



**A closer look at the lifting of the corporate veil under
the common law and Companies Act 71 of 2008.**

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CHAPTER ONE: INTRODUCTION

1.1 THE PURPOSE AND SIGNIFICANCE OF THE RESEARCH

The focus of this study is a critical analysis of the doctrine of piercing the corporate veil in terms of the common law and the recently enacted section 20(9) of the Companies Act 71 of 2008. The analysis will focus on the common law position of piercing the corporate veil and the principles established therein, in comparison to the recently enacted section 20(9) of the Companies Act. The study therefore aims to be comparative in nature. The Companies Act now provides the courts with a general statutory discretion, to pierce the corporate veil. The common law however, did not set out a clear set of principles, for piercing of the corporate veil.

Section 20(9) of the Companies Act is the first statutory provision within our law that governs the piercing of the corporate veil. However, the legislature did not define fundamental terms within the section which is vital to the interpretation of the section. The courts first considered this statutory provision in the case of *Ex Parte Gore and Others NO and Others NNO*.¹

During the analysis of this study, the case of *Ex Parte Gore* will be extensively examined and will be compared to the common law approach of piercing the corporate veil. In addition, thereto the common law will be utilized as an interpretative aid, when analysing the section to determine the intention of the legislature.

With the enactment of section 20(9), there are specific questions which arise;

- (a) Whether section 20(9) overrides the common law approach?;
- (b) What are the reasons (if any), for the legislature not providing a definition for vital terms such as ‘unconscionable abuse’ and ‘interested party?’;
- (c) What is meant by the term ‘unconscionable abuse’? and
- (d) Whether section 20(9) is only to be used as a remedy of last resort?

It is against this backdrop that we will evaluate the statutory provision.

¹ 2013 (3) SA 382 (WCC).

Whilst this statutory provision is welcomed, it does raise certain questions and reservations regarding its application and interpretation.² This section was enacted to alleviate the uncertainties brought about by the common law approach. In this regard we will consider legislature's failure to interpret section 20(9) and the reasoning thereof.

1.2 METHODOLOGY

On collating this dissertation on the piercing of the corporate veil, various resources were referred to. As this is a comparative and analytical study, a doctrinal research was considered appropriate.

The primary source of information came from case law and statutes from both South Africa and English law. The writer also referred to academic writings in journals and books.

To access these resources the writer utilized a number of databases. These databases include but was not limited to Juta, LexisNexis, Google Scholar, Sabinet and SAFLII.

1.3 OVERVIEW

Upon incorporation of a company, the company is considered to have its own separate legal personality, which allows the company to acquire rights and incur obligations, which are distinct from the shareholders and directors.³ This notion is referred to as the concept of separate legal personality. Section 14 of the Companies Act indicates that a company has a corporate identity upon its incorporation. This gives rise to the corporate veil of a company being created, which reinforces the distinction of the company and its members.

² R Cassim 'Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction' (2014) 26 *SA Merc* 307.

³ Cassim *et al Contemporary Company Law* 2ed (2012) at 31

This concept was derived from the English case of *Salomon v Salomon*,⁴ which established that a company is a separate legal person, distinct from the shareholders and directors, with the implication that the shareholders and directors are not liable for the debt of the company.⁵

In South Africa the first case to establish this principle was the case of *Dadoo v Krugersdorp Municipality*,⁶ where the court held that a company is regarded as a separate legal entity that exists on its own as a juristic person.⁷

Where there has been an abuse of the separate legal personality, the courts will seek to 'lift the corporate veil of the company' to determine where to attribute liability. The abuse may be a result of the misuse of the company by the members, or a breach of a fiduciary duty by one of the directors.

The lifting or piercing of the corporate veil was governed by the common law. However, there were no set guidelines or principles to establish when the courts should pierce the corporate veil. The courts relied on the facts of each case to determine if the corporate veil should be pierced. This had an effect of inconsistency as courts would at times apply a stricter or flexible approach, which had varying outcomes. However, the courts ensured as far as possible to uphold the separate legal personality of the company.

In this dissertation the lifting of the corporate veil in terms of the common law as well as the Companies Act 71 of 2008 will be considered, which has a statutory provision enacted to disregard the separate legal personality of a company. The case of *Ex Parte Gore*⁸, which was the first case to be decided in terms of section 20(9) of the Companies Act 71 of 2008. In doing so, the court had regard to foreign jurisprudence as well as other Acts to assist with interpreting the said provision.

⁴ 1897 AC 22 (HL)

⁵ Cassim *et al Contemporary Company Law* 2ed (2012) at 33.

⁶ 1920 AD 530

⁷ *Dadoo supra* at page 550.

⁸ 2013 (3) SA 382 (WCC).

1.4. CHAPTER OUTLINE

This dissertation consists of five chapters. Chapter one discusses the objective the dissertation aims to achieve. This chapter also includes the methodology used in compiling the dissertation and lastly considers the background and purpose of the study.

Chapter two deals with the concept of the separate legal personality and the origin thereof. Since the concept originated in English law, it is prudent to consider the impact it had on South African law, and the leading case, which established this principle in our law.⁹ The legal consequences stemming from the concept of the separate legal personality has also been considered in chapter two.

Chapter three sets out the common law approach to piercing the corporate veil in our law. This chapter considers the courts approach in dealing with the lifting of the corporate veil and the various principles, which were established.

The aim of the court is to strike a balance between protecting the separate legal personality of a company against the interest of justice.

The history and development of the concept of piercing the corporate veil in terms of the common law has been considered. This chapter further discusses the vital principles established by various leading cases. The case of *Cape Pacific v Lubner Controlling Investments Ltd Pty*¹⁰ set out useful guidelines to consider when piercing the corporate veil. The court herein held that the remedy should not be used as a remedy of last resort, even if there are other remedies readily available. The chapter also deals with instances when the courts will not hesitate to pierce the corporate veil. These can be considered as the exception to the concept of the legal personality.¹¹

⁹ *Dadoo v Krugersdorp Municipality* 1920 AD 530. This was the first case in terms of South African law which held that the company is a separate legal juristic person.

¹⁰ 1995 (4) SA 790 (A). The court held that our law does not have a categorisation approach, and that each matter is to be considered on its own facts.

¹¹ We will consider the issue of fraud and improper conduct as well as the breach of a fiduciary duty.

Lastly, chapter four deals with the recently enacted statutory provision section 20(9) of the Companies Act. This is the first statutory provision, which allows the court to disregard the separate legal personality of the company. The case of *Ex Parte Gore*,¹² was the first case to deal with section 20(9) of the Act. In this case the court considered, whether the corporate veil of certain subsidiary companies should be pierced, thereby attributing liability to the holding company. The court considered whether the common law approach alternatively section 20(9) of the Companies Act was to be used.

The court herein considered the statutory provision in all its entirety, and provided guidelines into the interpretation of the provision, as it has failed to define the term ‘unconscionable abuse’ of the juristic personality of the company as a separate entity. In an aim to provide interpretations to this term, the court herein considered other statutes as well as foreign jurisprudence, to ensure that the term was given due diligence and to uncover the true intention of the legislature. Since this is the first case which deals with section 20(9) of Act, this matter sets a precedent for following cases.

Chapter five is the final chapter of the dissertation and encompasses the conclusion of the study.

¹² 2013 (3) SA 382 (WCC).

CHAPTER TWO: THE LEGAL CONCEPT OF A COMPANY

2.1 INTRODUCTION

This chapter primarily deals with the concept of a separate legal personality of a company. What is legal personality? Legal personality can be defined broadly to mean an entity which is capable of having rights and duties, such as entering into contracts and to sue or be sued. Separate legal personality refers to rights and obligations of a company, which are distinct from those of its members.¹³

A 'company' is defined in section 1 of the Companies Act 71 of 2008 (hereinafter referred to as the Act) as meaning:

'a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date-

a) Was registered in terms of the-

I. Companies Act, 1973 (Act No 61 of 1973), other than as an external company as defined in that Act."

The Act defines a company as a juristic person. By virtue of the Act, a company has legal personality, which awards it the ability to acquire rights and obligations.

This chapter will serve to consider how the doctrine of separate legal personality was established and the courts attitude in arriving at such a decision.

This definition makes it clear that the Act applies to both companies formed under the Companies Act of 1973 and the Act.

2.2 LEGAL PERSONALITY

The foundation of company law rests on the concept that a company has a separate legal personality.¹⁴ Lord Chancellor Baron Thurlow in the late eighteenth century defined a company as having 'no soul to damn and no body to kick'.¹⁵ But even though a legal person is merely a legal concept and as such has no physical existence, it does possess its own legal personality to acquire rights and incur obligations, that are distinct from

¹³ Cassim *et al Contemporary Company Law* 2ed (2012) at 31.

¹⁴ Cassim *et al Contemporary Company Law* 2ed (2012) at 30.

¹⁵ Cassim *et al Contemporary Company Law* 2ed (2012) at 31.

those of directors and shareholders of a company.¹⁶ The need to create artificial legal personae is relevant in any established legal system, as it provides the bearer with rights, duties and obligations, in the same manner as a natural person.¹⁷ From this we can construe that the concept of legal personality is a creature of law, bound by the relevant statutes and the powers attributed to it.¹⁸ A metaphorical veil is created between the company and its members, which protect the members from liabilities and debts of the company.¹⁹

An understanding into the concept of a separate legal personality of a company is important to the understanding of company law. The leading case in this regard, is the case of *Salomon v Salomon*.²⁰ The fundamental principle that was established in this case is the doctrine of corporate personality, which illustrates the importance the courts have placed on this notion.

2.2.1. HISTORICAL DEVELOPMENT

*Salomon v Salomon*²¹

Salomon was the sole proprietor of a company who made his business into a limited company in order to enjoy perpetual succession. He complied with the law at the time and made sure that there were at least seven people who had subscribed as shareholders or members. Salomon did this by including his wife, four sons and daughter into the businesses, making two of his son's directors whilst he was the managing director. Salomon thus held 20 001 out of the 20 007 shares issued by the company.²² He was a secured creditor, a controlling shareholder, an employee and a director of the company. The company later became insolvent and went into liquidation. At the time of the liquidation of the company, the liquidators argued that the debentures used by Salomon

¹⁶ Cassim *et al Contemporary Company Law* 2ed (2012) at 31

¹⁷ R Becker 'Disregarding the separate juristic personality of a company: An English law comparison' (unpublished LLM thesis, University of Pretoria, 2014) at 4-5.

¹⁸ R Becker 'Disregarding the separate juristic personality of a company: An English law comparison' (unpublished LLM thesis, University of Pretoria, 2014) at 5.

¹⁹ WT Zindoga 'Piercing of the corporate veil in terms of Gore: section 20(9) of the new Companies Act 17 of 2008' (Unpublished LLM thesis, University of Cape Town 2015) at 10.

²⁰ 1897 AC 22 HC

²¹ *Salomon supra*

²² *Salomon supra* at Para 16.

as security for the debt were invalid.²³ The liquidators objected on behalf of the trade creditors and contended that the company was a sham or a mere alias. It was contended that the company was a scheme designed to enable Salomon to conduct his business in the name of the company and thereby limit his liability for the debts of the company.²⁴ The Court of Appeal held that Salomon had created the company solely to transfer his business to it. The company was Salomon in another form and in reality, his agent, and consequently the company's debts were his debts. The Court of Appeal further held that no payments should be made on the debentures held by Salomon until the ordinary creditors had been paid in full.²⁵

This decision was appealed, and the House of Lords unanimously held in favour of Salomon. The House of Lords found that the company had been validly formed and registered in terms of the 1862 Companies Act.²⁶ The 1862 Companies Act created limited liability companies as legal persons separate and distinct from the shareholders. Therefore, once the company was legally incorporated, it was a completely different person with its own rights and liabilities. The court indicated that it was 'common practice to have nominee shareholders in a company who did not take part nor intended to take part in the company'.²⁷

The House of Lords laid down an important principle, which laid the foundation of the separate juristic personality of a company:

'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 motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.'²⁸

²³ *Salomon supra* at Para 22.

²⁴ *Salomon supra* at Para 22.

²⁵ *Salomon supra* at Para 50-51

²⁶ Cassim *et al Contemporary Company Law* 2ed (2012) at 34

²⁷ Cassim *et al Contemporary Company Law* 2ed (2012) at 34

²⁸ Cassim *et al Contemporary Company Law* 2ed (2012) at 30

The principles laid down in the *Salomon*²⁹ case comprise the essential basis of the concept of separate legal personality.³⁰ The *Salomon*³¹ case went further and established this principle in relation to what was essentially a one-person company and small private partnerships.³²

Cognizance must be given to the case of *Foss v Harbottle*,³³ which established the ‘proper plaintiff rule’. This rule entails that when a wrong is committed against the company, the company itself would be considered to be the Plaintiff. The rule was later reinforced in *Salomon*.³⁴ The decision is considered to be significant as it brings to light that a company is a separate juristic person, who has the necessary *locus standi* (capacity) to act on its own.

The first South African case to deal with the concept of separate legal personality was the case of *Dadoo Ltd v Krugersdorp Municipal Council*.³⁵ The Appellate Division held that ‘the conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance.’³⁶ It has been established that once a company is formed and upon its incorporation the company is a separate entity from its members. However, stemming from this, there are certain legal consequences, which arise. The courts still have the discretion to disregard the separate legal personality in exceptional circumstances. We will consider the legal consequence of separate legal personality.

2.3 LEGAL CONSEQUENCES OF SEPARATE LEGAL PERSONALITY OF A COMPANY

On formation of a company there are certain rights and obligations which are bestowed upon the company. This has the effect of the company acquiring its own separate legal personality which is separate from its members. These will be briefly discussed below:

²⁹ 1897 AC 22 HC

³⁰ WT Zindoga ‘Piercing of the corporate veil in terms of Gore: section 20(9) of the new Companies Act 17 of 2008’ (Unpublished LLM thesis, University of Cape Town (2015) at 11.

³¹ *Salomon supra*

³² PA Delpont *The New Companies Act Manual* 2nd Edition 2011 p11.

