FINAL RESEARCH REPORT

THE EFFECTIVENESS OF SECTION 20(9) OF THE COMPANIES ACT 71 OF 2008 IN REACHING ITS STATED OBJECTIVE.

by

Lebohang Maboa

Submitted in partial fulfilment of the requirements for the degree
IIE *Legum Baccalaureus* (LLB)

in the

FACULTY OF LAW

at the

IIE MSA

Supervisor:
Ms. E Oosthuizen

Date of submission

17/11/2022

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ANNEXURE H- – FINAL REPORT MARKING RUBRIC

MODULE NAME: LEGAL RESEARCH PRACTICE			MODULE CODE: LRPR8419	
STUDENT NAME: Lebohang Maboa			**STUDENT NUMBER:** [redacted]	
Marking Criteria	**Does not meet the required standard** *(0% - 49%)*	**Meets the required standard** *(50% - 64%)*	**Partially exceeds the required standard** *(65% - 74%*	**Greatly exceeds the required standard** *(75% - 100%)*
In order to be awarded full marks for these elements of the report, students need to have demonstrated the following:	**The report is poorly constructed and requires substantial revisions.**	**Generally proficient, however, the report does - require some revision.**	**The report is adequately constructed but requires some revision.**	**Advanced work for undergraduate level - the report requires very little to no revision.**
1. Amendment to previous component tasks:	**0-1**	**2-3**	**4**	**5**
• Has the student attached relevant rubrics? • Have the proposed amendments been implemented?	No attempt to implement previous markers suggestions	Fair attempt at meeting previous markers suggestions	Previous markers suggestions have been exceeded	Previous markers suggestions have been greatly exceeded
2. Bibliography:	0-4.9	5-6.4	6.5-7.4	7.5-10

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• Have at least 10 academically accredited sources been identified? • Has at least one statute been identified? • Have at least 5 cases been identified? • Has the IIE Law Referencing guide been applied to the bibliography?	• Number of sources used is minimal against the required standard • Some sources used are not academically accredited • IIE Law Referencing guide inconsistently applied or not at all	• Number of sources used meets minimum standard required • Some sources used are not academically accredited • IIE Law Referencing guide applied but inconsistently	• Exceeds the minimum number of sources has been used. • IIE Law Referencing guide mostly applied with minor inconsistencies.	• Used additional sources over and above the required minimum; • IIE Law Referencing guide accurately followed with no inconsistencies
3. Language, spelling and grammar:	**0-1**	**2-3**	**4**	**5**
• Has the correct grammar, syntax, punctuation, and spelling been employed throughout? • Was formal language/academic register maintained throughout?	• Numerous grammatical and spelling errors. • No control of appropriate register or inappropriate register used.	• Some errors in grammar, punctuation and spelling that somewhat distract the reader from the content • Register is generally appropriate for academic work	• Few errors in grammar, punctuation, and spelling. • Register is appropriate for academic work	• Minimal to no grammatical or spelling errors. • Used appropriate register, maintaining academic register and language, far exceeding the standard expected of a student at this level

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4. **Content:** Is the research problem and questions clearly defined and threaded (golden thread) through the entire report?	**0-37** Report fails to meet the required standard	**38-47** Report meets the minimum standard	**48-54** Report exceeds minimum standard	**56-75** Report exceeds minimum standard
	Thread only partially or not sufficiently maintained through the report	Thread sufficiently maintained.	Thread well maintained.	Excellently maintained throughout the report
Are the research questions answered?	Research questions inadequately addressed and answered	Research questions fairly adequately addressed and answered.	Research questions competently addressed and answered.	Research questions fully addressed and answered.
Has the selected research method been properly applied?	Research methods not adequately or inconsistently applied	Research methods adequately applied	Good application of research methods	Research methods are well executed
Does the report reflect adequate engagement with the knowledge, interpretation, and application of the literature for a final year LLB student? • have the relevant issues have been identified? • have concepts explained and applied? • Are the conclusions drawn properly substantiated by application of relevant legislation, the Constitution, and opinions of authors and/or principles established or confirmed by the court?	Report reflects low competency in reflecting on issues and explaining concepts - conclusions drawn are incorrect and or insufficiently substantiated	Report reflects an adequate attempt to reflect on issues, explanations of concepts and substantiation of conclusions	Report reflects a good attempt at reflecting on issues, explanations of concepts and substantiation of conclusions	Report reflects high competency in terms of reflection on the issues, explaining concepts and drawing well-substantiated conclusions

Is there a logical progression in terms of the layout of the research report: – • does the introduction present an overview of the report? • Are the links between the chapters clear and in line with what was presented in the introduction?	Reports lacks a logical progression from introduction to conclusion, links between chapters are unclear.	Report reflects an adequate attempt at maintaining a logical progression from introduction to conclusion but links between chapters are not always clear	Report reflects good and logical progression from introduction to conclusion and links between chapters are clear	High competency in maintaining a logical progression from introduction to conclusion, demonstrates high competency in linking chapters
Are the arguments presented logically and coherently?	Arguments presented are neither logical nor coherent	Demonstrates fair competency in the presentation of arguments Arguments fairly logical and coherent	Good competency demonstrated in the presentation of arguments Arguments are logical and coherent	High competency demonstrated in presenting arguments and maintaining coherency throughout the report
Overall, does the research report, as a whole, demonstrate: • understanding of the significance of the research, • originality and • a thorough analysis of current legal position?	Overall, the research report does not meet the minimum standard: • Lacks originality in that too many quotations were used, poor paraphrasing and summarising. Students own thoughts and	Overall, the research report meets the minimum standards: • In terms of originality - quality of paraphrasing and summarising require some work. An adequate reflection of the student's own thoughts and words	Overall, the research report exceeds minimum standards. • Report reflects originality – paraphrasing and summarising are of a good quality. A good reflection of the students	Overall, the research report far exceeds the minimum standards: • reflects a high competency. • in terms of originally, paraphrasing and summarising are of a high standard, reflecting the students own voice and words

	words are not apparent • Little to no understanding of the significance of the research, neither does it reflect the current legal position.	• Fair articulation of significance of the research • Current legal position set out but lacks depth of analysis.	owns thoughts and words • Good articulation of significance of the research • good analysis of the current legal position.	• Excellent articulation of significance of the research • Analysis and presentation of the current legal position exceeds the standard expects of a student at this level
5. **Format** • Was the structure of the research report adhered to? • Is the text justified? • Was 1.15 spacing used? • Was Arial font size 11 used?	**0-1**		**2-4**	**5**
	Report fails to meet minimum standard: • Structure inconsistent with formal research • Font and line spacing inconsistent. • no logical flow • text is not justified or not consistently justified.	Report meets minimum standard: • Structure fairly consistent with formal research • Correct font and line spacing somewhat consistent • Text mostly justified • Logical flow with some inconsistencies	Report exceeds minimum standard: • Good structure, consistent with formal research • Correct font and line spacing consistently used. • Good flow but with minor inconsistencies. • Text mostly justified.	Report greatly exceeds the minimum standard: • Well-structured and consistent with formal research • Correct font and line spacing consistently used. • Excellent flow, logical and clear. • Text consistently justified.
				/100

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ANNEXURE I

Referencing Rubric – The IIE Legal Referencing Guidelines

Providing evidence based on valid and referenced academic sources is a fundamental educational principle and the cornerstone of high-quality academic work. Hence, The IIE considers it essential to develop the referencing skills of our students in our commitment to achieve high academic standards. Part of achieving these high standards is referencing in a way that is consistent, technically correct and congruent. This is not plagiarism, which is handled differently.

Poor quality formatting in your referencing will result in a penalty of **a maximum of ten percent being deducted from the percentage awarded**, according to the following guidelines. Please note, however, that **evidence of plagiarism in the form of copied or uncited work (not referenced), absent reference lists, or exceptionally poor referencing, may result in action being taken in accordance with The IIE's Intellectual Integrity Policy (0023).**

Markers are required to provide feedback to students by indicating **(circling/underlining) the information that best describes the student's work.**

Minor technical referencing errors: 5% deduction from the overall percentage – the student's work contains **five or more errors** listed in the minor errors column in the table below.

Major technical referencing errors: 10% deduction from the overall percentage – the student's work contains **five or more errors** listed in the major errors column in the table below.

If both minor and major errors are indicated, then 10% only (and not 5% or 15%) is deducted from the overall percentage. The examples provided below are not exhaustive but are provided to illustrate the error.

Required: Technically correct referencing style	Minor errors in technical correctness of referencing style Deduct 5% from percentage awarded	Major errors in technical correctness of referencing style Deduct 10% from percentage awarded
Consistency • The same referencing format has been used for all footnote references and in the bibliography/reference list.	Minor inconsistencies. • The referencing style is generally consistent, but there are one or two changes in the format of footnote referencing and/or in the bibliography. • For example, page numbers for direct quotes (footnote) have been provided for one source, but not in another instance. Two book chapters (bibliography) have been referenced in the bibliography in two different formats.	Major inconsistencies. • Poor and inconsistent referencing style used in footnotes and/or in the bibliography/ reference list. • Multiple formats for the same type of referencing have been used. • For example, the format for direct quotes (footnotes) and/or book chapters (bibliography/ reference list) is different across multiple instances.
Technical correctness • Referencing format is technically correct throughout the submission. • **The correct referencing format for the module's discipline has been used, i.e., either APA, OR Harvard OR Law** • Position of the reference: a reference is directly associated with every concept or idea. • For example, quotation marks, page numbers, years, etc. are applied correctly in the footnotes, sources in the bibliography/reference list are correctly presented.	Generally, technically correct with some minor errors. • The correct referencing format has been consistently used, but there are one or two errors. • Concepts and ideas are typically referenced, but a reference is missing from one small section of the work. • Position of the references: references are only given at the beginning or end of every paragraph. • For example, the student has incorrectly presented direct quotes (footnotes) and/or book chapters (bibliography/reference list).	Technically incorrect. • The referencing format is incorrect. • Concepts and ideas are typically referenced, but a reference is missing from small sections of the work. • Position of the references: references are only given at the beginning or end of large sections of work. • For example, incorrect author information is provided, no year of publication is provided, quotation marks and/or page numbers for direct quotes missing, page numbers are provided for paraphrased material, the incorrect punctuation is used (footnotes); the bibliography/reference list is not in alphabetical order, the incorrect format for a book chapter/journal article is used, information is missing e.g. no place of publication had been provided (bibliography); repeated sources on the reference list.
Congruence between footnotes and bibliography/ reference list • All sources are accurately reflected and are all accurately included in the bibliography/ reference list.	Generally, congruence between the footnotes referencing and the bibliography/ reference list with one or two errors. • There is largely a match between the sources presented in-text and the bibliography. • For example, a source appears in the footnotes, but not in the bibliography/ reference list or vice versa.	A lack of congruence between the footnote referencing and the bibliography. • No relationship/several incongruencies between the footnote referencing and the bibliography/reference list. • For example, sources are included in-text, but not in the bibliography and vice versa, a link, rather than the actual reference is provided in the bibliography.
In summary: the recording of references is accurate and complete.	In summary, at least 80% of the sources are correctly reflected and included in a reference list.	In summary, at least 60% of the sources are incorrectly reflected and/or not included in reference list.

