

**DISREGARDING THE SEPARATE JURISTIC PERSONALITY  
OF A COMPANY:  
AN ENGLISH CASE LAW COMPARISON**

by

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## **CHAPTER 1: Introduction**

### **1.1 Subject of this study**

The subject of this study is an analysis of the doctrine of piercing the corporate veil.<sup>1</sup> The analysis will focus on the concept of legal personality itself; both the common law and statutory position in South Africa; recent developments in England; and thereafter a practical comparison study of the English and South African positions.

The purpose of this study is to determine whether recent developments in English courts can provide guidance to their South African counterparts when adjudicating matters regarding the piercing of the corporate veil doctrine.

### **1.2 Context**

The legal status of a duly incorporated company is in law equal to a natural person. This principle is one of the cornerstones of South African company law. The modern day legal status of a company finds its origin in the age old case of *Salomon v Salomon* where Lord Haldbury stated the following:

“It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its own rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.”<sup>2</sup>

The abovementioned principle created in *Salomon* is now accepted by the legislature, courts and academics alike that from incorporation, a company has its own legal personality distinct from its shareholders.<sup>3</sup> As a distinct legal entity, the company has the capacity to acquire its own rights and incur its own duties and

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<sup>1</sup> South African courts and academics alike has in the past referred to both ‘piercing’ and ‘lifting’ the corporate veil interchangeably. However, it has been suggested that there is a difference between ‘piercing’ and ‘lifting’ the corporate veil. In *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769 the Court expressly distinguished between ‘piercing’ and ‘lifting’. The court held that ‘piercing’ is reserved for treating the rights, liabilities or activities of a company as the rights, liabilities or activities of its shareholders. ‘Lifting’, the court said, meant to have regard to the shareholding in the company for some legal purpose. In this study will there, to avoid confusion and to maintain consistency, only be referred to ‘piercing’ of the corporate veil.

<sup>2</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL) at par 30.

<sup>3</sup> Section 19(1) of the Companies Act 71 of 2008.

obligations.<sup>4</sup> The result of the aforementioned is that the obligations of the company remain those of the company and not the shareholders, directors or prescribed officers who own or act for the company.<sup>5</sup>

The incorporation of a company gives rise to the so-called 'corporate veil' of a company. The 'veil' is used as a metaphor to hide conduct of the company. In appropriate circumstances the court will 'pierce' the metaphoric 'veil' to expose the undesirable conduct of the company. The courts will be prepared to do the latter in appropriate circumstances to ensure the individuality of a company.<sup>6</sup> The purpose of the veil is to distinguish between the company and its shareholders and to protect those who deal with the company.<sup>7</sup>

### 1.3 Methodology

In this study the South African approach to piercing the veil will be analysed.<sup>8</sup> The approach will focus on the common law position,<sup>9</sup> principles created to pierce the veil,<sup>10</sup> the statutory approach and thereafter the position reflected in case law.<sup>11</sup>

The English approach will be analysed as well.<sup>12</sup> During this analysis the origin of the doctrine of piercing the corporate veil will be dealt with as well as the common law approach. The focus will however be on selected recent case law developments. In pursuance of the aforementioned will a study be done on *Ben Hashem v Ali Shayif*<sup>13</sup> and *VTB Capital Plc v Nutritek International Corp & Others*.<sup>14</sup>

After both the South African and English positions have been analysed the focus will move from purely analytical to a practical application of the principles formulated. In order to do so a fact based approach will be followed by applying the facts of

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<sup>4</sup> *Webb & Co Ltd v Northern Rifles* 1908 TS 462.

<sup>5</sup> Section 19(2) of the Companies Act 71 of 2008. It is interesting to note that this section stands in close relation to the case of *Salomon v Salomon* [1897] AC 22 (HL).

<sup>6</sup> Larkin MP *Regarding judicial disregarding of the company's separate identity* South African Mercantile Law Journal 1989 277 p277.

<sup>7</sup> Keuler A 'n *Regsvergelykende Studie Aangaande die Leerstuk Lig van die Korporatiewe Sluier* LLD Thesis 2013 p61.

<sup>8</sup> See Chapter 4 here under.

<sup>9</sup> Paragraph 4.2.1.

<sup>10</sup> Paragraph 4.2.2.

<sup>11</sup> Paragraph 4.3, 4.4, 4.5.

<sup>12</sup> Chapter 5.

<sup>13</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380.

<sup>14</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808.

selected South African case law, where the doctrine of piercing has been adjudicated, to the principles laid down in the selected recent English case law developments.<sup>15</sup> What stands to be concluded is threefold: Firstly whether one can apply English case law directly to the South African case law's facts; secondly, whether the courts would hypothetically come to the same conclusions than its South African counterparts did; and thirdly, whether the English approach is in fact a better approach, as opposed to the South African approach.

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<sup>15</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 and *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808.

## **CHAPTER 2: Concept of a separate legal personality**

### **2.1 Introduction**

Legal personality is a concept developed over centuries pertaining to who are legal subjects which can be the bearer of rights, duties and obligations. It is trite that a natural person is a legal subject who has certain rights in respect of a legal object.<sup>16</sup> Rights of legal subjects can be divided into real rights,<sup>17</sup> personal rights,<sup>18</sup> intellectual property rights<sup>19</sup> and personality rights.<sup>20 21</sup>

It has been accepted that, in any established legal system, a need to create artificial legal *personae* arises, which are capable to be bearer of rights, duties and obligations in the same way as a natural person. This is referred to as a separate legal personality. This means that a legal personality is not a natural phenomenon but a creature of law.

Cilliers described legal personality well:

“Legal personality is a mental construction; but it is not therefor a fiction. It is a juristic creation – a legally created capacity of sustaining rights and duties, which are also legal creations themselves, but it does not follow that it is not something real. In one sense it is artificial, as all things though by us are artificial.”<sup>22</sup>

The concept of a corporate personality can, with regards to the above, most conveniently be described as a legal personality which can be enjoyed by a group of natural persons.<sup>23</sup>

Although it is generally accepted that on incorporation of a company it comes into existence as a separate entity distinct from its shareholders, many theories have been formulated with regards to the nature of the juristic personality of a company.<sup>24</sup>

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<sup>16</sup> Subject to certain qualifications such as age, capacity, etc.

<sup>17</sup> Rights to a corporeal such as ownership.

<sup>18</sup> Such as a right to claim from another legal subject in terms of contract or delict.

<sup>19</sup> The rights in the physical embodiment of the intellect of a legal subject.

<sup>20</sup> The rights to privacy, dignity of fame.

<sup>21</sup> Delpont PA *The New Companies Act Manual* 2<sup>nd</sup> Edition 2011.

<sup>22</sup> Cilliers A *Critical enquiry into the origin, development and meaning of the concept “Limited Liability” in Company Law. Regshistoriese en regsvergelykende studie* LLD Thesis 1963.

<sup>23</sup> Keuler A *’n Regsvergelykende Studie Aangaande die Leerstuk Lig van die Korporatiewe Sluier* LLD Thesis 2013 p18.

## 2.2 How juristic personality is acquired

A legal person comes into existence In South Africa, as in other industrially advanced countries, corporations of all kinds, public and private, abound; state corporations, municipalities and universities; trade unions and employees' associations; companies; close corporations and co-operative societies.<sup>25</sup> Leaving aside corporations of public law, there are three ways in which an association of persons may acquire legal personality.

Firstly, by a general enabling act: the most commonly known example of a general enabling act is the Companies Act.<sup>26</sup> Acts like the Companies Act provides certain criteria to which an entity must comply before it will enjoy legal personality.

Secondly, a specific act: certain acts specifically provide that an entity formed of that specific act has a legal personality. An example is the University of Pretoria (Private Act) 13 of 1930 provides that the University is a legal person.<sup>27</sup>

Lastly, a certain entity can be regarded as a legal person by conducting itself as a juristic person. The common law recognises an association of persons as a legal person.<sup>28</sup> However, this is only possible if a particular act does not preclude such an effect.<sup>29</sup>

## 2.3 The effect of incorporation of a company

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<sup>24</sup> These theories include the fiction theory; concession theory; reality theory and the juristic reality theory. Most academics in South Africa believe that theory of juristic reality presents the most acceptable approach. This approach entails that a legal person is seen as a reality from a juristic point of view and its equation with man accepted is as a fact. According to Cilliers and Benade *et al* is none of these theories on the legal nature of a company completely satisfactory, although they have influenced legal thought concerning the company. Further are they also of opinion that most of the theories have has a discernable influence on our law but none of them can be regarded as a permanent basis of our company law. See Cilliers & Benade *et al Korporatiewe Reg* 3<sup>rd</sup> Edition 2001 p8.

<sup>25</sup> Pretorius JT *et al Hahlo's South African Company Law through the cases* 6<sup>th</sup> Edition 1999.

<sup>26</sup> In South Africa is the Companies Act 71 of 2008 the current position.

<sup>27</sup> With certain restrictions on its capacity and powers.

<sup>28</sup> According to Delpont are the following required before such an entity will acquire a legal personality by conduct: The property of the members and that of the legal person must be kept apart; the legal person must have the capacity to incur obligations and to have rights; and a legal person must be capable of having *locus standi* to sue in its own name and to be sued in that name.

<sup>29</sup> Delpont PA *The New Companies Act Manual* 2<sup>nd</sup> Edition 2011 p10.

Once a company is properly incorporated, it becomes a separate entity with its own rights and obligations. The effect of the legal personality of a company is illustrated in the age old case of *Salomon v Salomon and Co Ltd*:<sup>30</sup>

“It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its own rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.”

The company is therefore, once the company is incorporated, a separate legal subject independent of its constituent shareholders.<sup>31</sup> Numerous consequences flow from the fact that a company has a separate legal personality.<sup>32</sup>

## 2.4 Conclusion

The company as an association of persons exists as a separate legal entity with a legal personality from the moment of registration.<sup>33</sup> As a legal person, a company has all the powers that a natural person has, except to the extent that the company is not able to exercise such power.<sup>34</sup> A company therefore is entitled to all the rights a legal subject may have, subject to the extent that such rights are applicable and can be exercised by a company. The Constitution is very clear on this aspect:

“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.”<sup>35</sup>

The idea that a group of persons having the capacity to acquire rights and duties in the same way as an individual has been recognised even in primitive societies.<sup>36</sup> The

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<sup>30</sup> *Salomon v Salomon* [1897] AC 22 (HL).

<sup>31</sup> Delpont PA *The New Companies Act Manual* 2<sup>nd</sup> Edition 2011 p11.

<sup>32</sup> These consequences include the following: Perpetual succession; the company enjoys a separate existence from its shareholders; the company’s shareholders’ liability is limited; power to own property; and the company has *locus standi*.

<sup>33</sup> Ciliers & Benade *et al Korporatiewe Reg* 3<sup>rd</sup> Edition 2001 p5.

<sup>34</sup> For example see *Madrassa Anjuman Islamia v Johannesburg Municipal Council* 1919 AD 439 where the Court said that is not possible for a company to be physically present anywhere. Another example is in *Ex Parte Donaldson* 1947 (3) SA 170 (T) where the Court said that a company may not be appointed as a guardian for a minor.

<sup>35</sup> Section 8(4) of the Constitution of the Republic of South Africa 1996.

<sup>36</sup> Ciliers & Benade *et al Korporatiewe Reg* 3<sup>rd</sup> Edition p6.

theory which is supported by most academics in South Africa to recognise such entities is the 'Juristic Reality Theory'.<sup>37</sup> This theory acknowledges that a company is seen as in its equation with man from a juristic point of view.<sup>38</sup>

From the date and time the company is registered, the company is a juristic person.<sup>39</sup> The position taken by the legislature in the Companies Act<sup>40</sup> supports, and is most likely, a product of the principle set out in *Salomon v Salomon*<sup>41</sup> in that a company must be treated as an independent person with rights and liabilities appropriate to itself.

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<sup>37</sup> Cilliers & Benade *Company Law* 4<sup>th</sup> Edition 1984 p8.

<sup>38</sup> Cilliers & Benade *Company Law* 4<sup>th</sup> Edition 1984 p8.

<sup>39</sup> Section 19(1) of the Companies Act 71 of 2008.

<sup>40</sup> Companies Act 71 of 2008.

<sup>41</sup> *Salomon v Salomon* [1897] AC 22 (HL). The full quote in this regard reads: "It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its own rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

## **CHAPTER 3: The philosophy behind disregarding the separate juristic personality of a company**

### **3.1 Introduction**

South African law recognises that on incorporation, a company acquires an independent legal personality distinct from its shareholders.<sup>42</sup> As a distinct legal entity, the company has the capacity to acquire its own rights and incur its own duties and obligations.<sup>43</sup> Corporate obligations remain the liability of the company, not the shareholders, directors or prescribed officers who own or act for the company.<sup>44</sup>

Incorporation of a company gives rise to the so-called corporate veil of a company. As the metaphor has it, in appropriate circumstances, a court can 'pierce' the 'veil' which otherwise ensures the individuality of a company, careless of the consequences, both by separating it from those connected with it (the incorporators), and, so it is said, by obscuring the latter from the view.<sup>45</sup> The purpose of the veil is to distinguish between the company and its shareholders and to protect those who deal with the company.<sup>46</sup>

In the light of cases such as *Salomon v Salomon*<sup>47</sup> and *Dadoo Ltd v Krugersdorp Municipal Council*<sup>48</sup> where the Courts refused to disregard the separate juristic personality of a company, is it very difficult to persuade the courts to pierce the veil. In the last two mentioned cases the court has steadfastly applied the principle that the company is a separate legal entity distinct from its shareholders who comprise it. Despite the fact that the general rule remains that a company has a separate juristic personality which should not be disregarded, the possibility remains that the corporate structures of a company can be abused and the courts have, on occasion, been prepared to pierce the corporate veil.

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<sup>42</sup> Section 19(1) of the Companies Act 71 of 2008.

<sup>43</sup> *Webb & Co Ltd v Northern Rifles* 1908 TS 462.

<sup>44</sup> Section 19(2) of the Companies Act 71 of 2008. It is interesting to note that this section stands in close relation to the case of *Salomon v Salomon* [1897] AC 22 (HL).

<sup>45</sup> Larkin MP *Regarding judicial disregarding of the company's separate identity* South African Mercantile Law Journal 1989 277 p277.

<sup>46</sup> Keuler A *'n Regsvergelykende Studie Aangaande die Leerstuk Lig van die Korporatiewe Sluier* LLD Thesis 2013 p61.

<sup>47</sup> *Salomon v Salomon* [1897] AC 22 (HL).

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

The veil is said to be ‘pierced’ when, in certain exceptional circumstances, the court either ignores the company and treats its shareholders as if they were the owners of its assets and were conducting its business in their personal capacities, or attributes rights or obligations of the shareholders to the company. When the court pierces the corporate veil, it does so only for the purpose of adjudicating the rights and liabilities of the parties in the matter before it.<sup>49</sup> The effect thereof is that the liabilities of the company transfer to someone other than the company. In the view taken by Pickering are there two reasons why there are exceptions to the separate entity doctrine.<sup>50</sup> Firstly, he says that a company cannot at all times and in all circumstances be treated like an ordinary person. An example of this would be that a company has no *mens rea* and therefore not capable of committing a delict or a crime, unless the court pierces the veil and imposes the intention of the directors or shareholders on to the company. Secondly, if there were no exceptions to the separate personality rule, directors or shareholders would be allowed to hide behind the shield of limited liability, with potentially disastrous effects.

This chapter will focus on the philosophy of disregarding the separate juristic personality of a company and how the principle was moulded by the courts to the position as we know it today.

## **3.2 Historic development**

When looking at the historic development of the separate juristic personality of the company, one needs to have cognisance of the fact that not only is separateness an issue, but also the effect it has on limited liability of the company’s shareholders.

### **3.2.1 The doctrine of limited liability**

The basic principle of limited liability is that the company has a legal personality, separate and distinct from its shareholders. The company’s property is not the property of its shareholders and also is the company’s debts not the debts of its

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<sup>49</sup> Kanjan A *Companies* in Joubert WA (founding ed) *The Law of South Africa Volume 4(1)* 2<sup>nd</sup> edition 2011.

<sup>50</sup> Pickering *The Company as a Separate Legal Entity* 1968 32 *Mercantile Law Review* p481.

shareholders.<sup>51</sup> <sup>52</sup> Flowing from the separate legal personality of the company is the important notion of limited liability.