³³ (1843) 67 ER 189

³⁴ 1897 AC 22 HC

³⁵ 1920 AD 530

³⁶ *Dadoo supra* at page 550.

a) Limited liability

Limited liability refers to liability of the shareholders for the company's debt. The shareholders are as a general principle not liable for the debts of the company.³⁷ The shareholders liability is thus limited to the amount, which they have paid to the company in respect of their shares. This provides the shareholders with a sanctuary as it allows them to 'benefit from the profits of the company, whilst knowing that their personal liability is only limited to the number of shares purchased'.³⁸

Limited liability flows from the principle of separate legal personality. It is necessary to consider the elements for and against the doctrine of limited liability.³⁹

Section 19 (2) of the Act states 'that a person is not, solely by reason of being an incorporator, shareholder, or director of a company, liable for any liabilities or obligations of the company, extent that the Act or the company's Memorandum of Incorporation belong to the company'. A shareholder has no legal interest in the companies assets and therefore cannot insure the company against theft or damage.⁴⁰ The downside of limited liability is that it can be considered to be a risky investment by businesses as the risk of liability is transferred from the members to the creditors.⁴¹

b) Perpetual succession

A company has perpetual succession when the existence of a company does not depend on the existence of its members. Notwithstanding changes in its membership, the company continues to retain its legal identity and continues in existence until the company is wound up.⁴² In *Maasdorp & Another Harddow NO & Another*⁴³ the court considered that "a change in the membership of the shareholders would not ordinarily

³⁷ *Airport cold storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 at para 6.

³⁸ Cassim *et al Contemporary Company Law* 2ed (2012) at 35

³⁹ J Cohen 'Veil Piercing- A necessary evil? A critical study on the doctrines of limited liability and piercing the corporate veil'. (unpublished LLM thesis, University of Cape Town, 2006) at 8.

⁴⁰ *Macaura v Northern Assurance* 1925 AC 619.

⁴¹ JK Vandervoort 'Piercing the veil of limited liability companies: The need for a better standard' (2004) 3:1 Depaul Business & Commercial Law Journal 53.

⁴² Cassim *et al Contemporary Company Law* 2ed (2012) at 35.

⁴³ 1959 (3) SA 861 (C).

affect the legal rights of a corporation and to its immovable property, for it would remain vested with the ownership and would continue in possession and occupation thereof'.⁴⁴ Legal personality implies something more than the requirement that the company's property is to be kept separate from its members.⁴⁵

c) Debts and liabilities of the company belong to the company

As the profits of the company belong to the company, so to do the liabilities belong to the company. However, in exceptional circumstances, the shareholders of a company can be forced to pay the debts of the company.⁴⁶ These exceptional circumstances relate to the piercing of the corporate veil, which will be discussed in detail in the following chapters.

d) Contractual capacity

A company has a legal right to sue or to be sued in its own name. If the company sustains loss, a shareholder does not have the right of action for the loss. It therefore follows that when a wrong is committed to the company, the company is considered to be the Plaintiff and to take action and enforce its rights.⁴⁷ This principle was established in the case of *Foss v Harbottle*⁴⁸ and is known as the proper Plaintiff rule.

Similarly, a company may be held to be negligent, but a shareholder will not be held liable for the negligence of the company, unless he was personally negligent. Therefore, in order to redress a wrong done to the company or to recover monies or damages alleged to be due to the company, the company should prima facie bring the action

⁴⁴ *Massdorp supra* at page 866.

⁴⁵ J T Pretorius & D A Delpont 'South African Company law through the cases. A source book. A Collection of cases on Company Law with explanatory notes and comments.' 6th edition. 2008.54.

⁴⁶ *Salomon supra* at Para 24.

⁴⁷ Cassim *et al Contemporary Company Law* 2ed (2012) at 40.

⁴⁸ 1843 67 ER 189

itself.⁴⁹ The shareholders of a company cannot institute legal proceedings on behalf of the company; the company itself must institute the action.⁵⁰

2.4 CONCLUSION

The case of *Salomon*⁵¹ established the principle of separate legal personality of a company. However, there has been commentary to indicate that the above principle is subject to abuse, as limited liability is capable of manipulation. The courts will disregard the separate personality of the company where there has been misuse of corporate personality. This is known as 'piercing the corporate veil'.⁵² The courts aim in disregarding the separate personality of a company is to correctly attribute liability where it should lie.

⁴⁹ *Foss supra* at page 192. In *Caxton (Pty) Ltd v Reeva Forman Ltd* 1990 (3) SA 547 (A) at 560 H-L, the court held that a trading company has a right to sue for damages in respect of a defamatory statement, which is aimed at causing harm to its business reputation.

⁵⁰ Cassim *et al Contemporary Company Law* 2ed (2012) at 40. See *Magnum Financial Holdings (Pty) Ltd v Summerly* 1984 (1) SA 160 (W).

⁵¹ *Salomon supra*

⁵² *Lategan v Boyes* 1980 (4) SA 191 (T); *Gilford Motors V Horne* 1993 Chp 935 (CA)

CHAPTER 3: PIERCING OF THE CORPORATE VEIL IN TERMS OF THE COMMON LAW

3.1 INTRODUCTION

The doctrine of piercing the corporate veil is a common law principle in company law. The piercing of the veil gives the courts the power to disregard the principle of separate legal existence of a company so as to achieve a more acceptable result.⁵³ In terms of South African law, upon incorporation a company acquires an independent legal personality and is entitled to its own rights and carry out its own duties, which are separate from the shareholders.⁵⁴ This principle was established in the *Salomon*⁵⁵ case and has been widely used in both South African and English Law.

Therefore, the concept of piercing the corporate veil can be considered to be a judicial action taken by the courts, wherein the courts disregard the separate legal personality of the company,⁵⁶ and thus hold the shareholders or directors liable for the actions of the company, as if it were the actions of the shareholders or directors.⁵⁷

However, in certain circumstances a court may justifiably disregard the separate personality of a company in order to assume liability elsewhere for what appears to be acts of the company.⁵⁸ In these circumstances the court will lift/peer through the corporate veil of the company, in an aim to properly attribute personal liability on the relevant person who misuses the company's juristic personality.⁵⁹ In these instances, the court will ignore the separate existence of the company. Over the years, both foreign

⁵³ MP Larkin 'Regarding judicial disregarding of the company's separate identity' *SA Merc* (1989) 277.

⁵⁴ *Dadoo supra* at page 530.

⁵⁵ *Salomon supra*.

⁵⁶ Juristic persons are to adhere to the Bill of Rights in terms of the s 8(2) and s 8(4) of the Constitution. F Du Bois 'Wille's Principles of South African Law' 9ed (2007) at 396.

⁵⁷ L Roach *Company Law Concentrate: Law Revision and Study Guide* 3ed (2013) 34.

⁵⁸ H Sher 'Piercing the Corporate Veil: The independent legal personality of companies' 1996 (4) *JBL* 52.

⁵⁹ Cilliers & Benade *Company Law* 4ed (1984) at 6.

and local courts have considered this principle.⁶⁰ However, it is still difficult to determine when the courts will disregard the separate legal personality of a company.⁶¹

This chapter will consider the courts approach in dealing with the lifting of the corporate veil and the various principles under the common law, which formed as a result. The aim of the court is to ‘strike a balance between protecting the separate corporate identity and the conflicting interests of justice’⁶². The courts are always cautious when it comes to piercing the corporate veil, because when the corporate veil is pierced, the protection afforded to the shareholders and directors are removed.

3.1.2 A brief history of piercing the corporate veil

As canvassed in the previous chapter, the formulation of the principle of a company being a separate legal entity separate from its shareholders was laid down in the *Salomon*⁶³ case. This decision thus not only established one of the most important principles of corporate personality, that a company is a distinct entity apart from that of its shareholders, but it also led to the development of the exception to this rule namely, the doctrine of piercing the corporate veil.⁶⁴

In *Salomon*⁶⁵ there already appears to have been cognisance that fraud or dishonesty might justify the separate corporate personality of a company being disregarded.⁶⁶ In *Foss v Harbottle*⁶⁷, the proper plaintiff rule was established, which entails that when a wrong is committed against the company, the company itself has the capacity to institute action.

The case of *Dadoo Ltd v Krugersdorp Municipal Council*⁶⁸ was the first case in South Africa to deal with this principle. The court had to consider whether a race could be

⁶⁰ K L Sierbritz ‘Piercing the corporate veil: A critical analysis of section 20(9) of the Companies Act 71 of 2008’. (Unpublished LLM dissertation) 2016 15-16.

⁶¹ Cassim *et al Contemporary Company Law* 2ed (2012) at 34.

⁶² *Cape Pacific Ltd v Lubner Controlling Investments* 1995 (4) 790 (A) at 805.

⁶³ 1897 AC 22 HC

⁶⁴ W T Zindoga ‘Piercing of the Corporate Veil in terms of Gore: Section 20(9) of the new Companies Act 17 of 2008’. (Unpublished LLM University of Cape Town) 2015. 16.

⁶⁵ *Salomon supra*.

⁶⁶ *Cape Pacific supra* at page 802.

⁶⁷ (1843) 67 ER 189.

⁶⁸ 1920 AD 530.

attributed to a company. During the apartheid regime, only white persons could be owners of immovable property. This was significant as the company owned immovable property and secondly two Indian individuals owned all the shares in the company.⁶⁹ The court held as follows: ‘this conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not and cannot be regarded as vested in any of its members’.⁷⁰

Innes CJ stated, a company may own land and its right to do so⁷¹, and the consequence of ownership are ‘not merely matters of form but are attributes a company could have’.⁷² Due to the apartheid regime during this period as well as policy reasons relating to national security, it was necessary for the court to look behind the veil to determine the ‘residence of the companies shareholders to see who was in control of the company’.⁷³ However the question, which the court considered in this case was whether, the ownership of the company was in reality the ownership of the shareholders. The court held that it was not necessary in this case for the corporate veil to be pierced nor to look behind it.⁷⁴

English law in many instances will serve as guidance in interpreting the concept of piercing the corporate veil in South Africa and the relevant case law derived therein will operate as persuasive authority.⁷⁵ The courts in South Africa and England have failed to formulate a single, consistent principle upon which, to disregard the separate juristic personality of a company.⁷⁶

⁶⁹ *Dadoo supra* at page 543.

⁷⁰ *Dadoo supra* at page 550-551.

⁷¹ A company can acquire rights and incur obligations. J Cohen Veil Piercing- A necessary evil? A critical study on the doctrine of limited liability and piercing the corporate veil (Unpublished LLM thesis, University of Cape Town, 2006) at 4.

⁷² *Dadoo supra* at page 552.

⁷³ *Dadoo supra* at page 553. See Cassim *et al Contemporary Company Law* 2ed (2012) at 47.

⁷⁴ *Dadoo supra* at page 551.

⁷⁵ W T Zindoga ‘Piercing of the Corporate Veil in terms of Gore: Section 20(9) of the new Companies Act 17 of 2008’. (Unpublished LLM thesis University of Cape Town, 2015) at 15.

⁷⁶ LC Davids ‘The lingering question: Some perspective on the lifting of the corporate veil’ (1994) TSAR at 155.

The question of when to pierce the corporate veil and disregard a company's separate legal personality has been a source of debate. The courts have instead relied on a number of isolated, unrelated categories of conduct in order to explain such decision.⁷⁷

3.1.3. Difference between lifting and piercing the corporate veil

In *Atlas Maritime Co SA v Avalon Maritime Ltd*⁷⁸ the court distinguished between `piercing` and `lifting` the corporate veil.

Judge Staughton LJ stated as follows:

“To *pierce* the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To *lift* the corporate veil or *look behind it*, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose”.⁷⁹

The term `lifting` and `piercing` the corporate veil is however used interchangeably in our law⁸⁰, with the two terms being synonymous⁸¹.

3.1.4 Common law approach to piercing of the corporate veil

One of the core reasons for the formation of a company is to separate liability and protect the directors from debts and wrongful acts of the company.⁸²

The courts in South Africa have generally accepted the English position on the doctrine of piercing the corporate veil. In the case of *Amlin v Van Kooij*⁸³ the court defines piercing of the corporate veil as `a mechanism to determine who the controllers behind the company are and attribute the companies liabilities to them accordingly`. ⁸⁴

⁷⁷ A Domanski `Piercing of the Corporate veil: A New Direction` (1986) SALJ at 224.

⁷⁸ 1991 4 ALL ER 769.

⁷⁹ *Atlas Maritime Co SA supra* at page 779.

⁸⁰ For the purpose of this paper, the terms will be used alike.

⁸¹ *Ben Hashem v Al Shayif* 2009 1 FLR 115.

⁸² Rajak HH `Director and officer liability in the zone of Insolvency: A comparative analysis` (2008) 38 PER at 2.

⁸³ 2008 (2) SA 558 (C)

⁸⁴ *Amlin supra* at page 562.

In *Cape Pacific Ltd v Lubner Controlling Investments*⁸⁵ the court defined the piercing of the corporate veil as ‘disregarding the dichotomy between a company and the natural person behind it, or in control of its activities and attributing liability to that person where he has misused or abused the principle of corporate personality’.⁸⁶

It is evident through English case law, that they have adopted a categorisation approach to the piercing of the corporate veil, in that there are specific instances when the corporate veil will be pierced.⁸⁷ In South African law there is no definite categorisation, to indicate when the courts will pierce the corporate veil.⁸⁸

In *Cape Pacific v Lubner Controlling Investments (Pty) Ltd*⁸⁹ the Supreme Court of Appeal (SCA) implied that South Africa does not have a categorising approach to piercing the corporate veil, and there are no set categories of instances to administer when a court will pierce the corporate veil.⁹⁰ The court commended the rejection of the categorisation approach, stating that it could lead to uncertainties.⁹¹ The risk associated with using a categorisation approach is that, a situation may arise where there is a need to pierce the corporate veil due to an injustice, however the court may be unable to do so on the basis that the situation does not fit into any of the stipulated categories.⁹²

The leading case dealing with the piercing of the veil is the *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*⁹³ (hereinafter referred to as *Cape Pacific*). The then Appellate Division laid down guidelines as well as general principles relating to the common law instances of piercing the veil, namely⁹⁴:

⁸⁵ 1995 (4) SA 790 (A)

⁸⁶ *Case Pacific supra* at Para 28.

⁸⁷ A Domanski ‘Piercing of the Corporate Veil: A New Direction’ (1986) SALJ 244. The different categories were examined in the case of *Adams v Cape Industries plc* (1990) Ch 433 (CA) at 539.

⁸⁸ The case of *Cape Pacific* deals with the issue of categorisation in our law.

⁸⁹ 1995 (4) SA 790 (A).

⁹⁰ *Cape Pacific supra* at page 802.

⁹¹ RC Williams *Concise Corporate and Partnership Law*, 2ed (1997) at 100. The categories overlap and many do not adhere to the principle on which they are founded.

⁹² Cassim *et al Contemporary Company Law* 2ed (2012) at 43.

⁹³ 1995 (4) SA 790 (A)

⁹⁴ Cassim *et al Contemporary Company Law* 2ed (2012) at 48-49.

