



UNIVERSITY *of the*
WESTERN CAPE

**Piercing the corporate veil: A critical analysis of section
20(9) of the Companies Act 71 of 2008**

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DECLARATION

I, **Kim-Leigh Siebritz** declare that ‘Piercing the corporate veil: A critical analysis of section 20(9) of the Companies Act 71 of 2008’, is my work and has not been submitted for any degree or examination in any other University or academic institution. All sources and materials used are duly acknowledged and properly referenced.

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DEDICATION

This work is dedicated to the Glory and Honor of the Lord, Jesus Christ. To whom All Praise, Glory and Honor is due.

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This work would be absolutely impossible without the guidance, wisdom and provision of The Lord, God Almighty. Words fail to express my gratitude. To God the Father, the Son, Jesus Christ and the blessed Holy spirit.

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LIST OF ABBREVIATIONS

Companies Act 2006	Act 2006
Companies Act 71 of 2008	Act
Constitution of the Republic of South Africa, 1996	Constitution
Corporations Act 50 of 2001	Act 2001
Doctrine of piercing the corporate veil	Doctrine
Financial Services Board	FSB
King Financial Holdings	KFH
<i>Locus standi in iudicio</i>	<i>locus standi</i>
Number	No.
Price Waterhouse Coopers	PWC
United Kingdom	UK
United States of America	USA

KEY WORDS AND PHRASES

Companies Act 71 of 2008

Company

Corporate veil

Directors

Doctrine of the piercing of the corporate veil

Limited liability

Separate legal personality

Shareholders

South Africa

United Kingdom

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CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

This study critically analyses section 20(9) of the Companies Act 71 of 2008 (hereinafter 's 20(9)'), against comparable provisions in the legal frameworks of the United Kingdom (hereinafter 'UK'), the United States of America (hereinafter 'USA') and Australia.

The comparison herein will therefore take two stages. Firstly, s 20(9) will be compared with the provisions of the relevant statutes from the comparators of choice. The comparison will be made for the purpose of proposing an improvement to s 20(9). Secondly, s 20(9) will be compared to the doctrine of piercing the corporate veil (hereinafter 'doctrine') at common law.

Furthermore, this chapter expounds on the background and statement of the problem which has been solved by carrying out this research, the justification for conducting this study, the methodology that is employed and finally the research question and sub-inquiries that are tackled throughout the thesis.

1.2 RESEARCH PROBLEM

1.2.1 Background to research

When a company is formed, a metaphorical veil is drawn between the company, its shareholders and its directors (or agents).¹ This veil protects the shareholders and directors from liability where the company commits a wrongful act and from the

¹*Mobile Telephone Networks (Pty) Ltd v National Consumer Commission* (2012) ZANCT 3 Para. 15; *National Union of Metal Workers of South Africa v Lee Electronics (Pty) Ltd and Others* (LAC) (2012) ZALAC 33 Para. 11; Judge S & Moore I *Questions and Answers: Company Law 2014 and 2015* 4 ed (2014) 22; Cassim F (ed), Cassim M & Cassim R (2011) 41 and Hinkston MR, *Wisconsin Lawyer*, Vol 79: 2 'Piercing the corporate veil' available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=79&Issue=2&ArticleID=1133> (accessed on 28 October 2015).

debts incurred by the company.² In principle therefore, the debts of the company are not the debts of the shareholders.³ This protection stems from the concept of a company being a separate legal entity, distinct from its shareholders and agents.⁴

When a decision is made by the court to pierce the corporate veil in terms of the common law, the protection afforded to the shareholders and directors falls away.⁵ This places the focus on the substance of the company, or the controllers of the company⁶ and not on the company itself.⁷ This way, personal liability is attributed to the shareholder(s) or director(s),⁸ in respect of the debt or liability of the company.⁹ This is the common law doctrine of piercing of the corporate veil.¹⁰

The separate legal personalities of companies¹¹ have often been abused.¹² This is because a company (as a juristic and artificial person) only exists in terms of statute.¹³ In *Ebrahim v Airports Cold Storage (Pty) Ltd*,¹⁴ it was held that:

²Tweedle G & Flynn L ‘Piercing the corporate veil: Cape industries and multinational corporate liability for a toxic hazard 1950-2004’ 2007 *Oxford Journals* 270.

³Burrows A (ed) *English Private Law* 3 ed (2013) 126; Cassim F *The Practitioners Guide to the Companies Act 71 of 2008* (2011) 19 (hereinafter Cassim F (2011) and Dignam A *Hicks & Goo’s Cases and Materials on Company Law* 7 ed (2011) 105.

⁴ *Easi Gas (Pty) Limited v Gas Giant CC t/a Independent Gas and Another; In re: Oryx Oil South Africa (Pty) Limited v Gas Giant CC t/a Independent Gas and Another* (2016) ZAGPJHC 73 Para. 27; *Makhwelo v Minister of Safety and Security* (2015) 2 All SA 20 (GJ) Para. 12 (hereinafter Makhwelo (2015)) and *Jetivia SA and another (Appellants) v Bilta (UK) Limited (in liquidation)* (2015) UKSC 23 Para. 65.

⁵ Sjäfjell B & Richardson BJ (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (2015) 137.

⁶ *Flame SA v Freight Bulk Pte. Ltd.* 807 F 3d 572 (2015) 587.

⁷ *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (C) Para. 12 (hereinafter Amlin (2008)) and *Goldfinch Garments CC and Another v The Sheriff of the Court- Newcastle and Another* (2013) ZALCD 21 Para. 29 (hereinafter Goldfinch (2013)).

⁸ *Competition Commission v Delatoy Investments (Pty) Ltd and Others* (2016) ZACT 37 Para. 56; Sutton G *Rules of the Company Road* (2013) 1 and Bendremer FJ ‘Delaware LLCs and veil piercing: limited liability has its limitations’ (2005) 10:2 *Fordham Journal of Corporate & Financial Law* 385.

⁹ French D, Mayson S & Ryan C *Mayson, French & Ryan on Company Law* 30 ed (2013) 128 (hereinafter French D, Mayson S & Ryan C (2013)).

¹⁰ On the converse, there is also a doctrine of reverse piercing, whereby the shareholders in turn seek to hold the company liable, where there has been an abuse of juristic personality by the company. *Al-Kharafi & Sons and Another v Pema and Others* NNO (2008) ZAGPHC 273 Para. 30; *Inkunzi Civils CC v Greater Kokstad Municipality* (2012) ZAKZPHC 54 Para. 22 and *MJ v Wisan* 2016 UT 13 Para. 2.

¹¹ *Ochberg v Commissioner of Inland Revenue* 5 SATC 93 99.

¹² Cassim F (ed), Cassim M & Cassim R *et al* in *Contemporary Company Law* 2 ed (2011) 29 (hereinafter Cassim F (ed), Cassim M & Cassim R (2011)).

‘[I]t is an apposite truism that close corporations and companies are imbued with identity only by virtue of statute. In this sense their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted.’

As a company is only a figment of the law and therefore only exist in terms of statute, it is easy to use the company for ulterior motives by its agents and controllers.¹⁵

A challenge encountered at common law was anticipating the circumstances in which the veil was to be pierced.¹⁶ In terms of the common law, the veil is only to be pierced under exceptional circumstances,¹⁷ where no other remedies are available¹⁸ to the plaintiff or applicant.¹⁹

For the first time in South African law, there is now a statutory basis for the disregarding of the juristic personality of a company in terms of s 20(9)²⁰ akin to the common law doctrine.²¹ This section provides as follows:

‘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—

¹³Naidoo R *An Essential Guide for South African Companies* 2 ed (2009) 39. A company is formed by members subscribing to the memorandum of incorporation and meeting all other requirements of incorporation as stipulated by the relevant statute law. Sime S & Taylor M *Company Law in Practise* 9 ed (2012) 23.

¹⁴ *Ebrahim v Airports Cold Storage (Pty) Ltd* 2009 (1) All SA 330 (SCA) Para. 15 (hereinafter *Ebrahim* (2009)).

¹⁵*Ebrahim* (2009) Para. 15 and Klyachin AA & Spirina TA ‘Piercing the corporate veil through the mechanism of bringing to the subsidiary responsibility in Russia and abroad’ (2013) 28:1 *World Applied Sciences Journal* 98.

¹⁶Lamprecht L ‘Latest thinking on the piercing of the corporate veil’ 2013 *Without Prejudice* 39 (hereinafter Lamprecht L (2013)).

¹⁷*Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) Para.19 (hereinafter *Airport Cold Storage* (2008)).

¹⁸ *Amlin* (2008) Para. 23.

¹⁹ Cassim F (ed), Cassim M & Cassim R (2011) 62.

²⁰ Cassim F (ed), Cassim M & Cassim R (2011) 57 and Stein C & Everingham G *The New Companies Act Unlocked: A Practical Guide* (2011) 374-5.

²¹Cassim F (2011) 25. Botha is of the view that s 20(9) incorporates the common law to some extent into the section. Botha MM ‘Responsibilities of companies towards employees’ (2015) 18:2 *Potchefstroom Electronic Law Journal* 5.

- (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
- (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).’

It is submitted herein that s 20(9) of the Companies Act 71 of 2008 (hereinafter ‘the Act’) is vague and requires appropriate interpretation.²² The following discussion is a brief summary of some of the interpretive issues that will prove to be important when interpreting s 20(9). These issues will be expounded upon in Chapter 4.

Unlike how s 20(8) clarifies the effect of s 20(7) on the common law, it is submitted that the wording of the provision of s 20(9) does not provide proper guidance on the relationship between s 20(9) and the common law. For example, the Act provides in s 20(8) that s 20(7),²³ ‘must be construed concurrently with, and not in substitution for, any relevant common law principle...’ This clearly provides guidance as to how s 20(7) is to be interpreted by the courts. Unfortunately, no such guidance is provided to the judiciary and other law users on how s 20(9) is to be interpreted.²⁴

Section 20(9) provides that an ‘interested person’ may apply²⁵ to invoke s 20(9) as a remedy where the litigant is affected by an unconscionable abuse of juristic personality. The court may also invoke s 20(9), if the invocation of the section is appropriate.²⁶ No definition has been given for the term ‘interested person’, there is

²² Zindoga WT *Piercing of the corporate veil in terms of Gore: Section 20(9) of the new Companies Act 17 of 2008* (Unpublished LL.M thesis, University of Cape Town, 2015) 26 (hereinafter Zindoga WT (2015)).

²³ Section 20(7) of the Companies Act 71 of 2008 (hereinafter Act 71 of 2008) refers to the statutory Turquand rule.

²⁴ *Ex Parte Gore NO and others NNO* (2013) 2 All SA 437 (WCC) Para. 31 (hereinafter *Ex Parte Gore* (2013)).

²⁵Section 20(9) refers to an application procedure, although in *Commissioner for the South African Revenue Service v King and Others* (2005) ZAGPHC 229 259 it was referred to as an action.

²⁶Section 20(9) of Act 71 of 2008.

also no clearly defined scope or delimitation of the term.²⁷ This work is therefore paramount in defining the denotation, scope and delimitation of the term ‘interested person’.

Section 20(9) provides for the disregarding of the juristic personality of a company via a court order.²⁸ At common law, the juristic personality of the company is disregarded or ignored, for the purpose of imputing liability onto the shareholders or directors.²⁹ Once the company is sued and found liable, the liability of the company is placed on the shareholders and/or directors as a consequence of their abuse of the juristic personality of the company.³⁰ It is considered in Chapter 4 how liability will be imputed and upon whom will the liability of the company be placed, in terms of s 20(9), where a court orders that the company is ‘deemed not to be a juristic person’.³¹

In terms of s 20(9), a court may grant any ‘further order’ that it deems fit to give effect to s 20(9) (a). This ‘further order’ is an open-ended concept, it may therefore be any reasonable order as granted by the court to give effect to s 20(9) (a). This thesis will discuss what is meant by the term ‘further order’.

Section 20(9), unlike the common law, gives the court a general discretion to pierce the corporate veil in instances where there has been an ‘unconscionable abuse’ of the juristic personality of a company.³² The term ‘unconscionable abuse’ is undefined in the Act³³ and gives rise to further uncertainty as to the scope of the section. This term is vital to the application of s 20(9). Having said this, consideration will be given to the term ‘unconscionable abuse’, especially in light of the recent *Ex Parte Gore NO and others NNO*³⁴ judgment (hereinafter ‘*Ex Parte Gore*’). A discussion on

²⁷ *Ex Parte Gore* (2013) Para. 35.

²⁸ *Ex Parte Gore* (2013) Para. 1.

²⁹ French D, Mayson S & Ryan C (2013) 128.

³⁰ Cassidy J *Concise Corporations Law* 5 ed (2006) 41.

³¹ Section 20(9) of Act 71 of 2008.

³² Cassim R ‘The legal concept of a company’ in Cassim F (ed), Cassim M & Cassim R *et al Contemporary Company law* 2 ed (2012) 57.

³³ Cassim R ‘Hiding behind the veil’ (2013) 35 *De Rebus* 201 (hereinafter Cassim (2013)).

³⁴ (2013) 2 All SA 437 (WCC).

Ex Parte Gore is paramount as it is the most recent judgement decided upon the basis of s 20(9) and piercing the corporate veil in respect of companies.

If the test for piercing the corporate veil is whether an unconscionable abuse had occurred, it may be deemed as austere. The use of ‘unconscionability’ as a test was rejected as being too strict in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* (hereinafter ‘*Cape Pacific*’).³⁵ Will the use of unconscionability in s 20(9) as interpreted by the court in *Ex Parte Gore* suffer the same fate as in *Cape Pacific*? This question forms part of a pertinent analysis that will be deliberated on in Chapter 4 of this thesis.

1.2.2 Key research question

Whether s 20(9) is a mere statutory restatement of the common law doctrine of piercing the corporate veil or whether the section is a comparable remedy awarded to persons affected by the abuse of juristic personality?

1.2.3 Research objectives or sub-inquiries

Section 20(9) of the Act will be evaluated against the background of the common law, international best practices and academic opinion. The objectives or sub-inquiries are as follows:

- 1.2.3.1 What are the origins of or the policy rationale for the doctrine under South African law?
- 1.2.3.2 What are the international best practices and what can South Africa learn from the selected comparators of choice?
- 1.2.3.3 What is the scope and delimitation of the term ‘interested person’ used by the legislature in s 20(9)?
- 1.2.3.4 Does the use of the ‘unconscionable abuse’ test under the Act as compared to the ‘gross abuse’ test in the Close Corporations Act³⁶ bring better clarity to the law and take the law forward?
- 1.2.3.5 What does the phrase ‘deemed not to be a juristic person’ mean?

³⁵*Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 802 (hereinafter *Cape Pacific* (1995)).

³⁶ Considered in terms of *Airport Cold Storage* (2008).

1.2.3.6 What does the term ‘further order’ entail?

1.3 SIGNIFICANCE OF THE STUDY

The interpretation of the Act will prove to be important in the future, especially since the Act is relatively new. The Act was passed in 2008, however, s 20 (9) was inserted into the Act by way of the Companies Amendment Act 3 of 2011.³⁷ To date, only one case has been decided, in which s 20(9) was interpreted.³⁸ It is hoped that this study will contribute to and enrich South African jurisprudence by looking at other international best practises from the comparators of choice.

It is hoped that the thesis will be a novel contribution to company law by proposing an amendment to s 20(9). This proposed amendment to s 20(9) as found in Chapter 5, borrows from the tools of analysis considered in this study. Chapter 5 highlights the problems pertinent to the issues which are identified in Chapters 1-4, but it solves those problems by way of a well thought-out amendment to s 20(9). Chapter 5 therefore proffers a proposed amendment to s 20(9) as a solution to dealing with the problems that may arise as a consequence of the current challenges with interpreting s 20(9).

1.4 LIMITATIONS OF THE STUDY

The focus of this study is a critical analysis of s 20(9) of the Act, comparable provisions and case law in the UK, the USA and Australia. The study uses the common law as an interpretative aid, as one cannot understand the extent of the research problem without close analysis of the common law.

1.5 RESEARCH METHODOLOGY

Given the purpose of the study, an analytical and comparative research, desktop methodology is appropriate. The methodology adopted in this study involves an analysis of primary and secondary sources of law such as legislation, case law, journal articles, text books and internet sources.

³⁷ In terms of section 13 (d).

³⁸ In *Ex Parte Gore* (2013).

A comparative analysis is employed as borrowing from other jurisdictions³⁹ is beneficial to improving the interpretation and understanding of South African law. The consideration of foreign⁴⁰ and international law⁴¹ is encouraged in so far as it is consistent with the Constitution of the Republic of South Africa, 1996 (hereinafter the ‘Constitution’).⁴² In this instance, the proposed amendment to s 20(9) in Chapter 5 will greatly benefit from the international best practices from the comparators considered in Chapter 3.⁴³ A broad reading of the laws and case law of these established jurisdictions has been of paramount importance in the drafting and interpretation of the amendment to s 20(9) proffered in Chapter 5.

The UK’s laws on piercing the corporate veil will be utilised in the comparative study for the reason that English company law principles have had a long standing relationship with South African company law.⁴⁴ The USA’s legal framework has been used as an example of a liberal and extensive interpretation of the doctrine. The legal framework of Australia has been used to add valuable interpretation to the doctrine, given the precision with which the relevant Australian provisions regarding the piercing of the corporate veil have been drafted. In addition to the reasons provided above, all of the comparators of choice are common law jurisdictions, just like South Africa and for this reason; the comparators are well suited for this study.

³⁹ Section 39(1) (c) of the Constitution of the Republic of South Africa, 1996 (hereinafter Constitution (1996)) and Groppi T & Ponthoreau M (eds) *The Use of Foreign Precedents by Constitutional Judges* (2013) 7.

⁴⁰ The court may consider foreign law in interpreting statutes. Klug H *The Constitution of South Africa: A Contextual Analysis* (2010) 79. Allowing the courts to consider foreign law is unique. Goldsworthy JD (ed) *Interpreting Constitutions: A Comparative Study* (2006) 289.

⁴¹ Section 39(1) (b) of the Constitution (1996). The court must consider International law in interpreting statutes. Mubangizi JC *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2004) 47.

⁴² Section 39(1) of the Constitution (1996); *S v Makwanyane* 1995 (3) SA 391 (CC) Paras. 36-7 and Hugh C, Federico V & Orru R (eds) *The Quest for Constitutionalism: South Africa Since 1994* 2 ed (2016) 186.

⁴³ See 3.2.2 and 3.4.2 in respect of the precision with which the provisions in Australia has been drafted.

⁴⁴ Government Gazette No. 26493 (Notice 1183 of 2004) ‘South African Company Law for the 21st Century: Guidelines for Corporate Law Reform’ 3.

1.6 CONCLUSION

A challenge encountered at common law was anticipating the instances in which the corporate veil will be pierced. For the first time in South Africa there appears to be a section that allows for the piercing of the corporate veil in terms of statute.⁴⁵ Section 20(9) is vague and requires appropriate interpretation and improvement. The question answered in this thesis is: Whether s 20(9) is a mere statutory restatement of the common law doctrine of piercing the corporate veil or whether the section is a comparable remedy awarded to persons affected by the abuse of juristic personality. This research question will be answered by a comparative analysis.

⁴⁵ See 1.2.1.

CHAPTER 2

FOUNDATIONS TO THE CONCEPT OF PIERCING THE CORPORATE VEIL: THE DEVELOPMENTS AT COMMON LAW

2.1 INTRODUCTION

This chapter will define the terms, concepts and doctrines that form the basis of the piercing of the corporate veil at common law. This will be done by looking at the developments of the doctrine through the relevant precedents set in the UK and in South Africa from the classical case of *Salomon v Salomon & Co Ltd* (hereinafter ‘*Salomon*’)¹ to latter cases such as the recent judgement of *Ex Parte Gore*.² Furthermore the chapter also explores the origin of the doctrine under South African law.

The foundation of company law rests on the concept that a company is a separate legal entity.³ Consequently a company has separate legal existence, distinct from its members.⁴ A company is a juristic person.⁵ In the words of Lord Chancellor Baron Thurlow, a corporation cannot be expected to “...have a conscience, when it has no soul to damn and no body to kick...”⁶ Therefore, a juristic person cannot do things that are inherently human-like, making it distinctly different from a natural person.⁷

A company can acquire rights and incur obligations⁸ that are in principle distinct from that of its members.⁹ Juristic persons are also bound to adhere to the Bill of Rights in as far as it is applicable, in terms of s 8(2) and s 8(4) of the Constitution.¹⁰ When a

¹1897 AC 22 (HL).