Limited liability entails, *inter alia*, that a shareholder's liability for the debts of the company cannot exceed the value of the shares or securities that shareholders holds in the company.<sup>53</sup> The effect thereof is that creditors who have claims against the company may look only at the company's assets for the satisfaction of their claims as creditors, and generally cannot proceed against the personal assets of the company's shareholders. The benefit of a company with limited liability is that its shareholders' risks are capped while their potential for gain is unlimited.<sup>54</sup>

The modern company in South Africa finds its roots in the company legislation of 1844 -1862 as well as in the *Salomon* case.<sup>55</sup> The Joint Stock Companies Act of 1844 simplified the process of, and reduced the costs of incorporation, allowing for corporate form to be employed by a wider range of users.<sup>56</sup> However, the Joint Stock Companies Act made no provision for the limitation of shareholder's personal liability.<sup>57</sup>

Limited liability was given statutory recognition in the United Kingdom in the Limited Liability Act of 1855. Last mentioned required that shareholders of an entity meet certain criteria in order to enjoy limited liability. The Limited Liability Act of 1855 was incorporated in 1956 into the Joint Stock Companies Act in South Africa. According to the Joint Stock Companies Act, once all registration formalities were achieved, the company would automatically enjoy limited liability.<sup>58</sup>

If one has cognisance of Lord Halsbury's decision in *Salomon v Salomon*, one would appreciate the fact that the shareholders of a company would not be, automatically in

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<sup>51</sup> *Webb & Co. v Northern Rifles* 1908 TS 462; *Salomon v Salomon and Co Ltd* [1987] AC 22 (HL); *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL(Ir)); *Lee v Lee's Air Farming Ltd* [1960] 3 All ER 420 (PC).

<sup>52</sup> And *vice versa*.

<sup>53</sup> Section 1 of the Companies Act 71 of 2008 (and as substituted by Section 1(1)(aa) of Act 3 of 2011) defines 'securities' to mean any shares, debentures or other instruments, irrespective of their form or title, issued or authorised or to be issued by a profit company.

<sup>54</sup> Gower and Davies *Principles of Modern Company Law* 7<sup>th</sup> Edition 2003 p176.

<sup>55</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

<sup>56</sup> Cheong A P *Corporate Liability: A Study in Principles Attribution* Kluwer Law International 2001 p3.

<sup>57</sup> Glazer M *Piercing the Corporate Veil: A Review of the Concept and Consideration of its Relevance in South Africa Tax Law Dissertation* The University of Cape Town 1994 p2.

<sup>58</sup> Glazer M *Piercing the Corporate Veil: A Review of the Concept and Consideration of its Relevance in South Africa Tax Law Dissertation* The University of Cape Town 1994 p3.

their personal capacity, be entitled to the benefits, nor would they be liable for the obligations or responsibilities of the company.<sup>59</sup> Thus, a shareholder's profit and losses are restricted to his or her share in the company.<sup>60</sup>

Notwithstanding the decision in the *Salomon* case (but also recognised by Lord Halsbury), there are commentators who argue that limited liability can be subject to abuse because limited liability is capable of manipulation. To adjudicate abuse and disregard limited liability the courts have ignored the separate juristic personality of a company by what is referred to as 'pierced the corporate veil'.<sup>61</sup> Consequently, 'piercing' would be an exclusion to the rule of 'limited liability' and the court would then be entitled to look at substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie.<sup>62</sup>

### 3.2.2 A brief history of piercing the corporate veil.

The rule in *Foss v Harbottle* was constructed in 1843. This decision is significant because it brings to light that a company is a separate juristic person with *locus standi* on its own:

"It was not, nor could it successfully be argued that it was a matter of course for any individual shareholders of a corporation thus to assume to themselves the right of suing in the name of the corporators."<sup>63</sup>

The rule in *Foss v Harbottle* is referred to as the 'proper plaintiff rule'.<sup>64</sup> This rule was later reinforced in the *Salomon case*, where it was held that the company is a separate legal person, this being the first time the court asserted the separate legal existence of the company.<sup>65</sup>

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<sup>59</sup> *Salomon v Salomon And Co Ltd* [1897] AC 22 (HL).

<sup>60</sup> And also to the company's rules, for example, when the company will pay dividends.

<sup>61</sup> Some examples of cases where courts have pierced the corporate veil are: *Daimler Co Ltd v Continental Tyre and Rubber Co* [1916] 2 AC 3017; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168; *Lategan v Boyes* 1980 (4) SA 191 (T) and *Southern v Watson* [1940] 3 All ER 439.

<sup>62</sup> *Deputy Sherriff Harare v Trinpac Investments (Private) Ltd & another* [2012] JOL 28241 (ZH).

<sup>63</sup> *Foss v Harbottle* (1843) 67 ER 189. The rule laid down is known as the 'proper plaintiff' – rule. This entails that when a wrong is committed against a company, the company itself would be the plaintiff in the proceedings and not the members.

<sup>64</sup> This rule is subject to exceptions.

<sup>65</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

In terms of the *Salomon* case, shareholders of a company would not be, automatically, in their personal capacity, be entitled to the benefits nor would they be liable for the obligations of the company and the shareholders should be distinguished from the company itself. In the words of Lord Macnaghten:

“The company is at law a different person altogether from the subscribers to the memorandum: and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons and managers, and the same hands receive the profits, the company is not in law the agent of the subscriber...”<sup>66</sup>

However, the exception to the rule to disregard the separateness of a company is when the courts will in exceptional circumstances discard it. There must be distinguished between when the courts will exercise their powers at common law to ‘pierce the corporate veil’ and where the legislature have conferred their powers to the courts to vest liability on the company’s shareholders.<sup>67</sup> The courts have made it abundantly clear that they have no general discretion to simply disregard a company’s separate legal personality on a whim if they feel that it is just to do so. In *Botha v Van Niekerk* the learned Judge said that “(m)ere equity, at its best a reasonably unmanageable horse, is not sufficient”. The court thought that there should, at the very least, be unusual grounds which create a reasonably pressing need in the interest of justice.<sup>68</sup>

The doctrine of ‘piercing the corporate veil’ has gained considerable ground in South Africa during the 1980’s. The doctrine is a common law principle in company law. It asserts that in certain circumstances, a court is empowered to disregard the principle of the separate legal existence of a company and so achieve a more acceptable result.<sup>69</sup> However deciphering when the courts will and will not pierce the corporate veil seems to be the most confusing issue surrounding the doctrine, mostly because there seems to be very little consistency in the application of this doctrine by the courts. There are various tests which have been developed by the courts and

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<sup>66</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

<sup>67</sup> Cilliers & Benade *Maatskappyereg* 4de Uitgawe 1982 p13-14.

<sup>68</sup> *Botha v Van Niekerk* 1983(3) SA 513 (W).

<sup>69</sup> Larkin MP *Regarding judicial disregarding of the company’s separate identity* South African Mercantile Law Journal 1989 277 p277.

academics alike. The predominant approach adopted by the South African courts is the ‘categorisation approach’.

### 3.3 The purpose of piercing the corporate veil

It has been canvassed above that South African law recognises that, on incorporation, a company acquires an independent legal personality and becomes the carrier of its own rights and duties with its own estate, separate from its shareholders.<sup>70</sup> In certain circumstances a court may justifiably disregard the separate personality of a company in order to fix liability elsewhere for what appears to be acts of the company.<sup>71</sup> In these circumstances the courts will “peer” through the corporate veil: to give effect to the reality behind the façade of a company or even ignore the separate existence of the legal person, as it is described, to “pierce the corporate veil”.<sup>72</sup> The result is that personal liability attaches to someone who misuses the company’s juristic personality.<sup>73</sup>

South African courts have adopted the approach of piercing the corporate veil, and ignoring the separate legal personality of a company in certain instances in order to prevent its abuse by *“the natural person behind it as if there was no dichotomy between such person and the company”*.<sup>74</sup> In this event, the courts will generally strive to strike a balance between the conflicting interests of protecting the separate corporate identity and the public interest of exposing improper conduct. In *Cape Pacific v Lubner Controlling Investments (Pty) Ltd and Others* the court stated as follows.<sup>75</sup>

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<sup>70</sup> See *Dadoo Co Ltd v Krugersdorp Municipal Council* 1920 AD 530 where it was stated that a registered company is a legal person distinct from the members who compose it. The result follows from the separate existence with such corporations are by statute endowed, and the principle has been accepted in our practice. This conception of the existence of a company as a separate entity distinct from its shareholders is not, merely artificial and a technical thing. It is a matter of substance; property vested in the company is not and cannot be regarded as vested in all or any of its members.

<sup>71</sup> Sher H *Piercing the Corporate Veil: The independent legal personality of companies* 4 *Juta’s Business Law Journal* 52 1996.

<sup>72</sup> Cilliers & Benade *et al Korporatiewe Reg* 3<sup>rd</sup> Edition 2001 p13. See also the statement of principle by Lord Keith of Kinkel in *Woolfson v Strathclyde Regional Council* 1978 SC (HL): “it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts”.

<sup>73</sup> See *Deputy Sherriff Harare v Trinpac Investments (Private) Ltd & another* [2012] JOL 28241 (ZH).

<sup>74</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A).

<sup>75</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A).

“It is undoubtedly a salutary principle that our courts should not lightly disregard a company’s separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct (and I confine myself to such situations) is found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil. . . . And a court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would obviously have to be considered on its own merits.”

The courts will pierce the corporate veil even in the event of an isolated instance of fraudulent, improper or dishonest action by an otherwise legitimate company that usually engages in lawful activities. It is thus not a requirement that the company should be established with a fraudulent aim before the corporate fiction would be ignored.<sup>76</sup>

In summary, the position in South African law is that piercing the corporate veil is an exception to the principle of limited liability that flows from incorporation and the resultant separate legal personality of a company. Henochsberg concludes correctly, it is submitted, that the court “may lift the veil’ only where otherwise as a result only of its existence fraud would exist or manifest justice would be denied”.<sup>77</sup>

### **3.4 The difference between ‘piercing’ and ‘lifting’ the corporate veil**

Although the courts have referred to both the ‘piercing’ and ‘lifting’ of the corporate veil interchangeably, there has been distinguished between the two principles, and this mostly by English courts. As stated in *Yukong Line Ltd v Rendsburg Investments Corp (No 2)*:<sup>78</sup>

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<sup>76</sup> Sampson I *Environmental Auditing in South Africa, A guide to* October 2008 Service Issue 9.

<sup>77</sup> Henochsberg 55.

<sup>78</sup> *Yukong Line Ltd v Rendsburg Investments Corp (No 2)* [1998] 4 All ER 82.

“It may not matter what language is used as long as the principle is clear; but there lies the rub.”

However in *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)*<sup>79</sup> the Court did expressly distinguish between ‘piercing’ and ‘lifting’. The court held that ‘piercing’ is reserved for treating the rights, liabilities or activities of a company as the rights, liabilities or activities of its shareholders. ‘Lifting’, the court said, meant to have regard to the shareholding in the company for some legal purpose.

In South African law both ‘piercing’ and ‘lifting’ have been used, and are used interchangeably.<sup>80</sup> As been held before, these two expressions are synonymous.<sup>81</sup>

### 3.5 Conclusion

It was recognised as early as 1843 that a company is a separate legal person with its own *locus standi* in the formulation of the ‘proper plaintiff rule’.<sup>82</sup> This rule was later reinforced in the *Salomon* case, where it was held that the company is a separate legal person, this being the first time the court asserted the separate legal existence of a company.<sup>83</sup> The effect of the decision in *Salomon* has formed the cornerstone of modern day company law in that a company has rights and obligations appropriate to itself.

Limited liability is one of the consequences of the separate juristic personality of a company. What limited liability in short entails, is that the company’s property is not the property of its shareholders, and the same applies to its debts. This is a very attractive attribute of a company because a shareholder’s liability cannot exceed the value of the securities held in the company.<sup>84</sup> Thus, by investing in a company, the shareholders’ risk is capped while their potential for gain is unlimited.<sup>85</sup> It is thus clear from the foregoing that limited liability is most certainly essential to any sound economy and the corporate legal principles governing it.

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<sup>79</sup> *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769.

<sup>80</sup> For the purpose of this study the concepts will be referred to alike.

<sup>81</sup> *Ben Hashem v Al Shayif* [2009] 1 FLR 115.

<sup>82</sup> This rule was formulated in *Foss v Harbottle* (1843) 67 ER 189.

<sup>83</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

<sup>84</sup> There is in certain circumstances exceptions.

<sup>85</sup> Gower and Davies *Principles of Modern Company Law* 7<sup>th</sup> Edition 2003 p176.

Although the doctrine of limited liability and the doctrine of the separate juristic personality of the company are two different concepts, limited liability is a product of the separate juristic personality in terms of company law. As described by the court in *Dadoo Ltd v Krugersdorp Municipal Council*, a registered company is a legal person distinct from its shareholders who comprise it.<sup>86</sup>

Where the company's shareholders have abused the juristic personality of the company the courts will, in exceptional circumstances, be prepared to 'lift or pierce the corporate veil'.<sup>87</sup> In this event, the courts will generally strive to strike a balance between the conflicting interests of protecting the separate corporate identity and the public interest of exposing improper conduct. In summary, although the courts do not disregard the separate juristic personality easily, the courts will be prepared to pierce the corporate veil where it is in the interest of justice to do so.

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<sup>86</sup> *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530. See also *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL).

<sup>87</sup> "Abuse" here includes a wide variety of circumstances, for example, but not limited to, fraud, dishonesty, a natural person act as though there is no dichotomy between him-/herself and the company, etc.

## **CHAPTER 4: A South African Approach of piercing the Corporate Veil**

### **4.1 Introduction**

As canvassed above, the separate legal personality of a company should not be disregarded lightly. In the face of decisions such as *Salomon v Salomon & Co Ltd*<sup>88</sup> and *Dadoo Ltd v Krugersdorp Municipal Council*,<sup>89</sup> it is very difficult to persuade the courts to disregard the corporate veil. In the last two mentioned cases the courts have steadfastly applied the principle that a company is a separate legal entity distinct from its shareholders who comprise it, and have generally refused to look behind the veil and fasten the attention on the individual shareholders.

Unfortunately, the decisions of the courts do not display a pattern or any principle which is consistently applied. The result is, that in any particular case, it will be difficult to determine in which direction the court will go. However, the general rule is that the company will disregard the separate personality if the juristic personality is used as a mere façade or concealing the true facts<sup>90</sup> so that there is some kind of abuse of the corporate personality,<sup>91</sup> or the separate legal personality is not maintained in the full sense. The result thereof is that a separation between the company and the shareholders exist *de jure*, but not *de facto*.

It has been suggested that the doctrine of 'piercing the corporate veil' is a common law principle. It asserts that, in certain circumstances, a court is empowered to

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<sup>88</sup> *Salomon v Salomon* [1897] AC 22 (HL).

<sup>89</sup> *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.

<sup>90</sup> *Woolfson v Strathclyde Regional Council* 1978 SC 90 (HL) 96. See also *Smith v Hancock* 1894 2 Ch 377 385; *Gilford Motor Co Ltd v Horne* 1933 Ch 935; 1933 All ER Rep 109 (CA); *Jones v Lipman* 1962 1 All ER 442 445; 1962 1 WLR 832 836; *Tunstall v Steigman* 1962 2 QB 593 602; 1962 2 All ER 417 (CA) 421; *Adams v Cape Industries plc* 1990 1 Ch 443 549; 1991 1 All ER 929 (Ch and CA) 1022; *Wambach v Maizecor Industries (Edms) Bpk* 1993 2 All SA 158 (A); 1993 2 SA 669 (A) 675; *Macadamia Finance Ltd v De Wet* 1993 2 All SA 162 (A); 1993 2 SA 743 (A) 748; *The Shipping Corporation of India Ltd v Evdmon Corporation & The President of India* 1994 2 All SA 11 (A); 1994 1 SA 550 (A) 566.