1. The Appellate Division emphasised that it is ‘undoubtedly a salutary principle’⁹⁵ that the courts should always uphold the separate personality of a company.⁹⁶ The court added that if this is not carried out, it would undermine the principles, which highlight the concept of separate legal personality and the various legal consequence attached thereto.⁹⁷
2. It was stated that the court does not have a wide-ranging discretion to disregard a companies separate legal personality whenever it ‘considers it just to do so.’⁹⁸
3. The court accentuated that it was not formulating any general principles with regard to when the ‘corporate veil should or should not be pierced, and that each case must be decided on its own facts, which, once determined, are of decisive importance’.⁹⁹ The court established that we do not have a categorisation approach of the piercing of the corporate veil in our law. The court was rather in favour of a ‘balancing approach’, which laid down the principle that the separate legal personality of the company ‘must be weighed up against the factors, which are in favour of piercing the veil’¹⁰⁰.
4. The court stated that as a general principle, ‘where there is fraud, dishonesty or improper conduct other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil’.¹⁰¹ Therefore, this entails the concept of separate legal personality being weighed against those policy considerations, which are in favour of piercing the veil.¹⁰² In such an approach a court would be entitled to look to substance rather than form.¹⁰³
5. In the case of *Botha v Van Niekerk*¹⁰⁴ the court held that piercing the veil would be justified when the third party suffered ‘unconscionable injustice’ as a result

⁹⁵ *Cape Pacific supra* at page 803.

⁹⁶ *Cape Pacific supra* at page 803.

⁹⁷ *Cape Pacific supra* at page 803.

⁹⁸ *Cape Pacific supra* at page 803, See *Amlin (SA) supra* at Para22.

⁹⁹ *Cape Pacific supra* at page 802.

¹⁰⁰ Cassim *et al Contemporary Company Law* 2ed (2012) at 48.

¹⁰¹ *Cape Pacific supra* at page 803.

¹⁰² See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530. The court held that it would have to consider substance rather than form. This balancing approach is based on the United States case of *Glazer v Commission on Ethics for Public Employees* 431 So.2d 752 (La 1983).

¹⁰³ *Dadoo Ltd v Krugersdorp Municipal Council supra* at page 552.

¹⁰⁴ 1983 (3) SA 513 (W).

of improper conduct of the liable party.¹⁰⁵ The court in *Cape Pacific*¹⁰⁶ commented that the test was ‘too rigid and suggested that a ‘more flexible approach be used’, one that allows the facts of each case to determine whether the piercing of the corporate veil is to be considered.¹⁰⁷

6. The court added that it is immaterial that a company should have been ‘conceived and founded in deceit and never have been intended to function genuinely as a company¹⁰⁸, before its corporate personality can be disregarded. This includes the instance where a company is legitimately formulated, and there is evidence of fraud or improper conduct on behalf of the company, there is no reason in principle, which would exclude the separate personality of the company to be disregarded, in relation to the particular transaction, in question.¹⁰⁹
7. Lastly, the Appellate Division held that there is no reason why the piercing of the corporate veil should necessarily be precluded if another remedy exists. The court held that if there are more than one legal remedy available, the party is entitled to use any one of them, and he is not obliged to follow one rather than another.¹¹⁰ If the facts of a matter are in favour of piercing the corporate veil, and there are other remedies readily available at his disposal, the courts should not bar the usage of piercing the corporate veil due to other remedies being available.¹¹¹ The fact that another remedy exists or was not used is only relevant when ‘policy considerations come into play, however it is not of overriding importance’.¹¹²

However, not all subsequent common law cases favoured this approach. In *Hulse-Reutter v Godde*¹¹³, which was heard in the Supreme Court of Appeal, the learned judge stated that without a doubt the separate legal personality of a company is to be

¹⁰⁵ *Botha supra* at Para 35.

¹⁰⁶ *Cape Pacific supra* at page 804.

¹⁰⁷ *Cape Pacific supra* at page 805.

¹⁰⁸ *Cape Pacific supra* at page 805.

¹⁰⁹ *Cape Pacific supra* at page 804-805.

¹¹⁰ *Cape Pacific supra* at page 805.

¹¹¹ *Cape Pacific supra* at page 805.

¹¹² *Cape Pacific supra* at page 805. Also see Cassim *et al Contemporary Company Law* 2ed (2012) at 49.

¹¹² *Cape Pacific supra* at page 803.

¹¹³ 2001 (4) SA 1336 (SCA).

recognised even in the most unusual circumstances.¹¹⁴ A court does not have the power nor discretion to disregard the separate legal personality of a company, whenever it considers it ‘just or convenient’ to do so.¹¹⁵

The court in *Hulse- Reutter v Godde*¹¹⁶ adapted a stricter approach and held that piercing the veil should only be used as a last resort. The court went on further to state that the corporate veil would only be pierced if there was evidence of ‘misuse or abuse’ between the company and those who control it, as this has enabled those who control the company to gain an unfair advantage being afforded to the latter.¹¹⁷ It is evident from the above case of *Hulse- Reutter v Godde*¹¹⁸ that the court departed from the principles established in the *Cape Pacific*¹¹⁹ case and seems to have reintroduced the requirement of ‘unfair advantage’ into the test in determining whether or not to pierce the veil.¹²⁰

The court in *Amlin (SA) Pty Ltd v Van Kooij*¹²¹ agreed with this approach. Therefore, it was established that the corporate veil could only be disregarded in exceptional circumstances and used as a drastic remedy and should therefore be only used as a last resort.¹²²

In the more recent case of *Airport Cold Storage (Pty) Ltd v Ebrahim*¹²³ it was stated that a court has the power in certain exceptional circumstances to pierce the corporate veil and hold the directors and others personally liable for the debts of the company. There must be compelling reason for a court to ignore the separate legal existence of a company.¹²⁴

¹¹⁴ *Hulse- Reutter supra* at page 1346.

¹¹⁵ *Hulse- Reutter supra* at page 1346

¹¹⁶ 2001 (4) SA 1336 (SCA).

¹¹⁷ *Hulse-Reutter supra* at page 1346-1347.

¹¹⁸ 2001 (4) SA 1336 (SCA)

¹¹⁹ 1995 (4) SA 790 (A)

¹²⁰ Larkin & Cassim, *Company Law: The Annual Survey of South African Law* (2001) 506 at 515.

¹²¹ 2008 (2) SA 558 (C) 34.

¹²² Cassim *et al Contemporary Company Law* 2ed (2012) at 49-50.

¹²³ 2008 (2) SA 303 (C)

¹²⁴ W T Zindoga ‘Piercing of the Corporate Veil in terms of Gore: Section 20(9) of the new Companies (unpublished LLM Thesis, University of Cape Town) 2015 at 18.

It is clear from the above that courts should not lightly disregard a company's separate personality.¹²⁵ In *Lategan & another NNO v Boyes & another*¹²⁶ the court stated that they would be prepared to pierce the corporate veil of a company where fraudulent use, was made of the fiction of legal personality, dishonesty¹²⁷ or improper conduct¹²⁸ found to be present, other considerations will come into play.¹²⁹

3.2 CIRCUMSTANCE WHEN A COURT WILL DISREGARD THE SEPARATE LEGAL PERSONALITY OF A COMPANY

3.2.1 Fraud or improper conduct

A court will disregard the legal personality of a company in cases of fraud or improper conduct. In the case of *Lategan & another NNO v Boyes & another*¹³⁰ the court held that where there is an element of fraud or improper conduct, a court will be prepared to pierce the corporate veil. The honourable Judge Le Roux in this case stated that, the court would 'brush aside' the veil, which separates the corporate identity, where there is fraudulent use of the legal personality.¹³¹

Judge Le Roux J statement was merely obiter, as the court did not proceed to 'brush aside'¹³² the veil of corporate identity. It did seek however to 'exemplify' the tendency of Judges to think of categories for purposes of piercing the veil¹³³.

¹²⁵ There are however exceptional circumstances, e.g. fraud, misconduct and improper conduct or where the company has been used as an alter ego. *Botha v Van Niekerk* 1983 (3) SA 513; *Lategan v Boyes* 1980 (4) SA 191 (T); *DHN Food Distributors Ltd v London Borrow of Tower Hamlets* 1976 3 ALL ER 462.

¹²⁶ 1980 (4) SA 191 (T)

¹²⁷ *Botha v Van Niekerk* 1983 (3) SA 513 (W)

¹²⁸ *Botha v Van Niekerk* 1983 (3) SA 513 (W)

¹²⁹ L V Mthembu 'To lift or not to lift the corporate veil- the unfinished story: A critical analysis of common law principles in lifting the corporate veil'. (*Unpublished LLM University of Pretoria*) 2002. 24-25.

¹³⁰ 1980 (4) SA 191 (T)

¹³¹ *Lategan & another NNO supra* at page 197.

¹³² *Lategan & another NNO supra* at page 196.

¹³³ LV Mthembu 'To lift or not to lift the corporate veil- the unfinished story: A critical analysis of common law principles in lifting the corporate veil'. (*Unpublished LLM University of Natal*) 2002. 48-49.

In *Botha v Van Niekerk en n Ander*¹³⁴ the court considered the question of piercing the corporate veil within the South African context. The court held that on the facts there was no liability attached to the first respondent, and that only the company was liable to the applicant.¹³⁵

Fleming J delivered the majority judgment and formulated the test of ‘unconscionable injustice’ for piercing the corporate veil and stated that ‘limited liability is the highlight of the incorporation of the company and therefore will require special grounds before the separate legal personality is ignored’.¹³⁶ A court will consider lifting the corporate veil and attributing personal liability, where the other party has suffered an ‘unconscionable injustice’, due to the improper conduct on the part of the wrongdoer.¹³⁷ This test formulated by Fleming J is considered to be wider than the ‘*Lategan rule*’.¹³⁸

The tests in both *Lategan NNO v Boyes*¹³⁹ and *Botha v Van Niekerk*¹⁴⁰ have been pronounced as obiter. This does not mean that the courts are bound by these tests. However, South African courts are free to consider alternative approaches to piercing the corporate veil.¹⁴¹

The court in *Cape Pacific*¹⁴² similarly held that it has ‘come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil’.¹⁴³

In *The Shipping Corp of India Ltd v Evdomon Corp*¹⁴⁴, Corbett CJ stated that: ‘the corporate veil may be pierced where there is proof of fraud, dishonesty or other improper conduct in the establishment or the use of the company or the conduct of its affairs...’.¹⁴⁵

¹³⁴ 1983 (3) SA 513 (W)

¹³⁵ *Botha supra* at page 517.

¹³⁶ *Botha supra* at page 518-519.

¹³⁷ *Botha supra* at page 523-525

¹³⁸ A Domanski ‘Piercing the corporate veil- A new direction’ (1986) *SALJ* 103 at 227.

¹³⁹ 1980 (4) SA 191 (T).

¹⁴⁰ 1983 (3) SA 513 (W).

¹⁴¹ MP Larkin ‘Regarding Judicial Disregarding of the Company’s Separate Identity, Piercing the Corporate Veil (1989) *SA Merc* 276.

¹⁴² 1995 (4) SA 790 (A)

¹⁴³ *Cape Pacific supra* at 804.

¹⁴⁴ 1994 (1) SA 550 (A).

¹⁴⁵ *The Shipping Corp of India Ltd supra* at page 566.

It is evident from the above cases that the courts will always consider the element of fraud, when considering whether the veil should be pierced. It is indicative from the case law that the element of fraud and improper conduct will be in most circumstances the first aspect the courts will consider, as it reflects the operation of the business and the behaviour and acts of the directors, which gives the courts a better insight into the functionality of the company to detect fraud.¹⁴⁶

3.2.2 The company is used as a means or device to conceal wrongdoing.

In *Snook v London & West Riding Investments Ltd*¹⁴⁷ the court commented on the use of the word ‘sham’ when describing an incorporation of a company. The court described a ‘sham as any act or document, which is executed by the parties, in order to give third parties or the courts, the impression that there were legal rights, and obligations, which were different from the actual rights, and obligations which the parties intend to create.’¹⁴⁸ The court added that in order for the act or document to be considered a ‘sham’, there must have been a ‘common intention between the parties to the effect that the rights and obligations stemming therefrom, are not to create the legal rights and obligations, which they set out to’.¹⁴⁹

In *Re Polly Peck International plc*¹⁵⁰ the court held that the ‘word ‘façade’ or ‘cloak’ or ‘mask’ is used most aptly where one person (individual or corporate) uses a company either in an unconscionable attempt to evade existing obligations or to practise some other deception’.¹⁵¹

In *Cattle Breeders Farm (Pty) Ltd v Veldman*¹⁵² the company was owned by Veldman, who was the sole shareholder and the managing director. His wife and children resided in a house on a farm, which property was leased by the company. Veldman sought to eject his wife and children from the property. The house was the matrimonial home between Veldman and his wife.¹⁵³ He had failed to offer his wife any alternate

¹⁴⁶ R Becker ‘Disregarding the separate juristic personality of a company: An English case law comparison’. (Unpublished LLM thesis, University of Pretoria, 2014) at 21.

¹⁴⁷ 1967 1 ALL ER 518 (CA)

¹⁴⁸ *Snook supra* at page 528.

¹⁴⁹ *Snook supra* at page 528.

¹⁵⁰ 1996 2 ALL ER 433 at 445

¹⁵¹ Cassim *et al Contemporary Company Law* 2ed (2012) at 44.

¹⁵² 1974 (1) SA 169 (RA)

¹⁵³ *Cattle Breeders Farm (Pty) Ltd supra* at page 173-174.

accommodation. The court held that the company was nothing more than the husbands (Veldman) alter ego and had no greater rights to eject the wife than he had.¹⁵⁴ The court refused to allow Veldman to avoid his matrimonial duties and obligations. The court regarded Veldman and the company as one person.

In *Gilford Motor Co Ltd V Horne*¹⁵⁵ the court described the use of the company as a 'device and a stratagem, in order to mask the effective carrying on of a business'.¹⁵⁶

It is thus assumed that the courts will pierce the corporate veil where a device of a corporate structure is used in an attempt to evade rights and obligations.¹⁵⁷

3.2.3 Director uses company as a device to evade fiduciary duties.

A director is not permitted to evade the fiduciary duties which he or she owes to the company.¹⁵⁸ It is not permissible for a director to utilise the device of another company so that it appears that the other company is in fact entering into the transaction in question with the company of which he/she is the director.¹⁵⁹

In *Robinson v Randfontein Estates Gold Mining Co Ltd*¹⁶⁰ the Appellate Division refused to take into consideration the separate legal personality of a subsidiary company. It was held that Robinson had attempted to use the subsidiary as a device to evade the fiduciary duties he owed to the holding company as a director of that company.¹⁶¹ Robinson who was the director of a company, purchased property for his own benefit and thereafter resold the property to the company at a profit. Robinson was under a legal duty to have acquired the property for the company and not himself.¹⁶²

The court held that as a director Robinson owed a fiduciary duty to the holding and by disregarding the separate legal personality of the subsidiary company, this prevented

¹⁵⁴ *Cattle Breeders Farm (Pty) Ltd supra* at page 177.

