-RESEARCH REPORT-

AN ANALYSIS OF PIERCING THE CORPORATE VEIL AND STRIKING A BALANCE BETWEEN THE SEPARATE LEGAL PERSONALITY OF A COMPANY IN SOUTH AFRICA.

By

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CHAPTER ONE: INTRODUCTION

1.1 Introduction

The foundation of company law rests on the principle of separate legal personality of companies.[1] Separate legal personality means that a company has its own rights and liabilities distinct from those of its holders and controllers. Its holders and controllers, as a result, enjoy limited liability which means that they are not normally held responsible for the company's debts.[2] Separate legal personality can be seen as a "veil" which separates the company from its shareholders and directors.[3] An exception to this principle is the doctrine of piercing the corporate veil which essentially involves the courts, in certain circumstances, ignoring the separate legal personality afforded to companies and holding directors/shareholders personally liable.[4] The focus of this research report is to analyse this doctrine looking at its application in terms of legislation (namely: the Companies Act[5]) and in terms of the common law (as found in case law). This research report will also analyse how the courts have attempted to strike a balance between upholding the separate legal personality afforded to companies and piercing of the corporate veil.

The following chapter is an introduction to the research report and, as such, it will set out the research objectives, research questions, problem statement and research methodology. This chapter will also provide an overview of the proposed content for each chapter and it will explain the delimitations and limitations of this research report.

1.2 Research Objectives

The main objective of this research report is to provide an analysis of the doctrine of piercing the corporate veil. This analysis will look at the current statutory provision of piercing the corporate veil contained in section 20(9) of the Companies Act[6] and whether this provision provides clarity on the circumstances when the courts are allowed to ignore the separate legal personality of companies. This analysis will also look at the common law approach to piercing of the corporate veil as found in various case law and whether this approach is still applicable.

The secondary objective of this research report is to analyse how the courts have attempted to balance the piercing of the corporate veil and upholding the separate legal personality afforded to companies by looking at various case law where this has been discussed.

1.3 Research Questions

The following research questions will be addressed in this research report to achieve the research objectives mentioned in 1.2:

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[1] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil" in South African and selected jurisdictions* (mini-dissertation, University of Pretoria) 2016 3.
[2] Mashiri *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* (thesis, University of KwaZulu-Natal) 2016 1.
[3] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 3.
[4] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 12-13.
[5] Act 71 of 2008.
[6] S20(9) of Act 71 of 2008.

1.3.1 What does separate legal personality mean and when does it come into existence?
1.3.2 How is the corporate veil pierced by the courts in terms of legislation?
1.3.3 Does legislation provide clarity on the circumstances when the corporate veil can be pierced?
1.3.4 How is the corporate veil pierced by the courts in terms of common law?
1.3.5 Is piercing of the corporate veil in terms of common law still applicable?
1.3.6 Is piercing of the corporate veil a last resort remedy?
1.3.7 How have the courts attempted to balance upholding the separate legal personality afforded to companies and piercing of the corporate veil?

1.4 Problem Statement

1.4.1 Main Research Problem

What does the doctrine of piercing the corporate veil entail in terms of the Companies Act[7] and in terms of the common law (as found in case law)?

1.4.2 Secondary Research Problem

How do the courts strike a balance between piercing the corporate veil and upholding the separate legal personality afforded to companies?

1.5 Research Methodology

This research report will follow the black-letter/doctrinal research method. This method focuses on the law as it currently stands – i.e., research is conducted in the law itself and not into the world outside of law or the realities of life.[8]

Thus, for this research report, reliance will be placed on primary sources such as: the Constitution of the Republic of South Africa, 1996[9] (the Constitution), legislation and case law; and on secondary sources such as: textbooks, articles, dissertations and internet sources.[10]

The reason for using black-letter research is because it helps to conduct a critical and qualitative analysis of legal sources to provide coherence, clarity and simplification of the law regarding the chosen topic.[11] This method will assist in achieving the research objectives, answering the research questions and evaluating the research problem.

1.6 Chapter Outlines

[7] Act 71 of 2008.
[8] McConville, M & Chui, WH (Eds) Dobinson, I Johns, F Choongh, S Roberts, P Findlay, M Henham, R Wilson, G Israel, M Meszaros, G Pendleton, M Hall, S *Research Methods for Law* 2nd ed (e-book) (2017) 3-4 <https://edinburghuniversitypress.com/pub/media/resources/9781474404259_Research_Methods_for_Law_-_Introduction_and_Overview.pdf> [Accessed 20 April 2022].
[9] The Constitution of the Republic of South Africa, 1996.
[10] McConville *et al Research Methods for Law* 3-4.
[11] Jerome Hall Law Library "Legal Dissertation: Research and Writing Guide" 2019 website at https://law.indiana.libguides.com/dissertationguide [Accessed 20 April 2022].

Chapter 1

This chapter is an introduction to the research report and it sets the scene. It explains the research objectives, research questions, problem statement and the research methodology in detail. Furthermore, it contains an overview of the proposed content for each chapter and it includes the delimitations and limitations of the research. This chapter highlights the significance of the research.

Chapter 2

This chapter will analyse the literature wherein various authors have expressed their viewpoints on veil piercing and on striking a balance with the separate legal personality of companies. This analysis will include authors' explanations of separate legal personality and when this comes into existence. It will also discuss how the corporate veil is pierced in terms of the common law and, thereafter, in terms of legislation (according to the various authors). Lastly, this chapter will analyse the authors' viewpoints on how a balance is to be struck with veil piercing and upholding separate legal personality.

Chapter 3

This chapter will examine the legislation which is relevant to this research report. The focus here will be on section 19(1) of the Companies Act[12] which explains the legal status of companies and section 8(4) of the Constitution which provides that the rights in the Bill of Rights apply to juristic persons. The focus will further be on section 20(9) of the Companies Act[13] which provides the circumstances under which the court may pierce the corporate veil.

Chapter 4

This chapter will analyse the case law which is relevant to this research report. To understand the separate legal personality of companies the following cases are of use: *Salomon v A Salomon & Co Ltd*;[14] *Dadoo Ltd v Krugersdorp Municipal Council*;[15] *Airport Cold Storage (Pty) Ltd v Ebrahim*;[16] and *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO*.[17] In relation to common law veil piercing, the following cases are relied on: *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*;[18] *Airport Cold Storage (Pty) Ltd v Ebrahim;*[19] and *Hülse-Reutter v Gödde*.[20] In relation to statutory veil piercing, the following cases are relied on: *Ex Parte Gore NNO;*[21] and *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO*.[22] The above cases (including *Knoop NO v*

[12] S19(1) of Act 71 of 2008.
[13] S20(9) of Act 71 of 2008.
[14] [1897] AC 22 (HL).
[15] 1920 AD 530.
[16] 2008 (2) SA 303 (C).
[17] 2018 (4) SA 71 (SCA).
[18] 1995 (4) SA 790 (A).
[19] 2008 (2) SA 303 (C).
[20] 2001 (4) SA 1336 (SCA).
[21] 2013 (3) SA 382 (WCC).
[22] 2018 (4) SA 71 (SCA).

Birkenstock Properties (Pty) Ltd[23]) will be used to assess how the courts balance veil piercing with upholding the separate legal personality of companies.

Chapter 5

This chapter will summarise the analysis conducted in this research report. This includes an analysis of the authoritative sources, which have established the current legal position (regarding veil piercing and the balance to be struck with the separate legal personality of companies), to tie together the viewpoints which have been expressed in chapters 3 and 4. In other words, this chapter will explain the findings of the legal position in terms of the Companies Act[24] and in terms of the applicable case law. This chapter will also include the findings in terms of other sources which have contributed to the understanding of this research report. Lastly, this chapter will also identify if any gaps exist in the legal position.

Chapter 6

This chapter will provide conclusions of the entire research report. It will provide a conclusion of the legal position of the doctrine of piercing the corporate veil taking into account both the Companies Act[25] and relevant case law. It will also provide a conclusion on how the courts have balanced veil piercing with giving effect to the separate legal personality of companies. In short, this chapter will ensure that all the research questions outlined above are answered.

