing legal obligation to enable for the corporate veil to be pierced.[211] Lord Sumption's judgment imposes a restrictive approach to the doctrine, and only in the presence of evasion.[212]

The Supreme Court in *Prest* adopted a conservative approach toward the doctrine of piercing a corporate veil, commenting that 'if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course'.[213] The judgment provides that that the veil can be pierced only in exceptional circumstances making the doctrine extraordinarily narrow in scope.[214] The doctrine has brought a new kind of uncertainty to the traditional issues relating to the doctrine.[215]The requirements of concealment and evasion indicate that the veil can be pierced only in rare cases under the common law. Lord Wilson and Lady Hale doubted whether it is possible to classify all cases 'neatly into cases of either concealment or evasion.[216] The court in *Prest* also remarked that the power to pierce the corporate veil could only to be exercised when 'all other, more conventional, remedies have proved to be of no

---

[209] *Prest* supra at 28
[210] Prest supra at 28
[211] *Prest* supra at 114.
[212] *Prest* supra at 81.
[213] *Prest* supra at 35.
[214] Edwin C Mujih, 'Piercing the corporate veil as a Remedy of Last Resort after Prest v Petrodel Resource Ltd: Inching Towards Abolition?' (2016)37 (2) Comp Law 39,47
[215] Chrysthia N Papacleovoulou, *'Lifting'' or Piercing the Corporate Veil in Cyprus: a Doctrine under Challenge an analysis of English and Cyprus case law analysis'* (2016) 27(4) ICCLR 129,130
[216] *Prest* supra at 92

assistance',[217] and suggest that the remedy should only be used as a remedy of last resort. The reasoning in the *Prest* case returns the argument to 'categorising approach' which, as seen above, is fraught with inconsistency and uncertainty. It can hardly be said that the judgment has shed any light on the issue or provided guidance in the application of the doctrine; instead it has narrowed its application and has been seen as a progressive trend of restricting the doctrine.

4.6 CONCLUSION

This chapter discussed the problem of groups of companies being formed to camouflage the economic reality of risk and possibly leading to lead to economic abuse. The chapter also demonstrated that limited liability was never meant for company groups, but was accidentally extended to cover them. The economic theories proposed by some writers to justify company groups enjoying an unqualified right to limited liability was shown to be incorrect and baseless. Instead, this unqualified recognition of limited liability has created problems and abuse of the principle of juristic personality to the detriment of creditors.

The chapter also looked at the common law principle of piercing the corporate veil between company groups. South African courts have strictly upheld the concept of separate legal personality of the individual companies as per the *Salomon* principle. Courts seem to be leaning towards the conservative approach on the issue. In certain specific cases the courts have disregarded the principle where the separate legal persona incorporation was found to be a sham for ulterior purposes The conservative approach is followed despite the arguments by commentators that holding companies with subsidiaries enjoy a double layer of protection in the event of default

[217] *Prest* supra at 62.

and that subsidiaries should not automatically enjoy the benefit of limited liability held by holding companies.

The chapter also examined the application of section 20(9) of the Companies Act (2008) with reference to the recent case in *Ex parte Gore*[218] which gave guidance on the application of section 20(9) of the Companies Act to company groups. It was held in that case that if the holding company decided to form a subsidiary company with the intention to avoid certain liabilities or obligations, such conduct might constitute 'unconscionable abuse' of the juristic persona principle, possibly entitling the court to pierce the veil in terms of section 20(9).

In the English case of *Pres*t, the court rejected some common law grounds of piercing the veil. Lord Sumption held that the veil could be pierced in the presence of concealment and evasion by the respondent. There also had to be an existing legal obligation in order for the veil to be pierced. The decision in *Prest* case is not helpful because of its restrictive approach to piercing the veil, only in exceptional circumstances and as a last resort. The decision by *Prest* case restores the pre-20(9) *status quo* with its narrow categorisation approach. It is therefore not recommended that South Africa should follow the approach in *Pres*t case; doing so would be a regressive step to an unprincipled and inconsistent approach.

[218] *EX parte Gore* supra (n63).

Chapter 5: CONCLUSION

The research dealt with the traditional concept of separate legal personality. It demonstrated that the principle developed in *Salomon v Salomon*[219] is still at the core of South African company law. The principle confirms that the assets and liabilities of a company attach to the company. The principle has been widely applied and is essential to economic development, encouraging investors and members of the public to invest without risk to their personal estates.

