

UNIVERSITY OF CAPE TOWN
FACULTY OF LAW
COMMERCIAL LAW DEPARTMENT

**PIERCING OF THE CORPORATE VEIL IN TERMS OF GORE: SECTION 20(9) OF
THE NEW COMPANIES ACT 17 OF 2008**

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**RESEARCH DISSERTATION PRESENTED FOR THE APPROVAL OF SENATE IN
FULFILMENT OF PART OF THE REQUIREMENTS FOR THE LL.M. COMMERCIAL
LAW DEGREE IN APPROVED COURSES AND A MINOR DISSERTATION. THE
OTHER PART OF THE REQUIREMENT FOR THIS QUALIFICATION WAS THE
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DEDICATION

This dissertation is dedicated to God Almighty and to my late mother Mrs Maggie Zindoga.

ACKNOWLEDGEMENTS

My sincere thanks and praise to the Lord Almighty, through whom all things are possible. I would not have been able to accomplish this task on my own. Thank you Lord for the grace, wisdom, strength and ability. I wish to express my gratitude and sincere appreciation to my supervisor, Mr Richard Bradstreet for his invaluable guidance, insight comments, thoroughness and advice in the writing of this dissertation. Without his unwavering support, this work would not have been completed.

I would like to extend my greatest appreciation to my parents, Godfrey and Anna for their tremendous encouragement, unwavering support and being prize parents, without whom I could not have been where I am. Also, to my lovely fiancée, Gillian Mapwashike, whose affection, love, encouragement and prayers of day and night make me able to get such success and motivation to complete this dissertation. Looking forward to our lifelong journey.

My brothers and sisters, Walter, Pride, Faith, Baba George and Elizabeth, thank you so much for your prayers, moral support and encouragement throughout the year. Lastly, I would like to thank MasterCard Foundation for the sponsorship and assistance during my studies for an LLM in Commercial Law, and to all my friends for their prayers, support and encouragement throughout the year.

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CHAPTER 1

1 Introduction

1.2 Academic and practical reasons for choosing the subject

For many years, jurists have struggled to rationalise the common law rules which regulate the circumstances in which it is justifiable to override the principle of separate legal personality.¹ According to the principle of separate legal personality, which represents the division between the existence of the legal entity and that of its owners, the obligations of the corporation are not imputed to the owner or shareholders of the corporation. In order to address legal challenges associated with the principle, for example, abuse of separate legal personality by the shareholders or directors of an entity, the courts have come up with the doctrine of ‘piercing the corporate veil’, which allows a court to disregard the separate legal personality of the corporate entity and thereby hold such corporation’s shareholders and directors personally liable for the obligations of the corporation under certain circumstances.²

As the court in *Amlin v Van Kooij* observed, ‘piercing the veil necessitates that a court looks beyond the corporate entity and to its owners or shareholders in order to see for itself what obtained inside.’³ However, the position has not yet been reached in our law where it is possible to state with any degree of accuracy the circumstance in which the courts will pierce the veil under the common law.⁴ The courts have grappled with the correct approach to adopt in determining whether or not to pierce the corporate veil. The concept of veil piercing has been criticised as by some, as being vague, uncertain and unpredictable.⁵ In the classic words of Cardoso J in *Berkey v Third Avenue*, the concept is ‘enveloped in the mists of metaphor’.⁶ The courts seem to give different general formulations as to when the corporate veil will be pierced in terms of the common law principles. In a similar vein, the court in *R Polly Peck International* stated that piercing the veil ‘is a vivid but imprecise metaphor’.⁷

¹D Cabrelli ‘The Case Against ‘Outsider Reverse’ Veil Piercing in UK Company Law’ (2010) 10 *JCLS* 343.

² AB Sachs & LC Hodge ‘Piercing the mist: Bring the Thompson study into the 1990s’ (2008) 43 *WFLR* 341.

³ *Amlin (SA) Pty Ltd v Van Kooij 2008 (2) SA 558 (C)* at 12.

⁴ R Cassim *Contemporary Company Law* 2ed (2012) 45.

⁵ *Ibid.*

⁶ *Berkey v Third Avenue Co* 244 NY 84 (1926) at 94.

⁷ *R Polly Peck International plp* [1996] 2 All ER 433 at 447.

Whilst the common law cases demonstrate that the courts are far from enthusiastic about piercing the corporate veil to enable creditors or other third parties to obtain a remedy, it is not impregnable.⁸ Nevertheless, the doctrine, as a means of determining when to pierce the veil, has been subjected routinely to criticism.

Whereas the remedy of ‘piercing of the corporate veil’ previously only existed in the common law, it has now been expressly incorporated into legislation under the Companies Act 71 of 2008 (hereinafter ‘the Companies Act’). Section 20(9) of the Companies Act, has introduced a statutory basis for piercing the corporate veil of companies.⁹ The advantage of having a statutory provision that provides for the piercing of the corporate veil is that it provides the courts with useful guidelines as to when to pierce the corporate veil.¹⁰ Some regard section 20(9) as an alternative to broaden the grounds upon which a court might disregard the separate legal personality of an entity when there has been ‘unconscionable abuse’.¹¹

While this provision is to be welcomed, it does raise many questions and uncertainties surrounding its application and interpretation.¹² Roodt regards this as a curious provision, in that it is not at all clear what purpose it is intended to serve.¹³ For instance, the section fails to define the term ‘unconscionable abuse’, to provide any guidance on the circumstances that constitute an ‘unconscionable abuse’ of the juristic personality of the company as a separate entity and there is no clear indication where this term comes from.¹⁴ It is also not clear from a reading of the section whether section 20(9) overrides the common law or the judicial instances of piercing the corporate veil, or whether piercing of the veil must still be regarded as an exceptional remedy to be used only as a last resort, as is the case at common law.¹⁵ Moreover, section 20(9) does not provide

⁸ Cabrelli op cit (n1) 344.

⁹ *Ex Parte: Gore NO 2013 (2) All SA 437 at 144.*

¹⁰ Cassim op cit (n4) 42.

¹¹ Ibid.

¹² R Cassim ‘Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction’ (2014) 26 SA *MERCLJ* 307.

¹³ J Roodt ‘The Companies Act of 2008 - the consequences of the “unconscionable abuse” of the company's juristic personality’ 15 May 2015, available at <http://www.roodtinc.com/newsletter>, accessed on 12 April 2015.

¹⁴ Cassim op cit (n12) 307.

¹⁵ Ibid.

guidance in regard to who would constitute an ‘interested person’ within the scope and ambit of the section.¹⁶

Therefore, some questions of interpretation do arise: Can section 20(9) be seen as a replacement of the common law rule? Can the rule of veil piercing still be seen as a rule of last resort? What is meant by the terms ‘unconscionable abuse’ and ‘interested persons’ as it is not clear from the provision itself?

The first judgment on the interpretation of this important provision was handed down in the case of *Ex Parte Gore* [2013] 2 All SA 437 (WCC). The court had to decide on whether to ignore the separate legal personalities involved and, ‘pierce the corporate veil’, of certain subsidiary companies to attach liability to the holding company in terms of the common law or alternatively section 20(9) of the Companies Act.

A key question to be addressed by this dissertation is whether the court in *Gore*, in the course of its judgment answered some of the questions set out above, and set out some important principles in regard to the interpretation and application of section 20(9) of the Companies Act in light of accepted legal maxims and cannons of statutory interpretation. It is against this background that the statutory approach in piercing of the corporate veil must be examined. In view of the above the research seeks to demonstrate how the lack of a single, coherent principle has brought an element of inconsistency and uncertainty into the law and attempts to clarify this uncertainty.

1.3 Outline of Research

The first part of this minor dissertation will examine the historical development of the common law doctrine of piercing the corporate veil, its status and the concerns raised against the rule. In light of the fact that veil piercing erodes the limited liability of a company, it is necessary to appreciate both the relevance and the significance of separate legal personality and the historical development of the doctrine that carves out exceptions to limited liability in this context. The concept of separate legal personality goes hand in hand with the doctrine of veil piercing.

This part will further illustrate the various approaches that courts have taken in deciding whether or not to pierce the corporate veil. A criticism of the doctrine is that it comes with no clear

¹⁶ Ibid.

guidelines directing courts to the appropriate circumstances for piercing the corporate veil. It will be argued that the courts have relied invariably on a number of discrete, unrelated categories of conduct upon which to base decisions to disregard the corporate personality of a company, but this approach in the end is unsatisfactory. The concept of corporate personality will be discussed in this part in order to achieve a better understanding of the concept itself and to shed some light on the legal nature of the corporate personality.

Furthermore, this part will examine recent trends in foreign law in regard to the doctrine of piercing the corporate veil that may serve as guidelines to the interpretation and the application of the doctrine in South African law. Particularly, the English judicial approach to piercing the corporate veil will be discussed. This in turn will lead to a consideration of the question whether further development is necessary, and if so, which direction is best suited for South African company law.

The second part of this dissertation will discuss the rules of interpretation, the basic approaches to statutory interpretation followed by our courts and which approach has enjoyed preference in recent judgments. These approaches will assist in the discussion on the interpretation of section 20(9) of the Companies Act. Section 20(9) will be examined, and the concerns that writers have raised will be discussed. This part will further examine the judgment delivered in *Gore* with specific reference to the theories of statutory interpretation used, and the final interpretation applied by the court and what effect this has on the existing rules of piercing the corporate veil. It will be contended that courts must interpret and apply section 20(9) in a way that gives effect to the purport and spirit of the Constitution and results in clarity and simplicity in the statutory doctrine of piercing the corporate veil.

The fourth and final part of this research will summarize the discussion, where the research will be considered and recommendations made as to how section 20(9) should be best interpreted. Given the lack of a unified approach to the scope and conditions of application of the doctrine of veil piercing, which allegedly leads to confusion and frequent misuse, this study aims at clarifying the scope of the doctrine and conditions under which it can be applied. It will attempt to clear up some of the mist enveloping the concept of corporate veil piercing.

CHAPTER 2

Piercing of the Corporate Veil: Common Law

2.1 *Introduction*

As was previously discussed, the question of when the courts should ‘pierce the corporate veil’ and disregard a company’s separate legal personality has been a frequent source of debate, both at a national and at an international level, among academics and legal practitioners. The courts in South Africa, England and Canada alike failed to formulate a single, coherent principle upon which to base decisions to disregard the separate juristic personality of a company.¹⁷ Instead, judges have invariably relied on one or other of a number of discrete, unrelated categories of conduct in order to justify such decisions.¹⁸ Although there have been several attempts, the search for a universally accepted test for veil piercing decisions has so far proved difficult.

Therefore, this chapter will first consider the concept of separate legal personality in order to achieve a better understanding of this doctrine, and application of the veil piercing doctrine in South Africa. Furthermore, the chapter will comparatively provide and analyse the framework of piercing the corporate veil doctrine from the perspective of United Kingdom. The purpose of this comparative analysis is to thoroughly report any similarities or difference in the manner in which the courts in this jurisdiction have dealt with this issue. It is also important to note that this comparative analysis is an attempt to find a practical solution to this problem. This in turn will lead to a consideration of the question whether further development is necessary, and if so, which direction is best suited for South African company law.

2.2 *The Concept of Separate Legal Personality*

At the foundation of company law is the concept that a company has a separate legal personality. One of the legal consequences of separate legal personality is that a company acquires the capacity to have its own rights and obligations separate from that of its directors and shareholders.¹⁹ This means that corporate obligations vest in the company and not the shareholders, nor directors of such entity. Thus, a metaphorical veil is created between the shareholders, directors and the company which protects shareholders from the liabilities and debts of the company. In *Airport*

¹⁷ LC Davids ‘The lingering question: Some perspective on the lifting of the corporate veil’ (1994) *TSAR* 155.

¹⁸ A Domanski ‘Piercing of the Corporate Veil: A New Direction’ (1986) *SALJ* 224.

¹⁹ Cassim op cit (n4) 31.

Cold Storage v Ebrahim, the court confirmed that one of the most fundamental consequences of incorporation is that a company is a juristic entity separate from its members.²⁰ This fundamental principle of company law was first laid down in unequivocal terms by the House of Lords in the leading case of *Salomon v Salomon*, commonly referred to as the *Salomon* case.²¹ This case is a foundational case for the doctrine of corporate personality and illustrates how seriously the courts take the idea of separate legal personality.

This case concerned a common business manoeuvre whereby Aron Salomon, the owner of a boot and leather business sold it to a company he formed, in return for fully paid-up shares in it, allotted to him and members of his family. Salomon also received an acknowledgement of the company's indebtedness to him, in the form of secured debentures. These were later mortgaged to an outsider. Soon after formation, the company went under liquidation at the behest of unpaid trade creditors. The debentures, being secured by a charge on the company's assets ranked in priority to the trade creditors and so the mortgage to the outsider was paid off. About £1,000 remained and Aron Salomon, was now unencumbered owner of the debentures, claimed this is priority to the trade creditors. He succeeded and also defeated the claims that he should be made to indemnify the company in respect of its debts. On appeal the House of Lords held:

‘...the company is at law a different person altogether from the subscribers to the memorandum and that though it may be that after incorporation the business is precisely the same as it was before incorporation, and the same persons are managers, and the same hands received the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. Any member of a company acting in good faith is much entitled to take and hold the company's debentures as any outside creditors.’²²

The quoted passage vividly demonstrates that trading in the form of a company with its own legal personality is legally permissible.²³ The effect of the Lords unanimous ruling was to firmly uphold the doctrine of corporate personality. In addition, this implies that the company would be recognised as a legal person separate from its shareholder and directors. In our jurisprudence the concept of separate legal personality of a company is soundly affirmed in section 19(1) (b) of the

²⁰ *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) at 17.