²*Ex Parte Gore* (2013).

³Cahn A & Donald DC *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (2010) 625.

⁴Coyle B *Risk Awareness and Corporate Governance* 2 ed (2004) 178.

⁵Section 1 of Act 71 of 2008.

⁶Coffee JC ‘No soul to damn: No body to kick: An unscandalized inquiry into the problem of corporate punishment’ (1981) 79:3 *Michigan Law Review* 386 and Gerding E *The Economics of Legal Relationships: Law, Bubbles and Financial Regulation* (2014) 229.

⁷Like getting married *inter alia*. Cassim F (ed), Cassim M & Cassim R (2011) 31.

⁸Cohen J *Veil piercing - A necessary evil? A critical study on the doctrines of limited liability and piercing the corporate veil* (Unpublished LL.M thesis, University of Cape Town, 2006) 4.

⁹Bhatia N & Sethi J *Corporate and Compensation Laws* (2012) 3.

¹⁰Du Bois F *Wille's Principles of South African Law* 9 ed (2007) 396 (hereinafter Du Bois F (2007)).

company is incorporated,¹¹ the legal consequence of such incorporation is that the company is treated as a separate legal entity, apart from its directors, shareholders and employees.¹² It has been correctly stated that a ‘metaphorical veil’¹³ is drawn between the company, its incorporators and shareholders at incorporation.¹⁴

The doctrine has been considered by local and foreign courts for many years.¹⁵ In spite of the longevity of this doctrine, no clear set of principles has emerged to determine its application. It was held in *Cape Pacific* that the law on piercing the corporate veil is ‘far from settled’.¹⁶ It therefore remains difficult to predict when the courts will disregard the separate legal existence of a company.¹⁷

2.2 THE COMPANY AS A SEPARATE LEGAL ENTITY¹⁸

The idea of a company as a separate entity was established in the landmark decision of *Salomon*.¹⁹ Salomon, a trader in leather boots and shoes, sold his business to Salomon & Co. Ltd, which was incorporated by Salomon.²⁰ Salomon held the majority of the shares in the company and divided six shares equally amongst his wife and five children.²¹ Salomon & Co. Ltd eventually collapsed and was subsequently liquidated.²² During the liquidation process, Salomon lodged a claim

Section 8(2): ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’. Section 8(4): ‘A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person’. Cassim F (ed), Cassim M & Cassim R (2011) 32.

¹¹ A company is incorporated in terms of s 13 of Act 71 of 2008.

¹² Affirmed in s 19(1) (b) of Act 71 of 2008 and Cassim F (ed), Cassim M & Cassim R (2011) 35.

¹³ ‘Veil’ - A non-tangible veil which only exists in theory. *Zeman v Quickelberge and Another* (2011) 32 ILJ 453 (LC) Para. 41 and Cassim F (ed), Cassim M & Cassim R (2011) 41.

¹⁴ Cassim F (ed), Cassim M & Cassim R (2011) 31.

¹⁵ Cassim F (ed), Cassim M & Cassim R (2011) 33 and Wu M ‘Piercing China’s corporate veil: Open questions from the new company law’ (2007) 117 *The Yale Law Journal* 329.

¹⁶ *Cape Pacific* (1995) 802-3 and *Esterhuizen v Million-Air Services CC (in liquidation) and Another* (2007) ZALC 14 Para. 16.

¹⁷ Roach L *Company Law Concentrate: Law Revision and Study Guide* 2 ed (2013) 34 (hereinafter Roach L (2013)).

¹⁸ Cassim F (ed), Cassim M & Cassim R (2011) 31.

¹⁹ *Salomon* (1897) 42.

²⁰ *Salomon* (1897) 23.

²¹ *Salomon* (1897) 23-4.

²² *Salomon* (1897) 24.

against Salomon & Co Ltd on the basis of debentures that he held as a secured creditor.²³ The liquidator responded to the claim by stating that Salomon and Salomon & Co. Ltd were one or alternatively, that the company was used as an agent to carry on the business of Salomon.²⁴ The House of Lords held that Salomon & Co. Ltd was not a sham, it was a legal person.²⁵ The House of Lords held furthermore, that once the company as an artificial person has been created, 'it must be treated like any other independent person with its rights and liabilities appropriate to itself.'²⁶ Lord Macnaghten in the *Salomon* case observed that:

'The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.'²⁷

The principle²⁸ which has been adopted from the *Salomon* case, as expressed in the quote from Lord Macnaghten is that a company has a separate legal existence, quite distinct from its members. This principle was then implemented in the leading South African case of *Dadoo Ltd v Krugersdorp Municipal Council* (hereinafter '*Dadoo*').²⁹ In this case, Law 3 of 1885 of the South African Republic stipulated that only white persons could be owners of immovable property. However, in this case, a company called Dadoo Ltd was registered by two Indians who held all the shares of the company. The company had acquired a stand in Krugersdorp, which was then let

²³ *Salomon* (1897) 24.

²⁴ *Salomon* (1897) 26.

²⁵ *Salomon* (1897) 56.

²⁶ *Salomon* (1897) 30.

²⁷ *Salomon* (1897) 51.

²⁸ Separate legal existence is commonly referred to as the principle of Salomon by numerous authors such as; Bourne N *Principles of Company Law* 3 ed (1998) 11; Roach L (2013) 42 and Rush J & Ottley M *Business Law* (2006) 199. The principle of Salomon is also referred to in numerous cases such as; *Gilford Motor Company v Horne* (1933) Ch 935 (hereinafter *Gilford* (1933)); *Jones v Lipman* (1962) 1 All ER 442; *Quikfund (Australia) Pty Limited v Airmark Consolidators Pty Limited* (2014) FCAFC 70 Para. 126 and *GE Mortgage Solutions Limited v Jane Susan Fassos* (2012) NSWSC 1446 Para. 30 *inter alia*.

²⁹1920 AD 530. See Visser C (ed), Pretorius JT & Sharrock R *et al South African Mercantile and Company Law* 8 ed (2008) 261.

to Dadoo in his personal capacity. The municipal council sought an order to set aside the transfer of the stand to Dadoo Ltd, on the basis that the acquisition of the property was an infringement of Law 3 of 1885. On appeal, it was held that a company has a separate legal existence which is distinct from the members who compose it. For this reason, the property was vested in Dadoo Ltd. The *Dadoo* case is a very important development in South African jurisprudence³⁰ and in the common law as it signifies the adoption of the principle of the *Salomon* into South African law.³¹

2.2.1 Legal consequences of separate legal personality³²

The consequences that attach to the company having a separate legal personality are the following (applicable in this study): (a) limited liability; (b) a company is to sue and to be sued in its own name and (c) the debts and liabilities of the company (except in exceptional circumstances) accrue to the company. Only the consequences of separate legal personality that are relevant to the piercing of the corporate veil and the arguments raised herein will be briefly discussed below.

2.2.1.1 Limited liability³³

The concept of limited liability is a consequence of the principle of separate legal personality.³⁴ Limited liability means that the liability of the shareholders for the debts of the company is limited to the investment that the shareholders made to the company.³⁵ As a consequence of this limited liability, shareholders are in principle not liable for the debts of the company.³⁶ The concept of limited liability only

³⁰ It is also applicable in other jurisdictions such as in Zimbabwe where the case was referred to with agreement from the court in *S v Kuruneri* (2007) ZWHHC 59 67.

³¹ Becker R *Disregarding the separate juristic personality of a company: An English law comparison* (Unpublished LL.M thesis, University of Pretoria, 2014) 17.

³² Cassim F (ed), Cassim M & Cassim R (2011) 35.

³³ Cassim F (ed), Cassim M & Cassim R (2011) 35.

³⁴ Section 19(2) of Act 71 of 2008.

³⁵ Cortenraad WH *The Corporate Paradox: Economic Realities of the Corporate Form of Organisation* (2000) 88 (hereinafter Cortenraad WH (2000)); McLaughlin S *Unlocking Company Law* 3 ed (2015) 110 and Matheson JH 'Why courts pierce: An empirical study of piercing the corporate veil' (2010) 7:1 *Berkeley Business Law Journal* 3.

³⁶ Cassim F (ed), Cassim M & Cassim R (2011) 35 and Vandervoort JK 'Piercing the veil of limited liability companies: The need for a better standard' (2004) 3:1 *Depaul Business & Commercial Law Journal* 53.

accrues to the shareholders and not to the company.³⁷ The company is therefore, in principle, liable for the debt that it incurs.³⁸ This protection afforded to the shareholders in the form of limited liability, was set out in *Airport Cold Storage (Pty) Ltd v Ebrahim* (hereinafter ‘*Airport Cold Storage*’)³⁹ and is supported by s 19(2) of the Act which 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, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise.’⁴⁰

The policy rationale for the concept of limited liability is that it promotes investment⁴¹ by mitigating against the risks that may accrue to the investor⁴² if the company were to suffer a loss or to be held liable for a debt of some sort.⁴³ The concept of limited liability therefore attracts investment⁴⁴ as investors will not have to worry about their other assets⁴⁵ being attacked by creditors in the event that the company plummets or is unable to pay its debts.⁴⁶ The risk of the investor is therefore limited to his investment in the company.⁴⁷

³⁷ Davies PL *Introduction to Company Law* 2 ed (2010) 10 (hereinafter Davies PL (2010)).

³⁸ Cortenraad WH (2000) 88 and Rajak HH ‘Director and officer liability in the zone of Insolvency: A comparative analysis’ (2008) 38 *Potchefstroom Electronic Law Journal* 2.

³⁹ 2008 (2) SA 303 (C).

⁴⁰ Section 19(2) of Act 71 of 2008.

⁴¹ Allen N ‘Reverse piercing of the corporate veil: A straightforward path to justice’ (2012) 16:1 *New York Business Law Journal* 25.

⁴² Joseph S *Corporations and Transnational Human Rights Litigation* (2004) 131 (hereinafter Joseph S (2004)).

⁴³ Obidairo S *Transnational Corruption and Corporations: Regulating Bribery Through Corporate Liability* (2016) 188.

⁴⁴ Research Note: In the Shadow of the Corporate veil: James Hardie and Asbestos Compensation (GN 2004–05 in Parliamentary Library Department of Parliamentary Services in No. 12, 10 August 2004) 3.

⁴⁵ Marion A ‘Piercing the corporate veil’ (2012) 25:5 *Association of Insolvency and Restructuring Advisors Journal* 13.

⁴⁶ Schaffer J (ed) ‘Promoting growth through corporate governance’ 2005 *eJournal USA* 5.

⁴⁷ Forbes W *Behavioural Finance* (2009) 288 and Watt KB ‘Piercing the corporate veil: A need for clarification on Oklahoma’s approach’ (1993) 28 *Tulsa Law Review* 869.

2.2.1.2 A company is to sue and to be sued in its own name⁴⁸

Companies usually have a team of their own legal counsel who litigate on behalf of the company.⁴⁹ In this instance, it is the company that sues its opposition and not the counsel in their personal capacities.⁵⁰ In usual circumstances, the company is sued and not its members, incorporators or owners.⁵¹

2.2.1.3 The debts and liabilities of the company (except in exceptional circumstances) accrue to the company⁵²

The debts and liabilities of a company,⁵³ unless in exceptional circumstances, accrue to the company.⁵⁴ The debts of the company are the company's debts, they do not accrue to the shareholders or directors.⁵⁵ This is however subject to exception as discussed below.

2.2.2 Exceptions to the separate legal personality of companies⁵⁶

The principle that a company has a separate legal personality, distinct from its shareholders is fundamental to company law.⁵⁷ The problem with conferring separate legal personality to a company; is that the company may be used to act for the natural persons who compose it, in an inappropriate manner.⁵⁸ To avoid this abuse of the separate legal personality of a company, the doctrine is an exception to the application of the principle and impedes abuse.⁵⁹

⁴⁸ Sheikh S *A Guide to the Companies Act 2006* (2008) 193 (hereinafter Sheikh S (2008)); Shepherd C & Ridley A *Key Facts, Key Cases: Company Law* (2015) 24 (hereinafter Shepherd C & Ridley A (2015)) and Cassim F (ed), Cassim M & Cassim R (2011) 40.

⁴⁹ Bouchoux *DE Business Organizations for Paralegals* 5 ed (2010) 544. Companies usually have legal counsel that inform the company on its day to day activities, there are instances that arise that may justify the consultation of outside counsel. Tarr GA *Judicial Process and Judicial Policymaking* 6 ed (2013) 103.

⁵⁰ Sheikh S (2008) 193.

⁵¹ Tyagi M & Kumar A *Company Law* (2003) 34.

⁵² Cassim F (ed), Cassim M & Cassim R (2011) 39, 41.

⁵³ *Salomon* (1897) 56.

⁵⁴ Cassim F (ed), Cassim M & Cassim R (2011) 39, 41.

⁵⁵ Company Law Club 'Limited liability' available at <http://www.companylawclub.co.uk/limited-liability> (accessed on 30 October 2015).

⁵⁶ Cassim F (ed), Cassim M & Cassim R (2011) 41.

⁵⁷ Davies PL (2010) 9.

⁵⁸ Davies PL (2010) 9-10. See 1.2.1.

⁵⁹ *Azte INC. v Auto Collection INC.* 124 AD 3d 811 (2015) 812; *Northwest Cascade INC. v Unique Const. INC.* 351 P 3d 172 (2015) Para. 43 and Hannigan B *Company Law* 4 ed (2015) 51.

The doctrine and its application is imprecise to the point of vagueness.⁶⁰ It is therefore less reassuring to investors and participants in the corporate enterprise,⁶¹ who may want to know with certainty what the limitations are on the scope of shareholder liability for the acts of the corporation.⁶² Even though the doctrine is vague and imprecise, it is necessary.⁶³ The corporate veil is pierced in order to accomplish two separate and largely unrelated albeit legitimate policy objectives.⁶⁴ The large body of veil piercing cases, in the view of Macey and Mitts can be explained as judicial efforts to remedy one of the following problems:

‘First, courts pierce the corporate veil as a tool of statutory application, in the sense that piercing the corporate veil is done in order to bring corporate actors’ behaviour into conformity with a particular statutory scheme.... Second, courts also pierce in order to remedy what appears to be fraudulent conduct that does not satisfy the strict elements of common law fraud.’⁶⁵

The instances where a court will pierce the veil are far from settled,⁶⁶ however, there are guidelines which the court will use in order to guide its decision to pierce the corporate veil.⁶⁷ When the decisions in *Botha v Van Niekerk*,⁶⁸ *Cape Pacific*,⁶⁹ and *Hülse-Reutter v Gødde* (hereinafter ‘*Hülse-Reutter*’)⁷⁰ were decided, the courts in South Africa adopted the interpretation and application of the doctrine as it was

⁶⁰ Awoyemi OO *The Anatomy of United States’ Oil Pollution Act of 1990* (2013) 36.

⁶¹ Spasevski D ‘The concept of piercing of the corporate veil in international company law and practice’ (2015) 7:1 *Iustinianus Primus Law Review* 2.

⁶² Macey J & Mitts J ‘Finding order in the morass: The three real justifications for piercing the corporate veil’ 2014 *Cornell Law Review, Forthcoming* 3 (hereinafter Macey J & Mitts J (2014)).

⁶³ *Prest v Petrodel Resources Ltd* (2013) UKSC Para. 27 (hereinafter *Prest* (2013)).

⁶⁴ Macey J & Mitts J (2014) 101.

⁶⁵ Macey J & Mitts J (2014) 4.

⁶⁶ *Cape Pacific* (1995) 802-3; *Esterhuizen v Million-Air Services CC (in liquidation) and Another* (2007) ZALC 14 Para. 16; Pretorius JT *Hahlo’s South African Company Law Through the Cases: A Source Book : A Source Book* 6 ed (2001) 31 and Mthembu LV *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 LL.M thesis, University of Natal, 2002) 4.

⁶⁷ *Makhwelo* (2015) Para. 14 and Blumberg PI, Strasser KA & Georgakopoulos NL *et al The Law of Corporate Groups: Jurisdiction, Practice, and Procedure* (2008) 10-6.

⁶⁸ 1983 (3) SA 1336 (SCA).

⁶⁹ 1995 (4) SA 790 (A).

⁷⁰ 2001 (4) SA 1336 (SCA).

decided in these cases.⁷¹ Seemingly, this interpretation has been replaced by the one advanced in the recent *Ex Parte Gore* judgment (it has done so for the division of the Western Cape High court only, this decision therefore has persuasive authority in other jurisdictions of the courts in South Africa).⁷² These guidelines as assembled by Cassim⁷³ are briefly stated in the subsequent paragraph.

There are six guidelines that were set out in the leading judgments above, these are the following; (1) The courts should not lightly disregard the separate legal existence of a company, but should strive to uphold it wherever it is possible to do so.⁷⁴ (2) A court has no general discretion to simply disregard the company's separate legal personality whenever the court considers it just to do so.⁷⁵ (3) When considering whether to pierce the corporate veil or not, each case must be decided on its own merits.⁷⁶ The test for piercing the corporate veil as applied in *Botha v Van Niekerk*, was whether an 'unconscionable injustice' had occurred.⁷⁷ This test was rejected in *Cape Pacific* as being too strict.⁷⁸ The court in *Cape Pacific* remarked that the courts must instead look at the facts of each case to establish whether the corporate veil must be pierced or not.⁷⁹ (4) In instances of fraud, dishonesty, or improper conduct, the court established the fact that South Africa follows a balancing approach, it was held in *Cape Pacific* that 'the need to preserve the separate corporate identity would in such circumstances have to be balanced against public policy considerations which arise in favour of piercing the corporate veil'.⁸⁰ (5) It is not necessary for a company to have been founded for deceitful purposes for the veil to be pierced, the corporate veil may therefore be pierced if the company was legitimately formed for the purpose of commercial enterprise and then abused later

⁷¹ Henkeman M, Schoeman Tshaka Attorneys 'Piercing the corporate veil' available at <http://www.polity.org.za/article/piercing-the-corporate-veil-2014-04-10> (accessed on 10 November 2015).

⁷² Du Bois F (2007) 79.

⁷³ Cassim F (ed), Cassim M & Cassim R (2011) 48.

⁷⁴ *Cape Pacific* (1995) 803 and *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* (2009) ZAFSHC 67 Para. 12.

⁷⁵ *Cape Pacific* (1995) and *Makhwelo* (2015) Para. 14.

⁷⁶ *Cape Pacific* (1995) 802.

⁷⁷ *Cape Pacific* (1995) 827.

⁷⁸ *Cape Pacific* (1995) 802.

⁷⁹ *Cape Pacific* (1995) 805.

⁸⁰ *Cape Pacific* (1995) 803 and Cassim F (ed), Cassim M & Cassim R (2011) 49.

on.⁸¹ (6) The fact that the plaintiff has an alternative remedy in law prevents the court from piercing the veil, even if the court should consider it prudent to do so, this is because the court is bound to uphold the separate legal existence of the company, wherever this is possible and policy considerations demand for it to be upheld.⁸² The veil ought only to be pierced when it is a matter of last resort⁸³ as confirmed in *Amlin (SA) Pty Ltd v Van Kooij*.⁸⁴

2.3 AN EXAMPLE OF WHERE THE CORPORATE VEIL HAS BEEN PIERCED: *EX PARTE GORE*

Since the Companies Act came into operation in 2008, *Ex Parte Gore* has been the first case to deal with the abuse of the juristic personality of a company in terms of s 20(9).⁸⁵ Whilst the consideration of the term ‘unconscionable’ is not new to South African law,⁸⁶ *Ex Parte Gore* represents an important development of the common law as the interpretation of s 20(9) has been anticipated by the legal and business communities for the consequences that the interpretation of the section may have on the understanding and application of the doctrine of piercing of the corporate veil.⁸⁷ This case is therefore discussed in detail as the abuse of juristic personality, in terms of s 20(9), has become a part of the common law in South Africa as postulated by the decision of *Ex Parte Gore*. The *Ex Parte Gore* case is furthermore discussed here as a prelude to the statutory analysis of s 20(9) to follow in Chapter 4.

In *Ex Parte Gore*, a group of companies⁸⁸ (the King group) faced liquidation.⁸⁹ The liquidators sought to liquidate King Financial Holdings (hereinafter ‘KFH’, the

⁸¹ *Cape Pacific* (1995) 804.

⁸² Cassim F (ed), Cassim M & Cassim R (2011) 49.