<sup>91</sup> Companies Act 71 of 2008 s 20(9)(a). This provision stands in close resemblance of the Close Corporations Act 69 of 1984 s 65 which provides that, whenever a court finds that the incorporation of, or any act by or on behalf of, or any use of that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities, or of such member or members thereof, as are specified in its declaration; to similar effect.

disregard the principle of the legal separate existence of a company and so achieve a more acceptable result.<sup>92</sup>

The focus of this chapter will lie in the South African approach of piercing the corporate veil and under which circumstances the courts have been inclined to do so. The *modus operandi* of this chapter will begin with the common law approach, thereafter the courts' approach and lastly how legislation and specifically how the New Companies Act<sup>93</sup> influenced the court's approach to justify piercing the corporate veil.

## 4.2 Common Law Approach

### 4.2.1 General

Even though the company exists from a juristic point of view, the fact remains that a company has no soul and can therefore never be compared to the embodiment of a natural person in a physical sense. However, as canvassed above, a company is a legal person from a juristic point of view, and can act like a natural person, for the exception only where a company does not have the capacity to act like a natural person.<sup>94</sup>

South African courts have generally accepted the English position with regards to the conditions of when it is acceptable to apply the doctrine of piercing the corporate veil. The principle was laid out and arguably one of the first cases ever where the court was asked to pierce the corporate veil after the company was legally incorporated. This is the English case of *Salomon v Salomon and Co Ltd.*<sup>95</sup> In this matter Lord Halsbury laid down a principle which lays the foundation of the separate juristic personality of a company:

“It seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in

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<sup>92</sup>Larkin MP *Regarding judicial disregarding of the company's separate identity* South African Mercantile Law Journal 1989 277 p277.

<sup>93</sup> Companies Act 71 of 2008.

<sup>94</sup> Par 2.1.

<sup>95</sup> *Salomon v Salomon* [1897] AC 22 (HL).

the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.”<sup>96</sup>

In this particular case of *Salomon* it was contested by the company’s creditors that Mr Salomon did not maintain the separate personality of the company. The company was, what is referred to as a ‘one man company’. The liquidator, alleging that the company was a mere alias or agent of Mr Salomon claimed that the vendor was liable to indemnify the company against the claims of an ordinary creditor, and no payment should be made to the debentures held by him until the ordinary creditors have been paid in full. The liquidator succeeded at first in that the court found that the company was Mr Salomon in another form that employed the company as his agent. However, this decision was reversed by the House of Lords. The House of Lords found:

“...It has become the fashion to call companies of this class ‘one man companies’. That it is taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act may have been complied with, it is inaccurate and misleading; if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that, that I can see contrary to the true intention of the Act or against public policy, or detrimental to the interests of creditors”<sup>97</sup>

From the above it is clear that the House of Lords was not prepared to pierce the corporate veil merely because of the fact that the company was under the control of Mr Salomon. The court had great value of the ‘form’ factor with regard to the company and was satisfied that the company was properly incorporated.

In South Africa the court also steadfastly applied the principle that once a company is incorporated it should be regarded as a separate juristic personality. In the case of *Dadoo Ltd v Krugersdorp Municipal Council*,<sup>98</sup> the court heard a matter where a company owned immovable property. This is significant because firstly, Asiatics was prohibited to own immovable property in the old Transvaal, and secondly, all

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<sup>96</sup> At par 30 of the judgment.

<sup>97</sup> At par 53 the judgment.

<sup>98</sup> *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 (DeVilliers JA dissenting).

the shares in the company were owned by Asiatics. The court in short had to consider whether a particular race can be attributed to a company. The court needed to consider which carries more weight: substance (owned by Asiatics) over form (once a company is registered, it is a legal person distinct from the members who compose it). The court found as follows:

“This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be regarded as vested in any of its members.”

At common law, there are at least two necessary, but not sufficient conditions to pierce the corporate veil.<sup>99</sup> Firstly, the courts will only be prepared to pierce the corporate veil when special or exceptional circumstances exist.<sup>100</sup> As stated here above the separate legal personality of a company is a matter of substance, not a mere technicality, and although the interest of creditors should not be hindered by a mere technicality, substance must not be treated as form or swept aside as a technicality simply because it appears convenient in a particular case.<sup>101</sup> When the court does regard substance as the determining factor and pierce the veil, the court then imposes rights and obligations on the parties very different from that upon which they arranged their affairs.<sup>102</sup>

In the second instance, the courts have been prepared to pierce the corporate veil where the shareholders of the company have not only complete ownership and control of the company, but also control and domination of finances, policies and practices that the company has, so to speak, no separate mind, will or existence of its own.<sup>103</sup>

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<sup>99</sup> Kanjan A *Companies* in Joubert WA (founding ed) *The Law of South Africa Volume 4(1) 2<sup>nd</sup> edition* 2011. *Lifting or piercing the corporate veil in terms of common-law principles* par 87 LexisNexis Editor.

<sup>100</sup> *Banco de Moçambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) 345; *Botha v Van Niekerk* 1983 4 All SA 157 (W); 1983 3 SA 513 (W) 523; *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd* 1985 2 All SA 479 (T); 1985 4 SA 615 (T) 624–626.

<sup>101</sup> *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530. See also *Francis George Hill Family Trust v SA Reserve Bank* 1992 2 All SA 137 (A); 1992 3 SA 91 (A) 102..

<sup>102</sup> In *Wambach v Maizecor Industries (Edms) Bpk* 1993 2 All SA 158 (A) the plaintiff instituted action for damages arising out of a collision in which a vehicle owned by one of its subsidiaries was involved, the court refused to pierce the veil, saying that veil piercing in these circumstances, far from giving expression to commercial realities, would lead to total confusion in regard to the ownership of the vehicle.

<sup>103</sup> Kanjan A *Companies* in Joubert WA (founding ed) *The Law of South Africa Volume 4(1) 2<sup>nd</sup> edition* 2011.

Despite the above, there is no definitive test, or consequently applied principles which can give clear guidelines for veil piercing. This is unfortunate because without general principles, there is an existence of a great unpredictability. Instances where the veil can be pierced seem to fluctuate according to judicial thinking at the relevant time.<sup>104</sup> The lack of single and clearly identified principles has resulted in a number of overlapping lists of factors passed off as tests.<sup>105</sup>

I do deem it necessary to refer to the New Zealand courts for some wisdom in applying the principles as laid out by the *Salomon* case. In the case of *Re Securitibank Ltd (No 2)*<sup>106</sup> the court said the following:

“It may be... that the doctrine laid down in [the] *Salomon* [case]...has to be watched very carefully But that can only be so if a strict application of the principle of corporate entity would lead to a result so unsatisfactory as to warrant some departure from the normal rule... For myself, and with all respect, I would rather approach the question the other way round that is to say on the basis that any suggested departure from the doctrine laid down in [the] *Salomon* [case] should be watched very carefully. I think that is particularly so in a case such as the present where there is no suggestion that the individual corporate entities . . . were in some way used to create a sham facade.”

Similarly, in *Shipping Corporation of India Ltd v Eudan Corporation*<sup>107</sup> the learned Corbett CJ held that the separate personality of the company and the shareholders of utmost importance and that deviation from this rule should only occur in the rarest of cases. Such cases would be where there are elements of fraud or improper conduct present.

From the above, it appears that the courts seem to be more willing to pierce the corporate veil if doing so will result in justice being achieved.<sup>108</sup>

#### **4.2.2 Principles created to justify the piercing the corporate veil in South African Courts**

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<sup>104</sup> Payne PJ *Lifting the Corporate Veil: A Reassessment of the Fraud Exception* The Cambridge Law Journal, 1997 284 p284.

<sup>105</sup> Presser SB *Thwarting the killing of the Corporation: Limited Liability, Democracy and Economics* 1992 87 Northwestern University Law Review 148 at p151.

<sup>106</sup> *Re Securitibank Ltd (No 2)* 1978 2 NZLR 136 CA (NZ) at p158 to p159.

<sup>107</sup> *Shipping Corporation of India Ltd v Eudan Corporation* 1994 (1) SA 550 (A) at 566.

<sup>108</sup> Gallagher L and Ziegler P *Lifting the Corporate Veil in the Pursuit of justice*, The Journal of Business Law 1990 292 at p313.

Although the law can interfere with separateness of a company and upset the principle that every company has its own legal *persona* which should be distinguished from its shareholders, one should still dare to ask the question – “Should the separate legal statutes of the company be open to scrutiny through the doctrine of piercing the corporate veil or should the separate legal personality of the company be maintained at all times?”<sup>109</sup>

If one has cognisance of recent decisions in South African courts it seems as though there is no tendency to simply disregard the separate juristic personality of a company. To ‘pierce the corporate veil’ remained and remains an exceptional procedure. In the case of *Hülse-Reuter v Gödde* (which was heard in the Supreme Court of Appeal), the learned Judge puts it well:

“(T)here can be no doubt that the separate legal personality of a company is to be recognised and upheld in the most unusual circumstances. A court has no general discretion simply to disregard the existence of a separate corporate identity whenever it considers it just or convenient to do so...”<sup>110</sup>

The learned Judge continues:

“The circumstances in which the court will disregard the distinction between a corporate entity and those who control it are far from settled. Much will depend on an analysis of the facts of each case, consideration of policy and judicial judgment”<sup>111</sup>

Circumstances where the courts have disregarded the separate existence of a company distinct from those who comprise it cannot be strictly defined, though there are some tendencies<sup>112</sup> :

In *Lategan v Boyes* the view was expressed that the court will be prepared to pierce the corporate veil where some element of fraud or improper conduct exists.<sup>113</sup>

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<sup>109</sup> Presser SB *Thwarting the killing of the Corporation: Limited Liability, Democracy and Economics* 87 Northwestern University Law Review 148 at p124.

<sup>110</sup> *Hülse-Reuter v Gödde* 2001 (4) SA 1336 (SCA) at p1346.

<sup>111</sup> *Ibid* at 1346.

<sup>112</sup> The following examples is not intended to be a full or closed list, but is merely an indication of where the courts were prepared to pierce the corporate veil.

<sup>113</sup> *Lategan & another NNO v Boyes & another* 1980 (4) SA 191 (T).

In *Botha v Van Niekerk* the court said that the court will be prepared to pierce the corporate veil where it is in public interest and justifiable given the circumstances.<sup>114</sup>

In the same matter, the ‘unconscionable injustice’-test was formulated. What this in short entails is that if the separate existence of a company is upheld, does that lead to an unconscionable injustice?<sup>115</sup>

In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* the court stated piercing of the corporate veil could be justified in cases where fraud, dishonesty, or improper conduct exists.<sup>116</sup>

For purposes of this study, the most significant South Africa cases will be discussed in short, with special reference made to principles applied by the courts.

### “Fraudulent use”

In *Lategan v Boyes*<sup>117</sup> the facts of the matter were in short as follows: The two defendants in this case entered into a deed of suretyship in respect of a loan taken up by the company. In a subsequent amending agreement, the second defendant signed in his capacity as a director of the company. When sued on the deed of suretyship, the second defendant pleaded that he signed the amending agreement in his capacity as a director of the company, and not in his personal capacity as a surety. Therefore, he was of the opinion that he cannot be held personally liable for the principle debt, because he acted in his representative capacity.

In this Case the learned Justice Le Roux concluded as follows:

“I have no doubt that our courts would brush aside the veil of corporate identity time and again where fraudulent use is made of the fiction of legal personality”

Thus, in this particular case, the court was well prepared to disregard the separate legal *persona* of the company where fraudulent use was made of the separate juristic personality of the company.

### “Unconscionable abuse”

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<sup>114</sup> *Botha v Van Niekerk en ‘n Ander* 1983 (3) SA 513 (W).

<sup>115</sup> *Ibid.* The ‘unconscionable injustice’-test will be discussed in full below.

<sup>116</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).

<sup>117</sup> *Lategan v Boyes* 1980 (4) SA 191 (T).

This principle was laid down in *Botha v Van Niekerk*.<sup>118</sup> In this matter a contract of sale was concluded between the applicant and the respondents. The purchaser was described as ‘Van Niekerk or his nominee’. When demanded to perform in terms of the agreement Van Niekerk merely contended that he was replaced by the second respondent (company) as the purchaser and therefore not obliged to perform in terms of the agreement of sale. The applicant contended that the company was indeed actually Van Niekerk, but in another guise.

The court stated that an accurate and satisfactory formulation of the limits and ignorance of the distinction between the company and those who comprise cannot be made.

To determine whether the separate legal *persona* of the company should be disregarded the court formulated the ‘unconscionable injustice’-test. The last mentioned test has two components.

Firstly, the court needed to determine whether the conduct of the respondent was improper or not. If the court so find that the conduct of the respondent was improper, the court then, secondly, needed to determine whether the applicant has suffered an unconscionable injustice.

If one has cognisance of the abovementioned test it is clear that mere improper conduct by the respondent was not sufficient to pierce the corporate veil. Nor was unfairness towards the applicant sufficient to pierce the veil. Both elements must exist before the ‘unconscionable injustice’-test can be satisfied.

#### **“Fraud”, “dishonesty” and “improper conduct”:**

These principles were laid down in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* where the relevant facts of the matter were in short as follows:<sup>119</sup> The court, at first, needed to consider whether it is justified to pierce the corporate veil where an individual used two legal personalities (which he controlled at all relevant times) from separate companies to avoid performance in an agreement with a third party party. In the first instance the third party was successful, but the first company failed to perform in terms of the judgment against it. In a

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<sup>118</sup> *Botha v Van Niekerk* 1983 (3) SA 513 (W).

<sup>119</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).

following action the third averred that both companies were the real debtors in the judgment in the first action and should be enforceable against both of them. On appeal the Appellate Division found that both companies should be pierced in order to expose the individual as ‘the true villain of the pierce’ and the third was entitled to enforce the original judgment against the individual and the second company.

In the majority judgment laid down by Smalberger JA, he stated that the ‘unconscionable injustice’-test<sup>120</sup> was too rigid and that the test should rather be one where the interests of upholding the separate juristic personality of the company are weighed up against policy considerations in favour of piercing the veil.

Further on the court stated that piercing the corporate veil may occur where a company is legally incorporated but such incorporation was abused for the purpose of a specific transaction. The court referred thereto that all the facts should be taken into consideration and the court is entitled to pierce the veil where it is justifiable to do so. The court also made it clear that ‘piercing’ should not be regarded as a final remedy to the detrimented party where an alternative remedy exists. As per Smalberger JA”:

“it is not necessary that a company should have been conceived and founded in deceit and never have been intended to function genuinely as a company, before its corporate personality may be disregarded, hence it is matters not that the company was formed with the specific intention of being used to evade a contractual obligation or whether the company was formed with a legitimate purpose but was later used for an improper purpose – its separate legal personality may be disregarded in either event.”<sup>121</sup>

In the judgments delivered by both Smalberger JA and Van Heerden JA<sup>122</sup>, the learned judges, *per dicta*, stated that the abuse of the separate juristic personality takes place where: the company is used to perpetrate a fraud, or for a dishonest or improper purpose;<sup>123</sup> where the corporate identity is used to abuse or to achieve an

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<sup>120</sup> As formulated in *Botha v Van Niekerk* 1983 (3) SA 513 (W).

<sup>121</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 791.

<sup>122</sup> Smalberger JA delivered the majority judgment and Van Heerden JA the minority judgment.

<sup>123</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 at 804C.

unlawful or socially undesirable end;<sup>124</sup> or where the juristic personality of the company is used to justify a wrong, protect fraud or defend a crime.<sup>125</sup>

In his judgment the learned judge also confirmed that when considering whether it is legally appropriate in any given circumstances to disregard corporate personality, one should have cognisance of the 'substance-over-form'-doctrine.<sup>126</sup>

**“Misuse or abuse of the distinction between the corporate entity and those who control it:”**

In *Hülse Reutter and Others v Gödde* this principle was laid down and what happened was in short the following:<sup>127</sup>

The facts the court needed to consider was where a claim (which found its origin in an insolvent estate) was ceded to another company, Goldleaf, whom never performed in terms of the deed of cession. An action was brought for performance against the beneficial holders and controllers of Goldleaf and not the company itself. The reason therefore being that the controllers of Goldleaf acted in collusion with the insolvent estate to enter into the agreement for fraudulent purposes and in particular for the purpose of obtaining a respite for the insolvent estate from his creditors with no intention of the company ever honouring its obligations.

In his judgment Scott JA said that the separate legal personality of the company is to be recognised and upheld except in the most unusual circumstances and a court has no general discretion to disregard the corporate identity of the company whenever it considers it just or convenient to do so.