1.7 Delimitations and Limitations of Research

One delimitation of this research report is that the focus is only on analysing the doctrine of veil piercing and how the courts balance veil piercing with the separate legal personality of companies. Additionally, this research report will only be based on South African law as it relates to the veil piercing.[26] Lastly, due to time constraints, this research report will not take into account any legal development which occurs after the date of submission.[27]

In terms of limitations, a black-letter research method is used which means reliance is placed on primary and secondary sources of law. Consequently, when answering the research questions, the researcher did not personally engage with companies which have been subjected to veil piercing. Thus, this research report does not have first-hand conclusions.[28]

Another limitation is that the secondary objective of this research (namely: how the courts strike a balance with veil piercing and upholding the separate legal personality of companies) is relatively challenging. Decided cases have yet to give a final pronouncement as to how this balance should be struck. Therefore, there are some inherent limitations in analysing the secondary objective. Nevertheless, this could prove to be beneficial in that the door is left open for academics for future inquiry.

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[23] FSHC 04-06-2009 case no 7095/2008 at http://www.saflii.org/za/cases/ZAFSHC/2009/67.html [Accessed 20 April 2022].
[24] Act 71 of 2008.
[25] *Ibid*.
[26] Comparative research was prohibited for this research report.
[27] Any reliance placed on this research report needs to take into account legal developments after the date of submission.
[28] Empirical research was prohibited for this research report.

1.8 Conclusion

In conclusion, this chapter has provided an introduction to the research report by explaining the research objectives, research questions, problem statement and research methodology. This chapter has also provided an overview of the proposed content for each chapter and it has explained the delimitations and limitations of the research. This chapter has essentially highlighted the significance of the research.

CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

This chapter will analyse the literature wherein various authors have expressed their viewpoints on the topic of veil piercing and on striking a balance with the separate legal personality of companies. This analysis commences with an explanation of the separate legal personality which is afforded to companies and when this comes into existence. It then continues with a discussion on how the corporate veil is pierced in terms of the common law and, thereafter, in terms of legislation. Lastly, this chapter will analyse authors' viewpoints on how a balance is to be struck with veil piercing and upholding the separate legal personality. It is important to note that there are sources which will be used throughout this research report that are not necessarily included in this chapter.

2.2 Literature on Separate Legal Personality Afforded to Companies

Separate legal personality, according to Davis *et al*, means that a company is in itself seen as a separate legal person.[29] Consequently, a company is separate and distinct from its shareholders who then, as a result, enjoy limited liability.[30] Separate legal personality comes into existence once a company has been registered and incorporated (the date of incorporation on the registration certificate is the date when a company comes into existence as a separate legal person).[31] Davis *et al* do highlight that while incorporation gives those behind a company limited liability, this principle should not be abused and if it is the courts can disregard a company's separate legal personality (i.e., pierce/lift the corporate veil) and hold directors, shareholders and others personally liable.[32]

2.3 Literature on Piercing the Corporate Veil in Terms of The Common Law

Mashiri is of the opinion that the corporate veil, in terms of the common law, will normally be pierced where a party suffers harm following the abuse of the separate legal personality of companies.[33] He states that veil piercing is a remedy founded on the rule that a company should not be incorporated for purposes of committing fraud.[34] Mashiri further explains that according to the common law veil piercing, courts are allowed to treat those behind the company (e.g., directors and shareholders) as if they had conducted the business matters of the company in their personal capacities.[35]

Schoeman states that veil piercing in terms of the common law can occur when it is allowed by the legislature where there has been non-compliance with statutory provisions.[36]

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[29] Davis, D & Geach, W (Eds) Loubser, A Buba, Z Burdette, D Butler, D Coetzee, L Mongalo, T *Companies and other Business Structures* 4th ed (2019) 34.
[30] *Ibid*.
[31] Davis *et al Companies and other Business Structures* 58.
[32] Davis *et al Companies and other Business Structures* 37-38.
[33] Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 9.
[34] *Ibid*.
[35] Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 10.
[36] Schoeman, N "Piercing the corporate veil under the New Companies Act" 2012 *DR* (10) at https://www.derebus.org.za/piercing-corporate-veil-new-companies-act/ [Accessed 23 April 2022]. For example: where a company was run with the intent to defraud in terms of section 424 of the old Companies Act – s424 of Companies Act 61 of 1973.

Additionally, she states that it can be pierced if shareholders are using the separate legal personality of companies improperly/dishonestly or if they are involved in fraudulent activity.[37] Schoeman, however, points out that in these cases, policy requires the courts to conduct a balancing exercise and to consider the circumstances of each case to decide whether to pierce the veil or not.[38] Lastly, Schoeman is of the opinion that the courts generally follow a conservative approach when it comes to veil piercing – both in common law and legislation.[39] Similarly, Bourne argues that the separate legal personality of companies will not easily be disregarded – exceptional circumstances have to exist to not violate the sacred principle of limited liability.[40]

Bourne also points out that the courts are reluctant to set out the specific situations where they will pierce the corporate veil according to the common law.[41] Schoeman concurs averring that there is no concrete outline as to how veil piercing takes place according to the common law.[42] She does state that whichever route is taken, veil piercing is exceptional and the courts do not have the general discretion to ignore the separate legal personality of companies.[43] Schoeman maintains that common law veil piercing is a remedy of last resort.[44]

Moreover, Schoeman argues that where section 20(9) of the Companies Act[45] is inadequate, reliance can be placed on the common law, thus, confirming that the common law is still applicable.[46] In relation to the latter, Tshidzumba makes three important statements: (1) section 20(9) of the Companies Act[47] does not expressly abolish the common law principles regarding veil piercing;[48] (2) section 20(9) of the Companies Act[49] will not apply if there has not been an unconscionable abuse of a company's separate legal personality and in these circumstances the common law will apply;[50] and (3) the common law can be seen as an interpretation tool for section 20(9) of the Companies Act.[51] Bailey also holds that section 20(9) of the Companies Act[52] is supplemental not substitutive to the common law.[53]

2.4 Literature on Piercing the Corporate Veil in Terms of Legislation

Piercing the corporate veil in terms of legislation takes place by way of section 20(9) of the Companies Act.[54] Mashiri states that according to this section, unconscionability is the standard to determine when veil piercing as a remedy is available.[55] Schoeman explains that

[37] Schoeman "Piercing the corporate veil under the New Companies Act".
[38] *Ibid*.
[39] *Ibid*.
[40] Bourne, J "Lifting the Corporate Veil" 2002 *JBL* (10) 114-116.
[41] *Ibid*.
[42] Schoeman, N "When can you be held personally liable within your company and how can this be brought about?" 2019 *Go Legal* at https://www.golegal.co.za/corporate-veil-personally-liable/#:~:text=The%20concept%20'piercing%20the%20corporate,liable%20for%20the%20company's%20obligations [Accessed 22 March 2022].
[43] *Ibid*.
[44] *Ibid*.
[45] S20(9) of Act 71 of 2008.
[46] Schoeman "When can you be held personally liable within your company and how can this be brought about?".
[47] S20(9) of Act 71 of 2008.
[48] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 22.
[49] S20(9) of Act 71 of 2008.
[50] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 23.
[51] S20(9) of Act 71 of 2008; Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 23.
[52] S20(9) of Act 71 of 2008.
[53] Bailey *The Doctrine of Piercing the Corporate Veil in South Africa: An Analysis of The South African Approach with Lessons from The Canadian Jurisprudence* (mini-dissertation, University of Cape Town) 2020 41, 51.
[54] S20(9) of Act 71 of 2008.
[55] Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 32.

unconscionability means conduct that is unreasonably shocking.[56] Mashiri states that this is a wider remedy to pierce the corporate veil compared to the common law and it is still flexible considering the courts still decide each case based on its circumstances.[57] According to Schoeman, this is not a remedy of last resort which means that even if there is another available remedy, veil piercing is still an actionable remedy.[58]