⁸³ *Amlin* (2008) Para. 23 and *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) Para. 23 (hereinafter *Hülse-Reutter* (2001)).

⁸⁴ *Amlin* (2008) Para. 23.

⁸⁵ Cassim (2013) 202.

⁸⁶ *Botha v Van Niekerk* 1983 (3) SA 513 (W).

⁸⁷ Van Velden Pike Inc ‘South Africa: Piercing the corporate veil – Easier under the new South African Companies Act?’ available at

<http://www.mondaq.com/southafrica/x/281548/Corporate+Commercial+Law/Piercing+The+Corporate+Veil+Easier+Under+The+New+South+African+Companies+Act> (accessed on 5 October 2015).

⁸⁸ *Ex Parte Gore* (2013) Para. 2.

⁸⁹ *Ex Parte Gore* (2013) Para. 5.

parent of the King group) and the King group (the subsidiaries of KFH).⁹⁰ Three brothers; Adrian, Paul and Stephen (King brothers)⁹¹ were the directors of KFH and of the King group.⁹² The King brothers held the majority of shares in KFH and in the King group.⁹³ The King group and KFH were used by the King brothers as economic mechanisms to conduct business, which involved the provision of financial services to the public.⁹⁴

After questionable business practices were discovered, ranging from illegal share-conversion schemes⁹⁵ to misadministration of funds,⁹⁶ *inter alia*, it transpired after detailed investigations were undertaken by the Financial Services Board (FSB)⁹⁷ and Price Waterhouse Coopers (PWC)⁹⁸ that there was widespread irregularity, in the manner in which the business was conducted. It was furthermore established by the investigators, that the affairs of the King group were handled in a way that constituted a single economic entity.⁹⁹ All of the companies were treated like one entity by the King brothers who transferred the monies of their investors between the different companies in the King group.¹⁰⁰ The judgement was decided upon based on s 20(9) of the Act.¹⁰¹ It was held that the actions of the King brothers constituted an unconscionable abuse of the juristic personalities of the King group.¹⁰² The King group was therefore a sham.¹⁰³ The juristic personalities of the King group was therefore removed in terms of the section.¹⁰⁴ KFH was therefore regarded as the only company, as the juristic personality of KFH was the only one that remained intact.¹⁰⁵

⁹⁰*Ex Parte Gore* (2013) Para. 5.

⁹¹*Ex Parte Gore* (2013) Para. 6.

⁹²*Ex Parte Gore* (2013) Para. 6.

⁹³*Ex Parte Gore* (2013) Para. 6.

⁹⁴*Ex Parte Gore* (2013) Para. 7.

⁹⁵*Ex Parte Gore* (2013) Para. 13.

⁹⁶*Ex Parte Gore* (2013) Para. 12.

⁹⁷*Ex Parte Gore* (2013) Para. 7.

⁹⁸*Ex Parte Gore* (2013) Para. 13.

⁹⁹*Ex Parte Gore* (2013) Para. 15.

¹⁰⁰*Ex Parte Gore* (2013) Para. 7.

¹⁰¹*Ex Parte Gore* (2013) Para. 1.

¹⁰²*Ex Parte Gore* (2013) Para. 33.

¹⁰³*Ex Parte Gore* (2013) Para. 15.

¹⁰⁴*Ex Parte Gore* (2013) Para. 37.

¹⁰⁵*Ex Parte Gore* (2013) Para. 37.

2.4 CONCLUSION

The foundation of company law rests on the concept that a company has separate legal existence quite distinct from its incorporators and members.¹⁰⁶ This concept was first accepted into English law in the *Salomon* case and furthermore adopted by South Africa in the *Dadoo* case.¹⁰⁷ The concept of separate legal existence prevents shareholders and directors from being held personally liable for the debts of the company.¹⁰⁸ This concept is however subject to exception, one such exception being the piercing of the corporate veil.¹⁰⁹ This doctrine has been formed with the purpose of preventing the abuse of juristic personality. Although the formation of the doctrine is justified, it is vague and its application is uncertain.¹¹⁰ The guidelines for the application of the doctrine have been established in the leading judgements of *Botha v Van Niekerk*, *Cape Pacific*, and *Hülse-Reutter*.¹¹¹ These guidelines were strictly followed until the decision in *Ex Parte Gore* was made.¹¹²

¹⁰⁶ See 2.1.

¹⁰⁷ See 2.2.

¹⁰⁸ See 2.2.

¹⁰⁹ See 2.2.

¹¹⁰ See 1.2.1.

¹¹¹ See 2.2.2.

¹¹² See 2.3.

CHAPTER 3

INTERNATIONAL PERSPECTIVES/ COMPARATIVE ANALYSIS

3.1 INTRODUCTION

The concept of a company being a separate legal person is the bedrock¹ or foundation of company law, although it is sometimes described as a fiction.² ‘Most advanced legal systems recognise corporate legal personality while acknowledging some limits to its logical implications.’³ Internationally, there are no uniform principles to determine when the corporate veil will be pierced.⁴ This is significant as piercing the corporate veil is the most litigated issue in corporate law, while its principles are understood the least.⁵ The doctrine’s application in various jurisdictions has therefore historically produced divergent results.⁶

This chapter compares s 20(9) with the chosen comparators in their application of the doctrine. This chapter also critically discusses the shortfalls of s 20(9) and the laws of the respective comparators. The chapter further focuses on what the comparators can learn from each other in their application of the piercing of the corporate veil.

¹ *Prest* (2013) Para. 8; McPherson R & Raja N ‘Empirical study corporate justice: an empirical study of piercing rates and factors courts consider when piercing the corporate veil’ (2010) 45 *Wake Forest Law Review* 932; Xi C ‘Piercing the corporate veil in China: How did we get there?’ (2011) 5 *Journal of Business Law* 413; McLeod W ‘Shareholders’ liability and workers’ rights: piercing the corporate veil under Federal labor law’ (1991) 9:1 *Hofstra Labor and Employment Law Journal* 115 and Karapanço A & Karapanço I ‘The piercing of the corporate veil doctrine: A comparative approach to the piercing of the corporate veil in European Union and Albania’ (2013) 2:9 *Academic Journal of Interdisciplinary Studies* 153.

² *Green v Ziegelman* 873 NW 2d 794 (2015) 804 and Yebisi ET ‘The corporate veil and its relevance to co-operative societies in Nigeria’ (2014) 29 *Journal of Law, Policy and Globalization* 140.

³ *Prest* (2013) Para. 17.

⁴ *Ex Parte Gore* (2013) Para. 19 and Thompson RB ‘Piercing the corporate veil: an empirical study’ (1991) 76:5 *Cornell Law Review* 1036.

⁵ Lee C ‘Resolving nationality planning issue through the application of the doctrine of piercing the corporate veil in international investment arbitration’ (2016) 9:1 *Contemporary Asia Arbitration Journal* 89.

⁶ Şişmangil HE *Creditor Protection in Private Equity-Backed Leveraged Buyout and Recapitalization Practise: A Comparative Analysis of Company and Insolvency Law Mechanisms in England, Germany and Turkey* (2014) 54.

A comparative study is employed in the chapter as it is useful in interpreting legislation. The chosen comparators represent a balance of traditional and non-traditional or liberal approaches to the doctrine and its application. The chosen comparators also represent a balance of common law and legislative based approaches to the doctrine and its application. This mixture of traditional, non-traditional, common law and legislative approaches are extremely useful in attempting to interpret s 20(9). A comparative analysis is also justified by virtue of s 39(1) (c) of the Constitution and s 5(2) of Act⁷ as it makes provision for the use of foreign law in interpreting the Bill of Rights and other legislation. A comparative analysis is furthermore employed in this chapter as it serves to enrich South African jurisprudence. The next section discusses the piercing of the corporate veil in the UK.

3.2 UNITED KINGDOM (UK)

3.2.1 The general approach of the United Kingdom in piercing the corporate veil

The corporate veil in the UK is not pierced very often.⁸ This is due to the orthodox or conservative approach followed by the courts in the UK.⁹ Although the courts in the UK very rarely exercise their discretion to pierce the corporate veil,¹⁰ they will do so if the requirements for piercing the corporate veil have been met.¹¹

⁷ Courts ‘may consider foreign law’.

⁸ Moore M (2006) 180 and Navarro J *Piecing the Corporate Veil in Latin American Jurisprudence: A Comparison with the Anglo-American Method* (2016) 24 (hereinafter Navarro J (2016)).

⁹ Navarro J (2016) 35.

¹⁰ The English Lords are even more weary to pierce the corporate veil after *Prest*. Wibberley J & Di Gioia M ‘Lifting, piercing and sidestepping the corporate veil’ available at <http://www.guildhallchambers.co.uk/uploadedFiles/PiercingtheCorporate%20Veil.JW,MDG.pdf> (accessed on 06 June 2016) 6 (hereinafter Wibberley J & Di Gioia M (2016)).

¹¹ *Prest* Para. 103; Wibberley J & Di Gioia M (2016) 9 and Dean P ‘The corporate veil: when will it be pierced?’ available at [http://www.hfw.com/downloads/Client%20Brief%20-%20Corporate%20Veil%20\[A4%20pp\]%20December%202012.pdf](http://www.hfw.com/downloads/Client%20Brief%20-%20Corporate%20Veil%20[A4%20pp]%20December%202012.pdf) (accessed on 06 June 2016) 2.

3.2.2 The relationship of the common law doctrine and the Companies Act 2006

There are statutory provisions¹² that have the effect of piercing the corporate veil,¹³ but these provisions do not expressly provide for the piercing of the corporate veil as traditionally understood.¹⁴ These statutory provisions do not represent a desire of the English law makers to override the precedent of *Salomon*.¹⁵ The common law is therefore supplemented by the Companies Act 2006 (hereinafter ‘Act 2006’).¹⁶ In this regard, the separate legal personality of the company is not ignored, but the principle of limited liability is overridden or extended by statute law.¹⁷ It is noteworthy to take heed of the following quote by Sealy & Worthington:

‘[N]one of these statutory examples involve *ignoring* the company’s separate personality. Instead, they impose on defaulting directors (and perhaps other individuals) a liability *additional* to that of the company.’¹⁸

In *Dimbleby & Sons Ltd v National Union of Journalists*¹⁹ it was held that any parliamentary intention for the veil to be pierced has to be expressed in clear and unambiguous language.²⁰ Recently, in *Prest v Petrodel Resources Ltd* (hereinafter ‘*Prest*’),²¹ it was asserted that in the absence of a clear and express statutory provision, the veil will only be pierced on the ground of an ‘evasion of existing liability’.²² Lord Sumption in *Prest* held that the term ‘piercing the corporate veil’ is often indiscriminately used to describe a range of situations that do not constitute

¹² Such as in the Companies Act 2006 in the following sections: s 767(3) provides that if a public company acts before obtaining a training certificate, all officers and directors are liable to pay a fine, if the company fails to adhere within 21 days then the directors need to indemnify anyone who has suffered as a loss as a consequence of the non-compliance; s 399, requires parent companies to produce group accounts. Shepherd C & Ridley A (2015) 30; Ridley A *Key Facts Company Law* 4 ed (2011) 23 (hereinafter Ridley A (2011)) and Dignam A & Lowry J *Company Law* 8 ed (2014) 31.

¹³ Ridley A (2011) 20.

¹⁴ The traditional understanding of the application of the doctrine is that the company’s separate legal personality will be ignored. Shepherd C & Ridley A (2015) 26 and Sealy L & Worthington S *Sealy and Worthington’s Cases and Materials in Company Law* 10 ed (2013) 52 (hereinafter Sealy L & Worthington S (2013)).

¹⁵ Navarro J (2016) 38.

¹⁶ Sealy L & Worthington S (2013) 54 and Navarro J (2016) 38.

¹⁷ Navarro J (2016) 38.

¹⁸ Sealy L & Worthington S (2013) 54.

¹⁹ (1984) 1 WLR 427. See Sealy L & Worthington S (2013) 54.

²⁰ Shepherd C & Ridley A (2015) 27.

²¹ (2013) UKSC 34.

²² *Prest* (2013) Para. 59.

the piercing of the corporate veil doctrine.²³ These situations are often situations in which the law attributes ‘the acts or property of a corporation to those who control it, but without disregarding its separate legal personality²⁴ (e.g. joint liability, trust law, equitable remedies...).’²⁵ These situations refer to concealment cases and are discussed below.

3.2.3 *Prest v Petrodel Resources Ltd* : The distinction between cases of ‘Concealment’ and cases of the ‘Evasion of Existing Liabilities’

Prior to the landmark English decision in *Prest*, the grounds for piercing the corporate veil in the UK were based on agency, single economic entity and sham or façade.²⁶ These grounds have been jettisoned and replaced by the court in *Prest*.²⁷ The court placed all previous English veil piercing decisions into the categories²⁸ of ‘concealment’²⁹ or the ‘evasion of existing liabilities’.³⁰ The ‘evasion of existing liabilities’ is therefore the only ground upon which the corporate veil may be pierced in the UK.³¹

In *Prest* it was held that:

‘The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several

²³ Kain B ‘The second opinion: Presto! The UK Supreme Court holds the corporate veil can disappear in *Prest v Petrodel Resources* : A commentary on recent legal developments by the opinions group of McCarthy Tétrault LLP’ available at <http://www.canadianappeals.com/2013/06/17/the-second-opinion-all-in-the-family-the-corporate-veil-returns-to-the-uk-supreme-court/> (accessed on 1 February 2016) (hereinafter Kain B (2016)).

²⁴ *Prest* (2013) Para. 16.

²⁵ Kain B (2016).

²⁶ Ying HY & Ying R ‘Revisiting the Alter-ego exception in corporate veil piecing’ (2015) 27 *Singapore Academy of Law Journal* 177 (hereinafter Ying HY & Ying R (2015)).

²⁷ *Prest* (2013) Para. 28; Navarro J (2016) 47 and Ying HY & Ying R (2015) 177.

²⁸ Tan ZX ‘The new era of corporate veil-piercing: Concealed cracks and evaded issues?’ (2016) 28:1 *Singapore Academy of Law Journal* 209.

²⁹ *Prest* (2013) Para. 28. Lord Neuberger agreed with this distinction between concealment and evasion cases in *Prest* (2013) Paras. 60, 81.

³⁰ *Prest* (2013) Para. 28.

³¹ Ying HY & Ying R (2015) 183 and Kershaw D *Company Law in Context: Text and Materials* 2 ed (2012) 76.

companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant.’³²

Some jurisdictions like the UK, South Africa and Australia³³ differentiate between the court orders of ‘lifting the corporate veil’ and ‘piercing the corporate veil’. These terms are also often used interchangeably³⁴ by some authors and some jurisdictions. In *Ben Hashem v Al Shayif*³⁵ for example, the terms were referred to as ‘synonymous’- I.e. having the same or nearly the same meaning. In English law however, courts lifted the corporate veil in order to ascertain whether the corporate veil had to be pierced and to establish who the real controllers of the company were.³⁶ This was done by adducing evidence to establish if veil piercing was necessary.³⁷ This is referred to by the English courts as lifting the corporate veil or as concealment cases. As concealment cases do not amount to piercing the corporate veil, they have therefore been excluded from this study.³⁸

The evasion of existing liabilities takes place when a company is created or used in order to stand between a person and his obligations or when there is a legal right ‘against the person in control which existed independently of the [companies] involvement’.³⁹ As a consequence of the company having a separate legal existence, the company is used as a tool to evade existing liabilities. The controller therefore evades liability by virtue of the company being under his/her control.⁴⁰

³² *Prest* (2013) Para. 28.

³³ *McMahon v Wilson Curry Pty Ltd* (2013) FCCA 1743 Para. 9; *Refaat v Barry* (2014) VCC 199 Para. 190 ; *Ferreira v Stockinger* (2015) NZHC 2916 Para. 139 and *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254 264.

³⁴ *Davies v Apted* (2013) SASCFC 92 Para. 3.

³⁵ (2009) 1 FLR 115 Para. 150.

³⁶ *Prest* (2013) Para. 60.

³⁷ Mandaraka-Sheppard A ‘New trends in piercing the corporate veil – the conservative versus the liberal approaches’ 2013 *Maritime Business Forum* 6 (hereinafter Mandaraka-Sheppard A (2013)).

³⁸ *VTB Capital plc v Nutritek International Corp* (2013) UKSC 5 Para. 118 (hereinafter *VTB Capital plc* (2013)) and *Ben Hashem v Al Shayif* (2009) 1 FLR 115 Para. 150.

³⁹ Wilson J & Rogers A ‘Piercing the corporate veil: Ramifications of the Supreme Court decision in *Prest v Petrodel Resources Limited*’ available at http://www.11kbw.com/uploads/files/JW_AR_Piercing_the_corporate_veil.pdf (accessed on 1 February 2016) 24.

⁴⁰ *Prest* (2013) Para. 35.

The ground of the ‘evasion of existing liabilities’ is limited as the court may pierce the corporate veil only to remove the advantage which the controlling person would have had, if the veil was not pierced.⁴¹ This is an example of how vastly the South African position in terms of s 20(9) of the Act differs from the position in the UK. Section 20(9) of the Act gives the court the discretion to deem the corporation as not being a juristic person where there has been an unconscionable abuse of juristic personality. In doing so the court may grant any reasonable further order that it deems fit. It is submitted that s 20(9) is not limited or qualified, and is very open-ended to courts interpretation thereof. This contrasts with the limiting approach of the UK, when compared with s 20(9).

The division between concealment and evasion cases may be good law,⁴² in practise however, there may be cases that fall into both categories as held by Lord Sumption in *Prest*.⁴³ These cases are referred to as hybrid cases below.⁴⁴ Strictly speaking, only concealment and evasion cases are regulated and as a result this opens the door to unregulated hybrid cases. It was held in *Prest* that it is dangerous to foreclose all the possible future situations in piercing the corporate veil.⁴⁵ In these instances, a judge may decide not to pierce the corporate veil when the corporate veil should have indeed been pierced. If the distinction is not going to be applied strictly, then the intention of a relaxed application or any intention concerning these hybrid cases has to be made clear by the Law makers in the UK.

The lack of contrary evidence to disprove the distinction made between concealment and evasion cases is another shortfall of the distinction.⁴⁶ Lord Clarke held the following:

⁴¹ *Prest* (2013) Para. 35.

⁴² The distinction has been subject to debate. Duncan S ‘Freezing orders; the difficulties introduced by the decision in *Prest v Petrodel Resources Limited*’ (2014) 98 *Amicus Curiae* 26.

⁴³ *Prest* (2013) Para. 28.

⁴⁴ As held by Lady Hale in *Prest* (2013) Para. 92 and *Ying HY & Ying R* (2015) 188.

⁴⁵ *Prest* (2013) Para. 100.

⁴⁶ *Prest* (2013) Para. 103.

‘Lord Sumption may be right to say that it will only be done in a case of evasion, as opposed to concealment, where it is not necessary. However, this was not a distinction that was discussed in the course of the argument and, to my mind, should not be definitively adopted unless and until the court has heard detailed submissions upon it. I agree with Lord Mance that it is often dangerous to seek to foreclose all possible future situations which may arise and, like him, I would not wish to do so.’⁴⁷

In other words, arguments against the distinction have not been heard.⁴⁸ This distinction may therefore present a false dichotomy, as it excludes the arguments of a third party.⁴⁹ Although the distinction between concealment and evasion cases may be good in a legal sense, Lord Mance held that the distinction is essentially premised on biased and unchallenged information, evidence and opinions.⁵⁰ In agreement with Lord Clarke’s submission in the quote immediately above, a presentation of detailed submissions and arguments before the court should be able to solve uncertainties regarding the application of the distinction and the issue of hybrid cases.

3.3 UNITED STATES OF AMERICA (USA)

Piercing the corporate veil in the USA has been described as – ‘characterised by ambiguity, unpredictability, and even a seeming degree of randomness.’⁵¹ Piercing the corporate veil occurs frequently in the USA as ‘American judges have always felt rather free in overcoming the corporate veil whenever they have thought it appropriate.’⁵² The courts in the USA are therefore more willing to pierce the corporate veil than other jurisdictions.⁵³ Between the periods of 1930 - 1985, there were 2000 cases where the piercing of the corporate veil was considered by the

⁴⁷ *Prest* (2013) Para. 103.

⁴⁸ *Prest* (2013) Para. 103.

⁴⁹ The first party is Lord Sumption, the second party is the combination of the other Lords and the third party is an independent counsel arguing against the distinction of concealment and evasion cases.