¹⁵⁵ 1933 Ch 935 (CA)

¹⁵⁶ *Gilford Motor Co Ltd supra* at page 936.

¹⁵⁷ RC Williams *Concise Corporate and Partnership Law*, 2ed (1997) at 103. See *Adam v Cape Industries* 1991 (1) All ER 929

¹⁵⁸ Cassim *et al Contemporary Company Law* 2ed (2012) at 43.

¹⁵⁹ Cassim *et al Contemporary Company Law* 2ed (2012) at 43.

¹⁶⁰ 1921 AD 168

¹⁶¹ Cassim *et al Contemporary Company Law* 2ed (2012) at 44.

¹⁶² *Robinson supra* at page 194-195.

Robinson from evading such fiduciary duty to the holding company.¹⁶³ The court held that the subsidiary company was a device, which was created to allow, Robinson to evade his fiduciary duties to the holding company.¹⁶⁴

Judge Innes CJ reiterated the importance of a fiduciary duty and stated that when a person is in a position of authority, he has a duty to protect the interest of others.¹⁶⁵ In terms of business, such person is not allowed to make a secret profit at another's expense nor is he to place himself in a position where there is a conflict of interest.¹⁶⁶ This principle provides legal obligations on persons occupying such positions. Whether a fiduciary relationship is established is dependent upon the circumstances of each case. It seems hardly possible on principle to confine the relationship to 'agency cases'.¹⁶⁷ Directors have a fiduciary duty to always act in good faith and in the best interest of the company. This entails that the director should avoid at all costs conflicting issues and to make sure not to over exceed the company's power.

3.2.4 Separate legal personality used to overcome a contractual agreement.

The courts have pierced the corporate veil, where a company has been used as a means to evade or overcome a contractual duty. In *Die Dros (Pty) Ltd v Telefon Beverages CC*¹⁶⁸ the court held that it is acceptable for the separate personality of a company to be disregarded, when the natural person controlling the company is 'subject to a restraint of trade agreement and used the company as a 'front' to participate in activities, which are prohibited in terms of the restraint of trade'.¹⁶⁹

¹⁶³ Cassim *et al Contemporary Company Law* 2ed (2012) at 44. See MP Larkin "Regarding Judicial Disregarding of the Company's Separate Identity, Piercing the Corporate Veil (1989) SA Merc 235- The above decision demonstrates the willingness of the courts to disregard the separate personality of a company and attach liability to those who have abused the company by carrying out the acts of fraud of improper conduct.

¹⁶⁴ Cassim *et al Contemporary Company Law* 2ed (2012) at 44.

¹⁶⁵ *Robinson supra* at page 195.

¹⁶⁶ Cassim *et al Contemporary Company Law* 2ed (2012) at 44- As was pointed out in *The Aberdeen Railway Company v Blaikie Bros (1854) 1 Maqueen 474*, 'this doctrine is to be found in the civil law (Digest 18.1.34.7), and must of necessity form part of every civilized system of jurisprudence. It prevents an agent from properly entering into any transaction own property. There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent'.

¹⁶⁷ *Robinson supra* at page 177-180. See *Regal (Hastings) v Gulliver* (1967) 2 AC 134 (HL), *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA), *Da Silva v DH Chemicals* 2008 (6) 620 (SCA)- This case dealt with breach of a fiduciary duty of a director.

¹⁶⁸ 2003 (4) SA 207 (C)

¹⁶⁹ Cassim *et al Contemporary Company Law* 2ed (2012) at 44.

In *Gilford Motor Co Ltd v Horne*¹⁷⁰ the Defendant signed a restraint of trade agreement in which he bound himself not to participate directly or indirectly in any business like that of the Plaintiffs for a period of 5 years. The Defendant subsequently formed a company which competed directly with the Plaintiffs company. The Plaintiff sought an interdict to restrain the Defendant and the company from trading and competing with the Plaintiffs business.¹⁷¹ The Defendant contended that he had not contravened the terms of the restraint of trade agreement as he did not personally compete with the Plaintiffs business, but rather it was the company which did so.¹⁷²

The court rejected the defendant's argument and stated that the company was set up for the very purpose of avoiding the restraint of trade agreement, which the Defendant entered in to. The company was described as a “‘device’, a stratagem’ and a ‘mere cloak or sham’”.¹⁷³ The court granted an order interdicting the Defendant as well as the company from competing with the Plaintiff. The court extended the interdict to the company on the basis that the company was a mere channel which the defendant utilised, to allow him to compete with the Plaintiff's company.¹⁷⁴

Similarly, in *Le`Bergo Fashions CC v Lee*¹⁷⁵ the court had to consider whether a restraint of trade obligation can be imposed on a company. It had transpired that the first respondent signed a restraint of trade agreement with the applicant in her personal capacity. The respondent was the sole shareholder of a company and had used her company to compete with the applicant. Although the company had not been a party to the restraint of trade obligation the court was required to consider whether such obligation can be imposed on the company.¹⁷⁶ The court found that the respondent and the company were one persona, as the respondent carried on business of the company. The respondent by her ‘conduct and business activities had not treated the company as a separate entity but merely as an instrumentality or conduit for promoting her business affairs’.¹⁷⁷

¹⁷⁰ 1933 Chp 935 (CA)

¹⁷¹ *Gilford Motor Co supra* 936-937.

¹⁷² Cassim *et al Contemporary Company Law* 2ed (2012) at 44.

¹⁷³ *Gilford Motor Co supra* at page 965.

¹⁷⁴ *Gilford Motor Co supra* at page 965.

¹⁷⁵ 1998 (2) SA 608 (C)

¹⁷⁶ *Le Bergo Fashions supra* page 613.

¹⁷⁷ *Le Bergo Fashions supra* page 613.

The court held that even though the company had not been a party to the restraint of trade agreement, by virtue of the company assisting the respondent to breach the restraint of trade clause, this amounted to a wrongful act, which could be interdicted in law.¹⁷⁸

It is clear from the above two cases that the separate legal personality of a company will be disregarded in any situation. For instance, in *Gilford Motors Co Ltd v Horne*¹⁷⁹, a new company was formed with the intention to avoid the restraint of trade agreement, whilst in *Le`Bergo Fashion v Lee*¹⁸⁰ a company was already operational and in existence. From these cases we can gather, that the courts will not hesitate to disregard the separate personality where the company has been used as a vessel to conceal unlawful acts.

As the court in *Cape Pacific*¹⁸¹ correctly pointed out that, it is a not requirement to establish that a company was created or founded in deceit, before disregarding its separate corporate personality.¹⁸²

3.3 CONCLUSION

The courts strive to uphold the separate legal personality of a company, however there are instances as mentioned above where the courts will seek to separate the legal personality of a company. By separating the legal personality, the courts lift the corporate veil of the company and take into account the actions of the shareholders and directors, who in essence ‘control’ the company.

It is clear from the above, that our law does not favour the categorisation approach, which was clearly pointed out in *Cape Pacific*.¹⁸³ The categorisation approach can lead

¹⁷⁸ *Le Bergo Fashions supra* page 613-614. The court justified the piercing of the corporate veil on the basis of ‘improper conduct’, which it stated was to be distinguished from fraud and dishonesty.

¹⁷⁹ 1933 Chp 935 (CA)

¹⁸⁰ 1998 (2) SA 608. (C).

¹⁸¹ 1995 (4) SA 790 (A).

¹⁸² *Cape Pacific supra* at page804.

¹⁸³ *Cape Pacific supra* at page 804.

to injustices occurring and the courts should rather adopt a balancing approach.¹⁸⁴ When considering the balancing approach, the courts will weigh up the separate legal personality of the company against the principles in favour of piercing the corporate veil.¹⁸⁵

It is therefore noted from common law that there are no definite principles, which have been laid down to determine when the courts should pierce the corporate veil of a company. The courts have considered each matter based on their individual facts, looking to previous cases for guidance.

It is clear that the courts will not tolerate fraudulent acts carried out by the directors who seek to hide behind the company, or directors acting contrary to their fiduciary duty. The courts will not hesitate to lift the corporate veil in these circumstances. In terms of the common law, a director's fiduciary duty requires the director to act in good faith and in the best interest of the company.

The Companies Act has codified the director's duties and has extended the accountability of directors. Section 76 of the Act deals with the standard of conduct expected from directors which extends beyond the common law duty of directors.

However, what is of importance is that the Act has now introduced a statutory provision permitting the courts to pierce the corporate veil. The next chapter will set out the provisions of this section and the manner in which the courts have interpreted the section.

¹⁸⁴ *Cape Pacific supra* at page 803.

¹⁸⁵ *Cape Pacific supra* at page 803.

CHAPTER 4: SECTION 20(9) OF THE COMPANIES ACT AND ANALYSIS OF THE JUDGMENT IN *EX PARTE GORE*.

4.1. Introduction

For the first time in our law the Act has now enacted a statutory provision by way of section 20(9), which permits the court to disregard the separate legal personality of the company, where there has been ‘unconscionable abuse’ of the juristic personality of the company.¹⁸⁶

As indicated in the previous chapters, the common law did not set out clear principles signifying when the corporate veil is to be pierced. The courts relied on assistance from previous case law, which were utilized as guidelines and more importantly, the courts considered the facts of each case in arriving at their decision. In terms of the common law, the piercing of the corporate veil is applied to protect ‘the interests of a company’s creditors’.¹⁸⁷ Section 20(9) serves to codify the common law doctrine of piercing the corporate veil, whilst section 218 of the Act extends liability.¹⁸⁸

Section 20(9) of the Companies Act states:

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

- (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the

¹⁸⁶ R Cassim, ‘Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SA Merc* 307.

¹⁸⁷ N Schoeman ‘ Piercing the corporate veil under the new Companies Act: Is s20 (9) read with s218 a codification of the common law concept or is it further reaching? 2012 *De Rebus* 26.

¹⁸⁸ N Schoeman ‘ Piercing the corporate veil under the new Companies Act: Is s20 (9) read with s218 a codification of the common law concept or is it further reaching? 2012 *De Rebus* 26-27.

- company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
- (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).’

Section 20(9) provides the judiciary with a statutory discretion in order to pierce the corporate veil. In this chapter section 20(9) will be closely analysed, by considering the language used, which will assist to determine the intention of the legislature in enacting this section, and the manner in which it is to be interpreted. This dissertation will also consider the impact that this statutory provision has on the common law, and whether it will serve to substitute the common law approach. This dissertation will also consider whether the statutory provision overrides the common law approach to piercing of the corporate veil, where it is considered to be an exceptional remedy, to be only used as a last resort.

When interpreting section 20(9) of the Act, regard must be had to section 5 and section 7 of the Act. Section 5 deals with the general interpretation of the Act and section 7 deals with the purpose of the Act. From this we can gather that the purposive approach may be reasonable in interpreting section 20(9) of the Act.¹⁸⁹ The purposive approach focuses on the purpose that the statute aims to achieve.¹⁹⁰ When interpreting a statutory provision, one must always have regard to uphold the Constitution and all that it embodies.¹⁹¹

Section 39(2) of the Constitution¹⁹² specifies that ‘when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’. Therefore, it can be understood that the Constitution dictates a purposive and value-based approach when interpreting legislation.¹⁹³

¹⁸⁹ The Legislature has failed to define the relationship between the common law and section 20(9).
Du Plessis *Re-Interpretation of Statutes* 2ed (2002) 93.

¹⁹⁰ Du Plessis *supra* at page 94.

¹⁹¹ Section 39(2) of the Constitution of the Republic of South Africa 1996.

¹⁹² The Constitution of the Republic of South Africa 1996.

¹⁹³ Du Plessis *Re-Interpretation of Statutes* 2ed (2002) 93. K L Siebritz ‘Piercing the corporate veil: A critical analysis of section 20(9) of the Companies Act 71 of 2008. LLM. 15th June 2016. 45.

4.2. Analysis of the *Ex Parte Gore* judgment

This statutory provision was considered for the first time in the case of *Stephen Malcolm Gore N.O and 37 others*¹⁹⁴ (herein after referred to as the *Gore* case). The court in the course of its judgment set out some useful guidelines regarding the interpretation and application of section 20(9). When considering the interpretation of the statutory provision the court had regard to the language used. The court herein looked to foreign jurisdiction to assist with the interpretation of the section.

4.2.1 Facts of the *Ex Parte Gore* case

The applicants were all liquidators of one or more of companies, which formed part of a group of companies, referred to as ‘the King Group’. The holding company was King Financial Holding Limited (KFH), which was also in liquidation.¹⁹⁵ The King Group was effectively managed and owned by the Three King brothers, Adrian, Paul and Stephen. The KFHS shares were held by three groups of shareholders, namely the trustees of the Adrian King Beleggings Trust, the Paul King Beleggings Trust and the Stephen King Beleggings Trust.¹⁹⁶ The trusts were set up as family trusts, for the benefit of the King brothers and their families. The King brothers retained a majority of the KFHS shares and were directors of most of the subsidiaries.¹⁹⁷

The companies in the group provided financial services by marketing investments in both commercial and residential immovable properties¹⁹⁸. Investments petitioned by the King Group were structured in the form of a purchase by the investor of shares in a member of the group. The acquisition of such shares was attached with the extension of a loan by the investor concerned to the company of which he was to be a shareholder.¹⁹⁹

¹⁹⁴ 2013 (3) SA 382 (WC)

¹⁹⁵ *Ex Parte Gore supra* at Para 5.

¹⁹⁶ *Ex Parte Gore supra* at Para 6.

¹⁹⁷ *Ex Parte Gore supra* at Para 6.

¹⁹⁸ *Ex Parte Gore supra* at Para 6.

¹⁹⁹ *Ex Parte Gore supra* at Para 7.

Initially, the King Group used a number of companies to hold already developed commercial properties.²⁰⁰ At a later stage the King Group extended its projects to the development of commercial and residential properties.²⁰¹ The invested funds were in fact allocated by the management of the King Group into whichever company it saw fit, which in other words meant whichever company required funds.²⁰² The transactions were completed without any proper accounting records.

