THE LIMITS ON LIMITED LIABILITY: A COMPARATIVE ANALYSIS OF PIERCING THE CORPORATE VEIL IN SWEDISH AND SOUTH AFRICAN LAW

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CHAPTER 1: INTRODUCTION

1.1 INTRODUCTORY REMARKS ON THE STUDY

1.1.1 Veil-piercing

Companies, as legal persons, are equally involved in the commercial traffic as the natural persons who own and control them.[1] Both can acquire assets in their own name and attract an income from those assets to be enjoyed in their own capacity. Likewise, both legal and natural persons are responsible for their own liabilities and are distinct from one another. From a universal perspective, the principle of separate legal personality is one of the central underpinnings of company law and, amongst other things, affords limited liability to the shareholders of the company. This means that, once a company is created, a veil is drawn between the company and its shareholders and directors which ultimately shields the latter two from the company's debts and wrongdoings.[2]

The issue acknowledged globally is that the separate legal personality of a company has often been insulted. In many jurisdictions, courts have been confronted with the decision of whether to respect the separate legal personality of the corporation or to restrict this 'untouchable' principle to curtail severe cases of mishandling.[3] The mechanism used to do so is known as the doctrine of piercing the corporate veil which seeks to impute personal liability onto whomever abused the protection provided by the corporate structure.[4] Piercing the corporate veil has been described as:

> 'A facts-based determination by the courts in certain cases to disregard some or all of the characteristics of separate legal personality that statute law ordinarily attributes to a duly incorporated company'.[5]

[1] *Salomon v Salomon Co Ltd* [1897] AC 22.

[2] FHI Cassim, MF Cassim, R Cassim, J Shev & J Yeats *Contemporary Company Law* 3 ed (2021) Juta and Co at 54.

[3] To name a few: America, Canada, the United Kingdom, Sweden, and South Africa.

[4] Piet Delport *Henochsberg on the Companies Act 71 of 2008* 2 ed (2011) LexisNexis at 19(1).

[5] *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) at 27.

According to Easterbrook and Fischel[6]:

> 'Piercing seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled. There is consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.'[7]

In some countries, the threat of abuse to the corporate structure has been recognised by the Legislature to such an extent that they have codified veil-piercing in a statutory provision.[8] This is the case in South African law, where the Legislature introduced section 20(9) into the Companies Act 71 of 2008 (hereafter 'the 2008 Companies Act').[9] On the contrary, in countries such as Sweden, the Legislature has refused to codify the doctrine in the *Aktiebolagslagen* (2005: 551), hereafter referred to as the 'Swedish Companies Act'[10], by placing an emphasis on legal certainty and the need to safeguard the limited liability principle.

1.1.2 Problem Statement

The decision to pierce the corporate veil is a serious one that requires the balancing of competing interests. On the one hand, courts should be permitted to disregard the separate legal personality of a company to reveal abuses and to bolster the conscientious management of companies. On the other hand, courts must respect limited liability, as one of the dominant attributes that encourage the incorporation of companies, to ensure entrepreneurship and commercial development.[11] The problem is that the law governing veil-piercing has tended to be inconsistent in both South African and Swedish law. The issues mainly relate to the instances in which a court is permitted to pierce the veil and the approach to be adopted in making such an assessment. In South Africa, the confusion relating to veil-piercing has largely been experienced at common law seeing as it was the only available regulatory mechanism

[6] FH Easterbrook and DR Fischel 'Limited Liability and the Corporation' (1985) *The University of Chicago Law Review*, Vol. 52.

[7] Ibid at 89.

[8] See for example: section 119(1) of the Canadian Business Corporations Act (RSC 1985, C-44) and section 15 of the New Zealand Companies Act 105 of 1993.

[9] Companies Act 71 of 2008.

[10] *Aktiebolagslagen* (2005:551).

[11] Supra note 9 at 7.

until 2008.[12] Nonetheless, the South African Legislature sought to rectify this through the introduction of section 20(9) despite it being a common law jurisdiction.[13] However, the Swedish Legislature has refused to do so notwithstanding Sweden being a civil law jurisdiction. This is significant as it means that veil-piercing finds authority in other sources of uncodified law. Naturally, this generates a lot of room for argumentation in respect of when a Swedish court will be permitted to make an affirmative veil-piercing decision.

1.1.3 Significance of the Study

The task of regulating veil-piercing and establishing consistent principles which, on the one hand, preserve limited liability but, on the other hand, expose maltreatments of the corporate structure, is an onerous one. The purpose of this study is to analyse the manner in which the doctrine of piercing the corporate veil has been interpreted and applied in both civil and common law jurisdictions. A comparison between South Africa and Sweden will be advantageous to the study of veil-piercing globally as it considers the implications of codifying versus not codifying the doctrine when faced with ambiguous jurisprudence. In both countries, company law has undergone noteworthy development during the last two decades, with South African law being the most progressive. This study is imperative because it seeks to clarify the current position on the matter and to provide recommendations for the future development of veil-piercing in both South Africa and Sweden.

1.1.4 Terminology

There has been divergence among South African scholars as to whether a distinction should be drawn between the terms 'lifting' and 'piercing' of the corporate veil. Cassim et al[14] contend that 'lifting' refers to some human characteristic or quality that is fictionally ascribed to the company.[15] In contrast to 'piercing', it does not disregard the company's separate legal personality to impose liability on the shareholders. Instead, it looks behind the veil and considers who the shareholders or directors of the company are.[16] However, the dictum in *Cape Pacific* seems to suggest that the distinction is not relevant by holding:

[12] When the 2008 Companies Act was enforced.

[13] Delport op cit note 4 at 20(9).

[14] Cassim et al op cit note 2.

[15] Ibid at 59.

[16] Ibid.

> 'Equally trite is the fact that a court would be justified in certain circumstances in disregarding a company's separate personality in order to fix liability elsewhere for what are ostensibly acts of the company. This is generally referred to as lifting or piercing the corporate veil.'[17]

This is further supported in *Ex Parte Gore and Others NNO*[18] (hereafter '*Gore*'), where the court held:

> 'A broad consideration of the case law in several jurisdictions impels the conclusion that nothing really turns on the labels despite the documented debate therein about the nuances in the terminology.'[19]

The Swedish courts have also not drawn such a distinction. It can therefore be seen as an academic debate rather than one endorsed by the courts. Thus, for the purposes of this study, 'piercing' and 'lifting' will not be distinguished and will be viewed as having the same effect.

1.2 SCOPE OF THE RESEARCH

1.2.1 Research Question

The main research question to be answered is: (i) does South African and Swedish company law provide a sufficient degree of certainty and guidance for courts to rely on when determining whether to pierce the corporate veil? Additionally, (ii) what are the solutions for both countries to enhance legal certainty in respect of the application of the doctrine as well as the legislative structure? In connection with this: (iii) would Sweden, as a civil law jurisdiction, benefit from introducing a veil-piercing provision in their Companies Act as South Africa has done?

1.2.2 Research Methodology

The research methodology in this dissertation is of a doctrinal and comparative nature. It utilises a doctrinal methodology to clarify the meaning and existence of the law as it currently stands.[20] Doctrinal research is used to identify and analyse how a legal doctrine has developed

[17] Delport op cit note 4 at 19.

[18] Supra note 5.

[19] Ibid at 4.

[20] Alexander Petrov and Alexey Zyryanov 'Formal-Dogmatic Approach in Legal Science in Present Conditions' (2018) available at: *https://elib.sfu-*

and been applied.[21] This is done using commonly accepted sources of law which primarily consists of legislative provisions, preparatory works, case law and common-law principles. This methodology also requires an identification of the ambiguities relating to the doctrine and subsequent criticisms from case law, commentaries and relevant literature.[22] The investigation into the position in South Africa will rely heavily on case law as it not only demonstrates the position at common law, but it also provides the approach to be implemented when interpreting the legislative provision on veil-piercing. Although Sweden is a civil law jurisdiction which typically regards codified provisions as the primary source of law, the absence of a veil-piercing provision renders case law the most valuable legal source in respect of this matter.

This study will also utilise a comparative methodology to compare the legislation, case law and common-law principles of South Africa and Sweden. According to Strömholm[23], there are two ways of applying the comparative method. Firstly, one can assume a dominant role by making a concrete and intricate comparison between legal systems. Alternatively, one can take a subservient approach by merely observing and receiving impressions from one foreign legal system as opposed to intensely analysing the particulars. This study will take a mixed approach in that it will highlight the specific aspects in which the two jurisdictions either harmonise or diverge. Further, it will identify the gaps in Swedish law that could benefit from the guidance of South African law. This method is adopted cautiously as it is acknowledged that the legislation in South Africa might be incompatible for the Swedish legal system and may not have the equivalent advantageous effect.

1.2.3 Delimitations

As veil-piercing is a complex topic, both in South Africa and Sweden, this dissertation cannot address all the interconnected issues that arise. To encourage succinct and focused legal findings, this dissertation does not:

(i) attempt to investigate every consequence of separate legal personality but will only focus on limited liability;

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kras.ru/bitstream/handle/2311/71664/Petrov.pdf;jsessionid=D061BDFD149D8FCF2FD447E6BEB70C61?sequence=1 accessed on 7 December 2022.

[21] Jerome Hall Law Library 'Legal Dissertation: Research and Writing Guide' available at: *https://law.indiana.libguides.com/dissertationguide#s-lg-box-22069151* accessed on 7 December 2022.

[22] Ibid.

[23] Stig Strömholm 'Using Foreign Material in Legal Monographs' (1971) Svensk Juristtidning at 251-252.

(ii) identify every case where the court has pierced the veil in South African and Swedish law; or

(iii) discuss piercing the corporate veil in company groups except to the extent where cursory reference is relevant to the principal points of discussion.

1.3 DISSERTATION STRUCTURE

This dissertation will commence with an explanation of separate legal personality in South Africa, focusing on its initial establishment in *Salomon v Salomon Co Ltd*[24] (hereafter '*Salomon*') and subsequent acceptance in *Dadoo Ltd and Others v Krugersdorp Municipal Council*[25] (hereafter '*Dadoo*'). The reason being that these cases provide chief principles relating to the company's separate legal personality. They also demonstrate the weight attached to the principle as a means of promoting the incorporation of companies.

Chapter 3 will analyse the development of the South African common law on veil-piercing from a categorisation approach to a more balanced approach. It will explain the famous Supreme Court of Appeal ('SCA') judgment in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*[26] (hereafter '*Cape Pacific*') which indicated a movement away from limited categories towards a more even-handed approach. Moreover, Chapter 3 will identify some of the common instances where South African courts have chosen to pierce the veil as this will ultimately aid a more precise comparison to Swedish law.

Chapter 4 will meticulously examine section 20(9) of the 2008 Companies Act starting with the manner in which it should be interpreted under the Constitution[27], the Act itself, and the judgment of *Gore*. Emphasis will be placed on the words 'interested person', 'unconscionable abuse', 'incorporation', 'use', 'acts', 'deemed not to be a juristic person', and 'rights, obligations or liabilities'. In addition to providing a comprehensive analysis of section 20(9), a key purpose of this chapter is to present the consequences of codifying the doctrine of veil-piercing.

[24] Supra note 1.

[25] 1920 AD 530.

[26] 1995 (4) SA 790 (A).

[27] The Constitution of the Republic of South Africa, 1996.

The Swedish portion of this dissertation will begin in Chapter 5 where the principle of separate legal personality will be investigated. The definition and characteristics of the Swedish company will be discussed along with Chapter 1: Section 3 of the Swedish Companies Act which embodies the notion of limited liability of the shareholders.

Chapter 6 analyses the evolution of the Swedish common-law approach by dividing it into different time periods: (i) before the important judgment of *NJA 2014*[28]; (ii) *NJA 2014*; and (iii) post-*NJA 2014*. This is done to showcase the significance of the judgment as well as the pitfalls of its ambiguity as witnessed in later judgments. Chapter 6 also identifies some of the main instances where the court has pierced the corporate veil whilst highlighting the similarities and differences to South African law.

As Sweden does not have a provision on veil-piercing, Chapter 7 focuses on the background to the Swedish Companies Act and the proposals for introducing such a provision. The purpose of this is to display that there was support for veil-piercing to be codified but that the Swedish Legislature has attached firm weight to the limited liability principle. This Chapter also engages in an examination of sections which indirectly relate to veil-piercing, such as the provisions on creditor protection. Chapter 7 is a highly significant component of the paper as it engages in a discussion on the consequences of not codifying the doctrine in Swedish law whilst drawing a comparison to the position in South Africa.

Chapter 8 will render conclusions in relation to the research questions put forward in Chapter 1. Moreover, it will provide recommendations for both countries in relation to the application of the doctrine and the structure of the legislation.

[28] *NJA 2014* s 877.

CHAPTER 2: SEPARATE LEGAL PERSONALITY IN SOUTH AFRICA

2.1 INTRODUCTION

Legal personality is afforded to legal subjects which have the capacity to bear rights and duties.[29] This is inclusive of both natural and juristic persons.[30] The separate legal personality of juristic persons is the basic principle of company law and is one of the reasons why many decide to incorporate companies. Arguably, the most important aspect of separate legal personality is that the shareholders and directors avoid incurring liability that may arise from the actions of the company.[31] The concept itself was initially established by the House of Lords in *Salomon* and later upheld by South African courts in *Dadoo.* It is also a central foundation of many of the contemporary criticisms surfacing in response to courts piercing the corporate veil. For this reason, it is necessary to fully comprehend the nature of separate legal personality as first established in the United Kingdom and subsequently reinforced in South African law.

2.2 DEFINITION OF A COMPANY

Under section 1 of the 2008 Companies Act, a 'company' is defined as:

> '[…] a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date –
>
> (a) was registered in terms of the-
>
> (i) Companies Act, 1973 (Act 61 of 1973), other than as an external company as defined in that Act; or
>
> (ii) Close Corporations Act, 1984 (Act 69 of 1984), if it has subsequently been converted in terms of Schedule 2;
>
> (b) was in existence and recognised as an 'existing company' in terms of the Companies Act, 1973 (Act 61 of 1973); or
>
> (c) was deregistered in terms of the Companies Act, 1973 (Act 61 of 1973), and has subsequently been re-registered in terms of this Act ...'[32]

[29] Supra note 9 at 19.

[30] Piet Delport *New Entrepreneurial Law* 2 ed (2021) LexisNexis at 12.

[31] Michael Bailey *The Doctrine Of Piercing The Corporate Veil In South Africa: An Analysis Of The South African Approach With Lessons From The Canadian Jurisprudence* (LLM, University of Cape Town) 2020 at 13.

[32] Supra note 9 at 1.

In essence, the definition merely states that a company is a juristic person that is incorporated under the 2008 Companies Act, 1973 Companies Act, or the Close Corporation Act. It fails to offer any insightful exposures as to the nature, capabilities, and obligations of a company, and does not adequately consider what a company is.[33] According to Cassim et al[34], the most significant feature to draw from this definition is that a company is a juristic person because this injects the most substantial principle of a company's existence into it – its separate legal personality.[35] This is highlighted again in section 19(1) which states that, once the incorporation of a company has been registered, the company will constitute a juristic person with all the legal powers and capacity of an individual.[36] Although this concept is already recognised by the South African common law, the insertion into the 2008 Companies Act generates the separate legal existence for the company particularly.

2.3 LEGAL PERSONALITY AND LIMITED LIABILITY

To be a legal person is to be the subject of rights and duties.[37] The classic subjects of rights and duties are human beings who act in their own right and in a single capacity.[38] The language of our courts and the structure of our laws envisage human beings as assuming the roles of plaintiff and defendant in disputes.[39] However, it is necessary to recognise inanimate objects, such as corporations, as being legal persons and acquiring the right to litigate as either party. In the words of Bryant Smith[40]:

> 'The legal personality of a corporation is just as real as and no more real than the legal personality of a normal human being. In either case it is an abstraction, one of the major abstractions of legal science, like title, possession, right and duty.'[41]

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[33] Albertus Johannes Marais *Abuse of Legal Personality to Avoid Tax: Piercing the Corporate Veil as a Remedy in case of the Abuse of Legal Personality for Tax Purposes* (LLD, Stellenbosch University) 2019 at 15.