⁵⁰ *Prest* (2013) Para. 102.

⁵¹ Joseph S (2004) 130 and Caudill MD ‘Piercing the corporate veil of a New York Not-For-Profit Corporation’ (2003) 8:2 *Fordham Journal of Corporate & Financial Law* 462-3.

⁵² Druta D *The Company Law in the European Dimension: Freedom of Establishment, Competition between Jurisdiction, Protection of Creditors* (2014) 127.

⁵³ Farrar J ‘Piercing the corporate veil in favour of creditors and pooling of groups - A comparative study’ (2013) 25:6 *Bond Law Review* 32.

American courts.⁵⁴ The frequency of the use of the doctrine sparks an interest in the USA's application of the doctrine. This section of the chapter therefore considers whether the liberal approach as followed in the USA is appropriate.

The courts in the USA have developed numerous theories in order to determine when the corporate veil will be pierced.⁵⁵ Amongst these theories are the 'Instrumentality theory', the Alter-ego theory and the 'Identity theory'.⁵⁶ These theories are discussed below.

3.3.1 Theories to determine when to pierce the corporate veil⁵⁷

3.3.1.1 Instrumentality theory

The first theory is the 'Instrumentality theory'. This theory is also referred to as the 'totality of circumstances test'.⁵⁸ The theory consists of three interconnected parts, these are: 'Instrumentality', 'Improper purpose' and 'Proximate causation'.⁵⁹

3.3.1.1.1 Instrumentality

In this theory, the courts consider various aspects and various combinations of aspects⁶⁰ which will assist in determining whether the corporation was used as an instrument⁶¹ to perpetrate the will of the dominant faction⁶² and thereby the theory

⁵⁴ Örn P *Piercing the Corporate Veil– a Law and Economics Analysis* (Unpublished LLM thesis, University of Lund, 2009) 29 (hereinafter Örn P (2009)).

⁵⁵ Clausen N 'Use of the American doctrine of piercing the corporate veil: An argument in Danish business law' (1987) 5:1 *Berkeley Journal of International Law* 51-2.

⁵⁶ Egdahl RH & Walsh DC (eds) *Industry and HMOs: A Natural Alliance* 5 ed (2012) 71 and Örn P (2009) 1.

⁵⁷ Cheng TK 'The corporate veil doctrine revisited: A comparative study of the English and the US corporate veil doctrines' (2011) 34 *Boston College International & Comparative Law Review* 356 (hereinafter Cheng TK (2011)); Örn P (2009) 23 and Cambridge JR 'Piercing the veil of a Michigan limited liability company' 2003 *The Michigan Business Law Journal* 18.

⁵⁸ Cheng TK 'Form and Substance of the Doctrine of Piercing the Corporate Veil' (2010) 80(2) *Mississippi Law Journal* 550.

⁵⁹ Örn P (2009) 24 and *Nicks v Nicks* 774 SE 2d 365 (2015) 373-4.

⁶⁰ *Bridge v New Holland Logansport Inc* 815 F 3d 356 (2016) 364 and Santucci RM *Business Planning for Affordable Housing Developers* 2 ed (2013) 104.

⁶¹ *Meridian North Investments LP v Sondhi* 26 NE 3d 1000 (2015) 1005 and Mitchell RD 'Alter Ego Doctrine and Piercing the Corporate Veil' available at <http://www.mitchell-attorneys.com/legal-articles/alter-ego-doctrine-and-piercing-the-corporate-veil/> (accessed on 11 November 2015) (hereinafter Mitchell RD (2015)).

⁶² *Matter of Agai v Diontech Consulting Inc* 2016 NY Slip Op 2646 2646; *TIAA Global v One Astoria SQ* 127 AD 3d 75 (2015) 90 and *Kain Development LLC v Krause Properties LLC* 130 AD 3d 1229

determines whether the corporate veil should be pierced.⁶³ The various factors which are considered by the court must show that the corporation is operated in such a manner as to further the objectives of the dominant faction.⁶⁴ The aspects that are considered in a particular case are entirely up to the judge who has complete discretion.⁶⁵ The outcomes of the consideration of various aspects or combinations of aspects are therefore quite different, the “altruistic nature and the inherent open-endedness” means that some degree of unpredictability is unavoidable.⁶⁶

Frederick Powell compiled a list of eleven aspects which might point towards the presence of instrumentality.⁶⁷ These are the following:

1. “The parent corporation owns all or most of the capital stock of the subsidiary.
2. The parent and subsidiary corporations have common directors or officers.
3. The parent corporation finances the subsidiary.
4. The parent corporation subscribes to all of the capital stock of the subsidiary or otherwise causes its incorporation.
5. The subsidiary has grossly inadequate capital.
6. The parent corporation pays the salaries and other expenses or losses of the subsidiary.
7. The subsidiary has substantially no business except with the parent corporation, or no assets except the ones conveyed to it by the parent corporation.
8. In the papers of the parent corporation or in the statements of the officers, the subsidiary is described as a department or division of the parent corporation,

(2015) 1235. The ‘dominant faction’ is the dominating or controlling party. *AME. Federated Title Corp. v GFI MGT. Servs.* 126 F Supp 3d 388 (2015) 402.

⁶³ *Conason v Megan Holding LLC* 25 NY 3d 1 (2015) 29 NE 3d 215 6 NYS 3d 206 Para. 19 (hereinafter *Conason* (2015)) and Örn P (2009) 23-5.

⁶⁴ *Board of Mgrs. of Beacon Tower Condominium v 85 ADAMS ST LLC* 136 AD 3d 680 (2016) 683.

⁶⁵ Örn P (2009) 23 and Bainbridge SM ‘Abolishing LLC veil piercing’ (2005) 1 *University of Illinois Law Review* 77.

⁶⁶Smith NDP *Veils, frauds, and fast cars: Looking beyond the fixation on piercing to the illusory protection provided by incorporation* (Unpublished thesis in partial fulfilment of the Bachelor of Laws (Honours), University of Otago, Dunedin, 2013) 12.

⁶⁷ These aspects were originally written concerning the parent- subsidiary relationship, they are currently applied by the courts in the USA to the company and any other dominant faction(s) (in this case shareholders or directors). Örn P (2009) 23.

or its business or financial responsibility is referred to as the parent corporation's own.

9. The parent corporation uses the property of the subsidiary as its own.
10. The directors or executives of the subsidiary do not act independently in the interest of the subsidiary, but take their orders from the parent corporation in the latter's interest.
11. The formal legal requirements of the subsidiary are not observed.”⁶⁸

It is submitted that the possibility of different outcomes, after the consideration of various aspects of the instrumentality theory represents a weakness in this part of the theory. For example, a judge in a particular case before the court, may decide to make a ruling based on points number 1, 2 and 3. Another judge in a different case may decide to base his judgment upon the consideration of points 1, 4 and 6 and so forth. Arguments made for future cases, particularly those based on precedent or analogy will be impacted by the varying outcomes.

Arguments based on precedent⁶⁹ or analogy⁷⁰ are important and prominent features of legal reasoning and legal argument. Precedents are significant as they are binding, especially on lower courts that do not have the authority to change the decision of a higher court.⁷¹ Precedent represents a practical and theoretical authority over the content of the law. For this reason, precedent provides good grounds for believing that the law which was formerly decided upon is good law and that it is the correct

⁶⁸ Fredrick Powell formulated these 11 aspects for part 1 of the instrumentality theory in 1931. See Örn P (2009) 24-5.

⁶⁹ ‘A precedent is the decision of a court (or other adjudicative body) that has a special legal significance. That significance lies in the court's decision being regarded as having *practical*, and not merely *theoretical*, authority over the content of the law.’ Lomand G The Stanford Encyclopedia of Philosophy ‘Precedent and analogy in legal reasoning: First published Tue Jun 20, 2006’ available at <http://plato.stanford.edu/entries/legal-reas-prec/> (accessed on 8 February 2016) (hereinafter Lomand G (2006)). Precedent is closely linked to ‘stare decisis’. ‘Stare decisis’ literally translates as ‘to stand by decided matters’. The phrase ‘stare decisis’ is itself an abbreviation of the Latin phrase *stare decisis et non quieta movere* which translates ‘to stand by decisions and not to disturb settled matters’. Perrel PM ‘Stare decisis and techniques of legal reasoning and legal argument’ available at <http://legalresearch.org/writing-analysis/stare-decisis-techniques/> (accessed on 13 February 2016) (hereinafter Perrel PM (2016)).

⁷⁰ ‘An analogical argument in legal reasoning is an argument that a case should be treated in a certain way because that is the way a *similar* case has been treated.’ Lomand G (2006).

⁷¹ Perrel PM (2016).

application of the law. Precedent also has practical authority as it partly constitutes the law.⁷²

It is desirable to know which aspects have been applied in a certain way, so that the judgement will act as precedent for future cases. Allowing judges to decide between different factors and aspects in determining when instrumentality exists, without any guidelines or limitations may be dangerous for future cases.⁷³ It is submitted in agreement with Gibbons⁷⁴ that the legal system should ideally become less dependent on the memories or judgements of individuals.⁷⁵ The biggest problem as submitted here is that different considerations of aspects produce different results, impacting the application of the law and its development, in a manner that discourages certainty of the law and its application.⁷⁶ Furthermore, to the submission canvassed above, it is possible that an incorrect decision can extend the law far beyond the scope of the acceptable parameters of the doctrine (the appropriate scope is of course determined by ones interpretation of the doctrine). Precedent is important so that the law is consistent,⁷⁷ so that the correct law is applied and to ensure that legal certainty is present throughout cases, regardless of the hierarchies of the courts.⁷⁸ Cases fundamentally contain the law, the law as applied should be certain to some extent, so as to ensure legal certainty⁷⁹ and predictability.⁸⁰

3.3.1.1.2 'Improper purpose'

The second part of the Instrumentality theory is the requirement of 'Improper Purposes'. Here the court will enquire as to whether the dominant faction has used their dominance or influence in order to perpetrate fraud or improper purposes.⁸¹ The reason for this inquiry is because the corporate veil should only be pierced if there is

⁷² Lomand G (2006).

⁷³ Gibbons J (ed) *Language and the Law* (2013) 6.

⁷⁴ Gibbons J (ed) *Language and the Law* (2013).

⁷⁵ Gibbons J (ed) *Language and the Law* (2013) 6.

⁷⁶ *Prest* (2013) Para. 76.

⁷⁷ Farber DA 'The rule of law and the law of precedents' (2006) 90 *Minnesota Law Review* 1189.

⁷⁸ Lomand G (2006).

⁷⁹ Totskyi B 'Legal certainty as a basic principle of the land law of Ukraine' (2014) 21:1 *Jurisprudence* 204.

⁸⁰ Saha TK *Textbook on Legal Methods, Legal Systems & Research* (2010) 107.

⁸¹ Örn P (2009) 26.

some sort of fraud or injury that has taken place.⁸² Although the following list is not a *numerus clausus*, 'Improper purposes' may take the form of:

1. 'Actual fraud.
2. Violation of a statute.
3. Stripping the subsidiary of its assets.
4. Misrepresentation.
5. Estoppel.
6. Torts.
7. Other cases of wrong or injustice.'⁸³

This list represents the instances in which the corporate veil may be pierced in the USA. South African courts adopt a similar approach to that of the USA. The instances in which the corporate veil will be pierced are not clearly defined, instead case law represent instances in which the corporate veil has been pierced in the past.⁸⁴ Other unlisted grounds may therefore be brought before the court, to which the court will decide whether to pierce the corporate veil.

3.3.1.1.3 'Proximate causation'

The third part of the Instrumentality theory is the requirement of 'Proximate causation'.⁸⁵ The plaintiff that seeks to have the corporate veil pierced has to prove that the dominant faction has caused injury to the plaintiff.⁸⁶ In s 20(9) and in the common law doctrine (in South Africa), it is not expressly stated that a plaintiff is required to prove that a dominant faction has caused him/her injuries. Proving injury or damages, is a matter of procedure and practise (implicit in the requirement that the plaintiff has to establish *locus standi* before he may approach the court with a

⁸² Örn P (2009) 26.

⁸³ Cheng TK (2011) 380.

⁸⁴ Cassim F (ed), Cassim M & Cassim R (2011) 43.

⁸⁵ Örn P (2009) 26.

⁸⁶ *Conason* (2015) Para. 19 and Örn P (2009) 26.

matter).⁸⁷ It is submitted that the fact that the plaintiff needs to prove injury is therefore not express but implied in South African law and practise.

3.3.1.2 Alter-ego theory

The Alter-ego theory is the second theory that the courts in the USA use to determine whether to pierce the corporate veil.⁸⁸ The court may disregard the separate legal personality of an entity if it is merely the Alter-ego of another entity or person.⁸⁹ The Alter-ego theory is used as a metaphor to explain the existence of an unacceptably close relationship⁹⁰ between a parent and a subsidiary corporation⁹¹ or a company and a dominant faction.⁹² The parent exercises domination and control⁹³ over the subsidiary⁹⁴ and thereby, the subsidiary is used as an Alter-ego to perpetrate the will of the parent.⁹⁵ In such instances therefore, for the corporate veil to be pierced, the two corporations should not be capable of being considered as separate legal entities.⁹⁶

3.3.1.3 Identity theory

The third theory which is used by the USA to determine whether the corporate veil should be pierced is the 'Identity theory'.⁹⁷ 'The theory states that if the

⁸⁷ *Louw and Others v Richtersveld Agricultural Holdings Company (Pty) Ltd and Others* (2010) ZANCHC 54 Para. 32.

⁸⁸ Örn P (2009) 27.

⁸⁹ *Gajda v Steel Solutions Firm Inc* 39 NE 3d 263 (2015) 272.

⁹⁰ '[T]o such an extent that the corporation is indistinguishable from its shareholders' *Collins v State Farm Ins. Co* 160 So 3d 987 (2015) 997.

⁹¹ The text refers to subsidiary and parent only because this theory is traditionally used in situations which concern parent-subsidiary relationships. However, the theory includes the company and the dominant faction. The company may therefore be the Alter-ego of the dominant faction. Mitchell RD (2015).

⁹² Örn P (2009) 27.

⁹³ *Matter of Edrich v MMAL Corp* 134 AD 3d 935 (2015) 936.

⁹⁴ *US v Vernon* 814 F 3d 1091 (2016) 1102.

⁹⁵ *Bank of America v WS Management Inc* 33 NE 3d 696 (2015) 722.

⁹⁶ Cross FB & Miller RL *The Legal Environment of Business: Text and Cases: Ethical, Regulatory, Global and Corporate Issues* 8 ed (2012) 429 and Mandaraka-Sheppard A (2013) 17.

⁹⁷ This theory was used *Double G.G leasing, LLC v Underwriters at Lloyd* (2008) Conn Super Lexis 1305; *Saphir v Neustadt* 177 Conn 191, 413 A2d 843 (1979) and *Christina Bros Inc v South Windsor Arena Inc* 7 Conn App 648, 509 A2d (1986).

independence of a corporation, due to ‘a unity of interest and ownership’,⁹⁸ no longer exists,⁹⁹ it would ‘defeat justice and equity’¹⁰⁰ if the fiction of a separate identity is recognised and the entity is allowed to avoid liability¹⁰¹ for an operation conducted by the corporation for the benefit of the whole enterprise.¹⁰² In other words, if two or more corporations act as a single entity, it should not be allowed to act as separate entities, if this will allow it to evade liability by stating that it has a separate legal personality.

3.4 AUSTRALIA

In Australia, there are instances in which the corporate veil has been pierced,¹⁰³ but there are no clear guidelines¹⁰⁴ to determine when the corporate veil will be pierced.¹⁰⁵ For the purposes of this thesis, a detailed analysis of the Corporations Act 2001 will be provided as an attempt to inform the interpretation of s 20(9), while a brief mention of the common law position will be stated for completeness.

3.4.1 The common law grounds of piercing the corporate veil

The Australian courts, as with the English courts are reluctant to pierce the corporate veil.¹⁰⁶ Veil piercing has been described as unusual in Australian law.¹⁰⁷ This comes as a consequence of the inconsistency in previous veil piercing judgements, which

⁹⁸ *Trustees of the Chicago Regional Council of Carpenters Pension fund v Joyce bros. Storage Van Co.* 15 C 1584 ND (2016) Section 1; *Lodges at Bear Hollow v Bear Hollow Rest* 344 P 3d 145 (2015) Para. 14 and *Digby Adler Group LLC v Image Rent a Car Inc.* 79 F Supp 3d 1095 (2015) 1106.

⁹⁹ *Deschepper v Midwest Wine and Spirits Inc* 84 F Supp 3d 767 (2015) 781.

¹⁰⁰ *Zaist v Olson* 154 Conn 563, 227 A2d.

¹⁰¹ The aim of the doctrine is to prevent injustice where there has been an abuse of juristic personality. *Angelo Tomasso Inc v Armor Constr. & Paving Co.* 187 Conn 544, 599, 447 A2d 406 (1982).

¹⁰² Örn P (2009) 36.

¹⁰³ It is justified in certain circumstances. *Coshott and Australian Securities and Investments Commission* (2014) AATA 677 Para. 78.

¹⁰⁴ *Commissioner of Land Tax v Theosophical Foundation Pty Ltd* (1966) 67 SR (NSW) 70 75.

¹⁰⁵ Ramsay I & Noakes D ‘Piercing the corporate veil in Australia’ (2001) 19 *Company and Securities Law Journal* 254 (hereinafter Ramsay I & Noakes D (2001)).

¹⁰⁶ *1165 Stud Road v Power & Ors* (No 2) (2015) VSC 735 Para. 83; *Walker v Hungerfords* (1987) 44 SASR 532 559; *Labour Inspector (Macrury) v Cypress Villas Limited* (2015) NZEmpC 157 Para. 69 and Shub O ‘Separate corporate personality: Piercing the corporate veil’ available at www.thefederation.org/documents/04%20-%20Shub.doc (accessed on 11 November 2015) 4 (hereinafter Shub O (2015)).

¹⁰⁷ Beaton-Wells C & Fisse B *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011) 246.

makes it difficult to determine when the veil will be pierced.¹⁰⁸ This inconsistency stems from the fact that there is no common, unifying principle that the courts use to determine when the veil is going to be pierced as stated in *Briggs v James Hardie & Co Pty Ltd*.¹⁰⁹

There are broad categories of common law grounds upon which the corporate veil has been pierced in Australia.¹¹⁰ These grounds are stated as follows by Ramsey and Noakes¹¹¹:

1. 'agency;
2. fraud;
3. sham or façade;
4. group enterprises; and
5. unfairness/ justice.'¹¹²

Ground 1: Agency.¹¹³ The standard contract of agency regulation is dealt with in terms of the common law¹¹⁴ which regulates the standard relationship between the agent, the principal and the third party.¹¹⁵ In terms of the ground of agency, a shareholder, holding a very influential degree of control over the company, uses their control to make the company act as its agent.¹¹⁶ Courts are not prepared to pierce the corporate veil of a company if it merely seems like the company is an

¹⁰⁸ Noakes D *Reform to the Law of Corporate Groups in Australia to Protect Employees* (Unpublished PHD thesis, University of Melbourne, 2000) 259.

¹⁰⁹ (1989) 16 NSWLR 549 567.

¹¹⁰ Ramsay I & Noakes D (2001) 258.

¹¹¹ See Ramsay I & Noakes D (2001) 258-69.

¹¹² Ramsay I & Noakes D (2001) 258.

¹¹³ Agency is when an 'agent acts on behalf of another person, known as the principal, in order to achieve things that the agent finds difficult or inconvenient to do themselves.' The agent therefore binds the principal who is contracted to the third party. Thampapillai D, Tan V & Bozzi C *et al Australian Commercial Law* (2015) 136-7 (hereinafter Thampapillai D, Tan V & Bozzi C (2015)).

¹¹⁴ Thampapillai D, Tan V & Bozzi C (2015) 136.

¹¹⁵ Tomasic R, Bottomley S & McQueen R *Corporations Law in Australia* 2 ed (2002) 215-7. The authority of the principal can be given to the agent via the direct authority as given by the principal to the agent, this is known as actual authority. In the instance of veil piercing cases it is probable that the authority will be implied or ostensible. Implied authority is when the agency agreement is implied by the circumstances of the case (judged objectively), the parties therefore did not agree to the agency agreement. Munday RJC *Agency: Law and Principles* (2010) 49.