Further on the learned judge continued to confirm that when a court is asked to pierce the corporate veil he should have regard to the particular facts by a close analysis of each matter. However he stated further that “*there must at least be some misuse or abuse of the distinction between the corporate entity and those who*

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<sup>124</sup> *Ibid* at 808I.

<sup>125</sup> *Ibid* at 810D.

<sup>126</sup> Smalberger JA referred to *Dadoo v Krugersdorp Municipal Council* 1920 AD 530 where Innes CJ stated it as follows: 'the fundamental doctrine that the law regards the substance rather than the form of things - a doctrine common, one would think, to every system of jurisprudence and conveniently expressed in the *maxim plus valet quod agitur quam quod simulate concipitur*'.

<sup>127</sup> *Hülse Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA)

control it which results in an unfair advantage being afforded to the latter.”<sup>128</sup> What is rather unclear (and problematic), is that the court departed from the *Cape Pacific* case<sup>129</sup> without expressly stating so, and seemed to have reintroduced the requirement of an ‘unfair advantage’ into the test determining whether or not to pierce the veil.<sup>130</sup>

One finds it difficult to reconcile *Cape Pacific* and *Hülse Reutter* with one another. The reason therefore is because in *Hülse Reutter* the court required that there must be an ‘unfair advantage’, and the court said that there must be ‘no other remedy available’ to the detrimented party. Larkin and Cassim have asked the question as to whether this is the better approach to dealing with the veil piercing and have concluded that, if this is the correct approach, it may bring about the doctrine’s destruction. In this regard, Larkin and Cassim have stated “for what is there that can make any advantage unfair if there is no other remedy in law against it? Or, if an advantage is unfair why would there not be a legal remedy against it?”<sup>131</sup>

#### **A matter adjudicated under section 20(9) of the Companies Act 71 of 2008:**<sup>132</sup>

*Ex Parte Gore and Others NNO* was one of the first matters adjudicated in terms of the new Companies Act.<sup>133</sup> In this matter relief was sought by the applicants, being the liquidators of 41 companies to permit certain assets of those companies to be dealt with as if they were the property of the holding company. The relief which were asked for entailed selectively disregarding the separate personalities of a number of companies and treating their residual assets as the assets of the holding company for the purpose of settling creditors’ claims. The basis for this application relies on the basis that the relevant business of the group was conducted through the holding company with no or little regard to the distinction between the company’s legal personality and that of its subsidiaries. It is important to note that the application was brought under common law, alternatively in terms of section 20(9) of the Companies

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<sup>128</sup> *Hülse Reutter and Others v Gödde* 2001 (4) SA 1336 at par 20 1346.

<sup>129</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790.

<sup>130</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 was decided on a flexible test and thus did away with the rigidity of *Botha v Van Niekerk* 1983 (3) SA 513 (W). However in *Hülse Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) it seems as though the court reverted to a more rigid test.

<sup>131</sup> Larkin and Cassim *Company Law, The Annual Survey of South African Law* 2001 Juta 506 at p517.

<sup>132</sup> Hereinafter referred to as the “Companies Act.”

<sup>133</sup> *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC).

Act 2008.<sup>134</sup> An order was made in terms of section 20(9) of the Companies Act and not in terms of the common law.<sup>135</sup>

In considering the principles behind piercing the corporate veil, the learned judge, *inter alia*, made the following remark:

“In my view the determination to disregard the distinctness provided in terms of a company's separate legal personality appears in each case to reflect a policy-based decision resultant upon a weighing by the court of the importance of giving effect to the legal concept of juristic personality, acknowledging the material practical and legal considerations that underpin the legal fiction, on the one hand, as against the adverse moral and economic effects of countenancing an unconscionable abuse of the concept by the founders, shareholders, or controllers of a company, on the other.”<sup>136</sup>

The court stated that the language of section 20(9) is cast in very wide terms, indicative by the legislature that the specific provision may find application in a variety of factual circumstances. What appeared also to be problematic is that the court found itself unable to identify the interpretation of section 20(9) in a manner which put in a position to identify and discord between it and the cases decided before it, came into operation.<sup>137</sup>

When the court needed to consider the term ‘unconscionable abuse of the juristic personality of a company,’ the court found that such interpretation postulates conduct in relation to formation and use of companies are wide enough to cover the

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<sup>134</sup> Companies Act 71 of 2008.

<sup>135</sup> It is not intended for the purpose of paragraph 4.2.2 that an extensive study be made of section 20(9) of the Companies Act 71 of 2008. The purpose of the case discussion here is to clarify the principles created by the court. For easy reference section 20(9) reads 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-

(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).”

<sup>136</sup> *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) at par 29.

<sup>137</sup> *Ibid* at par 32.

descriptive terms like ‘sham’, device’ ‘stratagem’ and the like used in that connection in earlier cases.<sup>138</sup>

What is important to note is that the court also found that it is appropriate to regard section 20(9) as supplemental to the common law, rather than substitutive. The unqualified availability of the provision, the court said, militates against an approach that it should be granted only in the absence of any alternative remedy.<sup>139</sup>

*In casu* the court granted the relief sought by the applicants.

### 4.3 Statutory Approach under the Closed Corporations Act<sup>140</sup>

Section 20(9) of the Companies Act<sup>141</sup> resembles section 65 of the Closed Corporations Act to a great extent. In terms of section 65 the court may be called upon to find that the incorporation of the corporation or any act on behalf of it constitutes a ‘gross abuse’ of its juristic personality. In the event that the court may find that such conduct constitutes a ‘gross abuse’, it may ‘pierce the corporate veil’ to vest personal liability on its shareholders.<sup>142</sup>

When considering applications in terms of section 65<sup>143</sup>, the courts referred to case law adjudicated in terms of company law as guidance in this regard. As referred to in *Hülse-Reutter v Gödde*,<sup>144</sup> the court may pierce the veil where the corporation’s controllers acted fraudulently, dishonestly or improperly abused its legal personality to their unfair advantage.<sup>145</sup>

What seems rather significant is that the reference to ‘gross abuse’ in section 65 of the Closed Corporations Act is similar to ‘unconscionable abuse’ in terms of Section

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<sup>138</sup> *Ibid* at par 34.

<sup>139</sup> *Ibid* at par 34.

<sup>140</sup> Closed Corporations Act 69 of 1984. Hereinafter referred to as the ‘Closed Corporations Act.’

<sup>141</sup> Companies Act 71 of 2008.

<sup>142</sup> See *TJ Jonck BK t/a Bothaville Vleismark v Du Plessis* 1998 1 SA 971 (O) and the appeal to a full bench in this matter in *Olivier v TJ Jonck t/a Bothaville Vleismark* [2000] JOL 6106 (IC). The court was prepared to apply s 65 in the latter case; *L & P Plant Hire BK v Bosch* 2002 2 SA 662 (SCA); *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 2 SA 303 (C) and *Ebrahim v Airport Cold Storage (Pty) Ltd* [2009] 1 All SA 330 (SCA).

<sup>143</sup> Of the Closed Corporation Act 69 of 1984.

<sup>144</sup> *Hülse Reutter and Others v Gödde* 2001 4 SA 1336 (SCA).

<sup>145</sup> In *Le’Bergo Fashions CC v Lee* 1998 2 SA 608 (C) and *Die Dros (Pty) Ltd v Telefon Beverages CC* [2003] 1 All SA 164 (C) the courts have, for instance, been willing to consider disregarding a close corporation where a natural person who is subject to a restraint of trade, uses the close corporation as a front to engage in activity that is prohibited by the agreement in restraint of trade.

20(9) of the Companies Act.<sup>146</sup> As stated by the court is the remedy rather ‘drastic’ or ‘exceptional.’<sup>147</sup> However, it is unsure what the difference between ‘gross abuse’ and ‘unconscionable abuse’ is. It has been suggested that ‘gross abuse’ has a more extreme connotation than the ‘unconscionable abuse.’<sup>148</sup> It still stands to be considered what the extent of the difference between the two terms is. In any event, the principles developed with regard to piercing the corporate veil in context of section 65 of the Closed Corporations Act and common law may serve useful guidelines in considering matters in terms of section 20(9) of the Companies Act.

#### **4.4 Piercing the Corporate Veil in terms of Section 20(9) of Act 71 of 2008**

A new, and rather welcomed addition to the Companies Act<sup>149</sup>, is a statutory provision which will enable the court to disregard the separate legal personality of a company, and therefor ‘pierce the corporate veil’. Section 20(9) of the Companies Act reads as follow:

“(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 unconscionable abuse of the juristic personality of the company as a separate entity, the court may-

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a shareholder 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)”<sup>150</sup>

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<sup>146</sup> Companies Act 71 of 2008.

<sup>147</sup> *Ex Parte Gore and Others NNO 2013 (3) SA 382 (WCC)* at par 34.

<sup>148</sup> *Ex Parte Gore and Others NNO 2013 (3) SA 382 (WCC)* at par 34. Cassim has also suggested, though not explicitly, that an ‘unconscionable abuse’ might be more severe than ‘gross abuse.’ See Cassim R *Piercing the corporate veil ‘Unconscionable abuse’ under the Companies Act 71 of 2008* De Rebus - SA Attorneys' Journal August 2012.

<sup>149</sup> Companies Act 71 of 2008. Hereinafter referred to as the ‘Companies Act’.

<sup>150</sup> Section 20(9) was introduced by section 13(d) of the Companies Amendment Act, Act 3 of 2011.

Such a provision is new in company law; however section 65 of the Closed Corporations Act<sup>151</sup> contains a provision which is quite similar to section 20(9). Section 65 of the Closed Corporations Act permits a court (in certain circumstances) to disregard the legal personality of closed corporations, to in effect, deem the closed corporation not to have a legal *persona*.

There are a few concerns with regard to section 20(9). Cassim is of the opinion that, because the Companies Act contains a statutory provision to pierce the corporate veil, it creates certainty and visibility to the doctrine of piercing the veil.<sup>152</sup> Cassim is also concerned that the danger of a statutory provision to pierce the corporate veil is that the courts may interpret the provision in such a way that the doctrine becomes inflexible.<sup>153</sup> In *Ex Parte Gore* the court stated that because section 20(9) is cast in such wide terms, it might be that it was the intention of the legislature that section 20(9) may find application in a wide variety of factual circumstances.<sup>154</sup> This may pose a great threat to the doctrine, therefore legal personalities, itself. If section 20(9) is interpreted by the courts as in inflexible doctrine which can be applied to a wide variety of facts, companies may lose its protection and face commercial scrutiny.

Hereunder will follow an analysis on the elements of section 20(9) of the Companies Act.

#### **4.4.1 “On Application” or “In any proceedings”**

The court may be approached for an order to declare that a company is deemed not a juristic person in both motion and action proceedings. Besides the fact that ‘in any proceedings’ includes ‘action proceedings’, the court may also find at its own initiative that the company is deemed not to be a juristic person if it so finds that an ‘unconscionable abuse’ of the company’s corporate identity transpired.

#### **4.4.2 “By an interested person”**

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<sup>151</sup> 69 of 1984.

<sup>152</sup> Cassim R *Piercing the corporate veil ‘Unconscionable abuse’ under the Companies Act 71 of 2008* De Rebus - SA Attorneys' Journal August 2012.

<sup>153</sup> Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J, and Yeats J *Contemporary Company Law* 2<sup>nd</sup> Edition 2012.

<sup>154</sup> *Ex Parte Gore and others NNO* 2013 (3) SA 382 (WCC) at par 32.

Unfortunately, the Companies Act does not provide a definition for an ‘interested person’. It has been submitted that one may seek guidance in case law decided under section 65 of the Closed Corporations Act.<sup>155</sup>

In *TJ Jonck CC h/a Bothaville Vlesimark v Du Plessis*,<sup>156</sup> the court found that when considering an ‘interested person’ in terms of section 65 of the Closed Corporations Act, one should not interpret the term restrictively, but not as wide to include an indirect interest in the corporation. The court further stated that the interest should be limited to a financial or monetary interest. However in *Ex Parte Gore*<sup>157</sup> the court stated that one should not attach a mystical interpretation to an ‘interested person’.

#### **4.4.3 “The incorporation”, “any use” or “any act by or on behalf of the company”**

If one has cognisance of this particular part of section 20(9), one would realise that the addition of the ‘the incorporation of the company’, ‘any use of the company’ or ‘any act by or on behalf of the company’ constitute a wide variety of use of the legal personality of the company. This particular addition is quite in line with the decision in *Cape Pacific v Lubner* where the court found that it not a requirement that the company ‘have been conceived and founded in deceit’.<sup>158</sup>

In other words section 20(9) finds application not only where the company is used as a ‘sham’, ‘device’, ‘stratagem’ and the like, but also where the company was legally incorporated with bona fide reasons, but where the corporate identity was abused thereafter.<sup>159</sup>

#### **4.4.4 “Constitutes an unconscionable abuse of the juristic personality”**

Unfortunately, the legislature failed to define or to provide the courts with guidance as to which circumstances constitute an ‘unconscionable abuse’ in terms of the Companies Act.

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<sup>155</sup> Closed Corporations Act 69 of 1984. Both Cassim (Cassim R *Piercing the corporate veil ‘Unconscionable abuse’ under the Companies Act 71 of 2008* De Rebus - SA Attorneys' Journal August 2012 and Keuler (Keuler A ‘*n Regsvergelykende Studie Aangaande die Leerstuk Lig van die Korporatiewe Sluier* LLD Thesis 2013 p150) share the view.

<sup>156</sup> *TJ Jonck CC h/a Bothaville Vlesimark v Du Plessis* 1998(1) SA 971 (O).

<sup>157</sup> *Ex Parte Gore and others* NNO 2013 (3) SA 382 (WCC).

<sup>158</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).

<sup>159</sup> Keuler A ‘*n Regsvergelykende Studie Aangaande die Leerstuk Lig van die Korporatiewe Sluier* LLD Thesis 2013 p151.

In the past the courts pierced the corporate veil where fraudulent use of the company's legal personality was made.<sup>160</sup> In *Cape Pacific v Lubner* the court preferred a balancing approach (with reference to upholding the juristic personality weighed up against the need to disregard it) to when considering whether the corporate veil should be pierced.<sup>161</sup> In *Hülse Reutter v Gödde* the court preferred the approach in *Cape Pacific v Lubner*, but added that an unfair advantage must be awarded to those who abused the legal personality of the company.<sup>162</sup>

As conveyed here above, the reference made to 'gross abuse' in the Closed Corporations Act<sup>163</sup> is considered similar to an 'unconscionable abuse' in the Companies Act. The question now is whether there is a difference between a 'gross abuse' and 'unconscionable abuse'. It has been suggested that, with the support of common law, one should have cognisance of what the court considered to constitute a 'gross abuse' in terms of the Closed Corporations Act.<sup>164</sup>

However, despite the views displayed by Cassim and Keuler, one should not ignore the fact that the court, in *Botha v Van Niekerk*<sup>165</sup> considered an 'unconscionable injustice' to be the test.<sup>166</sup> Although the court considered 'injustice' instead of 'abuse', as per section 20(9), it is undoubtedly a great indication as to what will be considered 'unconscionable'.

In *Botha v Van Niekerk*<sup>167</sup>, the court considered a two-step process. Firstly, the court needed to determine whether the conduct of those who used the company's juristic personality was improper or not. If the court so find whether such conduct was improper, the court then, secondly, needed to determine whether the detrimented party has suffered an unconscionable injustice.

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<sup>160</sup> *Lategan v Boyes* 1980 (4) SA 191 (T):

<sup>161</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A):

<sup>162</sup> *Hülse Reutter v Gödde* 2001 (4) SA 1336 (SCA).

<sup>163</sup> Section 65 of the Closed Corporations Act 69 of 1084.

<sup>164</sup> Both Cassim ((Cassim R *Piercing the corporate veil 'Unconscionable abuse' under the Companies Act 71 of 2008* De Rebus - SA Attorneys' Journal August 2012) and Keuler (Keuler A 'n *Regsvergelykende Studie Aangaande die Leerstuk Lig van die Korporatiewe Sluier* LLD Thesis 2013 p150) share the view.

<sup>165</sup> *Botha v Van Niekerk* 1983 (3) SA 513 (W)

<sup>166</sup> Judgment was delivered in Afrikaans. The court referred to a 'onduldbare onreg', which can be translated as an 'unconscionable injustice'.