Overall Feedback about the consistency, technical correctness and congruence between footnote referencing and bibliography:

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CHAPTER ONE.

1.1 Introduction.

1.1.1 Background to the study.

The Companies Act 71 of 2008 (hereinafter referred to as the Companies Act)[1] is the cornerstone of Company law in the Republic of South Africa. It can be argued that section 20(9) of the Companies Act extended the common law position of the piercing of the corporate veil and made it easier for courts to lift or pierce the corporate veil.[2]

Piercing of the corporate veil takes place when the separate legal personality of a company has been mistreated resulting in the company no longer be viewed as a separate legal personality.[3]

The main focus of this legal research will assess the effectiveness of section 20(9) of the Companies Act[4] in reaching its stated objective. An analysis of the interpretation of section 20(9) of the current Companies Act[5] will be executed whilst clarifying concepts such as who is an 'interested party' and what 'unconscionable abuse' means. The circumstances under which the corporate veil can be pierced will aid the researcher in the process of establishing the effectiveness of section 20(9) of the Companies Act.[6] The effectiveness will be discussed and analysed through the common law positions (case law) and legislation established in relation to the piercing of the corporate veil to supplement section 20(9) of the Companies Act[7] which codified and adopted the common-law position related to the piercing of the corporate veil.[8]

1.2 Research objectives.

The objectives of this study entail assessing the case law and statutes in which the doctrine of piercing of the corporate veil was addressed in line with the founding values of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).[9] In order to establish the effectiveness of section 20(9) of the Companies Act[10] in reaching its stated objective which speaks to this doctrine. The roles and responsibilities of the of directors of a company will also be discussed.[11] A discussion regarding the consequences directors can face for not upholding their standard of conduct will also be included in the research.[12] Additional resources will be used in order to critically analyse the statutory interpretation of section 20(9) of the Companies Act,[13] and to identify if there are any gaps that exist in section 20(9) of the Companies Act[14] and if these gaps can be filled or improved.[15]

[1] 71 of 2008.
[2] Davis, D Geach, W Loubser, A Buba, Z Burdette, D Butler, D Coetzee, L & Mongalo, T *Companies and other Business Structures Commercial Law* 4th ed (2019) 37.
[3] 2008 (2) SA 303 C.
[4] S20(9) of 71 of 2008.
[5] S20(9) of 71 of 2008.
[6] S20(9) of 71 of 2008.
[7] S20(9) of 71 of 2008.
[8] Davis et al *Companies and other Business Structures Commercial Law* 37.
[9] 1996.
[10] S20(9) of 71 of 2008.
[11] Hendr kse, JW Hefer, L *Corporate Governance Handbook: Principles and Practice* 3rd ed (2019) 317-333.
[12] Hendr kse, JW *et al Corporate Governance Handbook: Principles and Practice* 384.
[13] S20(9) of 71 of 2008.
[14] S20(9) of 71 of 2008.
[15] Botha, C. *Statutory Interpretation an Introduction for students* 5th ed (2012) 3.

1.3 Problem statement.

Has section 20(9) of the Companies Act[16] aided by the courts of law been successful and effective in disregarding the separate legal personality of a company where there is unconscionable abuse of the juristic personality of a company?

1.4 Research questions.

1.4.1 What does it mean to pierce the corporate veil and under what circumstances can the corporate veil be pierced?
1.4.2 What does the term 'unconscionable abuse' mean as per section 20(9) of the Companies Act?[17]
1.4.3 Who is identified as an 'interested party' in terms of section 20(9) of the Companies Act?[18]
1.4.4 What are the roles and responsibilities of directors as per the Companies Act?[19]
1.4.5 What are the consequences of directors for not upholding their standard of conduct as per the Companies Act?[20]
1.4.6 Are there any gaps in section 20(9) of the Companies Act that can be filled or improved?[21]
1.4.7 Has section 20(9) of the Companies Act been effective in reaching its stated objective and is section 20(9) a remedy of last resort?[22]

1.5 Research methodology.

This legal research will follow a qualitative research design in particular the black letter law methodology also known as doctrinal research method.[23] The black letter law research methodology is appropriate for this legal research as it focuses heavily on the law itself as it presently stands, analysing legal rules whilst delving into the research on law that looks at what the law essentially is in the available sources.[24] In particular primary sources namely, case law, legislation and the Constitution of the Republic of South Africa, 1996, and secondary sources namely, books, internet sources, journals and articles of South African academics.[25] The use of the black letter law research method will help rectify and clarify the law in relation to the research topic at hand, by a distinctive method of examining the authoritative texts that consist of the primary and secondary sources mentioned.[26]

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[16] S20(9) of 71 of 2008.
[17] S20(9) of 71 of 2008.
[18] S20(9) of 71 of 2008.
[19] 71 of 2008.
[20] S20(9) of 71 of 2008.
[21] S20(9) of 71 of 2008.
[22] S20(9) of 71 of 2008.
[23] Du-Plooy-Cilliers, F Davis, C Bezuidenhout, RM *Research Matters* 2nd ed (2021) 329.
[24] Jerome Hall Law Library "Legal Dissertation: Research and Writing Guide" 2019 website at https://law.indiana.libguides.com/dissertationguide#:~:text=Doctrinal,%2C%20statutes%2C%20or%20regulations [Accessed at 19 April 2022].
[25] Venter, F *Legal Research: Purpose, Planning and Publication* (2018) 73-80.
[26] Jerome Hall Law Library "Legal Dissertation: Research and Writing Guide".

1.6 Chapter outlines.

Chapter 1.

The chapter provides a background to the research paper, objectives of the study, research questions, problem statement, proposed research methodology, chapter outlines of the study and delineation and limitations of the research paper.

Chapter 2.

The chapter will adequately express the diverse viewpoints of the various authors who have expressed their opinions in relation to the legal research topic at hand. The primary purpose of this literature review will be to analyse the different opinions of the various authors in order to establish the effectiveness of their opinions in reaching a conclusion as to whether or not section 20(9) of the Companies Act[27] is effective in reaching its stated objective.

Chapter 3.

The chapter will discuss the relevant statues and their applicability. The Companies Act[28] will be the main statute focused on in this research. Firstly, section 20(9) of the Companies Act[29] will be stipulated and its binding effect interpreted in relation to the problem statement at hand. Secondly, section 76(3) regarding the roles of directors will be discussed.[30] Thirdly, section 77 regarding the responsibilities of directors will be analysed.[31] Lastly, section 218 will be discussed regarding the repercussions of any individual who contravenes any section(s) of the Companies Act.[32] This chapter will have a look at what 'unconscionable abuse' means as per section 20(9) of the Companies Act.[33]

Chapter 4.

The chapter will analyse case law relevant to the legal research topic at hand. Case law from a common law stance, such as *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*[34] and *Airport Cold Storage (Pty) v Ebrahim*[35] will be discussed supplemental to case law such as *Ex Parte Gore NNO*[36] extending the common law position in terms of section 20(9) of the Companies Act[37]. Section 20(9) of the Companies Act[38] consists of multiple components contributing to the piercing of the corporate veil thus, judicial precedent Dadoo *Ltd v Krugersdorp Municipal Council* regarding separate legal personality and judicial precedent *Organisation Undoing Tax Abuse v*

[27] S20(9) of 71 of 2008
[28] 71 of 2008.
[29] S20(9) 71 of 2008.
[30] S76(2)-S76(3) of 71 of 2008.
[31] S77 of 71 of 2008.
[32] S218 of 71 of 2008.
[33] S20(9) of 71 of 2008.
[34] 1995 (4) SA 790 (A).
[35] 2008 (2) SA 303 C.
[36] 2013 (3) SA 382 (WCC).
[37] S20(9) of 71 of 2008.
[38] S20(9) of 71 of 2008.

Myeni[39] regarding directors standard of conduct and the consequences of directors not upholding their standard conduct as per the Companies Act[40] will be discussed.

Chapter 5.

The chapter will analyse the authoritative sources referred to in chapters three and four that set out whether section 20(9)[41] is effective in reaching its stated objective. Firstly, the researcher's findings in relation to the legal position as established by legislation will be analysed. Followed by an analysis of the researcher's findings in relation to the legal position as established by case law. Lastly, reference will be made to texts in which the case law was critiqued and the effects of those discussions on the problem that this research will address. Including an analysis of whether a gap exists in the prescribed legislation or case law.

Chapter 6.

The chapter will draw conclusions in relation to the effectiveness of section 20(9) of the Companies Act[42] in reaching its stated objective addressing the research questions that arose from the topic at hand.

1.7 Delineation and limitations of the research paper.

This research paper's focus will be on South African companies whose corporate veils have been pierced and more specifically the effectiveness of the piercing of the corporate veil through the use of case law, scholarly articles, books and law blogs. Furthermore, this research paper will not take into account any legal developments in relation to the effectiveness of the doctrine of the piercing of the corporate veil that occurred after 17 November 2022. The author will not directly interact with corporate firm's that have undergone the process of piercing the corporate veil.

1.8 Conclusion.

The chapter has provided a background to the research paper, objectives of the study, research questions, problem statement, proposed research methodology, chapter outlines of the study and delineation and limitations of the research paper.

[39] 2020 (3) SA 578 (GP).
[40] 71 of 2008.
[41] S20(9) of 71 of 2008.
[42] S20(9) of 71 of 2008.

CHAPTER TWO.

2.1 Introduction.

This chapter will express the diverse viewpoints of the various authors who have expressed their opinions relating to the legal research topic at hand. However, additional sources in the chapters to follow will be utilised thus, this research paper will not be confined to the sources mentioned in this chapter.

2.1.1 The effectiveness of section 20(9) of the Companies Act.

The viewpoint established in the book titled, Business Structures Commercial Law, sets out the foundational and integral aspects of the present research topic at hand. Chapter 2 of this book, deals with whether section 20(9) of the Companies Act[43] reaches its stated objective as explained in this book by way of discussing the common law and legislation established in relation to the piercing of the corporate veil. Davis *et al* argues that section 20(9) of the Companies Act[44] extended the common law position of the piercing of the corporate veil and made it easier for courts to lift or pierce the corporate veil.[45]

Furthermore, the viewpoints established in the book Corporate Governance Handbook: Principles and Practice, sets out two of the foundational aspects of the research topic currently being dealt with. Chapter 19 of this book provides an analysis regarding the roles and responsibilities of the directors of a company.[46] This is a crucial aspect to be discussed within this research paper as the directors of a company not upholding their roles and responsibilities has a direct impact on the effectiveness of section 20(9) of the Companies Act[47] reaching its stated objective. Furthermore, the discussion of the roles and responsibilities of the directors as per Chapter 19 of this book will aid the researcher in providing sufficient context to the discussion of the topic at hand.[48]

Moreover, Nwafor, in the article titled "Piercing the Corporate Veil: An incursion into the judicial conundrum" is of the opinion that a definite meaning is required to be established by parliament for the term 'unconscionable abuse' in order for section 20(9)[49] to achieve its purpose.[50] The research paper will re-examine Nwafor's opinion and recommend a suitable position where possible.