²¹ *Salomon v Salomon Co Ltd* [1897] AC 22 (HL).

²² *Salomon v Salomon* supra (n21) at 50.

²³ LV Mthembu *To lift or not to lift the corporate veil-unfinished story: A critical analysis of common law principles in lifting the corporate veil* LLM (Natal) (2002) 16.

Companies Act, which states that, ‘from the date and time that the incorporation of a company is registered, the company has all the legal powers and capacity of an individual’.²⁴

Nevertheless, this concept of separate legal personality and the benefits it produces may be subject to abuse as courts have acknowledged.²⁵ Consequently the courts have, on occasions, refused to recognise the existence of a separate personality of the corporate entity and disregard the veil of incorporation in order to examine who really controls the corporation. This process is usually described as ‘piercing the corporate veil’. Courts have created this equitable doctrine of piercing the corporate veil to allow corporate creditors to hold owners and shareholders personally liable for corporate obligations and liabilities under limited circumstances.²⁶ It must be stressed that such cases are exceptional and rare. The approach our courts have followed to date and the concerns raised around piercing the corporate veil will be discussed in depth below.

2.3 *Emergence of the concept of veil piercing*

2.3.1 *What is ‘Piercing the corporate veil’?*

When the corporate veil is pierced the focus shifts from the company to the natural person or persons behind it or in control of its activities as if there is no difference between the company and such person or such persons. The doctrine of piercing the corporate veil has been the primary method through which the courts have mitigated the strenuous demands of the logical fulfilment of the separate legal existence of a juristic entity.²⁷ Simply put, piercing the corporate veil permit courts, in appropriate circumstances, to ignore the separate existence of an artificial legal person.²⁸

In *Amlin v Van Kooij*, the court defined piercing the corporate veil as ‘a mechanism to determine who the controllers behind the company are and attribute the company’s liabilities to them accordingly’.²⁹ In *Cape Pacific Ltd v Lubber Controlling Investments*, it was held that piercing of

²⁴ Ibid.

²⁵ D Van Huyssteen *Piercing the Corporate Veil: A Critical Analysis of section 20(9) of the Companies Act 71 of 2008* LLM (Johannesburg) (2014) 17.

²⁶ LC Hodge & AB Sachs ‘Empirical Study: Piercing the Veil: Bringing the Thompson Study into the 1990s’ (2008) 43 *Wake Forest Law Review* 341 at 344.

²⁷ AG Forji ‘The Veil Doctrine in Company Law’, 28 September 2015, available at <http://www.llrx.com/features/veildoctrine.htm>, accessed on 24 May 2015.

²⁸ S Farzana ‘The Concept of Piercing the Corporate Veil in Corporate Law: A Critical Analysis’ (2009) 14 *The Chittagong University Journal of Law* 129 at 135.

²⁹ *Amlin (SA) (Pty) Ltd v Van Kooij* 2008 (2) SA 558 (C) at 22.

the corporate veil means ‘disregarding the dichotomy between a company and the natural person behind it or in control of its activities and attributing liability to that person where he has misused or abused the principle of corporate personality’.³⁰ It seems logical to say that piercing of the corporate veil refers to the judicially imposed exception to the separate legal entity principle, whereby courts disregard the separateness of the corporation and hold shareholders or directors responsible for the actions of the corporation as if it were the actions of the shareholder.

Before delving further into this topic one must, in order to avoid any confusion, distinguish between the concepts of piercing the veil and lifting the veil.³¹ Courts sometimes refer to the phrase piercing the veil when the effects is to lift the veil, and conversely. Piercing the veil and lifting the veil are in fact distinct and different legal terms with different legal consequences.³² Therefore, the concepts must not be used interchangeably. The distinction is drawn in a number of cases and is now well known. Staughton LJ offered the following basis for a distinction in *Atlas Maritime v Arolon Maritime*:

‘To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose’.³³

In *Pioneer Concrete Service v Yelnah*, Young J described ‘lifting the corporate veil’ as meaning ‘that although whenever each individual company is formed a separate legal personality is created, courts will on occasions look behind the legal personality to the real controllers’.³⁴ It is noteworthy that this does not necessarily entail ignoring the separate identity of the company but looking at who the members or directors of the company are.³⁵ This was illustrated in the case of *Daimler Company v Continental Tyre*.³⁶ The Daimler case did not entail piercing the veil since the court did not ignore the legal personality of the company in question, but rather simply taking into account the identity of its shareholders and directors in order to decide whether the company was

³⁰ *Cape Pacific Ltd v Lubber Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) at 28 (hereinafter Cape Pacific).

³¹ F Cassim *The Practitioner’s Guide to the Companies Act 71 of 2008* 1ed (2011) 22.

³² Cassim op cit (n12) at 22.

³³ *Atlas Maritime Co SA v Arolon Maritime Ltd* 1991 (4) SA 769 (CA) at 779.

³⁴ *Pioneer Concrete Service v Yelnah* (1986) 5 NSWLR at 254.

³⁵ Cassim op cit (n12) 22.

³⁶ *Daimler Company Ltd v Continental Tyre and Rubber Co Ltd* 1916 2 AC 307 at 264.

an enemy company.³⁷ It simply took into account the identity of its shareholders and directors in order to decide whether the company was an enemy company and lifting the veil.³⁸ In any event, this dissertation will be concerned with the application of the doctrine that has the effect of disregarding the separate legal existence of a company entirely, and will thus make reference to ‘piercing the veil’.

2.3.2 *A Brief History of the Doctrine of Piercing the Corporate Veil*

It is important to trace the origins of the doctrine of piercing the corporate veil and the reasons for the emergence of this phenomenon. The doctrine of piercing the corporate veil has its origin in the common law legal system particularly in England.³⁹ Originally, it was a reaction to the rigid stand of the House of Lords in the case of *Salomon* which is well known for firmly establishing the principle that the corporate entity is distinct from those who own or control it.⁴⁰ This decision thus not only established one of the most important principles of corporate personality that a company is a distinct entity apart from that of its shareholders, (thus limiting their liability), but it also led to the development of the exception to this rule namely, the doctrine of ‘piercing the corporate veil’.⁴¹ According to Marcantel the emergence of this phenomenon was an equitable response to the perceived or actual unfairness that could result from the application of strict limited liability statute.⁴²

It is therefore proper to have a survey of the application of the doctrine in the common law legal system with special emphasis on English Law. Accordingly, the legal framework of this doctrine in South Africa is therefore essentially built on foundations, which were put in place by the British in the middle of the nineteenth-century.⁴³ There are several English cases where the issue of piercing the corporate veil in terms of common law principles has been dealt with. However, it

³⁷ Ibid.

³⁸ Cassim op cit (n4) 47.

³⁹ B Kefyalew *Lifting the Corporate Veil in Corporate Groups Under the Commercial Code of Ethiopia* LLM (Addis Ababa) (2003) 60.

⁴⁰ EL Enyew ‘The Doctrine of Piercing the Corporate Veil: It’s Legal and Judicial Recognition in Ethiopia’ (2012) 6 *Mizana Law Review* 77 at 85.

⁴¹ Ibid.

⁴² JA Marcantel ‘Because Judges Are not Angels Either: Limiting Judicial Discretion by Introducing Objectivity into Piercing Doctrine’ (2010) 59 *KAN LAW REVIEW* 195.

⁴³ M Tong *Review of Company Law in South Africa: Should South Africa Follow the British Example in Corporate Governance Matters This Time?* LLM (Natal) (2003) 14.

should be noted that the English courts have in most instances relied on a categorising approach to piercing the corporate veil.⁴⁴ Therefore, the doctrine of piercing the veil of corporate personality must be looked at in a historical perspective. Thus, English case law will offer guidance, and, in some cases, even serves as persuasive authority, in interpreting the concept of piercing the corporate veil in South Africa.⁴⁵

The doctrine of piercing the corporate veil began to assume a certain shape and form and became recognised in different forms both in the common law and civil law legal systems.⁴⁶ Because the doctrine of piercing the corporate veil is a product of the common law, many courts have developed their own articulation of the circumstances in which the courts will pierce the veil.⁴⁷ Several critics argue that the doctrine has become so abstract that judicial decision regarding piercing have become largely discretionary.⁴⁸ As a result, many courts in different jurisdiction have inconsistently applied the doctrine.⁴⁹ At the same, despite its wide application, the doctrine remains one of the least understood.

This state of affairs can be observed not only in South Africa, but also in England. The uncertainty and confusion in regard to the doctrine of piercing the corporate veil is shared by courts in the United Kingdom. Thus, both in England and South Africa, courts have failed to formulate a single coherent principle upon which decisions to disregard the juristic personality are based.⁵⁰ It is against this background that common law approaches in lifting the veil must be examined.

The most vital and debatable question is when the courts will pierce the corporate veil. It is impossible to discern any broad principle of company law indicating the circumstances in which a court should pierce the corporate veil.⁵¹ To put it simply, there is no common, unifying principle,

⁴⁴ EJ Cohn and C Simitis 'Lifting the Veil in the Company Laws of the European Continent' (1963) 12 *The International and Comparative Law Quarterly* 189.

⁴⁵ T Moongalo *Corporate Law and Corporate Governance: A Global Picture of Business Undertaking in South Africa* 2ed (2003) 34.

⁴⁶ Enyew op cit (n40) 85.

⁴⁷ MA Sweeney 'Piercing the Corporate Veil in Ohio: The Need for a New Standard following *Dombroski v Wellpoint Inc.*' (2009) 57 *Cleveland State Law Review* 951 at 953.

⁴⁸ Sweeney op cit (n47) 954.

⁴⁹ Enyew op cit (n40) 85

⁵⁰ HY Yeo 'Revisiting the Alter Ego Exception in Corporate Veil Piercing' (2015) 27 *SACJL* 177 at 179.

⁵¹ Enyew op cit (n40) 86.

which underlies the occasional decision of the courts to pierce the corporate veil.⁵² Authorities in which the veil of incorporation has been pierced have not been of such consistency that any principle can be adduced. Some courts have followed a very strict and rigid approach where others have followed a more flexible approach.⁵³ This and the various approaches followed will be discussed below to show that courts have struggled in determining the correct approach to be followed when piercing the corporate veil.

2.4 *Piercing the corporate veil in South Africa.*

The application of the doctrine of veil piercing in South Africa is far from settled.⁵⁴ Despite the ambiguity surrounding the application of the piercing doctrine, several factors consistently influence decisions where courts allow piercing of the corporate veil. In the case of *Cape Pacific*, the then Appellate Division laid down a few principles relating to the circumstances in which a court would pierce the veil.⁵⁵ However, these principles should not be seen as mandatory as the decision by a court to pierce the veil would depend on the facts of each case.⁵⁶ This implies that we do not have a categorising approach in our law as categorisation might lead to uncertainty and the readiness of our courts to pierce the corporate veil has varied depending on the facts of the particular case.⁵⁷

The court in *Cape Pacific* stressed that courts should not lightly disregard a company's separate personality, but should strive to get effect to and uphold it as far as possible.⁵⁸ To do otherwise, the court said, would 'negate and undermine the policy and principle that underpin the concept of separate legal personality and the consequences that attach to it'.⁵⁹ But where fraud, dishonesty or other improper conduct are found to be present, other considerations will come into play.⁶⁰ The need to preserve the separate corporate identity would in such circumstances have to be balanced

⁵² IM Rams & B Noakes 'Piercing the corporate veil in Australia' (2001) 19 *Company and Securities Law Journal* 250 at 254.

⁵³ Cassim op cit (n4) 47.

⁵⁴ IM Rams & B Noakes op cit (n52) 254.

⁵⁵ *Cape Pacific Ltd v Lubber Controlling Investments* supra (n28) at 802.

⁵⁶ *Cape Pacific Ltd v Lubber Controlling Investments* supra (n28) at 802.

⁵⁷ Cassim op cit (n4) 48.

⁵⁸ *Cape Pacific Ltd v Lubber Controlling Investments* supra (n28) at 802.

⁵⁹ *Cape Pacific Ltd v Lubber Controlling Investments* supra (n28) at 802.