¹¹⁶ Shub O (2015) 3.

agent of the shareholder.¹¹⁷ For this ground to succeed there has to be proof of an agency agreement¹¹⁸ or there must be evidence of agency between the shareholder and the company.¹¹⁹ The courts therefore examine the true nature of the circumstances.¹²⁰ This may be seen as a limitation upon the application of the ground of agency.

It is submitted in agreement with this limitation (ie, the need for an agency agreement), that the Australian courts have furthered a controlled and limited application of the doctrine. The limitation makes the ground more controlled and guided when compared with the more liberal American ‘Alter-ego’ theory which is applied without limitation. This limitation however begs the question that if a contract of agency has to be present for the corporate veil to be pierced, then why is the remedy as sought by the creditors or the plaintiffs, not dealt with in terms of the law of agency?¹²¹ Where there is no contract of agency present, the doctrine of ostensible or apparent agency may effectively deal with the ground of agency, as the law may deem agency to arise and therefore estops the principal from adducing evidence to disprove the agency, which in turn makes the principal liable.¹²²

Ground 2: Fraud or improper dealing.¹²³ ‘Fraud’ is a term used to describe when a controller of a company allegedly uses the corporation to evade a legal obligation or to mask the failure to fulfil a legal obligation.¹²⁴ ‘At common law, a court will pierce the corporate veil where a corporate structure is used to perpetrate fraud.’¹²⁵ For fraud to be present, the ground of sham must be present.¹²⁶

¹¹⁷ Shub O (2015) 4.

¹¹⁸ Ridley A (2011) 21.

¹¹⁹ Shub O (2015) 4.

¹²⁰ Shub O (2015) 4.

¹²¹ Gillies P *Business Law* 12 ed (2004) 451-2 and Latimer P *Australian Business Law* 2012 31 ed (2012) 838.

¹²² See 3.4.1, footnote 105.

¹²³ *Patel v Patel* (2014) NZHC 2410 Para. 83.

¹²⁴ In *Gilford* (1933), the court held that the company was “a mere cloak or sham” or “a mere device” to enable the director to breach his restraint of trade agreement. The decision of *Gilford* (1933) was applied in *Jones v Lipman* (1962) 1 All ER 442. See Ramsay I & Noakes D (2001) 261.

¹²⁵ *Ballantyne Suites Pty Ltd v Ballantyne Chambers Pty Ltd* (In Liq) (2014) VSCA 223 Para. 34.

¹²⁶ Shub O (2015) 2.

Ground 3: Sham or Façade. '[T]he Court may lift the corporate veil if there is sufficient evidence that a corporate structure is a sham.'¹²⁷ This ground precedes fraud as the ground of fraud can only succeed if the argument of 'sham' succeeds.¹²⁸ It is submitted that the argument of fraud is therefore circular. A criticism of this argument is that a company may not have been formed with the intention to conceal the non-fulfilment of a legal obligation. Using the company as a sham or façade may have become the aim of its controllers on a later stage. This would mean that the company was incorporated in good faith. If sham or façade, has to succeed in order for the ground of fraud to succeed, then companies may get away with fraud, as the ground of sham or façade did not succeed. The South African position is therefore preferable in this regard, as it is not required that a company has to be formed with a fraudulent purpose in order for the corporate veil to be pierced on the grounds of fraud.¹²⁹

Ground 4: Group enterprise. In terms of this ground, the parent company will be liable for the acts of its subsidiaries,¹³⁰ provided that the subsidiaries operate under circumstances which make them indistinguishable from the parent,¹³¹ in other words the parent controls the subsidiary. The degree of control that the parent exercises over the subsidiary is important.¹³²

Courts are prepared to pierce the corporate veil and make a parent company liable where the subsidiary has committed torts (delict).¹³³ The following factors would indicate that two or more companies were acting in a group enterprise:

'[O]verlapping directors, officers, and employees, obvious influence of control extending from the top of the corporate structure; the extent to which the companies

¹²⁷ *Mrs X v Company B* (2014) NZHC 2126 Para. 96.

¹²⁸ *Shub O* (2015) 2.

¹²⁹ *Airport Cold Storage* (2008) Para. 25 and *Goldfinch* (2013) Para. 30.

¹³⁰ *Australian Competition and Consumer Commission v Yazaki Corporation* (No 2) (2015) FCA 1304 Para. 311.

¹³¹ *Oraka Technologies Limited v Geostel Vision Limited* (2015) NZHC 991 Para. 25 and *Ramsay I & Noakes D* (2001) 264.

¹³² *Keyes M Jurisdiction in International Litigation* (2005) 66.

¹³³ *Shub O* (2015) 6.

were thought to be participating in a common enterprise with mutual advantages; the relationship between the two companies is that of parent and subsidiary; there is an element of partnership or group accounting present; one company in the structure acts as agent for the controlling entity'.¹³⁴

Ground 5: Unfairness/ Injustice.¹³⁵ A party may seek to have the corporate veil pierced if they feel that they have been treated unfairly.¹³⁶ A shareholder may also seek to have the corporate veil pierced, in order to get to the underlying reality of a situation, in order to avoid an unfair outcome.¹³⁷

3.4.2 Corporations Act 50 of 2001 (Cth)

There are many sections¹³⁸ in the Corporations Act 50 of 2001 (hereinafter 'Act 2001')¹³⁹ which are interpreted in a manner that allows for the piercing of the corporate veil. Directors and shareholders¹⁴⁰ may be given personal liability under certain provisions in Act 2001.¹⁴¹ The focus of liability under Act 2001 is placed on directors.¹⁴² The subsequent paragraphs deal with the sections that allow for the implication of piercing the corporate veil in terms of Act 2001.

Section 588G of Act 2001¹⁴³ attributes personal liability to directors if they fail to correctly exercise their fiduciary duties whilst the company trades in insolvent

¹³⁴ Ramsay I & Noakes D (2001) 257.

¹³⁵ Ridley A (2011) 22.

¹³⁶ Segovia MI *The corporate entity and piercing the corporate veil* (Unpublished LL.M thesis, New York University School of Law, 1994) 5; Peter B 'Veil-piercing' (2010) 89 *Texas Law Review* 83 and Davis W & Hizir S 'Dance of the corporate veils: Shareholder liability in the United States of America and in the Republic of Turkey' (2008) 2 *Ankara Bar Review* 83.

¹³⁷ Ramsay I & Noakes D (2001) 269.

¹³⁸ Such as; s 197, s 267, s 292, s 295, s 588FE, s 588V, s 588W. Anderson H *Directors' Personal Liability for Corporate Fault: A Comparative Analysis* (2008) 55, 58 (hereinafter Anderson H (2008)) and Duncan WD *Joint Ventures Law in Australia* 3 ed (2012) 152 (hereinafter Duncan WD (2012)).

¹³⁹ Inns JD 'Behind the metaphor: Lifting the corporate veil available' at <http://jesse-dylan-inns.com/blog/2014/1/19/behind-the-metaphor-lifting-the-corporate-veil> (accessed on 22 March 2016).

¹⁴⁰ *Bluechip Development Corporation (Gladstone) Pty Ltd v Sunstruct Pty Ltd & Ors* (No.2) (2013) FCCA 1898 Para. 99.

¹⁴¹ Duncan WD (2012) 151.

¹⁴² Anderson H (2008) 53.

¹⁴³ 588G (1) and (2) of the Corporations Act 50 of 2001:

'(1) This section applies if:

(a) a person is a director of a company at the time when the company incurs a debt; and

circumstances.¹⁴⁴ This section places the duty on directors not to trade when the company is insolvent.¹⁴⁵ It accordingly acts alongside the fiduciary duties of the directors, in the interests of the company as a whole, in terms of the statutory duty of care and diligence of officers in terms of s 180 of Act 2001.¹⁴⁶ A director may be held personally liable for any debt incurred by the company during the time of the insolvent trading, this liability will not ensue if the director took all reasonable steps to prevent the company from incurring the debt or if the director was justified in failing to participate in the management of the company when the company incurred the debt.¹⁴⁷ The veil will therefore be pierced if the company cannot pay its debts whilst it is insolvent, the insolvency must however accrue to the failure of the directors to correctly exercise their fiduciary duties.¹⁴⁸ The approach of the courts in this regard has been robust as it places an expectation on directors to prevent insolvency.¹⁴⁹ The contravention of the section may result in civil or criminal liability,¹⁵⁰ depending on the circumstances of the breach.¹⁵¹

There are other sections in Act 2001 that allow for piercing the corporate veil.¹⁵² Unfortunately, these sections do not really add to the interpretation of s 20(9). Other sections in the Companies Act 71 of 2008 deal with insolvent trading,¹⁵³ solvency and liquidity¹⁵⁴ and the fiduciary duties of directors.¹⁵⁵ As the personal liability of

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- (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
 - (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and
 - (d) that time is at or after the commencement of this Act. ’
- (2) By failing to prevent the company from incurring the debt, the person contravenes this section if:
- (a) the person is aware at that time that there are such grounds for so suspecting; or
 - (b) a reasonable person in a like position in a company in the company's circumstances would be so aware.’

¹⁴⁴ Duncan WD (2012)151.

¹⁴⁵ Duncan WD (2012)151.

¹⁴⁶ Anderson H (2008) 55.

¹⁴⁷ Duncan WD (2012) 151.

¹⁴⁸ Anderson H (2008) 57.

¹⁴⁹ Anderson H (2008) 57.

¹⁵⁰ Anderson H (2008) 57.

¹⁵¹ Anderson H (2008) 56-7.

¹⁵² See 3.2.2.

¹⁵³ Section 77, read with s 22 of Act 71 of 2008.

¹⁵⁴ Section 4 of Act 71 of 2008.

directors are dealt with in separate sections of the Companies Act 71 of 2008, in addition to that of the piercing of the corporate veil, the sections in Act 2001 is not suitable to inform the interpretation of s 20(9). It is submitted that the layout of sections in the Companies Act 71 of 2008 is preferable as it is more certain and reassuring to directors. Separating the different sections in which personal liability may stem from is easier to understand and adhere to.

It is submitted that the remedy of piercing the corporate veil expressly applies to shareholders and directors in Australian law.¹⁵⁶ Section 20(9) does not expressly state that a director may be liable when the corporate veil is pierced. The broadness of the section however may be inclusive of directors and may therefore ensure in personal liability for directors.¹⁵⁷ The South African position may therefore be preferable as its vagueness may include more people as opposed to the Australian position which expressly includes only shareholders and directors.

Act 2001 expressly includes the actions of shadow directors,¹⁵⁸ whereas in South Africa and in the USA the term 'shadow directors' is unheard of in legislation.¹⁵⁹ It is submitted that the term may be inferred by the application of the common law, or may be included by the application of the term 'prescribed officers'¹⁶⁰ as defined in terms of Regulation 38 of the Companies Regulations 2011.¹⁶¹ Section 20(9) may

¹⁵⁵ Section 75, s 76 and s 77 of Act 71 of 2008 deals with the liability of directors in failing to fulfil their fiduciary duties. Anderson H (2008) 56-7.

¹⁵⁶ Anderson H 'Piercing the veil on corporate groups in Australia: The case for reform' 2009 *Melbourne University Law Review* 333, 343-6.

¹⁵⁷ By virtue of the words 'or of another person specified in the declaration' in terms of s 20(9) (a) of Act 71 of 2008.

¹⁵⁸ Sladen legal 'Shredding the corporate veil: Are you a shadow director?' available at <https://static1.squarespace.com/static/516cccd4e4b0bacecd415c77/t/54bef659e4b0cb3353d5fce3/1421801049063/shredding+the+corporate+veil+are+you+a+shadow+director.pdf> (accessed on 22 March 2016).

¹⁵⁹ The Companies Act 2006, in s 251(1) defines a 'shadow director' as 'a person in accordance with whose directions or instructions the directors of the company are accustomed to act'.

¹⁶⁰ Morajane TCR 'The binding effect of the constitutive documents of companies: the 1978 and 2008 Companies Acts of South Africa' (2010) 13:1 *Potchefstroom Electronic Law Journal* 184 and Cox I 'Who is a prescribed officer' available at <http://www.mondaq.com/southafrica/x/190810/Directors+Officers/Who+Is+A+Prescribed+Officer> (accessed on 11 June 2016).

¹⁶¹ '(1) Despite not being a director of a particular company, a person is a "prescribed officer" of the company for all purposes of the Act if that person - (a) exercises general executive control over and

therefore encompass more categories of persons that may be held liable, due to the fact that there are no categories of persons identified in s 20(9) that may be held liable when s 20(9) is interpreted in a particular instance and applied. Section 20(9) may therefore reasonably be construed as including shadow directors and others not expressly mentioned in the section.

3.5 CONCLUSION

In English Law, the corporate veil is only pierced when there are no other suitable remedies available to correct the abuse of juristic personality.¹⁶² The courts approach the issue of piercing the corporate veil on a case by case basis.¹⁶³ This is further evidenced by the restrictive application of the doctrine in English Law.¹⁶⁴ The court in the leading judgement of *Prest* has firmly established that if the doctrine is to exist, then the circumstances in which the doctrine finds application has to be clear and limited.¹⁶⁵ Further clarification by the courts in the UK are called for, in respect of the distinction between concealment and evasion cases, especially since the piercing of the corporate veil is only dealt with in terms of the common law.¹⁶⁶

Courts in the USA have developed numerous theories to determine when to pierce the corporate veil, the most popular amongst these theories are; the Instrumentality theory, the Alter-ego theory and the Identity theory.¹⁶⁷ The most important feature of the law in the USA regarding the piercing of the corporate veil is the possibility of uncertainties which may arise due to the discretion of judges when applying the theories.¹⁶⁸ The approach of the USA in piercing the corporate veil is therefore not ideal,¹⁶⁹ their interpretation should therefore be avoided by South Africa in its interpretation of s 20(9), especially in light of the fact that South Africa is a common

management of the whole, or a significant portion, of the business and activities of the company; or (b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.’

¹⁶² Mandaraka-Sheppard A (2013) 5.

¹⁶³ *Goldfinch* (2013) Para. 29.

¹⁶⁴ See 3.2.1.

¹⁶⁵ See 3.2.2.

¹⁶⁶ See 3.2.2.

¹⁶⁷ See 3.3.1.

¹⁶⁸ American Realists are of the view that the decision is based on a particular judge and what the judge had for breakfast. Bourne N *Principles of Company Law* 3 ed (1998) 13-4.

¹⁶⁹ See 3.3.1.

law jurisdiction and precedent is an important part of South African law and the development thereof.¹⁷⁰

In Australia, the courts are reluctant to pierce the corporate veil.¹⁷¹ The corporate veil is pierced in terms of the common law and in terms of Act 2001.¹⁷² The common law piercing grounds are; agency, fraud, sham or façade, group enterprises and unfairness/ justice.¹⁷³ With regard to the ground of agency, it is not clear why the Australian courts have chosen to deal with agency matters via the piercing of the corporate veil, this may result in remedy shopping. The ground of fraud is also questionable as it depends on the presence of sham or façade, which may not always be present in a case.¹⁷⁴ Lastly, the vagueness of s 20(9) in respect of who may be held to be liable is not necessarily a bad thing as its interpretation may encompass more persons.¹⁷⁵

It is noteworthy to mention at this point that although s 20(9) is vague and requires improvement, it is the only jurisdiction when compared to the comparators that actually has a section that may be considered as having the effect of the common law doctrine of piercing the corporate veil.¹⁷⁶

¹⁷⁰ Van der Merwe CG & Du Plessis JE (eds) *Introduction to the Law of South Africa* (2004) 43 (hereinafter Van der Merwe CG & Du Plessis JE (eds) (2004)).

¹⁷¹ See 3.4.1.

¹⁷² See 3.4.1.

¹⁷³ See 3.4.2.

¹⁷⁴ See 3.4.1.

¹⁷⁵ See 3.4.2.

¹⁷⁶ The company law in the USA, does not have a specific rule that allows for the application of the doctrine of piercing the corporate veil. Navarro J (2016) 7.

CHAPTER 4

ANALYSIS OF SECTION 20(9) OF THE COMPANIES ACT 71 OF 2008

4.1 INTRODUCTION

Prior to 2008,¹ the courts relied on the common law to pierce the corporate veil.² The previous Companies Act³ did not offer the courts the precise authority to pierce the corporate veil.⁴ The purpose of this chapter is therefore to answer the following question: Whether s 20(9) is a mere statutory restatement of the common law doctrine of piercing the corporate veil or whether the section is a comparable remedy awarded to persons affected by the abuse of juristic personality.

This chapter critically analyses the salient features of s 20(9). The tools of analysis employed in this regard include the method provided for in s 5 of the Act, which takes the purposes of the Act as set out in s 7 into account, the canons of statutory interpretation and s 158 of the Act. International experiences from the comparators of choice are used as an interpretive aid. Lastly, the common law principles of piercing the corporate veil as established in Chapter 2 are also consulted in this chapter.

4.2 THE RELATIONSHIP BETWEEN SECTION 20(9) AND THE COMMON LAW

The legislature has omitted to provide proper guidance on the relationship between s 20(9) and the common law.⁵ In *Ex Parte Gore* the court held that:

‘The introduction of the statutory provision has given rise to some debate on whether the subsection has replaced the common law on piercing the corporate veil.

¹ When Act 71 of 2008 came into operation.

² Mabuena N ‘Disregarding juristic personality; A critical comparison of South African case law and section 20(9) of the Companies Act of 2008’ (Published LL.B research paper, University of South Africa, 2013) 3.

³ 61 of 1973.

⁴ *Zindoga WT* (2015) 7.

⁵ *Ex Parte Gore* (2013) Para. 31.

Certainly there is no express intention apparent to that effect...but, equally, there is no express indication that the intention is not to displace the common law....⁶

The foregoing quotation is clear that there is no express indication to the effect that the common law is replaced with s 20(9), there is also no indication of an intention that s 20(9) is not replaced by the common law.⁷ This may be due to the fact that section 20(9) appears to have been added as an after-thought. Section 20(9) did not appear in the original Companies Act 71 of 2008 until it was inserted into the Act by way of the Companies Amendment Act 3 of 2011.⁸ This submission could explain the omission by the legislature in failing to provide proper guidance on the relationship between s 20(9) and the common law.

In *Ex Parte Gore*, Binns-Ward J expressly brought the common law into consideration when interpreting s 20(9).⁹ It was held in *Ex Parte Gore* that:

‘Having regard to the established predisposition against categorisation in this area of the law and the elusiveness of a convincing definition of the pertinent common law principles, it seems that it would be appropriate to regard s 20(9) of the Companies Act as supplemental to the common law, rather than substitutive.’¹⁰

In *Ex Parte Gore*, Binns-Ward J has decided that the common law is to supplement s 20(9).¹¹ In accordance with the decision in *Ex Parte Gore*, the definition of the term ‘supplement’ is ‘something that completes or makes an addition.’¹² On the other hand, the definition of the term ‘substitute’ is ‘a thing that takes the place or function of another.’¹³ It is submitted in agreement with the *Ex Parte Gore* judgement that the common law doctrine still exists; the section makes an addition to

⁶ *Ex Parte Gore* (2013) Para. 31.

⁷ *Ex Parte Gore* (2013) Para. 31.

⁸ See 1.3.

⁹ *Ex Parte Gore* (2013) Para. 34.

¹⁰ *Ex Parte Gore* (2013) Para. 34.

¹¹ *Ex Parte Gore* (2013) Para. 34.

¹² Merriam Webster Dictionary ‘Supplement’ available at <http://www.merriam-webster.com/dictionary/supplement> (accessed on 24 January 2016).

¹³ Merriam Webster Dictionary ‘Substitute’ available at <http://www.merriam-webster.com/dictionary/substitute> (accessed on 24 January 2016).

the common law and is geared at the development of the law. The possible reasons for this submission are stated in the subsequent paragraphs.

The legislature has clearly indicated the relationship between s 20(7) of the Act and the common law, but has failed to clearly define the relationship between s 20(9) and the common law.¹⁴ Having said this, one could therefore assume as a consequence of this omission, that the legislature would have provided for the replacement of the common law with s 20(9) if it had intended for s 20(9) to be the code of the common law doctrine, thereby replacing the common law with the section. This submission is based on a literal interpretation of s 20(9).¹⁵ However, when taking the context of the surrounding provisions and the purposes of the Act into consideration as per the reading of s 5 in accordance with s 7 of the Act (these sections are further consulted later in the text) based on the text-in-context canon of interpretation, this cannot be said to be the intention of the legislature.¹⁶

The relationship between the UK and its common law is useful in this regard. The common law doctrine in the UK is supplemented by Act 2006.¹⁷ The English courts have elected to leave the issue of piercing the corporate veil to the common law, and to use the Act as supplemental to the common law in the absence of a clear and express statutory provision that provides for the piercing of the corporate veil.¹⁸ Currently, s 20(9) does not clearly or expressly provide for the piercing of the corporate veil. Adopting the approach of the UK will not leave the section moot or redundant as the section will still be viewed from the perspective of the common law. It is submitted that this will further the development of common law doctrine.