Lastly, in answering the research questions at hand the dissertation by Phiri, provides a thorough explanation regarding the definition of a director and the purpose of a director in a company. Phiri,

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[43] S20(9) of 71 of 2008.
[44] S20(9) of 71 of 2008.
[45] Davis, D Geach, W Loubser, A Buba, Z Burdette, D Butler, D Coetzee, L & Mongalo, T *Companies and other Business Structures Commercial Law* 4th ed (2019) 37.
[46] Hendr kse, JW Hefer, L Corporate Governance Handbook: Principles and Practice 3rd ed (2019) 317-333.
[47] S20(9) of 71 of 2008.
[48] Hendr kse et al Corporate Governance Handbook: Principles and Practice 318.
[49] S20(9) of 71 of 2008.
[50] Nwafor, AO "Piercing the Corporate Veil: An incursion into the judicial conundrum" 2015 VIP (11) 152.

describes a director as an individual who is a member of the board of a company,[51] and goes on to state that the purpose of the director is to manage the affairs of the company.[52] The provision of this description is of great significance as the term director is used throughout this research paper in order to adequately address whether or not section 20(9) of the Companies Act[53] is effective in reaching its stated objective. Furthermore, this dissertation supports the position examined by Hendrikse *et al*,[54] in sufficiently discussing the roles and responsibilities of directors as per the Companies Act.[55]

2.1.3 What are the essential elements surrounding the piercing of the corporate veil doctrine?

The careful analysis and evaluation of the explanation of the piercing of the corporate veil aids the researcher in establishing the essential characteristics that this doctrine is composed of.

Schoeman discusses the crucial legal research question, under what circumstances can the corporate veil be pierced? Schoeman's opinion is in alignment with that of Bregmans.[56] Schoeman states that according to section 20(9) of the Companies Act[57] and common law the court can pierce the corporate veil of a company where the court establishes that a company's business was not conducted in alignment with the provisions of the Companies Act[58] or that it was a disguise for unlawful activities.[59]

Werksman's law blog supports the discussion and opinions of Schoeman-Louw,[60] and states an important opinion relevant to the discussion of the legal research topic at hand specifically regarding the circumstances under which the corporate veil can be pierced. The author of this blog, highlights that even though a company was not originally incorporated with misleading motives and intentions. What is of most significance is whether or not the company was used as a disguise at the time of the appropriate transaction.[61]

Golegal law blog also explains the relationship between the common law and legislation in relation to the piercing of the corporate veil. This explanation states that the common law is supplemental to legislation in that should the piercing of the corporate veil fail under common law there exists section 20(9) of the Companies Act.[62] Furthermore, advancing the position proposed by Hendrikse *et al,*[63] that the conduct of shareholders and directors are not consequence free.[64]

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51 Phiri Piercing of the Corporate veil: a critical analysis of section 20(9) of the Companies Act 71 of 2008 (Masters dissertation, University of Venda) 2017 15.
52 Phiri Piercing of the Corporate veil 15.
53 20(9) of 71 of 2008.
54 Hendr kse et al Corporate Governance Handbook: Principles and Practice 318.
55 Phiri Piercing of the Corporate veil 67-89.
56 Bregmans "Piercing the corporate veil".
57 S20(9) of 71 of 2008.
58 71 of 2008.
59 Schoeman-Louw, N "When can you be held personally liable within your company and how can this be brought about?" November 2019 website at Piercing the corporate veil - Personal liability within your company (golegal.co.za) [Accessed at 20 April 2022].
60 Schoeman-Louw, N "When can you be held personally liable within your company and how can this be brought about?".
61 Werksmans "Piercing the corporate veil between related employees" May 2013 website at https://www.werksmans.com/legal-updates-and-opinions/piercing-the-corporate-veil-between-related-employers/ [Accessed 20 April 2022].
62 S20(9) of 71 of 2008.
63 Hendr kse *et al Corporate Governance Handbook: Principles and Practice* 318.
64 Golegal "Piercing the corporate veil and your remedies".

Moreover, Cassim, addresses a pivotal issue raised in the legal research proposal in connection to who is identified as an interested party in terms of section 20(9) of the Companies Act.[65] Cassim stipulates that the prescribed section does not define the term "interested person."[66] This aids the researcher in identifying a gap that exists in terms of section 20(9) of the Companies Act[67] that can be filled or improved.[68]

Peter *et al's* article, addresses pivotal issues raised in the legal research proposal. In particular, the research questions and research problem. In this journal article the author explains the meaning of the term unconscionable abuse in terms of the Companies Act[69] and alludes to the fact that this term needs further clarification under the Companies Act.[70]

2.1.4 When will the piercing of a company's corporate veil take place?

What became apparent in this review was the unified stance of the various authors opinions as to when the piercing of the corporate veil of a company will take place.

Firstly, Bergmans law blog examines the position put forward by Cassim regarding when the corporate veil can be pierced. Bregmans is of the stance that the Companies Act[71] grants the court capacity to attach personal liability for the debts of a company to its directors if they are intentionally a party to incautious or fraudulent dealings by the company.[72]

Furthermore, Schoeman asserts that the veil of a company is pierced when the court acts to remove the protective covering of the limited liability presented by the company's structure.[73] Congruent to the school of thought of Diale-Ali *et al*.[74]

Finally, Diale, advances the position suggested by Peter *et al,*[75] stating that the piercing of the corporate veil is a remedy used by the courts to tackle the abuse of the separate legal personality of companies by directors and shareholders also known as 'controllers'[76] and this doctrine has become a codified concept under the Companies Act.[77] Enabling the court as advanced by Bergmans to disregard the separate legal personality of the company and hold its 'controllers' liable in their personal capacities, as a result of the manner in which the 'controllers' conducted business in their personal capacities.[78]

[65] S20(9) of 71 of 2008.
[66] Cassim, R "Hiding behind the veil" October 2013 website at https://www.derebus.org.za/hiding-behind-veil/ [Accessed at 20 April 2022].
[67] S20(9) of 71 of 2008.
[68] Cassim, R "Hiding behind the veil".
[69] 71 of 2008.
[70] Peter, N & Levenberg, SC "The mystery of the Corporate Veil: Comparing Anglo American Jurisdictions" 2019 *PSJLIA* (7) 166-167.
[71] 71 of 2008.
[72] Bregmans "Piercing the corporate veil" April 2014 website at https://www.bregmans.co.za/piercing-the-corporate-veil/ [Accessed at 22 April 2022].
[73] Schoeman, N "Piercing of the corporate veil under the New Companies Act" June 2012 website at https://www.derebus.org.za/piercing-corporate-veil-new-companies-act/ [Accessed 20 April 2022].
[74] Diale-Ali, U Botha, L "Piercing the corporate veil in tax and fraud cases".
[75] Peter 2019 *PSJLIA* (7) 166-167.
[76] Diale-Ali, U Botha, L "Piercing the corporate veil in tax and fraud cases" October 2021 website at Cliffe Dekker Hofmeyr - Piercing the corporate veil in tax fraud cases [Accessed 19 April 2022].
[77] 71 of 2008.
[78] Diale-Ali, U Botha, L "Piercing the corporate veil in tax and fraud cases".

2.2 Conclusion.

The literature review analysed the different opinions of the various authors in order to establish the effectiveness of their opinions in reaching a conclusion as to whether or not section 20(9) of the Companies Act[79] is effective in reaching its stated objective.

[79] S20(9) of 71 of 2008.

CHAPTER THREE.

3.1 Introduction.

This chapter will discuss the statutes most relevant to the research paper at hand and their applicability in order to address the legal research problem that exists.

3.2 The purpose of the Companies Act 71 of 2008.

The Companies Act[80] is the cornerstone of South African company law. In its preamble the Companies Act[81] prescribes that it exists to make amendments to the Close Corporations Act[82] 1984 and Companies Act[83] 1973 providing for a consistent and harmonious regime of business incorporation, management and regulation.[84]

Hence, section 20(9) of the Companies Act[85] is argued to extend the common law position of the piercing of the corporate veil.[86] Providing for an effective and predictable environment for the efficient regulation of companies.[87] Reducing the high amount of confusion in relation to the doctrine of the piercing of the corporate veil that existed in common law.[88] Furthermore, promoting the Companies Act's[89] compliance with the Bill of Rights, as prescribed in the section 8(4) of the Constitution[90] in relation to the application of company law.[91] Section 8(4) of the Constitution[92] provides that the rights contained in the Bill of Rights also apply to juristic persons. However, the extent of the application of the rights depends on the nature of the rights and the juristic person receiving such a right.[93]

3.3 Separate legal personality of a company.

The first component within the Companies Act[94] that influences the piercing of the corporate veil and its effectiveness is section 19(1)[95] which stipulates that a company is a legal juristic person. A company is a separate legal person capable of acquiring rights and duties separate from its members.[96] The Act[97] differentiates the incorporation and registration of a company. Although

[80] 71 of 2008.
[81] 71 of 2008.
[82] 69 of 1984.
[83] 61 of 1973.
[84] 71 of 2008.
[85] 71 of 2008.
[86] Davis et al *Companies and other Business Structures Commercial Law* 37.
[87] Cassim, R "Piercing of the corporate veil under section 20(9) of the Companies Act 71 of 2008: A new direction" 2014 *SAMLJ* (26) 329.
[88] *Ibid.*
[89] 71 of 2008.
[90] S8(4) of 1996.
[91] Phiri *Piercing of the Corporate veil* 33.
[92] S8(4) of 1996.
[93] Phiri *Piercing of the Corporate veil* 33.
[94] 71 of 2008.
[95] 71 of 2008.
[96] Davis et al *Companies and other Business Structures Commercial Law* 68.
[97] 71 of 2008.

incorporation can provide for the limitation of liability of those individuals behind the company, this principle may not be abused.[98] As per common law and section 20(9) of the Companies Act,[99] the courts have the power to lift the corporate veil holding abusers personally liable for company debts and or, ignoring the separate legal existence of the company.[100] For example, when a company has been used as a disguise for fraudulent and illegal conduct to be carried out. The next section to be discussed will expand on the piercing of the corporate veil.[101]

3.4 Piercing of the corporate veil.

3.4.1 Section 20(9) of the Companies Act.[102]

Section 20(9) of the Companies Act[103] stipulates:

> "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)."[104]