⁶⁰ JT Pretorius *Student Case Book on Business* 3ed (2004) 59.

against policy considerations which arise in favour of piercing the corporate veil.⁶¹ To put it differently, the court adopted a balancing approach and laid down the principle that the concept of separate legal personality must be weighed against those principles in favour of piercing the veil.⁶² The court further confirmed that each case will depend on its own facts.⁶³ Indeed, it has been argued that courts tend to take a fact-based approach to questions of piercing the corporate veil, and no particular trend is readily discernible from an overview of the cases.⁶⁴

In *Botha v Van Niekerk*, Flemming J, came to the conclusion, after a comprehensive analysis of the legal position, that imposing personal liability on the shareholders or directors of a company would only become justifiable when it is clear that the third party suffered an unconscionable injustice as a result of improper conduct of the liable party.⁶⁵ The court in *Cape Pacific* commented that this test was too rigid and suggested that a more flexible approach determined by the facts of each case must be adopted.⁶⁶ However, a rigid application of the piercing doctrine has been widely criticised as sacrificing substance for form.⁶⁷

In addition the court in *Cape Pacific Ltd* remarked that if the facts of a particular case justify piercing of the corporate veil, the existence of another remedy should not in principle serve as a bar to a court piercing the corporate veil.⁶⁸ The Appellate Division stated further that the existence of another remedy, or the failure to pursue one that was available, would be a relevant factor when policy considerations come into play, but it is not of overriding importance.⁶⁹ Subsequent cases at common law did not favour this view. In *Hülse-Reutter v Gödde*, the Supreme Court of Appeal adopted a stricter approach in this respect and insisted that piercing of the veil should only be used as a last resort.⁷⁰ Thus in *Hülse-Reutter*, the court accepted that the separate legal personality must be recognized and upheld except in unusual circumstances. The court further stated that the corporate veil would only be pierced if there was evidence of misuse or abuse of the distinction

⁶¹ JT Pretorius *Hahlo's South African Company Law through the case: A Source Book: A Collection of Cases on Company Law with Explanatory Notes and Comments* 5ed (1991) 32.

⁶² Cassim op cit (n2) 48.

⁶³ *Cape Pacific Ltd v Lubner Controlling Investments* supra (n28) at 802.

⁶⁴ IM Rams & B Noakes op cit (n52) 5.

⁶⁵ *Botha v Van Niekerk* 1983 (3) SA 513 (W) at 33.

⁶⁶ *Cape Pacific v Lubner Controlling Investments (Pty) Ltd* supra at 802.

⁶⁷ IM Rams & B Noakes op cit (n52) 5.

⁶⁸ *Cape Pacific v Lubner Controlling Investments (Pty) Ltd* supra (n14) at 802.

⁶⁹ *Cape Pacific v Lubner Controlling Investments (Pty) Ltd* supra (n14) at 802.

⁷⁰ *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) at 23.

between the company and those who control it and this has enabled those who control the company to gain an unfair advantage.⁷¹ In *Amlin (SA) Pty Ltd v Van Kooij* the court agreed with this approach. Therefore it is only in exceptional circumstances that the corporate veil will be disregarded.

In the more recent matter of *Airport Cold Storage (Pty) Ltd v Ebrahim* the court reiterated that directors and members of the company ordinarily enjoy extensive protection against personal liability, but that such protection can never be absolute, as the court has the power in certain exceptional circumstances to pierce the corporate veil and hold the directors and others personally liable for the debts of the company.⁷²

The *Amlin* case, fraud, agency, evasion, abuse of the corporate form, and the creation of a mere facade to conceal the true state of affairs or as a means or device to conceal wrongdoing or to avoid obligations, were all submitted as justifiable motivations for piercing the veil.⁷³ Van der Linde and Lombard refer to equitable considerations to be taken into account when the necessity of piercing the corporate veil is considered.⁷⁴ Meskin has a much stronger view, submitting that a court has no general discretion to disregard the company's separate legal personality whenever it considers it just to do so.⁷⁵ But that the principle should be that the court may pierce the veil only where otherwise, as a result only of its existence, fraud would exist or manifest justice would be denied.⁷⁶

Courts in which the veil of incorporation came under scrutiny have not been of consistency that any principle can be adduced. This demonstrates that there is no common, unifying principle, which underlies the occasional decision of the courts to pierce the corporate veil.⁷⁷ These cases merely provide instances in which courts have on the facts refused to be bound by the form or fact of incorporation when justice requires the substance or reality to be investigated.⁷⁸

Courts in South Africa are generally reluctant to pierce the corporate veil, there seems to be a tendency to reinvent the wheel each time the matter is argued. Instead courts tend to take a fact-

⁷¹ *Hülse-Reutter v Gödde* supra (n70) at 22.

⁷² *Airport Cold Storage (Pty) Ltd v Ebrahim* [2007] ZAWCHC 25 2008 (2) SA 303 (C) para 14.

⁷³ *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (C) at 34.

⁷⁴ Pretorius op cit (n61) 32.

⁷⁵ Meskin ES Henochsberg on the Companies Act 71 of 1973 (2012) 43.

⁷⁶ Meskin op cit (n75) 43.

⁷⁷ IM Rams & B Noakes op cit (n52) 4.

⁷⁸ Ibid.

based approach, i.e. decide on case by case basis to questions of piercing the corporate veil. This is a clear acknowledgement that the circumstances in which a court would pierce the veil are far from settled, and much depended on a close analysis of the facts of each case. In addition, some courts have relied on categories or instances governing when a court will pierce the veil. Nevertheless, if the categorizing approach is followed it might give rise to inconsistency and uncertainty in our law which might lead to obscene results. This implies that we do not have a categorising approach in our law. It is important to consider situations where fairness and public policy require the veil to be pierced and the specific case does not fall within the specific categories accepted by our court.⁷⁹ Surely one cannot accept that a person should suffer an injustice purely based on such technicality.⁸⁰

As discussed the law is not settled with regards to the circumstances in which the corporate veil will be pierced and much will depend on a close analysis of the facts of each case, policy considerations and judicial judgment. The courts have dealt with this topic on a case-by-case in a rather haphazard way. The question thus arises whether the common-law doctrine of piercing the corporate veil has been repealed by section 20(9) of the Companies Act to remedy these concerns. Nevertheless, it is important at this juncture to briefly visit other jurisdictions to try and establish how the courts dealt with this case.

2.5 *Piercing the corporate veil in England*

Since the decision over the classical case of *Salomon*, judges in the United Kingdom have recognised a number of discrete grounds that may lead to piercing of the corporate veil.⁸¹ These grounds have been developed under the concept of sham or facade, agency and single economic unit and have been exhaustively examined in the case of *Adams v Cape Industries*⁸², described by academics as a leading authority on this area of company law. Thus the corporate veil have been pierced when, for example, company promoters or directors have committed fraud or the corporate form has otherwise been abused, or a subsidiary company has been treated as the agent.

⁷⁹ Van Huyssteen op cit (n25) 20.

⁸⁰ Domanski op cit (n18) 226.

⁸¹ Domanski op cit (n18) 244.

⁸² *Adams v Cape Industries plc* [1990] Ch 433 (CA) at 539.

The validity of these grounds for veil piercing has however been extensively criticised by Heintzman and Kain, which has led Lord Neuberger in *VTB Capital v Nutritek* to lament that no consistent principle emerges from categorising.⁸³ This is so because a situation may arise where justice or equity calls for the court to pierce the veil, but a court may refuse to do so on the ground that the facts of the situation do not fit into any of the established grounds.⁸⁴

The extent to which these grounds can be regarded as genuine examples of piercing the veil has been doubted by the recent decision of the United Kingdom Supreme Court in *Prest v Petrodel*.⁸⁵ The Supreme Court in this case discussed the circumstances in which the courts are empowered to pierce the corporate veil of incorporation. It seems that this judgment has led the United Kingdom to move towards a narrower application of the doctrine, to reinstate some certainty back into what has become a metaphorical mess. In addition, it is arguable that the bar for situations in which the corporate veil might be pierced has been set even higher.⁸⁶ However, in order to fully understand the significance of *Prest*, it is important to look at the common law position before the Supreme Court decision in *Prest*, beginning with the court's ability to pierce the veil in cases where the company was being used to perpetrate fraud, or being used to evade a legal obligation which, following *Prest*, is likely to be the only instance in which the veil can be pierced. It should be noted at the outset that the extent to which some of these instances can be regarded as genuine grounds of piercing the veil has been doubted by the Supreme Court in what is now the leading case, namely *Prest*.

In *Adams*, the court stated that 'there is one well recognised exception to the rule prohibiting the piercing of the corporate veil'.⁸⁷ This is where the company is used to perpetrate fraud, or where the company is a façade or a sham. The two classic examples of the fraud exception are *Gilford Motor v Horne* and *Lipman v Jones*. In the former case, Mr Horne sought to escape a restraint of trade agreement by setting up a company and engaging in the prohibited business through his company rather than in his own name. The Court of Appeal clearly considered that Mr Horne

⁸³ TG Heintzman & B Kain 'Through the Looking Glass: Recent Development in Piercing the Corporate Veil' (2013) 28 *B.F.L.R* 536.

⁸⁴ Cassim op cit (n4) 48.

⁸⁵ *Prest v Petrodel Resources* [2013] UKSC 34 at 114.

⁸⁶ W MacArdle & G Jones '*Prest v Petrodel Resources and VTB Capital v Nutritek: A Robust Corporate Veil*' (2013) 3 *BLI* 295.

⁸⁷ *Adams v Cape Industries plc* [1990] Ch 433 (CA) at 539.

formed the company and made the company compete so that he was not competing in his own name, but because he was acting through the instrumentality of the company that he formed with the intention of escaping his contractual obligations, the court saw this as a ‘sham’ since it was the same person competing and thus violating the restraint.⁸⁸ In other words the company was formed to enable Mr Horne to continue to breach the agreement. Based on the aforesaid, the court pierced the corporate veil by granting an order restraining both the former employee and the company from competing with the plaintiff. Concurring with the majority judgment, Lawrence LJ confirmed that the defendant company was a ‘channel’ used by Mr Horne for the benefit to obtain the advantages of the customers of the defendant company ought to be restrained together with Mr Horne.⁸⁹

In the judgment of *Lipman*,⁹⁰ the defendant had agreed to sell freehold land with registered title to the plaintiff for a certain amount. The defendant subsequently sold and transferred the land to the company, which he acquired and in which he became the shareholder and the director with other persons. After, changing his mind and transferred the land to the company that he controlled, the defendant could not fulfil his contractual obligations to the plaintiff. The court specifically referred to the judgement of *Gilford* case, and held that the company was a ‘mask’, which Mr Lipman held before his face in an attempt to avoid recognition by the eye of equity. Accordingly, the court pierced the corporate veil against both the defendants.⁹¹ In the case of *Faiza Hashem v Ali Shayif*, Munby J also remarked that a company may be a façade even though it was not originally incorporated with any deceptive intent.⁹² The question is whether it is being used as a façade at the time of the relevant transaction. However, this ground for piercing the veil of incorporation, provided there is clear impropriety in the use of the corporate structure, appears to have survived the recent trend in veil piercing, which will be discussed below in depth.⁹³

Moving to the traditional ground of agency, it should be noted from the outset that a finding of agency does not, strictly speaking, pierce the corporate veil, as it respects the separate personalities

⁸⁸ *Gilford Motor Co Ltd v Horne* [1993] Ch 935 (CA) at 936.

⁸⁹ *Gilford Motor Co Ltd v Horne* supra (n88) at 118.

⁹⁰ *Lipman v Jones* [1962] 1 WLR 832 at 126.

⁹¹ *Lipman v Jones* supra (n90) at 126.

⁹² *Faiza Hashem v Ali Shayif* [2008] EWHC 2380 at 73.

⁹³ S Judge & I *Mogen Company Law 2014 and 2015: Question and Answers* 4ed (2014) 16.

of both the company.⁹⁴ However, the practical effect of a finding of agency can be to undermine the separation between the company and those in control of the incorporation.⁹⁵ For example, if a third party contracting with the company successfully argued that the company had contracted as an agent for its directors or shareholders, therefore those in control of such a company would be liable on the contract to the third party. The court in *Salomon* rejected the conclusion that Solomon & Co Ltd was an agent of Mr Aron Solomon and the court established that a company is not as such the agent of its shareholders.⁹⁶ But in certain circumstances it may be that, on the particular facts, the normal relationship between a company and those in control is in fact inverted, whether expressly or impliedly.⁹⁷ This may occur for instance where controlling shareholder or directors do not treat the company as a separate entity, but treat it as if it were merely a means of furthering their own private business affairs.⁹⁸ In this instance the company may be regarded as the ‘agent’ of its controlling shareholders and as such courts will impose liability on the shareholders in their capacity as the principal.⁹⁹ In treating the company as the agent of those in control, the separate legal personality of the company is still recognised. Hence the corporate veil is not pierced but liability is imposed personally on the directors in their capacity as the principal company. Therefore, the effect of piercing the corporate veil is achieved by establishing an agency relationship, without having to pierce the veil.¹⁰⁰

The ‘single economic unit’ theory of piercing the corporate veil is another way that the courts avoid having to pierce the veil in England. In reality, treating a group of companies as one single unit is not entirely disregarding the entity, but disregard the ‘separateness’ of their legal existence from one another since each company in a group of companies is a separate legal entity with its own separate legal personality, rights and liabilities separate from those of the other member companies.¹⁰¹ The fact that a group of companies effectively forms one economic unit does not necessarily mean that the separate identity of each company is to be ignored and that the group is to be treated as one entity. However, in recent years there has been a more relaxed approach to the

⁹⁴ P Watts, N Campbell & C Hare *Company Law in New Zealand* 1ed (2011) 92.

⁹⁵ Cassim op cit (n4) 52.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ D Keenan & J Bisacre *Smith and Keenan’s: Company Law* 12ed (2002) 27.