[34] Michael Blackman *Commentary on the Companies Act* (2002) Volume 1 Juta and Co at 4-107 – 4-111.

[35] Ibid.

[36] Supra note 9 at 19(1)(a)-(b). This is the case unless the juristic person is unable to exercise such a power or have the capacity to do so; or the company's Memorandum of Incorporation does not permit such power or capacity.

[37] Bryant Smith Legal Personality' (1928) *Yale Law Journal* 37, no. 3 at 283.

[38] Ibid at 287.

[39] Ibid.

[40] Ibid.

[41] Ibid at 293.

In South Africa, section 8(4) of the Constitution guarantees that 'a juristic person be entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.' Whilst affording protection to companies' rights, this also triggers challenges in respect of which personality rights apply to juristic persons. The Constitutional Court has clarified that juristic persons do not possess the right to life nor are they the 'bearers of human dignity', however, they do possess the right to equality, reputation, and privacy.[42] Generally, courts will attempt to equate the personality rights of natural and juristic persons where it is suitable to do so.[43]

The very essence of a company is its separate legal personality. As per Lord Chancellor Baron Thurlow, a company has 'no soul to damn and no body to kick'.[44] In other words, it has no physical existence but is rather a mere legal concept. Nonetheless, the very purpose of a company's separate legal personality is that it can still obtain rights and encounter obligations that are separate from the shareholders and directors of that company.[45] As mentioned, section 19(1)(*b*) of the 2008 Companies Act solidifies this concept by stipulating that, from the moment that the incorporation of a company is registered, it will acquire all the legal capacity and powers of an individual except if it is unable to exercise such capacity or power, or the company's Memorandum of Incorporation requires otherwise.[46] Despite the insertion of the concept into the 2008 Companies Act, it must be recognised that the company is still a creature crafted by statute. While legal personality is rooted in the common law, the Legislature has ensured that the existing company, by its very existence, is bound by the provisions and purpose of the 2008 Companies Act.[47]

One of the core effects of separate legal personality is, *inter alia*, the limited liability of the shareholders. The basic principle is that the shareholders are not liable for the debts of the

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[42] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smith NO* 2001 (1) SA 545 (CC) at 18.

[43] *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 461.

[44] According to Cassim et al op cit note 2 at 41, 'This statement of Lord Chancellor Thurlow does not appear in any of his reported judgments and has not been tracked to a primary source'. See also *Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A) 606.

[45] Cassim et al op cit note 2 at 41.

[46] Supra note 9 at 19(1)(*b*).

[47] Marais op cit note 33 at 20.

company and their obligations to the company are based on the value of their shares.[48] As per section 19(2) of the 2008 Companies Act, a shareholder, director, or incorporator is not, solely by them assuming such position, liable for the obligations or causalities of the company. [49] This is the position unless the alternative is provided for in the company's Memorandum of Incorporation or the company is a personal liability company.[50] Thus, it is the company that retains liability for its debt and its creditors may claim from its assets. Creditors may not, however, claim from the personal assets of the shareholders.[51] The notion of limited liability is evidently beneficial to the South African economy as it influences many to invest funds into business ventures and ultimately inspires the increase and development of companies.[52] It can be described as a social contract between shareholders and society because, by providing companies with limited liability, society will profit and thus, in a sense, becomes a stakeholder in companies generally.[53] Ultimately, one would battle to envisage economic activity without the availability of the company as a means of detaching the commercial and legal existence of an entity from the persons concerned therein.[54] Nonetheless, as will be demonstrated, the privilege afforded by limited liability opens itself up to potential abuse.

2.4 SEPARATE LEGAL PERSONALITY AS ESTABLISHED IN CASE LAW

To effectively understand the principle of separate legal personality, a discussion of *Salomon* and *Dadoo* is instrumental. The former case stipulates essential principles encompassing the notion of separate legal personality whilst indicating that incorporation is available to all entities, ranging from a sole trader or small private partnership to a sizable public company.[55] It emphasises the legitimacy of limited liability of the shareholders even where they are inextricably linked with the company and its affairs. The latter case demonstrates another significant consequence of separate legal personality, that the company's assets remain with

[48] *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) at 6.

[49] Supra note 9 at 19(2).

[50] In this case, both the past and present directors will be held jointly and severally liable for the company's debts since they specifically agreed to be liable for such.

[51] Cassim et al op cit note 2 at 46.

[52] Ibid at 46.

[53] Marais op cit note 33 at 21.

[54] Ibid at 20.

[55] Paul Davies & Sarah Worthington *Gower and Davies' Principles of Modern Company Law* 9 ed (2012) Sweet & Maxwell at 36.

the company and do not belong to the shareholders in their personal capacities. Thus, emphasising the distinctiveness between the company and its shareholders.

2.4.1 *Salomon v Salomon & Co Ltd*

The following statement of facts relevant to this paper are taken from the judgment of Lord Watson and Cassim et al.[56] Salomon was a boot manufacturer and leather merchant who had the intention to transfer his business to a joint stock company to which he was a shareholder, with a nominal capital of 40 000 shares of £1 each. Salomon's family (his wife, daughter and four sons) were also shareholders of the company albeit only acquiring one £1 share each. Salomon, on the other hand, held 20 0001 out of the 20 007 shares issued by the company. Additionally, Salomon was issued debentures secured over the company's assets. This meant that Salomon was a dominant shareholder, a director, an employee, and a secured creditor of the company. Unfortunately, the company's business was unsuccessful and ended up being liquidated. The issue was that, after realising the company's assets, the payment of the debentures held by Salomon would result in the ordinary creditors receiving nothing. The liquidator objected to this and submitted that Salomon was using the company as an alias to conduct his business whilst limiting his liability for the company's debts. The liquidator contended that, rather, Salomon and the company were one and the same as he owned all but six of the issued shares. Ultimately, the company's debts should be borne by Salomon.

The Court of Appeal found in the liquidator's favour, holding that Salomon had employed the company as his agent.[57] It ordered that, before paying the debentures held by Salomon, the ordinary creditors must be paid in full. Nonetheless, this decision was reversed by the House of Lords in a strict enforcement of the concept of separate legal personality. The House of Lords emphasised that, owing to the valid incorporation of the company, it was a separate legal person with its own rights and obligations.[58] Importantly, the intentions of the persons who formed the company are immaterial in ascertaining such rights and obligations.[59] In relation to the shares held by Salomon's family members, Lord Macnaghten explicitly stated an important legal principle, although in relation to the Companies Act of 1862:

[56] Cassim et al op cit note 2 at 44-45.

[57] Supra note 1 at 31.

[58] Ibid at 33.

[59] Supra note 1 at 30.

> 'The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.'[60]

Evidently, despite Salomon's dominance and the other shareholders' passive stance, the House of Lords was willing to conclude that the separate legal personality of the company should be upheld.[61] This was so to the effect that the secured debentures were declared valid, and Salomon was not held liable for the debts of the company. However, important to note is that an essential consideration in this case was the absence of fraud on the part of the shareholders. What followed this judgment was an adamant precedent apparent in numerous succeeding cases.[62] Consequently, the legal fiction of the corporate veil was sustained, and the notion of separate legal personality firmly entrenched in English law.

2.4.2 *Dadoo Ltd v Krugersdorp Municipal Council*

In 1915 – a time when Indian people were prohibited from owning immovable property in the Transvaal – two Indian shareholders formed a company called 'Dadoo Ltd'. The company purchased property and rented it out to one of the shareholders, Dadoo, in his personal capacity. The Krugersdorp Municipal Council objected to this, arguing that the company had contravened Transvaal Law 3 of 1885 which prevented Asiatic people from owning fixed property.[63] The trial court, as per Judge Wessels held that Dadoo had used the company as a means of doing something that he was not legally permitted to do.

On appeal, the issue that came before the Appellate Division was whether the statute specifically prohibited companies with Indian shareholders from owning property. Chief Justice Innes found against the Municipal Council and held that the statute was not applicable to companies, notwithstanding the fact that the company shares were exclusively held by

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[60] Supra note 1 at 51.

[61] Ibid at 34.

[62] *Macaura v Northern Assurance Co* 1925 AC 619; *Lee v Lee's Air Farming Limited* 1961 AC 12; *Farrar v Farrars Limited* (1888) 40 ChD 395.

[63] Supra note 25 at 2.

persons of Indian origin.[64] Innes, C.J reinforced the principle introduced in the *Salomon* judgment by Lord Macnaghten, namely, that a registered company is legal person separate from the persons which compose it.[65] Innes, C.J emphasised that:

> 'This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members.'[66]

The purchasing of the property by the company was thus not in contravention of any existing statutes preventing the ownership or control of property by Asiatic persons. This case clearly supported the principle that property purchased by a company belongs to the company itself and not to the shareholders. For the purposes of this paper, the discussion of company property will end here. What is important about this judgment is that it introduced the notion of separate legal personality into South African company law.

2.5 CONCLUSION

The principle of limited liability, as established in *Salomon* and later endorsed in *Dadoo*, is a well-founded pillar of South African company law. Moreover, it serves an essential function of advancing the South African economy as it encourages persons to incorporate companies by eliminating the fear of liability. *Salomon* reveals that limited liability is available to shareholders even when they are intricately associated with the company's activities. However, the principle of limited liability and its recognition in the 2008 Companies Act has sometimes been a cover for shareholders to hide behind when disrespecting the corporate structure. Thus, the dominant adversary to limited liability is the doctrine of piercing the corporate veil as it serves to expose such misconduct.

[64] Supra note 25 at 550.

[65] Ibid.

[66] Ibid at 550-551.

CHAPTER 3: SOUTH AFRICAN COMMON-LAW APPROACH TO PIERCING THE CORPORATE VEIL

3.1 INTRODUCTION

Having already considered the roots of separate legal personality, this Chapter will discuss the development of veil-piercing and its application in South African law. Veil-piercing has been described as 'a vivid but imprecise metaphor'.[67] The reason being that it presents a controversial legal issue, namely, in what instances will the court pierce the corporate veil? As it is a rather radical remedy, South African courts are often reluctant to pierce the veil unless there exists an undeniable need to do so. The position taken by our courts has varied over time, with the SCA now having espoused a non-categorisation approach by refusing to create rigid categories of when to pierce the veil. Whilst this dodges the threat that categorising could pose, it has resulted in some uncertainty as to what factual matrixes would invite the remedy. Without attempting to formulate set categories, this Chapter will identify some of the scenarios where the court has in fact pierced the veil. It will also primarily explain the development of the common law approach and the pertinent principles arising from leading cases that demonstrate South African law as it presently stands.

3.2 DEVELOPMENT OF THE COMMON LAW APPROACH

A discussion on the history of the common law is a critical part of apprehending the position in South African law today. It will be revealed how the courts have modified their approach from one of categorisation, as seen in the cases of *Lategan and Another NNO v Boyes and Another* ('*Lategan'*)[68] and *Botha v Van Niekerk* ('*Botha*')[69], to a more flexible and balanced one as seen in *Cape Pacific* and *Hülse-Reutter v Gödde* ('*Hülse-Reutter*').[70]

3.2.1 Categorisation Approach

The 1980 judgment of *Lategan* represents a rigid attitude in respect of veil-piercing. In this case, Le Roux J maintained that courts could only pierce the veil where there has been evidence

[67] Walker J in *Re Polly Peck International plc (in liquidation)* (No 2) [1998] 3 All ER 812.

[68] 1980 (4) SA 191 (T).

[69] 1983 (3) SA 513 (W).

[70] 2001 (4) SA 1336 (SCA).

of fraud.[71] He based his judgment on the precedent set in *Orkin Bros Ltd v Bell*[72] where the court pierced the veil owing to fraud on part of the director. It was found that the 'sole purpose of the transaction was to diminish the personal liability of the directors under a contract of suretyship'.[73] In light of this decision, Le Roux J in *Lategan* remarked that:

> 'Our courts would brush aside the veil of corporate identity time and time again where fraudulent use is made of the fiction of legal personality.'[74]

Nonetheless, the court did not opt to 'brush aside' the corporate veil because the question of fraud was absent. Le Roux J's obiter statement has been referred to as a 'blunt utterance' illustrating the propensity of Judges to categorise instances relating to veil-piercing.[75] It also demonstrates the immensely narrow and limiting approach to applying the doctrine during the 1980s. However, it is firmly accepted now that to hold that fraud is always a precondition to be able to pierce the veil is incorrect.[76]

The judgment was followed shortly thereafter by the *Botha* case which formulated the 'unconscionable injustice' test. Whilst slightly expanding the circumstances in which to pierce the veil, the court highlighted that it would only do so if there was evidence that the plaintiff underwent 'unconscionable injustice' owing to the defendant's improper conduct.[77] To satisfy the test, it must be proven that the defendant engaged in improper conduct – which was not found to be the case in *Botha*. The case involved a contract of sale for a house in which the purchaser was stated as 'Van Niekerk or his nominee'.[78] Van Niekerk was the sole shareholder and director of a company. Inserted into the contract was a guarantee that the balance of the purchase price would be paid by a certain date. This was subsequently not fulfilled, and the seller issued a demand for payment. In response, Van Niekerk argued that a nomination had transpired, and the company now assumed the role of the purchaser. However, the seller argued

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[71] Supra note 68 at 211.

[72] 1921 TPD 92.

[73] Supra note 68 at 211.

[74] Ibid at 201.

[75] *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (C) at 20.

[76] As seen in *Botha*.

[77] Supra note 69 at 525.

[78] Supra note 69 at 513.

that the company was merely a façade and was in fact Van Niekerk acting in another guise.[79] They asked the court to pierce the corporate veil to uphold the contract despite the existence of a valid nomination because Van Niekerk was attempting to evade his contractual obligations.[80]

Flemming J found that there was no unconscionable injustice suffered by the plaintiff because of the defendant's improper conduct.[81] Owing to the nomination provision, the seller accepted the risk that the nominee might be liable and there was no stipulation that the nominee have adequate funds to meet the contractual obligations.[82] Additionally, the court believed that, at the time of the application, it was possible that the company could have sufficient funds to pay the purchase price.[83] Thus, there was no finding of improper conduct and Van Niekerk could not be held liable in his personal capacity. Whilst Flemming J slightly expanded the categories, Domanski[84] argues that his reasons to refuse to pierce the veil were unconvincing. He believes that the court was justified to pierce the veil owing to the improper conduct of the respondent.[85] Van Niekerk failed to timeously adhere to his contractual obligations and only nominated the company at an incredibly late stage in the proceedings. Moreover, the timing of the company's incorporation is suspicious and indicates that Van Niekerk had the intention to escape his contractual obligations.[86] Nevertheless, Flemming J's finding that there was no improper conduct rendered the unconscionable injustice test obiter and confined only to that set of facts.

Despite *Botha* suggesting a small development of the law, both judgments undoubtedly endorsed a categorisation approach. By doing so, they represent the tendency of Judges to rely on several unrelated categories of conduct to justify their decisions. In addition to generating legal inconsistency, the real danger of categorising is accurately depicted by Domanski as follows:

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[79] Supra note 69 at 515.

[80] Ibid.

[81] Ibid at 525.

[82] Ibid at 515 and 525.

[83] Ibid.

[84] Andrew Domanski 'Piercing the Corporate Veil - A New Direction?' (1986) 103 *South African Law Journal* 224.

[85] Ibid at 227.

[86] Ibid.