In simplified terms section 20(9)[105] prescribes that the piercing of the corporate veil takes place when the separate legal personality of a company has been mistreated and, as a result of this mistreatment the company can no longer be viewed as a separate legal personality.[106] The company will not be considered a juristic person regarding any right, duty or liability.[107] This legal principle exists to prohibit directors and shareholders who use the company's structure to hide their fraudulent and corrupt activities.[108]

Upon the interpretation of section 20(9)[109] it is evident that the language used in this section has been articulated in broad terms.[110] Although given the peculiarity of cases, the legislature could have intentionally articulated section 20(9)[111] in broad terms to grant the court the discretion to decide each case based on its own merits.[112] Promoting the flexibility of the application of section 20(9)[113] throughout various cases.[114] However, the broad articulation of this section has resulted

[98] Davis et al Companies and other Business Structures Commercial Law 69.
[99] 71 of 2008.
[100] *Ibid.*
[101] *Ibid.*
[102] S20(9) of 71 of 2008.
[103] S20(9) of 71 of 2008.
[104] S20(9) of 71 of 2008.
[105] S20(9) of 71 of 2008.
[106] 2008 (2) SA 303 C.
[107] Golegal "Piercing the corporate veil and your remedies".
[108] *Ibid.*
[109] S20(9) of 71 of 2008.
[110] Phiri Piercing of the Corporate veil 69.
[111] S20(9) of 71 of 2008.
[112] Phiri Piercing of the Corporate veil 70.
[113] S20(9) of 71 of 2008.
[114] Phiri Piercing of the Corporate veil 71.

in challenges arising in relation to the interpretation of certain aspects of this section as a result of the lack of clarity provided with regards to the definition for unconscionable abuse and what constitutes an 'interested person'.[115]

3.4.2 Unconscionable abuse of the company.

The mistreatment of the company may be caused by the unconscionable abuse of the company. The Companies Act[116] stipulates that the legal personality of a company may be disregarded where there is unconscionable abuse of the juristic personality of a company. However, it is not clear what constitutes 'unconscionable abuse'.[117] Therefore, resulting in the statute not addressing the research objective in this instance.

This lack of clarification by the legislature has caused confusion and apprehension to the courts, 'interested persons' and society at large in determining the circumstances under which the corporate veil can be pierced.[118]

Further clarification regarding the term unconscionable abuse will be provided in the succeeding chapter with reference to case law and additional resources where this term was addressed.

3.4.3 Interested person.

Section 20(9) of the Companies Act stipulates "any 'interested person' may bring an application to court …"[119]

This statutory provision fails to define the term 'interested person' or provide guidance on who would constitute an 'interested person'.[120] As a result, the pure reliance of section 20(9)[121] does not clarify who may invoke section 20(9) of the Companies Act.[122] Thus, this signifies the importance of the succeeding chapter that will make reference to case law intended to clarify unclear terminology within section 20(9),[123] addressing the problems warranting this research paper.

3.5 Standards of director's conduct.

According to section 76(3) of the Companies Act[124] the director of a company when acting in that capacity, must exercise the powers and perform the functions of director:

> "In good faith and for a proper purpose;
> In the best interests of the company;
> With the degree of care, skill and diligence that may reasonably be expected of an individual:
> carrying out the same functions in relation to the company as those carried out by that director and
> having the general skill, knowledge and experience of that director."[125]

[115] Cassim "Piercing of the corporate veil under section 20(9) of the Companies Act 71 of 2008: A new direction" 307.
[116] 71 of 2008.
[117] Cassim "Piercing of the corporate veil under section 20(9) of the Companies Act 71 of 2008: A new direction" 316.
[118] Cassim "Piercing of the corporate veil under section 20(9) of the Companies Act 71 of 2008: A new direction" 329.
[119] S20(9) of 71 of 2008.
[120] Cassim, R "Piercing the corporate veil 'Unconscionable abuse' under the Companies Act 71 of 2008" August 2012 website at https://www.derebus.org.za/piercing-corporate-veil-unconscionable-abuse-companies-act-71-2008/ [Accessed 9 September 2022].
[121] S20(9) of 71 of 2008.
[122] S20(9) of 71 of 2008.
[123] S20(9) of 71 of 2008.
[124] S76(3) of 71 of 2008.
[125] S76(3) of 71 of 2008.

Directors are the controlling minds of companies.[126] There has been instances where directors abuse the principle of separate legal personality of the company.[127] Hence, as an instrument guarding against the abuse of the corporate structure the legislature and the courts have allowed an exception to the principle of separate legal personality.[128]

The Companies Act,[129] 1973 did not consist of clear rules in relation to the duties and liabilities of directors. The duties and liabilities of directors were left to common law.[130] The researcher submits that it is imperative that directors know their prescribed duties and responsibilities because the standard of a director's conduct can impact the profitability of a company and ultimately contribute to the directors behaving in such a manner that their actions would constitute an unconscionable abuse of the corporate structure, resulting in the courts piercing the corporate veil of the company.

The Companies Act,[131] 2008 creates certainty of the standard of conduct of directors by partially codifying the duties of directors.[132] This partial codification accommodates the ever-changing environment of company law. Accommodating the development of common law by the application of legal principles.[133] Further substantiating the argument stated above that Company law exists to supplement and extend common law.[134]

3.6 Liabilities of directors.

According to section 77 of the Companies Act[135] directors are generally liable for a breach of a fiduciary duty; losses, damages or cost resulting from breach of sections 75, 76(2), 76(3) or (b).[136]

The breach of fiduciary duties by directors gives rise to the imposition of liabilities on directors through the piercing of the corporate veil.[137] Where the breach of duty results in an outsider being wronged, the court could pierce the corporate veil in order to reach the director hiding behind the veil and impose liability on the director.[138]

Section 77 of the Companies Act[139] is important to discuss in that the standard of conduct and the liabilities of a director of company operate coherently. Performing a significant role in identifying whether or not a standard of conduct has been met or not. This has a direct relationship upon the analysing of whether or not the corporate veil of a company must be pierced or not depending on the findings of the court upon their application of the relevant legal principles to the respective circumstance in question.

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[126] Phiri *Piercing of the Corporate veil* 12.
[127] Phiri *Piercing of the Corporate veil* 42.
[128] Phiri *Piercing of the Corporate veil* 9.
[129] 61 of 1973.
[130] Davis et al *Companies and other Business Structures Commercial Law* 139.
[131] 71 of 2008.
[132] Davis et al *Companies and other Business Structures Commercial Law* 139.
[133] Ibid.
[134] Davis et al Companies and other Business Structures Commercial Law 37.
[135] S77 of 71 of 2008.
[136] S77 of 71 of 2008.
[137] Phiri *Piercing of the Corporate veil* 43.
[138] *Ibid.*
[139] S77 of 71 of 2008.

In addition to section 77,[140] the researcher submits that section 332 of the Criminal Procedure Act,[141] 1977 supports section 20(9) of the Companies Act.[142] Section 332,[143] prescribes that the criminal activities carried out by a company may be placed on directors of the company consequently, directors cannot hide in the event of criminal wrongdoing behind the separate legal personality of a company to evade criminal prosecution.[144]

3.7 Repercussions of contravening the Companies Act.[145]

Additional to section 20(9),[146] section 218(2)[147] provides that any individual who violates any provision of the Companies Act[148] will be liable to any other individual for any loss or damage suffered by that individual as a result of the contravention.[149] Substantiating this, Stein is of the view that section 218(2)[150] could have drastic financial repercussions for directors, because it is broad enough to include a financial claim by anyone against a director personally if that director contravened any provision of the Companies Act[151] and thereby caused that person to suffer from financial loss.[152] Moreover, counsel De Bruyn submits the language in this provision is clear.[153]

3.8 Conclusion.

Lastly, the enactment of section 20(9) of the Companies Act[154] enlarged the common law scope of the piercing of the corporate veil remedy in South African company law.[155] Understandable from the preceding discussion the veil of a company can pierced in justified circumstances affixing the liability that is seemingly to be that of the company to the rightful individuals. A further analysis of the various stated legislative provisions will be provided in chapter five along with the researcher's stance in relation to these views.

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140 S77 of 71 of 2008.
141 S332 of 51 of 1977.
142 S20(9) of 71 of 2008.
143 S332 of 51 of 1977.
144 Sandilands, K "Piercing the corporate veil under companies act 71 of 2008" October 2019 website at https://serr.co.za/piercing-the-corporate-veil-under-companies-act-71-of-2008 [Accessed 8 September 2022].
145 71 of 2008.
146 S20(9) of 71 of 2008.
147 S218(2) of 71 of 2008.
148 71 of 2008.
149 Davis et al *Companies and other Business Structures Commercial Law* 39.
150 S218(2) of 71 of 2008.
151 71 of 2008.
152 Davis et al Companies and other Business Structures Commercial Law 39.
153 2022 (1) SA 422 (GJ).
154 S20(9) of 71 of 2008.
155 Peter "The mystery of the Corporate Veil: Comparing Anglo American Jurisdictions" 184.

CHAPTER FOUR.

4.1 Introduction.

The courts guard against the abuse of the corporate structure of the legislature as discussed in the preceding chapter. In the present chapter, a discussion of the case law that is relevant to the research paper at hand will be discussed. The discussion will illustrate how judicial precedent plays a role in establishing whether section 20(9) of the Companies Act[156] is effective in reaching its stated objective.

4.2 Separate legal personality of a company.

4.2.1 Salomon v Salomon & Co Ltd.[157] (Salomon)

This case deals with the legal personality of a company. In *Salomon*[158] the court came to the conclusion that once a company is legally incorporated, the company must be treated as an independent individual with its rights and liabilities appropriated to it; the motives of the founder of the company are irrelevant when discussing the rights and liabilities of a company.[159] This case supplements section 19(1) of the Companies Act,[160] which was discussed in the previous chapter.

4.2.2 Dadoo Ltd v Krugersdorp Municipal Council.[161] (Dadoo)

This case deals with the principle of separate legal personality of a company. This principle also implies that the assets of the company are not owned by the director, shareholder or incorporator of a company but, the assets belong to the company itself.[162] A legal person is regarded as an entity that can acquire rights and duties separate from its members.[163] In *Dadoo*[164] the court recognised the separate legal personality of the company and subsequently concluded that the ownership of the property in issue belonged to the company and not its shareholders.[165] This case substantiates section 19(1) of the Companies Act[166] that was discussed in the preceding chapter. In particular, the finding of Innes CJ who pronounced that a registered company is a legal persona that is exclusive from the members, shareholders, directors, or incorporators.[167]

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156 S20(9) of 71 of 2008.
157 1897 AC 22 HL.
158 1897 AC 22 HL.
159 Davis et al *Companies and other Business Structures Commercial Law* 35.
160 S19(1) of 71 of 2008.
161 1920 AD 530.
162 Phiri *Piercing of the Corporate veil* 2.
163 Davis et al *Companies and other Business Structures Commercial Law* 35.
164 1920 AD 530.
165 Phiri Piercing of the Corporate veil 32.
166 S19(1) of 71 of 2008.
167 Peter “The mystery of the Corporate Veil: Comparing Anglo American Jurisdictions” 158.