¹⁴ This is in line with the text-in-context approach of statutory interpretation. Barak A *Purposive Interpretation in Law* (2005) 111.

¹⁵ This follows a literal interpretation of the omission, whereby the intention of the legislature is to be found in the actual reading, or plain grammatical meaning of the text, unless this reading leads to absurdity or is ambiguous. Du Plessis *Re-Interpretation of Statutes* 2 ed (2002) 93; Botha C *Statutory Interpretation: An Introduction for Students* 4 ed (2005) 47; *Grey v Pearson* (1857) All ER Rep 21 (HL) 36 and *Ensor v Rensco Motors (Pty) Ltd* 1981 (1) SA 815 (AD) 817 H, 818 A.

¹⁶ This refers to considering the text of the provision within the context in which the provision is found, taking into account the purpose of the legal framework as a whole. Barak A *Purposive Interpretation in Law* (2005) 111.

¹⁷ See 3.2.2.

¹⁸ *Prest* (2013) Para. 59.

The common law is still developing, deeming s 20(9) as the code of the common law doctrine at this point could result in the doctrine becoming rigid.

Leaving a principle or doctrine to be dealt with in terms of the common law has advantages as the law remains open to development and is less rigid.¹⁹ On the other hand however, codifying law may bring about certainty and represent the logical development of that area of law.²⁰

According to Wilson and Keyes, the definition of a ‘code’ is:

‘An instrument enacted by the legislature which forms the principal source of law on a particular topic. It aims to codify all leading rules derived from both judge-made and statutory law in a particular field. It has an organizing and indexing role that other statutes do not share.’²¹

In South Africa, it is understood (by some authors)²² that s 20(9) is the code of the common law doctrine. The question that becomes important is: whether s 20(9) is a proper code, when judged against the definition of a code, as per the quote immediately above? Furthermore: can s 20(9) be interpreted without any other interpretation from the common law? Wilson and Keyes further submit that:

‘Codification in common law systems brings its own challenges, in the sense that whereas a code is intended to provide that solution to any legal question related to its content without resort to outside legal sources in a common law system, case law and precedent would always have to be relevant to at least the interpretation of the codes provisions.’²³

¹⁹ Hutchinson AC *Evolution and the Common Law* (2005) 1.

²⁰ Keyes M & Wilson T (eds) *Codifying Contract Law: International and Consumer Law Perspectives* (2014) 5 (hereinafter Keyes M & Wilson T (2014)).

²¹ Keyes M & Wilson T (2014) 4.

²² Schoeman N ‘Piercing the corporate veil under the new Companies Act: Is s 20(9) read with s 218 a codification of the common law concept or is it further reaching?’ 2012 *De Rebus* 26; Zindoga WT (2015) 7 and Schoeman-Louw N ‘Piercing the corporate veil in terms of the new companies act’ available at https://www.findanattorney.co.za/content_piercing-corporate-veil (accessed on 1 June 2016).

²³ Keyes M & Wilson T (2014) 4 and Gibbons J (ed) *Language and the Law* (2013) 6.

When this fact is considered in light of the definition of a code as provided by Wilson and Keyes,²⁴ it is submitted that in the absence of a clear and express statutory provision, as held in *Prest* (the current approach of the UK courts)²⁵ the section should not be considered as the code of the common law doctrine as it is difficult to see how the courts will interpret s 20(9) without the help of the common law.²⁶

The UK has left the matter of piercing the corporate veil to the common law,²⁷ which in turn allows for the doctrine to be developed. At present, *Ex Parte Gore* is only applicable in the Western Cape Division of the High Court.²⁸ Other jurisdictions in South Africa can adopt this approach, by rejecting the notion that s 20(9) is the code of the common law, by allowing the doctrine to develop and mature at common law, it will serve to secure justice in a more improved manner compared to what the current s 20(9) would provide if it were to be adopted as a code of the common law doctrine. The author of this thesis therefore respectfully disagrees with the authors that have held that s 20(9) is the code of the common law doctrine or rather that s 20(9) expressly includes the doctrine of piercing the corporate veil into legislation.²⁹ It is submitted that s 20(9) rather intends to improve the law and to extend the scope of the law in this respect, where there are uncertainties in relation to s 20(9), reference can be made to the common law.³⁰

It is therefore submitted that if s 20(9) is to be regarded as the code of the piercing of the corporate veil, then this needs to be clarified in a clear and unambiguous manner. With that being said, until this position is clarified, it is submitted in agreement with

²⁴ Keyes M & Wilson T (2014) 4.

²⁵ See 3.2.2.

²⁶ *Ex Parte Gore* (2013) Para. 34.

²⁷ Navarro J (2016) 25.

²⁸ Du Bois F (2007) 79.

²⁹ Other authors are of the view that s 20(9) does not codify the common law, but rather supplements and provides a wider scope than the common law. Lamprecht L (2013) 39; Lewis A 'Piercing the corporate veil has been extended' 2013 *Moneyweb's Tax Breaks* 3 and PWC 'Piercing the corporate veil: section 20(9) of the Companies Act 2008' 2013 *Synopsis Tax Today* 2 and 'Whereas the remedy of 'piercing of the corporate veil' previously only existed in the common law, it has now been expressly incorporated into legislation under the Companies Act 71 of 2008' Zindoga WT (2015) 7.

³⁰ *Ex Parte Gore* (2013) Para. 34.

Ex Parte Gore that the common law is to inform the interpretation of s 20(9) by supplementing it. For this reason, it is ameliorate to consider s 20(9) as a provision which is comparable to the common law doctrine. The conclusion drawn at this point is that if s 20(9) cannot and should not be considered as the code of the common law doctrine, then it cannot be said that s 20(9) is a mere restatement of the common law doctrine.

4.3 ANALYSIS OF THE SALIENT FEATURES OF SECTION 20(9)

4.3.1 The scope and delimitation of the term ‘Interested Person’

Any interested person may apply to the court to invoke s 20(9).³¹ The legislature has not defined the term ‘interested person’. The term will therefore be broken down into a two-part discussion, the first discussion will deliberate on the term ‘interested’, the second discussion will elucidate the meaning of the term ‘person’. A conclusion will thereafter be drawn from an amalgamation of the discussions re: ‘interested’ and ‘person’.

The court in *Ex Parte Gore* has not defined the term ‘interested person’ but it has succeeded in providing important interpretive indications in order to define the term.³² The court in *Ex Parte Gore* held the following in respect of the term ‘interested person’:

‘I do not think that any mystique should be attached to it. The standing of any person to seek a remedy in terms of the provision should be determined on the basis of well-established principle; see *Jacobs en ‘n Ander v Waks en Andere* 1992 (1) SA 521 (A), at 533J-534E...’³³

The discussion of the term ‘interested’ follows in the present and subsequent paragraphs. At common law, in accordance with the ‘well-established principle’ as per *Ex Parte Gore*, a litigant needed the necessary capacity to sue alongside a

³¹ Section 20(9) of Act 71 of 2008.

³² *Ex Parte Gore* (2013) Para. 35.

³³ *Ex Parte Gore* (2013) Para. 35.

demonstrable legal interest in the matter at issue, in order to have *locus standi in iudicio* (hereinafter ‘*locus standi*’).³⁴ In *TJ Jonck CC h/a Bothaville Vlesimark v Du Plessis*,³⁵ in relation to the term ‘interest’, it was held that the term ‘interest’ should not be interpreted restrictively, it also shouldn’t be too wide to include an indirect interest.³⁶ In *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* it was held that an applicant must have a direct interest in the matter.³⁷ The well-established principles at common law therefore ‘require a sufficient,³⁸ personal and direct interest in the matter’.³⁹

The court in *Ex Parte Gore* expressly included s 38 of the Constitution (hereinafter ‘s 38’) in the determination of the term ‘interested’ in the following quote:

‘[A]nd, of course, if the facts happen to implicate a right in the Bill of Rights, s 38 of the Constitution.’⁴⁰

Section 38 provides:

‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are — (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 members.’⁴¹

³⁴ Mqingwana B *An analysis of locus standi in public interest litigation with specific reference to Environmental law; a comparative study between the law of South Africa and the law of the United States of America* (Unpublished LL.M thesis, University of Pretoria, 2011) 9 (hereinafter Mqingwana B (2011)). The term ‘*locus standi in iudicio*’ means ‘standing’ in order to litigate. Van der Merwe CG & Du Plessis JE (eds) (2004) 131.

³⁵ 1998(1) SA 971 (O).

³⁶ *TJ Jonck CC h/a Bothaville Vlesimark v Du Plessis* 1998(1) SA 971 (O) 986.

³⁷ 1988 (3) SA 369 (A) 388.

³⁸ *Jacobs en ‘n ander v Waks en andere* 1992 (1) SA 521 (AD) 533J – 34A.

³⁹ Van der Merwe CG & Du Plessis JE (eds) (2004) 132.

⁴⁰ *Ex Parte Gore* (2013) Para. 35.

⁴¹ Section 38 of the Constitution (1996).

Section 38 will only apply to a particular case at issue if one of the rights in the Bill of Rights has been affected.⁴² The following quote by Van der Merwe and Du Plessis, is of pivotal importance in this part of the chapter:

‘In cases not involving the Bill of Rights, however, the far stricter common-law rules continue to apply – and will do so until those rules are brought into line with the Constitution.’⁴³

The fact that a fundamental right in the Bill of Rights has been transgressed is sufficient to grant the applicant *locus standi* in order to litigate (in terms of s 38).⁴⁴ For this reason, s 38 expands ‘*locus standi* far beyond the dispensation of the concept of *locus standi* at common law’.⁴⁵ The interest (in order for an applicant to have *locus standi*) would have to be personal in terms of the common law, whereas, when considering the term ‘interest’ in terms of s 38, the interest need not be personal by virtue of s 38(b), but it may be on behalf of someone else. Furthermore, it need not be personal but the interest may be on behalf of a group of persons by virtue of s 38(c). On the other hand, the interest need not be personal, but it may be in the public interest by virtue of s 38(d). Finally, the interest need not be personal but it may be the interest of an association of persons on behalf of its members by virtue of the application of s 38(e).

It is submitted that the application of s 38 extends the right of access to the courts by others, including other juristic persons that do not necessarily have a personal interest in the piercing of the corporate veil. In the same vein, the extension opens the floodgates to other persons who would not otherwise have had *locus standi* in terms of the common law if it had not been for the inclusion of s 38 into the consideration of the term ‘interested person’ (by virtue of *Ex Parte Gore*). This opens companies up to vexatious and frivolous cases especially since s 38 is to be

⁴² The categories of rights in the Bill of Rights are as in sections 10- 35.

⁴³ Van der Merwe CG & Du Plessis JE (eds) (2004) 132.

⁴⁴ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 37.

⁴⁵ Mqingwana B (2011) 26.

interpreted liberally.⁴⁶ Moreover, the simple fact that a litigant has *locus standi* does not necessitate that the right in the Bill of Rights has actually been offended; it simply means that the applicant has standing in order to litigate.⁴⁷ This should serve as a protective measure to companies against vexatious and frivolous cases.⁴⁸

In addition to extending the categories of persons that may apply to the court as an ‘interested person’ in a s 20(9) matter, the fact that s 38 was brought into the interpretive context in *Ex Parte Gore*⁴⁹ creates the possibility of inequality between those persons that need to apply to invoke s 20(9) in terms of the common law as the rules of *locus standi* in terms of the common law are much stricter than s 38.⁵⁰ It will therefore be more difficult for a person who is applying in terms of the common law as compared to a person who is applying on the basis of an infringement of a fundamental right to which s 38 is applicable. This inequality may be remedied by applying to the courts to hear a s 20(9) matter on the basis of s 157 of the Act, instead of on the basis of the well- established common law principles.

Section 157 of the Act extends the standing of individuals who may apply for relief in terms of the Act as follows:

- ‘(1) When, in terms of this Act, an application can be made to, or a matter can be brought before a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person-
- (a) directly contemplated in the particular provision of this Act;

⁴⁶ Ekeke AC *Access to justice and locus standi before Nigerian courts* (Unpublished LL.M thesis, University of Pretoria, 2014) 92.

⁴⁷ Van der Merwe CG & Du Plessis JE (eds) (2004) 132.

⁴⁸ Where an action is frivolous and vexatious, courts should not hesitate to request security for the respondents costs as held in *Boost Sports Africa (Pty) Ltd v The South African Breweries (Pty) Ltd* (SCA) unreported case no 20156/2014 (1 June 2015). See Chadwick I ‘Companies – in what circumstances will they be required to furnish security for costs?’ (2015) *De Rebus* available at <http://www.derebus.org.za/companies-circumstances-will-required-furnish-security-costs/> (accessed on 06 June 2016).

⁴⁹ *Ex Parte Gore* (2013) Para. 35.

⁵⁰ Van der Merwe CG & Du Plessis JE (eds) (2004) 132.

- (b) acting on behalf of a person contemplated in paragraph (a), who cannot act in their own name;
- (c) acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members; or
- (d) acting in the public interest, with leave of the court.’

It is submitted that s 157 of the Act therefore offers a less stringent admission for determining whether a person has *locus standi* as compared with the common law. Section 157 should have the same effect of an application which is made on the basis of s 38, where an infringement of a fundamental right is concerned. The submission proffered above brings equality in the determination of the term ‘interested person’. The query of determining who an ‘interested person’ is, when determined in accordance with s 157 of the Act will ‘best improve the realisation and enjoyment of rights’.⁵¹

The term ‘person’ is discussed in this paragraph. Section 1 of the Act provides that a ‘person’ includes a ‘juristic person’. The term juristic person as defined in the Act includes a foreign company and ‘a trust, irrespective of whether or not it was established within or outside the Republic’.⁵² A foreign company then in turn includes ‘a profit, or non-profit, entity’ or any entity ‘carrying on business or non-profit activities, as the case may be, within the Republic’.⁵³ It is therefore submitted that ‘interested persons’ for purposes of s 20(9) are:

- (a) Natural person(s) or an association of natural persons;
- (b) Juristic persons;
- (c) Foreign companies;
- (d) Trusts;⁵⁴

⁵¹ Section 158(b) (ii) of Act 71 of 2008.

⁵² Section 1 of Act 71 of 2008.

⁵³ Section 1 of Act 71 of 2008.

⁵⁴ See *Rees and Others v Harris and Others* 2012 (1) SA 583 (GSJ) Para. 17; *B v B and Others* 2016 (1) SA 47 (WCC) Para. 44; *WT and others v KT* 2015 (3) SA 574 (SCA) Para. 31; *Land and Agricultural bank of South Africa v Parker and others* 2005 (2) SA 77 (SCA) 87; *Van der Merwe NO*

- (e) Trust as established in a foreign jurisdiction, or
- (f) Organs of state
- (g) Amongst others.

4.3.2 The meaning of the term ‘Unconscionable Abuse’

4.3.2.1 Definition of ‘Unconscionable’

On the issue of defining the meaning of ‘unconscionable abuse’, the court in *Ex Parte Gore* held the following:

‘The term ‘unconscionable abuse of the juristic personality of a company’ postulates conduct in relation to the formation and use of companies diverse enough to cover all the descriptive terms like ‘sham’, ‘device’, ‘stratagem’ and the like used in that connection in the earlier cases, and - as the current case illustrates - conceivably much more.’⁵⁵

The decision in *Ex Parte Gore* is broad enough to encompass many different expressions in which the doctrine may be cast; it does not however solve the issue of determining the precise meaning of the term ‘unconscionable abuse’. The quote simply tells the reader that the term may encompass all previous terms or descriptive metaphors in which the doctrine has been cast in the past,⁵⁶ and possibly all other terms in which the doctrine may be cast in the future (by virtue of ‘conceivably much more’).⁵⁷ If the discussion of the term as provided for at *Ex Parte Gore* is followed, the term remains without a definitive meaning, the term as per *Ex Parte Gore* is capable of a very broad application and is therefore applicable to varying factual circumstances. This is in itself not problematic.

and *Others v Hydraberg Hydraulics CC and Others* (2010) ZAWCHC 129 Para. 35; *A v A* (2015) ZAGPJHC 259 Para. 59 ;Stander L ‘Piercing the veneer of the trust in the South African trust Law: Liability of trustees of a business trust for fraudulent trading’ (2008) 17: 3 *International Insolvency Review* 165 and Norton Rose Fulbright ‘Piercing of the corporate veil: applicability to trusts?’ available at <http://www.nortonrosefulbright.com/knowledge/publications/77357/piercing-of-the-corporate-veil-applicability-to-trusts> (accessed on 1 June 2016).

⁵⁵ *Ex Parte Gore* (2013) Para. 34.

⁵⁶ Such as sham, device, stratagem. *Ex Parte Gore* (2013) Para. 34 and others such as mask, cloak, device *inter alia*. *VTB Capital plc* (2013) Para. 124.

⁵⁷ *Ex Parte Gore* (2013) Para. 34.

On the other hand, having a term that refers to all the previous descriptive terms would refer to different but also unclear metaphors, causing a return to the morass of common law piercing. Hence the discussion in *Ex Parte Gore* regarding ‘unconscionable abuse’, respectfully, does not provide a definition of the term within the application of s 20(9).⁵⁸ It is submitted that determining the meaning of the term by referring to different, unrelated and unclear expressions or metaphors amounts to circular reasoning. The approach of the UK in the subsequent paragraph supports this submission.

Courts in the UK have warned against the use of metaphors. In *VTB v Nutritek International Corp*,⁵⁹ the court warned against the use of metaphors in law as it may lead to decisions made on the basis of morality or the sense of justice instead of decisions made based on law.⁶⁰ The use of metaphors may also lead to confusion and uncertainty.⁶¹ These metaphors are encompassed in the far reaching scope of the discussion in *Ex Parte Gore* regarding the term ‘unconscionable abuse’. The court in *VTB v Nutritek International Corp* held that:

...“façade’, ‘sham’, ‘mask’, ‘cloak’, and ‘device’ and stated that while such words may be useful metaphors such pejorative expressions are often dangerous, as they risk assisting moral indignation to triumph over legal principle, and while they may enable a court to arrive at a result which seems fair in that case in question, they can also risk causing confusion and uncertainty in the law”.⁶²

As it is undesirable to use metaphors in deciding an issue brought before the court in terms of s 20(9), it is submitted that ‘unconscionable abuse’ is not meant to have a specific definition, perhaps this could have been the intention of Judge Binns-Ward in *Ex Parte Gore*.⁶³ The term ‘unconscionable abuse’ is meant to display a certain

58 Roodt Inc Attorneys ‘The art of law – piercing the corporate veil now depends on a value judgment by the court’ Available at <http://www.roodtinc.com/newsletter174.asp> (accessed on 21 May 2016).

⁵⁹ (2013) 2 AC 337.

⁶⁰ *VTB Capital plc* (2013) Para. 124.

⁶¹ *VTB Capital plc* (2013) Para. 124.

⁶² *VTB Capital plc* (2013) Para. 124.

⁶³ *Ex Parte Gore* (2013) Para. 34.

degree or standard of abuse. For instance in *The Shipping Cooperation of India Ltd v Evdoman Corporation and Another*, Cobett CJ indicated that it is not necessary to attempt to define the circumstances in which the corporate veil will be pierced.⁶⁴

The enquiry should move from being focused on the definition of unconscionable abuse, but should rather be focussed on the degree of abuse that points toward the presence of an ‘unconscionable abuse’. If ‘unconscionable abuse’ is seen as a degree or standard, it will remain broad enough to cover all the instances in which the corporate veil has been pierced in the past and for the future, without specifically including the use of metaphors which may lead to uncertainty and the confusion of the law.⁶⁵ This submission is in line with *Botha v Van Niekerk*, in so far as the judgement referred to an ‘unconscionable injustice’⁶⁶ as a test. The term ‘unconscionable injustice’ was used as an assessment of whether the conduct in the case met the test or standard, in order to justify the piercing of the corporate veil. The next section therefore deals with the term ‘unconscionability’ when viewed as a test.