> '[…] a situation may arise in which considerations of fairness or public policy would call for a decision to pierce the veil, but the court, on the facts, is unable to allocate the case to an established pigeonhole. The obvious counter-argument is that in a proper case it may be open to the court to create a new category to fit the facts. But such a casuistic approach, even if it is permissible, cannot satisfy those who believe that a legal system should be built, as far as possible, on a foundation of principle.'[87]

3.2.2 Balanced Approach

The SCA in *Cape Pacific* famously overturned the categorisation approach to piercing the corporate veil. It moved away from limited categories and encouraged a more flexible attitude. Notably, the principles established in this case represent the common-law position as it stands today.

The primary facts essential to understanding the principles stemming from the judgment are as follows. Gerald Lubner ('Lubner') owned shares in a company called Findon Investments (Pty) Ltd ('Findon') which ultimately enabled him to personally occupy a flat in Clifton. In 1976, he became a non-resident for exchange-control purposes and the Findon shares were transferred to Lubner Controlling Investments (Pty) Ltd ('LCI'). LCI was owned by four trusts through two companies, one of them being the Gerald Lubner Family Trust (Pty) Ltd ('GLI'). Notably, the sole director of LCI was Swerski who was also a director of GLI (along with Lubner). LCI sold shares to Cape Pacific Ltd ('Cape Pacific') in 1979, which essentially gave them access to the Clifton flat. However, LCI denied ever selling these shares and the shares were not transferred as per the agreement. Thus, Cape Pacific instituted action for specific performance (delivery of the shares) in the Cape Provisional Division and was successful. However, it transpired that LCI had already transferred the shares to GLI. Cape Pacific then brought an application against LCI for contempt of court owing to their failure to deliver the shares. Unfortunately, this application failed as they never attempted to join GLI as a party to the proceedings. Finally, Cape Pacific brought an action against Lubner, LCI and GLI. It pleaded that the Court direct GLI and Lubner to deliver the shares to them, and award Cape Pacific its costs. It argued that the Court had grounds to pierce the corporate veil and treat Lubner, GLI and LCI as one in the same because Lubner maintained effective control over all

[87] Domanski op cit note 84 at 225.

the companies and used this to defeat their claim to the shares.[88] In essence, Lubner had used GLI and LCI as his alter egos to retain ownership of the Clifton flat. This was a clear blending of his personal affairs and the companies' transactions as separate legal persons. The trial court ruled against piercing the veil as it believed that the transfer of shares, although objectively improper, did not result in 'unconscionable injustice' because the applicant failed to timeously recover the shares despite having knowledge of the transfer.[89] Arguably, this decision was a questionable application of the 'unconscionable injustice' test and represents an era of judicial caution where judges were hesitant to provide tangible assertions which conflicted with *Salomon*.[90]

In the Appellate Division, Smalberger JA delivered a celebrated judgment still employed today. He affirmed the notion that courts do not possess a general discretion to ignore a company's legal personality whenever it considers it fair to do so.[91] In this respect, courts should not be tempted to lightly neglect separate legal personality but should rather endeavour to uphold it as per the salutary principle.[92] To do otherwise would undermine important company law policy and principles. Nevertheless, dishonesty, fraud or improper conduct could all be appropriate circumstances in which the court could justify piercing the veil.[93] Where this is the case, Smalberger JA advocated for a balanced approach entailing an evaluation of preserving separate legal personality and other policy considerations.[94] In doing so, courts must take a substance over form approach by analysing the parties' real intentions rather than their legal charade. Smalberger JA asserted that, where a company has been legitimately established but nonetheless is used to perpetrate fraud, dishonesty, or improper conduct, then there is no reason why the corporate veil cannot not be pierced.[95] If there is such misuse, courts are permitted to discount the veil and impose liability where it should justly lie. Importantly, Smalberger JA overruled the 'unconscionable injustice' test as formulated in *Botha*, holding

[88] Supra note 26 at 3-4.

[89] Ibid.

[90] Patson Waliwona Manda *A Comparative Analysis of Piercing the Corporate Veil in English and South African Law* (LLM, University of Pretoria) 2019 at 31.

[91] Supra note 26 at 29.

[92] Ibid.

[93] Ibid at 32.

[94] *Die Dros (Pty) Ltd and another v Telefon Beverages CC* and others [2003] 1 All SA 164 (C) at 23.

[95] Supra note 26 at 32.

that it was too strict.[96] What should be preferred is a more flexible approach that relies on an evaluation of the facts of each case to determine when it would be appropriate to pierce the veil. When the court did pierce the veil, it was subsequently revealed that Lubner had complete control over LCI and effectively controlled the affairs of GLI.[97] It was likely that the transfer of shares from LCI to GLI was done to ensure Lubner's continued occupation of the Clifton flat and not for GLI's corporate interest. Lubner's intention was exposed for what it really was – to have GLI as one of his guises.[98]

Another important finding in *Cape Pacific* was that veil-piercing should not be considered a remedy of last resort.[99] This assertion not only contradicts preceding case law but also conflicts with the court's prior statement that the veil should not be lightly neglected. Notwithstanding this judgment, the SCA in *Hülse-Reutter* adopted a much firmer stance. It maintained that veil-piercing only ought to be used as a remedy of last resort and that the separate legal personality of a company must be defended, bar certain rare circumstances.[100] The SCA recognised that the circumstances in which to pierce the veil were still unsettled law and agreed with Smalberger JA in *Cape Pacific* that much would depend on the facts of each case, considerations of policy and judicial judgment.[101] This was supported by the court in *Amlin v Van Kooij*[102] where the court stated that:

> '[…] piercing the veil is rather a drastic remedy. For that reason alone it must be resorted to rather sparingly and indeed as the very last resort in circumstances where justice will not otherwise be done between two litigants. It cannot, for example, be resorted to as an alternative remedy if another remedy on the same facts can successfully be employed in order to administer justice between the parties.'[103]

[96] Supra note 26 at 37.

[97] Ibid at 35-36.

[98] Ibid.

[99] Ibid at 38.

[100] Ibid at 23.

[101] Cassim et al op cit note 2 at 65.

[102] Supra note 75.

[103] Supra note 75 at 23.

It must be highlighted that the facts of *Hülse-Reutter* did not lend themselves to an alternative remedy available for the litigant. This likely influenced the SCA's decision to rule it as a remedy of last resort where no other remedy exists. It can be argued that *Cape Pacific* would find acceptance and applicability in cases where there are in fact other remedies available to the parties. Thus, what the court submits must still stand true:

> 'If the facts of a particular case otherwise justify the piercing of the corporate veil, the existence of another remedy, or the failure to pursue what would have been an available remedy, should not in principle serve as an absolute bar to a court granting consequential relief. The existence of another remedy, or the failure to pursue one that was available, may be a relevant factor when policy considerations come into play, but it cannot be of overriding importance.'[104]

The court in *Cape Pacific* should be commended for not attempting to squash the facts of the case into prevailing categories of appropriate circumstances which authorised the court to pierce the veil. Rather, Smalberger JA adopted a flexible approach dependent on the facts of each case and a balancing of conflicting principles. Such an approach was a big leap from prior case law and signified a movement away from rigid categorisation. Nonetheless, South African courts have battled to maintain a sufficient level of certainty throughout the decades as courts still do not know the exact circumstances in which to pierce the veil.[105] Fortunately, although the SCA in *Hülse-Reutter* took a slightly more rigid stance, there are overlapping principles that tend to indicate a harmonised common-law approach. Firstly, the main theme is upheld that courts do not have a general discretion to pierce the veil and the decision should not be made lightly. Secondly, fraud is not a prerequisite to pierce the veil but there must be some abuse of the company's corporate personality. Thirdly, a balanced approach should be adopted to balance the need to pierce the veil against the need to preserve the company's separate legal personality. It is submitted that this approach is the most appropriate in safeguarding legal certainty. This is supported by many South African authors who hold a firm belief that to attain the most accurate outcomes, an even-handed approach to piercing the veil is vital.[106] In conclusion, there is no reason why courts should not pierce the veil if 'it can be established on

[104] Supra note 26 at 38.

[105] This is evidenced by conflicting judgments on piercing the veil being a remedy of last resort.

[106] Supra note 70 at 20; Domanski op cit note 84 at 231-235; Cassim et al op cit note 2 at 56.

a balance of probabilities that the particular transactions complained of were the tainted fruits of fraud or other improper conduct'.[107]

3.3 INSTANCES WHERE THE COURT HAS PIERCED THE CORPORATE VEIL

It will be valuable to explain some common instances where the court has in fact pierced the corporate veil under the common law. This section is not an attempt to create rigid categories but merely to identify the circumstances when the court has found it necessary to pierce the veil, considering that it is deemed a rather exceptional remedy. This will constructively serve the discussion on the Swedish common law in Chapter 6.

3.3.1 Using separate legal personality to evade contractual duties

Courts have often found it essential to pierce the veil in circumstances where the company has been used as a mechanism to escape contractual duties. For example, in *Gilford Motor Co Ltd v Horne*[108], a former director of the company had signed a restraint of trade agreement which disallowed him from engaging in any similar business activities for a five-year period. Nonetheless, after his employment was terminated, the director formed a company that was in competition with the former company's business. The director argued that he had not breached the agreement as it was the company, as a separate legal person, who was in competition and not himself personally.[109] The court did not accept this argument and asserted that the company was used as a ploy to disguise the effective carrying on of a business by the director and a breach of his contractual duties.[110]

A similar situation was seen in the *Le'Bergo Fashions CC v Lee*[111] case. Here, the respondent had signed a restraint of trade agreement not to engage in business activities that competed with the applicant. However, the respondent proceeded to compete with the applicant by using her company which she was the sole director and shareholder of. The issue was whether the company could be held liable for the breach of the restraint of trade agreement

[107] As stated by Nxusani AJ in *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* 2009 ZAFSHC 67at 17.

[108] [1933] Ch 935 (CA).

[109] Cassim et al op cit note 2 at 57.

[110] Supra note 108 at 956.

[111] 1998 (2) SA 608 (C).

even though it was not a party to it. The court held that the respondent and the company had acted as one person as the respondent had used the company as an instrumentality for fostering her business activities.[112] The court believed that this demonstrated that the respondent was involved in improper conduct as she used the company as a disguise to breach an agreement and avoid any contractual obligations arising therein.[113] Importantly, the court noted:

> 'It also seems clear that a company can be a façade even though it was not originally incorporated with any deceptive intentions, what counts is whether it is being used as a façade at the time of the relevant transaction.'[114]

These cases demonstrate that the separate legal personality of a company cannot be used as a ploy for avoiding contractual obligations. If this is the case, the court has deemed it necessary to pierce the corporate veil and expose the situation for what it really is.

3.3.2 Using separate legal personality to escape fiduciary duties

This ground specifically applies to directors as they owe the company several mandatory fiduciary duties.[115] Importantly, directors are not permitted to evade their fiduciary duties by hiding behind the separate legal personality of another company to make it seem that it is the other company, and not them, entering into the specific transaction. If this is found to be the case, a court may pierce the corporate veil to expose the true nature of the transaction. This was seen in *Robinson v Randfontein Estates Gold Mining Co Ltd*[116], where a director had used the separate legal personality of a subsidiary company to escape his fiduciary duties that he owed to the holding company. The Appellate Division refused to preserve the separate legal personality of the subsidiary company, holding that it was merely a mechanism that the director had used to escape his fiduciary duties to the holding company.[117]

[112] Supra note 111 at 613.

[113] Ibid at 613-14.

[114] Ibid at 133.

[115] Supra note 9 at 76.

[116] 1921 AD 168.

[117] Cassim et al op cit note 2 at 56.

3.3.3 Using separate legal personality as a sham to deceive third parties

The court has pierced the veil where a company is used to pretend to be something, which in reality it is not, for the purposes of deceiving third parties.[118] A sham may take the form of an act or document but, most significantly, the intention to deceive a third party must be present.[119] An example of this was seen in *Hülse-Reutter* where the appellants had the common intention to hide their identities through using the separate legal personality of a company. According to Scott JA, this element of concealing the truth justified the court to pierce the corporate veil.[120] This finding was supported by numerous UK cases[121], one being *Adams v Cape Industries*[122], where the court held the following:

> 'The court was entitled to pierce the corporate veil and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or façade to conceal the true facts, thereby avoiding or concealing any liability of those individual(s)'.[123]

3.3.4 Using the company as an alter ego

According to Blackman[124], the alter ego doctrine encompasses two distinct concepts. On the one hand, it is used to ascertain the subjective mind of the company as a way of imputing the intention of the controllers onto the company itself.[125] On the other hand, it is used to reveal any offensive behaviour by the shareholders of a company, where the company has been used as an extension of themselves.[126] The latter concept relates to piercing the corporate veil and, in such case, the separate legal personality of the company is not recognised. The alter ego doctrine in relation to veil-piercing indicates that the shareholder has used the corporate veil to realise an inappropriate goal which the shareholder personally intends to do.[127] The courts will

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[118] Supra note 75 at 23.

[119] *Snook v London and West Riding Investments Ltd* [1967] 2 Q.B. 786 at 802.

[120] Ibid at 218.

[121] Ibid. See also *Hitch v Stone (Inspector of Taxes)* (2001) EWCA Civ 63; *Trustor AB v Smallbone (No 2)* [2001] EWHC 703; *Woolfson v Strathclyde Regional Council* [1978] UKHL 5.

[122] 1991 1 All ER 929.

[123] Ibid at 23.

[124] Blackman op cit note 34 at 4-137.

[125] Ibid.

[126] As seen in *Cape Pacific*.

[127] Blackman op cit note 34 at 4-137.

look at the reality of the situation and the way the company was operated. Notably, merely having control over a company is not sufficient to pierce the veil, there must be some element of impropriety involved.[128] This was seen in *Cape Pacific* where Smalberger JA found that Lubner had exercised absolute control over the companies and that they were essentially his alter egos.[129] Smalberger JA opined that:

> 'There was but one purpose – that of Lubner, and one will – that of Lubner. Policy considerations strongly suggest that the veil of corporate personality should be pierced in relation to LCI's and GLI's fraudulent or improper dealings with the Findon shares in order to reveal Lubner as the true villain of the piece.'[130]

3.4 CONCLUSION

With any luck this section has not only sufficiently elucidated the development of the common law but also demonstrated the disconcerted nature of the law regarding when to pierce the corporate veil. Evidenced by frequent references in contemporary cases, *Cape Pacific* is still considered the leading case reflecting the common law position.[131] Accordingly, there is no exhaustive list of circumstances dictating when courts are required to pierce the veil and it will rather be contingent on a comprehensive factual analysis, policy considerations and judicial discretion.[132] Courts are, and should be, reluctant to frivolously disregard separate legal personality and thereby destabilise the policies of corporate personality. However, where there is evidence of fraud, dishonesty or other improper conduct, courts are permitted to evaluate the substance of the facts to ascertain whether misappropriation of the corporate personality has occurred.[133] On a positive finding, the court may ignore the veil and impute liability in a justifiable manner.

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[128] Marais op cit note 33 at 52.

[129] Supra note 26 at 34.

[130] Ibid at 35.

[131] As seen in cases such as *Kolisang v Alegrand General Dealers and Auctioneers and Another* 2022 ZAGPJHC 431; and *Trustees for the time being of the Bymyam Trust v Butcher Shop and Grill CC* 2021 ZAWCHC 269.

[132] Supra note 26 at 29-32.

[133] Ibid at 28.

CHAPTER 4: SOUTH AFRICAN STATUTORY LAW APPROACH TO PIERCING THE CORPORATE VEIL

4.1 INTRODUCTION

The introduction of section 20(9) was momentous in South African company law as it was the first general provision to disregard the company's separate legal personality.[134] It retained the common-law approach whilst providing an unequivocal statutory remedy for aggrieved litigants to rely on. Prior to the enactment of the 2008 Companies Act, veil-piercing was governed by the common law and the 1973 Companies Act.[135] Although the 1973 Companies Act permitted the court to hold directors and shareholders personally liable in some cases, there had yet to be a statutory provision giving the court direct authority to pierce the veil.[136] The structure of section 20(9) was based on section 65 of the Close Corporations Act[137] which was worded so that courts could interpret it in a way that incorporated a range of conduct not embraced by the personal liability provisions in the 1973 Companies Act.[138] Section 65 of the Close Corporations Act reads 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.'[139]

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[134] Rehana Cassim 'Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction' (2014) *South African Mercantile Law Journal 26*, no. 2 at 307.