4.3 Piercing of the corporate veil in terms of common law.

4.3.1 Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd.[168] (Cape Pacific)

This case deals with the piercing of the corporate veil. In *Cape Pacific*[169] the plaintiff purchased shares from one Lubner in a property owning company. Lubner moved the shares in the property owning company, to a different company that he administered in order to stop the plaintiff from asserting its rights under the agreement of sale.[170]

As a result of Lubner's misuse of the company, the court concluded that if a company has been legitimately established and is legitimately operated, but is misused to implement fraudulent activities, or for a deceitful purpose, there is no reason, in principle, why its separate legal personality cannot be overlooked in relation to the transaction in question.[171]

4.3.2 Airport Cold Storage (Pty) Ltd v Ebrahim.[172] (Airport Cold Storage)

This case deals with the lifting of the corporate veil. In *Airport Cold Storage*[173] a father and son sought to escape personal liability for the debts of a close corporation.[174] A creditor of the close corporation had vended and supplied meat and vegetables supplies to the close corporation on account.[175] The close corporation was at a later stage placed under provisional liquidation at a time when it owed the creditor R278 377.[176] Upon the liquidation of the close corporation, the creditor proved a claim against it for the balance, but it received no dividend in the liquidation because the corporation had no assets.[177] The creditor then sought to hold the member and his father personally liable for debt.[178]

The court concluded that the defendants carried out the business of the corporation in order to promote their own interests as if the business was their own.[179] When it suited the defendants they chose to ignore the separate legal personality of the corporation. Consequently, the defendants cannot hide behind the corporate veil of the corporation in order to evade its liabilities.[180]

4.4 Piercing the corporate veil in terms of the Companies Act 2008.[181]

4.4.1 *Forestry and Fisheries v B Xulu and Partners Incorporated.[182] (Forestry and Fisheries)*

[168] 1995 (4) SA 790 (A).
[169] 1995 (4) SA 790 (A).
[170] Peter "The mystery of the Corporate Veil: Comparing Anglo American Jurisdictions" 162.
[171] Davis et al Companies and other Business Structures Commercial Law 37.
[172] 2008 (2) SA 303 C.
[173] 2008 (2) SA 303 C.
[174] 2008 (2) SA 303 C 12.
[175] Davis et al Companies and other Business Structures Commercial Law 39.
[176] 2008 (2) SA 303 C 12.
[177] *Ibid.*
[178] *Ibid.*
[179] Davis et al Companies and other Business Structures Commercial Law 40.
[180] Ibid.
[181] 71 if 2008.
[182] 2022 (1) SA 434 (WCC).

This case deals with the piercing of the corporate veil under the Companies Act 2008. In *Forestry and Fisheries,* the first respondent, B Xulu (BX) & Partners Inc (BXI), is an incorporated firm of attorneys, the principal member of which is BX.[183] The facts illustrated that BX under the pretense of settling BXI liabilities, appropriated funds from the company, directing the funds to himself, friends, family and organisations under his control.[184]

Upon the court's analysis of the situation it found that BX failed to separate BXI's separate juristic personality from his personal interests being the controller of BXI resulting in unconscionable abuse.[185] Furthermore, the conduct of BX satisfies all the requirements to pierce the corporate veil holding BX jointly and severally liable with BXI.[186]

4.4.2 Unconscionable abuse of a company.

4.4.2.1 *Ex Parte Gore NNO.*[187]*(Gore)*

This case deals with the piercing of the corporate veil in a group of companies on the ground of the improper use of the corporate personality.[188] In *Gore*[189] the controllers of the group of companies did not treat the companies in the group as separate legal entities.[190]

Therefore, the court concluded that it was appropriate to pierce the corporate veil to treat the parent company of the group of companies as liable for the acts of the subsidiary.[191] As a result of the application of section 20(9)[192] in the case, this case helped in defining the term 'unconscionable abuse' which the Companies Act[193] does not define.[194] The critiques of this case will follow in chapter five.

4.4.2.2 *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO.*[195] *(City Capital)*

This entire case did not discuss the doctrine of the piercing of the corporate veil,[196] however, its importance in this research paper stems from, the Supreme Court of Appeal's definition of unconscionable conduct in terms of its standard grammatical definition – "Showing no regard for conscious."[197] The court concluded that it would not be desirable to try formulate any definition of the term and additionally the unconscionable abuse of the juristic personality of a company as per

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183 2022 (1) SA 434 (WCC) 1.
184 Kader, M "Piercing the corporate veil" April 2022 website at https://www.lexisnexis.co.za/lexis-digest/legal/piercing-the-corporate-veil [Accessed 8 September 2022].
185 Kader "Piercing the corporate veil".
186 Ibid.
187 2013 (3) SA 382 (WCC).
188 2013 (3) SA 382 (WCC) 2.
189 2013 (3) SA 382 (WCC).
190 Nwafor "Piercing the Corporate Veil: An incursion into the judicial conundrum 148.
191 Davis et al Companies and other Business Structures Commercial Law 38.
192 S20(9) of 71 of 2008.
193 71 of 2008.
194 Cassim "Piercing of the corporate veil under section 20(9) of the Companies Act 71 of 2008: A new direction" 307.
195 2017(85) SA 277 SCA.
196 2017(85) SA 277 SCA 3.
197 Shindlers "City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO 2018 (4) SA 71 (SCA)" February 2020 website at https://www.schindlers.co.za/2020/city-capital-sa-property-holdings-limited-v-chavonnes-badenhorst-st-clair-cooper-no-and-others-2018-4-sa-71-sca/ [Accessed at 8 September 2022].

the definition of section 20(9)[198] includes the use of, or an act by a company to commit fraud or for deceitful or improper purpose.[199]

4.4.3 Interested person.

4.4.3.1 *TJ Jonck BK h/a Bothaville Vleismark.[200] (Bothaville)*

Case law has played an integral role in clarifying who can invoke section 20(9) of the Companies Act.[201] In *Bothaville[202]* the phrase 'interested party' was described with reference to its explanation in line with section 65 of the Close Corporations Act.[203] The court stated that the term should not be interpreted too narrowly resulting in its restriction or too widely resulting in its inclusion of indirectly interested individuals.[204] In chapter five an analysis of the term 'interested person' will follow.

4.5 Standards of director's conduct in company and liabilities of directors.

4.5.1 *Robinson v Randfontein Estates Gold Mining Co Ltd.[205] (Robinson)*

This case deals with the piercing of the corporate veil as a result of a director of a company breaching their fiduciary duty owed to a company. In *Robinson[206]* the court declined recognising the separate legal personality of a subsidiary company which the plaintiff had tried to use as a shield to avoid the fiduciary duty that he owed to the holding company.[207]

Consequently, the court treated both the subsidiary company and the holding company as a single entity, thereby disregarding the separate existence of the subsidiary company on the basis that the directors have a fiduciary duty to the company, not to use corporate opportunities to benefit any other individual besides the company itself.[208]

4.6 Repercussions of contravening the Companies Act.[209]

4.6.1 Rabinowitz v Van Graan.[210] (Rabinowitz)

This case deals with the enforceability of the proposition that section 218(2) imposes liability upon directors for contraventions of the Companies Act.[211] In this case the court made it clear that

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[198] S20(9) of 71 of 2008.
[199] Shindlers "City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO 2018 (4) SA 71 (SCA)".
[200] 1998 (1) SA 971 (O).
[201] S20(9) of 71 of 2008.
[202] 1998 (1) SA 971 (O).
[203] Polity "Piercing the corporate veil" April 2014 website at https://www.polity.org.za/article/piercing-the-corporate-veil-2014-04-10 [Accessed 9 September 2022].
[204] *Ibid.*
[205] 1921 AD 168.
[206] 1921 AD 168.
[207] Phiri *Piercing of the Corporate veil* 78.
[208] *Ibid.*
[209] 71 of 2008.
[210] 2013 (5) SA 315 (GSJ).
[211] S218(2) of 71 of 2008.

directors can be held personally liable in terms of section 218(2) for allowing or being aware of conduct that falls within the scope of section 22(1) – the prohibition against reckless trading.[212]

The court stipulated that the plaintiff must however, allege and prove the exact contravention of the Companies Act[213] as well as the causation between the act complained of and the damage experienced.[214] Furthermore, if that loss was caused by a director breaching their fiduciary duties as per section 76 of the Companies Act,[215] then the directors can be held personally liable under section 218(2) to third parties for losses experienced by those third parties.[216]

Moreover, whenever a court finds that section 77(3)[217] has been contravened by a director, the court must then make an order declaring such a person as a delinquent in terms of section 162(5).[218] Such a person in addition, to being personally liable for the company's debt, will not be permitted to act as a director for a certain period of time.[219] Further reference in regard to this discussion of delinquent directors can be made to the case of *Organisation Undoing Tax Abuse v Myeni.*[220]

4.7 Conclusion.

The mentioned case law has illustrated that when 'controllers' of companies use the companies for an improper purpose, and in that process, treat the entity in such a way that there is no clarity between the separate juristic personality of the entity and those controlling the entity, section 20(9) of the Companies Act[221] will be implemented. Chapter five will provide an analysis of the various authors views regarding the prescribed cases mentioned in chapter four along with the researcher's stance in relation to these views.

[212]Hogan Lovells "Paying the Piper" November 2017 website at https://www.hoganlovells.com/en/publications/paying-the-piper [Accessed 9 September 2022].
[213] 71 of 2008.
[214] 2013 (5) SA 315 (GSJ) 8.
[215] S76 of 71 of 2008.
[216] Hogan Lovells "Paying the Piper".
[217] S77(3) of 71 of 2008.
[218] S165(2) of 71 of 2008.
[219] Myburgh, E "Holding delinquent directors personally liable" July 2017 website at https://www.derebus.org.za/holding-delinquent-directors-personally-liable/ [Accessed 9 September 2022].
[220] 2020 (3) SA 578 (GP).
[221] S20(9) of 71 of 2008.

CHAPTER FIVE.

5.1 Introduction.

This chapter will adequately analyse the diverse authoritative sources referred to in chapters three and four that set out whether section 20(9)[222] is effective in reaching its stated objective. This will include an analysis of whether a gap exists in the prescribed legislation or case law.

5.2 Legislation.

5.2.1 Separate legal personality of a company.

From the researcher's establishment of the importance of the Companies Act[223] in answering the existing legal research problem. The researcher found the need to continue dissecting the various elements that section 20(9) of the Companies Act[224] is comprised of contributing to the piercing of the corporate veil.

The first component within the Companies Act[225] to be discussed is the separate legal personality of the company, section 19(1).[226] The contents of this section were stipulated in chapter three of this research paper.