Cassim believes that section 20(9) of the Companies Act[59] has granted extensive powers to the courts for veil piercing which did not exist under the common law.[60] She states that the words 'unconscionable abuse' have been given a very wide meaning by the courts which means a much lower level of abuse is required to pierce the corporate veil which might be too low of a level.[61] Additionally, Cassim, notes that applications in terms of this section can be brought whenever the separate legal personality of a company is illegitimately used in a way that affects a person which reasonably should not be allowed.[62] Lastly, Cassim states that the common law balancing approach (discussed above) must be applied by the courts when deciding whether to pierce the corporate veil in terms of this section.[63]

Naidu *et al* have highlighted some shortcomings of section 20(9) of the Companies Act,[64] namely: (1) it fails to define essential terms such as 'unconscionable abuse' and (2) it fails to provide definitive guidance as to which circumstances will amount to 'unconscionable abuse'.[65] They argue that these shortcomings have led to the courts adopting different thresholds and criteria which has left the door open to inconsistent application of this doctrine.[66] They deduce that this area of law desperately needs clear circumstances of abuse and codified thresholds.[67]

Additionally, upon analysis of court decisions, Nwafor submits that the courts appear to be too hasty to use their judicial power to ignore the separate legal personality of companies.[68] He further claims that the failure of the legislature in section 20(9) of the Companies Act[69] to give meaning to the term 'unconscionable abuse' can result in this section not achieving its purpose.[70] In contrast, Manda argues that while the term 'unconscionable abuse' can be seen as vague, he believes that it further extends and enriches the common law and that it encompasses a wide scope of misuse which can be committed against the separate legal personality of companies.[71] He believes this term is adaptive and prepared for future scenarios.[72]

[56] Schoeman "Piercing the corporate veil under the New Companies Act".
[57] Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 42.
[58] Schoeman "When can you be held personally liable within your company and how can this be brought about?".
[59] S20(9) of Act 71 of 2008.
[60] Cassim, R "Piercing the Veil Under Section 20(9) of the Companies Act 71 of 2008: A New Direction" 2014 *SAMLJ* (26) 335.
[61] *Ibid*.
[62] *Ibid*.
[63] S20(9) of Act 71 of 2008; Cassim 2014 *SAMLJ* 336.
[64] S20(9) of Act 71 of 2008.
[65] Naidu, D Dhlamini, Z Pillay, K "Piercing the corporate veil – a clarion call for certainty" 2022 *Without Prejudice* at https://www.withoutprejudice.co.za/free/article/7462/view [Accessed 9 April 2022].
[66] *Ibid*.
[67] *Ibid*.
[68] Nwafor, A "Piercing The Corporate Veil: An Incursion Into The Judicial Conundrum" 2015 *Corporate Board: Role, Duties and Composition* (11) 151.
[69] S20(9) of Act 71 of 2008.
[70] Nwafor 2015 *Corporate Board: Role, Duties and Composition* 152.
[71] Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* (mini-dissertation, University of Pretoria) 2019 102.
[72] *Ibid*.

2.5 Literature on Striking a Balance Between Piercing the Corporate Veil and Upholding the Separate Legal Personality Afforded to Companies

The various authors above have implied that a balance must be struck between veil piercing and upholding the separate legal personality of companies. This can be seen when they refer to the following being prerequisites to veil piercing: exceptional circumstances; a balancing exercise; a conservative approach; and unreasonably shocking conduct.

Bailey also argues that the remedy of veil piercing in terms of section 20(9) of the Companies Act[73] should be used sparingly.[74] This is because section 7(b)*(i)* of the Companies Act[75] states that the purpose of this Act is to encourage entrepreneurship as well as enterprise efficiency and, consequently, he argues that disregarding the separate legal personality of companies too easily can conflict with this section.[76]

Manda states that the courts have to balance the policy considerations favouring veil piercing against those favouring the preservation of a company's separate legal personality.[77] He states that this balancing test constitutes a check and balance procedure which helps to prevent the courts from disregarding the separate legal personality of companies too easily (in order to uphold the consequences, principles and policies which underly separate legal personality).[78]

2.6 Conclusion

In conclusion, the above chapter has, using the viewpoints of various authors, explained that separate legal personality commences on the date that the company is registered and incorporated and this means that the company is seen as a separate legal person. Further, this chapter has explained that in terms of the common law, the corporate veil can be pierced when the separate legal personality of the company is abused and there are exceptional circumstances. According to these authors, the common law remedy is one of last resort and it is still applicable today. Additionally, in terms of legislation the corporate veil can be pierced when there has been an unconscionable abuse of juristic personality. The authors have argued that the legislative remedy is not one of last resort and that it is a wider remedy than the common law. However, the authors have also identified shortcomings of the legislative remedy which should be addressed. Finally, this chapter has discussed how there should be a balance between the policy considerations favouring veil piercing and those favouring the preservation of a company's separate legal personality.

[73] S20(9) of Act 71 of 2008.
[74] Bailey *The Doctrine of Piercing the Corporate Veil in South Africa* 50.
[75] S7(b)*(i)* of Act 71 of 2008.
[76] Bailey *The Doctrine of Piercing the Corporate Veil in South Africa* 8.
[77] Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 90.
[78] *Ibid*.

CHAPTER THREE: LEGISLATION

3.1 Introduction

The previous chapter examined various authors' viewpoints on the subject matter of this research report, suitably, the following chapter will contain a more specific analysis of the relevant legislation. This analysis is conducted with the intention of addressing one aspect of the problem statement, namely: what does the doctrine of piercing the corporate veil entail in terms of the Companies Act.[79]

3.2 Purpose of The Companies Act[80] With Reference to Its Preamble

According to the preamble of the Companies Act,[81] the purpose of this Act is to provide for, *inter alia*, the incorporation and the registration of companies. This purpose is extremely important for this research report as it provides the date on which a company obtains separate legal personality – discussed below. Furthermore, another purpose of the Companies Act[82] as stated in its preamble, is to provide investors and third parties with appropriate legal redress when it comes to companies. Once again, this is extremely important for this research report as this alludes to the remedy of veil piercing – also discussed below.

3.3 Section 19(1) of the Companies Act[83]

This section addresses the legal status of companies and states:

> "From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company-
>
> (a) is a juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act;
>
> (b) has all of the legal powers and capacity of an individual, except to the extent that-
>
> > (i) a juristic person is incapable of exercising any such power, or having any such capacity; or
> >
> > (ii) the company's Memorandum of Incorporation provides otherwise." [84]

This section expressly acknowledges the separate legal personality of companies.[85] Firstly, it is necessary to examine the concepts of incorporation and registration which are prerequisites to separate legal personality. Incorporation takes place by way of section 13 of the Companies Act[86] and involves those incorporating the company to each complete and sign the Memorandum of Incorporation (MOI).[87] Thereafter, the notice of incorporation needs to be filed with the Companies and Intellectual Property Commission (CIPC) with the prescribed fee

[79] Act 71 of 2008.
[80] Act 71 of 2008.
[81] *Ibid*.
[82] *Ibid*.
[83] S19(1) of Act 71 of 2008.
[84] *Ibid*.
[85] Cassim 2014 *SAMLJ* 325.
[86] S13 of Act 71 of 2008.
[87] Davis *et al Companies and other Business Structures* 58.

and a copy of the MOI.[88] Registration takes place by way of section 14 of the Companies Act.[89] This process involves the CIPC accepting the notice of incorporation and assigning a unique registration number to the company.[90] The CIPC then enters all the prescribed information into the companies register and, if all formalities are met, a registration certificate will be issued to the company.[91] This registration certificate is conclusive proof that all incorporation requirements have been met and the company is said to be incorporated from the date stated in the certificate.[92] This date is important because it is the date when the company will come into existence as a separate legal entity.[93]

According to section 19(1)*(b)* of the Companies Act,[94] once the incorporation of a company is registered, the company has all the capacities and legal powers of an individual (i.e., the company becomes a legal person with its own obligations and rights).[95] This gives companies their separate legal personality.[96] Practically for companies this means: (1) its assets and liabilities are its own; (2) it exists in perpetuity even if the ownership structure changes; (3) it can sue in its own name to enforce its rights and it can be sued by others in its own name for incurred liabilities; and (4) shareholders/directors/etc. are generally not liable for company debts – they enjoy limited liability.[97] The doctrine of limited liability as a consequence of a company's separate legal personality is emphasised in section 19(2) of the Companies Act:[98]

> "A person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."