[135] Companies Act 61 of 1973.

[136] Cassim et al op cit note 2 at 76. Personal liability under the 1973 Companies Act was found in sections 50(3), 66, 172(5)(b), 280(5), 344(h) and 424. According to MS Blackman op cit note 34 at 2 – 182, veil-piercing could be said to have transpired when directors were held liable for the 'loss, damages or costs sustained by the company as a consequence of the actions of the director'.

[137] 69 of 1984.

[138] Bailey op cit note 31 at 36.

[139] Supra note 137 at 65.

Similarly, section 20(9) of the 2008 Companies Act states:

> 'If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may—
>
> (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the 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).'

Whilst the introduction of this section has been commemorated, it has sparked substantial debate as to how it should be applied. The reason being that it neglects to provide a definition of the term 'unconscionable abuse' or to clarify the circumstances that may in fact constitute 'unconscionable abuse'.[140] It also sparks uncertainty as to whether section 20(9) supersedes the common law instances of veil-piercing or whether it must still be considered as a remedy of last resort. Further, it lacks guidance in respect of 'interested person' as it omits to indicate which persons would fall under this term.[141] Fortunately, Binns-Ward J in the case of *Gore* provided a valued judgment offering guidance on the interpretation of section 20(9). Such guidance will be utilised in this dissertation to unpack section 20(9) and to assert the purposive approach in which to interpret it.

4.2 INTERPRETATION OF SECTION 20(9)

To enable an accurate interpretation of section 20(9) of the 2008 Companies Act, it is necessary to explain the interpretation method required by both the Act and the Constitution.[142]

4.2.1 Constitutional Dispensation

The constitutional dispensation has seen a movement away from a strict rule-based interpretation, which focused on the intention of the Legislature, towards one that is value-

[140] Cassim op cit note 134 at 307.

[141] Ibid.

[142] Supra note 27.

based. This is evidenced by section 39(2) of the Constitution which requires any legislation to be interpreted in line with the 'spirit, purport and objects of the Bill of Rights'.[143] Froneman J in *Matiso v The Commanding Officer, Port Elizabeth Prison*[144] emphasised that the interpretative notion of establishing the Legislature's intention no longer applies in our system of judicial review based on the supremacy of the Constitution.[145] The reason for this is simple: it is the Constitution that is sovereign and not the Legislature. This was supported by Wallis J in *Natal Joint Municipal Pension Fund v Endumeni Municipality.*[146] Here, it was also clarified that interpretation is objective as opposed to subjective. It entails attributing meaning to the words used in a document by affording consideration to the context of the provision in relation to the entire document as well as the circumstances that gave rise to its existence.[147]

When interpretating section 20(9), courts are obliged to follow the purposive and value-based approach as depicted above. In doing so, courts must be cautious not to interpret section 20(9) in an inconsistent manner so as to imprint their subjective views into the jurisprudence and ultimately trigger legal ambiguity. Additionally, due consideration must be afforded to the legislation's apparent purpose, the separation of powers doctrine, and the manner in which citizens of the country may ordinarily interpret the provision to which they will be governed by.[148]

4.2.2 Interpretation as per the 2008 Companies Act

According to Blackman, section 5 of the 2008 Companies Act is required to be read in a holistic manner with the rest of the Act – particularly with the preamble, sections 6, 7, 158 and 220, and the associated notes.[149] Moreover, section 5(1) requires that the Act be interpreted and applied in a way that upholds the express purposes contained in section 7. The reason for section 5's insertion into the legislative text was likely to ensure that interpreters take cognisance of the general purpose of the 2008 Companies Act. Subsequently, this means that

[143] Supra note 27 at 39(2).

[144] 1994 3 SA 592 (SE).

[145] Ibid at 597B-H.

[146] 2012 (4) SA 593 (SCA).

[147] Ibid at 18.

[148] Blackman op cit note 34 at 1-45.

[149] Ibid at 1-36.

all future interpretations of section 20(9) must accord with such purpose and must be upheld over interpretations that would tend to defeat it.

However, it must be noted that section 5 read with section 7 is not decisive in and of itself. The South African Law Reform Commission asserts that, if we were to hold this view, we would merely be generating a new version of literal interpretation.[150] When interpreting legislative texts, one must assess relevant external and internal aids instead of solely relying on the purposive provision.[151] In this respect, a purpose-seeking interpretative process cannot be confined to section 7 but must additionally be informed by judicial judgment.[152] Thus, a judge is not free to simply consider section 7's broad purpose and then formulate their own policy through a subjective interpretation of the provision. Instead, the aim of section 7 is to direct and, in a sense, forcefully guide the interpreter in interpreting the legislation in a manner that aligns with the Act itself and the constitutional demands.[153]

4.2.3 Ex Parte Gore

As mentioned, section 20(9) has created some ambiguity as to the meaning of certain elements of the provision. However, the case of *Gore* has clarified the interpretative approach to section 20(9) and offers some imperative guiding principles. Notably, *Gore* is the leading case on the matter and the principles established therein are still respected currently. What follows is an analysis of section 20(9) using the principles established in *Gore* as well as additional case law. For this to be advantageous, the pertinent facts of this noteworthy judgment will be discussed before investigating further.[154]

The applicants were the liquidators of 41 companies which formed part of a group of companies, known as 'the King Group'. King Financial Holdings Limited ('KFH'), the holding company, was also in liquidation. The majority of KFH's shares were held by the trustees of the Paul King Beleggings Trust, the Adrian King Beleggings Trust and the Stephen King Beleggings Trust ('the King brothers'). The King brothers were the directors of KFH and most

[150] South African Law Reform Commission Issue Paper 112 (Protect 25) Statutory Revision: Review of the Interpretation Act 33 of 1957 (2006).

[151] Ibid at 40.

[152] Blackman op cit note 34 at 1-46.

[153] SALRC op cit note 150 at 41.

[154] Supra note 5 at 5-16.

of its subsidiaries and effectively exercised control of the Group. The companies provided financial services through marketing investments in residential and commercial immovable property. In 2008, the King Group's activities attracted the Financial Services Board's interest and resulted in a search and seizure operation. The inspection report revealed widespread irregularity in the King Group's business conduct and sparked another investigation by accountants into the receipt and allocation of the King Group's investments. It transpired that the King Group had been managed in a way that did not preserve any discernible corporate identity between the different companies in the Group. The entire Group was essentially operated as one entity under the control of the holding company, notwithstanding the fact that the only company in the Group legally registered as a financial service provider was King Services (Pty) Ltd. As a result of the dishonest administration of the companies' affairs, it was difficult for the liquidators to identify the correct corporate entities against which the investors had claims. The issue before the court was whether to pierce the veil and ignore the separate legal personality of the subsidiary companies and treat their assets as assets of the holding company for the sake of the investors' claims. The applicants relied on the common law and, in the alternative, section 20(9) of the 2008 Companies Act.

Binns-Ward J stressed that the language of section 20(9) is cast in very broad terms, implying that the lawgiver would appreciate that the provision find application in widely changing factual settings.[155] Additionally, the width of the provision has consequently expanded the circumstances in which courts may be willing to grant relief through discounting corporate personality.[156] Section 20(9) thus provides a 'firm, albeit very flexibly defined, basis for the remedy, which will inevitably operate to erode the foundation of the philosophy that piercing the corporate veil should be approached with an *a priori* diffidence'.[157] The provision thus moves away from the idea that the remedy is drastic or exceptional by asserting that it is available purely when the factual matrix of a case justifies it.[158]

Binns-Ward J went on to address the statutory provision's relationship with the common law. In interpreting section 20(9), he emphasised that section 5 read with section 7 of the Act

[155] Supra note 5 at 32.

[156] Ibid.

[157] Ibid at 33.

[158] Ibid at 34.

must be consulted so as to uphold the true purpose of the Act. In doing so, Binns-Ward J responded to the debate surrounding whether section 20(9) has replaced on the common law position by asserting that: 'there is no express intention apparent to that effect' but likewise there is 'no express indication that the intention is not to displace the common law'.[159] In line with the recognised predisposition against rigid categories of veil-piercing and the lack of a convincing definition of common-law principles, Binns-Ward J emphasised that section 20(9) should be considered supplemental to the common law, as opposed to substitutive.[160]

The *Gore* judgment is momentous in encouraging an accurate and purposive interpretation of section 20(9). It also clarifies that section 20(9) is not contrary to the common-law principles established in cases before its hearing but nonetheless emphasises that the remedy is generally available whenever there exists an illegitimate use of the juristic personality of a company. In applying his newly developed guidelines to the facts, Binns-Ward J found that the conduct of the King Group, which encompassed a blatant disrespect for the separate legal personalities of the individual companies, would in itself constitute a considerable abuse of the corporate personality of all the entities concerned.[161] He concluded that the King companies shall be deemed a single entity by disregarding their separate legal personalities and treating KFH, as the holding company, as if it were the only company.[162] Notably, substantial findings were made in relation to the terms 'interested person' and 'unconscionable abuse' to be discussed separately below alongside supplementary case law.

4.2.4 'Interested person'

The application to invoke section 20(9) must be brought by an 'interested person' or by the courts own initiative.[163] The 2008 Companies Act fails to define what is meant by the term 'interested person' which indicates the intention of the legislative drafters to give a wide ambit to the section. According to the court in *Gore*, the standing of any person looking to invoke the section 20(9) remedy should be ascertained based on well-established principle and, if the facts

[159] Supra note 5 at 31.

[160] Ibid at 34.

[161] Ibid at 37.

[162] Ibid.

[163] Blackman op cit note 24 at 2-181.

involve a right in the Bill of Rights, section 38 of the Constitution.[164] The term must not be overcomplicated but the general rule is that persons who approach the court for relief should prove that they have the necessary *locus standi* by establishing a direct interest in the matter.[165] The court in *Jacobs v Waks*[166] ('*Jacobs*') highlighted that the direct interest must be a real, as opposed to hypothetical, one and should not be too remote.[167] For example, the court in *Gore* stated that there was no doubt that the liquidators of the constituent companies had a direct and sufficient interest in the relief.[168] Conversely, as seen in *Dalrymple v Colonial Treasurer*[169], a taxpayer who has paid his taxes does not necessarily possess the right to be consulted in the disposal and dealings of these taxes. Here, such an interest was deemed to be too remote.[170]

As mentioned, the wording of section 20(9) was strongly influenced by section 65 of the Close Corporations Act. The court in *TJ Jonck BK h/a Bothaville Vleismark v Du Plessis NO*[171], when interpreting section 65, suggested that the term 'interested person' is limited to a financial or monetary interest.[172] It must then be ascertained whether 'interested person' contained in section 20(9) acquires a similar meaning in the context of its almost identical wording. Instead of explicitly addressing this issue, Binns-Ward J in *Gore* merely upheld the findings from the *Jacobs* case. In *Jacobs*, the court clarified that it is not required that the interest be measured in monetary terms.[173] On the facts, the court held that the respondent possessed a direct interest in having certain City Council decisions set aside because they infringed on his dignity – which is evidently not a financial interest nor one that can be measured in money.[174] *Gore's* acceptance of the *Jacobs* case implies that section 20(9) has an extended meaning to section 65 of the Close Corporations Act in that it does not require that an 'interested person' have a

[164] Supra note 5 at 35.

[165] *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1998 (3) SA 369 (A) at 388.

[166] 1992 (1) SA 521 (A).

[167] Ibid at 533-4.

[168] Liquidators, by nature, have a very real interest in the assets of the company and winding up the correct company within the group.

[169] 1910 TS 372 at 390.

[170] Cassim op cit note 135 at 313.

[171] 1998 (1) SA 971 (O)

[172] Ibid at 986.

[173] Supra note 166 at 535.

[174] Ibid.

financial or monetary interest. However, this was not expressly affirmed in this case and the question as to whether a litigant is an 'interested person' under section 20(9) will always depend on the facts of the case. In other words, where the absence of a financial or monetary interest of a litigant would cause the interest to be too remote, then a financial or monetary interest would clearly be mandatory.[175]

Notably, an application from an 'interest person' is not the only way to permit the court to pierce the corporate veil. The legislature has afforded the court a degree of autonomy through using the words 'or in any proceedings in which the company is involved' in section 20(9). This indicates that a court may, of its own accord, decide to pierce the corporate veil even if the litigant has not asked the court to do so. Such an interpretation was upheld by Binns-Ward J in *Gore* – exemplifying the breadth of the courts' powers and direction to pierce the veil under section 20(9).[176]

4.2.5 'Unconscionable abuse'

Despite the wide discretionary powers of the court, the standard of 'unconscionable abuse' must be satisfied before piercing the corporate veil under section 20(9). Unfortunately, but to be expected, the Legislature omitted to define the term and thus reference must be made to relevant case law. Notably, this paper guarantees that the following interpretation of 'unconscionable abuse' is conducted in a manner consistent with the overall purposes of the Companies Act as listed in section 7.

Section 65 of the Close Corporations Act refers to the 'gross abuse' of the juristic personality of the corporation, whereas section 20(9) provides that a company will not be considered a juristic person where there is an 'unconscionable abuse' of its juristic personality. It is questionable why the Legislature opted to use the words 'unconscionable abuse' instead of strictly mimicking section 65, since the purpose of the two provisions is essentially the same. In the context of section 65, the court in *Mncube v District Seven Property Investments CC*[177] specified that a 'gross abuse' of the corporate personality would be seen where the corporation

[175] Cassim op cit note 134 at 316.

[176] Ibid at 310. Notably, this dissertation does not attempt to exam whether it is acceptable to afford courts such a wide power.

[177] (2006) JOL 17381 (D)

is used for a 'nefarious purpose'.[178] What is meant by this appears unclear. Binns-Ward J in *Gore* explained that 'gross abuse' encompasses a more severe connotation than 'unconscionable abuse'. In providing clarity as to the meaning of the latter term, he held that:

> 'The term "unconscionable abuse of the juristic personality of a company" postulates conduct in relation to the formation and use of companies diverse enough to cover all the descriptive terms like "sham", "device", "stratagem" and the like used in that connection in the earlier cases, and – as the current case illustrates – conceivably much more'.[179]

According to Binns-Ward J, it suffices to assert that the provision creates a remedy that can be used whenever there is an illegitimate use of the company's juristic personality which unfavourably impacts a third party in a manner that reasonably should not be tolerated.[180] The Judge is effectively creating a lower standard of abuse to be met under section 20(9) than the degree of abuse required for veil-piercing under section 65. Importantly, he also rejected the finding in *Botha*, where the court held that it would only pierce the veil if there was 'unconscionable injustice' as a result of the defendant's improper conduct.[181] In drawing a distinction between the two, Binns-Ward J illustrated that 'unconscionable abuse' is where the conduct gives rise to the remedy of veil-piercing, whereas 'unconscionable injustice' links to the result of the defendant's conduct which is suffered by the plaintiff.[182] This was in line with the reasoning in *Cape Pacific* where it was held that the test of unconscionable injustice, as expressed in *Botha,* was too constricted and the court advocated for a more flexible approach.[183] In *Gore*, the court did not waver to find an unconscionable abuse of the companies' juristic personalities. Binns-Ward J opined that the controllers of the companies had failed to draw the appropriate distinction between the separate personalities of the constituent companies in the group and had misrepresented to the investors the manner in which their funds were being used.[184]

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[178] Supra note 177 at 14.

[179] Supra note 5 at 33.

[180] Ibid.

[181] Ibid at 34.

[182] Ibid at 34-36.

[183] Supra note 26 at 37.