The researcher agrees with Davis *et al* in that although incorporation can provide for the limitation of liability of those individuals behind the company, this principle may not be abused.[227] Davis *et al*, advances the position suggested by scholarly writer Peter *et al,*[228] wherein it is stated that the piercing of the corporate veil is a remedy used by the courts to tackle the abuse of the separate legal personality of companies by directors and shareholders.[229]

Upon the analysis of section 19(1)[230] the lack of critique found regarding this section has informed the researcher's view that one should accept the section for what it is and that no gaps exist within the section.

5.2.2 Piercing of the corporate veil.

Section 19 (1) of the Companies Act[231] influences section 20(9).[232] Thus, the second component within the Companies Act[233] this research paper discussed in chapter three was section 20(9) of

[222] S20(9) of 71 of 2008.
[223] 71 of 2008.
[224] S20(9) of 71 of 2008.
[225] 71 of 2008.
[226] S19(1) of 71 of 2008.
[227] Ibid.
[228] Peter 2019 PSJLIA (7) 166-167.
[229] Diale-Ali "Piercing the corporate veil in tax and fraud cases".
[230] S19(1) of 71 of 2008.
[231] S19(1) of 71 of 2008.
[232] S20(9) of 71 of 2008.
[233] 71 of 2008.

the Companies Act.[234] Fundamentally, this section exists to forbid directors and shareholders who use the company's structure to hide their fraudulent and corrupt activities.[235]

The researcher agrees with the unified stances of Bergmans, Schoeman and Cassim regarding section 20(9) of the Companies Act[236] granting the court capacity to attach personal liability for the debts of a company to its directors if they are intentionally a party to incautious or fraudulent dealings by the company.[237]

Furthermore, the researcher concurs with the sentiments of Phiri, regarding the articulation of section 20(9)[238] in broad terms in order to grant the court the discretion to decide each case based on its own merits.[239] Phiri, goes on to further express that this is an important attribute of the section as it permits for the flexibility of the application of the section throughout the various cases with different circumstances.[240] However, as simple and broad as section 20(9)[241] may seem various gaps have been identified by the researcher within section 20(9)[242] and these gaps will be identified and discussed below.

5.2.3 Unconscionable abuse.

Within section 20(9)[243] 'unconscionable abuse' has not been defined. Nwafor, argues that a definite meaning must be established by parliament for the term 'unconscionable abuse' in order for section 20(9)[244] to achieve its purpose.[245] Peter *et al*, attempted to explain the definition of the term unconscionable abuse in terms of the Companies Act.[246] However, Peter *et al* discovered that this term requires further clarification under the Companies Act.[247]

Scholarly writer Subramanien, is of the opinion that the courts can contribute to establishing this definition in setting the precedent of, to what extent abuse in a company is permitted to exist before it will be considered unconscionable.[248] Cassim, concurs with Subramanien's sentiments advising that some guidance in establishing the facts or circumstances that would constitute an unconscionable abuse of a juristic personality can be obtained from the jurisprudence that has been developed in relation to section 65 of the Close Corporation Act[249] which is similarly worded to section 20(9) of the Companies Act.[250]

However, Phiri argues that guidelines stipulating the circumstances under which the corporate veil must be pierced would result in section 20(9)[251] application being rigid.[252] Making it easier for

[234]S20(9) of 71 of 2008.
[235] *Ibid.*
[236] S20(9) of 71 of 2008.
[237] Bregmans "Piercing the corporate veil".
[238] S20(9) of 71 of 2008.
[239] Phiri Piercing of the Corporate veil 70.
[240] Phiri Piercing of the Corporate veil 71.
[241] S20(9) of 71 of 2008.
[242] S20(9) of 71 of 2008.
[243] S20(9) of 71 of 2008.
[244] S20(9) of 71 of 2008.
[245] Nwafor, AO "Piercing the Corporate Veil: An incursion into the judicial conundrum" 2015 VIP (11) 152.
[246] 71 of 2008.
[247] 71 of 2008.
[248] Subramanien, D "Unconscionable abuse" – section 20(9) of the companies act 71 of 2008" 2014 *Obiter* 152.
[249] S65 of 69 of 1984.
[250] S20(9) of 71 of 2008.
[251] S20(9) of 71 of 2008.
[252] Phiri *Piercing of the Corporate veil* 70.

individuals who abuse the corporate entity to abuse the entity in a masterly manner by ensuring that they escape the stated circumstances.[253] The exclusion of the grounds of unconscionable abuse in section 20(9),[254] has resulted in the section not continuously requiring amendments as it is open for interpretation and discretion by the courts of law as mentioned above.[255]

The researcher accepts the critiques of Subramanien, Peter *et al* and Cassim in that the legislative, executive and judicial branches of government have not done enough in providing clarification for what the term 'unconscionable abuse' means. Thus, impacting the establishment of whether section 20(9)[256] is effective in reaching its stated objective. The researcher supports Cassim and Subramanien's suggestions that alternative avenues should be explored in order to define the term 'unconscionable abuse' providing interim solutions of the court referring to the definition of 'gross abuse' as per the Corporations Act[257] in order to provide guidance for the application of the definition.

5.2.4 Interested person.

A gap exists in the law regarding the definition of an 'interested person'. Upon the discussion of case law in the next section within this research paper this term will be analysed.

5.2.5 Standards of director's conduct.

The duties and liabilities of directors were left to common law. However, Cox states that the current standards of director's conduct are a reinstatement of common law.[258] The legal writings of Werksmans Attorneys are of an opposing stance that the standards of director's conduct are codified in the Company's Act[259] and the Act[260] makes a few notable additions.[261] The Act[262] extends the duties of directors and increases the accountability of directors to the shareholders of the company.[263]

Legislation has proved that the standards of directors conduct directly influences whether or not the corporate veil of a company will be pierced. Section 76(3)[264] essentially conveys that a director must not take part in any unlawful activities that would impact the company. Thus, in applying the expected standards of director's conduct to section 20(9)[265] in order to answer the problem that is the focus of this research paper it is evident to the researcher that if a director carries out their conduct in accordance with what is expected of them as per section 76(3)[266] there would be no need for the court to pierce the corporate veil.

[253] Phiri *Piercing of the Corporate veil* 71.
[254] S20(9) of 71 of 2008.
[255] *Ibid.*
[256] 69 of 1984.
[257] 69 of 1984.
[258] Cox, I "Unpacking section 76 of the Companies Act 71 of 2008" February 2013 website at http://coxattorneys.co.za/assets/the-standards-of-directors-conduct.pdf [Accessed 23 October 2022].
[259] 71 of 2008.
[260] 71 of 2008.
[261] Werksmans Attorneys "Companies Act 71 of 2008 duties and liabilities of directors".
[262] 71 of 2008.
[263] *Ibid.*
[264] S76(3) of 71 of 2008.
[265] S20(9) of 71 of 2008.
[266] S76(3) of 71 of 2008.

Deloitte law blog is of the opinion that South African legislation encourages directors to act honestly and bear responsibility for their actions.[267] Hendrikse *et al,*[268] supports this in stipulating that the conduct of shareholders and directors are not consequence free.[269]

The researcher deduces from all that has been read that when a director does not act lawfully the courts through legislation (for example, 20(9))[270] will consequently hold them accountable.

5.2.6 Liabilities of directors.

Where the breach of duty results in an outsider being wronged, the court will pierce the corporate veil in order to reach the director hiding behind the veil.[271] Section 77 of the Companies Act[272] is important to discuss in that the standard of conduct and the liabilities of a director of company operate coherently.[273] Section 77 stipulates that directors are generally liable for a breach of a fiduciary duty; losses, damages or cost resulting from breach of sections 75, 76(2), 76(3) or (b).[274]

Upon the analysis of the prescribed legislation it has been proven that directors will be held liable for their misconduct in that their unlawful activities directly influence the corporate veil of a company being pierced. However, to what extent can directors be held liable in companies.[275] Law blog Polity answers this research question by stating that under the Companies Act[276] the liabilities of directors have been extended.[277] Werksmans law blog and the scholarly writings of Sandilands concur with the findings of Polity.[278] Sandilands goes on to further add that the Criminal Procedure Act also provides for the liabilities of directors.[279]

The researcher has identified that the directors' misconduct can have grave consequences for both the director and company in issue.[280] These consequences range from a director being held criminally liable in terms of section 332 of the Criminal Procedure Act,[281] the piercing of the corporate veil in terms of section 20(9) of the Companies Act,[282] and the removal of a director or prevention of taking office in the future in terms of the Companies Act.[283]

In order to further substantiate the legislative analyses provided, case law relevant will analysed in the next part of this research paper.

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[267] Deloitte "The standard of directors' conduct in South Africa" undated website at https://www2.deloitte.com/za/en/pages/governance-risk-and-compliance/articles/the-standard-of-directors-conduct.html [Accessed 23 October 2022].
[268] Hendrikse *et al Corporate Governance Handbook: Principles and Practice* 318.
[269] Golegal "Piercing the corporate veil and your remedies".
[270] S20(9) of 71 of 2008.
[271] Werksmans Attorneys "Companies Act 71 of 2008 duties and liabilities of directors".
[272] S77 of 71 of 2008.
[273] Werksmans Attorneys "Companies Act 71 of 2008 duties and liabilities of directors".
[274] S77(2)(a) of 71 of 2008.
[275] Polity "Liabilities in Companies – How far does it really go?" August 2017 website at https://www.polity.org.za/article/liability-in-companies-how-far-does-it-really-go-2017-08-08 [Accessed 23 October 2022].
[276] 71 of 2008.
[277] *Ibid.*
[278] Werksmans Attorneys "Companies Act 71 of 2008 duties and liabilities of directors".
[279] Sandilands "Piercing the corporate veil under companies act 71 of 2008".
[280] *Ibid.*
[281] S332 of 51 of 1977.
[282] S20(9) of 71 of 2008.
[283] 71 of 2008.

5.3 Case law.

5.3.1 Separate legal personality of a company.

The principle of separate legal personality and the doctrine of the piercing of the corporate veil have a direct relationship as one exists because of the other. Hence, the need to analyse the case law that supplements section 19(1) of the Companies Act.[284]

5.3.1.1 *Salomon*[285] *and Dadoo.*[286]

Case law *Salomon*[287] and *Dadoo* both speak to the separate legal personality of a company. From *Dadoo*[288] Phiri, expressed that the principle of separate legal personality also entails that the assets of a company are not owned by the company shareholders and directors but they belong to the company itself.[289] Thus, the researcher has deduced that it makes sense that if the directors and shareholders misuse the belongings of the company as if the belongings of the company personally belong to them, then they should be held personally liable by the corporate veil of the company being pierced in order to reveal the directors or shareholders hiding behind the veil.