The flow of funds within the Group appears to have been determined by the need of the King brothers to sustain their scheme by finding money to pay out existing investors who wished to withdraw their funds.²⁰³ The King brothers had also managed to persuade investors to enter into a so-called 'share conversion' transaction, which entailed one of the existing investments in one or more of the subsidiary companies, could be converted into shares in KFH.²⁰⁴

Eventually the investors began to encounter serious difficulties in identifying the relevant corporate entities against which the individual investor-creditors might have claims. There were in reality no distinctions for practical purposes when it came to dealing with the investor's funds between the holding company (KFH) and the subsidiary companies.²⁰⁵

The liquidators approached the court for an order to permit certain of the assets of the companies to be dealt with as if they were the property of the holding company. The relief sought was to selectively disregard the separate personalities of several of the companies and treat the residual assets as the assets of the holding company.²⁰⁶

The basis of the application was the allegation that the business of the group was conducted through the holding company with no distinction between the holding company and that of its subsidiaries. The application was brought under the common

²⁰⁰ *Ex Parte Gore supra* at Para10

²⁰¹ *Ex Parte Gore supra* at Para 11.

²⁰² *Ex Parte Gore supra* at Para 11.

²⁰³ *Ex Parte Gore supra* at Para 12.

²⁰⁴ *Ex Parte Gore supra* at Para 13.

²⁰⁵ *Ex Parte Gore supra* at Para 15.

²⁰⁶ *Ex Parte Gore supra* at Para 16.

law, alternatively in terms of s20 (9) of the Companies Act 2008 and described as an application for the ‘piercing of the corporate veil’.

4.2.2 The Courts findings

The court held that the King brothers disregard of the separate corporate personalities of the companies within the King Group was so extensive so as to conclude that the group was in fact a sham.²⁰⁷ The court found that there was no distinction for practical purposes when it came to dealing with investor’s funds between KFH and the subsidiary companies.²⁰⁸ The court held that the lack of distinction between the separate personalities (holding company and subsidiary) and the use of funds in a manner that was inconsistent with what had been represented amounted to an unconscionable abuse.

The court held further that KFH shall be deemed not to be a juristic person and further that the King companies shall be regarded as a single entity by ignoring their separate legal existence and treating the holding company, King Financial Holdings, as if it were the only company.²⁰⁹

The courts pierced the veil in terms of section 20(9) of the Act. The core element which the court considered, was the ‘unconscionable abuse’ of the juristic personality. The court found that the activities of the King group fell within the meaning of ‘unconscionable abuse’ in terms of section 20(9). There was no clear distinction between the holding company and its subsidiaries. Further, the transaction of the funds were done in a manner which were unclear.

The court noted that the language used in section 20(9) is cast in very wide terms and is indicative of an appreciation by the legislature that the provision is to consider widely varying factual circumstances.²¹⁰ The width of the provision appears to have broadened the bases upon which the courts are prepared to grant relief, when it comes to

²⁰⁷ *Ex Parte Gore supra* at Para 15.

²⁰⁸ *Ex Parte Gore supra* at Para 15.

²⁰⁹ *Ex Parte Gore supra* at Para 37.

²¹⁰ *Ex Parte Gore supra* at Para 37.

disregarding the corporate personality. The court had to consider what the legislature meant by the term ‘unconscionable abuse’ as it was not defined.

The court acknowledged that the common law is far from settled with regards to the piercing of the corporate veil and indicated that the courts considered the facts of each case. The common law did not provide a list of instances when the corporate veil is to be pierced but acknowledged that the case of *Cape Pacific Ltd V Lubner Controlling Investments (Pty) Ltd*²¹¹ set out useful guidelines to assist when the corporate veil should indeed be pierced.

With the introduction of the statutory provision, the court considered whether the subsection replaced the common law on piercing the corporate veil. The court held that there is ‘no express intention apparent to that effect however, there is also no express indication that the intention is not to displace the common law’.²¹² Therefore, the court noted section 20(9) will serve as supplemental to the common law.²¹³

We note from the judgement that the court was required to interpret section 20(9) as the terms ‘unconscionable abuse’ and ‘interested party’ are not defined in the Act. We will now consider the court’s interpretation of section 20(9) below.

4.3 The court’s interpretation of section 20(9) of the Companies Act

As previously mentioned, the Companies Act has now enacted a statutory provision by way of section 20(9), which has the effect of disregarding the separate personality of the company. The *Ex Parte Gore*²¹⁴ case was amongst the first of cases, which considered an application in terms of section 20(9). As this was the first case, the courts were required to interpret and give meaning to section 20(9), as the legislature did not define the section and the wordings therein.

²¹¹ 1995 (4) SA 790 (A)

²¹² *Ex Parte Gore supra* at Para31.

²¹³ *Ex Parte Gore supra* at Para 31.

²¹⁴ 2013 (3) SA 382 (WC)

The court in *Ex Parte Gore*²¹⁵ stated that the language used in section 20(9) has been cast in wide terms, which is the intention of the legislature, so to apply the section in widely varying factual circumstances.²¹⁶

Section 20(9) states that the provision may be brought before a court by way of application by an ‘interested person or in any proceedings in which a company is involved’. It is noted that section 20(9) has the effect of giving the courts the power to pierce the veil on its own accord, even where the Plaintiff has not requested such relief from the court. This alone demonstrates the width of the powers which section 20(9) provides to the courts to pierce the corporate veil.²¹⁷

4.3.1 ‘Interested person’ under section 20(9) of the Companies Act

Section 20(9) states that the application must be brought before court by an ‘interested person’ to the proceedings. However, the term ‘interested person’ has not been defined in the Companies Act. It begs the question as to why the legislature elected not to provide a definition.

As a rule, a person who claims relief from a court in respect of any matters must establish that he or she has a direct interest in that matter in order to acquire the necessary locus standi/ capacity to seek relief.²¹⁸

However, the court in *Ex Parte Gore*²¹⁹ stated that ‘no mystique’²²⁰ should be attached to the term ‘interested person’. The court went on further to state that the any person who seeks a remedy in terms of this provision should consider, the well-established principle laid down in *Jacobs en n Ander v Waks en Andere*,²²¹ and to make sure that no rights are compromised in terms of the Bill of Rights.

²¹⁵ 2013 (3) SA 382 (WC)

²¹⁶ *Ex Parte Gore supra* at Para 32.

²¹⁷ R Cassim, ‘Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SA Merc* 310.

²¹⁸ *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388.

²¹⁹ 2013 (3) SA 382 (WC).

²²⁰ *Ex Parte Gore supra* at Para 35.

²²¹ 1992 (1) SA 521 (A) at 533-534.

Section 38 of the Constitution²²² of the Republic of South Africa deals with the enforcement of rights. This provision of the Constitution provides any person with the right to approach any competent court where they allege that a right in terms of the Bill of Rights has been infringed or threatened.²²³ The Constitution goes on to define the ‘persons’, which may approach a court, as follows:

- (a) ‘anyone acting in their own interest
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its member’.

When interpreting statutes, it is imperative that interpretation is in line with the Constitution and does not seek to infringe on any persons rights as entrenched in our Constitution.

The court in *Jacobs en n Ander v Waks en Andere*²²⁴ case held, that the ‘direct interest should not be remote, and that it must be a real interest and not an abstract, academic or hypothetical interest’.²²⁵ When assessing what constitutes a ‘direct interest’, the court held that it would depend upon the facts of each case, therefore, implying that there cannot be a set rule.²²⁶

It is a requirement that the litigant have an interest in the pending action however, the interest is not to be too remote.²²⁷ In *Dalrymple v Colonial Treasurer*²²⁸ the court was tasked with considering whether taxpayers have a right to determine or have a say as to how collected taxes are to be expended. The applicants in this matter alleged that the executive government had breached a statute by expending funds, which is contrary to

²²² The Constitution of the Republic of South Africa 1996.

²²³ This provision aims to illustrate the definition of ‘persons’ in the Constitution.

²²⁴ 1992 (1) SA 521 (A)

²²⁵ R Cassim, ‘Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction” (2014) 26 *SA Merc* 307 at 313 -314.

²²⁶ In *Jacobs supra* at page 534, the court found that the liquidators had a ‘direct’ and ‘sufficient’ interest so as to qualify as ‘interested persons. R Cassim ‘Hiding behind the veil’ *De Rebus* (2013) 35.

²²⁷ *Dalrymple v Colonial Treasurer* 1910 TS 372 at 390.

²²⁸ *Dalrymple supra* at page 390.

the statute. The applicants challenged the court and alleged that as taxpayers it was their right to make sure that public funds were used in accordance with the relevant statute.²²⁹

The court held that taxpayers do not have a right to be consulted in the expenditure of the taxes. Should the collected taxes be disposed of in a manner contrary to the statute, accordingly, the Minister will deal with this. The court held that individual taxpayers' interest would be too remote to authorise the taxpayers to bring an action.²³⁰

The court in *Ex Parte Gore*²³¹ held that the provision section 20(9) of the Act is similar to section 65 of the Close Corporation Act 69 of 1984 (herein after referred to as the Close Corporation Act).

Section 65 provides that upon application by an 'interested party'²³², where the close corporation is involved, and where there has been any act by or on behalf of the close corporation, which amounts to a 'gross abuse of the juristic personality of the corporation as a separate entity, the court may declare that the corporation is deemed not to be a juristic person'.²³³ By making such declaration, the courts take away the rights, obligations and liabilities of the corporation or any member thereof, and the court may pronounce further to give effect to such declaration.

It is noted that section 20(9) of the Act, uses similar wording to section 65 of the Close Corporation Act. Therefore, we will consider the interpretation of the term 'interested person' under section 65 of the Close Corporation Act. Surely, this section could assist by providing insight into what would constitute an 'interested person'.

In *TJ Jonck BK h/a Bothaville Vleismark v Du Plessis*²³⁴ the court considered the meaning of 'interested person' under section 65 of the Close Corporation Act. The court stated that the term 'interested person' is not to be interpreted too restrictively, but at

²²⁹ *Dalrymple supra* at page 380.

²³⁰ *Dalrymple supra* at page 390.

²³¹ 2013 (3) SA 382 (WC)

²³² This term has been inserted in section 20(9) of the Act. The wording of section 65 of the Close Corporation Act is similar in wording to section 20(9) of the Act.

²³³ Section 65 of the Close Corporation Act 69 of 1984. The term 'unconscionable abuse' is inserted in section 20(9) of the Act, which is used to measure the level of abuse.

²³⁴ 1998 (1) SA 971 (O)

the same time is it not to be interpreted to widely to include a direct interest.²³⁵ The court went on further to state that ‘the interest must be material, relevant or direct, and, in particular, it is limited to a financial or monetary interest’.²³⁶

We note from the above that section 65 of the Close Corporation Act, requires that the interest be financial or monetary in nature. The question, which thus arises, is whether the interest in terms of section 20(9) includes a financial or monetary nature.

The court in *Ex Parte Gore*²³⁷ did not attempt to interpret the term ‘interested person’ and further did not indicate whether such interest should entail a financial nature. Neither did the court make reference to the above-mentioned case of *TJ Jonck BK h/a Bothaville Vleismark v Du Plessis*²³⁸ for the interpretation of an ‘interested person’. The court approved and implemented the principle set out in the *Jacobs v Waks*²³⁹ case. The court in this case accordingly held that it is not necessary for the interest to be measurable in monetary terms.²⁴⁰

Judge Binn Wards J, merely indicated that no mystique should be attached to the meaning of the term ‘interested person’.²⁴¹

Cassim²⁴² argues that *Ex Parte Gore*²⁴³ did not require the interest to be of a financial nature and states, that this extends the scope of section 20(9) of the Companies Act, thus making it wider than that of section 65 of the Close Corporation Act, where it is a requirement. It can be questioned, whether the court in *Ex Parte Gore*²⁴⁴ intended this, owing to the fact that the two sections are worded similarly, and the courts have taken a narrow approach in the interpretation of section 65 of the Close Corporation Act, by

²³⁵ *TJ Jonck BK h/a Bothavillw Vleismark supra* at page 986.

²³⁶ *TJ Jonck BK h/a Bothavillw Vleismark supra* at page 986.

²³⁷ 2013 (3) SA 382 (WC).

²³⁸ 1998 (1) SA 971 (O)

²³⁹ 1992 (1) SA 521 (A)

²⁴⁰ *Jacobs supra* at page 535.

²⁴¹ *Ex Parte Gore supra* at Para 35.

²⁴² R Cassim, ‘Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SA Merc* 307 at 314.

²⁴³ 2013 (3) SA 382 (WC)

²⁴⁴ *Ex Parte Gore Supra*

holding that the interest is to be of a financial or monetary nature.²⁴⁵ Inherently one would assume that section 20(9) would adopt the same approach.²⁴⁶

Having regard to the above it is questionable whether the legislature intended for section 20(9) to be interpreted more widely than section 65 of the Close Corporation Act. Should the term 'interested person' have included a financial interest? However, since the term 'interested person' has not been defined, this is open to interpretation by the courts, which, when assessing the matter can establish whether the absence of a financial interest would result in the interest being too remote.²⁴⁷ The court in *Ex Parte Gore*²⁴⁸ reaffirmed the case of *Jacobs v Waks*²⁴⁹ wherein it was stated the litigant's interest in a matter would depend upon the facts of each matter.²⁵⁰

4.3.2 Unconscionable abuse

The term 'unconscionable abuse' is not defined in section 20(9) of the Act, nor does the section provide any guidance as to what constitutes an unconscionable abuse, of the juristic personality of the company. The courts have been tasked with determining and providing an interpretation to this term. The term 'unconscionable' was first introduced into South African law in the case of *Botha v Van Niekerk*.²⁵¹

²⁴⁵ R Cassim, 'Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction' (2014) 26 SA Merc 307 at 314.

²⁴⁶ R Cassim, 'Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction' (2014) 26 SA Merc 307 at 313. Cassim goes on to consider the term 'interested party' is to be interpreted in light of the legislature's intention, and correctly points out that the Companies Act into effect on the 1st May 2011, and that close corporations may no longer be formed and that companies may not be converted into a close corporation. She goes on further to state that the Companies Act does not provide for small owner managed companies, whereas close corporations run in a simplified and flexible manner. It is on this basis that she contends the difference between the two provisions and the requirement for the financial and monetary provision under the Close Corporation when interpreting the term 'interested person'. It is further contended that, the Companies Act now provides for small owner managed companies that are similar to close corporations, and are to be run in a simplified and flexible manner.

²⁴⁷ R Cassim, 'Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction' (2014) 26 SA Merc 307 at 314.

²⁴⁸ 2013 (3) SA 382 (WC)

²⁴⁹ 1992 (1) SA 521 (A)

²⁵⁰ *Ex Parte Gore* supra at Para 36.