<sup>167</sup> *Supra*.

In *Ex Parte Gore*,<sup>168</sup> a case considered under section 20(9), the court considered an ‘unconscionable abuse’. The court stated that a ‘gross abuse’ had a more extreme connotation than an ‘unconscionable abuse’. In *Ex Parte Gore* the court said 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.”<sup>169</sup>

It is important to note that the test for piercing the corporate veil in terms of section 20(9) of the Companies Act focuses on the abuse of the juristic personality of the company as a separate entity and whether the ‘abuse’ constitutes abuse which is ‘unconscionable’.<sup>170</sup>

#### **4.4.5 “Company is to be deemed not to be a juristic person”**

A court may declare a company not to be a juristic person in respect of certain rights, obligations or liabilities of the company, or of a shareholder of a company.<sup>171</sup> It should be noted that the court may not intervene in terms of section 20(9) where the ‘unconscionable abuse’ requirement is not met.<sup>172</sup>

One begs to ask the question as to what happens after the court has declared the company to not be a juristic person. The result is that the court would vest liability where it should rightly lie.<sup>173</sup> When the court makes such declaration a wide power is also conferred onto the courts to make a further order to give effect to the above declaration.<sup>174</sup>

### **4.5 The influence of the Constitution of the Republic of South Africa**

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<sup>168</sup> *Ex Parte Gore and others NNO 2013 (3) SA 382 (WCC)* at par 34.

<sup>169</sup> *Ibid.*

<sup>170</sup> Cassim R *Piercing the corporate veil ‘Unconscionable abuse’ under the Companies Act 71 of 2008* De Rebus - SA Attorneys' Journal August 2012.

<sup>171</sup> Section 20(9)(a) of the Companies Act 71 of 2008.

<sup>172</sup> *Ibid.*

<sup>173</sup> An example of this is found in *Ex Parte Gore and others NNO 2013 (3) SA 382 (WCC)* where the court in its Order ruled that King Financial Holdings and 41 companies be deemed not to be juristic persons and be declared a single entity by ignoring their own separate legal existence and treating the holding company, King Financial Holdings, as if it were the only company.

<sup>174</sup> Section 20(9)(b) of the Companies Act 71 of 2008.

Section 8(4) of the Constitution provides as follow:<sup>175</sup>

“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.”

The Companies Act provides that it should be interpreted to promote compliance of the Bill of Rights as provided for in the Constitution, in the application of company law.<sup>176</sup>

In terms of the Companies Act a company is regarded as a juristic person from the date and time that the company was registered.<sup>177</sup> It is thus clear that the Companies Act ‘creates’ the juristic person, and the Constitution ‘protects’ the juristic person when it is registered as such in terms of the Companies Act. But the question stands to be determined is whether a company has a right to be a juristic person, or is the company entitled to the rights in terms of the Bill of Rights once it is a juristic person? According to De Waal *et al*, a juristic person is both a beneficiary and bound to the Bill of Rights.<sup>178</sup> If it is found that the company has a right to be a juristic person, and not merely entitled to the rights enshrined in the Constitution, one should reconsider the piercing of the corporate veil doctrine.

Keuler is of the opinion that because of the fact that a company’s juristic personality is recognised in the Constitution, one should reconsider the doctrine. She refers to the doctrine of *trias politica*. In this regard she asks the question who gives the court the authority to pierce the corporate veil, if section 19 of the Companies Act is not declared unconstitutional.<sup>179</sup>

If one is of the opinion that being a juristic person is a right in terms of the Bill of Rights, then such a right should only be limited in terms of the Constitution and not in terms of another statutory provision.

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<sup>175</sup> Act 108 of 1996. Referred to as the Constitution of the Republic of South Africa. Hereinafter referred to as the ‘Constitution’.

<sup>176</sup> Section 5 read together of section 7 of the Companies Act 71 of 2008.

<sup>177</sup> Section 19(1)(b) of the Companies Act 71 of 2008. Hereinafter referred to as the ‘Companies Act’.

<sup>178</sup> De Waal HJ *LexisNexis Editor: Ramdassel A Law of South Africa* 296 Juristic persons Section 8(4) of the Constitution<sup>1</sup> provides: “A juristic person is entitled to the rights in the Bill of Rights to the extent required by the rights and the nature of that juristic person.” <sup>2</sup> This provision identifies certain bearers of rights; it does not constitutionally protect the establishment, existence and functioning of juristic persons which are covered primarily by the right to freedom of association in section 18.3.

<sup>179</sup> Keuler A ‘n *Regsvergelykende Studie Aangaande die Leerstuk Lig van die Korporatiewe Sluier* LLD Thesis 2013 p157.

If one has cognisance of the other side of the coin and say that a company is merely entitled to the rights in terms of the Bill of Rights only once it is regarded as a juristic person in terms of the Companies Act, the company's separate juristic personality could be pierced by a statutory provision.

#### 4.6 Conclusion

It is common cause that the trademark case in the piercing of the veil doctrine is the *Salomon case*.<sup>180</sup> Since the aforementioned decision, the doctrine has developed but the principle remains that the company's juristic personality can be abused and in such event the perpetrators should not be allowed to hide behind the veil.

In the past the courts have been prepared to pierce the corporate veil in cases ranging from fraud, dishonesty and improper conduct to a balancing approach where the interests of the parties and justice are considered.<sup>181</sup>

Although it has been held that the common law decisions are irreconcilable with section 20(9) Companies Act, the courts should still consider section 20(9) in addition to, instead of in substitution to the common law.<sup>182</sup>

In any event, when the courts stand to consider section 20(9), the courts should not only consider common law, but also decisions made under section 65 of the Closed Corporations Act.<sup>183</sup> In particular the courts should consider how 'gross abuse'<sup>184</sup> was defined when considering the definition of 'unconscionable abuse' as per the Companies Act.

Although the piercing doctrine has manifested itself in the 19<sup>th</sup> century, it has greatly developed in South African law over a great period of time. There was no concrete principle or even a pattern laid out in this time but great strides have been made.<sup>185</sup> Section 20(9) of the Companies Act may have brought a more rigid approach to the piercing doctrine, but it will definitely bring about more certainty.

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<sup>180</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

<sup>181</sup> See *Lategan v Boyes* 1980 (4) SA 191 (T); *Botha v Van Niekerk* 1983 (3) SA 513 (W); *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A); *Hülse Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) and *Ex Parte Gore and others* NNO 2013 (3) SA 382 (WCC).

<sup>182</sup> *Ex Parte Gore and others* NNO 2013 (3) SA 382 (WCC)

<sup>183</sup> *Supra*.

<sup>184</sup> As per section 65 of the Closed Corporations Act 69 of 1984.

<sup>185</sup> *Supra*.

## **CHAPTER 5: The English Approach to disregard the separate juristic personality of a company**

### **5.1 Introduction**

Historically, corporate personality arose from activities of organisations such as religious orders which were granted rights to hold property and to sue and be sued in their own right.<sup>186</sup> As time progressed the rationale shifted from religious entities and moved over to commercial enterprises.

Arguably, the most significant legal reform in company law was the enactment of the Joint Stock Companies Act in 1844.<sup>187</sup> The Joint Stock Companies provided that a company may enjoy legal personality upon registration once the requirements of the Act were met. Although companies enjoyed legal personality, the members did not enjoy limited liability. It is only upon the arrival of the Limited Liability Act in 1855 (which was replaced by the Joint Stock Companies Act 1865) that the members' liability towards the company was limited to the amount which they invested in the company.<sup>188</sup> The effect was that the company was divorced from its members and thus considered a separate entity upon incorporation.<sup>189</sup>

If one has cognisance of the separate personality doctrine, the effect thereof is that the members of a company are not liable for the company's liabilities. This does not mean that the members are not liable to contribute anything.<sup>190</sup> In the United Kingdom the majority of companies have limited liability, and so is the liability of the members limited by either guarantee or shares held in the company.<sup>191</sup>

Ever since the decision in *Salomon* in 1897 there have been a number of developments to circumvent the doctrine of a separate juristic personality and in pursuance thereof expose those behind the veil.<sup>192</sup> Even though statutory exceptions

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<sup>186</sup> Dewey J *The historic background of corporate legal personality* Yale Law Journal Vol 35 No. 6 pp 655-673

<sup>187</sup> The Joint Stock Companies Act 1844.

<sup>188</sup> The Limited Liability Act 1855.

<sup>189</sup> Nyombi *Lifting the veil of incorporation under common law and statute* International Journal of Law and Management 2014 56(1) p67.

<sup>190</sup> *Ibid.*

<sup>191</sup> In the case of a guarantee, the liability of the members is limited to the amount stated in the guarantee. For companies limited by shares, the liability of the members is limited to the amount that is unpaid on their shares. In terms of Section 74 of the Insolvency Act 1986.

<sup>192</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

to the doctrine have a history dating back to its enactment, development in common law has really started to gather pace in the past three decades.<sup>193</sup>

## 5.2 Principle in *Salomon v Salomon*<sup>194</sup>

The issue in *Salomon* was whether Mr Salomon was liable for the debts run up by his insolvent company. The Court of Appeal, being in agreement with the judge of the first instance, held that he was indeed liable for the debts, because the court found that the formation of the company was a mere scheme to enable him to carry on business in the name of the company.

The House of Lords disagreed with the Court of Appeal and held that even if it is true that the formation of the company was a “scheme”, the House of Lords could not justify making an order contrary to the intent and meaning of the Companies Act. The House of Lords went further and stated the schemes of those who incorporated the company had no bearing on the question of whether the company has a separate legal existence.<sup>195</sup>

Amongst other, one of the bases upon which the Court of Appeal had come to its conclusion, was that the other six shareholders were mere “puppets” of Mr Salomon, all of whom were members of his family. The House of Lords held that it makes no difference whether the other shareholders were “puppets” or not. The question was whether the company has been formed validly and duly incorporated. If the requirements of the Companies Act were met with regard to incorporation, one cannot say that the company was an agent or alias of Mr Salomon, but rather another person.

Probably the greatest leap and respect shown by the House of Lords for the doctrine of a separate juristic personality of the company, is the fact that the company in question was, as referred to by Lords Halsbury in his judgment,<sup>196</sup> a ‘one man company’. The House of Lords found it “*inaccurate and misleading*” that if the company was legally incorporated to vest liability on an individual by mere fact that he is a “*predominant partner possessing overwhelming influence and entitled to*

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<sup>193</sup> Nyombi *Lifting the veil of incorporation under common law and statute* International Journal of Law and Management 2014 56(1) p67.

<sup>194</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

<sup>195</sup> *Ibid* at par 31.

<sup>196</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL) at par 53.

*practically to the whole of the profits*”, and went further by stating that it is not “*contrary to the true intention of the Act or against public policy, or detrimental to the interests of creditors.*”<sup>197</sup>

In summary, and arguably the greatest summary of the principle in *Salomon*.<sup>198</sup>

“It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its own rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.”

### 5.3 Common Law Approach

Unfortunately, and similar to South African Law, there are no common or unifying principles, which underlies the occasional decision of the courts to pierce the corporate veil. This is probably a product of the combination of the fact that corporate personality is granted by statute and the refusal by the court in *Salomon* to pierce the veil on that principle.<sup>199</sup>

The result is that English courts have been inconsistent on when to pierce the veil and case law merely provide instances in which the courts have on the facts refused to be bound by the form and incorporation when justice requires that the substance or reality to be investigated.<sup>200</sup>

In the view taken by Nyombi is the fundamental problem with the *Salomon* decision is not the corporate personality doctrine, but the House of Lords’ lack of guidance on when to pierce the veil; and due to the lack of guidance, courts have been forced to ignore corporate personality by taking a fact-based approach.<sup>201</sup>

Hereunder follows fact based scenarios which can be described as exemptions, and where the courts have (and have not) been prepared to pierce the corporate veil:

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<sup>197</sup> *Ibid.*

<sup>198</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL) at par 30.

<sup>199</sup> *Supra.*

<sup>200</sup> *Commissioner of Land Tax v Theosophical Foundation Pty Ltd* (1966) 67 SR (NSW) 75.

<sup>201</sup> Nyombi *Lifting the veil of incorporation under common law and statute* International Journal of Law and Management 2014 56(1) p68.

### **Fraud and sham companies:**

In the light of case law, courts were generally prone to pierce the veil on these two grounds.<sup>202</sup> The rationale therefore possibly is that the perpetrators allegedly used the separate juristic personality to evade a legal or fiduciary duty.

The 'sham' exemption is where a company was used to hide the real purpose of its controller. An example of this is found in *Trustor AB v Smallbone*. The court found that it was entitled to pierce the corporate veil and as:<sup>203</sup>

“...recognise the receipt of the company as that of the individual of the company was used as a device of façade to conceal the true facts thereby avoiding or concealing any liability of those individual(...) In my judgment the court is entitled to 'pierce the corporate veil' and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device of façade to conceal the true facts thereby avoiding of concealing any liability of those individual(s).”<sup>204</sup>

For 'fraud' to be used as grounds to pierce the veil there need to be some intention to use the corporate structure in such a way that it denies the detrimented party a pre-existing legal right.<sup>205</sup>

According to Nyombi (in fraud cases) sham companies were created to hide the fraud or breach in an existing duty. In conclusion both fraud and sham companies are exceptions to the separate entity doctrine and should no longer be looked at in isolation.<sup>206</sup>

### **Agency and group companies:**

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<sup>202</sup> *Trustor AB v Smallbone* No.2 (2001) 3 All ER 987; *Gilford Motor Co. v Horne* (1933) Ch 935; *Jones v Lipman* (1962) 1 All ER 442; *Stone & Rolls Ltd v Moore Stephens* (2009) UKHL 39; *Kensington International Ltd v Congo* (2005) EWHC 2684 (Comm); *Standard Chartered Bank v Pakistan National Shipping Corp* (2002) UKHL 43.

<sup>203</sup> *Trustor AB v Smallbone* No.2 (2001) 3 All ER 987

<sup>204</sup> *Trustor AB v Smallbone* No.2 (2001) 3 All ER 987 at par23.

<sup>205</sup> Payne J *Lifting the corporate veil: a reassessment of the fraud exemption* Cambridge Law Journal 1997 Vol 56 pp284-290.

<sup>206</sup> Nyombi *Lifting the veil of incorporation under common law and statute* International Journal of Law and Management 2014 56(1) p71.

Even in South Africa agency is one of the most commonly used exceptions to the separate entity doctrine. Agency arises where a shareholder or parent company has a degree of effective control to qualify as a principal.<sup>207</sup>

The effect of agency, with regard to the 'piercing of the corporate veil'-doctrine is that the acts of the company are then deemed to be the acts of the shareholder or parent company.<sup>208</sup> As per the judgment of Danckwerts LJ:

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

In *Linsen International v Hupuss Sea Transport PTE* the court indicated that mere control over a company is not enough. The claimant in the proceedings must, in addition to control, also show impropriety in the sense of misuse of the company's juristic personality to conceal the wrong doing.<sup>209</sup>

It is thus clear that English courts will in cases of 'agency' pierce the corporate veil to expose the wrongdoers who abused the corporate structures of the company.

### ***On the grounds of justice:***

According to Gallagher and Ziegler the courts have been inconsistent when piercing the veil, merely because it seems to be in the interest of justice.<sup>210</sup> It might be the case due to the lack of a definitive criterion when applying this principle.<sup>211</sup>

Although one should recognise that 'justice' can sometimes warrant piercing the corporate veil, the justice argument remains underdeveloped and clarity is needed in order to cement it as an exception to the separate entity doctrine.<sup>212</sup>

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<sup>207</sup> Nyombi *Lifting the veil of incorporation under common law and statute* International Journal of Law and Management 2014 56(1) p68.

<sup>208</sup> See *Re F.G. (Films) Ltd* (1953) 1 WLR 482; *Smith, Stone & Knight Ltd v Birmingham Corporation* (1939) 4 All ER 116; *DHN Food Distributors Ltd v Tower Hamlets LBC* (1976 3 All ER 462 (CA); *Merchandise Transport v British Transport Commission* (1962) 2 QB 173.

<sup>209</sup> *Linsen International v Hupuss Sea Transport PTE* (2011) EWHC 2339 (Comm).