[184] Ibid at 33.

This paper has advocated for a purposive approach to be adopted when interpreting section 20(9) yet the court in *Gore* failed to do this and subsequently relied too heavily on a literal interpretation of the term 'unconscionable abuse' by distinguishing it from 'gross abuse' in section 65. It thus set the standard for 'unconscionable abuse' tremendously low so as to encompass just about any type of abuse of the juristic personality.[185] The result is that a litigant's likelihood of success in bringing the remedy would be significantly greater when relying on section 20(9) as opposed to the common law. Another point of issue taken with the distinction is that, despite the miniscule difference in wording, both section 65 and section 20(9) essentially have the same purpose: preventing an abuse of the corporate personality. In *Ebrahim v Airport Cold Storage*[186], the SCA did not interpret the slight variance in wording between section 64 of the Close Corporations Act and section 424 of the Repealed Companies Act. The SCA believed the sections to have the same substance and to therefore possess the same threshold requirement.[187] With this context in mind, it is submitted that section 20(9) and section 65 be afforded the same meaning or, at the very least, 'unconscionable abuse' must be interpreted through a narrower lens than done by the court in *Gore*. To do otherwise would risk opening the floodgates to litigation and would result in amplified occurrences of piercing the corporate veil at the cost of safeguarding the sanctity of separate legal personality.[188]

4.2.6 Incorporation, use, or acts

Cassim et al highlights that 'unconscionable abuse' of the company's juristic personality can occur in three ways: (i) upon the company's incorporation; (ii) as a consequence of any use of the company; and (iii) as an outcome of any act by, or on behalf of, the company.[189] Consequently, it is not a prerequisite to raise section 20(9) only where the company has been created as a sham or stratagem. Section 20(9) may also be invoked where the company was legitimately formed but is later misused.[190] Hence, the drafting of this section is fairly liberal

[185] Cassim op cit note 134 at 318.

[186] (Pty) Ltd 2008 SA 585 (SCA).

[187] Ibid at 13.

[188] Bailey op cit note 33 at 48.

[189] Cassim et al op cit note 2 at 80.

[190] Ibid.

as there is much leeway for a wide interpretation of 'any use of' the company. Nonetheless, it aligns with the common-law position, as expressed by the Appellate Division in *Cape Pacific*, that the court may pierce the veil even if the company was legitimately created and operated but is later misused for one specific event.[191] In this regard, it is not essential that the company be 'conceived and founded in deceit' before a court may elect to discount the corporate personality.[192]

4.2.7 'Deemed not to be a juristic person'

As made clear by Smalberger JA in *Cape Pacific*, the salutary principle is firmly entrenched in South African law and courts should strive to uphold it.[193] The fact that section 20(9) permits a court to deem a company not to be a juristic person is a weighty consequence since the outcome is that the company's separate legal personality in relation to specific rights, obligations or liabilities of the company will terminate.[194] Another issue is that, although section 20(9) requires courts to allocate liability to those responsible for the conduct, it affords little guidance as to what would be considered suitable when deeming a company not to be a juristic person.[195] Further, section 20(9)(*b*) gives courts a wide discretion when deciding on the degree of liability to impute as it permits courts to grant 'any further order the court considers appropriate to give effect to a declaration' of deeming the company not to be a juristic person.[196] In *Gore*, the court remarked that section 20(9)(*b*) empowers the courts with 'the very widest of powers to grant consequential relief'.[197] Despite these extensive powers, there is an obvious lack of assistance as to what would be an appropriate degree of liability to award and it is left to the discretion of the court to make such decisions. It could be argued that this is yet another flaw in the drafting of section 20(9) as it contributes to the plentiful cavities left by the statutory remedy.

[191] Supra note 26 at 28.

[192] Ibid.

[193] Ibid at 29.

[194] Cassim et al op cit note 2 at 85.

[195] Bailey op cit note 33 at 49.

[196] Supra note 9 at 20(9)(b).

[197] Supra note 5 at 34.

4.2.8 'Rights, obligations, or liabilities'

Section 20(9) mandates that the 'unconscionable abuse' be in relation to specific rights, obligations or liabilities of the company, or its members (in the case of a non-profit company), shareholders or another person specified in the declaration. The meaning of this is clear: even if there exists an unconscionable abuse, a court is not empowered to interpose using section 20(9) where it does not link to any such right, obligation or liability.[198] For a better understanding, see the following example:

> '[…] where a court comes to the conclusion that a company was incorporated for an unlawful purpose, such as lending money above the permitted rate in terms of the provisions of the Usury Act 73 of 1968, the court may not intervene under section 20(9) of the Act where the company has never made a loan to anyone, whether at or above the permissible rate'.[199]

4.2.9 Consequences of creating a statutory remedy

Through the introduction of section 20(9) and thus the codification of a statutory remedy of veil-piercing, litigants may seek to pierce the veil even where other effective solutions exist against the company. This indicates a clear divergence from the common law as it eliminates any uncertainty that veil-piercing may be applied as a remedy of last resort. This was confirmed in *Gore* where Binns-Ward J found that the doctrine was applicable regardless of the existence of other effective remedies.[200] He emphasised that the SCA's declaration in *Hülse-Reutter* – that the remedy is of an exceptional nature – has been misinterpreted to suggest that a litigant cannot rely on veil-piercing if there is an alternative remedy available.[201] Although veil-piercing must not be frivolously relied upon, the current position is that, where the court has the opportunity to use a remedy that would uphold the separate legal personality of a company, it may nonetheless elect to pierce the veil under section 20(9).[202] This approach harmonises section 20(9) with the common law as expressed in *Cape Pacific,* that veil-piercing is not a

[198] Cassim et al op cit note 2 at 85.

[199] FHI Cassim, MF Cassim, R Cassim, J Shev & J Yeats *Contemporary Company Law* 2 ed (2012) Juta and Co at 63.

[200] Supra note 5 at 34.

[201] Ibid.

[202] Cassim op cit note 135 at 322.

remedy of last resort and is a powerful mechanism that should be relied upon to thwart abuse of the corporate personality.

The codification of the doctrine in section 20(9) also prevents the common law from limiting the application of the statutory remedy by not expressly permitting such a limitation within the wording of section 20(9).[203] This is supported by a consideration of section 65 of the Close Corporations Act, where no courts attempted to limit the application of section 65 to a remedy of last instance.[204] However, as discussed earlier, the court in *Gore* clarified that the common-law remedy has not been displaced by section 20(9).[205] Where the section 20(9) requirements cannot be met, the common-law remedy will apply. Moreover, the common law can provide useful guidelines in interpreting section 20(9) – particularly the balanced approach as advocated for in *Cape Pacific*. Unfortunately, the downfall that exists with codifying the doctrine is that piercing the veil may become stagnant, especially if the courts interpret section 20(9) in an overly technical manner.[206]

4.3 CONCLUSION

Section 20(9) has afforded the courts an extensive set of powers in terms of its discretion to pierce the corporate veil. Even if a litigant has not requested the court to pierce the veil, it may now do so out of its own accord and in the presence of alternative remedies that would not require a disregard for the company's legal personality. Although section 20(9) is welcomed, one cannot ignore its relatively vague wording that has given rise to misinterpretations by our courts. However, the much-admired judgment of Binns-Ward J in *Gore* has elucidated many of the interpretative gaps that were unexplained by the 2008 Companies Act, such as the meaning of 'interested person' and 'unconscionable abuse'. The latter term was given a remarkably expansive interpretation so as to encompass even more abusive situations than under section 65 of the Close Corporations Act.

The development of piercing the corporate veil in South African law has taken time to find stability. Prior to the introduction of section 20(9), courts had opted for a stricter approach

[203] Marais op cit note 33 at 187.

[204] Ibid.

[205] Supra note 5 at 34.

[206] Cassim et al op cit note 2 at 77.

to applying the remedy since the need to preserve the separate legal personality of companies was placed in an overpowering light. Despite its loose wording, section 20(9) – and the subsequent interpretative guidelines provided by *Gore* – represent a creditable approach to piercing the corporate veil when equated globally. In the chapters that follow, the position in South Africa will be compared to the significantly distinct approach adopted in Swedish company law.

CHAPTER 5: SEPARATE LEGAL PERSONALITY IN SWEDEN

5.1 INTRODUCTION

As this Chapter will demonstrate, South Africa's corporate structure in relation to the concept of a company seems to be mirrored in Sweden. Despite the Swedish company sometimes being referenced using the broader term 'corporate business organisation', it nonetheless acquires separate legal personality distinct from its shareholders as is the case in South Africa.[207] To draw an accurate comparison between the two countries, it is necessary to examine the concept of a Swedish company and thus reveal which situations give rise to limited liability (as one of the so-called advantages of separate legal personality). In other words, it is important to ascertain whether the notion of limited liability has a comparable connotation in Swedish law to that of South African law.

5.2 THE COMPANY

The Swedish company has been defined as a legal fiction which functions as a nexus of contracted relationships, and which has divisible residual claims on its cash flows and assets.[208] Crucial to its operation are the shares that are distributed among the company's shareholders. Those who possess company shares acquire two privileges. The first being the right to vote at the annual general meeting, and therefore offering their input into significant affairs and the composition of the company.[209] The second being the ability to relish the economic benefits of the company.[210] It can thus be said that the general objective of a company is to produce profits for the shareholders. To do this, the company must comply with the necessary requirements to be recognised as a legal entity with legal capacity to enter into commercial transactions. For a successful incorporation, the Swedish Companies Act requires that the company be registered at the Companies Registration Office and that the shareholders provide at least 50 000 Swedish

[207] Philip Knutsson *Piercing the Corporate Veil: Limits of Limited Liability* (LLM, Stockholm University) 2017 at 14.

[208] Philip Örn *Piercing the Corporate Veil – a Law and Economics Analysis* (LLM, Lund University) 2009 at 10; Marios Koutsias 'Shareholder Supremacy in a Nexus of Contracts: A Nexus of Problems' (2017) *Kluwer Law International* at 136-138.

[209] Supra note 10 at 7:2.

[210] Torsten Sandström *Swedish Corporate Law* 4 ed (2012) Norstedts Juridik AB at 139 and 178.

Krona ('SEK') as initial share capital.[211] The latter requirement serves as a type of guarantee for the company's creditors. Apart from meeting incorporation requirements, Hansmann and Kraakman[212] submit that the Swedish company holds the following five characteristics: (i) centralised management under a board structure; (ii) transferable shares; (iii) shared ownership by contributors of capital; (iv) legal personality; and most importantly (v) limited liability.[213] The last two attributes are the most relevant to this paper's comparative analysis and will be addressed in more detail below.

5.3 LEGAL PERSONALITY AND LIMITED LIABILITY

Upon successful registration, the company acquires a separate legal personality which enables it to conclude commercial agreements and own assets distinct from its shareholders.[214] Hansmann and Kraakman assert that the company assumes a robust type of legal personality that encompasses two common-law rules, namely, the rule of liquidation protection and the priority rule.[215] The former rule proclaims that shareholders are prevented from simply demanding their share of a company's assets at any given time so as to potentially bring about the liquidation of the company.[216] This safeguards the operation of the company and ensures that its value remains distinct from its shareholders or their personal creditors.[217] The latter rule states that the creditors of the company acquire a higher priority right to the company assets than the personal creditors of the shareholders.[218] This renders it easier for the company to conclude contracts as creditors can rely to a larger degree on the credit security provided by the assets.[219] What is clear from these two rules is that the legal personality of the Swedish company is prominent and encourages an absolute distinction between the company and its shareholders.

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[211] Supra note 10 at 2:25 and 1:5.

[212] R. Kraakman, P. Davies, H. Hansmann, G. Hertig, K. Hopt, H. Kanda, and E. Rock *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2017) Oxford University Press.

[213] Ibid at 5.

[214] Örn op cit note 208 at 11.

[215] Kraakman et al op cit note 212 at 7.

[216] Ibid.

[217] Ibid.

[218] Örn op cit note 208 at 11.

[219] Ibid.

One of the results of separate legal personality is the limited liability of the shareholders who, upon incorporation of the company, are protected against any obligations or liabilities incurred by the company.[220] In Sweden, limited liability for shareholders was initially established through the Swedish Limited Companies Ordinance of 1848 and furthered through the enactment of the Companies Act of 1895. The latter encompassed a statutory assurance against the increase of shareholder liability.[221] Limited liability in Sweden was originally justified on the argument of public good. It was thought that it would assist industrial enterprises in their contribution to state welfare development and would offer better employment conditions.[222] Against this backdrop, the principle of limited liability was considered a central component when drafting the current Swedish Companies Act and finds expression in Chapter 1: Section 3 which states:

> In a limited company, the shareholders do not have any personal payment responsibility for the company's obligations.[223]

The principle differentiates the company from other types of entities and operates irrespective of whether the shareholders are natural or legal persons.[224] According to the Supreme Court in *NJA 2014*, the idea is that whoever supplies capital to a company will not risk losing more than what was initially invested and later contributed.[225] This enables risky business enterprises to still attract capital thus generating more development prospects for the Swedish business community. In summary, limited liability ensures that the risk connected with the business activity is transferred from the shareholders to the creditors because the latter are perceived as more capable of bearing the loss.[226] It is for this reason that the company has

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[220] Carl Hemström *Legal Positions of the Business Organizations – Cooperatives and Nonprofit Organizations* 8 ed (2011) Norstedts Juridik at 125.

[221] Matilda Lindblad *Parent Company Liability for Torts of Subsidiaries: A Comparative Study of Swedish and UK Company Law with Emphasis on Piercing the Corporate Veil and Implications for Victims of Torts and Human Rights Violations* (LLM, Uppsala University) 2020 at 22.

[222] Rasmus Klocker Larsen 'Foreign Direct Liability Claims in Sweden: Learning from Arica Victims KB v. Boliden Mineral AB' (2014) *Nordic Journal of International Law* 83, no. 4 at 417.

[223] Supra note 10 at 1:3. Notably, this quotation has been translated from Swedish.

[224] Jennie Svensson *Ansvarsgenombrott: En komparativ studie av svensk och amerikansk bolags - och miljörätt vad gäller institutet ansvarsgenombrott* (LLM, Göteborgs University) 2008 at 9.

[225] Supra note 28 at 7.

[226] Lindblad op cit note 221 at 23.

become the leading form of association for sizable business activities in Sweden. Considering this, an initial glance at the Swedish Companies Act suggests an absolute protection of limited liability for shareholders owing to the wording of Chapter 1: Section 3. A literal interpretation clearly indicates that shareholders will not incur any personal obligations on the company's behalf. However, as will be demonstrated in this paper, this provision should not be interpretated as providing unqualified protection. In specific circumstances, a case may empower Swedish courts to pierce the corporate veil, disregard the separate legal personality of the company, and impute liability onto the company's shareholders. However, the benefits that arise from the principle of limited liability are strongly acknowledged in Swedish law, and courts are tremendously cautious when imposing restrictions on said principle.[227]

5.4 CONCLUSION

Like South Africa, one of the dominant benefits of the Swedish corporate structure is the limited liability of the shareholders who, as a general rule, will not be personally liable for the debts of the company.[228] Both jurisdictions ensure that the concept of limited liability is afforded legislative protection – as seen in section 19(2) of the 2008 Companies Act and Chapter 1: Section 3 in the Swedish Companies Act. However, this freedom is open to abuse by shareholders who hold alternative interests than merely managing a profit-making business. As will be seen in following chapter, there are instances where Swedish companies are formed with the intention of pursuing personal interests of the shareholders – thus disrespecting the freedom afforded to them by the limited liability principle.

[227] Svensson op cit note 224 at 9.

[228] Ross Grantham, 'The Doctrinal Basis of the Rights of Company Shareholders' (1998) *The Cambridge Law Journal, Vol 57* at 554 at 561.