²⁵¹ 1983 (3) SA 513 (W)

It is important to note that in *Botha v Van Niekerk*²⁵² the court held that the veil can be pierced if the Plaintiff suffered an “unconscionable injustice” as a result of the improper conduct on the part of the defendant.²⁵³ As discussed in the previous chapter, the Appellate Division in the *Cape Pacific v Lubner Controlling Investments (Pty) Ltd*²⁵⁴ case stated that the test of unconscionable injustice is too narrow and rigid and that a more flexible test should be adopted, which would allow the facts of each case to determine whether the piercing of the veil was appropriate.²⁵⁵

As mentioned above, the court in *Ex Parte Gore*²⁵⁶ held that section 20(9) is similar, but not exactly the same, as section 65 of the Close Corporations Act.²⁵⁷ Therefore, the courts can look to the Close Corporations Act for guidance, as there has already been commentary developed in respect of this section. Section 65 of the Close Corporations Act states that there must be ‘gross abuse’ of the juristic personality of the corporation as a separate entity.

The court in *Ex Parte Gore*²⁵⁸ held that the term ‘unconscionable abuse’ has a less extreme connotation when compared to that of ‘gross abuse’.²⁵⁹ The court held that the term ‘unconscionable abuse’ of the juristic personality of a company suggests the conduct in formation and carrying on of business of the company, wherein it will encompass terms such as ‘sham’, ‘device’; ‘stratagem’ as we found in earlier cases.²⁶⁰ The court herein made reference to the earlier cases decided under the common law.²⁶¹ The court further indicated that this provision brings about a remedy which is to be used where there is ‘illegitimate use’ of the juristic personality which affects a third party in a way that reasonably should not be countenanced.²⁶²

²⁵² 1983 (3) SA 513 (W)

²⁵³ *Botha supra* at page 525.

²⁵⁴ 1995 (4) SA 790 (A)

²⁵⁵ *Cape Pacific supra* at page 805.

²⁵⁶ 2013 (3) SA 382 (WC)

²⁵⁷ *Ex Parte Gore supra* at Para 30.

²⁵⁸ *Ex Parte Gore supra*

²⁵⁹ *Ex Parte Gore supra* at Para 28.

²⁶⁰ *Ex Parte Gore supra* at Para 28.

²⁶¹ The court herein referred to various earlier common law cases. See R Cassim ‘Hiding behind the veil’ 2013 October De rebus 37.

²⁶² *Ex Parte Gore supra* at Para 34.

Therefore, having regard to the *Ex Parte Gore*²⁶³ case we gather that there is a lower standard of abuse which would need to be proven, in order to pierce the veil of a company, in comparison to the level of abuse required in terms of section 65 of the Close Corporation Act²⁶⁴, when piercing the veil of a close corporation. It is clear from the *Ex Parte Gore*²⁶⁵ judgment that the court adopted a wide interpretation when interpreting the term ‘unconscionable abuse’.

The court in *Ex Parte Gore*²⁶⁶ concluded that that section 20(9) of the Companies Act should be seen as supplemental to the common law, rather than substitutive.²⁶⁷ The common law has thus been extended under section 20(9) of the Companies Act.²⁶⁸ As discussed earlier the case of *Cape Pacific v Lubner Controlling Investments (Pty) Ltd*²⁶⁹ held that a balancing approach to piercing the corporate veil should be adopted. The balancing approach entailed the need to uphold the companies separate legal personality, balanced against the principles that favour the piercing of the corporate veil.²⁷⁰

However, the requirement for piercing the corporate veil under section 20(9) of the Act, focuses only on the abuse of the juristic personality of a company as a separate legal entity, and whether such abuse constitutes as an ‘unconscionable abuse’. As in the common law case of *Hulse-Reutter v Godde*²⁷¹ the court stated that the abuse should result in an ‘unfair advantage’ to those who control the company. This is not a requirement under section 20(9) of the Act. Perhaps it can be argued that the legislature intended there to be flexibility in the application of the remedy.²⁷²

We can ultimately conclude that the court will consider the facts of each case, which gives the court the flexibility to interpretation of the term.²⁷³

²⁶³ 2013 (3) SA 382 (WC)

²⁶⁴ Act 69 of 1984

²⁶⁵ *Ex Parte Gore supra*

²⁶⁶ *Ex Parte Gore supra*

²⁶⁷ *Ex Parte Gore supra* at Para 34.

²⁶⁸ N Schoeman ‘Piercing the corporate veil under the new Companies Act: Is s20(9) read with s218 a codification of the common law concept or is it further reaching?’ 2012 June *De rebus* 27.

²⁶⁹ 1995 (4) SA 790 (A)

²⁷⁰ *Cape Pacific supra* at page 805.

²⁷¹ 2001 (4) SA 1336 (SCA)

²⁷² R Cassim, ‘Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SA Merc* 307 at 318.

²⁷³ R Cassim, ‘Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 *SA Merc* 307 at 320. Cassim has concluded that the test for piercing the

Aside from the term unconscionable abuse not being defined, it is questionable why the legislature did not use the words ‘gross abuse’ in section 20(9) of the Companies Act, despite the section being worded so comparably to that of section 65 of the Close Corporation Act. It is also questionable why the court in *Ex Parte Gore*²⁷⁴ proposed a lower standard of abuse for section 20(9) in comparison to section 65 of the Close corporation act. It is suggested that that the crucial words ‘unconscionable abuse’ would include just about any form of abuse of the juristic personality which would be seen as unconscionable.

It therefore appears from the *Ex Parte Gore*²⁷⁵ case that section 20(9) has broaden the bases upon which South African courts can now disregard the separate legal personality of a company, as compared with the common law.

4.3.3 Not a remedy of last resort

The court in *Gore* acknowledged that in terms of the common law the ‘separate legal personality of a company should only be disregarded in exceptional circumstances and as a last resort’²⁷⁶.

The Appellate Division in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*²⁷⁷ held that if the facts of the matter justify the piercing of the corporate veil, the existence of another remedy should not prevent the court from piercing the corporate veil.²⁷⁸ The court went on further to indicate that the availability of another remedy would only be relevant when policy considerations are deliberated, however it is not of overriding importance.²⁷⁹

corporate veil under section 20(9) has been ‘simplified’.

²⁷⁴ 2013 (3) SA 382 (WC)

²⁷⁵ *Ex Parte Gore supra*

²⁷⁶ *Ex Parte Gore supra* at Para 27. The court herein considered the cases of *Hulse- Reutter v Godde* 2001 (4) Sa 1336 (SCA), *Airport Cold Storage (Pty) Ltd v Ebrahim and Others* 2008 (2) SA 303 (C) and *Al- Khafari & Sons v Pema and others NNO* 2010 (2) SA 360 (W).

²⁷⁷ 1995 (4) SA 790 (A)

²⁷⁸ *Cape Pacific supra* at page 805.

²⁷⁹ *Cape Pacific supra* at page 805.

However, in the case of *Hulse Reutter v Godde*²⁸⁰ the Supreme Court of Appeal held that the remedy of piercing the corporate veil should only be used as a last resort.

The court in *Ex Parte Gore*²⁸¹ stated that the judgment of the *Hulse Reutter v Godde*²⁸² has been misunderstood to imply that the corporate veil should not be pierced if an alternate remedy exists. Judge Binn Ward stated that this is not the effect of the judgment as it would then be in clear contradiction to the *Cape Pacific v Lubner Controlling Investment (Pty) Ltd*²⁸³ case. Rather the judgment goes on further to state that, if the facts of the case provide for an alternate remedy, this is to be considered.²⁸⁴

Having regard to the above, the question that now arises is whether section 20(9) would be used as a remedy of last resort or whether the aggrieved party can use section 20(9) despite there being other remedies available.²⁸⁵

It would appear from *Ex Parte Gore*²⁸⁶ that the section 20(9) could be used regardless of there being other remedies available. The court in *Ex Parte Gore*²⁸⁷ stated that ‘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’.²⁸⁸

It was held that section 20(9) ‘affords a firm, albeit very flexibly defined, basis for the remedy, which will inevitably operate, to erode the foundation of the philosophy that piercing the corporate veil should be approached with *a priori* diffidence.’²⁸⁹ The court in *Ex Parte Gore*²⁹⁰ went on further to state that by having a statutory provision readily

²⁸⁰ 2001 (4) SA 1336 (SCA)

²⁸¹ 2013 (3) SA 382 (WC)

²⁸² 2001 (4) SA 1336 (SCA)

²⁸³ 1995 (4) SA 790 (A)

²⁸⁴ *Ex Parte Gore supra* at Para 28.

²⁸⁵ In the English case of *Prest v Petrodel Resources Limited* 2013 2 AC 413 at para 62, the Supreme Court herein held that the authority to pierce the corporate veil, should only be exercised when, ‘all other, more conventional, remedies have proved to be of no assistance’. It is noted that the court herein adopted a more conservative approach towards the piercing of the corporate veil.

²⁸⁶ 2013 (3) SA 382 (WC)

²⁸⁷ *Ex Parte Gore supra*

²⁸⁸ *Ex Parte Gore supra* at Para 34

²⁸⁹ *Ex Parte Gore supra* at Para 34

²⁹⁰ 2013 (SA) 382 (WC)

available, and when the facts of a case can justify the provision being used, this detracts from the concept that the remedy should be regarded as exceptional, or drastic.²⁹¹

*Ex Parte Gore*²⁹² has established that the language of section 20(9) has been cast in wide terms, ‘which may be indicative of an appreciation by the legislature that the section may be applied widely in varying factual circumstances.’²⁹³ Surely, this will imply that section 20(9) can be relied upon despite there being other remedies available to the parties.

The courts are now provided with a wider discretion when determining whether to pierce the corporate veil, in comparison to the common law approach. Essentially this has the effect of aligning section 20(9) with the dicta expressed by the Appellate Division in *Cape Pacific v Lubner Controlling Investment (Pty) Ltd*²⁹⁴, wherein it was held that the piercing of the corporate veil is not a remedy of last resort.²⁹⁵

4.3.4. Does section 20(9) override the common law?

With the enactment of section 20(9) there have been questions raised as to whether this subsection overrides the common law. It must however be noted, that the common law did not provide a standard set of principles which are to be followed, when piercing the corporate veil. The courts relied upon the facts of each case in arriving at their decision. The court in *Ex Parte Gore*²⁹⁶ stated that there is no apparent express intention, which indicates that the subsection has replaced the common law. The court held that ‘there is no express indication that the intention is not to displace the common law’.²⁹⁷

The court in *Ex Parte Gore*²⁹⁸ held that section 20(9) of the Companies Act could be viewed as supplemental to the common law rather than substitutive.²⁹⁹ It was further

²⁹¹ *Ex Parte Gore supra* at Para 34

²⁹² *Ex Parte Gore supra*

²⁹³ *Ex Parte Gore supra* at Para 32

²⁹⁴ 1995 (4) SA 790 (A)

²⁹⁵ R Cassim ‘Piercing the corporate veil ‘Unconscionable abuse’ under the companies Act 71 of 2008’ *Derebus* August 2012 26.

²⁹⁶ 2013 (3) SA 382 (WC)

²⁹⁷ *Ex Parte Gore supra* at Para 31

²⁹⁸ *Ex Parte Gore supra*

²⁹⁹ *Ex Parte Gore supra* at Para 34

contended that the principles, which were developed at common law, could be used as useful guidelines when interpreting section 20(9). Binns Ward J held that section 20(9) should to be read with subsection 5(1) and (2) and with s7 of the Companies Act, when interpreting this provision.

One can therefore draw the inference that section 20(9) can be seen as the development of the common law, which serves to provide a proper instrument to ensure that the Constitution is given effect to at all times.³⁰⁰

4.4. English position with regards to piercing the corporate veil

The court in *Ex Parte Gore*³⁰¹ considered the circumstances in which the English Courts will pierce the corporate veil. In *Faiza Ben Hashem v Shayid and another*³⁰² and *VTB Capital plc v Nutritek International Corp*³⁰³ were discussed. In the case of *Faiza Ben Hashem v Shayid and another*³⁰⁴ the court herein set out seven principles to determine whether to pierce the corporate veil of a company:

1. ‘Ownership and control of a company are not themselves sufficient to justify piercing the veil;
2. The court cannot pierce the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interests of justice;
3. The corporate veil can only be pierced when there is some impropriety;
4. The company’s involvement in an impropriety will not by itself justify a piercing of its veil: (furthermore) the impropriety must be linked to use of the company structure to avoid or conceal liability;
5. It follows...that if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer and impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing;

³⁰⁰ WT Zindoga Piercing the corporate veil in terms of Gore: Section 20(9) of the new Companies Act 17 of 2008 (unpublished LLM thesis, University of Cape Town) at 49.

³⁰¹ 2013 (3) SA 382 (WC)

³⁰² 2008 EWHC 2380

³⁰³ 2013 2 AC 337

³⁰⁴ 2008 EWHC 2380

6. A company can be a façade for such purposes even though not incorporated with deceptive intent, the relevant question being whether it is being used as a faced at the time of the relevant transaction(s).
7. And the court will pierce the veil only so far as it is necessary to provide a remedy for the particular wrong, which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes”.³⁰⁵

This highlighted that there are two pre-requisites to piercing the corporate veil. The elements are ‘control and impropriety’.³⁰⁶

In *VTB Capital plc v Nutritek International Corp*³⁰⁷ the question raised was ‘if a person used a puppet company to enter into a contract with a third party in order to perpetrate a fraud on that third party the corporate veil may be pierced with the consequence that the puppeteer would be treated as a party to the contract’.³⁰⁸ The UK Supreme Court held that to pierce the corporate veil would amount to an extension to the circumstances in which the corporate veil has been conventionally pierce because it would lead to the person ‘controlling the company being held liable as if he had been co-contracting party with the company concerned to a contract to which the company and not he was a party’.³⁰⁹ The court further indicated that there is a remedy afforded to the Plaintiff for negligent or fraudulent misrepresentation and there was no proof of use of the corporation as a mere facade to conceal the true facts.³¹⁰

Lord Neuberger handed down the judgment and stated that a pertinent statutory provision could arrive at a different conclusion on the question of when the court could pierce the corporate veil.³¹¹

³⁰⁵ *Ex Parte Gore supra* at Para 22. See *Faiza Ben Hashem supra* at Para 159-165.

³⁰⁶ R Becker ‘Disregarding the separate juristic personality of a company: an English law comparison’ (Unpublished LLM thesis, University of Pretoria), 2014 44.

³⁰⁷ (2013) 2 AC 337

³⁰⁸ *VTB Capital plc supra* at Para 24. See Arden DBE ‘Piercing the corporate veil- old metaphor, modern practice’? 2017 (1) JCCL&P 1 at page 8-9.

³⁰⁹ *VTB Capital plc supra* at para 132

³¹⁰ *VTB Capital plc supra* at Para 24.