<sup>210</sup> Gallagher L and Ziegler P *Lifting the corporate veil in the pursuit of justice* 1990 Journal of Business Law 292.

<sup>211</sup> See *Creasy v Breachwood Motors* (1933) BCLC 480; *Re H (Restraint Order: Realizable Property)* (1996) 2 All ER 391 (CA); *Re a Company* (1985) 1 B.C.C.; *Adams v Cape Industries plc* (1990) CH 433.

### **Tort cases:**

It may in certain cases be necessary to establish liability on the person who directed the mind and will of a company.<sup>213</sup> In this regard the courts have developed the identification theory<sup>214</sup> which attributed the requisite intention or knowledge of a person or persons controlling the company.<sup>215</sup>

### **Enemy character:**

During the First World War there was a prohibition to trade with other from enemy countries. In *Daimler Co. Ltd v Continental Tyre & Rubber Co Ltd*<sup>216</sup> an English company commenced action for recovery of a trade debt against a German company. The House of Lords found that a company who claimed the payment of the debt to the company would amount to trading with the enemy. The reason therefore being that the character of the company's members should be compared to the company itself.

This 'enemy character'-exception to the separate entity doctrine is viewed by many as an unjustified attack on the doctrine, but the exception still remains.<sup>217</sup>

## **5.4 Selected Case Law Developments**

Hereunder will follow an analysis of recent case law developments in the United Kingdom. The two cases to be discussed are *Ben Hashem v Ali Shayif*<sup>218</sup> and *VTB Capital PLC v Nutritek International Corp.*<sup>219</sup>

### **5.4.1 Ben Hashem v Ali Shayif<sup>220</sup>**

The facts of the matter were in short as follow:

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<sup>212</sup> Nyombi *Lifting the veil of incorporation under common law and statute* International Journal of Law and Management 2014 56(1) p72.

<sup>213</sup> *Lennard's Carrying Company Ltd v Asiatic Petroleum Co. Ltd* (1915) AC 705.

<sup>214</sup> Also referred to as the alter ego doctrine.

<sup>215</sup> See *Lennard's Carrying Company Ltd v Asiatic Petroleum Co. Ltd* (1915) AC 705; *R v Kite and Oll Ltd* (1996) 2 Cr App Rep (S) 295; *Lubbe and Others v Cape Industries Plc* (2000) 1 Loyd's Rep 139; *Williams v Natural Life Hewlth Foods Ltd* (1998) 2 All ER 577; *MCA Records v Charly Records* (2001) EWCA Civ 595; *Contex Drouzhba Ltd v Wiseman* (2007) EWCA Civ 1201. Nyombi *Lifting the veil of incorporation under common law and statute* International Journal of Law and Management 2014 56(1) p71.

<sup>216</sup> *Daimler Co. Ltd v Continental Tyre & Rubber Co Ltd* (1916) 2 AC 307.

<sup>217</sup> Nyombi *Lifting the veil of incorporation under common law and statute* Int J.L.M. 2014 56(1) p71.

<sup>218</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380.

<sup>219</sup> *VTB Capital plc v Nutritek International Corp and Others* [2013] 1 All ER 1296.

<sup>220</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380.

The company in question incorporated to buy and manage properties. The shareholders were the husband and his four sons from previous marriages. Share certificates showed that the husband owned 30% of the shares. Initially these proceedings were for ancillary relief but in 2006 a Chancery action by the company was started. From 2001 the wife had lived in a property owned by the company which she had entered after leaving the matrimonial home in Saudi Arabia following an argument.

Counsel for the wife made several claims including:

1. The company was in reality solely the husband's as he had provided all the funds and prevented sale of assets without his consent;
2. That the husband had been seeking to defeat the ancillary relief claim at all stages of the proceedings;
3. The properties owned by the company, and in particular the property she inhabited were in effect the husband's; and
4. That the husband was worth significantly more than he had disclosed. The wife averred a figure of £250m. Accordingly, the properties and the shares were to be available for the ancillary relief claim.

In his judgment the court considered the history of the litigation and the relevant case law. In particular he considered the issue of whether the wife can pierce the corporate veil to make good the claim that the entire company and its assets are in reality part of the available pool of assets for financial provision.

The court considered whether it should pierce the corporate veil. In doing so the court derived principles from case law and laid them out as follow:<sup>221</sup>

1. Ownership and control of a company are not of themselves sufficient to justify piercing the veil;<sup>222</sup>
2. The court cannot pierce the veil, even where there is no unconnected third party involved, merely because it is thought to be in the interests of justice;<sup>223</sup>

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<sup>221</sup> The court derived the principles from *Nicholas v Nicholas* [1984] FLR 285; *Green V Green* [1993] 1 FLR 326; *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447; *Wicks v Wicks* [1999] Fam 65; *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734; *Mubarak v Mubarak* [2001] 1 FLR 673; *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 and *Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch).

<sup>222</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 159.

<sup>223</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 160.

3. The corporate veil can only be pierced only if there is some impropriety;<sup>224</sup>
4. The court cannot pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid liability;<sup>225</sup>
5. If the court is prepared to pierce the corporate veil it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing;<sup>226</sup> and
6. Flowing from the above principles, a company can be a façade even though it was not originally incorporated with any deceptive intent. The question is whether it is being used as a façade at the time of the relevant transaction(s), and the court will pierce the veil only so far it is necessary to provide a remedy for the particular wrong which those controlling the company have done.<sup>227</sup>

The court went further and stated that there are two essential pre-requisites to any claim to pierce the corporate veil: This being ‘control’ and any kind of ‘impropriety’ to justify piercing.

*Control:*

The court found that just because the husband, as she put it, ‘called the shots’, it did not mean that the other directors were mere ciphers.<sup>228</sup> The court went further and stated that the facts that the husband was “heavily involved” and the “dominant director”, it does not show that the company is his ‘alter ego’.<sup>229</sup>

*Impropriety:*

The court held that the requirement of some ‘impropriety’ was essential to disregard the company’s separate corporate personality.<sup>230</sup> The courts stated as follows with reference to other case law:

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<sup>224</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 161.

<sup>225</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 162.

<sup>226</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 163.

<sup>227</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 164.

<sup>228</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 194.

<sup>229</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 197.

<sup>230</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 198.

“The common theme running through all the cases in which the court has been willing to pierce the veil is that the company was being used by its controller in an attempt to immunise himself from the liability for some wrongdoing which existed entirely *dehors* the company.”<sup>231</sup>

The court concluded that he was not entitled to pierce the veil of the incorporation and this part of the wife’s claim was rejected.

#### **5.4.2 *VTB Capital PLC v Nutritek International Corp***<sup>232</sup>

The facts of the matter were as follows:

VTB lent US\$225,050,000 to a Russian company, Russagroprom LL C (“RAP”), under a Facility Agreement. The advance was primarily to enable RAP to buy six other Russian companies and three associated companies from Nutritek International Corp (“Nutritek”). RAP subsequently defaulted on the loan. It was VTB’s case that it was induced to enter into the Facility Agreement in relation to the loan, and an accompanying interest rates swap agreement, by misrepresentations made by Nutritek for which other respondents were jointly and severally liable. The misrepresentations alleged were firstly that RAP and Nutritek were not under common control and, secondly, that the value of the companies was much greater than was in fact the case. VTB’s case was that the misrepresentations were fraudulent. VTB sought to pursue their claims against Nutritek and others, including the individual allegedly pulling the strings behind the corporate veil, Mr Malofeev, both in tort and in contract. In order to pursue a claim in contract, and, in particular, to seek to rely upon the English jurisdiction clause in the Facility Agreement, VTB argued that the Court should pierce RAP’s corporate veil on the basis of the alleged fraudulent conduct, so as to render Nutritek and others jointly and severally liable under the Facility Agreement.

With regard to the piercing of the corporate veil doctrine, and to vest liability where it should rightly lie, the court laid down the following principles

1. The court stated that there cannot be a common law claim for damages, as distinct from an equitable remedy, whenever an impropriety occurred

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<sup>231</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 199.

<sup>232</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808

consisting of the misuse or abuse of the company as a device or a sham the by the controller.<sup>233</sup>

2. The court found that the true basis upon which the courts have pierced the corporate veil is that the company was being used by its controller in attempt to immunise himself from liability for some wrongdoing which existed entirely *dehors* the company.<sup>234</sup>
3. The court stated that where a claim of wrongdoing is made against the person controlling the company, it is inappropriate to permit the corporate veil to be pierced to enable the claimant to pursue a contractual claim against the wrongdoer.<sup>235</sup>
4. The court found that when the wrongdoer uses the company as a façade to conceal his involvement, the court should make the following anomaly: if the wrongdoer conceals his involvement in the company, then the corporate veil can be pierced; but if he wrongdoer does not conceal his involvement in the company, the victim will have a claim against the wrongdoer in tort but it will not be possible to pierce the corporate veil.<sup>236</sup>
5. And probably the biggest hurdle of them all, the court needed to consider whether he could ignore the privy of contract to pierce the corporate veil.<sup>237</sup> Thus, the court needed to consider whether ‘piercing of the corporate veil’ could lead to a situation where non-contracting parties could become contractually bound under an agreement entered into by a separate entity that controlled them, or the other way around.

What VTB alleged was that the misrepresentations made by Nutritek were part of a conspiracy between various natural and legal persons. In the light of last

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<sup>233</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 97. In this instance the court disagreed with Burton J in *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177.

<sup>234</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 98.

<sup>235</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 99.

<sup>236</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 100.

<sup>237</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 101.

mentioned, VTB argued that the court should pierce the corporate veil of RAP and find each of these persons liable under the loan agreement.

VTB, *inter alia* relied on judgment of Burton J in the cases of *Antonio Gramsci Shipping Corp v Stepanovs*<sup>238</sup> and *Alliance Bank JSC v Aquanta Corporation*.<sup>239</sup> In the Gramsci case Burton J concluded as follows:

“...there was no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppeteer who, all the time, was pulling the strings.”<sup>240</sup>

The court, in the VTB case refused to accept and found it inconceivable that the revelation of the true facts will show that the defendants were the real parties to the agreement. The court went further and found that by most, the facts will show no more that the defendants induced VTB to enter into the relevant contracts by dishonest deceptions. But still, in this regard there was no basis to pierce the corporate veil in that the court refused to find that the defendants were in fact additional parties to the contracts.

In conclusion, the court clarified the principles in which English courts may pierce the corporate veil. The court also reinforced the doctrine of privity of contract, and it stated that the controllers cannot be parties to contracts, by the mere fact that they controlled the companies for which they acted.

## 5.5 Conclusion

In English law legal personality stems firstly from religious entities and later found its way forward to apply to commercial entities, whose status as such was later codified in statute.<sup>241</sup> It was only in 1852 when corporate entities' members started to enjoy limited liability in their capacity as members.<sup>242</sup>

Although the courts recognised the fact that a company's juristic personality wasn't absolute, they weren't much prone to pierce the corporate veil of an entity. The most

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<sup>238</sup> *Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 333 (Comm); [2011] 1 Loyd's Rep 647..

<sup>239</sup> *Alliance Bank JSC v Aquanta Corporation* [2011] EWHC 3281 (Comm); [2012] All ER (D) 31 (Jan).

<sup>240</sup> The court referred to Para 26 of *Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 3281 (Comm); [2012] All ER (D) 31 (Jan)

<sup>241</sup> As held here above in par 5.1. The statute referred is Joint Stock Companies Act in 1844

<sup>242</sup> Limited Liability Act in 1855.

recognisable example is found in the case of *Salomon v Salomon*.<sup>243</sup> In the last mentioned matter the court showed much appreciation for the effects of having a separate legal personality.<sup>244</sup> When the court was asked to pierce the veil the court considered a more legal positivistic approach and found it contrary to the Act and public policy to pierce the corporate veil if all statutory and legal requirements were met. The result of last mentioned was that the courts started to follow a fact based approach.

As time progressed English courts developed its own principles on when to (or not to) pierce the corporate veil of a company. The circumstances developed by the courts are when the company is used as ‘fraud’ and ‘sham’; in cases of agency and group companies; on the grounds of justice; tort cases and where the company has an enemy character.<sup>245</sup>

In *Ben Hashem v Ali Shayif* the court laid down principles for piercing the corporate veil.<sup>246</sup> Besides the principles, the court had great value for two instances which it considered essential before the court will pierce the corporate veil. The first requirement was ‘control’ and the second the requirement that there must have been some ‘impropriety’.

With regard to control the court stated that the fact that an individual holds a dominant position, it doesn’t mean that the other directors were mere ciphers. The court stated that the fact that an individual also ‘calls the shots’, it does not mean that the company was the individual’s alter ego.

With regard to an impropriety the court stated that it was essential that there was some impropriety before the court will disregard the company’s separate corporate personality. In this regard the court also stated that it will be prepared to pierce the corporate veil when the wrongdoer use the company’s structures to immunise himself from liability.

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<sup>243</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

<sup>244</sup> In this regard Lord Halsbury stated as follow: “*It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its own rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.*”

<sup>245</sup> These circumstances are discussed in par 5.3 here above.

<sup>246</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380.

In *VTB Capital Plc v Nutritek International Corp & Others* the court laid down, though to a great extent similar to the court in *Ben Hashem*, its own principles with regard to piercing of the corporate veil doctrine.<sup>247</sup>

What the court in *VTB Capital* needed to consider was the effect of privity to a contract with regard to piercing of the veil. The court in this instance followed a fact based approach.

The doctrine of privity to a contract is rather essential in piercing matters, as the court is asked to vest liability on an individual who was in effect not a party to a contract. In *casu*, the court found that, following a fact based approach, the wrongdoers could not be held liable under the contract.

If one has cognisance of the *Ben Hashem* and the *VTB Capital* case and the principles laid down therein respectively, one would see similarities, but also by a closer examination thereof, one would note the substantial differences. The effect thereof would be examined in the following chapter's analysis in a case law comparison.<sup>248</sup>

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<sup>247</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808.

<sup>248</sup> The purpose of chapter 6 is a case law comparison of the principles with South African case law.

## **CHAPTER 6: A Case Law Comparison**

### **6.1 Introduction**

The purpose of this chapter is to do a fact based comparison with South African and English case law. In this chapter the approach will be to use selected South African case law's facts and compare them to the principles laid down in the *Ben Hashem*<sup>249</sup> and *VTB Capital*<sup>250</sup> cases respectively. What sought to be determined is threefold: Firstly, to determine whether one can apply English case law directly to the South African case law's facts; secondly, whether the courts would hypothetically come to the same conclusions; and thirdly, whether the English approach is in fact a better approach, as opposed to the South African approach.

The selected South African case law to be used are the following matters: *Lategan v Boyes*,<sup>251</sup> *Botha v Van Niekerk*,<sup>252</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*,<sup>253</sup> *Hülse Reutter and Others v Gödde*<sup>254</sup> and *Ex Parte Gore and others NNO*.<sup>255</sup>

### **6.2 Applying South African Case Law to English Case Law**<sup>256</sup>

#### **6.2.1 *Lategan v Boyes 1980 (4) SA 191 (T)***<sup>257</sup>

In this particular matter the court was asked to pierce the corporate veil because the director whom, *inter alia*, pleaded that he did not sign as a surety to the principle debt in question in his personal capacity, but rather his capacity as director of the company and therefore could not be held personally liable.

The court stated that our courts would be prepared to pierce the corporate veil of a company where fraudulent use was made of the fiction of legal personality. In *casu*,

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<sup>249</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380.

<sup>250</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808.

<sup>251</sup> *Lategan v Boyes 1980 (4) SA 191 (T)*.

<sup>252</sup> *Botha v Van Niekerk 1983 (3) SA 513 (W)*.

<sup>253</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995 (4) SA 790 (A)*.

<sup>254</sup> *Hülse Reutter and Others v Gödde 2001 (4) SA 1336 (SCA)*.

<sup>255</sup> *Ex Parte Gore and others NNO 2013 (3) SA 382 (WCC)*.

<sup>256</sup> The purpose of this chapter is to apply the facts of South African case law, as discussed in paragraph 4.2.2, to the principles laid down in both *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (hereinafter referred to as '*Ben Hashem*') and *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 (hereinafter referred to as '*VTB Capital*').

<sup>257</sup> Hereinafter referred to as '*Lategan v Boyes*'.

the court found that there was no evidence that the director failed to mention the position to the sureties and therefore the court refused to pierce the corporate veil.