From the above analysis, it is clear that section 19(1) of the Companies Act[99] has satisfactorily addressed research question 1.3.1 (what does separate legal personality mean and when does it come into existence).

3.4 Section 8(4) of the Constitution

Section 8(4) of the Constitution addresses the application of the Bill of Rights in relation to juristic persons (including companies) and states the following:

"A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

This section further affirms that companies are entitled to the same rights as natural persons (to the extent that it is possible for the company to exercise these rights).[100] Thus, it can be

[88] *Ibid*.
[89] S14 of Act 71 of 2008.
[90] Davis *et al Companies and other Business Structures* 58.
[91] *Ibid*.
[92] *Ibid*.
[93] *Ibid*.
[94] S19(1)*(b)* of Act 71 of 2008.
[95] Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 9.
[96] Cassim 2014 *SAMLJ* 325.
[97] Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 9; Bailey *The Doctrine of Piercing the Corporate Veil in South Africa* 6.
[98] S19(2) of Act 71 of 2008.
[99] S19(1) of Act 71 of 2008.
[100] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 7. However, as with all rights in the Bill of Rights, section 8(4) of the Constitution is subject to the limitation clause found in section 36 of the Constitution. This section holds that the rights contained in the Bill of Rights are not absolute and they can be limited by a law of general application if it is justifiable and reasonable in an open and democratic society which is founded on values of freedom, equality and human dignity taking into account: the nature of the right; the importance of the limitation's purpose; the extent and nature of the limitation; the relation between the limitation and its purpose; and whether less restrictive means are available to achieve this purpose.

said that section 8(4) of the Constitution confirms section 19(1) of the Companies Act[101] which affords separate legal personality to companies.[102]

This is important to mention because according to section 2 of the Constitution, any law or conduct inconsistent with the Constitution will be declared invalid.

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

Section 20(9) of the Companies Act[104] relates to the doctrine of veil piercing and states the following:

> "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)."

In summary, this section allows the court to disregard a company's separate legal personality (by deeming it not to be a juristic person) and to pierce the corporate veil where the company's juristic personality as a separate entity was unconscionably abused.[105]

This section grants the courts very wide discretionary powers to pierce the corporate veil to reach the perpetrators who unconscionably abused the company's separate legal personality and hold them accountable.[106] This allows the courts to affix the liabilities to the rightful individuals who abused the separate legal personality.[107] Essentially, the courts are given the power to reach perpetrators and prevent them from hiding behind the corporate veil which otherwise would have shielded them from the company's liabilities.[108]

At this point in the analysis, it is necessary to examine the wording of section 20(9) of the Companies Act[109] as this has caused a lot of controversy.[110] Firstly, this section can be invoked by an "interested person" – the Companies Act[111] does not clarify what is meant by this term, however, case law has provided some answers which will be discussed in the next chapter.[112] The other option is that this section can be invoked by the court on its own initiative (*mero*

[101] S19(1) of Act 71 of 2008.
[102] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 7.
[103] S20(9) of Act 71 of 2008.
[104] *Ibid*.
[105] Cassim 2014 *SAMLJ* 307.
[106] Phiri *Piercing the Corporate Veil: A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* (dissertation, University of Venda) 2017 69.
[107] Phiri *Piercing the Corporate Veil* 70.
[108] Phiri *Piercing the Corporate Veil* 70; Siebritz *Piercing the corporate veil: A critical analysis of section 20(9) of the Companies Act 71 of 2008* (thesis, University of the Western Cape) 2016 64.
[109] S20(9) of Act 71 of 2008.
[110] Phiri *Piercing the Corporate Veil* 70.
[111] Act 71 of 2008.
[112] Cassim 2014 *SAMLJ* 311.

motu) – this is implied from the wording of section 20(9) of the Companies Act[113] which states this section can be invoked in any proceeding where the company is involved.[114]

Secondly, this section will only apply where there has been an "unconscionable abuse" of the company's separate legal personality.[115] Unconscionable abuse again is a term which the legislature failed to define and to advise which circumstances would constitute unconscionable abuse.[116] Case law has provided some clarity which will be discussed in the next chapter.[117]

Thirdly, once unconscionable abuse is found, the court can deem the company not to be a juristic person in relation to the transaction(s) in question.[118] Nwafor suggests that this means the court will not grant any order against the company and only those responsible for the unconscionable abuse will be held liable for the wrongdoing.[119]

Lastly, in terms of this section, the court can make any further order it deems appropriate.[120] The term 'further order' is argued by Siebritz to be an open-ended concept which can amount to any order that the court deems reasonable to give effect to section 20(9)*(a)* of the Companies Act.[121]

From the above analysis, it is clear that section 20(9) of the Companies Act[122] has satisfactorily addressed research question 1.3.2 (how is the corporate veil pierced by the courts in terms of legislation). However, this section has not satisfactorily addressed research question 1.3.3 (does legislation provide clarity on the circumstances when the corporate veil can be pierced).

3.6 Conclusion

In conclusion, the above chapter has found that section 19(1) of the Companies Act[123] gives express acknowledgement of a company's separate legal personality and that section 8(4) of the Constitution affirms this position. This chapter also discussed the implications of separate legal personality and the exception to this principle in the form of veil piercing. This exception is found in section 20(9) of the Companies Act[124] which states that the court can disregard a company's separate legal personality where its juristic personality has been unconscionably abused and hold shareholders/directors/controllers directly liable. Finally, this chapter has largely satisfied one aspect of the problem statement (what does veil piercing entail in terms of the Companies Act).[125] However, from this chapter is has also become clear that the Companies Act[126] does not fully address the problem statement as reference to case law is needed.

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[113] S20(9) of Act 71 of 2008.
[114] Cassim 2014 *SAMLJ* 309.
[115] Cassim 2014 *SAMLJ* 310.
[116] Cassim 2014 *SAMLJ* 316.
[117] *Ibid*.
[118] Nwafor 2015 *Corporate Board: Role, Duties and Composition* 149.
[119] *Ibid*.
[120] S20(9) of Act 71 of 2008.
[121] S20(9)*(a)* of Act 71 of 2008; Siebritz *Piercing the corporate veil* 67. For example: This order can be to pierce the corporate veil and impute liability or it can be something totally different such as an order to pierce the corporate veil and order specific performance.
[122] S20(9) of Act 71 of 2008.
[123] S19(1) of Act 71 of 2008.
[124] S20(9) of Act 71 of 2008.
[125] Act 71 of 2008.
[126] *Ibid*.

CHAPTER FOUR: CASE LAW

4.1 Introduction

In the previous chapter, the legislation relevant to this research report was analysed and, in some parts, it became essential to refer to case law to fully interpret the legislation. Therefore, it is now necessary to analyse the case law which is relevant to this research report. In this chapter, the facts of the cases will not be discussed as the focus is on the principles established by these cases.

4.2 Separate Legal Personality

4.2.1 Salomon v A Salomon & Co Ltd[127] *('Salomon')*

The principle of separate legal personality was originally coined in this landmark English case where the House of Lords held that once a company is legally incorporated and an artificial person is created, the company must be treated the same as any other independent person with its own liabilities and rights – in other words, the company is a separate legal person and must be treated as such.[128]

4.2.2 Dadoo Ltd v Krugersdorp Municipal Council[129] *('Dadoo')*

This English principle was adopted into South African law in the leading case of *Dadoo*[130] where the court held that, upon incorporation, a company holds a separate legal existence which is completely different from the members who make up the company.[131] The court emphasised that this principle is not just an artificial concept but rather it is of a crucial basis.[132] The court further held that company property vests in the company itself and cannot be seen as vesting in the shareholders.[133]

4.2.3 Airport Cold Storage (Pty) Ltd v Ebrahim[134] *('Airport Cold Storage')*

In addition to confirming all of the abovementioned principles, the court in this case highlighted that incorporation allows members to enjoy limited liability and that assets belonging to a company are its exclusive property and not its members.[135] This proves that although companies do not have a physical existence in the same way as a person, it can incur liabilities and acquire assets.[136]

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[127] [1897] AC 22 (HL).
[128] *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL) 30; Davis *et al Companies and other Business Structures* 35; Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 8.
[129] 1920 AD 530.
[130] *Ibid*.
[131] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; Siebritz *Piercing the corporate veil* 12-13.
[132] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 8.
[133] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 8; Davis *et al Companies and other Business Structures* 35.
[134] 2008 (2) SA 303 (C).
[135] *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) 17.
[136] Davis *et al Companies and other Business Structures* 35.