However, the limited liability principle may be abused by those controlling the company. In the case of abuse of the juristic *persona* of the company, an exception to the doctrine of limited liability was discussed in chapter 3 − the doctrine of piercing the corporate veil. The doctrine allows the court to disregard the principle of separate legal personality. South African courts have grappled with the correct approach to justify piercing the corporate veil. Courts have had difficulty under the common law in finding an appropriate formula or principle, and the outcome has been lacking in coherence or clear principle, only resorting to piercing the veil in the case of fraud or dishonesty. More than this, separate legal personality at common law is only disregarded where justice so requires and only in exceptional circumstances. Many cases have held that the remedy may be used as a last resort, at the discretion of the court.

The inclusion of section 20(9) to the Companies act of 2008 has widened the basis for piercing the corporate veil in the event of the court finding that the conduct of the wrongdoer amounted to an 'unconscionable abuse'. The statute, however; fails to define the meaning of the phrase, and the courts have merely held that unconscionable abuse is less extreme then the term 'unconscionable injustice' as

[219] *Salomon* supra (n 1)

held in *Hulse-Reutter and Others v Godde.*[220] 'Unconscionable injustice' refers to the consequence of the conduct whereas 'unconscionable abuse' refers to the nature of the conduct. The latter assists the courts in deciding whether the facts of the case fall into the assailed category. It is settled that the statutory remedy can be invoked by an applicant despite the presence of an alternate remedy because the remedy under section 20(9) is not a 'remedy of last resort'. Furthermore, the remedy under section 20(9) is no longer available only in 'exceptional cases'.

The dissertation also looked at the statutory remedy of piercing the corporate veil in the context of a group of companies, examining whether the subsidiaries of a holding company should also enjoy limited liability even if all the companies were effectively a single entity under central control. The issue was whether creditors could seek an order against the holding company for the debts of a subsidiary. The norm has been for courts to strictly uphold the separate legal personality of the individual companies as per the *Salomon* principle, adopting a conservative approach. There was major concern that, with groups of companies, the situation was open to abuse and exploitation by the holding company; a group could be created to camouflage the economic reality of the risk. These problems are increasing as more businesses choose to operate in groups. An exception under the doctrine of piercing the corporate veil is a possible solution. In *Gore's case* the court decided to pierce the veil after finding that the company structure was a sham and a stratagem to gain unfair advantage – advancing the remedy under the common law. However section 20(9) does not address some concerns that are specific to groups of companies.

Chapter 4 argued that limited liability was never intended for company groups but for an individual company. When company law started allowing a company to hold

[220] *Hulse-Reutter* supra (n 75)

shares in another company, the protection was then extended accidentally to subsidiary companies, something that section 20(9) does not address. The economic argument that a company group should automatically enjoy an undisputed right to limited liability lacks substance. Instead, the recognition of limited liability to subsidiary companies has created problems of abuse of juristic personality. The drafters of the Companies Act failed in their duty to consider the harm (especially to creditors) that might result from such malpractice. The legislature ought to have addressed these concerns relating to company groups. As illustrated, the notion that the rules that apply to individual company should automatically apply to the context of group of companies poses problems. It is recommended that the legislature should consider developing rules that specifically deal with company groups.

The dissertation also looked at the English judgment of *Pres*t to see if comparative insights could be gained, especially because United Kingdom courts have shared similar confusion over the doctrine of piercing the veil. The court in *Prest* took another direction by holding that the veil could only be pierced when necessary, and in the event of concealment and evasion by the wrongdoer. The court rejected some common law grounds for piercing the veil. The approach in *Prest* is not recommended for South Africa because it has set the bar even higher and limited the circumstances in which the veil can be pierced. The restrictive approach that the remedy should only be lie in exceptional cases fails to offer insight or guidance.

5.1 Recommendations

The study recommends that, for the benefit of creditors dealing with groups of companies, legislation is developed in South Africa to address the concerns relating to company groups. These company formations are increasing in number as more businesses opting to venture into business as groups. It has become necessary that a set of rules regulating the operation of company groups be developed to avoid

exploitation and abuse of both creditors and the principle of juristic personality. Section 20(9) in particular should be expanded to include circumstance which constitute 'unconscionable abuse' in generally and also where company groups are concern. An established approach and set of guidelines in the statute would allow the court to follow and would be used in conjunction with common law principles where a new fact arises.