The researcher concurs with the legal writing of the law blog the Law Teacher and has observed that since *Salomon*[290] the complete separation of a company and its members has never been doubted.[291] Furthermore, Siebritz expands on the importance of the influence of the *Salomon*[292] case on *Dadoo*[293] stating that the *Dadoo*[294] case is a very integral development in South African jurisprudence and in the common law as it signifies the implementation of the principle of the *Salomon*[295] case into South African law.[296]

5.3.2 Piercing of the corporate veil in terms of common law.

5.3.2.1 *Cape Pacific*[297] *and Airport Cold Storage.*[298]

In terms of common law *Cape Pacific*[299] and *Airport Cold Storage*[300] the courts concluded that owners, directors and shareholders of companies will not be allowed to use a separate legal entity as an instrument to justify the deceitful actions of individuals hiding under the disguise that an incorporation can provide for the limitation of liability of those behind the company.[301]

[284] S19(1) of 71 of 2008.
[285] 1897 AC 22 HL.
[286] 1920 AD 530.
[287] 1897 AC 22 HL.
[288] 1920 AD 530.
[289] Phiri *Piercing of the Corporate veil* 2.
[290] 1897 AC 22 HL.
[291] Law Teacher "Separate legal personality of the company" July 2019 website at https://www.lawteacher.net/free-law-essays/business-law/separate-legal-personality-of-the-company-business-law-essay.php [Accessed 23 October 2022].
[292] 1897 AC 22 HL.
[293] 1920 AD 530.
[294] 1920 AD 530.
[295] 1897 AC 22 HL.
[296] Siebritz *Piercing of the corporate veil: critical analysis of section 20(9) of 71 of 2008* (Masters Dissertation, University of the Western Cape) 2016.
[297] 1995 (4) SA 790 (A).
[298] 2008 (2) SA 303 C.
[299] 1995 (4) SA 790 (A).
[300] 2008 (2) SA 303 C.
[301] Davis et al *Companies and other Business Structures Commercial Law* 69.

Law blog GoLegal discusses *Cape Pacifc*[302] (before the *Ex Parte Gore* judgement)[303] in a legal write up and suggests that the courts in the case focused on the preservation of the integrity of the principle of legal personality.[304] Thus, the court held in terms of the common-law principles that the corporate veil is an exceptional remedy, drastic remedy or a remedy of last resort that will be used where no alternative remedy exists.[305] Should the piercing of the corporate veil fail first in terms of common law then only will section 20(9) of the Companies Act[306] be applied.

However, upon the enactment of the Companies Act[307] and the judgement of *Gore* this finding of the court was disagreed with by the scholarly writings of authors Subramanien and Tatenda given that the provision of section 20(9)[308] ignores the view expressed in the case as within this piece of legislation there is no indication of section 20(9)[309] being regarded as a remedy of last resort.[310] This disagreement will be expanded on below.

5.3.3 Piercing the corporate veil in terms of the Companies Act, 2008.[311]

5.3.3.1 *Forestry and Fisheries.*[312]

The judgement of *Forestry and Fisheries*[313] is important in that the court held that the conduct of the respondent satisfied all the requirements for piercing the corporate veil, and the respondent was held jointly and severally liable for failing to separate the juristic personality of the company from his personal interests resulting in unconscionable abuse.[314] Legal editor Kader submits that if there is in fact no distinction between the separate legal personality of a juristic entity and those controlling it improperly, a piercing is justified.[315]

The researcher agrees with the findings of the case and that of Kader in that, from this case a clear illustration has been provided regarding the application of the piercing of the corporate veil in terms of the Companies Act.[316]

5.3.3.2 *Gore.*[317]

The judgement of *Gore*[318] is a very important judgement in relation to the interpretation of section 20(9) of the Companies Act.[319] Subramanien is of the opinion that *Gore*[320] is significant because it allows for the piercing the corporate veil remedy to be available beyond exceptional

302 1995 (4) SA 790 (A).
303 2013 (3) SA 382 (WCC).
304 GoLegal "Piercing the corporate veil and your remedies" October 2019 website at https://www.golegal.co.za/shareholders-directors-liability/ [Accessed 23 October 2022].
305 *Ibid.*
306 71 of 2008.
307 71 of 2008.
308 S20(9) of 71 of 2008.
309 S20(9) of 71 of 2008
310 GoLegal "Piercing the corporate veil and your remedies".
311 71 of 2008.
312 2022 (1) SA 434 (WCC).
313 2022 (1) SA 434 (WCC).
314 Kader "Piercing the corporate veil".
315 *Ibid.*
316 71 of 2008.
317 2013 (3) SA 382 (WCC).
318 2013 (3) SA 382 (WCC).
319 S20(9) of 71 of 2008.
320 2013 (3) SA 382 (WCC).

circumstances (in contrast to *Cape Pacific*)[321] and rather in instances where there has been the illegitimate use of the juristic personality of a company.[322] As a result of the findings of this judgement the doctrine of the piercing of the corporate veil in terms of the Companies Act[323] will no longer apply as the courts of law previously held in terms of the common law and *Cape Pacific[324]* as a remedy of last resort.[325] Hence, broadening its effectiveness.

Furthermore, Tatenda agrees with Subramanien that section 20(9) and the Companies Act[326] as a whole must be seen as supplementing common law rather than substituting it.[327] Tatenda argues that common law may have not been replaced by statute because it has not been found to be unconstitutional since it has to be applied giving regard to the Constitution.[328] Cassim supports this stance stating that the possible reason for that, is the fact that the common law remedy may still apply in cases where the requirements of section 20(9)[329] are not met.[330]

Nwafor further argues that the application of section 20(9)[331] in this case helped in defining the term 'unconscionable abuse' which the Companies Act[332] does not define.[333] This term was given a wide meaning by *Gore*[334] and said to suggest conduct with regards to the formation and use of companies diverse enough to cover all descriptive terms such as 'sham' or 'device' and more.[335] Alleviating the uncertainties brought by the common law. Although Cassim argues that too low a threshold might have been set by *Gore*.[336] The judiciary had to exercise its discretion in order to define the term. Showing that they will go behind the veil where it is just and equitable to do so.[337]

The researcher has deduced that *Gore[338]* plays a key role in the interpretation and wider application of section 20(9)[339] to the extent that it can be applied on a case-by-case basis. Alleviating the uncertainties of the Companies Act[340] brought by the common law.

5.3.3.3 *City Capital.[341]*

This judgement provides a definition of unconscionable conduct in terms of its standard grammatical definition – "Showing no regard for conscious".[342] The court concluded that it would not be desirable to try formulate any definition of the term and additionally the unconscionable

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[321] 1995 (4) SA 790 (A).
[322] Subramanien, D "Unconscionable abuse" – section 20(9) of the companies act 71 of 2008" 2014 *Obiter* 161.
[323] 71 of 2008.
[324] 1995 (4) SA 790 (A).
[325] Subramanien "Unconscionable abuse" – section 20(9) of the companies act 71 of 2008" 161.
[326] S20(9) of 71 of 2008.
[327] Subramanien "Unconscionable abuse" – section 20(9) of the companies act 71 of 2008" 161.
[328] Tatenda, MP A critical analysis of the piercing of the corporate veil in South African corporate law, with special reference to the position in groups of companies (Masters Dissertation, University of Kwa-Zulu-Natal) 2016.
[329] S20(9) of 71 of 2008.
[330] Cassim "Piercing of the corporate veil under section 20(9) of the Companies Act 71 of 2008: A new direction" 335.
[331] S20(9) of 71 of 2008.
[332] 71 of 2008.
[333] Cassim "Piercing of the corporate veil under section 20(9) of the Companies Act 71 of 2008: A new direction" 307.
[334] 2013 (3) SA 382 (WCC).
[335] Nwafor "Piercing the Corporate Veil: An incursion into the judicial conundrum 148.
[336] Cassim "Piercing of the corporate veil under section 20(9) of the Companies Act 71 of 2008: A new direction" 335.
[337] Nwafor "Piercing the Corporate Veil: An incursion into the judicial conundrum 146.
[338] 2013 (3) SA 382 (WCC).
[339] S20(9) of 71 of 2008.
[340] S20(9) of 71 of 2008.
[341] 2017(85) SA 277 SCA.
[342] Shindlers "City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO 2018 (4) SA 71 (SCA)" February 2020 website at https://www.schindlers.co.za/2020/city-capital-sa-property-holdings-limited-v-chavonnes-badenhorst-st-clair-cooper-no-and-others-2018-4-sa-71-sca/ [Accessed at 8 September 2022].

abuse of the juristic personality of a company as per the definition of section 20(9)[343] includes the use of a company to commit fraud or for deceitful or improper purpose.[344]

The researcher supports the opinion of Subramanien, that the courts can contribute to establishing the definition of unconscionable abuse by setting the precedent of to what extent abuse in a company is permitted to exist before it will be considered unconscionable.[345] Furthermore, by the court contributing to the establishment of the definition concurs with the opinions of Phiri. Which argue that the guidelines stipulating the circumstances under which the corporate veil must be pierced could result in the application of section 20(9)[346] being rigid.[347] Thus, making it easier for individuals who abuse the corporate entity to avoid the piercing of the corporate veil regardless if the facts of the case so favours.[348] Moreover, Phiri argues to the exclusion of the grounds of unconscionable abuse in section 20(9).[349] This has resulted in the prescribed section being compact rather than long and bulky.[350]

The researcher inferred from the opinions of Phiri, Subramanien and the court in the judgement of *City Capital*,[351] that although a definition of the term 'unconscionable abuse' has not yet been provided by the legislature the courts of law are actively contributing to closing this gap that exists within section 20(9) whilst acknowledging from the opinions of Phiri, that the lack of the definition of this term does not entirely have a negative effect on section 20(9) reaching its stated objective.

5.3.4 Interested person.

The Companies Act[352] did not provide a definition for the term interested person, subsequently this created a gap in the legislation. Various scholarly writers and judgments attempted to fill this gap in striving to establish a definition for the term 'interested person'.