⁹⁹ Cassim op cit (n4) 52.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

application of this principle that a holding company and its subsidiary are separate legal entities.¹⁰² Courts in England apply the single economic unit ground to pierce the corporate veil in situations where two or more corporations are not operated as wholly separate entities, but instead combine their resources to achieve a common business purpose.¹⁰³ Thus, in The United Kingdom the courts have been prepared to disregard the separate legal entities of the various holding and subsidiary companies in a group and have, for certain purposes, treated them as one ‘economic entity’.¹⁰⁴ When the corporate veil is pierced in a group of companies, the court treats the group as a single entity as opposed to a collection of different corporate entities.

This culminated in the decision of *DHN Food Ltd v. London Borough of Tower Hamlets*, where the English Court of Appeal treated the three companies in a group as single economic entity.¹⁰⁵ The court stated that there was evidence of a tendency by courts to ignore the separate legal entities of various companies within a group and to look instead at the economic entity of the whole group. But in *Adams v Cape*, which also dealt with the question of piercing the veil in the group context, the English Court of Appeal adopted a stricter approach and asserted that courts are not entitled to disregard the separate legal personality of a company in a group simply because it is just to do so.¹⁰⁶

This categorising approach has at times caused more certainty than justice in the English jurisprudence, and threatened the protection that incorporations provides.¹⁰⁷ Domanski submits that a categorising of instances where the courts may be willing to pierce the corporate veil may lead to a strict approach, especially in those instances where there has been no abuse of the corporate entity and the company itself is desirous that the veil should be pierced.¹⁰⁸ A recent shift has seen the United Kingdom move towards a narrower application of the doctrine, to reinstate some certainty back into what has become a metaphorical mess. This narrow approach of the Supreme Court in *Prest* will be analysed below.

¹⁰² Watts op cit (94) 94.

¹⁰³ Cassim op cit (n4) 53.

¹⁰⁴ Ibid.

¹⁰⁵ *DHN Food Ltd v. London Borough of Tower Hamlets* [1969] 1 WLR 852 at 52.

¹⁰⁶ *Adams v Cape Industries* supra (n76) at 51.

¹⁰⁷ NDP Smith *Veils, Frauds, and Fast Cars: Looking beyond the fixation on piercing to the illusory protection provided by incorporation* LLM (Otago) (2013) 15.

¹⁰⁸ Domanski op cit (n18) 230.

2.5.1 *The new approach in Prest*

Now that we have established the common law position as it stood before the *Prest* case, it becomes essential at this juncture to discuss how this judgment contributed to the development of this doctrine. Before delving further into the *Prest* case it is helpful to briefly discuss the relevant facts and history of this key judgment.

The issue before the Supreme Court in *Prest* was whether a number of properties belonging to the Petrodel Group which were wholly owned by the group, could be transferred to Mr Prest's wife in the context of divorce proceedings between them, given that the properties legally belonged not to Mr Prest but to his companies. The court found that, for reasons of wealth protection and avoidance of tax, the legal interest in the properties had been vested in the companies a long time before the marriage had dissolved.¹⁰⁹ Accordingly, the court found that the doctrine of piercing the corporate veil was not applicable because the husband's actions did not conceal or evade any legal obligation to his wife, nor was he concealing or evading the law in relation to the distribution of assets of the marriage upon its dissolution.¹¹⁰ However, the UK Supreme Court did find in favour of the wife in this matter on another ground.

Instead, the Supreme Court held that the properties vested in the companies were held by the husband's companies on trust for him and they were accordingly properties to which the husband was entitled, either in possession or reversion.¹¹¹ Lord Sumption confirmed that the corporate veil may only be pierced where a corporate structure has been implemented or used to avoid an existing legal obligation.¹¹² In the course of his judgment, Lord Sumption tacitly applied the previous 'façade' or 'sham' test for ignoring the separate personality of a company because he said that there was no intention to use the companies as a sham or façade since the arrangement predated the marriage. Therefore, the Lord Sumption recognised the companies' separate legal personality and said that they were holding properties on trust for Prest.

The Supreme Court in this case adopted a conservative approach towards the doctrine of piercing the corporate veil and commented pertinently that 'if it is not necessary to pierce the corporate

¹⁰⁹ Cassim op cit (n12) 326.

¹¹⁰ *Prest v Petrodel Resources* [2013] UKSC 34 at 114.

¹¹¹ *Prest v Petrodel Resources* supra (n85) 114.

¹¹² *Prest v Petrodel Resources* supra (n85) 114.

veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course'.¹¹³ Following this judgment, it is arguable that the Supreme Court limited the grounds on which the veil can be pierced and used the public policy as mechanism to justify such conduct. Hence, a court cannot, and should not, pierce the corporate veil merely because it is thought to be necessary in the interests of justice. In addition, the court recognised that veil piercing is an extraordinary remedy and measure of last resort as has always been the case.

Accordingly, it is clear that Lord Sumption does not regard many of the grounds discussed as true situations in which the veil was pierced, especially those grounds involving groups of companies or a relationship of agency.¹¹⁴ Lord Sumption emphasised that these grounds have nothing to do with corporate veil piercing and that should not confuse agency and single unit as grounds of veil piercing. Therefore, these grounds should not have been categorised as such.¹¹⁵ Therefore, the judgment must now be regarded as the leading case in this area and casts significant doubt on the validity of many of the grounds discussed above. However, for situations in which the corporate veil might be pierced, the bar has arguably been set even higher than it was prior to the Supreme Court's decision in *Prest*.¹¹⁶ It can be logical to argue that this judgment provides some welcome clarity and simplicity in that it provides guidance on the limited circumstances in which veil piercing may be pierced. Based on this judgment, courts around the world must begin to take a more cautious approach to the veil-piercing doctrine in the wake of the *Prest* case.

2.5 Conclusion

To sum up, case law in South Africa has demonstrated that the courts are generally reluctant to lift the corporate veil. A consistent guiding principle has not yet evolved to enable us to predict with any degree of certainty as to when the court will pierce the veil of a company. In short, there is no single uniform standard for deciding and justifying veil piercing and much will depend on a close analysis of the facts of each case and, of course, judicial judgment. Accordingly, the question then arises as to how courts should remedy this problem? In order to rectify this inconsistency the South

¹¹³ Cassim op cit (n12) 326.

¹¹⁴ L Roach *Company Law Concentrate* 3ed (2013) 39.

¹¹⁵ Mogen op cit (n93) 16.

¹¹⁶ MacArdle & Jones op cit (n75) 295.

African courts should adopt a broad, unifying common-law principle that could serve as a basic for deciding piercing cases in a more logical and juridical satisfactory manner. This issue has now been dealt with in section 20(9). Some regard this as a codification of the common law veil piercing and this legislative provision appears to be an improvement of a vague and unpredicted rule. To understand this provision, its impact on the common law veil piercing and applicability, a detailed discussion on the court's interpretation will follow below.

CHAPTER 3 Interpretation of Section 20(9) of the Companies Act: Ex Parte Gore

3.1 Introduction

For the first time in our jurisprudence the Companies Act 71 of 2008 introduced a statutory provision by way of section 20(9), permitting courts to discard the separate legal personality of the company and to pierce the corporate veil if there has been an ‘unconscionable abuse’ of the juristic personality of the company. Section 20(9) codified the common law doctrine of piercing the corporate veil and 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)’.

Thus section 20(9) gives the judiciary a general statutory discretion to pierce the corporate veil. This gives rise to two important questions namely, what impact this has on the existing common law and secondly how this provision will be interpreted by our courts. However, the common law principles as discussed would remain relevant and continue to apply. In my opinion, it would be appropriate to regard section 20(9) as supplemental to the common law, rather than substitutive.¹¹⁷ This is so because the new statutory provision gives more certainty and visibility to the doctrine of piercing the veil, but a danger is that it may result in the doctrine becoming inflexible, particularly if the courts interpret the provision in a highly technical way.¹¹⁸ In addition, the interpretation of section 20(9) gives rise to many questions and uncertainties. For instance, the terms ‘unconscionable abuse’ and ‘interested persons’ are not defined anywhere in the Act. It is

¹¹⁷Cassim op cit (n12) 323.

¹¹⁸ Cassim op cit (n4)58.

also not clear whether the section overrides the principle at common law that the doctrine is an exceptional remedy to be used only as a last resort. Answers thereto will depend on the interpretation adopted by the courts.

This statutory provision came under scrutiny for the first time in *Gore*. In the course of its judgment, the court answered some of the questions posed above and usefully set out some important guidelines in regard to the interpretation and application of section 20(9). In order to evaluate the court's interpretation of this provision a detailed discussion on the traditional theories of statutory interpretation will be discussed in greater detail below. Many theories exist, some of which have dominated over the years. These theories of interpretation are deemed to be explanatory and justificatory and are therefore also seen as the different approaches to the interpretation of statutes. In addition, the Constitution of the Republic of South Africa, 1996 brought about a new legal dispensation to the interpretation of statutes in our law. Based on this constitutional dispensation the interpretation of statutes should comply with constitutional norms, promoting constitutional values and objectives.¹¹⁹ This has a profound impact on the approaches to statutory interpretation, which will be discussed in depth. It becomes clear in recent judgments that our courts are placing emphases on the importance of the Constitution when interpreting statutes.¹²⁰

3.2 Theories of statutory interpretation in South Africa

Over the years, courts have developed principles of interpreting statutes. Instead of discussing all the theories of interpretation, which could form a thesis on its own, this study will highlight a few of the most important ones as defined in case law and academic writings. These theories will assist in the discussion on the interpretation of section 20(9) with particular reference to the discussion in *Gore*. Firstly, a discussion on the different approaches and theoretical positions that South African courts have assumed and invoked in day-to day practice will be considered. The purposive approach coupled with contextualism is regarded as the new or modern approach to the interpretation of statutes in general.¹²¹ This approach was adopted by the courts in its desire to go beyond the literal grammatical meaning of words in order to establish the intention of the

¹¹⁹ The Constitution of the Republic of South Africa, section 39(2).

¹²⁰ Van Huyssteen op cit (47) 3.

¹²¹ Ibid.

legislature. In order to get a clear understanding of this modern approach a detailed discussion on how the courts apply this approach will be discussed in depth. This does not mean we should turn a blind eye to the common-law theories of statutory interpretation because every interpretation must fall within one of the theories.

According to the literalism movement in its crude, unqualified form the meaning of a statutory provision can be retrieved from the actual words in which the statute is couched, regardless of manifestly unjust or even absurd consequences.¹²² The literalist view generally means that the particular words to be interpreted are taken out of the enactment and accorded a literal or grammatical meaning.¹²³ The interpreter should concentrate primarily on the literal meaning of the provision to be interpreted. If the meaning of the word is clear, it should be put into effect and it must be equated with the legislator's intention. The literal approach was succinctly expounded in the classic dictum of *Grey v Pearson* by Lord Wensleydale when he stated that only when the 'plain meaning' of the word is vague or misleading and would result in absurd result or inconsistency then the court may deviate from the literal meaning to avoid such an absurdity.¹²⁴ In *Union Government v Mack* it was held that the intention of the legislature should be deduced from the particular words or phrases used in the legislation.¹²⁵ Courts came to regard the literal meaning as analogous with what the legislature intended. As expected there are a number of criticisms which have been raised against the literal approach. It has been argued that the view that legislative text can be clear and unambiguous must be questioned. This is so because there are only a few texts which are so clear that only one interpretation is possible.

It is also important to note that the literal approach leaves little or no room for judicial law making, thus turning courts into mechanical interpreters. This view creates the impression that once the legislature has spoken, the courts cease to have any law-making function. Taking into account the above mentioned criticisms it will be naive that the courts should simply rely on the literal meaning of the words. Now that we have established the inadequacies of this form of interpretation, it

¹²² L Du Plessis *Re-Interpretation of Statutes* 2ed (2002) 93.

¹²³ CJ Botha *Statutory Interpretation: An Introduction for Students* 5ed (2005) 49.

¹²⁴ *Grey v Pearson* [1843-60] All ER Rep 21 (HL) at 36.

¹²⁵ *Union Government v Mack* 1917 AD 731 at 739.

becomes essential at this juncture to activate another approach capable of bringing the meaning of the words or language into context namely, the contextual approach.

This approach is concerned with the clarification of the meaning of a particular legislative provision in conjunction with the legislative text as a whole, as well as other contextual considerations.¹²⁶ When looking at the context of a statutory instrument one must not only have regard to the language of the entire statute, but also the purpose and background of the statute.¹²⁷ This was also confirmed by the SCA in *Hoban v Absa Bank Ltd*.¹²⁸ Nevertheless, the Constitutional Court in *Harksen v Lane* has emphasized the importance of construing constitutional provisions in context holding that this includes the history and background of the statute as well as other provisions within the statute.¹²⁹ In addition, where the language is clear and unambiguous the court must read in context. This was also confirmed by the court in *University of Cape Town v Cape Bar Council* in which it was held that the court has to examine all the contextual factors in ascertaining the intention of the legislature, irrespective of whether or not the words of the legislation are clear and unambiguous.¹³⁰ However, it is important to note that this theory of interpretation goes hand in hand with the contextual approach, which will be discussed below in detail. This is so because the purposive approach attributes meaning to a legislative provision in the light of the purpose it seeks to achieve, thus the purpose of the legislation is the prevailing factor in interpretation and the contextual approach is used to establish that purpose.¹³¹

With this in mind, the search for the purpose of legislation requires a purposive approach which recognises the contextual framework of the legislation right from the outset.¹³² This rule, commonly known as the mischief rule, was developed in the famous *Heydon case*.¹³³ The mischief rule is applied by the courts in circumstances where the provision in question was enacted to remedy a defect. In applying the rule, the court is essentially asking four questions: what was the legal position before the legislation was adopted, what the defects in the common law are, what

¹²⁶ South African Law Commission Discussion Paper 112 (Project 25) 'Statutory Revision: Review of the Interpretation Act 33 of 1957' (2006) at para 2.67.2.