³¹¹ *VTB Capital plc supra* at Para 130

Lastly in *Prest v Petrodel Resources*³¹² the court confirmed that ‘the corporate veil may only be pierced where a corporate structure has been implemented or used to avoid an existing legal obligation’.³¹³ The court went on further to indicate that a court should not pierce the corporate veil merely because ‘it is thought to be necessary in the interest of justice’.³¹⁴ The court held that piercing of the corporate veil is an extraordinary resort, which should only be used as a last resort. This SCA case has set out the limited circumstances when the corporate veil may be pierced.

The court in *Ex Parte Gore*³¹⁵ stated that it is not clear whether the UK courts would have arrived at the different conclusions, even if there was a statutory provision similar to section 20(9) enacted within their law.

4.5. Piercing the corporate veil of trusts

The Trust Property Control Act 57 of 1988 governs the formation and controlling of a trust. As we have gathered from the previous chapters, when the courts pierce the corporate veil of a company, they in essence hold the shareholders and or directors of a company liable. With regards to trusts, the distinction that arises, is between a ‘sham trusts and going behind the trust or veneer’.³¹⁶ A sham trust exists where there appears to be a validly formed trust, however one of the requirements were not met. Therefore, there is no trust but only the sham of a trust.³¹⁷ The defect must have always been present, as a valid trust cannot become a sham trust.³¹⁸ Where a court chooses to ‘go behind the trust form’, they presume that the trust is validly formed, otherwise there would be no trust to go behind.³¹⁹

³¹² 2013 UKSC 34 114

³¹³ *Prest supra* at page 114

³¹⁴ *Prest supra* at page 114

³¹⁵ 2013 (3) SA 382 (WC)

³¹⁶ I M Shipley, “Trust assets and the dissolution of a marriage: a practical look at invalid trusts, sham trusts, and piercing the veneer of trusts/ going behind the trust form” 2016 SA Merc 508 at 510.

³¹⁷ I M Shipley, “Trust assets and the dissolution of a marriage: a practical look at invalid trusts, sham trusts, and piercing the veneer of trusts/ going behind the trust form” 2016 SA Merc 508 at 511.

³¹⁸ I M Shipley, “Trust assets and the dissolution of a marriage: a practical look at invalid trusts, sham trusts, and piercing the veneer of trusts/ going behind the trust form” 2016 SA Merc 508 at 511.

³¹⁹ I M Shipley, “Trust assets and the dissolution of a marriage: a practical look at invalid trusts, sham trusts, and piercing the veneer of trusts/ going behind the trust form” 2016 SA Merc 508 at 511.

There are different reasons why the courts will choose to disregard the subsistence of a trust. In the case of *Van Zyl N.O and another v Kaye NO and others*³²⁰ the applicants applied to court to ‘go behind’ the trust and to disregard the ‘veneer’, in order to reveal the true situation. The applicants sought relief in respect of a company, which K was the sole director, and which owned certain immovable property. The applicants further applied for an order declaring that the proceeds from the sale of two immovable properties (one in Cape Town Constantia and one in Plettenberg Bay) be treated as part of the insolvent estate³²¹. The applicants sought and order in terms of section 20(9) of the Companies Act 71 of 2008, that the property (Plettenberg) of K be treated as part of the insolvents estate.³²²

With regards to the issue of the trust, the applicants alleged that the trust was a mere alter ego of K, and that the assets of the trust be regarded as that of the K³²³. The applicants contended that K treated the trust property as if it were his own property.

The judgment was handed down by Binn Wards J³²⁴ who held the following in regard to piercing the veneer of a trust:

“ an equitable remedy in the ordinary, rather than technical, sense of the term; one that lends itself to a flexible approach to fairly and justly address the consequence of an unconscionable abuse of the trust form in the given circumstances. It is a remedy that will general be given when the trust form is used in a dishonest or unconscionable manner to evade a liability or avoid an obligation”.³²⁵

The court found that the applicant had failed to prove that the trust was a sham and further that K had used the trust as his alter ego.³²⁶ The court went on further to state that, that even if K administrated the trust without proper regard to his fiduciary duties, there may have been reason to remove K as a trustee.³²⁷ In conclusion the court found that the property in question (Cape Town) is that of the trust and not that of K, and there

³²⁰ 2014 (4) SA 452 (WC)

³²¹ *Van Zyl NO & another supra* at page 455

³²² *Van Zyl NO & another supra* at page 454.

³²³ *Van Zyl NO & another supra* at page 455

³²⁴ Judge Binn Wards was the judge, which handed down judgment in the Ex Parte Gore case.

³²⁵ *Van Zyl NO & another supra* at Para 22

³²⁶ *Van Zyl NO & another supra* at Para 20 & 29

³²⁷ *Van Zyl NO & another supra* at Para 31

is furthermore no evidence to suggest that he used the trust to avoid any obligations, which may be enforceable.³²⁸

Turning to the issue of the Plettenberg Bay property, the court stated that seeing as though the application was brought in terms of section 20(9) of the Companies Act, it ‘implicitly entails an acceptance by the applicants that the property properly vests in the company’.³²⁹ When dealing with the application brought in terms of section 20(9), the court held that the applicant has failed to show that the company was used in a manner that constituted an unconscionable abuse of its corporate personality.³³⁰ There was no evidence before the court to indicate that there were any unconscionable or fraudulent acts, in securing property and other deals relating to the property. The court considered that K was in control of the company and the acquiring of the property. The court stated that the mere fact that a shareholder or director, ‘might have full and effective control over a company affords no basis, by itself, to disregard the separate personality of the company’.³³¹

In arriving at its decision the court had regard to the *Ex Parte Gore*³³² case and which stated therein that section 20(9) of the Companies Act ‘brings about that a remedy can be provided whenever the illegitimate use of the concept of juristic personality adversely, affects a third party in a way that reasonably should not be countenanced’.³³³ Accordingly the courts held that there was no abuse of the separate legal personality and did not grant the application in terms of section 20(9), thus not declaring the property that of K. The property accordingly did not form part of the insolvent estate and remained that of the companies.

4.6. Piercing of the veil of trusts in matrimonial matters

The formation of trusts has become more widespread in our law. Upon marriage spouses choose to place their assets in trusts for protection and estate planning purposes.

³²⁸ *Van Zyl NO & another supra* at Para 33

³²⁹ *Van Zyl NO & another supra* at Para 31

³³⁰ *Van Zyl NO & another supra* at Para 33

³³¹ *Van Zyl NO & another supra* at Para 33

³³² 2013 (3) SA 382 (WC)

³³³ *Van Zyl NO & another supra* at Para 32

However, upon dissolution of the marriage, spouses tend to disagree regarding the distribution of assets including trusts assets. The dissolution of a marriage solely depends on the matrimonial property regime that governs the marriage. The distribution of assets will depend on the matrimonial regime of the spouses, that being marriage in or out of community of property with the inclusion or exclusion of the accrual system.

In *WT v KT*³³⁴ the Supreme Court of Appeal was required to decide upon the issue of whether the assets of a trust should be regarded as forming part of the joint estate of the parties concerned.³³⁵ The parties were married in community of property, and thus assets distributed accordingly. The respondent submitted to the court that the assets of the trust should be treated as part of the joint estate for purposes of distribution.

The SCA considered two issues of appeal:

1. The first issue to be considered, was whether the respondent had been deceived by the appellant as to the nature of the trust, the surrounding benefits and the fact that she was not a beneficiary and was precluded from her claim of 50% of the joint estate.³³⁶ The court found that the trusts were formed prior to the marriage, therefore could not have been formed to deprive the respondent from obtaining any benefits. Further the court contended that the respondent failed to produce any evidence in this regard.³³⁷
2. The second issue for determination was whether the veneer of the trust should be pierced. It was contended that the trust was established as the alter ego of the appellant, by virtue of the fact that the appellant controlled the trust with a view of increasing his personal wealth.³³⁸ The legal principles associated with 'looking behind' the veneer have been transplanted from the 'piercing the corporate veil'.³³⁹ The court held that a spouse 'has no standing to challenge the management of the trust by her husband'.³⁴⁰ It was common cause that the appellant obtained the property prior to the marriage, therefore implying that

³³⁴ 2015 (3) SA 574 (SCA)

³³⁵ *WT supra* at Para 1

³³⁶ *WT supra* at Para

³³⁷ *WT supra* at Para 3

³³⁸ *WT supra* at Para 30

³³⁹ *WT supra* at Para 33

³⁴⁰ *WT supra* at Para 33

there was no financial contribution made from the respondent.³⁴¹ The court held that the court of appeal erred in giving any weight to contributions made by the respondent into the bank accounts controlled by the appellant.³⁴² The fundamental misdirection in this regard, is that the parties had one joint estate, as per their marriage in community property. It was stated that a court dealing with the marital regime of community of property ‘has no comparable discretion as envisaged in s 7(3) of the Divorce Act to include the assets of a third party in the joint estate’.³⁴³ The court therefore upheld the order relating to the assets of the trusts and deemed them to belong to that of the trust.³⁴⁴

Similarly, in *REM v VM*³⁴⁵ the Supreme Court of Appeal was tasked in deciding whether certain assets formed part of the accrual of the appellant’s estate. The parties were married out of community of property with the accrual system. It was alleged that the trusts were the alter ego of the appellant, and that the assets of the trusts were the assets of the appellant.³⁴⁶

The court held in this regard that the appellant administered the trusts with little regard for his fiduciary duties and it warrants his removal as trustee.³⁴⁷ However, there was no evidence to suggest that the appellant transferred personal assets to the trust as if they were assets of the trust, with the fraudulent or dishonest purpose of avoiding his marital obligation.³⁴⁸

It was not established that the transfer of assets to the trust were done with the objective of ‘cloaking them with the form an appearance of assets of the trust, whilst in reality retaining ownership’.³⁴⁹

³⁴¹ *WT supra* at Para 37

³⁴² *WT supra* at Para 38

³⁴³ *WT supra* at Para 35

³⁴⁴ *WT supra* at Para 39

³⁴⁵ 2016 ZASCA 5

³⁴⁶ *REM supra* at Para 3

³⁴⁷ *REM supra* at Para 20

³⁴⁸ *REM supra* at Para 20

³⁴⁹ *REM supra* at Para 20

The SCA held that the trust should not to be taken into account in determining the appellant's estate. The appellant therefore did not deprive the respondent of any interest.

4.7. Overview

It has been contended that the doctrine of piercing orders has been attained from the principles relating to piercing the corporate veil of a company. With regards to a trust, when the veneer is pierced, the assets are deemed to vest personally to the trustees rather than in the estate of the trust.³⁵⁰

In the case of piercing the veil of a company this does not exist. It is submitted that the piercing of the veil of a trust should only be granted with regards to 'particular transactions, and the declaration that a trust is invalid should be held over.³⁵¹

Creditors and companies are not the only ones who seek to pierce the corporate veil of a company.

In the case of *Baloyi v Malherbe and another*³⁵² the applicant was awarded compensation arising from an unfair dismissal. The applicant sought to enforce the arbitration award but was unsuccessful, as the close corporation had deregistered.³⁵³ The applicant contended that the respondent's delay can be construed as a stratagem intended to frustrate the arbitration award and hence is an abuse of the juristic personality.³⁵⁴ The applicant sought to pierce the corporate veil of the company and hold the second respondent personally liable. The court held that there was no evidence of fraudulent or reckless conduct on the part of the respondents or those running the company and hence indicated that the piercing of the corporate veil was not

³⁵⁰ IM Shipley , “ Trust assets and the dissolution of a marriage: a practical look at invalid trusts, sham trusts, and piercing the veneer of trusts/ going behind the trust form” 2016 SA Merc 508 at 531.

³⁵¹ IM Shipley , “ Trust assets and the dissolution of a marriage: a practical look at invalid trusts, sham trusts, and piercing the veneer of trusts/ going behind the trust form” 2016 SA Merc 508 at 531.

³⁵² 2015 (2) ALL SA 20 (GJ)

³⁵³ *Baloyi supra* at Para 7.

³⁵⁴ *Baloyi supra* at Para 9.

warranted.³⁵⁵ It begs the question, whether the application was brought in terms of section 20(9) would the outcome have been different?

Judge Binn Ward when handing down judgment in the *Van Zyl*³⁵⁶ case utilized the principles of piercing the corporate veil. One of the key elements to piercing the corporate veil of a company is that there must be ‘unconscionable abuse’ of the juristic personality.³⁵⁷ Similarly it was held in the *Van Zyl*³⁵⁸ case, that in order for a trust form to be pierced, it must have been used in a dishonest or unconscionable manner in order to evade liability.³⁵⁹ The thread of an act being carried out in an unconscionable manner has now been extended to apply to the law of trusts.

4.8 Conclusion

Section 20(9) of the Companies Act is the first statutory provision, which permits the court to disregard the separate legal juristic personality of a company. With the enactment of the section there is more clarity and certainty given to the doctrine of piercing the corporate veil. The courts are also given wider powers when piercing the corporate veil.

It has been established above that the *Ex Parte Gore*³⁶⁰ case confirmed that the statutory provision does not substitute the common law but should rather be used as supplemental. With the introduction of the statutory provision, the court considered whether the subsection replaced the common law on piercing the corporate veil. The court held that there is no express intention apparent to that effect, however there is also no express indication that the intention is not to displace the common law.³⁶¹ Therefore, the court noted section 20(9) would serve as supplemental to the common law. The

³⁵⁵ *Baloyi supra* at Para 26.

³⁵⁶ 2014 (4) SA 452 (WC)

³⁵⁷ Section 20(9) of the Act.

³⁵⁸ *Van Zyl NO supra*

³⁵⁹ IM Shipley, “ Trust assets and the dissolution of a marriage: a practical look at invalid trusts, sham trusts, and piercing the veneer of trusts/ going behind the trust form” 2016 *SA Merc* 508 at 535.

³⁶⁰ 2013 (3) SA 382 (WC)

³⁶¹ N Schoeman ‘ Piercing the corporate veil under the new Companies Act: Is s20(9) read with s218 a codification of the common law concept or is it further reaching? 2012 June *De Rebus* 31.

courts pierced the veil in terms of section 20(9) of the Act. The core element which the court considered, was the ‘unconscionable abuse’ of the juristic personality.

The common law still serves as useful guidelines when interpreting section 20(9) of the Act, when deciding whether there has been unconscionable abuse of the juristic personality, as the term unconscionable abuse has not been defined in the Act. Further where the requirements of section 20(9) have not been met, the courts can still look to the common law remedy of piercing the veil.³⁶²

The court noted that the language used in section 20(9) is cast in very wide terms and the width of the provision appears to have broadened the bases upon which the courts are prepared to grant relief.³⁶³

It was further established that section 20(9) is not to be considered as a remedy of last resort, as in the instant of the common law. The court may pierce the corporate veil even if there are other remedies available. Further a court may also invoke section 20(9) on its own initiative, irrespective of whether it was sought by the applicant.