4.2.4 City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO[137] *('City Capital')*

This case is more recent and it has essentially confirmed everything which has been said in the above three cases (i.e., all these principles are still applicable today).[138] The court here emphasised that these principles now stem from the separate legal existence that section 19(1) of the Companies Act[139] endows upon a company.[140]

4.3 Piercing the Corporate Veil in Terms of Common Law

4.3.1 Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd[141] *('Cape Pacific')*

In this influential case, the court held that even if a company is legitimately established and operated, there is no reason in logic nor in principle why its separate legal personality cannot be disregarded in relation to the transaction in question if the company was misused for an improper/dishonest purpose or to perpetrate fraud.[142] The court explained that this is necessary to attach personal liability onto the responsible individual(s) and it stated that full effect of the separate legal personality will still be given in other respects – it is only disregarded for the transaction in question.[143]

4.3.2 Airport Cold Storage[144]

Here the court explained that while members of the company are usually protected against personal liability, that this protection is not absolute and, in certain exceptional circumstances, the court has the power to pierce the corporate veil and hold the members personally liable for the company's debts.[145] The court went further to provide clarity on these "exceptional circumstances" stating that it will be where the company is used as a façade to conceal the true facts or where the members do not treat the company as a separate entity but rather as their "alter ego" to advance their individual, extra-corporate interests. [146]

4.3.3 Hülse-Reutter v Gödde[147] *('Hülse')*

Even though the court here recognised that deciding when to pierce the corporate veil was an issue far from settled at the time, it held that there must be some form of abuse/misuse of the company's separate legal personality resulting in an unfair advantage being afforded to the

[137] 2018 (4) SA 71 (SCA).
[138] *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO* 2018 (4) SA 71 (SCA) 27.
[139] S19(1) of Act 71 of 2008.
[140] *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO* 2018 (4) SA 71 (SCA) 27.
[141] 1995 (4) SA 790 (A).
[142] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 33.
[143] *Ibid*.
[144] 2008 (2) SA 303 (C).
[145] *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) 19.
[146] Fraud, as held by the court, is an obvious example of such exceptional circumstances but it is not a requirement - *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) 25.
[147] 2001 (4) SA 1336 (SCA).

abusers/misusers.[148] The court also held that common law veil piercing is a remedy of last resort.[149]

4.4 Piercing the Corporate Veil in Terms of Legislation

4.4.1 Ex Parte Gore NNO[150] *('Gore')*

In this matter, the court delivered its first judgement on section 20(9) of the Companies Act[151] and it answered questions relating to interpretation and application which is vital to company law and crucial to this research report.[152]

Firstly, as explained above, the term "interested person" is not defined in the Companies Act.[153] In relation to this, the court states that no mystique should be attached to these words.[154] Thus, to determine whether someone is an "interested person" courts should look at the principle of standing.[155] If the matter involves a right in the Bill of Rights, standing will be determined in terms of section 38 of the Constitution.[156]

Secondly, as explained above, the term "unconscionable abuse" is also not defined in the Companies Act.[157] The court states that "unconscionable abuse" is a term diverse enough to include conduct which encompasses all the descriptive metaphors used in the past and much more.[158] The court, thus, adopted a very wide interpretation of the term "unconscionable abuse" and, as such, a much lower standard of abuse is required to invoke this remedy compared to the common law.[159] This can also be seen where the court states that this remedy can be executed whenever the illegitimate use of a company's separate legal personality affects a third party in a way that cannot reasonably be allowed.[160]

Thirdly, the court highlighted various aspects of interpretation and application that are important to take note of, namely: (1) the language of this section has been cast in very wide terms indicating the legislature's intention for this section to find application in "widely varying factual circumstances"; (2) the width of this section broadens the bases upon which the courts can grant relief by disregarding the separate legal personality of companies; (3) this section affords a firm but flexible basis for veil piercing to such an extent that it is available simply when the facts of a case justify it (i.e., this section abolishes the notion that veil piercing is an exceptional remedy); (4) this section must be seen as supplemental to the common law instead of substitutive; and (5) because this remedy provided is given unqualified availability, it does not

[148] *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) 20.
[149] *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) 23.
[150] 2013 (3) SA 382 (WCC).
[151] S20(9) of Act 71 of 2008.
[152] Cassim 2014 *SAMLJ* 307.
[153] Act 71 of 2008.
[154] *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) 35; Bailey *The Doctrine of Piercing the Corporate Veil in South Africa* 42.
[155] *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) 35. Standing (or *locus standi*) means the person needs to have a direct and real interest in the matter that is not remote, abstract, academic or hypothetical – Cassim 2014 *SAMLJ* 312.
[156] *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) 35; Cassim 2014 *SAMLJ* 312. A person is said to have standing in terms of s38 of the Constitution if they are: acting in their own interest; acting on behalf of someone else who cannot act in their own name; acting in the interest of, or as a member of, a group/class of persons; acting in the public interest; and if it is an association acting in its members' interests – s38(a-e) of the Constitution of the Republic of South Africa, 1996.
[157] Act 71 of 2008.
[158] For example: terms like "device", "sham" and "stratagem" as used in earlier cases – *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) 34.
[159] Cassim 2014 *SAMLJ* 318-319.
[160] *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) 34.

only have to be granted because there is no other alternative remedy available (i.e., it is not a remedy of last resort).[161]

Lastly, however, the court did note that there are no clear determinable principles in relation to the grounds upon which a court will pierce the corporate veil.[162]

4.4.2 City Capital[163]

In this case, the court, found it undesirable to define "unconscionable abuse" in terms of this section but held that it is sufficient to say that it includes an act by/use of a company for an improper/dishonest purpose; to commit fraud; or where the company is used to conceal true facts (quite similar to the common law position).[164]

4.5 Striking a Balance Between Upholding the Separate Legal Personality Afforded to Companies and Piercing the Corporate Veil

In *Cape Pacific*[165] and in *Knoop NO v Birkenstock Properties (Pty) Ltd*[166] ('*Knoop*'), the courts emphasised that the separate legal personality of a company should not be too lightly disregarded because this will undermine and negate the concept of separate legal personality.[167] Both cases stress that the courts need to strive to give effect to and uphold the separate legal personality of companies.[168] However, both held that where there is dishonesty, improper conduct or fraud (i.e., justifying circumstances) then the need to preserve the separate legal personality needs to be balanced against policy considerations which favour veil piercing.[169] The courts go on to explain that the focus needs to be on substance rather than form and that each case needs to be decided based on its own merits to determine whether it is appropriate or not to disregard the separate legal personality.[170]

In *Hülse,*[171] it was held that courts do not have the general discretion to pierce the corporate veil whenever it sees it convenient/just to do so. The courts need to conduct a close analysis of the facts of each case and they need to take into account policy and judicial judgement considerations.[172]

[161] *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) 32-34.
[162] *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) 21; Cassim 2014 *SAMLJ* 329.
[163] 2018 (4) SA 71 (SCA).
[164] *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO* 2018 (4) SA 71 (SCA) 29.
[165] 1995 (4) SA 790 (A) 31.
[166] FSHC 04-06-2009 par [12] case no 7095/2008 at http://www.saflii.org/za/cases/ZAFSHC/2009/67.html [Accessed 20 April 2022].
[167] This position was later also confirmed by the court in the case of *Die Dros (Pty) Ltd v Telefon Beverages CC* 2003 (4) SA 207 (C) 23.
[168] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 31; *Knoop NO v Birkenstock Properties (Pty) Ltd* FSHC 04-06-2009 par [12] case no 7095/2008 at http://www.saflii.org/za/cases/ZAFSHC/2009/67.html [Accessed 20 April 2022].
[169] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 31; *Knoop NO v Birkenstock Properties (Pty) Ltd* FSHC 04-06-2009 par [14-17] case no 7095/2008 at http://www.saflii.org/za/cases/ZAFSHC/2009/67.html [Accessed 20 April 2022].
[170] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 32; *Knoop NO v Birkenstock Properties (Pty) Ltd* FSHC 04-06-2009 par [14-17] case no 7095/2008 at http://www.saflii.org/za/cases/ZAFSHC/2009/67.html [Accessed 20 April 2022].
[171] 2001 (4) SA 1336 (SCA) 20.
[172] *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) 20; Bourne 2002 *JBL* 114-116.