BIBLIOGRAPHY

Primary Sources

South African cases

Airport Cold Storage (Pty) Ltd v Ebrahim and others 2008 (2) SA 303.

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

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

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

Cabinet of Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A).

Dadoo v Krugersdorp Municipality 1920 AD 530.

Dalrymple v Colonial Treasurer 1910 TS 372.

Die Dros (Pty) Ltd v Telefone Beverages cc [2003] 1 All SA 164.

Ex parte Gore NO and others NNO [2013] 2 All SA 437 (WCC).

Hulse-Reutter and Others v Godde 2001 (4) SA 1336 (SCA).

Jacob v Wakes 1992 (1) SA 521 (A).

Lategan and Another NNO v Boyes and Another 1980 (4) SA 191 (T).

Nel v Metequity Ltd 2007 (3) SA 34 SCA.

The Shipping Corporation of India Ltd v Evdomon Corporation 1994 (1) SA 550 (A).

Ritz Hotel Ltd v Charles of the Ritz Ltd 1988 (3) SA 290 (A).

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168.

Van Zyl v Kaye 2014 (4) SA 452.

Foreign cases

Adam v Cape Industries Plc [1990] Ch 433.

DHN Food Distributors Ltd v London Borough of Tower Hamlets [1976] 3 All ER 465.

Daimler Co Ltd v Continental Tyres and Rubber Co [1916] 2 AC 307.

Gilford Motors Co Ltd v Horne [1933] Ch 935 (CA).

Lazarus Estate Ltd v Beasley [1956] 1 QB 702.

Prest v Petrodel Resources Ltd [2013] UKSC 34.

Salomon v Salomon & Co Ltd [1897] AC 22 (HL).

Southern v Watson [1940] 3 All ER 439.

VTB Capital plc v Nutritek International Corp [2013] 2 AC 337.

South African statutes

The Close Corporation Act of 1984.

The Companies Act 61 of 1973.

The Companies Act 71 of 2008.

SECONDARY SOURCES

Books, reference works and dissertations

Becker R, '*Disregarding the Separate Juristic Personality of A Company: An English Case Law Comparison'* (LLM dissertation University of Pretoria, 2014).

Blackman MS, Jooste RD and Everingham GK *Commentary on the Companies Act* vol 1 (2017) Juta & Co Ltd, Cape Town.

Blumberg P I, *The Multinational Challenge to Corporation Law* (2003) Oxford University Press New York.

Cassim, FHI, Jooste, R; Shev, J and Yeats, J *Contemporary Company Law* 2 ed (2012) Juta & Co, Cape Town.

Cohen, Jacqui, *Veil Piercing a necessary evil? A critical study on the doctrine of limited liability and the corporate veil* (LLM dissertation, University of Cape Town, 2007).

Easterbrook FH and Fischel DR *The Economic Structure of Corporate Law* 1991 Harvard University Press.

Gower, *Principles of Modern Company Law* 6 ed (1997) Sweet and Maxwell London.

Gower, *Principles of Modern Company Law* 9 ed (2012) Sweet and Maxwell London.

Delport PA, Vorster, *Q, Henochsberg on the Companies Act 71 of 2008* vol 1 2016 LexisNexis, Durban.

McCourt, Alison, *A comparative study of the Doctrine of Corporate Groups with special emphasis on insolvency*, Oxford Business & Economics Conference held at Oxford, UK, 2007.

Schmitthoff, Clivean, Wooldridge F, (eds) *Groups of Companies* (1991) Sweet and Maxwell London.

Sealy, LS, *Cases and Materials in Company Law* 3 ed (1985) Butterworths, Durban.

Smith A, *Remedying Abuses of Limited Liability in Company Group* (LLM dissertation University of Cape Town, 2015).

Stevens R, *The External Relation of Company Groups in South African Law: A critical analysis* (LLD dissertation University of Stellenbosch, 2011).

Van Huyssteen, D, *Piercing the corporate veil: A critical Analysis of section 20(9) of the Companies Act 71 of 2008* LLM dissertation University of Johannesburg, 2014).