In *Ben Hashem* the court required that there must be some impropriety before the veil can be pierced.<sup>258</sup> The court went further and also required that there must be some causal link between the impropriety and the use of the company structure to avoid liability.<sup>259</sup> The impropriety in the *Ben Hashem* case was that the company's controller must have used the company's separate juristic personality to immunise himself from liability.<sup>260</sup>

In *Lategan v Boyes* the court required *fraudulent*<sup>261</sup> use of the company structure.<sup>262</sup> However, in *Ben Hashem* the court did not require fraudulent use, but a causal link between the impropriety and the use of the company structure. If one applies last mentioned to the facts of *Lategan v Boyes*, where the director averred that he signed as a surety in his capacity as director of the company and not in his personal capacity; one may conclude that the director used the company structure, where he was a director, to elude liability in his personal capacity.

It is submitted, that in the light of the aforementioned where the facts of *Lategan v Boyes* are applied to the principles in the *Ben Hashem* case, the court would have come to a different conclusion as opposed to the decision reached in the court *a quo* and pierced the corporate veil.

If one applies the facts of *Lategan v Boyes* to the principles in *VTB Capital*, it seems as though one would come to a different conclusion.<sup>263</sup>

As in *Ben Hashem*, the court found that it was prepared to pierce the corporate veil where the wrongdoer used the company's structure to immunise himself from liability, which clearly happened in the given facts. In *VTB Capital* the court did not stop there.

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<sup>258</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 161.

<sup>259</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 162. It is interesting to note that the court found it unnecessary to have some causal link between the impropriety and damages suffered by a claimant as required in the law of delict, but rather a link between the impropriety and the use of company structure.

<sup>260</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 199.

<sup>261</sup> My emphasis.

<sup>262</sup> *Lategan v Boyes* 1980 (4) SA 191 (T) at par 201.

<sup>263</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808.

The court stated where a claim of wrongdoing was made against a wrongdoer, it is inappropriate to pierce the corporate veil to enable a claimant to pursue a contractual claim, as was the case in *Lategan v Boyes*.<sup>264</sup>

The court also required that the wrongdoer should have concealed his involvement in the company before it was prepared to pierce the corporate veil.<sup>265</sup> The facts in *Lategan v Boyes* does not reveal the aforementioned, but rather that the director signed as surety in such capacity, which makes his involvement in the company quite clear.

The last principle to be considered is privity of contract, as considered by the court in *VTB Capital*. In *Lategan v Boyes* the court accepted that the director signed surety in that capacity and he didn't conceal such. If one accept last mentioned and consider the doctrine of privity to a contract, he cannot be held liable in his personal capacity, but only in his capacity as a director. If a claimant requests the court to pierce the corporate veil to uplift his capacity as a director, the court may refuse to do so, because the court in *VTB Capital* stated that it was not prepared to pierce the veil to entitle a claimant to pursue a contractual claim.

In the light of the aforementioned, it is submitted that a different conclusion would have been reached by applying the principles of *VTB Capital*, as opposed to the principles laid down in *Ben Hashem*, to the facts of *Lategan v Boyes*. It is therefore submitted that the court would not be prepared to pierce the corporate veil in this regard.

### **6.2.2 *Botha v Van Niekerk* 1983 (3) SA 513 (W).**<sup>266</sup>

In this matter a contract of sale was concluded. The purchaser, in terms of the agreement, was 'Van Niekerk or his nominee'. Van Niekerk was the sole director and shareholder of a company, which he nominated in terms of the agreement, which nomination was accepted. When the seller demanded the guarantee (in terms of the agreement) from Van Niekerk, he contended that he was not obliged to perform because he was replaced by the company. The seller argued that the company was Van Niekerk in another guise. In *casu* the court formulated the 'unconscionable

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<sup>264</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 99.

<sup>265</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 100.

<sup>266</sup> Hereinafter referred to as '*Botha v Van Niekerk*'.

injustice'-test and consequently refused to disregard the separate personality of the company.

Applying the aforementioned to *Ben Hashem*, one should have cognisance of the fact that (and in accordance with the court in *Botha v Van Niekerk*) mere ownership and control are not themselves sufficient to justify piercing the veil.<sup>267</sup> The fact that the company in question was a so-called 'one-man-company' will, in this regard, not be a ground for piercing itself.

The question to be considered was firstly, whether there was an impropriety, and secondly, whether there was a causal link between the impropriety and the use of the company structure.<sup>268</sup> In this regard the answer would be positive, because if Van Niekerk did not nominate the company to replace him as the purchaser, then there could have been no impropriety.

What needs to be considered now is whether there was a '(mis)use' of the company as a device or a façade to conceal wrongdoing.<sup>269</sup> But it is submitted that in this regard one should appreciate the word 'wrongdoing' instead of using or misusing the company structure. It is at this point that one should refer to another principle laid down in *Ben Hashem*, and this is where the element of 'the interest of justice' plays a roll.<sup>270</sup> In this regard the court considered the laws which English law, for better or for worse, recognises the creation of separate legal entities with its own rights and liabilities.<sup>271</sup>

Having cognisance of what is stated here above, it is submitted that the court, by applying the principles in *Ben Hashem* to the facts of *Botha v Van Niekerk*, would not have pierced the corporate veil. The reason therefore is that it would not be in the 'interest of justice' to vest liability on an individual where there is no real evidence of use of the company structure to commit a 'wrong'.

By applying the same set of facts to the principle laid down in *VTB Capital*, it seems as though the same conclusion would be reached but for a different reason.

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<sup>267</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 159.

<sup>268</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 161 and 162.

<sup>269</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 163.

<sup>270</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 160.

<sup>271</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 160.

The determining factor in this approach would be the doctrine of privity of a contract.<sup>272</sup>

If the nomination was in fact accepted and therefore duly effected this alone would be grounds to refuse the piercing of the veil. In *Botha v Van Niekerk* the court found that the nomination was duly effected and therefore it is submitted that a court should not disregard the separate legal personality of a company.

In addition to the principle above there was no evidence that Van Niekerk concealed his involvement in the company.<sup>273</sup> Although it is accepted that mere control is not sufficient to pierce the veil, one cannot turn a blind eye to the fact that it seems as though Van Niekerk used the company to immunise himself from liability.<sup>274</sup> In this regard, what needs to be considered further is whether such conduct constitutes a “*wrongdoing which existed entirely dehors the company*”.<sup>275</sup> It is submitted that this question ought to be answered negatively.

Therefore it is submitted that by applying the facts of *Botha v Van Niekerk* to the principles laid down in *VTB Capital*, the court may not have been prepared to pierce the corporate veil.

### **6.2.3 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995 (4) SA 790 (A)*:<sup>276</sup>**

The relevant facts of the matter were, in short, as follows: Lubner Controlling Investments (LCI) sold its shares and loan account in another company to Cape Cape Pacific (CP). After denying the sale to CP, LCI transferred the shares to Gerald Lubner Investments (GLI). At all relevant times a certain Mr Lubner was the sole shareholder of GLI and controlled LCI completely. CP was initially successful against LCI, but after LCI did not perform in terms of the judgment obtained against him, CP approached the court once again and contended that both LCI and GLI were the real debtors. In *casu* the court pierced the veil to vest liability in both LCI and GLI.

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<sup>272</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 101.

<sup>273</sup> As per paragraph 100 in *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808.

<sup>274</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 98.

<sup>275</sup> *Ibid.*

<sup>276</sup> Hereinafter referred to as ‘*Cape Pacific*’.

By applying *Ben Hashem* the same conclusion might be reached. As accepted by the court in *Ben Hashem*, does control (which Mr Lubner had over LCI and GLI), not itself be sufficient to pierce the veil.<sup>277</sup> Evidence showed however that Mr Lubner used the companies' structures as a device to, by denying the sale agreement; rather transfer the shares in question to GLI for his own benefit. It is therefore submitted that he used the GLI as a device.<sup>278</sup>

Mr Lubner therefore did not elude liability in his personal capacity, but rather used one of his companies to not perform, in his capacity as controller of another one of his companies. And here another principle as laid down in *Ben Hashem* is applicable. The principle is that a company can be used as a device or façade, even though it was not incorporated with deceptive intent. The question is whether a company was used as a device or façade at the time of the relevant transaction.<sup>279</sup> It is submitted that GLI was used as a device or façade at the time of the transaction.

In light of the above, it is submitted that by applying the principles in *Ben Hashem* to the facts in *Cape Pacific*, the court might have been prepared to pierce the corporate veil.

By applying the principles in *VTB Capital* to the facts of *Cape Pacific*, the conclusion may have differed.

It is accepted that LCI used GLI as a device to immunise itself from liability by transferring the shares in question to the last mentioned.<sup>280</sup> However, and it is submitted that although GLI was the concealing device,<sup>281</sup> the device cannot use itself to elude liability.<sup>282</sup> The 'eluder' in this regard remains to be LCI and not GLI. Therefore, it should not be permitted to vest liability in those who were mere vehicles. The 'wrongdoing' is still done by the 'eluder' and therefore liability should solely vest with him.<sup>283</sup>

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<sup>277</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par159.

<sup>278</sup> As per par 163 in *Ben Hashem v Ali Shayif* [2008] EWHC 2380.

<sup>279</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 164.

<sup>280</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 98.

<sup>281</sup> As per par 100 of *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808.

<sup>282</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 98.

<sup>283</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 99.

When considering privity to a contract, it seems as though it is impossible to vest liability onto GLI where he played no active role in terms of the agreement between CP and LCI.<sup>284</sup> Therefore a court would not be prepared to pierce the corporate veil in this regard. CP would have then been limited to either claim damages or specific performance in a contractual claim, or if the claims remained unsatisfied, liquidated the company.

It is therefore submitted that the conclusion in applying the principles laid down in *Ben Hashem* and *VTB Capital* respectively to *Cape Pacific*, may have resulted in different conclusions. By applying *Ben Hashem*, the veil might have been pierced, but by applying the principles in *VTB Capital*, the sanctity of the veil might be upheld.

#### **6.2.4 *Hülse Reutter and Others v Gödde 2001 (4) SA 1336 (SCA)*:<sup>285</sup>**

Gödde was a creditor of a certain Jurgen Härksen, but he ceded his claim to another company (Goldleaf), who subsequently failed to make payment. To enforce his claim Gödde instituted action against those who controlled Goldleaf. The grounds argued by Gödde to substantiate last mentioned is that they controlled Goldleaf and acting in collusion with Härksen, in that they knew that last mentioned had no intention to fulfil his obligations. In *casu* the court refused to pierce the corporate veil.

Applying the above facts to *Ben Hashem* the conclusion may prove to be different. In the first instance the court in *Ben Hashem* stated that it will not be prepared to pierce the veil, merely because it is thought to be in the interests of justice.<sup>286</sup> The court, however, went further and referred thereto that the court should uphold the laws which recognise separate legal personalities, but should not do so if legal technicalities would produce injustices.<sup>287</sup> Applying this to *Hülse Reutter*, one may come to the conclusion that the facts indicate that the appellants used the technicality of having separate juristic *personae* to act in co-operation with Härksen to not perform in terms of his obligations fraudulently.

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<sup>284</sup> As per *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 101.

<sup>285</sup> Hereinafter referred to '*Hülse Reutter*'.

<sup>286</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 160.

<sup>287</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 160.

The impropriety requirement in *Ben Hashem* is apparent in this case.<sup>288</sup> However, such impropriety can be linked to the use of a company structure.<sup>289</sup> With the present element of fraud, it seems as though the controllers of Goldleaf used the company structure to avoid liability, knowing that they had no intention to perform in terms of the cession.

In *Hülse Reutter* the evidence showed that Goldleaf's controllers used the company structure as a device to conceal their wrongdoing, as required by *Ben Hashem*.<sup>290</sup> However, in *Hülse Reutter* the court did not pierce the veil because there was no 'unfair advantage'.

In conclusion, applying the facts of *Hülse Reutter* to the principles laid down in *Ben Hashem*, it seems as though that the court might have pierced the corporate veil.

When one applies the facts of *Hülse Reutter* to the principles laid down in *VTB Capital*, the result poses to be similar but not for the same reasons.

In the first instance, the court in *VTB Capital* required the controller to use the company in attempt to immunise himself from liability.<sup>291</sup> Although the controllers agreed to the cession in co-operation with Härksen, they in effect also have taken up to perform in terms of the agreement which, the evidence shows, they knowingly avoided.

The principle which the court in *VTB Capital* laid down is that the court will be prepared to pierce the veil where a wrongdoer concealed his involvement in the company.<sup>292</sup> What the controllers concealed is not their involvement in the company, but rather their involvement in the non-performance of the company. It is submitted that last mentioned should be included in the principle's scope when there is some element of dishonesty involved.

When the doctrine of privity to a contract stands to be considered, one should note that the evidence showed elements of dishonesty.<sup>293</sup> However, the appeal court

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<sup>288</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 161.

<sup>289</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 162.

<sup>290</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380 at par 163.

<sup>291</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 98

<sup>292</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 99.

<sup>293</sup> As considered in *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 101.

regarded the agreement of cession to be a true cession. In this regard, one also needs to consider the principle that it is inappropriate to enable a claimant to pursue a contractual claim against the controller.<sup>294</sup> In this regard the facts in *Hülse Reuter* showed that Gödde would not have suffered prejudice if he did institute his claim against Goldleaf first. But, the court also accepted the dishonesty of the controllers in terms of the agreement. Therefore, on the grounds of dishonesty in conclusion of the agreement, one may rather tend to disregard privity of a contract.

In light of the aforementioned it is submitted that the court may have pierced the corporate veil by applying *Hülse Reuter* to the principles of *VTB Capital*.

### **6.2.5 *Ex Parte Gore and others NNO 2013 (3) SA 382 (WCC)*:<sup>295</sup>**

In this matter the liquidators of 41 companies applied to court to permit certain assets to be dealt with as if they were the property of the holding company. The basis on which the relief was sought, was that the separate legal personalities were treated with little or no distinction between the legal personalities. The court agreed with the liquidators, but made the order not in common law, but in terms of section 20(9) of the Companies Act in that the conduct constituted an ‘unconscionable abuse.’<sup>296</sup>

In applying the aforementioned to the principles *Ben Hashem* it seems as though piercing would be imminent.

The evidence in *Ex Parte Gore* showed that the group of companies was in fact a sham. Taking the aforementioned into consideration, such conduct can be regarded as a misuse of the different companies’ separate personalities which administration was regarded as shams.<sup>297</sup> It also doesn’t matter if the company was originally incorporated with any deceptive intent or not.<sup>298</sup> What is required though is that the company structure was used as a sham at the time of the particular wrong.

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<sup>294</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 99.

<sup>295</sup> Hereinafter referred to as ‘*Ex Parte Gore*’.

<sup>296</sup> Companies Act 71 of 2008.

<sup>297</sup> *Ben Hashem v Ali Shayif* [2008] EWHC at par 163.

<sup>298</sup> *Ben Hashem v Ali Shayif* [2008] EWHC at par 164.

It is submitted that the above two principles as laid down in *Ben Hashem* will suffice to pierce the corporate veil and the same conclusion would be reached as the court *a quo*.

By applying the principles in *VTB Capital* the conclusion, it is submitted to be the same.

In *VTB Capital* the court stated that there cannot be a common law claim for damages, distinct from an equitable remedy, whenever an impropriety occurred consisting of misuse or abuse of the company as a device or sham by the controller.<sup>299</sup>

Due to the fact that the evidence in *Ex Parte Gore* showed, which the court accepted, that the group of companies were indeed a sham, it is submitted that the relief granted in *casu* constitutes an equitable remedy in the circumstances. In light thereof the conclusion would be the same and the corporate veil be pierced.

### 6.3 Conclusion

In this part of the study a fact based approach was followed to determine whether one can apply facts of South African case law to the selected case law which were considered in England.<sup>300</sup> It is submitted that it is possible to conduct such an application of British case law principles. However, in *Ex Parte Gore*,<sup>301</sup> where section 20(9)<sup>302</sup> needed consideration instead of the common law, the approach was more rigid and therefore harder to apply the principles to the facts of the specific matter. It is submitted that a different set of facts of a matter which was considered in terms of Section 20(9) may reveal another conclusion.