¹²⁷ *Jaga v Dönges* 1950 (4) SA 653 (A) at 662.

¹²⁸ *Hoban v Absa Bank Ltd t/a United Bank* 1992 2 SA 1036 (SCA) at 1044B.

¹²⁹ *Harksen v Lane* 1997 11 BCLR 658 (CC) at 1534

¹³⁰ *University of Cape Town v Cape Bar Council* 1986 (4) SA 903 (A) at 913.

¹³¹ JW Carter & DJ Harland *Contract Law in Australia* 2ed (1993) 110.

¹³² Botha op cit (n123) 66.

¹³³ *Heydon* 1584 76 ER 637 at 69.

remedy was provided by the legislature to solve this problem, and the true reason for the remedies. It is to be noted that the application of the mischief rule gives the judge more discretion when interpreting statutes. The purposive approach to statutory interpretation has been followed in numerous cases in South Africa and has been accepted by the Appellate Division in the case of *Hleka v Johannesburg City Council*.¹³⁴ It is further important to note that the Constitution mandates a purposive and value-based approach when interpreting statutes in South Africa as set out in section 39(2) of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution') which will be discussed in detail below.

Taking into account the above, it would be rash to commend this approach to be the only viable approach applicable as this might create problems in our jurisprudence. For instance, to give effect to the purpose of the statute would mean that one should ascertain such purpose from the outset. This might become problematic as the purpose is determined by interpreting the statute first. It is because of these type of challenges that some writers are of the opinion that this approach should only be followed as a secondary aid to statutory interpretation.¹³⁵

Now that we have discussed the theoretical positions that South African courts have assumed over the last decade or two, it is therefore important at this point to look at the new dispensation in terms of section 39(2). This new interpretation paradigm entails value judgments and obliges the courts to adopt a different approach based on constitutional values. This will be discussed in greater detail below.

3.3 *The New Constitutional Dispensation: A Purposive Approach*

'When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bills of Rights'.¹³⁶

As mentioned above, South African statutory interpretation had for a long time been rooted in positivism and, prior to the advent of the new constitutional dispensation, statutory interpretation more often than not proceeded in terms of the famous dictum in *Venter v R*.¹³⁷ In terms of this 'golden rule', the aim of interpretation was to ascertain the intention which the legislature meant

¹³⁴ *Hleka v Johannesburg* 1949 (1) SA 842 (A) at 852.

¹³⁵ F Müller 'Basic Question of Constitutional Concretisation' (1999) 10 *SLR* 269.

¹³⁶ The Constitution of the Republic of South Africa, Section 39(2).

¹³⁷ *Venter v R* supra (n102) at 914.

to express from the language which it employed.¹³⁸ This traditional approach to statutory interpretation was characterised by strict devotion to the legislative text, and parliamentary sovereignty.¹³⁹

It was assumed that the legislature encodes its intention within the language of the statutory provision and that, when clear and unambiguous, the words would disclose the true meaning of the provision.¹⁴⁰ Nevertheless, the chief problem of the literal approach was that it assumes that language has a fixed and ordinary effect so that the correct use thereof will always reveal the true intention of the legislature. But, as Du Plessis points out, language is always open-ended and makes for a proliferation of meanings.¹⁴¹ With this in mind, it is logical to argue for the reshaping of the judiciary's approach to statutory interpretation in the wake of the introduction of a supreme Constitution and the concomitant exigencies of constitutional interpretation.¹⁴²

The advent of constitutional democracy has, at least at a formal level, significantly dealt a blow to the orthodox text-based approach to statutory interpretation.¹⁴³ Since the advent of the Constitution, the arguments against the continued application of the strict and literal rule have gained momentum. To put it simply, the adoption of section 39(2) of the Constitution resulted in a move away from a strict rule-based jurisprudence towards one that is value-based, underpinned by universally accepted values and norms. In fact, in *Du Plessis v De Klerk*, it was said that constitutional interpretation is concerned with the recognition and application of constitutional issues and not with the literal meaning of legislation.¹⁴⁴ However, this does not seek to deprive statutes of their worth, but to give it a new direction.¹⁴⁵ In other words, we should not give a blind eye to the literal meaning of the legislation. This is because the literal meaning will continue to apply as a secondary aid to statutory interpretation.

In *Matiso v The Commanding Officer, Port Elizabeth Prison* Froneman J illustrated the influence of the supreme Constitution on the interpretation of statutes as follows:

¹³⁸ Venter v R supra (n102) at 914.

¹³⁹ Botha op cit (n123) 67.

¹⁴⁰ S Woolman & M Bishop *Constitutional law of South Africa* 2ed (2012) 32.

¹⁴¹ L Du Plessis *Interpretation in S Woolman et al Constitutional Law of South Africa* 2ed (2008) 32.

¹⁴² Du Plessis op cit (n122) 100.

¹⁴³ Botha op cit (n123) 67.

¹⁴⁴ *Du Plessis and Others v De Klerk* 1996 (5) BCLR 658(CC) at 722.

¹⁴⁵ *Daniels v Campbell* 2004 (5) SA 331 (CC) at 83.

‘The interpretive notion of ascertaining “the intention of the Legislature” does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature. This means that both the purpose and method of statutory interpretation should be different from what it was before the commencement of the Constitution on 27 April 1994. The purpose now is to test legislation and administrative action against the values and principles imposed by the Constitution. The purpose necessarily has an impact on the manner in which both the Constitution itself and a particular piece of legislation said to be in conflict with should be interpreted....’¹⁴⁶

From my point of view this represents a new direction and shift in the interpretation of statutes. This is so because the interpretation of statutes now starts with the Constitution, and not with the legislative text. According to Froneman J statutory interpretation in this sense is thus primarily concerned with the recognition and application of constitutional values and not with a search to find the literal meaning of the statute due to the fact that all statutory law must be consistent with the values and principles enshrined in the Constitution.¹⁴⁷ In my view the ‘intention of the legislature’ ought to apply as a secondary aid in the system of judicial review based on the supremacy of the Constitution because the Constitution and not Parliament, is sovereign. This entails that when interpreting a particular statute one should go one step further by ensuring that the interpretation is in line with the core values expressed in the Constitution.

In my own opinion this represents a new direction as statutes should now be interpreted having due regard to the Constitution, its values and objectives. However, it should be noted that traditional principles of statutory interpretation still applies as secondary aids to interpretation. This is also in line with the teleological approach to statutory interpretation. This approach emphasises fundamental constitutional values. According to this approach the main aim and purpose of the provision must be ascertained against the fundamental constitutional values.¹⁴⁸ The fundamental values in the Constitution form the foundation of a normative jurisprudence during which legislation and actions are evaluated against and filtered through those constitutional values.¹⁴⁹ In *Coetsee v Government of the Republic of South Africa*, Sachs J explained the teleological approach of interpretation as follows:

¹⁴⁶ *Matiso v The Commanding Officer, Port Elizabeth Prison* 1994 3 SA 592 (SE) at 597B-H.

¹⁴⁷ *Matiso v The Commanding Officer, Port Elizabeth Prison* 1994 3 SA 592 (SE) at 597B-H.

¹⁴⁸ South African Law Commission Discussion Paper 112 (Project 25) ‘Statutory Revision: Review of the Interpretation Act 33 of 1957’ (2006) at 2.67.3.

¹⁴⁹ *Ibid.*

‘The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution...’¹⁵⁰

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*, the Constitutional Court took the same approach and stated that all statutes must be interpreted through the prism of the Bill of Rights.¹⁵¹ This means that the teleological approach aligns with the constitutional mandate to interpret all statutes through the prism of the Bill of Rights. Because the Constitution is the ultimate yardstick against which every statute is interpreted and reviewed, as it requires interpreters to look beyond the text of statutory provisions, even when clear and unambiguous. As such, broad purposive interpretation is slowly supplanting or has already supplanted the old ‘golden rule’ of statutory interpretation as described above.¹⁵²

Another Constitutional Court judgment in which this movement of a wider value-based approach was followed was in the *Goedgelegan* case.¹⁵³ Moseneke DCJ clearly stated his favour towards a value-based approach by stating that ‘...the Constitution must be interpreted purposively...many pronouncement in this court and other courts endeavor to encapsulate this approach’.¹⁵⁴ He further confirmed his support for this approach by stating that when interpreting a statute a generous approach should be followed and not an approach that is merely focused on the text.¹⁵⁵ This ‘generous’ approach implies that statutes should be interpreted in such a way as to afford the fullest protection possible of the claimant’s constitutional guarantees.¹⁵⁶ This is a clear indication that our courts are placing emphases on the importance of the Constitution when interpreting statutes and acknowledging the transition from a strict rule-based jurisprudence towards one that is value based, underpinned by universally accepted values and norms.

Not only the judiciary, but also many commentators have suggested that a purposive approach should be followed which will promote the democratic values enshrined in the new Constitution. However, the inclusion of a purpose provision will also be important in a more substantive sense

¹⁵⁰ *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) at 46

¹⁵¹ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) at 21.

¹⁵² Woolman op cit (n140) 32.

¹⁵³ *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* (2007 (6) SA 199 (CC) at 51.

¹⁵⁴ *Department of Land Affairs v Goedgelegen Tropical Fruits* supra (n153) 51.

¹⁵⁵ *Department of Land Affairs v Goedgelegen Tropical Fruits* supra (n153) 51.

¹⁵⁶ *Department of Land Affairs v Goedgelegen Tropical Fruits* supra (n153) 51.

in that it will force judges, judicial officers and all interpreters of legislation to accept a purposive and value-coherent methodology of interpretation that is fully in line with the demands of the new constitutional order, more specifically section 39(2).¹⁵⁷ In light of the dynamic development of our law, the Companies Act includes a purpose provision that reflects many of the constitution's own values as will be discussed in depth below, and South African corporate law is by no means exempt from the teleological dimension of statutory interpretation.

Despite the ostensible movement towards adoption of a purposive approach towards statutory interpretation not all the courts in South Africa hold this view, and continue to follow a literalist approach to interpretation, without reference to the supreme Constitution and its values.¹⁵⁸ The inherent pitfalls of such an approach must also be recognized. In *Public Carriers Association v Toll Road Concessionaries*, Smallberger JA stated that 'the notion of what is known as a 'purposive construction' is not entirely alien to our law'.¹⁵⁹ Unfortunately, Smallberger JA preferred to follow the literal interpretation principle as being entrenched in our law. He was of the opinion that it was only in cases of ambiguity that there was room for a purposive approach.

In *Commissioner, SARS v Executor, Frith's Estate* the Supreme Court of Appeal reiterated the well-known traditional rule of interpretation as follows:

'The primary rule in construction of a statutory provision is (as is well established) to ascertain the intention of the legislator and (as is equally well established) one seeks to achieve this, in the first instance, by giving the words under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it.'¹⁶⁰

However, it is said that one cannot accept this approach to be the only approach applicable within our law as this might create problems. The most apparent criticism is that an unnecessary effort to establish the purpose or intent of the legislature can give rise to a negation of the meaning of the express words used in a particular statute.¹⁶¹ Secondly, if the purposive approach is followed strictly, it might become quite restrictive because it is aimed at a specific purpose. This might

¹⁵⁷ *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 635.

¹⁵⁸ P A Swanepoel *An Analysis of the Purposive Approach to the Interpretation of South Africa Legislation* LLM (Pretoria) (2012) 48.

¹⁵⁹ *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd* 1990 (1) SA 925(A) at 943.

¹⁶⁰ *Commissioner, SARS v Executor, Frith's Estate* 2001 (2) SA 261 (SCA) at 273.

¹⁶¹ GE Davenish 'African Christian Democratic Party v Electoral Commission: The new methodology and theory of statutory interpretation in South Africa' (2006) 123 SALJ 399.

cause some important values to be disregarded. This might lead to some important core values to be overlooked.¹⁶² Thirdly, statutory interpretation can become too complex to capture the interpretative approach within one single element such as the purpose of the statute.¹⁶³ Lastly, to give effect to the purpose of a statute would mean that one should ascertain such purpose from the outset. This might become problematic as the purpose is determined by interpreting the statute first.