4.3.2.2 ‘Unconscionability’ as a test? ⁶⁷

‘Unconscionability’ as a test was rejected in *Cape Pacific* as it was too strict.⁶⁸ The court in *Ex parte Gore* used this test in its determination of s 20(9).⁶⁹ The question in this section of the chapter is: whether the use of unconscionability as used in *Ex Parte Gore* will suffer the same fate as in *Botha v Van Niekerk*? The hierarchies of the courts and the doctrine of precedent will be used in this determination.

As a starting point, the decision in *Cape Pacific* was made by the Appellate Division (now, Supreme Court of Appeal). The decision in *Ex Parte Gore* was made by a division of the High Court. Accordingly, considering the rules of jurisdiction and the hierarchies of the courts, the judgment in *Cape Pacific* overrules the decision of *Ex*

⁶⁴ 1994 (1) SA 550 (A) 566 F-C.

⁶⁵ *VTB Capital plc* (2013) Para. 124.

⁶⁶ *Cape Pacific* (1995) 37.

⁶⁷ See 1.2.1.

⁶⁸ *Cape Pacific* (1995) 802.

⁶⁹ *Ex Parte Gore* (2013) Para. 29.

Parte Gore.⁷⁰ The decision in *Ex Parte Gore* may however have persuasive authority in another division of the High court.⁷¹ This essentially means that if the strictness of the test of unconscionability was to be disputed in the Court of Appeal (of the judgement of *Ex Parte Gore*), the decision in *Cape Pacific* will be followed in the absence of compelling considerations that demand otherwise. In *Cape Pacific*, judge Smalberger held the following concerning the use of ‘unconscionable injustice’ as a test:

‘With due respect to the learned judge I would avoid, in a matter such as the present, what is perhaps too rigid a test and opt for a more flexible approach - one that allows the facts of each case ultimately to determine whether the piercing of the corporate veil is called for.’⁷²

Making provision for a facts-based analysis or adopting an approach which considers the merits of each case as held in *Cape Pacific*⁷³ is preferable. It is submitted that the measure or degree of unconscionable abuse is too high of a test to determine when the corporate veil should be pierced.

On the reverse side of this argument, one could also argue that the degree or test of abuse is very high because the courts should only pierce the corporate veil when all other remedies have been exhausted,⁷⁴ thereby returning to the position at common law. In fact, in the most recent decision on piercing the corporate veil in South Africa, *Basfour 121 CC v M & R Interior Concepts*,⁷⁵ where the juristic personality of a close corporation was abused, Boqwana J used *Airport Cold Storage*,⁷⁶ *Hülse-Reutter*⁷⁷ and *Cape Pacific*,⁷⁸ as authority. Therefore, in respect of piercing the corporate veil in terms of s 65 of the Close Corporations Act 69 of 1984 (hereinafter

⁷⁰ Du Bois F (2007) 79.

⁷¹ Du Bois F (2007) 79.

⁷² *Cape Pacific* (1995) 37.

⁷³ *Cape Pacific* (1995) 37.

⁷⁴ *Hülse-Reutter* (2001) Para. 20.

⁷⁵ *Basfour 121 CC v M & R Interior Concepts* (2015) ZAWCHC 44 (hereinafter *Basfour* (2015)).

⁷⁶ *Basfour* (2015) Paras. 36, 49, 59, 62.

⁷⁷ *Basfour* (2015) Para. 60.

⁷⁸ *Basfour* (2015) Para. 71.

‘s 65’), the position is that the courts should only pierce the corporate veil when all other remedies have been exhausted. This paragraph refers to the developments regarding s 65, it is therefore not applicable to the developments concerning s 20(9).

It could be contended that perhaps it was the intention of the legislature to have a very high standard for when the corporate veil is to be pierced. This would mean that all other lesser degrees of the abuse of the juristic personality was meant to be solved by the other remedies available to the plaintiff as initially decided in *Hülse-Reutter*.⁷⁹ In terms of this argument, the piercing of the corporate veil as a doctrine is only meant to be used when there has been an unconscionable abuse, which can be defined in a literal interpretation⁸⁰ as unreasonably excessive, unjustifiable, unthinkable, beyond what is expected of anyone with a moral conscience, type of abuse.⁸¹ The Oxford dictionary relates the origin of the word unconscionable to ‘conscience’. The literal meaning of the word therefore points to a degree of abuse that is higher than a simple form of abuse which is defined as ‘use of (something) for a bad effect or for a bad purpose; misuse’, ‘use or treat in such a way as to cause damage or harm’, ‘the improper use of something’, ‘unjust or corrupt practice’.⁸²

Section 158(b) (ii) of the Act may be instructive in this respect, the section is construed as follows:

‘[T]he Commission, the Panel, the Companies Tribunal or a court-
if any provision of this Act, or other document in terms of this Act, read in its
context, can be reasonably construed to have more than one meaning, must prefer

⁷⁹ *Hülse-Reutter* (2001) Para. 23.

⁸⁰ Literalism is to be employed as an interpretive aid by the courts when interpreting statutes. In terms of this approach, the court must use the ordinary dictionary meaning of the words that it is interpreting unless, such literal interpretation will lead to absurdity or inconsistency. Du Plessis *Re-Interpretation of Statutes* 2 ed (2002) 53.

⁸¹ The free dictionary ‘Unconscionable’ available at <http://legal-dictionary.thefreedictionary.com/unconscionable> (accessed on 23 January 2016) defines the word ‘unconscionable’ as ‘Unusually harsh and shocking to the conscience; that which is so grossly unfair that a court will proscribe it’, ‘When a court uses the word unconscionable to describe conduct, it means that the conduct does not conform to the dictates of conscience.’

⁸² Oxford University press ‘abuse’ available at <http://www.oxforddictionaries.com/definition/english/abuse> (accessed on 24 January 2016).

the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.⁸³

In line with the argument above, it is submitted that if it was the intention of the legislature to have such a strict test for when s 20(9) is to be used, then a portion of applicants may be left without a remedy due to the lack of other remedies that aim at correcting the abuse of the juristic personality of a company. The abuse that the applicant has been a victim of, may also fail to meet the standard or test of ‘unconscionable abuse’. It is undesirable to leave applicants without a remedy, for this reason, the test of unconscionability is too strict.

This submission is supported by *Ex Parte Gore*, in which it was held that:

‘The newly introduced statutory provision affords a firm, albeit very flexibly defined, basis for the remedy, which will inevitably operate, I think, [*to erode the foundation of the philosophy that piercing the corporate veil should be approached with an à priori diffidence. By expressly establishing its availability simply when the facts of a case justify it, the provision detracts from the notion that the remedy should be regarded as exceptional, or ‘drastic’*] (emphasis added).⁸⁴

The degree or test of unconscionability is furthermore too impractical of a test to succeed in a legal system. On a practical level, it may prove difficult to distinguish what would pass the test of an ‘unconscionable abuse’. In *Ex Parte Gore*, Binns-Ward J justified the quote above by stating that ‘[t]his much seems to be underscored by the choice of the words ‘unconscionable abuse’ in preference to the term ‘gross abuse’...[in s 65]... the latter term having a more extreme connotation than the former.’⁸⁵ Judge Binns-Ward in *Ex Parte Gore* held that ‘gross abuse’ is worse than ‘unconscionable abuse’, but has failed to demonstrate the degree of difference between the terms or the reasoning behind his statement. Having said this: how will

⁸³ Section 158(b) (ii) of Act 71 of 2008.

⁸⁴ *Ex Parte Gore* (2013) Para. 34.

⁸⁵ *Ex Parte Gore* (2013) Para. 34.

the courts differentiate between a gross abuse and an unconscionable abuse in practise? The question is dealt with in the next sub-section.

4.3.2.3 Section 65 of the Close Corporations Act 69 of 1984 vis-à-vis Section 20(9) of the Companies Act 71 of 2008

Section 65 has been used by some academics⁸⁶ and judges⁸⁷ in order to make sense of s 20(9). An attempt is made to find a meaning of the phrase ‘unconscionable abuse’ by analysing the term ‘gross abuse’ in s 65 as analysed in *Botha v Van Niekerk* and in *Airport Cold Storage*.⁸⁸ It is submitted that this is a dead-end attempt as 20(9), is a mere paraphrase of s 65. The ambiguities in s 65 will therefore be the same ambiguities in s 20(9). For this reason, s 65 cannot be used to solve the problems inherent in interpreting s 20(9). The term ‘unconscionable abuse’ in s 20(9), is therefore likely to face the same fate as ‘unconscionable injustice’ as decided in *Botha v Van Niekerk*. Consider the differences and material similarities of the sections as set out in the table below.

⁸⁶ Cassim (2011); Cassim (2013) 201 and Roodt Inc Attorneys ‘The Companies Act of 2008 - the consequences of the unconscionable abuse of the company’s juristic personality’ available at <http://www.roodtinc.com/newsletter70.asp> (accessed on 05 October 2015) (hereinafter Roodt Inc Attorneys (2015)).

⁸⁷ *Ex Parte Gore* (2013) Para. 30.

⁸⁸ *Airport Cold Storage* (2008) Para. 24.

Section 65	Section 20(9)	Difference/Similarity
Powers of Court in case of abuse of separate juristic personality of corporation	‘Validity of company actions’ Section 20(9) is subsection of s 20	Difference No. 1 -s 65 has a specific heading -s 20(9) falls within the broader heading, ‘Validity of company actions’
Whenever a Court on <u>application</u> by an <u>interested person</u> , or in any <u>proceedings</u> in which a corporation is involved,	If on <u>application</u> by an <u>interested person</u> or in any <u>proceedings</u> in which a company is involved, a court...	Similar in all material aspects
...finds that the <u>incorporation of</u> , or <u>any act</u> by or on behalf of, or <u>any use</u> of, that corporation,	finds that the <u>incorporation of the company</u> , <u>any use</u> of the company, or <u>any act</u> by or on behalf of the company,	Similar in all material aspects
constitutes a gross abuse of the <u>juristic personality</u> of the corporation as a <u>separate entity</u> ,	constitutes an unconscionable abuse of the <u>juristic personality</u> of the company as a <u>separate entity</u> ,	Difference No. 2 -s 65 refers to the term ‘gross abuse’ -s 20(9) refers to the term ‘unconscionable abuse’
the Court may <u>declare</u> that the corporation is to be <u>deemed not to be a juristic person</u> in respect of such <u>rights</u> , <u>obligations</u> or <u>liabilities</u>	the court may— (a) <u>declare</u> that the company is to be <u>deemed not to be a juristic person</u> in respect of any <u>right</u> , <u>obligation</u> or <u>liability</u>	Similar in all material aspects
of the corporation, or of such <u>member</u> or members thereof, or of such other <u>person or persons</u> , <u>as are specified in the declaration</u> , and the...	of the company or of a shareholder of the company or, in the case of a non-profit company, a <u>member</u> of the company, or of <u>another person specified in the declaration</u> ; and	Difference No. 3 - s 20(9) add the terms ‘shareholders’ and ‘non-profit company’, the aspects of this portion of the sections however still remain materially similar.
...court may give such <u>further order</u> or orders as it may deem fit <u>in order to give effect to such declaration</u> .’	(b) may make any <u>further order</u> the court <u>considers appropriate</u> to <u>give effect to a declaration</u> contemplated in paragraph (a).’	Similar in all material aspects

From the comparison of s 65 and s 20(9) tabulated above, it is submitted that there are only three differences which emanated from the comparison of the two sections provided above. The differences identified are not significant enough to argue that the sections differ in any material aspect. This submission therefore agrees to some extent with other writers in their claims that s 65 and s 20(9) are similar in all

material aspects.⁸⁹ However, the submission extends their views by submitting that s 20(9) is a paraphrase of s 65.⁹⁰ It is therefore the same content, expressed in similar but slightly different terms. This submission is supported by the contention provided in section 4.3.2.4, in which it is established that there is no factual difference with the words ‘unconscionable abuse’ and ‘gross abuse’ when considered in terms of case law analogy.

The above submission is not made on the basis of ignorance of what was held by the court in *Ex Parte Gore*: the term ‘gross abuse’ in s 65 has a more extreme meaning than the term ‘unconscionable abuse’ in s 20(9).⁹¹ ‘Unconscionable’ abuse would accordingly be a less serious form of abuse which still however warrants punishment.⁹² By implication, using the term ‘unconscionable abuse’ as opposed to ‘gross abuse’, would mean that s 20(9) would be applicable to more offences than those applicable to s 65. In accordance with this argument, the conclusion follows that claiming that there is no material differences between ‘unconscionable abuse’ and ‘gross abuse’ may be a bit of an overstatement. The next section therefore conducts a facts-based analysis or comparison of the facts which amount to an ‘unconscionable abuse’ and those facts that amount to a ‘gross abuse’.⁹³

4.3.2.4 Facts-based analysis of *Ex Parte Gore* and *Airport Cold Storage*

The term ‘gross abuse’⁹⁴ as well as the term ‘unconscionable abuse’⁹⁵ is undefined. The court in *Ex Parte Gore* essentially compared one uncertainty to another and then came to the conclusion that the one uncertainty, ‘gross abuse’ is more severe than the other uncertainty ‘unconscionable abuse’. The degree of difference between ‘unconscionable abuse’ and ‘gross abuse’, if any, has not been specified by the court.

⁸⁹ In *Ex Parte Gore* (2013) Para. 30; Subramanien D ‘Unconscionable abuse’ – Section 20(9) of the Companies Act 71 of 2008 : *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) (2014) *Obiter* 156 and Cassim (2013) 201.

⁹⁰ Roodt Inc Attorneys (2015).

⁹¹ *Ex Parte Gore* (2013) Para. 34.

⁹² In *Goldfinch* (2013) Para. 30 and Watt G *Trusts and Equity* 6 ed (2014) 14.

⁹³ *Ex Parte Gore* (2013) Para. 4.

⁹⁴ *Basfour* (2015) Para. 59.

⁹⁵ Cassim F (2011) 25.

If the term ‘unconscionable abuse’ is less extreme than the term ‘gross abuse’ then some guidance on the difference between these terms will have to be specified.

The table below considers the facts of *Ex Parte Gore* where the court held that the presence of those facts constituted an ‘unconscionable abuse’, such as in *Airport Cold Storage*, where facts of a case constituted an ‘unconscionable abuse’. Consider the analysis tabulated below

<i>Airport Cold Storage</i>	<i>Ex Parte Gore</i>	Submission of Similarities
‘The close corporation in question formed part of a <u>conglomerate of associated family businesses</u> ’ ⁹⁶	‘The King Group was effectively <u>managed and owned by the eponymous King brothers</u> , Adrian, Paul and Stephen.’ ⁹⁷	Holding and subsidiary companies run by a family
‘Conducted with <u>scant regard for their respective separate legal personalities</u> ’ ⁹⁸	‘Funds...from investors were transferred by the controllers of the holding company between the various companies in the group at will, with <u>no effectual regard to the individual identity of the companies concerned</u> .’ ⁹⁹	No regard to the separate legal personality of each company
‘The close corporation in question had <u>failed to keep proper books of account</u> ’ ¹⁰⁰	The group had ‘ <u>grossly inadequate record keeping</u> .’ ¹⁰¹	Failed to keep proper accounting books.
The close corporation had been incorporated with the object ‘defraud the creditors of the company’ ¹⁰²	‘In the period leading up the collapse of the group the King brothers also persuaded investors to enter into so-called ‘share conversion’ transactions in terms of which ostensibly existing investments in one or more	The facts in this instance are different. Both groups were in financial trouble, they created a plan to defraud the creditors and investors. In <i>Airport Cold Storage</i> this was done by way of

⁹⁶*Airport Cold Storage* (2008) Para. 34.

⁹⁷*Ex Parte Gore* (2013) Para. 6

⁹⁸*Airport Cold Storage* (2008) Para. 38.

⁹⁹*Ex Parte Gore* (2013) Para. 8.

¹⁰⁰*Airport Cold Storage* (2008) Para. 39.

¹⁰¹*Ex Parte Gore* (2013) Para. 8.

¹⁰²*Airport Cold Storage* (2008) Para.15.

<i>Airport Cold Storage</i>	<i>Ex Parte Gore</i>	Submission of Similarities
	<p>subsidiary companies could be converted into shares in KFH.¹⁰³</p> <p>‘The share conversion scheme was inept and dishonest. The investigation into it by PWC showed, for example, that <u>the shares were ‘converted’ at markedly different (and apparently arbitrarily determined) values.</u>¹⁰⁴</p>	<p>forming the Close Corporation in <i>Ex Parte Gore</i>, it was done by creating share-conversion scheme. The aim of fraud is the common factor.</p>
<p>‘The close corporation became <u>incapable of trading profitably and of meeting its financial commitments</u> to its major supplier as and when they fell due.’¹⁰⁵</p>	<p>The flow of funds within the Group appears to have been materially determined by the need of the King brothers to sustain their scheme by <u>finding money to pay out existing investors</u> who wished to withdraw their funds.¹⁰⁶</p>	<p>Evidence of solvency and liquidity issues.</p>

In *Ex Parte Gore*, Binns-Ward J agrees with the judgement in *Airport Cold Storage*, in respect to the disregarding of the independence of the juristic personalities within the group.¹⁰⁷ It was held that:

‘Thus in the current case, as in *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C), in which the application of s 65 of the Close Corporations Act was under consideration, the conduct of the business of the group of companies with scant regard for the separate legal personalities of the individual corporate entities of which it was comprised would in itself constitute a gross abuse of the corporate personality of all of the entities concerned.’¹⁰⁸

¹⁰³ *Ex Parte Gore* (2013) Para. 13.

¹⁰⁴ *Ex Parte Gore* (2013) Para. 13.

¹⁰⁵ *Airport Cold Storage* (2008) Para. 77.

¹⁰⁶ *Ex Parte Gore* (2013) Para. 12.

¹⁰⁷ *Ex Parte Gore* (2013) Para. 33.

¹⁰⁸ *Ex Parte Gore* (2013) Para. 33.

The quote in *Ex parte Gore* and the facts analysis in the table is evidence that there is in fact no difference between the terms ‘gross abuse’ and ‘unconscionable abuse’. The facts do not display any difference in degree between the terms; the facts are materially the same. For this reason, it remains unclear what the differences are between ‘gross abuse’ and ‘unconscionable abuse’. It is submitted that there is no difference between the two terms.

4.3.3 The scope and meaning of the order, ‘Deemed not to be a juristic person’

Section 20(9) provides for the disregarding of juristic personality of a company via a court order.¹⁰⁹ At common law however, the juristic personality of the company is not removed, but simply disregarded or ignored, for the purpose of imputing liability onto the shareholders and directors where the concept of separate legal existence and the doctrine of limited liability otherwise would have shielded¹¹⁰ them from the debts of the company.¹¹¹

The following view by Roodt Inc Attorneys is interesting as it displays a possible interpretation of this part of s 20(9):

‘Moreover, it is by no means clear how declaring that a company is "deemed not to be a juristic person" - in short, deeming it not to exist as a legal entity in its own right - is, in and of itself, in any way helpful to a victim of the abuse’.¹¹²

Section 20(9) may only provide recourse for creditors if it is to be regarded as implicit that the individuals who were engaged in the company's business would then be regarded as sole proprietors or partners, and would therefore be personally liable for the debts of the business on that basis.’¹¹³ If this interpretation of deeming the company not to exist any longer is to be followed or if this part of the section is to be interpreted in this way, then who will the creditor or applicant sue (the company that

¹⁰⁹ *Ex Parte Gore* (2013) Para. 1.

¹¹⁰ Schoeman-Louw N ‘Piercing the corporate veil of trusts and companies’ available at <http://www.schoemanlaw.co.za/piercing-corporate-veil-trusts-companies/> (accessed on 1 June 2016).

¹¹¹ French D, Mayson S & Ryan C (2013) 128.

¹¹² Roodt Inc Attorneys (2015).

¹¹³ Roodt Inc Attorneys (2015).

does not exist or the shareholders in their personal capacity)? This interpretation is not ideal, especially when this portion of the section is viewed in line with the purpose of the Act and its background. This will be consolidated shortly in this chapter.

As a consequence of the operation of limited liability, a company is to sue and to be sued in its own name.¹¹⁴ At common law, the company is sued and is in principle liable for satisfying the debt, as a consequence of disregarding the juristic personality in the form of piercing the corporate veil, the shareholders or directors pay the debt that the company owes to the creditor or applicant. The debt remains the company's debt and is only liable to be paid by the shareholders or directors by virtue of the abuse of the juristic personality of the company that the director or shareholder has orchestrated. The debt is therefore imputed onto the shareholders or directors, by virtue of the piercing of the corporate veil. The company remains an incorporated entity and does not become another type of business entity like a partnership or sole proprietor *inter alia*...¹¹⁵ However in *Airport Cold Storage*, Griesel J at Para. 20, cited academic opinion (Blackman) which in essence referred to the company being treated as if it were a partnership for the purposes of veil piercing. This refers to the possible effect of piercing, but it does not mean that the business entity becomes a partnership; it is only the liability that ensues which is comparable to that of a partnership.