Similarly, *Gore*[173] suggests that to strike this balance, each case will involve a policy-based decision. This decision depends on the weighing that the court needs to do. The importance of upholding the principle of separate legal personality will be on the one hand and the adverse moral and economic effects of allowing an unconscionable abuse of the principle will be on the other hand.[174]

4.6 Conclusion

In conclusion, this chapter has found that upon incorporation, companies obtain separate legal personality and this has several implications. Furthermore, that the courts will pierce the corporate veil in terms of the common law if the company was used for a dishonest/improper purpose, to perpetrate fraud, to conceal the true facts or if members do not treat the company as a separate entity. Moreover, this chapter has established that veil piercing in terms of section 20(9) of the Companies Act[175] will take place if there is an unconscionable abuse of the company's separate legal personality. In terms of the balance that needs to be struck, the need for veil piercing needs to be balanced against the need for upholding the separate legal personality of companies. This chapter has addressed various aspects of the problem statement regarding how the corporate veil should be pierced in terms of common law and legislation and how a balance should be struck between veil piercing and upholding the separate legal personality of companies.

[173] 2013 (3) SA 382 (WCC) 29.
[174] *Ibid*.
[175] S20(9) of Act 71 of 2008.

CHAPTER FIVE: ANALYSIS OF AUTHORITATIVE SOURCES

5.1 Introduction

In Chapter 2, the literature wherein various authors expressed their viewpoints on veil piercing was analysed. Thereafter, a more specific analysis was conducted on relevant legislation in Chapter 3 and on relevant case law in Chapter 4. Consequently, this chapter will summarise all these analyses to tie together the various viewpoints and set out the ultimate legal position where possible. This chapter will include findings from new sources which have contributed to the understanding of this research report and it will identify if there are any gaps in the legal position.

5.2 Analysis of Legislation

5.2.1 Section 19(1) of the Companies Act[176]

In terms of this section, the finding regarding the legal position is that a company obtains separate legal personality once it is incorporated and registered.[177] According to Mashiri, this means a company is a legal person in its own right which can incur its own obligations and acquire its own rights.[178] This is concurred by Manda, Phiri and several others.[179] Bailey explains that the separate legal personality of companies metaphorically creates a veil between the company and its shareholders/directors and this gives them limited liability.[180] However, as emphasised by Davis *et al,* this principle should not be abused and if it is, the courts can pierce the corporate veil and hold directors/shareholders/others personally liable.[181]

5.2.2 Section 20(9) of the Companies Act[182]

According to Casim, this section means that the courts are allowed to disregard a company's separate legal personality and pierce the corporate veil where there has been an unconscionable abuse of the company's juristic personality as a separate entity.[183]

Schoeman, Mashiri and Cassim agree that this remedy is much wider than the common law and Cassim further states that this section has provided the courts with more extensive powers.[184] In support of the abovementioned, Cassim notes the following: (1) this section can be invoked by the courts *mero motu*;[185] (2) this section gives the courts the widest of powers to grant consequential relief; (3) an application under this section can be brought whenever a

176 S19(1) of Act 71 of 2008.
177 *Ibid*.
178 Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 9.
179 Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 11; Phiri *Piercing the Corporate Veil* 15.
180 Bailey *The Doctrine of Piercing the Corporate Veil in South Africa* 15.
181 Davis *et al Companies and other Business Structures* 37-38.
182 S20(9) of Act 71 of 2008.
183 Cassim 2014 *SAMLJ* 307.
184 Schoeman "When can you be held personally liable within your company and how can this be brought about?"; Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 4; Cassim 2014 *SAMLJ* 335.
185 *Mero motu* means at one's own initiative - Cassim 2014 *SAMLJ* 309.

company's separate legal personality is illegitimately used and this affects another person in a way which cannot reasonably be allowed; (4) the use of the term 'unconscionable abuse' extends the width of this remedy; and (5) this section is not a remedy of last resort.[186]

In relation to this section's use of the term 'unconscionable abuse', Siebritz argues that it amounts to taking a step backwards.[187] She suggests that the word 'unconscionable' should be removed because it does not provide any criterion which the courts can use to measure their decision with certainty/clarity.[188] Removal of this term, she argues, is necessary because it will cause practical interpretation issues and because a doctrine cannot be based on a criterion which cannot be measured with certainty.[189] Siebritz holds that removing the term 'unconscionable' will not take away from this section's application nor will it negatively change this section.[190]

Manda disagrees.[191] He highlights that the lack of a definition can be beneficial in that it provides the courts with discretion and flexibility and that this broad term can encompass a wide trajectory of misuse which means this term is adaptive and prepared for future instances.[192]

Nwafor states that unless the legislature assigns a proper definition to term 'unconscionable abuse' that this provision may not achieve its purpose because, without some legislative guidance, this section will be subject to judicial discretion which can result in conflicting and inconsistent judicial pronouncements.[193] Naidu *et al* agree and further state that this area of law desperately needs clear circumstances of abuse and codified thresholds.[194]

Upon analysis, the researcher agrees with Siebritz. The word 'unconscionable' should simply be removed this section. Removal of this word will avoid unnecessary confusion and inconsistences in judicial pronouncements while still maintaining this section's purpose.[195] As long as there is some form of abuse of the company's juristic personality then this section should find application.[196] This is still in line with Manda's argument as removing this word does not take away from the court's discretion or flexibility and it can still encompass a wide trajectory of misuse. Moreover, the researcher disagrees with Naidu *et al* because providing codified thresholds can restrict the application of this section and essentially create loopholes to escape liability – as explained by Mashiri.[197]

5.3 Analysis of Case Law

5.3.1 Separate Legal Personality

[186] Cassim 2014 *SAMLJ* 335.
[187] Siebritz *Piercing the corporate veil* 76.
[188] *Ibid*.
[189] *Ibid*.
[190] *Ibid*.
[191] Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 102.
[192] Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 47, 88, 102.
[193] Nwafor 2015 *Corporate Board: Role, Duties and Composition* 136, 152.
[194] Naidu *et al* "Piercing the corporate veil – a clarion call for certainty".
[195] Siebritz *Piercing the corporate veil* 76.
[196] Siebritz *Piercing the corporate veil* 76-77.
[197] Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 57.