3.4 Guidelines on applying the purposive approach to interpreting legislation

It is submitted that the judiciary has accepted that the purposive approach to the interpretation of legislation is the correct one to follow, at least in principle. However, they have not really attempted to give any step-by-step guidelines on how the approach works in practice. Miers and Page suggests the following effective three-stepped approach:¹⁶⁴

- a) The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
- b) The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament, embodied in the Act, and if they are clear and unambiguous and in harmony with the intention, object and scheme and with the general body of the law, that is the end.
- c) If the words are apparently obscure or ambiguous, then the meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one which the words are reasonably capable of bearing, is to be given them.

In my opinion if this three-stepped methodology is followed, the purposive approach would not be far from the requirements of the Constitution to promote the spirit, purport and objectives of the

¹⁶² *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC) at 229.

¹⁶³ Van Huyssteen op cit (n25) 9.

¹⁶⁴ GK Goldswain 'The purposive approach to the interpretation of fiscal legislation –the winds of change' (2008) Vol. 16 No. 2 *Meditari Accountancy Research* 107.

Bills of Rights in the interpretation of legislation.¹⁶⁵ It is submitted that this leads to fairness and is thus in line with the spirit and purport of the Constitution.

3.5 Mandate to promote values of the Constitution in the Companies Act.

The Companies Act expressly provides that in interpreting this legislation, it must be interpreted and applied in a manner that gives effect to the purposes set out in sections 5(1) and 7. One of those stated purposes is the promotion of compliance with the Bill of Rights.¹⁶⁶ This in itself prescribes a purposive approach for the interpretation of the Companies Act and thus gives effect to section 39(2) as discussed above. In addition, this gives a clear indication that a teleological approach should be followed when interpreting the provisions in the Companies Act. Furthermore, it is of vital importance to take note of section 158, which also supports the purposive approach by providing that ‘...a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act’. This is so because section 158 sets out the remedies available to ensure that the purpose are reached. Section 158(a) further confirms that the courts have to develop the common law as necessary to improve the realisation and enjoyment of the rights provided for in the Companies Act. Subsections 158(b) (i) and (ii) further state that a court must promote the spirit, purport and objects of the Companies Act.¹⁶⁷ This was a bold move considering that for many years constitutional law and company law existed as if they were largely separate disciplines with a very limited area of overlap.¹⁶⁸ The reference to the Bill of Rights recorded in sections 7 and 158 of the Companies Act seems to place even more emphasis on the fact that the value and rights are confirmed in the Constitution has become imperative when applying and interpreting the Companies Act.

3.6 Analysis of the Ex Parte Gore judgment

Many interpretative questions have been raised around section 20(9) of the Companies Act 2008, as discussed above. These questions have been answered in the recent case of *Gore* which will be discussed in depth hereinafter. In *Gore* the Western Cape High Court, per Binns-Ward J, delivered the first judgment on the application and interpretation of section 20(9). The case dealt with the

¹⁶⁵ Goldswain op cit (n134) 171.

¹⁶⁶ Companies Act 71 of 2008.

¹⁶⁷ Ibid.

¹⁶⁸ D Bilchitz ‘Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance’ (2001) *SALJ* 501.

issue of piercing the corporate veil in the context of company groups. The court applied section 20(9) to the facts before it and resolved to pierce the corporate veil. The discussion below will examine some of the guidelines provided by *Gore* for the interpretation of section 20(9). As mentioned, this judgment gives valuable insight into the questions raised above, concerning the interpretation of section 20(9). However, before exploring further into *Gore* case it is helpful to briefly discuss the relevant facts of this key judgment in order to get a clear understanding of the issues before us.

3.6.1 Facts of the case

The applicants were the liquidators of 41 companies that had formed part of a group of companies, referred to as ‘the King Group’. The holding company was King Financial Holdings Limited (hereafter ‘KFH’), which was also in liquidation. The three King brothers were directors of KFH and most of its subsidiaries, and held a majority of the KFH shares, which enabled them to exercise control over the King Group. The companies in the King Group provided financial services by way of marketing investments in commercial and residential immovable properties. Investments solicited by the King Group were structured in the form of a purchase by an investor of shares in a member of the group. The acquisition of the shares was coupled with an extension of a loan by the investor concerned to the company of which he was to be a shareholder. The affairs of the King Group had been conducted in a manner that did not maintain any distinguishable corporate identity between the various companies in the group. As a consequence of the dishonest and chaotic administration of the affairs of the King Group, the liquidators of the constituent companies were unable to identify the relevant corporate entities against which the individual investor-creditors had claims. The question before the court was whether it should in these circumstances pierce the corporate veil and disregard the separate corporate personality of the various subsidiary companies, so that the assets of the subsidiary companies could be regarded as the assets of the holding company for purposes of the investors’ claims. The application was brought under the common law, alternatively in terms of section 20(9).

3.6.2 The court’s findings

The court first and foremost starts off by acknowledging that the circumstances in which a court would pierce the corporate veil were far from settled, and stated that much depends on a close

analysis of the facts of each case.¹⁶⁹ The court noted that the common law does not provide for a closed list of circumstances in which the court will pierce the corporate veil.¹⁷⁰

The court held that that section 20(9) is a statutory remedy for piercing the corporate veil and that the remedy could be used in a variety of circumstances as a remedy of first instance, and not as a last resort in circumstances where justice will not otherwise be done.¹⁷¹ In addition, the court noted that section 20(9) will not override, but rather supplement the common law instances of piercing the corporate veil.¹⁷²

The court further found that the entire group had in effect operated as one entity through the holding company, and that the King brothers had ‘treated all their companies as one’.¹⁷³ It found that there was no distinction for practical purposes when it came to dealing with investor’s funds between KFH and the subsidiary companies. The court further held that the disregard for the separate entities within the group was so extensive as to impel the conclusion that the group was in fact a sham.¹⁷⁴ This can be viewed as an acceptable threshold for determining abuse of separate legal personality. The court came to the conclusion that the entire group had in effect operated as one entity through the holding company, and that the disregard of the separate entities within the group was so extensive as to impel the conclusion that the group was in fact a sham. The court opined that there was an unconscionable abuse of the corporate veil and therefore section 20(9) was applicable.

Even though the court pierced the corporate veil in *Gore*, the court seemed to have adopted a very wide interpretation of the words ‘unconscionable abuse’, since it pierced the corporate veil on the basis that the King Group was a sham, and found that this had brought the activities of the group within the meaning of ‘unconscionable abuse’ in section 20(9).

¹⁶⁹ Hülse-Reutter v Götde supra (n70) at 20.

¹⁷⁰ *Ex Parte: Gore NO* supra (n9) at 11.

¹⁷¹ *Ex Parte: Gore NO* supra (n9) at 15.

¹⁷² *Ex Parte: Gore NO* supra (n9) at 15.

¹⁷³ *Ex Parte: Gore NO* supra (n9) at 15.

¹⁷⁴ *Ex Parte: Gore NO* supra (n9) at 15.

3.6.3 The court's interpretation of section 20(9) of the Companies Act

The judgment of *Gore* is important in the context of the interpretation of section 20(9). The significance of the judgment is that, while section 20(9) is not out of harmony with the piercing of the veil judgments that have been previously handed down by the courts, it shed light on the basis on which a court may disregard the corporate personality and makes the remedy one that is generally available whenever there has been an illegitimate use of the juristic personality of a company, especially in cases where this illegitimate use affects the interests of a third party adversely.¹⁷⁵ The judgment answered some of the questions set out at the beginning of this study, and usefully set out some important guidelines in regard to the interpretation and application of section 20(9) of the Companies Act. It is the purpose of this study to examine in depth some of the guidelines provided by *Gore* in the discussion to follow. It will be argued that the wording and the interpretation of section 20(9) as decided in *Gore* result in giving courts very wide powers to pierce the corporate veil, which hitherto never existed under the common-law remedy of piercing the corporate veil.

3.6.3.1 'Interested person' under section 20(9) of the Companies Act

The application to declare that the company be deemed not to be a juristic person must be brought by an 'interested person'.¹⁷⁶ Section 20(9) does not define the term 'interested person' or provide any guidance in regard to who would constitute an 'interested person' within the scope and ambit of the section. It is questionable why the legislature chose not to define the term and this does raise questions as to how the courts will interpret the term 'interested person'.

As a general rule a person who claims relief from a court in respect of any matter must establish that he or she has a direct interest in that matter in order to acquire the needed locus standi to seek relief.¹⁷⁷ This entails that the direct interest should not be remote, and that it must be a real interest and not an abstract, academic or hypothetical interest. The test to determine whether a litigant's interest in a particular case qualifies as a direct interest, or whether it is too remote, would always

¹⁷⁵ D Subramanien 'Unconscionable abuse-Section 20(9) of the Companies Act 71 of 2008' (2014) *OBITER* 161.

¹⁷⁶ Cassim op cit (n12) 311.

¹⁷⁷ *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388.

depend on the particular facts of each individual case, and that no definite rule can be laid down.¹⁷⁸ In applying this declaration to section 20(9), each application before the court would necessitate the court's examining whether the interest of the applicant in deeming a company not to be a juristic person is a direct interest that is not too remote, abstract, academic or hypothetical. The fact that no definite rule can be laid down to answer this question means that courts must exercise their own discretion on this issue on a case-by-case basis.¹⁷⁹ This entails that the assessment of whether a litigant's interest in a case qualifies as a direct interest, or whether it is too remote, would always depend on the particular facts of each individual case.

Owing to the fact that section 65 of the Close Corporations Act 69 of 1984 (hereinafter 'Close Corporations Act')¹⁸⁰ and section 20(9) of the Act are so similar, it is to be noted that the interpretation of the term 'interested person' under section 65 of the Close Corporations Act would offer some useful guidance in determining who an interested person would be for the purposes of bringing an application in term of section 20(9). This is so because some of the words of section 20(9) were borrowed from section 65 of the Close Corporations Act. In *TJ Jonck BK h/a Bothaville Vleismark v Du Plessis*, which examined the meaning of the term 'interested person' in terms of section 65 of the Close Corporations Act, the court remarked that the term 'interested person' is not to be interpreted too restrictively, but at the same time it is not to be interpreted too widely so as to include an indirect interest.¹⁸¹ The interest must be material, relevant or direct, and, in particular, it is limited to a financial or monetary interest.

In *Gore* the court simply approved of and adopted the general principles stated in *Jacobs v Waks*.¹⁸² The court stated that no mystique should be attached to the term 'interested person' and held that the standing of any person to seek a remedy in terms of the section 20(9) should be determined on

¹⁷⁸ *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534.

¹⁷⁹ Cassim op cit (n12) 313.

¹⁸⁰ Section 65 of the Close Corporations Act states as follows: 'Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, 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 of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration.'

¹⁸¹ *TJ Jonck BK h/a Bothaville Vleismark v Du Plessis* 1998 (1) SA 971 (O) at 986.

¹⁸² Cassim op cit (n12) 312.

the basis of well-established principle.¹⁸³ The court's reasoning on this issue is quite interesting as the judgment, including the acknowledgement that the common law is not replaced by section 20(9), gives effect to the presumption that the legislature will not change the existing law more than necessary.¹⁸⁴ It is arguable that, by implication, the High Court did not require that an 'interested person' under section 20(9) must have a financial interest or such interest to be measured in monetary terms. Nevertheless, this extends the scope of section 20(9) of the Companies Act much more widely than that of section 65 of the Close Corporations Act, where a financial or monetary interest is a requirement.

The approach followed by the court in *Gore* accords with the purposive trend in the interpretation of statutory provisions due to the fact that the court adopted a wide interpretation of the term 'interested person'. It should, however, be borne in mind that the unequivocal adoption of a purposive approach towards interpretation of the Companies Act is premised thereupon and that it should only be practiced in circumstances where the express wording of a statutory provision is not clear or where the adoption of the clear wording of a particular statutory provision would give rise to an ambiguity or results that could clearly not have been contemplated by the legislature. The purposive interpretation adopted by the court was aimed at giving effect to the object or purpose of legislation which includes encouraging the efficient and responsible management of companies and encouraging transparency and high standards of corporate governance.¹⁸⁵ The court in *Gore* has, in my view, finally put a nail in the coffin of the literal or textual approach in its pure form by following a purposive interpretation. Although, the court in *Gore* managed to shed more light and visibility to the meaning of 'interested person' in section 20(9), the meaning of the term 'unconscionable abuse' in the section remains unclear. However, the discussion to follow will attempt to unpack and to give meaning to the term 'unconscionable abuse' as decided in *Gore*.

3.6.3.2 'Unconscionable abuse'

The term 'unconscionable abuse' is not defined in section 20(9) nor anywhere in the Act and the section does not provide any direction as to the circumstances that would constitute an

¹⁸³ *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 533J.

¹⁸⁴ *Jacobs en 'n Ander v Waks en Andere* supra (n183) at 533J.

¹⁸⁵ Section 7 of the Companies Act 71 of 2008.

‘unconscionable abuse’ of the juristic personality of the company as a separate entity. This does raise many questions and uncertainties surrounding its application and interpretation.

It is trite law that legislative language should be read in its ordinary sense.¹⁸⁶ In order to determine the ordinary sense or meaning of legislative language a dictionary may be used as an aid. The term ‘unconscionable’ can be defined as ‘not restrained by conscience’, or ‘unscrupulous’.¹⁸⁷ ‘Abuse’ is defined as ‘an improper usage, corrupt practice’ and ‘to use incorrectly or misuse’.¹⁸⁸ Accordingly, in its ordinary sense, the ‘unconscionable abuse’ in section 20(9) requires an unscrupulous or unprincipled misuse of the juristic personality of the company as a separate entity.