CHAPTER 6: SWEDISH COMMON-LAW APPROACH TO PIERCING THE CORPORATE VEIL

6.1 INTRODUCTION

Piercing the corporate veil, as similarly understood in South African law, refers to the practice by which courts ignore the separate legal personality of the company and permit creditors to reach the assets of the shareholders. It serves to mitigate the incentive for companies to enter unduly risky activities with the thought that they will not bear liability for the aftermath.[229] The nonexistence of an express provision authorising the doctrine in the Swedish Companies Act has resulted in skewed responses from the courts when formulating veil-piercing principles. Thus, veil-piercing has been described as one of the most debated doctrines in Sweden.[230] It has been the subject of much criticism and widespread deliberations within legal literature for its absence of clarity. Nonetheless, despite the shortage of well-defined case law, Swedish academia offers an array of explanatory content which sheds light on how the cases should be interpreted. As will be demonstrated, interpretations suggest that piercing the corporate veil has in fact been moulded by precedent, and the courts have found that limited liability would be unreasonable to uphold in certain situations.[231]

This Chapter will analyse the evolution of the common-law approach since 1935 until the noteworthy judgemnt of *NJA 2014*.[232] Here, the Supreme Court gave an infamous judgment in an attempt to revolutionise the traditional common-law position (in the absence of any legislative provision codifying the doctrine). Like South Africa, Swedish courts have been unsure as to the circumstances in which to pierce the veil and have indirectly advocated for a non-categorisation approach. While not attempting to endorse strict categories, this paper will highlight the most common situations in which the court has pierced the veil and ignored the company's separate legal personality. To do this, a weighty reliance is placed on prominent scholars who have interpreted the somewhat ambiguous case law and ascertained the following

[229] Örn op cit note 208 at 15.

[230] Karin Eklund and Daniel Stattin *Company Law and Stock Market Law* 3 ed (2016) Justus at 81.

[231] Örn op cit note 208 at 23.

[232] Supra note 28.

reoccurring situations: (i) dependence or alter ego; (ii) undercapitalisation; and (iii) misconduct or impropriety.[233]

6.2 DEVELOPMENT OF THE COMMON-LAW APPROACH

It is necessary to evaluate the progression of veil-piercing jurisprudence to compare it to South African law. From the outset it is apparent that both jurisdictions were similarly critiqued for missing guidance prior to the introduction of a significant judgment – for South Africa this was *Cape Pacific* and for Sweden this was *NJA 2014.* Nonetheless, both judgments were still subjected to scrutiny, the latter more so than the former. Notably, as the succeeding cases were published in Swedish, the below analysis is largely founded on academic secondary sources and available translations.

6.2.1 Prior to *NJA 2014*

Before *NJA 2014*, the case law involving piercing the corporate veil was scarce and provided little guidance beyond what was related to the specific facts of each case. The earliest case heard in the Supreme Court was *NJA 1935*[234]. The matter involved piercing the veil of a cooperative, which invites a similar type of limited liability as a company.[235] A man operated a tailoring business as a sole proprietor but, after several years of economic difficulty, he formed a cooperative with four of the tailoring business employees. The type of business carried out in the new cooperative was precisely the same as the sole proprietorship. The cooperative eventually became insolvent and was unable to perform its contractual duties, such as paying its supplier. The supplier argued that, although members of cooperatives do not endure personal liability for the obligations of their association, the cooperative was created with the sole intention to operate as a façade for the main owner.[236] The supplier asserted that there was essentially no separate legal entity as the cooperative existed merely so that the main owner could continue to run the same business but without being personally liable.[237] The

[233] Eklund and Sattin op cit note 230 at 85; Jan Andersson *Capital Protection in Limited Companies* 6 ed (2010) Litteratur Compagniet AB at 287-289; Krister Moberg 'Liability of Parent Corporations for Subsidiary Obligations: Piercing the Corporate Veil' (1998) *Nerenius & Santérus Förlag AB* at 81; Rolf Dotevall Aktiebolagsrätt: fördjupning och komparativ belysning*'* (2015) *Norstedts Juridik* at 110 -113.

[234] *NJA 1935* s 81.

[235] Knutsson op cit note 207 at 24.

[236] Ibid.

[237] Ibid.

supplier's case was dismissed in the District Court and Appellate Court but subsequently accepted by the Supreme Court for the following reasons. Firstly, further investigation revealed that the cooperative did not meet the requirements for registration in the Swedish Cooperatives Act[238] and therefore should never have been registered in the first place.[239] Secondly, the owner formulated the cooperative with the goal of continuing his former business but merely in the name of a new organisation, and that the business was operated for his own personal benefit.[240] Ultimately, the Supreme Court pierced the cooperative's veil and held the main owner personably liable for the association's debts.

In *NJA 1942*[241]*,* a cooperative initiated a construction project on their building lot situated between two other properties. The one was owned by a company and the other by an individual. Notably, before the construction had commenced, the cooperative transferred all its shares and other assets to the neighbouring company. During the project, the individual's property became impaired by the construction, and they sued the company for damages to repair their property. The company argued that they did not bear liability for the damage caused because it was the cooperative who initiated the construction on their own territory. The individual asked the Supreme Court to pierce the veil of the company to hold them liable for the damage caused by the cooperative. The District Court found for the individual stating that the company was responsible for the damages as it possessed essentially all the cooperative's tangible and fixed assets.[242] It could therefore be viewed as the owner of the cooperative's territory even though the cooperative was the registered owner. Contrary to this, the Appellate Court placed a firm emphasis on the limited liability of cooperatives and concluded that the company was not liable for the damages.[243] The Supreme Court's decision was eagerly anticipated, and the final decision was that the company did bear liability. The court ruled that the company's true purpose was to give themselves more space for their business through funding the cooperative's construction project.[244] Moreover, in agreement with the District Court, the company acquired all the cooperative's assets and subsequently possessed the building on the cooperative's

[238] Cooperatives Act 1911:55 at 5.

[239] Knutsson op cit note 207 at 25.

[240] Ibid.

[241] *NJA 1942* s 473.

[242] Brocker & Grapatin *Piercing the Corporate Veil* (1996) Norstedts Juridik AB, Stockholm at 40.

[243] Ibid.

[244] Knutsson op cit note 207 at 27.

territory irrespective of the formalities, namely, the cooperative being the registered owner. The Supreme Court believed that these reasons justified its decision to pierce the cooperative's veil.

Another case which dealt with piercing the corporate veil of a company was *NJA 1947*.[245] The company comprised five shareholders – four companies and one city municipality. The company acquired ownership of a water reservoir which, because of their failure to adequately maintain the property, resulted in a flood. The flood damaged the neighbouring property, and the company was held liable for damages. However, the company had become bankrupt as it had used a substantial portion of its share capital. It ultimately transpired that the company was part of the municipality's initiative to acquire the reservoir and enjoy the advantages of certain power stations. It was also elucidated that the company did not possess any monetary assets bar the 30 000 SEK share capital and that the shareholders were personally financing the costs of the reservoir.[246] The neighbour asked the District Court to pierce the corporate veil and hold the shareholders liable for the company's duty to pay damages. In contrast to previous cases, all the instances agreed with each other that the veil should be pierced. One of the deciding factors was the lack of independency and corporate governance within the company.[247] The Supreme Court believed that the sole purpose of creating the company was to generate a profit from the reservoir for the shareholders.[248] This was supported by the fact that the shareholders provided the financing for the costs associated with the reservoir when the share capital was insufficient. The lower courts highlighted that the company's share capital constituted the minimum amount that a company is allowed as per the bylaws.[249] The Supreme Court did not specifically identify this as a determining factor for piercing the veil. However, it appears to have considered the fact through its recognition that there were additional circumstances, other than the absence of corporate governance, that influenced its decision to pierce.[250]

[245] *NJA 1947* s 647.

[246] Jonathan Andersson *Lifting of the corporate veil: Legislative effect on the trade and industry* (LLM, Linköping University) 2015 at 10.

[247] Ibid.

[248] Ibid.

[249] Knutsson op cit note 207 at 28.

[250] Ibid.

The final pertinent case to be discussed is *NJA 1975*.[251] For the sake of clarity, this paper will offer a simplified explanation of the facts as best described by Knutsson.[252] A man (hereafter 'the chairman') was the chairman of two car dealing companies. Him and his wife were the shareholders of one of the two ('Company A') and his children were the shareholders of the second ('Company B'). In his capacity as chairman, he represented both companies and made them contract with each other. The contract ensured that Company B would run the business on behalf of Company A as a commissioner. Following this, the chairman cancelled the contract and created three new contracts that governed different transactions between the companies. The result of these transactions, however, was that Company B would become bankrupt. The bankrupt estate of Company B brought a claim against Company A holding that they be liable for the debts arising from the new contracts. Notably, many of the other creditors, who did not receive payment for deliveries, filed similar suits against Company A. Company A dismissed the claims by arguing that the two companies were separate legal entities and did not incur liability for each other's responsibilities. The lower courts rejected the claims on the basis that there was nothing contained in the contracts that permitted one company to be liable for another. However, the Supreme Court engaged in a more thorough investigation of the facts and came to a dissimilar conclusion. It found it necessary to highlight that the chairman had legal capacity to represent both companies in contractual relationships and that his immediate family were the shareholders of both companies. Moreover, it established that Company B's assets were insufficient to be considered as independent and many of the assets in their possession were Company A's property. It was also recognised that the assets in Company B's possession were transferred to them from Company A (and not a result of their business) which they subsequently transferred back to Company A before the end of each financial year-end. The Supreme Court concluded that Company A was the actual business operator of Company B and should therefore be held liable for the debts of the bankrupt estate.

Evidently, the Supreme Court did not make any definitive ruling on general veil-piercing principles. The court's analysis was strictly limited to the independent factual matrix before it and it ultimately rendered its judgment on a case-by-case basis. This approach changed in the infamous case of *NJA 2014* which was the first time that the Supreme Court explicitly commented on veil piercing.

[251] *NJA 1975* s 45.

[252] Op cit note 207 at 25-26.

6.2.2 *NJA 2014*

This case involved two company groups who both experienced financial difficulty and were rendered bankrupt. The cause of the bankruptcy was the Swedish Tax Agency's decision to reject the company groups' tax deduction requests. After a few years, the two bankrupt estates sued the consultancy firm, Deloitte, for malpractice on the basis that the advice the company groups received had ultimately triggered their economic failure. While the legal process was ongoing, the two estates formed a new company with a capital stock of 100 000 SEK (the minimum amount required under the Swedish Companies Act of 1975)[253] and transferred the lawsuit to it. The case was unsuccessful, and the new company was held liable to pay the costs of Deloitte. However, the company was extremely new and undercapitalised, thus it went insolvent a week after the judgment. Deloitte brought a claim against the shareholders of the estates asserting that the veil be pierced to hold them personally liable for the costs associated with the judicial process.

The District Court's judgment, later confirmed by the Appellate Court, followed a similar conventional approach to prior case law but nonetheless offered a more comprehensive discussion on piercing the veil. The court highlighted the need to balance the purpose of the company – ensuring that shareholders are not personally liable for the company's debts and obligations – with the need to safeguard funds for the creditors.[254] The court firmly recognised the existence of veil-piercing as a principle in Swedish common law, despite it not being codified in the Swedish Companies Act. However, it asserted that the principle must be applied in a restrictive manner and must only be utilised when the court is certain that there has been a misuse of the company.[255] Indicators of abuse could include inadequate capitalisation and a lack of independence as seen in the current matter. Here, the company was capitalised with the minimum amount of money required by legislation and was formed for the very purpose of acquiring the judicial process.[256] This technically enabled the shareholders of the estates to pursue the legal process without risking negative financial consequences but whilst still

[253] Swedish Companies Act (1975:1385) at 1:3.

[254] Supra note 28 at 6.

[255] Ibid at 8.

[256] Ibid at 13.

retaining the potential to share in the financial benefits of success.[257] The court thus believed that this justified it to pierce the corporate veil.

When the matter came before the Supreme Court, it opted for a radical way of reasoning in comparison to the lower courts and prior precedents.[258] The previous approach was to indirectly refer to the unwritten veil-piercing principle within the field of association law and to make findings solely on the facts of each case. Here, the Supreme Court relied on the veil-piercing principle that was developed through courts in relation to the liability of shareholders under civil law.[259] One can assume that the reason was to make the common-law principle more robust in a civil-law jurisdiction. The court highlighted that *NJA 1935* and *NJA 1975* both constituted examples of liability based on the principles of contract law, and the *NJA 1947* case could inflict liability of the shareholders through the law of delict.[260] The court also noted that there was a possibility for liability in 'certain other extraordinary cases' but omitted to provide an additional discussion on the meaning of this phrase.[261] Finally, the court drew an important distinction between creditors in contractual cases and creditors in non-contractual cases.[262] Regarding the former, creditors have the opportunity to inspect the company before entering into the contract by undertaking processes such as due diligence. Thus, the court asserted that civil-law principles were inappropriate to render shareholders liable and support should rather be acquired from the provisions relating to safeguarding corporate funds in the Swedish Companies Act.[263] Regarding the latter, broader protection is required for creditors as there is no opportunity to avoid judicial proceedings. However, the degree of protection depends on the facts of each case.[264]

On the facts of this case, the firm could be seen as a creditor in a non-contractual case as it was suing for the costs of the judicial process by relying on the Swedish Code of Judicial

[257] Supra note 28 at 13.

[258] Knutsson op cit note 207 at 34

[259] Ibid.

[260] Ibid at 35.

[261] Ibid.

[262] Supra note 28 at 10.

[263] Ibid at 11.

[264] Ibid at 10.

Procedure.[265] The court found that the two shareholders used the company as a means of avoiding the risk of being liable for judicial costs by operating an undercapitalised company.[266] This was supported by the fact that they only founded the company a few months before the judicial proceedings and did not engage in any business activities.[267] Any monetary transactions only related to the judicial proceedings and were paid by the shareholders to merely cover the expenses. Conclusively, the court rendered the shareholders personally liable for the obligations of the company and were required to pay for the judicial costs.[268]

The Supreme Court has faced criticism in Swedish academia based on the ambiguous nature of the *NJA 2014* judgment. Professor Sandström[269] emphasised that the court relied on very little legal sources to establish its judgment – implying that only the opinion of the highest instance is relevant when generating precedent.[270] By disregarding much of the relevant legal material, the court left several questions unanswered. This has resulted in opinions that the court was solely creating a precedent concerning the specific factual situation involving companies undertaking judicial proceedings.[271] One of the issues was that it failed to explain what was meant by imposing liability on shareholders in 'certain other extraordinary cases'. For the sake of clarity, it is suggested that this refers to the circumstances of veil-piercing that have been recognised under the traditional doctrine, to be discussed under section 6.3. Although these are not concrete categories, they provide a sense of clarity and guidance for future courts to rely upon. However, this is merely a personal interpretation of the phrase and represents the effect of the ambiguous judgment as it forces scholars to draw their own conclusions. It is therefore unfortunate that the court did not make it explicit that it was creating a general veil-piercing principle as this would have significantly stabilised Swedish company law.

[265] Swedish Code of Judicial Procedure (*Rättegångsbalken*) (1942:740).

[266] Supra note 28 at 12.

[267] Ibid.

[268] Ibid at 13.

[269] Torsten Sandström 'Piercing the Corporate Veil and the Swedish Companies Act – A Terse Precedent' (2015) *InfoTorg Juridik.*

[270] Ibid at 1.

[271] Wiktor Brandell *Ansvarsgenombrott: En Principiell Analys Av Rättsinstitutets Existens I Svensk Rätt* (LLM, Stockholm University) 2017 at 24.