From the analysis conducted on the cases of *Salomon,*[198] *Dadoo,*[199] *Airport Cold Storage*[200] *and City Capital,*[201] it is clear that all four essentially hold the same thing – once a company is incorporated it obtains separate legal personality which means: (1) it has its own rights and liabilities; (2) its members enjoy limited liability; and (3) the company's property belongs to itself not to its members.[202] These effects are concurred by various academics (see 5.2.1).[203] Again, if this principle is abused the courts can pierce the corporate veil.[204]

5.3.2 Piercing the Corporate Veil in terms of the Common Law

From the analysis on *Cape Pacific*[205] and *Airport Cold Storage*[206] it is clear that the corporate veil can be pierced where there has been fraud, dishonesty, improper conduct or where the members did not treat the company as a separate entity (i.e., where the company was used as a façade to conceal the true facts). Schoeman agrees and furthers states that the veil can be pierced when it is allowed by the legislature where there has been non-compliance with statutory provisions.[207]

In the case of *Hülse,*[208] the court held that in order to pierce the corporate veil there needs to be some form of abuse/misuse of the company's separate legal personality which results in an unfair advantage being afforded to the abusers/misusers – Mashiri concurs.[209] Additionally, the court in *Hülse*[210] emphasised that veil piercing is a remedy of last resort – Schoeman concurs.[211] Bourne also agrees as she states that the separate legal personality of companies will not easily be disregarded – exceptional circumstances have to exist.[212]

Interestingly, Bourne and Schoeman state that there is no concrete outline as to when veil piercing should take place which Phiri regards as confusing.[213]

5.3.3 Piercing the Corporate Veil in terms of Legislation

In terms of case law, section 20(9) of the Companies Act[214] was mainly analysed in the case of *Gore.*[215] Firstly, the court interpreted the term 'interested person' to mean someone who has standing in terms of the well-established principles of *locus standi* (or in terms of section

[198] [1897] AC 22 (HL).
[199] 1920 AD 530.
[200] 2008 (2) SA 303 (C).
[201] 2018 (4) SA 71 (SCA).
[202] *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL) 30; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; Siebritz *Piercing the corporate veil* 13; *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) 17; *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO* 2018 (4) SA 71 (SCA) 27.
[203] Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 9; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 11; Phiri *Piercing the Corporate Veil* 15; Bailey *The Doctrine of Piercing the Corporate Veil in South Africa* 15.
[204] Davis *et al Companies and other Business Structures* 37-38.
[205] 1995 (4) SA 790 (A) 33.
[206] 2008 (2) SA 303 (C) 25.
[207] Schoeman "Piercing the corporate veil under the New Companies Act".
[208] 2001 (4) SA 1336 (SCA) 20.
[209] Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 9.
[210] 2001 (4) SA 1336 (SCA) 23.
[211] Schoeman "When can you be held personally liable within your company and how can this be brought about?".
[212] Bourne 2002 *JBL* 114-116.
[213] Bourne 2002 *JBL* 114-116; Schoeman "When can you be held personally liable within your company and how can this be brought about?"; Phiri, S "Piercing the Corporate Veil: A Critical Analysis of Section 20(9) of the South African Companies Act 71 of 2008" 2020 *Corporate & Business Strategy Review* (1) 25.
[214] S20(9) of Act 71 of 2008.
[215] 2013 (3) SA 382 (WCC); Cassim 2014 *SAMLJ* 307.

38 of the Constitution if a constitutional right is involved).[216] Cassim states that this has given the term 'interested person' a very wide meaning which might not correctly reflect the legal position.[217]

Secondly, *Gore*[218] interpreted the term 'unconscionable abuse' to include all conduct which illegitimately uses a company's separate legal personality in a way that affects a third party which cannot reasonably be allowed. Cassim states that the court gave this term a very wide meaning which means a much lower level of abuse is required to now pierce the corporate veil.[219]

Thirdly, *Gore*[220] also found that this section is intended to be applied in a wide variety of circumstances and that it gives the courts extended powers to grant relief – Mashiri and Cassim concur.[221]

Cassim stresses that the extensive powers granted to the courts by this section coupled with the wide interpretations from *Gore*[222] might result in the corporate veil being disregarded too easily (the threshold of abuse might be too low).[223] Similarly, Nwafor is of the opinion that the court in this case seemed too hasty in using their judicial power to disregard the companies' separate legal personalities.[224]

Fourthly, in *Gore*,[225] the court found that this remedy is not one of last resort. Cassim and Schoeman both agree with this point and Schoeman further explains that this means even if there is another remedy available, veil piercing is still an actionable remedy.[226]

Fifthly, in *Gore,*[227] the court held that this legislative remedy must be seen as supplemental to the common law rather than substitutive. Manda believes that this section further extends the common law and Schoeman and Bailey argue that when this section is inadequate, reliance can be placed on the common law.[228] Tshidzumba states that the common law can be used as an interpretation tool.[229] Tshidzumba and Bailey also rightly point out that this section does not expressly abolish/repeal the common law.[230] In a more practical sense, Tshidzumba also explains that this section will not apply if its standard has not been met and in these circumstances the common law will apply.[231]

Lastly, in *Gore,*[232] the court did point out that there are no clear principles which the courts can use as grounds to pierce the corporate veil (similar to the common law).

[216] *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) 35. *Locus standi* means standing in law (i.e., the right/capacity to appear in court or to bring an action) – Cassim 2014 *SAMLJ* 312.
[217] Cassim 2014 *SAMLJ* 335.
[218] 2013 (3) SA 382 (WCC) 34.
[219] Cassim 2014 *SAMLJ* 335.
[220] 2013 (3) SA 382 (WCC) 32-33.
[221] Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 42; Cassim 2014 *SAMLJ* 335.
[222] 2013 (3) SA 382 (WCC).
[223] Cassim 2014 *SAMLJ* 329, 335.
[224] Nwafor 2015 *Corporate Board: Role, Duties and Composition* 151.
[225] 2013 (3) SA 382 (WCC) 34.
[226] Schoeman "When can you be held personally liable within your company and how can this be brought about?"; Cassim 2014 *SAMLJ* 335.
[227] 2013 (3) SA 382 (WCC) 34.
[228] Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 102; Schoeman "When can you be held personally liable within your company and how can this be brought about?"; Bailey *The Doctrine of Piercing the Corporate Veil in South Africa* 41, 51.
[229] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 23.
[230] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 22; Bailey *The Doctrine of Piercing the Corporate Veil in South Africa* 41, 51.
[231] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 23.
[232] 2013 (3) SA 382 (WCC) 21.

Another case which analysed section 20(9) of the Companies Act[233] is that of *City Capital*.[234] Here it was held that attempting to define the term 'unconscionable' is undesirable.[235] Nwafor clearly disagrees with the court's approach as he states that a definite meaning should be given to the term 'unconscionable abuse' (see 5.2.2).[236]

5.3.4 Striking a Balance Between Upholding the Separate Legal Personality Afforded to Companies and Piercing the Corporate Veil

In *Cape Pacific*[237] and in *Knoop,*[238] the court emphasised that the separate legal personality of a company should not be too lightly disregarded and that the courts need to strive to uphold it (as stated in *Hülse,*[239] the courts do not have the general discretion to pierce the corporate veil).[240] However, the court in both these cases held that where there are justifying circumstances then the need to preserve the separate legal personality needs to be balanced against policy considerations which are in favour of veil piercing.[241] Here the focus then needs to be on substance rather than form and each case needs to be decided based on its own merits.[242] As stated in *Hülse*[243]*and Gore,*[244] the courts need to conduct a close analysis of the facts of each case and they need to take into account policy and judicial judgement considerations. According to *Gore,*[245] this requires the court to perform a weighting/balancing exercise with the importance of upholding the principle of separate legal personality on the one hand and the adverse moral and economic effects of allowing an unconscionable abuse of the principle on the other hand.[246]

In light of the above cases, Cassim is of the view that in order not to pierce the corporate veil too easily, the courts must carefully apply the balancing approaches discussed in *Cape Pacific*[247] and *Gore*.[248] She explains that the courts need to cautiously apply their discretion to these matters and that they need to give due consideration to both sides of the balancing equation.[249]