Section 5 of the Act provides that the Act 'must be interpreted and applied in a manner that gives effect to the purposes set out in section 7.' One of the relevant purposes in section 7 is to:

- ‘[P]romote the development of the South African economy by-
- (i) encouraging entrepreneurship and enterprise efficiency;

¹¹⁴Barnard Inc Attorneys 'Business entity basics for the entrepreneur' available at <http://www.camargueum.co.za/article/30062015/business-entity-basics-entrepreneur> (accessed on 08 October 2015) and Cassim F (ed), Cassim M & Cassim R (2011) 29.

¹¹⁵ Liability is then on the partnership or sole proprietor as this type of business entity does not create a separate legal existence between the shareholders and the business entity.

- (ii) creating flexibility and simplicity in the formation and maintenance of Companies’¹¹⁶

Another particular purpose relevant to this study is s 7(j) of the Act. The focus of this purpose is to ‘encourage the efficient and responsible management of companies’. It is submitted therefore that an order declaring a company as ceasing to exist does not encourage the efficient and responsible management of companies. Furthermore, such an order may act as a deterrent to companies or individuals seeking to abuse the juristic personality of companies. It cannot however be said to encourage responsible and efficient management thereof. If a company comes to an end in terms of s 20(9) (following the interpretation of Roodt Attorneys Inc), it can no longer be managed, by virtue of the fact that the company no longer exists. The common law interpretation on the effect of piercing the corporate veil appears better placed to meet the purpose as set out in s 7(j) of the Act.

The interpretation of the Act that allows the court to deem a company as ceasing to exist is in conflict with the s 5 and s 7(j) of the Act as expressed above.¹¹⁷ This interpretation as offered by Roodt Attorneys Inc. however draws the attention of the interpreter toward the possibility of such an extreme interpretation of the section. The section is so vague that it may be construed widely, resulting in causing the company to no longer be in existence. If deeming a company not to be a juristic person simply implies the removal of the advantage of limited liability, this would leave incorporators of the company or shareholders or whoever is responsible for the abuse of the juristic personality exposed to personal liability, as is the case within a partnership. The adoption of an interpretation of the section which prescribes that the company will cease to exist is unreasonable and offends s 158, s 5 and s 7(j) of the

¹¹⁶ This is furthered in s 158(b) of the Act :

(b) the Commission, the Panel, the Companies Tribunal or a court-

(i) must promote the spirit, purpose and objects of this Act; and

(ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.’

¹¹⁷ The background and purposes of the Act needs to be considered with the wording of the section in the Act, in order to determine the intention of the legislature. *Jaga v Dönges* 1950 (4) SA 653 (A) 662.

Act; accordingly, it is submitted in disagreement with the submission of Roodt Attorneys Inc, this cannot be the intention of the legislature.

4.3.4 The scope of the term ‘Further order’

In terms of s 20(9) a court may grant any ‘further order’ that it deems fit to give effect to s 20(9) (a). This ‘further order’ is an open-ended concept and it may therefore be any reasonable order as granted by the court to give effect to s 20(9) (a). The section does not expressly provide for the piercing of the corporate veil, which is the imputing of liability onto the shareholders as at common law. A court may be inclined to impute the liability of the company onto the shareholders, as the common law is to be used as a guideline in determining the application of s 20(9).¹¹⁸ The problem in this regard, is that the imputing of liability onto the shareholders may be the result of the application of an order granted in terms of s 20(9) (b), especially when the common law doctrine is used as an interpretive aid. However, the order as granted by the court does not have to result in the imputing of liability onto the shareholders as at common law. The order as granted by the court may therefore be one that is a common law equivalent (ignoring the separate legal personality to impute liability) or something totally different to give effect to s 20(9) (a), such as granting an order of specific performance.¹¹⁹

The terms, ‘lifting’ and ‘piercing’¹²⁰ the corporate veil are used interchangeably.¹²¹ In these instances, the terms are not viewed as the description of different court orders, but rather as synonyms for the same order.¹²² This has indeed created much confusion; whereas others feel that the interchangeable use of the terms does not matter as they refer to the same order.¹²³

¹¹⁸ *Ex Parte Gore* (2013) Para. 34.

¹¹⁹ An order of specific performance was granted in terms of *Jones v Lipman* 1962. See Bourne N *Essential Company Law* 3 ed (2000) 10.

¹²⁰ *Rees and Others v Harris and Others* 2012 (1) SA 583 (GSJ) Para. 13 and *Loyiso and Others v Amethyst (Pty) Ltd and Others* (2015) ZALCJHB 460 Paras. 16, 28.

¹²¹ *VTB Capital plc* (2013) Para. 118. In *Ben Hashem v Al Shayif* (2009) 1 FLR 115 150.

¹²² *Ben Hashem v Al Shayif* (2009) 1 FLR 115.

¹²³ *Yukong Line Ltd v Rendsburg Investments Corp (No 2)* (1998) 4 All ER 82.

In English law, courts lifted the corporate veil in order to ascertain whether the corporate veil had to be pierced and to establish who the real controllers of the company were. This was done by adducing evidence to establish if veil piercing was necessary.¹²⁴ The order of lifting the corporate veil in the instance of concealment cases are therefore viewed as a different order when compared to the order of piercing the corporate veil upon the grounds of the evasion of existing liabilities. In *Atlas Maritime Co SA v Avalon Maritime Ltd*¹²⁵ it was held that:

‘Piercing the corporate veil is reserved 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’.¹²⁶

In terms of the common law, piercing the corporate veil is the result of the doctrine’s application. In many cases, judges have treated the cases of ‘lifting the corporate veil’ as ‘piercing the corporate veil’. ‘[P]iercing the veil is the ultimate result, the sanction or remedy, whereupon the company is identified with its controllers in certain circumstances...’¹²⁷

Lord Sumption in *Prest* held that the term ‘piercing the corporate veil’ is often indiscriminately used to describe a range of situations that do not constitute the piercing of the corporate veil doctrine. These are often situations in which the law attributes ‘the acts or property of a corporation to those who control it, but without disregarding its separate legal personality (e.g., joint liability, trust law, equitable remedies...).’¹²⁸

In the cases of lifting the corporate veil, other equitable remedies such as an order of specific performance or damages in respect of a breach of contract may be used to

¹²⁴ See 3.2.3.

¹²⁵ (1991)1 Lloyd’s Rep.

¹²⁶ *Atlas Maritime Co SA v Avalon Maritime Ltd* (1991) 1 Lloyd’s Rep 563 571.

¹²⁷ *Mandaraka-Sheppard A* (2013) 6.

¹²⁸ *Kain B* (2016).

remedy the abuse of the juristic personality of the company. In the case of piercing the corporate veil, these other remedies or situations are not within the application of the doctrine. However, the only case which presents the true reflections of the exception to the rule of separate legal personality is that which has been exemplified in the case of *Salomon*. In the case of *Salomon*, the only result of the exception created in this case, is the piercing of the corporate veil by the way of ignoring the juristic personality of the companies and imputing personal liability onto its controllers.¹²⁹

It is submitted that the application of the ‘further order’ as provided in s 20(9) (b) is capable of wide construction and should be limited. The approach of the English courts could be adopted in this regard, whereby this section should be narrowly construed to reflect the true exception to *Salomon*. If the interpretation of the section is not a limited one, too many different outcomes may result. As piercing the corporate veil is the ultimate result of the doctrine in the form of imputing the liability of the company onto its controllers in their personal capacity, it strictly excludes any other remedies or orders.

Allowing the section to maintain the words ‘further order’ may extend the ambit of the doctrine to the extent that it may become unruly. This extension may disregard the principles of legal certainty and the long standing rules of corporate law. Unless the relationship between the section and the common law is brought into the interpretive muster of the section, the application of s 20(9) may become indiscriminate. It is therefore submitted that the term ‘further order’ is to be interpreted restrictively, or that its interpretation is to be limited.

4.4 CONCLUSION

In short, allowing the doctrine to develop and mature at common law, will serve to secure justice in a much better way than the current s 20(9).¹³⁰ It is submitted in agreement with the decision in *Ex Parte Gore* that the common law is to supplement

¹²⁹ Mandaraka-Sheppard A (2013) 8.

¹³⁰ See 4.2.

the application and interpretation of s 20(9).¹³¹ It is argued in this study that the legislature intended for s 20(9) to be a remedy that is comparable to the common law doctrine. However, this intention has not been made clear due to the poor drafting of the section.¹³² Chapter 5 will point towards a better way of providing clarity to the understanding and interpretation of s 20(9) through a proposed amendment to the section.

When using the term ‘gross abuse’ to determine the meaning of ‘unconscionable abuse’, it is determined that this does not take the law forward as s 20(9) sounds like a mere paraphrase of s 65 of the Close Corporations Act.¹³³

The adoption of an interpretation of the section which prescribes that the company will cease to exist – this is unreasonable and offends s 158, s 5 and s 7(j) of the Act.¹³⁴ It is submitted that the application of the ‘further order’ as provided in s 20(9) (b) is too wide and the section requires future amendment or the adoption of a restrictive or limited interpretation.¹³⁵

¹³¹ See 4.2.

¹³² See 4.2.

¹³³ See 4.3.2.3.

¹³⁴ See 4.3.3.

¹³⁵ See 4.3.4.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The main focus of this chapter is to summarise the findings of this research in a manner that leads to a proposed amendment to s 20(9). The proposals to law reform are based on the strengths drawn from the tools of analysis namely principles from international experiences considered in chapter 3, analysis of the common law doctrine and of s 20(9) in Chapter 4. All of this was done in line with the contextual approach to the interpretation of the provisions of the Act as suggested in s 5.

5.2 SUMMARY OF THE SALIENT FEATURES ACROSS CHAPTERS 1-4

The concept of ‘separate legal existence’ was first accepted into English law in the *Salomon* case and furthermore adopted by South Africa in the *Dadoo* case.¹ This concept is however subject to exception.² The exception of focus herein is the remedy of piercing of the corporate veil.³ This doctrine has been formed with the purpose of preventing the abuse of juristic personality.⁴

In the UK, the common law is supplemented by certain statutory provisions that extend or override the principle of limited liability.⁵ In this way, the separate legal personality of the company is therefore not ignored.⁶ This approach is followed as a consequence of there not being a clear and express provision that allows for the corporate veil to be pierced.⁷

¹ See 2.4.

² See 2.2.1.3.

³ See 2.2.

⁴ See 2.4.

⁵ See 3.2.2.

⁶ See 3.2.2.

⁷ See 3.2.2.

The ground of the ‘evasion of existing liabilities’ is the only ground upon which the corporate veil may be pierced in the UK.⁸ It is limited as the court may pierce the corporate veil only to remove the advantage which the controlling person would have had, if the veil was not pierced.⁹

Piercing the corporate veil in the USA has been described as – ‘characterised by ambiguity, unpredictability, and even a seeming degree of randomness.’¹⁰ Courts in the USA have developed numerous theories to determine when to pierce the corporate veil.¹¹ These theories are the ‘Instrumentality theory’, the Alter-ego theory and the ‘Identity theory’.¹² The application of these theories may lead to uncertainty and yields contradictory results. In *Prest* it was held that ‘its application yield[s] few predictable results.’¹³ The use of theories is to be avoided in the interpretation of s 20(9). These theories over-lap and add to the messy and unclear reception of the doctrine.

The provision in Act 2001 of Australia, does not expressly deal with piercing the corporate veil.¹⁴ Although comparable provisions do not add to the interpretation of s 20(9), the clarity with which the sections are drafted can be borrowed as an international best practise for the amendment of s 20(9). The strength in the Australian interpretation of the doctrine lies in the way in which the doctrine has been incorporated into its legislation, in a clear and unambiguous manner.

Although s 20(9) is vague and requires interpretation, South Africa is the only jurisdiction when compared to the comparators that actually has a section that may be considered as having the effect of the common law doctrine of piercing the corporate veil.¹⁵ Other jurisdictions can therefore borrow from s 20(9).¹⁶

⁸ See 3.2.3.

⁹ See 3.2.3.

¹⁰ See 3.3.

¹¹ See 3.3.

¹² See 3.3.1.

¹³ *Prest* (2013) Para. 76.

¹⁴ See 3.2.2.

¹⁵ See 3.5.

¹⁶ See 3.5.

The legislature has omitted to provide proper guidance on the relationship between s 20(9) and the common law. In agreement with the *Ex Parte Gore* judgement, the common law doctrine still exists; the interpretation and application of s 20(9) by courts has the potential to contribute to the incremental development of the common law, provided that improvements are made to s 20(9).

Any interested person may apply to the court to invoke s 20(9), a litigant can apply in three ways, (1) in terms of the well-established principles of *locus standi*, where the applicant will only have *locus standi* if the interest is personal and direct;¹⁷ (2) in terms of s 38 of the Constitution, which allows for greater access to the courts when a fundamental right has been infringed¹⁸ or (3) in terms of s 157 of the Act.¹⁹ It is submitted the element of ‘interest’ may be established either in terms of the common law principles, s 38 or s 157 of the Act. Once this has been established then the consideration of ‘persons’ who may apply are; natural person(s) or an association of natural persons (or their representative(s)); juristic persons; foreign companies; trusts as established in a foreign jurisdiction, or organs of state and others, who have been determined to have an interest in respect of the common law principles, s 38 or s 157 of the Act.²⁰

The term ‘unconscionable abuse’ is undefined in the Act,²¹ the court held in *Ex Parte Gore* that the term may encompass all previous terms or descriptive metaphors in which the doctrine has been cast in the past,²² and possibly all other terms in which the doctrine may be cast in the future.²³ By the failure of the Binns-Ward J to give a definition, perhaps it could be considered that the term ‘unconscionable abuse’ is meant to display a certain degree or standard of abuse, instead of having a definite meaning.²⁴ It will possibly remain broad enough to

¹⁷ See 4.3.1.

¹⁸ See 4.3.1.

¹⁹ See 4.3.1.

²⁰ See 4.3.1.

²¹ See 1.2.1.

²² See 4.3.2.1.

²³ See 4.3.2.1.

²⁴ See 4.3.2.1.

cover all the instances in which the corporate veil has been pierced in the past and for the future, without specifically including the use of metaphors which may lead to uncertainty and the confusion of the law.²⁵ This is in alignment with the position in the UK regarding the use of metaphors for piercing the corporate veil.²⁶

‘Unconscionability’ as a test was rejected in *Cape Pacific*.²⁷ The issue of ‘unconscionability’ as a test will probably be rejected in future, in the absence of compelling evidence proving the contrary. This is so as the decision in *Cape Pacific* takes precedence over the decision in *Ex Parte Gore*.²⁸

In *Ex Parte Gore*, Binns-Ward J remarked that the term ‘gross abuse’ has a ‘more extreme connotation’²⁹ than the term ‘unconscionable abuse’.³⁰ When an analysis is made of s 20(9) as compared with s 65, it is submitted that there is no material difference between the terms, s 20(9) therefore sounds like a paraphrase of s 65 of the Close Corporations Act.³¹ This has been supported by the finding that there is no material difference of the facts that constitute a ‘gross abuse’ as considered in *Airport Cold Storage*, when compared to the facts that amount to an ‘unconscionable abuse’ as ruled in *Ex Parte Gore*.³²

The term ‘deemed not to be a juristic person’ simply means that the corporate veil will be pierced in order to remedy the abuse that was perpetrated. For this reason, the common law interpretation is the appropriate interpretation to be adopted when considering an order as per s 20 (9), this also complies with s 5 and s 7 of the Act.³³

²⁵ See 4.3.2.1.

²⁶ See 4.3.2.1.

²⁷ See 4.3.2.2.

²⁸ See 4.3.2.2.

²⁹ *Ex Parte Gore* (2013) Para. 34.

³⁰ See 4.3.2.2.

³¹ See 4.3.2.3.

³² See 4.3.2.3.

³³ See 4.3.3.

Finally, even though the term ‘further order’ is capable of a wide application, it should rather be interpreted restrictively to allow only for the piercing of the corporate veil as traditionally understood (the imputing of liability from one entity onto the other).³⁴ Allowing other remedies to qualify as a ‘further order’ does not reflect the appropriate application of the doctrine.³⁵ As piercing the corporate veil is the ultimate result of the doctrine in the form of imputing the liability of the company onto its controllers in their personal capacity, it strictly excludes any other remedies or orders.³⁶ It is therefore submitted that the section needs to be amended or an intention of a restrictive interpretation needs to be made clearer. Otherwise the order contemplated in s 20(9) may have the spectre of becoming indiscriminate.³⁷

For the reasons above, it is submitted that s 20(9) is not a mere statutory restatement of the common law doctrine of piercing the corporate veil but rather a comparable remedy for the abuse of juristic personality. It is therefore submitted that s 20(9) of the Act is another remedy available to litigants. The section has wider application and gives more discretion to courts when awarding the remedy.³⁸

5.3 A CASE FOR REFORM

This thesis argues that s 20(9) is not a mere statutory restatement of the common law doctrine of the piercing of the corporate veil. It is a comparable statutory provision to the doctrine as established in this work.

This section of the conclusion takes the form of a proposed amendment to s 20(9). It encompasses the approach of the common law, the UK and Australian jurisprudence. The learned Lord Sumption in *Prest*, held the following:

³⁴ See 4.3.4.

³⁵ See 4.3.4.

³⁶ See 4.3.4.

³⁷ See 4.3.4.

³⁸ *Ex Parte Gore* (2013) Para. 33.

‘The recognition of a limited power to pierce the corporate veil, in carefully defined circumstances, is necessary if the law is not to be disarmed in the face of abuse’.³⁹

Unlike in other jurisdictions where courts are not empowered by a statutory provision, similar to the doctrine at common law when piercing the veil, South Africa boasts of the presence of s 20(9) under the Act. The present challenge with s 20(9) however, is that the provision needs to be clearly defined and in order to be applied in determined circumstances. For this reason, a proposal to amend s 20(9) has been proffered in an attempt to minimise potential interpretive issues.

5.3.1 Recommendations

The general recommendation is that the doctrine is to be given a workable interpretation -one that is practical, predictable and effective in its operation. The issue of determining when the doctrine is applicable has been a common thread across the precedent at common law.⁴⁰ For this reason, a workable provision of the doctrine has been submitted herein.

The term ‘unconscionable abuse’ in the current s 20(9) does not take the law forward; keeping the term in the section is a backward step into the morass of the common law doctrine.⁴¹ The term should therefore be removed altogether. Removal of the term from s 20(9) is the preferred submission due to the practical issues that a court may face in applying the section. A doctrine cannot be based on a criterion which cannot be measured with certainty. The common law doctrine was simpler in this respect, as there was no criterion against which the abuse was to be measured. It simply had to be an abuse of juristic personality which was incapable of being solved by other remedies. It is therefore submitted herein that the term ‘unconscionable’ is removed from the section as the requirement of an

³⁹ *Prest* (2013) Para. 27; *JJES Pty Ltd v Sayan* (No 2) (2014) NSWSC 975 Para. 18 and *Permark International Interiors Pty Ltd v Amoveo Pty Ltd & Ors* (2013) VSC 563 Para. 29.

⁴⁰ *Prest* (2013) Para. 75 and Moore M ‘A temple built on faulty foundations: Piercing the corporate veil and the legacy of *Salomon v Salomon*’ 2006 *Journal of Business Law* 180-1 (hereinafter Moore M (2006)).

⁴¹ See 4.4.

‘abuse’ of juristic personality does not take away from the application of the section or change the section in any way.

5.3.2 Proposed amendment to section 20(9)

It is hereby recommended that s 20(9) be amended as follows:

20 (9)

‘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 abuse of the juristic personality of the company as a separate entity, the court may—

- (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
- (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).’
- (c) ***‘The application of this section ‘must be construed concurrently with, and not in substitution for, any relevant common law principle...’⁴²***
- (d) ***This section shall apply to a group of companies in the same manner as it is applicable to an individual or group on individuals as stated in paragraph (a).⁴³***

Word Count: 28200

⁴² Adopted from s 20(8).

⁴³ See 3.4.1, ground 4.

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