6.2.3 Post-*NJA 2014*

Since the decision of the Supreme Court, there have been few cases dealing with piercing the corporate veil. In the first District Court case that followed, *T 1597-16*[272], there was no reliance placed on *NJA 2014* but rather on *NJA 1947*. This could be owing to a misinterpretation that the Supreme Court had rejected the principle of veil-piercing in association law.[273] It could also be that the court opted for a more traditional approach through interpreting *NJA 2014* to only relate to companies undertaking judicial proceedings. A similar approach was taken by the District Court in *T 16247-12*[274], where there was a complete disregard for any sources of law, including *NJA 2014*. Again, this may be a consequence of the Supreme Court's unsurety as to whether the precedent was only set in relation to companies undertaking judicial proceedings. However, in *T 4520-15*, the District Court was faced with an almost identical fact set to the Supreme Court bar the fact that the company undergoing judicial proceedings had already been operating for several years.[275] Here, the court was the first to explicitly recognise the 2014 judgment. By doing so, it identified the shareholders as being creditors in a non-contractual case and in need of extended protection.[276] It also determined that the company in question was not acting in a manner consistent with its operation and was instead serving an individual shareholder's interests.[277] Again, the capital was only enough to cover the company's own attorney's fees and they would be unable to pay the judicial costs if they lost the case.[278] For these reasons, the District Court held that the shareholder was undertaking the judicial proceedings through the company as a means of avoiding a negative personal outcome but still being able to benefit from the success of the company.[279] The court then pierced the veil and held the shareholder liable for the judicial costs.

Clearly the Supreme Court's judgment in *NJA 2014*, even if it intended to do the opposite, has failed to enforce a decisive precedent relating to veil-piercing generally. The ambiguity of the judgment and lack of reliance on legal materials has resulted in succeeding courts only

[272] *T 1597-16* (District Court of the City of Vaxjo).

[273] Ibid at 37.

[274] *T 16247-12* (District Court of the City of Goteborg).

[275] *T 4520-15* (District Court of the City of Nacka).

[276] Ibid at 10-11.

[277] Brandell op cit note 271 at 45.

[278] Supra note 275 at 13.

[279] Ibid.

applying the judgment to similar factual scenarios. This is unfortunate as it means that the traditional approach to veil-piercing will continue to dominate Swedish jurisprudence until the Supreme Court has the opportunity to clarify the matter. Until then, no positive standards or conclusions should be drawn.

6.2.4 Comparison to South Africa

Although both jurisdictions were confronted with legal insecurity and criticism throughout the twentieth and beginning of the twenty-first century, the position in Swedish law is visibly distinct from South African law for the following reasons. Firstly, South Africa clearly recognises the principle of veil-piercing at common law whereas some scholars question whether the Supreme Court in *NJA 2014* did, in fact, recognise the doctrine in relation to association law. On this point, Doctor Adestam[280] has expressed the opinion that the Supreme Court rejected the veil-piercing exception as it indicated that shareholders can be held liable on the grounds of general civil law principles.[281] This links to the second point that South African courts can directly rely on the common-law principle of veil-piercing considering that South Africa is a common law jurisdiction. Swedish courts, on the other hand, are clearly trying to uphold veil-piercing by linking it to legislative provisions that approve imposing personal liability on shareholders. In addition, South African law has had more opportunity to advance and obtain clarity than Swedish law merely owing to the higher number of cases that have come before the courts. However, this could also be attributed to the fact that South Africa possesses a statutory veil-piercing provision that enables more litigants to rely on and bring matters to court. Finally, and most importantly, South African courts have provided a clear approach to be followed at common law. This was owing to the Appellate Division's judgment in *Cape Pacific* where it created and clarified principles relating to veil-piercing generally and not one's which apply only to the specific facts of a case.

6.3 INSTANCES WHERE THE COURT HAS PIERCED THE VEIL

Whilst it is not the purpose of this section to induce definite conclusions as to what circumstances lead to veil-piercing, it will be emphasised that the courts have ascribed significance to the following factors in veil-piercing cases.

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[280] Johan Adestam 'Piercing the Corporate Veil and Limited Personal Liability of Stockholders – An Analysis Based on NJA 2014 s 877' (2015) *Ny Juridik* 2:15 at 13.

[281] Knutsson op cit note 208 at 26.

6.3.1 Dependence or Alter Ego

One of the flags that will attract the court's attention is if the company lacks independence or if there is a presence of an alter ego. A lack of independence was very apparent in the case of *NJA 1947.* In this case, which involved the acquisition of a water reservoir, the Supreme Court relied comprehensively on the fact that the company's costs were covered solely by the capital contributions of the shareholders and that the company was not conducting any independent operations.[282] The key identifiers of a lack of independence were: (i) no independent commercial purpose or management; and (ii) financial dependence on the shareholders owing to undercapitalisation.[283] Both *T 4520-15* and *NJA 2014* are additional examples of a lack of independence, more specifically the presence of an alter ego. Here, the shareholders were using the company for their own personal benefit and the company was financially dependent on the shareholders covering the costs of litigation. This corresponds with South African law where the court may be justified in piercing the corporate veil where a dominant shareholder uses the company as an extension of themselves.

6.3.2 Undercapitalisation

Eklund and Sattin[284] identify the following different forms of undercapitalisation. Undercapitalisation can be initial in the sense that the company was already undercapitalised upon its creation. It can also be emerged, meaning it was rendered undercapitalised through activities or expansion that resulted in loss. Additionally, undercapitalisation can be formal in that it fails to meet the legal capital requirements under a statutory provision. It can also be functional in that the company does not possesses the necessary assets required to effectively run a specific type of business.[285] Instead of viewing this as a stand-alone factor, it is submitted that this should be considered a tool to establish alter ego or misconduct. This is what the Supreme Court did in *NJA 1947* where the combination of an alter ego and undercapitalisation of the company demonstrated an act of misconduct and thus authorised the court to pierce the veil. To have undercapitalisation as an independent factor to pierce the veil would be discouraging to Swedish shareholders as the required share capital is already relatively low.[286]

[282] Lindblad op cit note 221 at 38.

[283] Svensson op cit note 224 at 108.

[284] Op cit note 230 at 87.

[285] Ibid.

[286] Knutsson op cit note 207 at 46.

This may be supported by the fact that South African courts have yet to explicitly recognise this as an exclusive factor permitting veil-piercing.

6.3.3 Misconduct

Moberg[287] opines that, to pierce the veil, the company must be so reliant on the shareholders that it constitutes an improper use of the company structure.[288] This indicates that an element of qualified inappropriateness must exist and can be manifested through operating the company in a manner that contradicts its original purpose.[289] The conduct requires an act of malice and not merely negligence – hence, the reference to a qualified inappropriateness. We can see a deviation from the true purpose in *NJA 1935* where the owner created the cooperative with the intention of entering into contracts on his behalf, therefore infringing the provision that obliged cooperatives to operate in the interest of all members.[290] This was similarly the case in *NJA 1942* where the cooperative was used to transfer assets. In *NJA 2014,* the company was merely a mechanism for the shareholders to avoid the provisions in the Swedish Code of Judicial Procedure which is clearly an inappropriate manner of using the corporate structure. Thus, while the courts have not explicitly stated what will constitute impropriety, case law suggests that a deviation from the usual arrangements to evade the law could amount to misconduct. Eklund and Sattin highlight that impropriety should not be considered an independent criterion but that the entire circumstances, including undercapitalisation and dependence, should amount to misconduct.[291]

In analysing these circumstances, they appear more like criteria for affirmative veil-piercing and one can conclude that it is rather the factors of misconduct and alter ego that impact the decision to pierce the veil. Undercapitalisation can be considered a sub-factor that informs either of the former criteria. This is different to South African law which focuses less on criteria for affirmative veil-piercing and more on applying a uniform and balanced approach. However, the circumstances in which South African courts have tended to pierce the veil correspond with that of Swedish courts. The presence of an alter ego is similarly a relevant

[287] Moberg op cit note 233.

[288] Ibid at 81.

[289] Knutsson op cit note 207 at 47.

[290] Ibid.

[291] Eklund and Stattin op cit note 230 at 88-89.

consideration in South Africa. Moreover, the misconduct criterion in Swedish law tends to link to when a South African company is used for ulterior purposes, such as evading contractual and fiduciary duties.

6.4 CONCLUSION

The Supreme Court's judgment in *NJA 2014* is undoubtedly an imperative feature to any discussion of veil-piercing in Swedish law. In summary, the court took an alternative approach to previous case law by viewing shareholder liability as liability based on the general principles of civil law. The result of this is still imprecise but there are indications that some district courts have interpreted the judgment to only apply to specific facts. However, the Supreme Court has yet to clarify its ruling and for now veil-piercing retains its position as a principle within both association law and civil-law liability principles. The dominant factors that constitute the Swedish veil-piercing principle include a lack of independence (encompassing alter ego), undercapitalisation, and misconduct. The latter two requiring a qualified application and will likely need to be combined with a lack of independency for courts to pierce the veil.

CHAPTER 7: SWEDISH STATUTORY-LAW APPROACH TO PIERCING THE CORPORATE VEIL

7.1 INTRODUCTION

One of the central issues relevant to this paper is that the Swedish Legislature has yet to codify a general veil-piercing principle in the Swedish Companies Act. The only provisions that indirectly relate to veil-piercing are Chapter 17: Section 55 and Chapter 29: Section 92. The former concerns the continuation of a business where the share capital has fallen below a specific level and the latter concerns the liability of shareholders for delictual acts. The outcome of having no express veil-piercing provision has been comprehensively examined under Chapter 6 where it was concluded that the current position is founded on ambiguous case law precedents supplemented by academic interpretations. With this as a backdrop, Chapter 7 will analyse the provisions of the Swedish Companies Act which relate to the veil-piercing discussion. To aid this analysis, this Chapter will also examine the background to the introduction of the Act involving two proposals for a general veil-piercing provision. However, both proposals were subsequently rejected, and the common-law position as discussed in the previous chapter remains. The purpose of Chapter 7 is therefore to clarify what the position is specifically in Swedish statutory law as this will enable an accurate and effective comparison to South African law. Notably, the Swedish Companies Act does not possess an equivalent provision to section 5 of the 2008 Companies Act dealing with the way in which to interpret the Act. Thus, there will be no discussion of interpretative methods under this Chapter.

7.2 BACKGROUND

It is essential to note that the two inquiries were made before the *NJA 2014* judgment during the years 1987 and 2001. Nonetheless, they are still relevant to deliberate as there have been no further inquiries succeeding *NJA 2014,* and they emphasise the issue in a broader perspective by providing a variety of advantages and disadvantages that would follow a potential provision.

7.2.1 Payment Liability Committee Inquiry of 1987

In 1987, the Committee of Payment Liability received permission from the Swedish government to investigate the issue of piercing the corporate veil.[292] The Committee engaged in an analysis of the case law up until that date and concluded that one of the main elements in concern was misconduct relating to the operation of the company.[293] However, the Committee highlighted that there must be a restrictive approach to veil-piercing. This meant that the misconduct needed to be qualified and connected to the arrangement of the company's business, and not only to wrongdoing that caused damage to individual creditors.[294] The Committee also emphasised that the undercapitalisation element will only be satisfied when the undercapitalisation is caused by the shareholders in a manner that relates to the operation of the business.[295]

The Committee then investigated the need for a codified veil-piercing provision. One of the main issues was what kind of creditors would benefit from legislation. The Committee drew a distinction between larger creditors, such as banks and the government, and smaller creditors such as contractors and customers.[296] The argument was that the former category did not require the protection of a veil-piercing provision as they have the opportunity to conduct comprehensive investigations into companies that they contract with. However, the latter group do not always acquire such opportunities and might require protection. Clearly a codified provision would be limited in relation to the creditor perspective. The Committee also recognised that there was a need for legal certainty and that the non-existence of a general veil-piercing provision negatively hindered this.[297] The introduction of such a provision would fulfil this need and would have the outcome of more cases being litigated with affirmative rulings. Furthermore, it would have a preventative effect by encouraging companies to act with caution when operating in a manner that may cause injury to their creditors. This was an important consideration as creditors' interests have often been mistreated by financial crimes that were not always captured by the existing provisions relating to creditor protection.[298]

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[292] SOU 1987: 59 - Payment Liability Committee Proposal on Piercing the Corporate Veil (*Ansvarsgenombrott*).

[293] Ibid at 108-109.

[294] Ibid.

[295] Ibid.

[296] Ibid at 94.

[297] Ibid at 95.

[298] Ibid at 95.

In conclusion, the Committee opined that there was a need for a general provision on veil-piercing to safeguard legal certainty. However, it submitted that the provision should be expressed in a manner that only covered specific situations that were subject for veil-piercing. By including a controlled version, the Committee believed that the notion of limited liability of the company would still be espoused. It therefore proposed that the subsequent amendment be added to the section relating to limited liability in the Swedish Companies Act:

> 'In the case of the corporation not being able to fulfil its obligations towards the creditors which is a result of a stockholder's misconduct, the stockholder is together with the corporation jointly and severally liable for the insolvency of the corporation. However, the stockholder will not be held liable unless the economic position of the corporation has been clearly insufficient with respect to its business and foreseeable risks. A stockholder shall also not be held liable for corporate obligations in cases where he has informed the creditor about the economic position of the corporation to an extent that can be reasonably expected of him.'[299]

The outcome of the investigation was sent to the Council on Legislation where it rendered its own proposal.[300] It asserted that further scrutiny needed to be given to the wording of the amendment, specifically 'misconduct' and 'clearly'. It considered the former to be an inappropriate formulation because it is an emotive word that could result in personal considerations of what would constitute misconduct.[301] Additionally, to use 'clearly' in relation to the company's finances would be unfitting.[302] Ascertaining whether a company's finances are 'clearly insufficient' would require the court to determine whether bankruptcy is imminent. This could prove difficult as company funds may vary rapidly over short periods of time in business expansions. The Council concluded that, instead of encouraging legal certainty, the vague design of the amendment would intensify the risk of insecurity regarding veil-piercing.[303] It thus rejected the proposal and parliament later voted in agreement with this decision.

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[299] SOU 1987:59 op cit note 291 at 128. Translation by Knutsson op cit note 208 at 31.

[300] Proposal 1990/91:198 - Swedish Companies Act Amendments (*Om Ändringar i Aktiebolagslagen*).

[301] Ibid at 43.

[302] Ibid.

[303] Ibid at 44.

7.2.2 Legislative Inquiry of 2001

During the build-up to the current Swedish Companies Act, the question of codification was discussed again briefly in the 2001 Legislative Inquiry.[304] The Committee concluded that the need for codification had not intensified since the last inquiry.[305] Instead, it had lessened owing to the strict developments in other areas of law and the new provisions introduced into the Swedish Companies Act which included compulsory liquidation and the duties of accountants to report illegalities.[306] Furthermore, the Committee highlighted that it was not possible to frame a direct rule on veil-piercing in a more precise manner than the Payment Liability Committee had done in 1987. The only option would be to use the general wording as expressed in the prior proposed amendment and that this would be inappropriate with respect to legal certainty.[307] It therefore rejected the proposal to insert such a provision.

7.3 INTERPRETATION OF THE SWEDISH COMPANIES ACT

The absence of a direct provision on veil-piercing is sometimes justified by the fact that there are well-established creditor-protection provisions already existing in the Swedish Companies Act. Thus, despite the robust recognition of limited liability in Chapter 1: Section 3, the argument is that Chapter 17: Section 3 and Chapter 25: Section 13 are sufficient to afford protection to creditors falling within the requirements.[308]

7.3.1 Chapter 1: Section 3

Chapter 1: Section 3 encompasses the central underpinning of Swedish company law – the principle of limited liability. It states that, in a limited company, the shareholders do not acquire any personal payment responsibility for the company's obligations.[309] As Chapter 5 of this paper has already engaged in an in-depth analysis of the section, it suffices to state that Chapter 1: Section 3 is the chief rival to the introduction of a codified veil-piercing principle. The rejection of the 1987 and 2001 proposals demonstrates the power that the principle of limited

[304] SOU 2001:1 - Inquiry into the New Swedish Companies Act (*Ny Aktiebolagslag*).

[305] Ibid at 286.