In the judgement *Bothaville,*[353] the phrase 'interested party' was described with reference to its explanation in section 65 of the Close Corporations Act.[354] The court in *Bothaville*[355] stated that the term should not be interpreted too narrowly resulting in its restriction or too widely resulting in its inclusion of indirectly interested individuals.[356] However, in contrast to this opinion the court in *Gore*[357] gave the words 'interested person' a wide meaning stating that no mystery is attached to the meaning of the term.[358] According to Siebritz the court in *Gore*[359] provided important interpretative indications in order to define the term.[360] However, Cassim argues it is questionable

[343] S20(9) of 71 of 2008.
[344] Shindlers "City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO 2018 (4) SA 71 (SCA)".
[345] Subramanien, D "Unconscionable abuse" – section 20(9) of the companies act 71 of 2008" 2014 *Obiter* 152.
[346] S20(9) of 71 of 2008.
[347] Phiri *Piercing of the Corporate veil* 70.
[348] *Ibid.*
[349] S20(9) of 71 of 2008.
[350] Phiri *Piercing of the Corporate veil* 71.
[351] 2017(85) SA 277 SCA.
[352] 71 of 2008.
[353] 1998 (1) SA 971 (O).
[354] Polity "Piercing the corporate veil" April 2014 website at https://www.polity.org.za/article/piercing-the-corporate-veil-2014-04-10 [Accessed 9 September 2022].
[355] 1998 (1) SA 971 (O).
[356] *Ibid.*
[357] 2013 (3) SA 382 (WCC).
[358] Cassim "Piercing of the corporate veil under section 20(9) of the Companies Act 71 of 2008: A new direction" 311.
[359] 2013 (3) SA 382 (WCC).
[360] Siebritz *Piercing of the corporate veil: critical analysis of section 20(9) of 71 of 2008* 16.

whether this was the intention of *Gore*[361] and whether it correctly reflects the legal position.[362] Siebritz in the attempt of clarifying the uncertainty regarding this definition submits that an interested person for purposes of section 20(9)[363] are natural persons, juristic persons, foreign companies, trusts, organs of state.[364]

The researcher agrees with the opinions of *Gore* and Siebritz in an attempt to provide a definition for the term 'interested person'. Reason being that the wide definition of the term permits for the broad application of the term on a case by case basis, not hindering any individuals access to courts as per their fundamental constitutional right,[365] that the Companies Act[366] is not permitted to infringe upon.

5.3.5 Standards of director's conduct in a company and liabilities of directors.

5.3.5.1 *Robinson*[367] and *Rabinowitz.*[368]

In the *Robinson*[369] judgement, Phiri argues that the director is not allowed to be used as a disguise to escape the fiduciary duties owed to the company.[370] Thus, the court treated both the subsidiary company and the holding company as a single entity, thereby disregarding the separate existence of the subsidiary company on the basis that the directors have a fiduciary duty to the company, not to use corporate opportunities to benefit any other individual besides the company itself.[371] Tatenda concurs with Phiri regarding the director not abusing of the separate legal personality of the company.[372]

Where the directors abuse the separate legal personality of the company, they do not uphold their fiduciary duties there will be repercussions for their actions. In the *Rabinowitz*[373] judgement directors were held personally liable for their contravention of section 218(2) of the Companies Act.[374] The legal write up of Hogan Lovells claims the enforceability of section 218(2) read together with section 22(1) of the Companies Act[375] was crystalised in Robinowitz.[376] Furthermore, whenever a court finds that section 77(3)[377] has been contravened by a director, the court must then make an order declaring such a person as a delinquent in terms of section 162(5).[378]

The researcher agrees with the opinions of Phiri and Tatenda concerning the importance of a director not abusing the separate legal personality of a company. Furthermore, the researcher acknowledges and agrees with the repercussions that exist in relation to directors contravening

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[361] 2013 (3) SA 382 (WCC).
[362] Cassim "Piercing of the corporate veil under section 20(9) of the Companies Act 71 of 2008: A new direction" 335.
[363] S20(9) of 71 of 2008.
[364] Siebritz *Piercing of the corporate veil: critical analysis of section 20(9) of 71 of 2008* 52-53.
[365] S34 of 1996.
[366] 71 of 2008.
[367] 1921 AD 168.
[368] 2013 (5) SA 315 (GSJ).
[369] 1921 AD 168.
[370] Phiri *Piercing of the Corporate veil* 78.
[371] *Ibid.*
[372] Tatenda A critical analysis of the piercing of the corporate veil in South African corporate law, with special reference to the position in groups of companies 1.
[373] 2013 (5) SA 315 (GSJ).
[374] 71 of 2008.
[375] S22(1) of 71 of 2008
[376] Hogan Lovells "Paying the Piper".
[377] S77(3) of 71 of 2008.
[378] S165(2) of 71 of 2008.

section 218(2) of the Companies Act.[379] The researcher acknowledges that section 218(2)[380] is brief and well-articulated allowing for the court to properly make use of the numerous sections in the Companies Act, 2008 that provide for the personal liability of directors such as sections 76 and 77,[381] in order to reach a well informed decision in relation to whether or not to pierce the corporate veil as per section 20(9).[382] Furthermore, contributing to the section not continuously requiring to be amended as it is open for interpretation.

5.3.6 Conclusion.

This chapter analysed the diverse authoritative sources referred to in chapters three and four that set out whether section 20(9)[383] is effective in reaching its stated objective. It is evident that the enactment of section 20(9) of the Companies Act[384] coupled with judicial precedent have enlarged the common law scope of the piercing of the corporate veil remedy in South African company law.[385] The existing gaps in the prescribed legislation were identified and accounted for in relation to their impact in section 20(9)[386] reaching its stated objective.

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[379] S218(2) of 71 of 2008.
[380] S218(2) of 71 of 2008.
[381] S76-77 of 71 of 2008.
[382] S20(9) of 71 of 2008.
[383] S20(9) of 71 of 2008.
[384] S20(9) of 71 of 2008.
[385] Peter "The mystery of the Corporate Veil: Comparing Anglo American Jurisdictions" 184.
[386] S20(9) of 71 of 2008.

CHAPTER SIX.

6.1 Introduction.

This chapter will conclude the legal research that has been executed throughout this research paper. Drawing conclusions regarding the key findings that were obtained from the research paper and reiterating these findings by addressing the research questions.

6.2 Piercing of the corporate veil in terms of the common law.

The piercing of the corporate veil is defined as the disregarding of the separate legal personality of a company as a result of the limited liability of a company being abused by its shareholders and directors answering research question 1.4.1.[387]

Prior to the existence of section 20(9) of the Companies Act[388] the corporate veil of a company was pierced strictly through the use of the common law.[389]

6.3 Piercing of the corporate veil in terms of the Companies Act.[390]

Post the enactment of the Companies Act[391] the corporate veil of a company can be pierced through section 20(9) of the Companies Act[392] and where not applicable, the common law provisions will take over.[393] It has been argued that section 20(9)[394] has extended the common law position making it easier for courts to lift the corporate veil.[395] Given that section 20(9)[396] and the common law operate concurrently it is clear that section 20(9)[397] captures all the common law grounds and justifies the piercing of the corporate veil in one wide category limiting the mystery attached to this section.[398]

Although section 20(9)[399] developed the common law this development created various gaps within the legislature such as unclear definitions of the terms 'unconscionable abuse' and 'interested party'. In answering research questions 1.4.2 and 1.4.3 the researcher concludes that an interim solution has been established by Cassim,[400] regarding using the Corporations Act[401] for guidance regarding the definition of the term 'unconscionable abuse' as Nwafor has suggested parliament must assign a definite meaning to the term to close this existing gap.[402] From Nwafor's

387 Davis et al *Companies and other Business Structures Commercial Law* 37.
388 S20(9) of 71 of 2008.
389 *Ibid.*
390 S20(9) of 71 of 2008.
391 71 of 2008.
392 S20(9) of 71 of 2008.
393 Phiri *Piercing of the Corporate veil* 90.
394 S20(9) of 71 of 2008.
395 Davis et al *Companies and other Business Structures Commercial Law* 38.
396 S20(9) of 71 of 2008.
397 S20(9) of 71 of 2008.
398 Phiri Piercing of the Corporate veil 90.
399 S20(9) of 71 of 2008.
400 Cassim "Piercing of the corporate veil under section 20(9) of the Companies Act 71 of 2008: A new direction" 335.
401 69 of 1984.
402 Phiri Piercing of the Corporate veil 89.

suggestion the researcher recommends that parliament should also assign a meaning to the term ‘interested party’ due to the confusion that exists regarding what the term means.

6.4 Standards of director’s conduct in a company and liabilities of directors.

Section 76(3) of the Companies Act[403] stipulates the directors conduct. Answering research question 1.4.4. Directors are the controlling minds of companies.[404] There has been instances where directors abuse the principle of separate legal personality of the company.[405] Hence, guarding against the abuse of the corporate structure the legislature and the courts have allowed an exception to the principle of separate legal personality.[406]

According to section 77 of the Companies Act[407] directors are generally liable for a breach of a fiduciary duty; losses, damages or cost resulting from breach of sections 75, 76(2), 76(3) or (b).[408] The breach of fiduciary duties by directors gives rise to the imposition of liabilities on directors through the piercing of the corporate veil.[409] Answering research question 1.4.5.

6.5 Effectiveness in section 20(9) in reaching its stated objective.

Section 20(9) of the Companies Act[410] is effective in reaching its stated objective. Answering research question 1.4.7. This section is supported by the common law provision for the piercing of the corporate veil as was stipulated above.[411] This section also developed common law provisions resulting in the doctrine of the piercing of the corporate veil no longer being regarded as a remedy of last resort.[412] Answering research question 1.4.7. The development of the common law provision of the piercing of the corporate veil through section 20(9)[413] enabled an wider application of section 20(9)[414] ensuring that there are no loopholes permitting directors and shareholders to easily abuse the limited liability of the company for their personal gain.[415] Furthermore, section 20(9)[416] is supported by numerous sections throughout the Companies Act[417] namely, sections 22(1),[418] 76(3),[419] 77,[420] 218(2)[421] that hold directors and shareholders accountable to behave in the best interests of the company.

Moreover, answering research question 1.4.5 repercussions do exist holding directors and shareholders completely liable for their misconduct such as the removal of the director, the director being declared a delinquent and the director being held criminally liable. Furthermore, answering research question 1.4.1 it is evident from case law that the application of section 20(9)

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[403] S76(3) of 71 of 2008.
[404] Phiri Piercing of the Corporate veil 12.
[405] Phiri Piercing of the Corporate veil 42.
[406] Phiri Piercing of the Corporate veil 9.
[407] S77 of 71 of 2008.
[408] S77 of 71 of 2008.
[409] Phiri Piercing of the Corporate veil 43.
[410] S20(9) of 71 of 2008.
[411] Davis et al Companies and other Business Structures Commercial Law 37.
[412] GoLegal “Piercing the corporate veil and your remedies”.
[413] S20(9) of 71 of 2008.
[414] S20(9) of 71 of 2008.
[415] Phiri Piercing of the Corporate veil 70.
[416] S20(9) of 71 of 2008.
[417] 71 of 2008.
[418] S22(1) of 71 of 2008.
[419] S76(3) of 71 of 2008.
[420] S77 of 71 of 2008.
[421] S218(2) of 71 of 2008.

and the Companies Act[422] hold directors personally liable for their various acts of misconduct such as fraud, or dishonest and improper purpose and crimes through the use of section 20(9)[423] preventing directors from hiding behind the corporate veil.

6.6 Conclusion.

The research conducted throughout this research paper, has illustrated and concluded that section 20(9) of the Companies Act[424] is effective in reaching its stated objective. The section was a good development in South African company law. Reason being the doctrine of the piercing of the corporate is now easily accessible to everyone holding more individuals who pierce the corporate veil accountable.

[422] 71 of 2008.
[423] S20(9) of 71 of 2008.
[424] S20(9) of 71 of 2008.

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