However, it is noteworthy that the term ‘unconscionable’ was first introduced to South African law in *Botha v Van Niekerk* when it was decided that personal liability only becomes justifiable when it is clear that the third party has suffered an ‘unconscionable injustice’ because of the unjust actions of the liable party.¹⁸⁹ As discussed in the previous chapter, the Appellate Division in *Cape Pacific* rejected this test on the basis that it was rigid and held that a more flexible approach ought to be adopted, which would allow the facts of each case ultimately to determine whether the piercing of the veil was appropriate in the circumstances or not.¹⁹⁰

Some guidance may perhaps be obtained from the jurisprudence that has thus been developed in respect of section 65 of the Close Corporations Act, which is worded similarly to section 20(9). Owing to the fact that section 65 and section 20(9) of the Companies Act are so similar it will be left to the courts to interpret whether there is a difference between the interpretation of the terms ‘gross abuse’ in section 65 and ‘unconscionable abuse’ in section 20(9) and to what extent must the abuse go to before it may be considered to be unconscionable.¹⁹¹ It is submitted that courts in their effort to interpret the meaning and extent of the words ‘unconscionable abuse’ in section 20(9) should adopt a similar approach used in the interpretation of the term ‘gross abuse’ in section 65 of the Close Corporations Act as a point of reference.¹⁹²

¹⁸⁶ *Union Government v Mack* 1917 AD 731 at 739.

¹⁸⁷ M Dooner, E Higgleton & L Knight *Collins Dictionary* 9 ed (2007) 1748.

¹⁸⁸ W Little & J Coulson *The Shorter Oxford English Dictionary* 3 ed (1970) at 2288.

¹⁸⁹ *Botha v Van Niekerk* supra (n58) at 33.

¹⁹⁰ *Cape Pacific Ltd v Lubber Controlling Investments* supra (n18) at 805.

¹⁹¹ Subramanien op cit (n175) 161.

¹⁹² *Ibid.*

According to Binns Ward J in *Gore* the term ‘gross abuse’ as stated in the Close Corporations Act has a more extreme meaning than the term ‘unconscionable abuse’.¹⁹³ This implies that for the corporate veil to be pierced under section 20(9), a lower standard of abuse must be proved as compared to the standard of abuse required for the corporate veil of a close corporation to be pierced under section 65 of the Close Corporations Act.¹⁹⁴ It is not clear why the court in *Gore* suggested a lesser standard of abuse for section 20(9) as compared to section 65 of the Close Corporations Act, when in general both companies and close corporations are statutorily formed and registered for the purpose of, and benefit of, limited liability.¹⁹⁵

Regarding the meaning of the term ‘unconscionable abuse’ of the juristic personality of a company in section 20(9), Binns Ward J was willing to accept that the term ‘unconscionable abuse’ will encapsulate conduct that is associated with circumstances where the formation of companies are used as a ‘sham’, ‘device’, and ‘stratagem’.¹⁹⁶ The court stated that this indicates that the remedy of piercing the corporate veil may be used whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced.¹⁹⁷

It is clear from the judgment that the judge did not apply a narrow literal approach, but adopted a very wide interpretation of the words ‘unconscionable abuse’. Thus attributing a wider meaning to the term to provide for wider application of section 20(9). This all gives effect to the purpose of the Companies Act in section 7 which includes encouraging the efficient and responsible management of companies and encouraging transparency.

In addition, the court also set a lesser standard of abuse than that required for the piercing of the veil of close corporations under section 65 of the Close Corporations Act. Thus, in order for the corporate veil of a company to be pierced under section 20(9) of the Companies Act, a lower standard of abuse would need to be proved compared to the level of abuse required for the corporate veil of a close corporation to be pierced under section 65 of the Close Corporations

¹⁹³ Subramanien op cit (n175) 34.

¹⁹⁴ Cassim op cit (n12) 318.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ *Ex Parte Gore* supra (n9) at 34.

Act.¹⁹⁸ This broadens the cases in which a court will pierce the veil compared to what the courts have been prepared to do prior to the enactment of this provision.¹⁹⁹

In addition, the application of a wider meaning of the term ‘unconscionable abuse’ and the fact that the provision is unqualified, affords a rectification of the common-law philosophy that it should only be used as a last resort.²⁰⁰ This further confirms that the judge applied a purposive approach in the interpretation of section 20(9). Under this modern purposive approach, the default position is to ascertain the purpose underlying a provision in all cases and use the literal rule as secondary aid to the interpretation of statutes. This form of modern purposivism prevails over literalism in all cases, not just cases of absurdity or ambiguity. In this instance the main object of the Companies Act is to promote the development of the South African economy by encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation.²⁰¹

The fact that the court in *Gore* broadens the interpretation of the term ‘unconscionable abuse’, together with the statutory remedy of veil piercing being available whenever the illegitimate use of the company’s separate legal personality affects one in a way that should not reasonably be countenanced, clearly shows that the judge comfortably accepts that section 20(9) can be seen as supplemental to the common law.²⁰² This will find more value in the discussion to follow. In my view, it can be argued that the interpretation of the term ‘unconscionable abuse’ will be dependent on the fact of each case and this will be open for interpretation by the courts. However, it should be noted that the interpretation of the term ‘unconscionable abuse’ proposed by the court, is similar to the position at common law in relation to assessing whether to pierce the veil or not. Based on this it can be argued that there is no discord between the common law principle and section 20(9).

3.6.3.3 *Remedy of last resort: section 20(9)*

At common law, piercing the corporate veil is regarded as a drastic remedy that must be resorted to sparingly and as a very last resort in circumstances where justice will not otherwise be done.²⁰³

¹⁹⁸ Cassim op cit (n12) 318.

¹⁹⁹ Van Huyssteen op cit (n25) 26.

²⁰⁰ Subramanien op cit (n175) 35.

²⁰¹ Section 7 of the Companies Act.

²⁰² Cassim op cit (n12) 335.

²⁰³ *Hülse-Reütter v Godde* supra (n63) at 23.

It is not clear from the reading of the section whether the same principle is to be applied to section 20(9). The question is whether section 20(9) would also be utilized as a remedy of last resort or whether an applicant could rely on section 20(9) despite other remedies being available.

The Judgment of *Gore* is authority for the view that the answer to this question is in the positive. Binns-Ward J remarked that the unqualified availability of the remedy under section 20(9) militates against an approach that the remedy should be granted only in the absence of any alternative remedy.²⁰⁴ It is submitted that the court's interpretation of section 20(9) is in this respect correct. The significance of the judgment is that, while section 20(9) is not out of harmony with the piercing of the veil judgments that have been previously handed down by the courts, it in fact broadens the basis on which a court may disregard the corporate personality and makes the remedy one that is generally available whenever there has been an illegitimate use of the juristic personality of a company, especially in cases where this illegitimate use affects the interests of a third party adversely.²⁰⁵ This in itself promotes a purposive approach towards interpretation of the Companies Act.

To put simply, the language of section 20(9) is drafted in very wide terms, which may be indicative of an appreciation by the legislature that the section may be applied widely in varying factual circumstances.²⁰⁶ This may mean that section 20(9) may be relied upon despite other remedies also having been available. The courts will now have a wider discretion to pierce the corporate veil under section 20(9) compared to the discretion under the common law where the remedy of piercing the veil was used as a last resort.²⁰⁷ This also brings the position under section 20(9) more into line with the dicta expressed by the Appellate Division in *Cape Pacific*, that piercing the corporate veil is no longer a remedy of last resort.²⁰⁸ This is because there is a statutory alternative to veil piercing. It is clear that Binns-Ward J's approach to the matter of interpretation is purposive and value-based rather than literal.

An important manifestation of this approach is the mischief rule which has been accepted by our courts including the Constitutional court. Binns-Ward J clearly acknowledged that under the

²⁰⁴ *Ex Parte Gore supra* (n9) at 34.

²⁰⁵ Cassim op cit (n12) 319.

²⁰⁶ *Ex Parte Gore supra* (n9) at 31.

²⁰⁷ *Hülse-Reütter v Godde supra* (n70) at 23.

²⁰⁸ *Ex Parte Gore supra* (n9) at 34.

common law a judicial philosophy exists that the separate legal personality of a company should be disregarded only in exceptional circumstances and as a last resort.²⁰⁹ In my view this is a perfect example of where the mischief rule has been applied because the court referred to the common-law position before the legislation was adopted and the provision in question was enacted to remedy a defect.

3.6.3.4 *Does s 20(9) override the common law?*

There has been much debate in our jurisprudence as to whether the introduction of section 20(9) overrides the common law or the judicial instances of piercing the corporate veil. In *Gore* the court had no hesitation in finding that there is no clear intention that the common law is or is not replaced by this provision.²¹⁰ Binns-Ward J refers to other sections in the statute which expressly states whether the common law has been replaced or still finds applicability. He confirms that based on these sections ‘...there is no express intention to that effect but, equally, there is no express indication that the intention is not to displace the common law’. This is a perfect example of where the wording of the particular provision in the context of the statute as a whole, is unclear rendering the literal approach to interpretation applicable.

It was contended that the principles developed at common law with regard to piercing the corporate veil would serve as useful guidelines in interpreting section 20(9).²¹¹ Where the requirements of section 20(9) were not met and could not be relied on, the common-law remedy of piercing the veil would still apply.²¹² Binns-Ward J then further confirms that the provision needs to be read with subsections 5(1), (2) and (7) of the Companies Act requiring the interpretation of the provision to be done in context with the statute. According to this interpretation, the court stated that it was unable to identify any discord between section 20(9) and the approach to piercing the corporate veil evinced in cases decided before it came into operation. It seems to be clear that, based on the court’s approach to interpreting section 20(9), the new provision is a clear improvement on the previously vague and unpredictable common law rule of piercing the corporate veil. In light of this, the question to be answered now is whether the court in *Gore* followed the most recent trend,

²⁰⁹*Ex Parte Gore* supra (n9) at 27.

²¹⁰ *Ex Parte Gore* supra (n9) at 31.

²¹¹ Cassim op cit (n12) 336.

²¹² Cassim op cit (n12) 323.

namely the constitutional dispensation in the interpretation of section 20(9) and what implication this interpretation has for the existing rules or principles that apply in relation to piercing the corporate veil which will find more value in the discussion to follow.

Since the advent of the Constitution, the arguments against the continued application of the strict and literal rule have gained momentum. Many commentators, including the judiciary, have suggested that a purposive approach should be followed which will promote the democratic values enshrined in the new Constitution. In light of this, the question to be answered is whether the court in *Gore* followed the most recent trend in the interpretation of statutes. One can be forced to accept that the court did recognise the values enshrined in the Constitution in the interpretation of section 20(9).

Binns-Ward J referred to the application of section 7 of the Companies Act in his interpretation of section 20(9). Section 7 read together with section 5 and 158 sets out the purposes of the Companies Act. One of the purposes being compliance with the Bill of Rights as provided for in the Constitution, in the application of company law.²¹³ In referring to section 7, even though not expressly confirmed in his judgment, one can infer that the judge has shown his appreciation to the fact that the value-based purposive approach should be followed in the interpretation of section 20(9).²¹⁴ In addition, section 7 in itself gives effect to section 39(2) of the Constitution.

The broad interpretation given to the term ‘unconscionable abuse’ by Binns-Ward J in *Gore*, together with the remedy of piercing the corporate veil being available whenever the illegitimate use of the company’s separate legal personality affects one in a way that should not reasonably be countenanced, make it clear that the legal bases upon which courts have hitherto been prepared to pierce the corporate veil under the common law have now been considerably extended under section 20(9) of the Companies Act.²¹⁵ With this, one cannot come to any other conclusion that section 20(9) can be seen as the development of the common law to provide proper mechanism to ensure that the values as enshrined in section 8(3) and 39(2) of the Constitution are upheld in the corporate world.

²¹³ Section 7 of the Companies Act 71 of 2008.

²¹⁴ Van Huyssteen op cit (25) 32.

²¹⁵ Cassim op cit (n12) 315.

The court acknowledged that the circumstances in which a court would pierce the veil were far from settled, and stated that much depended on a close analysis of the facts of each case, considerations of policy, judicial management, and economic effects it would have if the injustice caused is not rectified. This clearly confirms the importance of the values of the Constitution as discussed above, when applying section 20(9) to a particular matter.

3.7 Conclusion

In light of the vagueness and confusion which exist in regard to the common law doctrine of piercing the corporate veil South Africa it seems to be clear that, based on the court's approach in interpreting section 20(9), the new provision has conferred extensive powers on the South African courts to pierce the corporate veil, powers that do not exist under common law. The provision signifies a new way and shift in thinking in regard to the remedy of piercing the corporate veil.

Finally, section 20(9) broadens the basis on which a court may disregard the corporate personality and makes the remedy one that is generally available whenever there has been an illegitimate use of the juristic personality of a company, especially in cases where this illegitimate use affects the interests of a third party adversely. In applying this statutory doctrine it is of fundamental importance that courts must strike a balance between the need to preserve a company's separate legal personality and policy considerations in exercising their discretion whether to pierce the corporate veil under section 20(9) of the Companies Act.