[306] Ibid at 287.

[307] Ibid 288.

[308] Richard Ramberg 'Piercing the Corporate Veil: Comparing the United States with Sweden' (2011) *New England Journal of International and Comparative Law 17* at 185.

[309] Supra note 10 at 1:3.

liability holds in Swedish law. Through declining a proposal for a veil-piercing provision twice, it can be assumed that the government sought to avoid escalating the already ambiguous position in Swedish law. Further, it can be deduced that codifying the principle of veil-piercing would impact limited liability in a more general manner and would ultimately do more damage than good.[310] This would make the formation of the corporate structure less attractive and confidence in the Swedish Companies Act would be hindered if the limited liability provision were to be reduced.[311]

7.3.2 Chapter 17: Section 3

Chapter 17: Section 3 governs 'value transfers' from companies and is broad enough to encompass a variety of commercial transactions. According to the Swedish Companies Act, a value transfer can be defined as: the classic allocation of profits and related transactions in addition to any other commercial transaction which results in the company's wealth being condensed and which does not have a solely commercial nature.[312] Importantly, this provision contains an 'amount block rule' which disallows value transfers if it exceeds the prescribed amount. The provision also contains a 'rule of caution' which declares that, even if the value transfer satisfies the requirements under the amount block rule, it will still be disallowed if it appears to be unjustifiable. This must be ascertained through considering: (i) the relationship between the company's equity capital and the type, the size, and the risks of the company's operation; and (ii) the company's need for liquidity and consolidation. The rule of caution is mandatory, and the Act does not permit a waiver.[313] If a disallowed value transfer has been made, the Act requires the amount to be refunded.[314] All that the company needs to prove is that the recipient knew or should have known that the transfer violated a provision of the Swedish Companies Act. If the transfer was a hidden allocation of profits, the company would need to show that the recipient knew or should have known that it was in fact a value transfer.[315]

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[310] Emil Hargestam *Ansvarsgenombrott: En Analys Av Oskrivna Undantag Från Aktieägares Avsaknad Av Ansvar För Bolagets Förpliktelser* (LLM, Lunds University) 2016 at 34

[311] Ibid at 35.

[312] Supra note 10 at 17:1.

[313] Ramberg op cit note 308 at 183.

[314] Supra note 10 at 17:6.

[315] Ibid.

Clearly, Chapter 17: Section 3 is drafted in a relatively wide manner through the inclusion of 'any commercial transactions' which reduce the company's wealth and are not of an exclusively commercial nature. This affords protection to creditors where there has been a potentially abusive transaction made on the company's behalf and will permit the Court to hold the shareholders liable for any transactions falling within the broad scope of the provision.

7.3.3 Chapter 23: Section 13

Chapter 23: Section 13 provides extensive rules relating to compulsory liquidation. As per this section, the board of directors is required to establish a control balance sheet in two circumstances. Firstly, where there are factors that suggest that the company's equity capital is less than half of the registered share capital.[316] Secondly, where the company has been established to have insufficient assets to pay a seizure claim when confronted with enforcement pursuant to the Swedish Enforcement Code.[317] If any of these circumstances arise, the board is required to convene two meetings to establish the liquidation of the company. A failure to do this will authorise the court to liquidate the company. However, if the company regains its financial strength during the proceedings, the court is not permitted to liquidate it.[318] If the directors neglect to comply with the requirements of Chapter 25: Section 13, they will become jointly liable for any obligations transpiring during the time of negligence.[319] Additionally, the shareholders can be held personally liable if they knew that the company was required to enter into liquidation but nonetheless made a decision to continue the operation of the company's business.[320] Importantly, the provision also ensures that any person (not of a director or shareholder status) will be jointly liable for the company's obligations if they acted on the company's behalf while having knowledge of the directors' negligence.[321]

Like Chapter 17: Section 3, this mandatory creditor protection rule is drafted in a wide-ranging manner as it imposes liability on a variety of persons: directors, shareholders, and any person acting on the company's behalf while knowing about the directors' negligence. The

[316] Supra note 10 at 25:13.

[317] Swedish Enforcement Code (*utsökningsbalken*) (1981:774).

[318] Supra note 10 at 25:18(2).

[319] Ibid.

[320] Supra note 10 at 25:19.

[321] Ibid at 25:18(2).

purpose is to thwart the company from continuing to operate and causing financial harm to the creditors.[322] It seeks to ensure that unprofitable companies are wound up at the earliest possible point so that creditors still have the chance to acquire relief.[323]

7.3.4 Comparison to South Africa

The obvious difference between the two jurisdictions is that the South African government has codified veil-piercing whereas the Swedish government has refused to do so by rejecting the 1987 and 2001 proposals. There are two dominant consequences of this. Firstly, with no express provision governing veil-piercing in the Swedish Companies Act, reliance must be placed on the precedent set in *NJA 2014*. This is a confusing prospect considering that Sweden is a civil-law jurisdiction. Moreover, as mentioned, *NJA 2014* has not provided enough clarity to ensure the stability of Swedish company law. It has been subject to skewed interpretations and ensuing cases have tended to differ in their outcomes. As it currently stands, Swedish courts seem to be relying on the traditional criteria established through case law, namely, misconduct, alter ego, and undercapitalisation. In comparison, South African litigants are permitted to rely on both the statutory veil-piercing provision and the common-law doctrine as established by case law.

The second consequence is that, since Sweden has a civil-law system, statutes are considered the primary source of law and Swedish creditors are protected by mandatory rules contained in the provisions of the Swedish Companies Act.[324] This is not necessarily a negative result because the mandatory rules are drafted in relatively wide terms to afford creditors adequate security. For example, the cautionary rule relating to large value transfers is not explicitly found anywhere in the 2008 Companies Act but this is likely because more room is given for piercing the corporate veil. Additionally, the rules on compulsory liquidation act as a robust safeguard for creditors as they regulate both the detecting of financial problems, and the saving of a company's capital resources.[325]

[322] Ramberg op cit note 308 at 185.

[323] Ibid.

[324] Ibid at 186.

[325] Ibid.

Ramberg[326] submits that, since Sweden has mandatory creditor protection rules, the need for a liberal approach to veil-piercing is reduced. The likely reason being that the mandatory rules prevent creditors from being negatively affected by Chapter 1: Section 3 – the principle of limited liability. However, it is necessary to highlight that, like Sweden, South Africa has accepted the limited liability principle into its law and has recognised it through section 19(2) of the 2008 Companies Act. Yet, the South African parliament has still elected to include an express veil-piercing provision to limit this principle in certain situations. In South African law, a balance is struck between exposing corporate mishandlings and protecting the separate legal personality of a company. Thus, it is not the provision itself that could negatively hinder the limited liability principle but rather its interpretation by the courts. It can be argued that the Swedish common law is in a similar state to the South African common law in the early 2000s as there is uncertainty surrounding the correct approach to veil-piercing. Thus, a legislative provision governing veil-piercing could be advantageous to the stability of Swedish company law, but this will be discussed further in Chapter 8.

7.4 CONCLUSION

It appears that the limited liability principle in Swedish company law assumes a superior role in comparison to piercing the corporate veil. This is because it is firmly entrenched in Chapter 1: Section 3 of the Swedish Companies Act whereas veil-piercing is governed by the common law and creditors tend to seek protection from elsewhere in the Act. The Swedish Companies Act contains robust creditor-protection rules that are immensely wide-ranging in the sense that a variety of persons and commercial transactions are covered by their umbrella. The issue is whether this is enough to not only protect creditors but to ensure legal stability in respect of piercing the corporate veil. As it stands, there has been no further inquiry into the matter and the law is governed by the precedent set in *NJA 2014* and the traditional jurisprudence relating to veil-piercing criteria.

[326] Ramberg op cit note 308.

CHAPTER 8: CONCLUSIONS AND RECOMMENDATIONS

8.1 CONCLUDING REMARKS

This dissertation has attempted to conduct a comparative analysis which is palatable for the reader and one which will hopefully provide insight into the operation of veil-piercing in both common-law and civil-law jurisdictions. South Africa and Sweden, although an unexpected and rarely chosen duo, have proven to be a beneficial pair to evaluate and have aided an effective comparative study. The central theme which can be deduced is that there has been a lack of sufficient guidance in both countries. The South African common law was critiqued for its ever-changing nature and the inconclusiveness as to what the correct approach to veil-piercing was. The three saving graces were: *Cape Pacific*, section 20(9) of the 2008 Companies Act, and Binns-Ward J's judgment in *Gore.* The former introduced a flexible approach to veil-piercing which was dependent on the facts of each case and no longer based on rigid categorisation. The codification of veil-piercing in section 20(9) is an embraced accessory to South African company law as it now empowers an aggrieved litigant or the court to use the remedy notwithstanding alternative remedies being available. This section would not be as advantageous if not for Binns-Ward J's renowned judgment in *Gore* and the invaluable principles established in relation to the interpretative approach to be adopted. However, despite the considerable effort to provide an adequate framework for veil-piercing, the South African stance still possesses some cracks that trigger legal uncertainty. Most notably, section 20(9) has failed to define imperative terms relating to the remedy. It can thus be concluded that South African company law, although highly commendable, does not offer a premier degree of guidance as it presently stands. Therefore, it will be beneficial to offer recommendations in respect of the application of the principles and the structure of the legislation in the final section of this paper.

As established, South Africa is not alone in its incoherence as Sweden has also struggled to formulate a well-defined framework for veil-piercing. The main reason for this stems from the fact there has been no codification of the doctrine despite Sweden being a civil-law jurisdiction. This has resulted in varied understandings as to whether veil-piercing is authorised under the general principles of association law or indirectly through civil-law principles relating to contract and delict. Ultimately, piercing the corporate veil is an unclear doctrine that has been hard to grasp in Swedish law. There are no apparent trends in case law or legislation

that signify any potential change of the current position. Thus, the doctrine will likely stay malleable, at the cost of certainty, for the foreseeable future.[327] Nonetheless, this paper will conclude with certain recommendations that could greatly stabilise Swedish law if utilised.

8.2 RECOMMENDATIONS

8.2.1 Application and Interpretation

Despite the codification of the doctrine in South Africa, there is still a degree of uncertainty surrounding the principles that govern its application. This is supported by the court in *Gore* which opined that there are no explicit determinable principles that indicate the grounds for courts to make an affirmative veil-piercing decision.[328] In relation to the application and interpretation of the doctrine, Cassim[329] suggests two ways to inspire more certainty in South African company law. Firstly, when describing terms relating to the doctrine, courts must avoid using metaphors. There has been a tendency to refer to a variety of words such as 'device', 'sham', 'stratagem', 'cloak', and 'alter ego'.[330] These types of expressions only further aid the confusion relating to veil-piercing and preference should rather be given to explaining the doctrine concisely and rationally.[331] Secondly, Cassim opines that courts should refrain from allowing morality to trump legal principle. In *Gore*, there was a significant focus on the adverse moral and economic consequences of unconscionable abuse when adopting the balanced approach. It is questionable whether morality should in fact be a factor to consider seeing as the word 'unconscionable' already encompasses an element of morality.[332] Moreover, the Supreme Court in the United Kingdom has rejected using morality as a factor to justify a veil-piercing decision and has highlighted that the use of pejorative expressions has enabled morality to surpass legal principle.[333] In line with section 5(2) of the 2008 Act, South African courts should consider this foreign law when interpreting section 20(9) so as to ensure that legal certainty prevails over moral indignation.

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[327] Ramberg op cit note 308 at 191.

[328] Supra note 5 at 21.

[329] Cassim op cit note 134.

[330] Ibid at 333.

[331] Ibid.

[332] Ibid.

[333] *Antonia Gramsci Shipping Corp v Stepanovs* [2012] BCC 182 at 147.

Having already conducted a comprehensive critique of the Swedish courts' approach in Chapter 6, it suffices to state that they would benefit from adopting a similar approach to South Africa. While Swedish courts should not lightly disregard a company's separate legal personality so as to undermine the corporate structure, they should consider adopting the balancing approach as visualised in *Cape Pacific*. This would entail balancing the policy considerations that support piercing the veil with the need to preserve the company's separate legal personality.[334] Historically, the Swedish courts have placed too strong of an emphasis on the concept of limited liability and have failed to generate a set of basic principles governing veil-piercing in the general sense. Swedish courts should move away from rendering restrictive judgments that are solely based on the facts at hand and should instead seize any opening to develop the law in a manner that promotes stability. It has been asserted that *NJA 2014* was the only real attempt to deviate from the traditional approach, however, the court's execution was substandard and only resulted in more confusion. Future courts should learn from these errors and should grasp the opportunity to generate more concise judgments and legal principles as was done in the South African cases of *Cape Pacific* and *Gore*.

8.2.2 Moderations to the legislative structure

This paper has identified two central issues with the structure of section 20(9) of the 2008 Companies Act. As mentioned, the term 'interested person' has sparked confusion owing to the almost-identical wording of section 20(9) to section 65 of the Close Corporations Act. To terminate uncertainty stemming from legal interpretations, it would be beneficial to clarify whether 'interested person' in section 20(9) mandates the existence of a monetary or financial interest. This could be done by inserting a definition of 'interested person' into section 1 of the 2008 Companies Act or including it in section 20(9). In addition to this, the term 'unconscionable abuse' has presented issues. In fact, it has been described as the 'most troublesome aspect of section 20(9)' mainly because it has afforded the courts far-reaching powers to attach meaning to it.[335] A solution would be for the Legislature to insert a definition of the term 'unconscionable abuse' into the Act as this will encourage a slightly narrower interpretation than what is currently permitted. This is necessary because the existing situation has the potential to encourage an excessive and unreasonable amount of litigation. However, when inserting such a definition, the Legislature must be cautious not to render it too rigid and

[334] Supra note 26 at 29.

[335] Cassim et al op cit note 2 at 81.

the wording should still enable the courts to constantly develop the law through judicial interpretations that harmonise with the revolutions of society.

Whether or not Sweden would benefit from codifying the doctrine depends on whether it is characterised as a principle stemming from association law or from civil law generally. It would not make sense to codify the doctrine if it was rooted in civil law principles as it would be impossible to create a single provision containing general principles of shareholder liability in civil law. The reason being that civil law is such a broad area of law and includes contract and delict. Since no clear precedent came from *NJA 2014*, it can be assumed that the traditional position still stands, and that veil-piercing is embedded in association law.[336] This view would facilitate a valuable conversation on the prospects of a veil-piercing provision in the Swedish Companies Act. In both the 1989 and 2001 Inquiries, the Committees made convincing arguments for the rejection of a veil-piercing provision which were founded on reasonable grounds. The structure of the provision was much too extensive and had the potential to jeopardise the limited liability principle. However, this does not mean that the idea of a veil-piercing provision should altogether be rejected. The Legislature should consider inserting the following into the Swedish Companies Act:

> Where shareholders act through the corporation on their own behalf, or when the ownership structure reveals that the corporation has lost its independency, the shareholders should be held jointly and severally liable with the corporation for its obligations, if there are extraordinary circumstances that justify such liability.[337]

The above suggestion does not utilise the words ‘clearly’ or ‘misconduct’ which were dominant concerns in the 1989 Inquiry.[338] The first segment of the provision covers alter ego since this appears to be an undeniable reason to pierce the veil in Swedish law. The second segment uses the words ‘extraordinary circumstances’ to encompass other factors such as undercapitalisation and qualified inappropriateness (as an element of misconduct). It is thus wide enough to allow for judicial interpretation and to ensure the protection of the limited liability principle, but it nonetheless gives the doctrine statutory

[336] Knutsson op cit note 207 at 49.

[337] This formulation is supported by Knutsson who made a similar recommendation.

[338] Ibid at 49.

support in a civil-law jurisdiction. The Swedish Legislature should avoid waiting for another Supreme Court judgment to develop the law, especially in a civil-law country, and should be making active strides to codify the doctrine and leave behind the forgone years of instability.

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