Washington T Z, '*Piercing the Corporate Veil in terms of Gore: s20(9) of the Companies Act 2008* (LLM dissertation University of Cape Town, 2015).

Williams R C, *Concise Corporate and Partnership Law* 2 ed 1992 The Michie Company.

Williams RC, *Concise Corporate and Partnership Law* 1994, The Michie Company.

Williams RC, *Concise Corporate and Partnership Law* 2ed (2012) The Michie Company.

Ying HY & Ying R and Kershaw D, *Company Law in Context: Text and Material* 2ed (2012) Oxford University Press.

Journal articles

Anderson H, 'Piercing the veil on Corporate Groups in Australia: The case for Reform' (2009) 33 *Melbourne University Law Review*.

Anderson H, 'Creditors Rights of Recovery: Economic Theory, Corporate Jurisprudence and the Role of Fairness' (2006) 1 *Melbourne University Law Review* 30.

Bainbridge SM, 'Abolishing Veil Piercing' (2001) 26 *University of Illinois Law Review* 534.

Bhama, M, 'The Company Law Implications of cornering a power on a subsidiary to acquire the shares of its holding company' (2006) *Stellenbosch Law Review*.

Blackman MS, 'Abolishing veil Piercing' (2001) 26 *Journal of Corporate Law* 479.

Blumberg PI, 'Limited liability and corporate groups' (1986) 11 *Journal of Corporate Law* 573.

Blumberg PI, 'The Corporate Entity in an Era of Multinational Corporation', (1990) 15 *Delaware Journal of Corporate Law* 283.

Bainbridge SM, 'Abolishing Veil Piercing' 2005 *University of Illinois Law Review* 77.

Chrystio N Papacleovailou, '*Lifting the Corporate veil in Cyprus: a Doctrine under Challenge an analysis of English and Cyprus case law analysis'* (2016) 27 (4) ICCLR 129

Cassim R, 'Hiding behind the veil' (2013) *De Rebus* 35-36.

Cassim R, 'Piercing the corporate veil "unconscionable abuse" under the Companies Act 71 of 2008' (2012) *De Rebus*.

David C, 'The case against outsider reverse veil piercing in UK Company Law' *University of Edinburg Department of Law*.

Cassim R, 'Piercing the veil under s20 (9) of the Companies Act 71 of 2008: A New Direction' (2014) 26 *SA Merc Law Journal.*

Domaski A, 'Piercing the Corporate Veil − a New Direction' (1986) 103 *SALJ* 224.

Edevin C Mujih, '*Piercing the Corporate veil as a remedy of last resort after Prest v Petrodel Resources Ltd: Inching towards Abolishing*? (2016) 37 (2) Comp Law 39

Easterbrook, FH and Fischel, DR 'Limited Liability and the Corporation' (1985) 52(1) *University of Chicago Law Review* 89.

Halpern, P, Trebilcock, M, & Turnbull S 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 *University of Toronto Law Journal* 117.

Hansmann & Kraakman, 'Towards Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879

Huss, RJ 'Revamping Veil Piercing for all Limited Liability Entities: Forcing the Common Law Doctrine in the Statutory Age' (2001) 70(1) *Cincinnati Law Review* 10

Imalin A, 'Rethinking Limited Liability' (2011) *Cambridge Law Review*.

Larkin MP 'Regarding Judicial, Disregarding of the Company's Separate Identity' (1989) *SA Merc LJ* 277.

Manne H, 'Our Two Corporation System: Law and Economics' (1967) 53 *Virginia Law Review* 259.

Murphy D, 'Holding Company Liability for Debt of its Subsidiaries: Corporate Governance Implications' 10(2) Bond Review 241 (1998).

Pickering, 'The Company as a Separate Legal Entity' (1963) 32 *Mercantile Law Review.*

Rams I M, & Noakes D B, 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities Law Journal* 250.

Skinner G, 'Rethinking limited liability of parent corporation for foreign subsidiaries' violation of international Human Rights Law' (2005) 72(4) *Washington and Lee Law Review.*

Yazici Alper, 'Lifting the corporate veil in Group of Companies: would the single economic unit doctrine of EU Competition Law set precedent?' (2014) 5(9*)* *Law & Justice Review.*