In light of the above fact based comparison study, it is clear that different hypothetical conclusions were reached, as opposed to the conclusions reached by South African courts. Also, by applying the different sets of English principles, different conclusions were reached.

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<sup>299</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 at par 97.

<sup>300</sup> *Ben Hashem v Ali Shayif* [2008] EWHC at par 164 and *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808.

<sup>301</sup> *Ex Parte Gore and others* NNO 2013 (3) SA 382 (WCC).

<sup>302</sup> Companies Act 71 of 2008.

By time and again applying the same sets of principles to the relevant facts, a more consistent pattern was formed and created some legal certainty. It is submitted that the principles laid down were not too rigid, but also in the same breath, did not pose a threat to the doctrine of piercing the corporate veil itself.

In conclusion, it is not justified to say that the English approach trumps the South African approach, or *vice versa*. What is a fair conclusion is that by applying the same principles time and again, a sense of legal certainty was created.

## **CHAPTER 7: Conclusion**

### **7.1 General summary**

It is established in South African law that a company has a separate legal personality from the moment of registration which can be the bearer of its own rights, duties and obligations distinct from its members. As a legal person, a company has all the powers that a natural person has, except to the extent that the company is not able to exercise such power.<sup>303</sup> This doctrine of a company being a separate entity finds origin in the age old matter of *Salomon v Salomon* where Lord Halsbury stated the following:<sup>304</sup>

“It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its own rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.”

As reflected in this study such a legal personality is not absolute and the courts have at times been prepared to disregard the separate personality of the company and expose those who misused or abused it. Last mentioned is what is referred to as to ‘pierce’ the corporate veil.<sup>305</sup> In this event, the courts have generally strived to strike a balance between the conflicting interests of protecting the separate corporate identity and the public interest of exposing improper conduct.

### **7.2 The principles that justifies piercing the corporate veil**

History indicates that the courts were not inclined to pierce the corporate veil. In the face of decisions such as *Salomon v Salomon & Co Ltd*<sup>306</sup> and *Dadoo Ltd v*

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<sup>303</sup> For example see *Madrassa Anjuman Islamia v Johannesburg Municipal Council* 1919 AD 439 where the Court said that is not possible for a company to be physically present anywhere. Another example is in *Ex Parte Donaldson* 1947 (3) SA 170 (T) where the Court said that a company may not be appointed as a guardian for a minor.

<sup>304</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL) at par 30.

<sup>305</sup> “Abuse” here includes a wide variety of circumstances, for example, but not limited to, fraud, dishonesty, a natural person act as though there is no dichotomy between him-/herself and the company, etc.

<sup>306</sup> *Salomon v Salomon* [1897] AC 22 (HL).

*Krugersdorp Municipal Council*,<sup>307</sup> is it very difficult to persuade the courts to disregard the corporate veil. In the last two mentioned cases the courts have steadfastly applied the principle that a company is a separate legal entity distinct from its members who comprise it, and have generally refused to look behind the veil and fasten the attention on the individual members.

However, in certain circumstances the courts have been prepared to pierce the veil at times. It is rather unfortunate that the decisions of the courts do not display a pattern or any principle which is consistently applied when they were indeed inclined to pierce the veil. The result of the aforementioned is that there exist some legal uncertainty as to when the courts will pierce the veil and when it will uphold the separate legal personality of the company. However, the general rule is that the company will disregard the separate personality if the juristic personality is used as a mere façade or concealing the true facts<sup>308</sup> so that there is some kind of abuse of the corporate personality,<sup>309</sup> or the separate legal personality is not maintained in the full sense. The result hereof is that a separation between the company and the shareholders exist *de jure*, but not *de facto*.

At common law there are two conditions for veil piercing. Firstly, veil piercing is an exceptional procedure, and therefore special or exceptional circumstances should exist before the court will disregard the company's separate personality.<sup>310</sup> Secondly, it was accepted that mere ownership and control of the company is not sufficient to pierce the corporate veil. It is submitted that the aforementioned two principles are

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<sup>307</sup> *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.

<sup>308</sup> *Woolfson v Strathclyde Regional Council* 1978 SC 90 (HL) 96. See also *Smith v Hancock* 1894 2 Ch 377 385; *Gilford Motor Co Ltd v Horne* 1933 Ch 935; 1933 All ER Rep 109 (CA); *Jones v Lipman* 1962 1 All ER 442 445; 1962 1 WLR 832 836; *Tunstall v Steigman* 1962 2 QB 593 602; 1962 2 All ER 417 (CA) 421; *Adams v Cape Industries plc* 1990 1 Ch 443 549; 1991 1 All ER 929 (Ch and CA) 1022; *Wambach v Maizecor Industries (Edms) Bpk* 1993 2 All SA 158 (A); 1993 2 SA 669 (A) 675; *Macadamia Finance Ltd v De Wet* 1993 2 All SA 162 (A); 1993 2 SA 743 (A) 748; *The Shipping Corporation of India Ltd v Evdomon Corporation & The President of India* 1994 2 All SA 11 (A); 1994 1 SA 550 (A) 566.

<sup>309</sup> Companies Act 71 of 2008 s 20(9)(a). This provision stands in close resemblance of the Close Corporations Act 69 of 1984 s 65 which provides that, whenever a court finds that the incorporation of, or any act by or on behalf of, or any use of that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities, or of such member or members thereof, as are specified in its declaration; to similar effect.

<sup>310</sup> See *Woolfson v Strathclyde Regional Council* 1978 SC 90 (HL) 96; *Botha v Van Niekerk* 1983 4 All SA 157 (W); 1983 3 SA 513 (W) 523; *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 2 All SA 543 (A); 1995 4 SA 790 (A); *The Shipping Corporation of India Ltd v Evdomon Corporation & The President of India* 1994 2 All SA 11 (A); 1994 1 SA 550 (A); *Hülse-Reutter v Gödde* 2002 2 All SA 211 (A); 2001 4 SA 1336 (SCA). The general rule is that the corporate entity should be recognised and upheld except in the most unusual circumstances.

themselves not sufficient to disregard the separate juristic personality of the company.<sup>311</sup>

Recent decisions in South African courts indicate that our courts are not inclined to simply disregard the separate juristic personality of the company. As stated in *Hülse-Reuter v Gödde*, piercing the corporate veil is an exceptional procedure and that company's legal *personas* should be recognised and upheld in the most unusual circumstances.<sup>312</sup>

Circumstances where the courts have disregarded the separate existence of a company distinct from those who comprise it cannot be strictly defined and the courts have generally followed a fact based approach. The courts indicated certain scenarios such as: circumstances where element of fraud and improper conduct exist;<sup>313</sup> where upholding the separate legal existence leads to an unconscionable injustice;<sup>314</sup> in circumstances where fraud, dishonesty, or improper conduct exists<sup>315</sup> and where there was a misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter.<sup>316</sup>

Over the years the courts have developed the doctrine and made great strides in the formation of principles pertaining to when the veil could be pierced. Unfortunately, the approach was fact based and no common or unifying principles were developed. The result of the aforementioned is some legal uncertainty as to when the doctrine of piercing will be applied and where the sanctity of the separate legal personality will be protected.

### **7.3 A statutory approach of disregarding the separate juristic personality**

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<sup>311</sup> The principle that identity of ownership and control is not a sufficient condition was established in *Salomon v A Salomon & Co Ltd* 1897 AC 22 52; 1895–99 All ER Rep 33 (HL) 37: “*If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment of the Court of Appeal is disposed of*”, per Lord Halsbury.

<sup>312</sup> *Hülse-Reuter v Gödde* 2001 (4) SA 1336 (SCA) at 1346.

<sup>313</sup> *Lategan & another NNO v Boyes & another* 1980 (4) SA 191 (T).

<sup>314</sup> *Ibid.* The ‘unconscionable injustice’-test will be discussed in full below.

<sup>315</sup> *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).

<sup>316</sup> *Hülse Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA).

Section 20(9) of the Companies Act<sup>317</sup> is the new statutory provision in South Africa which makes room for the application of the piercing doctrine. However, one cannot turn a blind eye to the resemblance of section 20(9) of the Companies Act and section 65 of the Closed Corporations Act.<sup>318</sup> Section 65 makes provision that the court may be called upon to find that the incorporation of the corporation or any act on behalf of it constitutes a 'gross abuse' of its juristic personality. In the event that the court may find that such conduct constitutes a 'gross abuse' it may 'pierce the corporate veil' to vest personal liability on its shareholders.<sup>319</sup> The similarities vest in the reference of how the legal personality of an entity was abused. Section 20(9) of the Companies Act of 2008 refers to an 'unconscionable abuse' and Section 65 of the Closed Corporations Act refers to a 'gross abuse'.

Although the similarity is to some extent obvious it remains unsure what the difference between 'gross abuse' and 'unconscionable abuse' is. It has been suggested, though not explicitly, that an 'gross abuse' might be more severe than an 'unconscionable abuse'.<sup>320</sup> However, it is submitted that that the courts should consider matters where 'gross abuse' was considered as a guideline to adjudicate matter in terms of Section 20(9) of the Companies Act where acts which constitute an 'unconscionable abuse' are to be considered.

By including a statutory provision in the Companies Act with its own requirements, it may be the bearer of legal certainty in circumstances where the piercing doctrine raises its unruly head.<sup>321</sup> However, there are some concerns as to the application of section 20(9) of the Companies Act. The biggest concern raised by academics is that by including a statutory provision for piercing the application of the doctrine, it may become inflexible.<sup>322</sup> In contrast thereto as the court in *Ex Parte Gore* stated that section 20(9) is cast in wide terms, which may be indicative of the intention of the

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<sup>317</sup> Companies Act 71 of 2008.

<sup>318</sup> Closed Corporation Act 69 of 1984.

<sup>319</sup> See *TJ Jonck BK t/a Bothaville Vleismark v Du Plessis* 1998 1 SA 971 (O) and the appeal to a full bench in this matter in *Olivier v TJ Jonck t/a Bothaville Vleismark* [2000] JOL 6106 (IC). The court was prepared to apply s 65 in the latter case; *L & P Plant Hire BK v Bosch* 2002 2 SA 662 (SCA); *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 2 SA 303 (C) and *Ebrahim v Airport Cold Storage (Pty) Ltd* [2009] 1 All SA 330 (SCA).

<sup>320</sup> Cassim R *Piercing the corporate veil 'Unconscionable abuse' under the Companies Act 71 of 2008* De Rebus - SA Attorneys' Journal August 2012

<sup>321</sup> Section 20(9) of the Companies Act 71 of 2008.

<sup>322</sup> Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J, and Yeats J *Contemporary Company Law* 2<sup>nd</sup> Edition Juta 2012.

legislature that section 20(9) should find application in a wide variety of circumstances, it might be that it was the intention of the legislature that section 20(9) may find application in a wide variety of factual circumstances.<sup>323</sup> In view of the aforementioned, it is submitted that it is of the utmost importance that the courts strike a balance between a feared rigid approach and an approach, which is undoubtedly able to bring legal certainty to the doctrine of piercing the veil when applying section 20(9) of the Companies Act.

#### 7.4 Applying English Case Law to South African case studies

In this study the English position was analysed from its origin to how its courts have recently approached the piercing doctrine. Generally English courts had a more legal positivistic approach when dealing with matters regarding the juristic personality of a company. The foundation of the aforementioned and probably the most commonly referred to matter in this regard is the case of *Salomon v Salomon* where the court found it contrary to the relevant Act and public policy to pierce the corporate veil.<sup>324</sup>

In the past the English Courts followed a fact based approach to pierce the corporate veil. The circumstances where the courts were prepared to pierce the veil include scenarios where the company structure was used as a sham<sup>325</sup> or defraud others;<sup>326</sup> in cases of 'agency' where the wrongdoers abused the corporate structures of a company;<sup>327</sup> where it is in the interest of justice to do so;<sup>328</sup> in circumstances where a wrongdoer directed the mind and will of a company;<sup>329</sup> and where a company had an enemy character.<sup>330</sup>

In this study the focus was on selected recent English case law developments. These cases are *Ben Hashem v Ali Shayif*<sup>331</sup> and *VTB Capital Plc v Nutritek*

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<sup>323</sup> *Ex Parte Gore and others NNO 2013 (3) SA 382 (WCC)* at par 32.

<sup>324</sup> *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

<sup>325</sup> *Trustor AB v Smallbone No.2* (2001) 3 All ER 987

<sup>326</sup> Payne J *Lifting the corporate veil: a reassessment of the fraud exemption* Cambridge Law Journal 1997 Vol 56 pp284-290.

<sup>327</sup> *Linsen International v Hupuss Sea Transport PTE* (2011) EWHC 2339 (Comm).

<sup>328</sup> See *Creasy v Breachwood Motors* (1933) BCLC 480; *Re H (Restraint Order: Realizeable Property)* (1996) 2 All ER 391 (CA); *Re a Company* (1985) 1 B.C.C.; *Adams v Cape Industries plc* (1990) CH 433.

<sup>329</sup> *Lennard's Carrying Company Ltd v Asiatic Petroleum Co. Ltd* (1915) AC 705.

<sup>330</sup> *Daimler Co. Ltd v Continental Tyre & Rubber Co Ltd* (1916) 2 AC 307.

<sup>331</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380.

*International Corp & Others*.<sup>332</sup> In both these matters the courts formed principles regarding the piercing doctrine.

In this study the principles formed in *Ben Hashem*<sup>333</sup> and *VTB Capital*<sup>334</sup> were applied to facts of matters in South African case law respectively, to determine firstly whether one can apply English case law directly to the South African case law's facts; secondly, whether the courts would hypothetically come to the same conclusions; and thirdly, whether the English approach is in fact a better approach, as opposed to the South African approach.

The answer to the first question appears positive when the principles of English courts were applied to the selected South African case law. In the application thereof the study showed that the hypothetical conclusions may have differed to the respective conclusions reached by South African courts. Even when the same conclusions were in fact reached, the reasons of such conclusions were different from the respective courts' decisions.

The last question remains whether the approach followed in the selected case law of English is in fact better than the approach followed in South African courts. Although different conclusions were reached when applied to the selected South African case law, different conclusions, or reasons for the conclusions, were also reached when applying the separate sets of principles laid down in the English decisions respectively.

In *Ben Hashem*,<sup>335</sup> the approach, as submitted, was less rigid than the principles laid down in *VTB Capital*.<sup>336</sup> The distinguishing factor seems to be the appreciation which the court showed in *VTB Capital* for the doctrine of privity of a contract and the tendency to not pierce the veil for a contractual claim.<sup>337</sup> However, the aforementioned didn't always find application in all the matters considered.

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<sup>332</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808.

<sup>333</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380.

<sup>334</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808.

<sup>335</sup> *Ben Hashem v Ali Shayif* [2008] EWHC 2380.

<sup>336</sup> *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808.

<sup>337</sup> The principle found at par 99 and par 101 of *VTB Capital Plc v Nutritek International Corp & Others* [2012] EWCA Civ 808 respectively.

It is submitted that by applying the same sets principles to a set of facts, a sense of legal certainty was created. It is submitted further that the principles laid down and the application thereof was not too rigid and also did not pose a threat to the doctrine of piercing the corporate veil itself.

## 7.5 Final Conclusion

The focus of this study was to analyse both the South African and English position. After such analysis was done it was the intention to compare the position with regard to case law and create a practical application of the English position to the South African position.

It is concluded that the piercing of the corporate veil is very much alive and is continuously developing as time progresses in both England and South Africa. In South Africa the focus is on the how the courts will interpret section 20(9) of the Companies Act.<sup>338</sup> Academics fear that the interpretation of a statutory approach will roll over in an inflexible approach by the courts.<sup>339</sup> It is submitted that, although the aforementioned approach may be a reality, it doesn't necessary mean to be the only possible result. In this regard the courts should direct the path to create legal certainty, but also avoid an inflexible approach when adjudicating matters in terms of section 20(9).

It is also concluded that the English position can indeed be compared to the South African position and this study has proven that in the comparison can just and equitable conclusions, although hypothetically, be reached.

In final conclusion it is submitted that when the South African courts adjudicate matters regarding the piercing of the corporate veil doctrine, they should, in addition to the newly developed statutory approach and the common law approach, also consider the English approach to direct the path forward when hearing matters and setting precedents in the doctrine.

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<sup>338</sup> Act 71 of 2008.

<sup>339</sup> See par 4.6.

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