CHAPTER 4

Conclusion

It is clear from the above case study that the courts in South Africa have grappled with the correct approach to justify the common law instances in which it is reasonable to override the principle of separate legal personality. Although there have been several attempts by the courts to determine the circumstances in which the courts will pierce the veil, the foregoing discussion has established that the search for a generally accepted justification for veil piercing decisions has so far proved difficult. However, it was also established that the readiness of South African courts to pierce the corporate veil has varied quite considerably depending on the close analysis facts of each case, consideration of policy and judicial judgment.²¹⁶ This implies that South African courts do not follow the categorising approach and that there are no set categories of instances governing when courts will pierce the corporate veil which, according to most academics, may lead to unfavourable results.²¹⁷ In addition, a judicial philosophy that the separate personality of juristic persons should be disregarded only in exceptional circumstances and as a last resort under the common law has been articulated in some recent South African judgments.²¹⁸ With this in mind, it becomes difficult to state with any degree of accuracy the circumstances in which the courts will pierce the veil. Accordingly, the question then arises as to how courts should remedy this problem.

Furthermore, the study also established that this uncertainty and confusion in regard to the doctrine of piercing the corporate veil is shared by courts in the United Kingdom. In *Prest*, commenting on the question of the circumstances when the corporate veil would be pierced, the Supreme Court asserted that ‘the question is heavily burdened by authority, much of it characterised by incautious dicta and inadequate reasoning’.²¹⁹ Nevertheless, the judgment of Lord Sumption in *Prest* has brought some certainty to the concept of veil piercing in England. This is so because the court rejected some of the unrelated common law grounds of piercing the corporate veil as the true situations in which the veil can be pierced. Lord Sumption emphasised that these grounds have nothing to do with corporate veil piercing and should not have been categorised as such.²²⁰ To put

²¹⁶ See Chapter 2 at 6.

²¹⁷ See Chapter 2 at 17.

²¹⁸ See Chapter 2 at 18.

²¹⁹ Cassim op cit (n12) 329.

²²⁰ See Chapter 2 at 25.

it differently, the court in *Prest* rejected the categorising approach to veil piercing. Such rejection of a categorising approach is commendable because categorising could lead to uncertainty.²²¹ The Supreme Court held that the veil should, therefore, be pierced only where necessary ‘to prevent the abuse of corporate legal personality’, such as abuse being using the company to evade the law or to frustrate its enforcement, and ‘only for the purpose of depriving the company or its controller of the advantage they would otherwise have obtained’.²²² Following this pivotal decision, it is arguable that the court made changes to the concept of veil piercing in England and the bar for situations in which the corporate veil might be pierced has been set even higher. As discussed the judgment further provides guidance on the limited circumstances in which veil piercing may be permitted.

In order to rectify this inconsistency, South African courts should adopt a narrow, and unifying principle that could serve as a basic for deciding piercing cases in a more logical and satisfactory manner.²²³ Perhaps the approach envisaged in the *Prest* case ought to be applied to unify and rationalise piercing decisions on the basis of a single underlying principle and as such it may prove capable of bringing order and clarity into an untidy area of the law. To a certain extent, the *Prest* case is a significant case in setting out the limited circumstances in which veil piercing may occur in future.

Nevertheless, South African courts are not bound by precedent set by foreign courts and are free to consider alternative approaches to piercing the corporate veil in foreign jurisdictions. This is soundly affirmed in section 39(1) (b) of the Constitution, which states that courts have the discretion to consider foreign law.²²⁴ It is submitted that, in the light of the confusion and uncertainty in the common law on the application of the doctrine of piercing the corporate veil, courts must strive to clarify the doctrine of piercing the corporate veil in South African law.²²⁵ As the Supreme Court held in *Prest*, it is important to maintain clarity and simplicity in piercing the corporate veil, and if the doctrine of piercing the corporate veil is to exist, ‘the circumstances in which it can apply must be limited and as clear as possible’.²²⁶ It seems logical to say that when

²²¹ Cassim op cit (n4) 43.

²²² Mogen op cit (93) 27.

²²³ See Chapter 2 at 30.

²²⁴ The Constitution of the Republic of South Africa, section 39(1) (b).

²²⁵ Cassim op cit (n12) 331.

²²⁶ Ibid.

dealing with veil piercing matters courts must endeavour to develop ways that will maintain clarity and simplicity, so as to demystify the confusion which exists in the common law.²²⁷

At the very least, the *Prest* ruling should stimulate South African courts to consider ways that can be used to disregard the separate legal personality of incorporations based on the fraudulent evasion concept identified in *Prest*. In other words, the South African test for veil piercing should be brought in line with the more narrow approach articulated by Lord Sumption. As stated above, courts must exercise caution and wisdom to ensure that they do not develop a disproportionate and inappropriate application of the doctrine of piercing the corporate veil in South African law.²²⁸

However, it would be rash to suggest that the principle formulated in *Prest* is capable of resolving all the problems posed by the concept of separate corporate entity. Where there is fraud and dishonesty or other improper conduct, as formulated in *Prest*, the need to preserve the separate corporate entity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil. In other words, courts should adopt the balancing approach as a supplement to the test formulated in *Prest* for piercing the corporate veil, in order to achieve a more equitable result. This approach accords with the position in the *Cape Pacific*, where the then Appellate Division stated that ‘under the common law, the corporate personality of a company may be disregarded even if the company had been legitimately established and operated but was subsequently misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, and that it is not necessary for the company to have been ‘conceived and founded in deceit’ before its corporate personality may be disregarded’.²²⁹ This balancing approach laid down by the Appellate Division is modelled on the United States case of *Glazer v Commission on Ethics for Public Employees*, where the Supreme Court of Louisiana stated that ‘the policies behind the recognition of a separate corporate existence must be balanced against the policies justifying piercing’.²³⁰

The balancing approach requires an evaluation of competing policy consideration in order to determine whether or not the veil of incorporation should be pierced. Thus the policies behind recognition of a separate corporate existence must be balanced against the policies justifying

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ *Cape Pacific Ltd v Lubber Controlling* supra (n30) at 28.

²³⁰ Domanski op cit (n18) 234.

piercing. In such an approach a court would be entitled to look to substance rather than form to arrive at the fact.²³¹ Domanski has also argued that, ‘the concept of separate legal personality must be weighed against those principles in favour of piercing the veil’.²³² It goes almost without saying that the separate juristic personality of the company has always been and remains a cornerstone of our company law. South Africa courts, therefore, should apply this test cautiously and with the protection of that separate personality as a foremost consideration. It is evident from the discussed cases that the strict application of the separate legal personality would led to unfair results. As stated above, courts must exercise caution and wisdom to ensure that they do not develop a disproportionate and inappropriate application of the doctrine of piercing the corporate veil in South African law.²³³

With the enactment of section 20(9) supplementing the concept of veil piercing, one can argue that this provision is the answer to the many concerns raised with respect to the common-law rule of piercing the corporate veil. However, in light of the uncertainty and confusion which exists in relation to the common law doctrine of piercing the corporate veil, what seems to be a codification of the common- law rule has also brought many questions and uncertainties which requires interpretation in order to determine whether this provision is an improvement of the common law rule of veil piercing. As discussed, the section fails to define the term ‘unconscionable abuse’ and to provide any guidance on the circumstances that constitute an ‘unconscionable abuse’ of the juristic personality of the company as a separate entity. It is also not clear from a reading of the section whether section 20(9) overrides the common law or the judicial instances of piercing the corporate veil, or whether piercing of the veil must still be regarded as an exceptional remedy to be used only as a last resort, as is the case at common law.²³⁴ Moreover, section 20(9) does not provide guidance in regard to who would constitute an ‘interested person’ within the scope and ambit of the section.²³⁵ The question thus arises whether section 20(9) can be seen as an improvement on the common law rule of piercing the corporate veil. These issues were first dealt with in the recent case of *Gore* in which the court interpreted section 20(9) for the first time.

²³¹ Cassim op cit (n4) 49.

²³² Domanski op cit (n18) 234.

²³³ Cassim op cit (n12) 327.

²³⁴ See Chapter 3 at 27.

²³⁵ See Chapter 3 at 27.

In the course of its judgment, the court answered some of the questions set out above, and usefully set out some important guidelines in regard to the interpretation and application of section 20(9). Taking into account all the arguments which have been discussed in this study it can be said that the court in *Gore* adopted a purposive approach coupled with contextualism in an attempt to answer some of the questions raised. This afforded the court the opportunity to interpret section 20(9) as a provision that aimed at developing an uncertain common law rule of veil piercing which is characterised as vague and unpredictable. The court further referred to the application of section 7 of the Companies Act when interpreting a provision in this Act.²³⁶ This provision clearly requires a teleological approach to be followed when interpreting any provision within the Companies Act, it has to be interpreted in such a way as to give effect to the purposes in section 7; one of which is to give effect to the spirit, purport and objects of the Bill of Rights. According to Van Huyssteen this is nothing more than a confirmation of section 39(2) which screams for a value-based purposive approach to be followed in the interpretation of the Companies Act.²³⁷ In addition, this approach allows the courts to apply a wider meaning to the words of the section when so required which, in turn, allows them to firstly take into account the history and its short comings and secondly, it allows them to adjust the interpretation made to provide for possible changes and circumstances in future.²³⁸ Simply put, the purposive approach provides for a very adaptable form of interpretation in line with the constant change in society.

On the question of whether section 20(9) has replaced the common law on piercing the corporate veil, it was held that there is no express intention to this effect but, equally, no express indication that the intention is not to displace the common law. I submit that section 20(9) should not be seen as a provision that replaces the common law in its entirety but should rather be seen as a supplement, developing a rule that for many years has not been applied properly due to its vagueness and uncertainty. This was confirmed by Binns-Ward J in his acknowledgement that the facts of each case should determine whether the veil should be pierced. This has been the view of our courts long before section 20(9) came into existence; thus where the requirements of section 20(9) are not fulfilled and the section may not be relied upon, the common law remedy of piercing the veil would still be applicable. The principles developed at common law with regard to piercing

²³⁶ *Ex Parte Gore* supra (n9) at 31.

²³⁷ Van Huyssteen op cit (n25) 29.

²³⁸ *Ibid.*

the corporate veil would no doubt serve as useful guidelines for interpreting section 20(9) of the Companies Act. In addition, Binns-Ward J also endorsed the common law balancing approach in the context of piercing the corporate veil in terms of section 20(9).²³⁹ The court stated that in determining whether to pierce the corporate veil, one must weigh up or balance the importance of giving effect to the separate legal personality of a company against the adverse moral and economic effects of tolerating an unconscionable abuse of the juristic personality of the company.²⁴⁰ The court thus regarded the adverse moral effects of the unconscionable abuse as a factor to be taken into consideration in the balancing approach. This clearly shows that section 20(9) is a mere development, as opposed to replacement of the common law. In regard to the meaning of the term ‘unconscionable abuse’ of the juristic personality of a company in section 20(9), it has been established that the court adopted a very wide interpretation of the words ‘unconscionable abuse’ and that the term assumes an illegitimate use of a company that affects the rights of another. One could argue that the term ‘unconscionable abuse’ implies some form of moral consideration. Cassim notes that ‘the wide meaning given to the term ‘unconscionable abuse’, make it clear that the legal bases upon which courts have been prepared to pierce the corporate veil under the common law have been considerably extended under section 20(9)’.²⁴¹

It was also noted that the term ‘interested person’ have been given a wide meaning by *Gore*, which is arguably wider than the meaning given to the similarly worded section 65 of the Close Corporations Act, where a financial or monetary interest is an essential prerequisite. The court stated that no mystique should be attached to the term ‘interested person’ and held that an ‘interested person’ will be the third party whose rights are affected or a representative depending on the legal capacity of such person. Lastly, it was also established that section 20(9) is not a remedy of last resort and is not to be regarded as an exceptional remedy, as is arguably the case under the common law. This reaffirms the submission that section 20(9) must be seen in light of the judgment in *Gore* as supplementing the common law rather than substituting it, and that piercing of the corporate veil is not available only in the absence of an alternative remedy.

²³⁹ *Ex Parte Gore* supra (n9) at 25.

²⁴⁰ *Ex Parte Gore* supra (n9) at 29.

²⁴¹ Cassim op cit (n12) 323.

Based on the foregoing discussion, it is crystal clear that section 20(9) is a clear improvement of the common law rule of veil piercing. This is so because it affords a firm and flexibly defined basis for the remedy of veil piercing. However, it is of vital importance for the courts to interpret section 20(9) in line with approach articulated by Binns-Ward J in *Gore* and to take a more cautious approach towards statutory interpretation in order to maintain clarity and simplicity. One way of doing this would be for the courts to maintain and promote simplicity, so as to demystify the confusion which exist in the common. In addition, courts must refrain from using metaphors and pejorative expressions in their judgment as such expressions may obstruct substance principles being formulated, and may thereby cause confusion and uncertainty in the South African Company law. So, it can be concluded that the court in *Gore* has answered the question raised above and set out some important principles in regard to the interpretation and application of section 20(9). This represents a new direction and a sharp shift in thinking in regard to the remedy of piercing the corporate veil.

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