In essence, section 20(9) has given the courts wider powers when piercing the corporate veil. A risk factor which is to be considered, is that the courts may apply the doctrine to rigidly. The courts will be required to exercise its discretion when piercing the corporate veil, but at the same time, making sure to give effect to the key principle of the separate legal personality of the company.

³⁶² Cassim *et al Contemporary Company Law* 2ed (2012) at 57.

³⁶³ *Ex Parte Gore supra* at Para 32.

CHAPTER 5- CONCLUSION

5.1 INTRODUCTION

It has been established that section 20(9) is the first statutory provision in our law that makes provision for the piercing of the corporate veil.³⁶⁴ Prior to the enactment of this statutory provision, our law regarding piercing of the corporate veil was governed by the common law. In terms of the common law, there were no principles laid down regarding when the corporate veil is to be pierced.³⁶⁵ The court considered each case based on the facts of the matter, which resulted in inconsistency, as the courts at times would apply a strict or firm approach or a more flexible approach.³⁶⁶ The courts when dealing with these cases were required to use their discretion and closely analyse the facts of each matter. The courts at all times were mindful of the concept of the separate legal personality of the company, as the foundation of company law rests on the premise that a company has a separate personality, which is distinct from its members.³⁶⁷

5.2 SIGNIFICANT FEATURES ESTABLISHED IN TERMS OF THE COMMON LAW

At the beginning of this study we considered the concept of the separate legal personality of the company, which was introduced in the case of *Salomon v Salomon*.³⁶⁸ Stemming from the *Salomon v Salomon*³⁶⁹ case, the English courts were forced to consider the separate legal personality of a company. The first case to discuss the notion in South African law was the case of *Dadoo Ltd v Krugersdorp Municipality Council*³⁷⁰, which found that the shareholders were distinct from the company.

³⁶⁴ Cassim *et al Contemporary Company Law* 2ed (2012) at 57.

³⁶⁵ *Cape Pacific v Lubner Controlling Investment (Pty) Ltd* 1995 (4) SA 790 (A). As discussed the court herein provided useful guidelines for the courts to consider when piercing the corporate veil.

³⁶⁶ *Cape Pacific supra* at page 800.

³⁶⁷ Cassim *et al Contemporary Company Law* 2ed (2012) at 31.

³⁶⁸ 1897 AC 22 (HL)

³⁶⁹ 1897 AC 22 (HL)

³⁷⁰ 1920 AD 530 at 550-.

As there was no statutory provision governing the piercing of the corporate veil, the courts were left to deliberate each matter based on its own facts. As such matters which, were previously decided upon, became persuasive for subsequent cases.

In *Botha v Van Niekerk*³⁷¹ the principle of ‘unconscionable injustice’ was established, which was found to occur when the third party suffered ‘unconscionable injustice as a result of the improper conduct of the liable party’.³⁷² However, *Cape Pacific Ltd v Lubner Controlling Investment*³⁷³ held that the test established in *Botha v Van Niekerk*³⁷⁴ was too rigid in its approach and stated that a more flexible approach be determined which is based primarily on the facts of each case.³⁷⁵

Useful guidelines were set out in *Cape Pacific v Lubner Controlling Investment (Pty) Ltd*³⁷⁶ when piercing the corporate veil. The court added that our law does not favour the categorisation approach when dealing with the piercing of the corporate veil, as each case is to be decided on its own facts.³⁷⁷

In the instance where there are elements of ‘fraud, dishonesty and improper conduct the courts are urged to apply a balancing approach against policy consideration to determine, whether the corporate veil should be used’.³⁷⁸ Most importantly, the court herein held that the remedy of piercing the corporate veil may be used even if there are other remedies readily available.

However, in the subsequent case of *Hulse Reutter V Godde*³⁷⁹ the SCA adopted a stricter approach and held that the corporate veil may only be pierced as a last resort. The court aimed in this regard to protect and uphold the separate legal personality of the company. The court went on further to state that the corporate veil would only be

³⁷¹ 1983 (3) SA 513 (W)

³⁷² *Botha supra* at page 515

³⁷³ 1995 (4) SA790 (A)

³⁷⁴ 1983 (3) Sa 513 (W)

³⁷⁵ *Cape Pacific supra* at page 803.

³⁷⁶ 1995 (4) SA 790 (A)

³⁷⁷ Cassim *et al Contemporary Company Law* 2ed (2012) at 43.

³⁷⁸ *Cape Pacific supra* at 804.

³⁷⁹ 2001 (4) SA 1336 (SCA)

pierced if there was an indication of misuse or abuse of the separate legal personality, in which those controlling the company, gained an unfair advantage.³⁸⁰

The cases thereafter followed suit and established that the remedy of piercing the corporate veil was only to be used in ‘exceptional circumstances’.³⁸¹

In terms of the common law, it has been established that the courts in South Africa are hesitant to pierce the corporate veil and are urged to consider the facts of each case, when arriving at its decision.

5.3 SYNOPSIS OF SECTION 20(9) OF THE COMPANIES ACT

The enactment of section 20(9) is welcomed in our law, as there is now a statutory provision, which administers the piercing of the corporate veil. Section 20(9) of the Companies Act permits the courts to disregard the separate legal personality of a company where there has been ‘unconscionable abuse of the juristic personality’. The statutory provision can be seen as the codification of the common law rule of piercing the corporate veil.

The introduction of this statutory provision has created some confusion due to the uncertainties and questions which arise, from the legislature not defining nor providing any guidance on the interpretation of essential terms, which are imperative when considering the provision.

Section 20(9) does not define the term ‘unconscionable abuse’ nor does it indicate the circumstances that constitute an unconscionable abuse. It is also unclear from the statutory provision whether section 20(9) overrides the common law and is to be used as an exceptional remedy of last resort, nor did the legislature define the term ‘interested person’.

The case of *Ex Parte Gore*³⁸² was the first case, to be decided in terms of section 20(9) of the Act. When considering what would constitute an ‘unconscionable abuse’, the

³⁸⁰ *Hulse Reutter supra* at Para 30.

³⁸¹ *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (C) at para 23.

³⁸² 2013 (3) SA 382 (WC)

court noted that the term “ gross abuse” appears in section 65 of the Close Corporation Act, which is worded similarly to section 20(9).³⁸³ The court was left to consider whether the term ‘unconscionable abuse’ would be defined similarly to that of ‘gross abuse’ and further how far would the abuse extend before it can be considered unconscionable.

The court held that the provision of section 65 is closely similar, but not exactly the same as that of section 20(9).³⁸⁴ The language of section 20(9) is cast in wider terms, which can be seen as an appreciation by the legislature, to cast the provision in ‘widely varying factual circumstances’.³⁸⁵ Therefore, the court indicated that a lower level of abuse is required under section 20(9) of the Act in comparison to the section 65 of the Close Corporation Act.³⁸⁶ The court accordingly held that the provision could be used, whenever a third party has been adversely affected by the illegitimate use of the notion of the juristic personality.³⁸⁷

Section 20(9) states that the provision may be invoked upon application by an ‘interested party’. However, the term ‘interested party’ has not been defined in the Act. It is noted the term ‘interested party’ has been given a wider meaning by *Ex Parte Gore*³⁸⁸ than the similarly worded section 65 of the Close Corporation Act. The court held that there should be no ‘mystique’ attached to the definition and that the applicants are to have a ‘direct’ and ‘sufficient interest’ in the relief sought.³⁸⁹ By contrast section 65 of the Close Corporation Act provides for the interested party to have a financial interest.

The Act does not expressly state that the applicant is to have a monetary interest as the words ‘sufficient’ and ‘direct’ suggest that the interest be monetary in nature.³⁹⁰ Further, upon application the court will determine whether the applicant has the

³⁸³ *Ex Parte Gore supra* at Para 27.

³⁸⁴ *Ex Parte Gore supra* at Para 30.

³⁸⁵ *Ex Parte Gore supra* at Para 32.

³⁸⁶ R Cassim ‘Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A new direction’ 2014 (26) *SA Merc* 307 at 312-313.

³⁸⁷ *Ex Parte Gore supra* at Para 34.

³⁸⁸ 2013 (3) SA 382 (WC)

³⁸⁹ *Ex Parte Gore supra* at Para 35.

³⁹⁰ R Cassim ‘Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A new direction’ 2014 (26) *SA Merc* 307 at 335.

necessary locus standi (*capacity*) to bring about the application. The Act makes provision for the court to invoke the use of section 20(9) of its own accord where it deems it necessary.

The court held that section 20(9) of the Companies act does not override the common law, but should be considered in conjunction.³⁹¹ In the instance where the requirements of section 20(9) are not fulfilled, the courts may rely on common law.

Further, the remedy of piercing the corporate veil is no longer an exceptional remedy only to be used as a last resort but can be used when so required.³⁹² In tune with this, section 20(9) provides the courts to grant such a relief even when the applicants have not applied for such. The court may do so on its own accord.

5.4 SUMMARY

Surely, there must be an explanation why the legislature has not defined section 20(9). In terms of the common law the courts were urged to consider the facts of each case to decide whether the corporate veil has been pierced. Perhaps it was the legislatures intention not to define the terms, so as to allow the courts the opportunity to define the term in accordance with the facts before it. In essence, the legislature did not want to take away such power from the courts, as was conferred to the courts in terms of the common law. This also allows for a more flexible approach when interpreting the section.

If one has regard to *Cape Pacific v Lubner Controlling Investment (Pty) Ltd*³⁹³, it is noted that the court indicated that where there are elements of fraud or dishonesty, there must be a ‘balancing approach against policy consideration when piercing the corporate veil’.³⁹⁴ It would appear that section 20(9) is in line with *Cape Pacific*³⁹⁵ case. The common law adopted a ‘conservative approach’ to the piercing of the corporate veil.³⁹⁶ The statutory provision can be said to be line with this ‘conservative approach’, as the

³⁹¹ *Ex Parte Gore supra* at Para 34.

³⁹² *Ex Parte Gore supra* at Para 34.

³⁹³ 1995 (4) SA 790 (A)

³⁹⁴ *Cape Pacific supra* at page 803-804.

³⁹⁵ *Cape Pacific supra*.

³⁹⁶ N Schoeman ‘Piercing the corporate veil under the new Companies Act’ *Derebus* June 2012 10 at 12.

term ‘unconscionable abuse’ has not been defined, which in turn gives the courts the power to determine the abuse in line with the facts before it.

Furthermore, as indicated in *Cape Pacific v Lubner Controlling (Pty) Ltd*³⁹⁷ our law does not have a categorisation approach as this will lead to uncertainties. It can be noted that the failure to define section 20(9) protects the statutory provision from developing a category of abuse, which the courts will need to adhere to, when considering the level of abuse in terms of the ‘unconscionable abuse’. It is also important to note that with the rate in which technology is developing and expanding, surely the level of abuse (cybercrime) and fraud will amplify. Hence, by not defining ‘unconscionable abuse’, the courts are free to consider the abuse as per the facts of the matter and all levels of abuse.

We note that the judge has indicated in *Ex Parte Gore*³⁹⁸ that section 20(9) is similar but not exactly the same to section 65 of the Close Corporation Act, as the level of abuse is different. The court in *Ex Parte Gore*³⁹⁹ applied a much lower level of abuse than its counterpart. Perhaps the legislature imposed a greater level of abuse on a Close Corporation, owing to the size of the entity and the fewer members involved, hence the greater the ability to commit fraud.

Therefore, it is clear that inclusion of section 20(9) was not an oversight, but was the legislature’s intention to have the statutory provision included within our law.⁴⁰⁰ There has been commentary to the effect, that the inclusion of section 20(9) was an afterthought by the legislature as the section was inserted into the Act by way of the Companies Amendment Act 3 of 2011.⁴⁰¹ South Africa is one of the few countries, which have a statutory provision to govern the piercing of the corporate veil. This section can surely not be considered an afterthought on the part of the legislature, given the impact the section will have on the law. Rather it can be construed, that the section was included to provide clarity and simplicity to the courts when piercing the corporate

³⁹⁷ 1995 (4) SA 790 (A)

³⁹⁸ 2013 (3) SA 382 (WC)

³⁹⁹ 2013 (3) SA 382 (WC)

⁴⁰⁰ N Schoeman ‘Piercing the corporate veil under the new Companies Act’ *DeRebus* June 2012 10 at 12.

⁴⁰¹ Siebritz K L Piercing of the corporate veil: A Critical analysis of section 20(9) of the Companies Act 71 of 2008 (Unpublished LLM thesis, University of Cape Town ,2016) at page 44.

veil. Further, the Act has codified the director's duties. The directors have a fiduciary duty to act in the best interest of the company and if they go against this, they will be held personally accountable for their actions. This codification of the directors duties only protects the directors internally and not the creditors who have been wronged.

As noted in previous chapters, the doctrine of piercing the veil extends to trusts as well. The Supreme Court of Appeal (SCA) acknowledged that the principles relating to 'going behind the veneer of a trust' have been uprooted from the company law doctrine of piercing the corporate veil.⁴⁰² Aside from trusts, the courts have used the piercing of the veil doctrine in matrimonial cases. There is commentary to the effect that the courts should treat matrimonial cases differently from other cases, when using this section, as it impacts the fairness of the settlement award.⁴⁰³

The enactment of section 20(9) offers possibilities for further development within the law.⁴⁰⁴ The *Ex Parte Gore*⁴⁰⁵ case was the first case to be decided under this statutory provision and has broadened the basis of which to disregard the separate legal personality of a company. Undoubtedly within time, and as this section is considered and further analysed by the courts, we will have a clearer understanding of the section and the legislature's intention. South Africa can be seen as a front-runner for actually enacting a section to this effect and will surely be considered by foreign jurisdictions. It can therefore be concluded that section 20(9) will present with short term problems however, the objective which it seeks to obtain will prove to be useful in the long run.

⁴⁰² IM Shipley 'Trust assets and the dissolution of a marriage: a practical look at invalid trusts, sham trusts, and piercing the veneers of trusts/ going behind the trust form' 2016 *SA Merc* 508 at 521.
See *WT & others v KT* 2015 (3) SA 574 (SCA) at para 30.

⁴⁰³ DBE Arden 'Piercing the corporate veil- old metaphor, modern practice?' 2017 (1) *JCCL&P* 1 at 15.

⁴⁰⁴ DBE Arden 'Piercing the corporate veil- old metaphor, modern practice?' 2017 (1) *JCCL&P* 1 at 15.

⁴⁰⁵ 2013 (3) SA 382 (WC).

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