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233 S20(9) of Act 71 of 2008.
234 2018 (4) SA 71 (SCA).
235 *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO* 2018 (4) SA 71 (SCA) 29.
236 Nwafor 2015 *Corporate Board: Role, Duties and Composition* 152.
237 1995 (4) SA 790 (A) 31.
238 *Knoop NO v Birkenstock Properties (Pty) Ltd* FSHC 04-06-2009 par [12] case no 7095/2008 at http://www.saflii.org/za/cases/ZAFSHC/2009/67.html [Accessed 20 April 2022].
239 2001 (4) SA 1336 (SCA) 20.
240 This position was later also confirmed by the court in the case of *Die Dros (Pty) Ltd v Telefon Beverages CC* 2003 (4) SA 207 (C) 23.
241 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 31; *Knoop NO v Birkenstock Properties (Pty) Ltd* FSHC 04-06-2009 par [14-17] case no 7095/2008 at http://www.saflii.org/za/cases/ZAFSHC/2009/67.html [Accessed 20 April 2022].
242 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 32; *Knoop NO v Birkenstock Properties (Pty) Ltd* FSHC 04-06-2009 par [14-17] case no 7095/2008 at http://www.saflii.org/za/cases/ZAFSHC/2009/67.html [Accessed 20 April 2022].
243 2001 (4) SA 1336 (SCA) 20; Bourne 2002 *JBL* 114-116.
244 2013 (3) SA 382 (WCC) 29.
245 *Ibid*.
246 This balance, Bailey argues, could help to encourage the responsible and efficient management of companies as required by section (7)(j) of the Companies Act 71 of 2008 (individuals will be more hesitant to abuse the separate legal personality for fear of veil piercing). Although, he argues, it could also conflict with the requirement of section 7(b)*(i)* of the Companies Act 71 of 2008 which is to encourage enterprise efficiency and entrepreneurship (individuals might be hesitant to incorporate a company). Thus, Bailey argues that the veil piercing as remedy should be used sparingly. - Bailey *The Doctrine of Piercing the Corporate Veil in South Africa* 8, 50.
247 1995 (4) SA 790 (A).
248 2013 (3) SA 382 (WCC); Cassim 2014 *SAMLJ* 326.
249 Cassim 2014 *SAMLJ* 326.

Manda states that this balancing exercise constitutes a check and balance procedure which helps to prevent the courts from disregarding separate legal personality too easily.[250]

5.4 Conclusion

In conclusion, the above chapter has analysed the authoritative sources which have set out the legal position and has tied together various viewpoints. Some key takeaways from this chapter are: (1) section 19(1) of the Companies Act[251] is uncomplicated and simply entails that a company obtains separate legal personality upon incorporation and this has several implications; (2) section 20(9) of the Companies Act[252] is a bit more controversial mainly because of the term 'unconscionable abuse' and, as such, this researcher suggests the word 'unconscionable' be removed from this section; (3) the corporate veil can be pierced in terms of the common law where a company was used as a façade to conceal the true facts and this remedy is still applicable; and (4) the courts need to perform a balancing exercise when deciding to pierce the corporate veil.

[250] Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 90.
[251] S19(1) of Act 71 of 2008.
[252] S20(9) of Act 71 of 2008.

CHAPTER SIX: CONCLUSION

6.1 Introduction

Considering Chapters 2, 3, 4 and 5 have discussed and analysed the authoritative sources, legislation and case law which are relevant to this research report, it is now necessary to provide conclusions for the entire research report and to address whether all research questions have been answered.

6.2 Separate Legal Personality Afforded to Companies

This research report concludes that from the date a company is incorporated and registered, it obtains separate legal personality.[253] This means: (1) it has its own rights and liabilities separate from those of its members; (2) its members enjoy limited liability; and (3) the company's property belongs to itself not to its members.[254]

Therefore, this research report has identified when separate legal personality comes into existence as well as what it meant by this phrase, thus, research question 1.3.1 has been satisfactorily answered.

6.3 Piercing the Corporate Veil in Terms of The Common Law

Furthermore, this research report concludes that the corporate veil can be pierced in terms of the common law where there has been fraud, dishonesty, improper conduct or where the members did not treat the company as a separate entity.[255] In other words, the corporate veil can be pierced where the company was used as a façade to conceal the true facts.[256] As long as there is some form of abuse or misuse of the company's separate legal personality which results in an unfair advantage being afforded to the abusers/misusers then the corporate veil can be pierced in terms of the common law.[257] Following from this point, the courts have not set out the clear grounds when they will pierce the corporate veil under the common law and this has led and will continue to lead to confusion.[258] In light of all of this, research question 1.3.4 has somewhat been answered – veil piercing in terms of the common law occurs when a company is used as a façade to conceal the true facts. However, because there are no clear grounds for this veil piercing it cannot be said that this question has been answered with certainty or even completely. Whether the judiciary will provide these clear grounds remains to be seen.

This research report also concludes that veil piercing in terms of the common law is a remedy of last resort and that exceptional circumstances have to exist in order for the courts to invoke

[253] S19(1) of Act 71 of 2008.

[254] *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL) 30; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; Siebritz *Piercing the corporate veil* 13; *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) 17; *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO* 2018 (4) SA 71 (SCA) 27.

[255] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 33; *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) 25.

[256] *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) 25.

[257] *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) 20.

[258] Bourne 2002 *JBL* 114-116; Schoeman "When can you be held personally liable within your company and how can this be brought about?"; Phiri 2020 *Corporate & Business Strategy Review* 25.

this remedy.[259] Thus, research question 1.3.6 has been fully answered – veil piercing according to the common law is a remedy of last resort.

Moreover, this research report concludes that the remedy of piercing of the corporate veil in terms of the common law is still applicable.[260] The newer legislative remedy did not expressly abolish the common law remedy and, as held by *Gore*,[261] it must be seen as supplemental, not substitutive, to the common law remedy.[262] The common law can even be used as an interpretation tool for the legislative remedy.[263] Consequently, research question 1.3.5 has been satisfactorily answered – veil piercing in terms of the common law is still applicable.

6.4 Piercing the Corporate Veil in Terms of Legislation

This research report also concludes that the corporate veil can be pierced in terms of legislation (namely: section 20(9) of the Companies Act[264]) where there has been an unconscionable abuse of the company's separate legal personality.[265] From this it is clear that research question 1.3.2 (how is the corporate veil pierced by the courts in terms of legislation) has been satisfactorily answered.

However, this research report has also concluded that the use of the word 'unconscionable' has caused much confusion and conflicting opinions amongst academics largely due to the legislature's failure to define this term and failure to provide definitive guidance as to which circumstances will amount to 'unconscionable abuse'.[266] In light of all the analyses conducted in this research report, the researcher suggests that this word should be removed from section 20(9) of the Companies Act[267] as this will avoid the unnecessary confusions and inconsistencies. Nevertheless, for the time being, the term 'unconscionable abuse' is said to encapsulate all identified grounds for veil piercing in terms of the common law as well as any conduct which illegitimately uses a company's separate legal personality which affects a third party in a way which cannot be allowed.[268] What remains to be seen in years to come is how the legislature and the judiciary navigate their way around the term 'unconscionable abuse'. From this it is clear that legislation does not provide clarity on the circumstance when the corporate veil can be pierced, thus, research question 1.3.3 has been answered albeit in the negative.

Additionally, this research report has concluded that the legislative remedy to veil piercing is not a remedy of last resort and it is much wider and grants more powers to the courts in comparison to the common law remedy (this means that a much lower level of abuse is required to now pierce the corporate veil).[269] However, various academics are of the opinion that this might be too low a level and can result in the separate legal personality of companies

[259] *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) 23;
[260] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 22; Bailey *The Doctrine of Piercing the Corporate Veil in South Africa* 41, 51.
[261] 2013 (3) SA 382 (WCC) 34.
[262] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 22; Bailey *The Doctrine of Piercing the Corporate Veil in South Africa* 41, 51.
[263] Tshidzumba *Analysis of the "doctrine of piercing of the corporate veil"* 23.
[264] S20(9) of Act 71 of 2008.
[265] S20(9) of Act 71 of 2008; Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 32.
[266] Naidu *et al* "Piercing the corporate veil – a clarion call for certainty".
[267] S20(9) of Act 71 of 2008.
[268] *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) 34.
[269] Schoeman "When can you be held personally liable within your company and how can this be brought about?"; Mashiri *A critical analysis of the piercing of the corporate veil in South African corporate law* 4; Cassim 2014 *SAMLJ* 335.

being disregarded too easily.[270] From this point as well as the one above (the lack of clarity surrounding unconscionability) it becomes clear that there is a need for the legislature to look into the section again.[271]

6.5 Striking A Balance Between Piercing the Corporate Veil and Upholding the Separate Legal Personality Afforded to Companies

Lastly, this research report concludes that in order for the separate legal personality of companies not to be disregarded too easily and in order for the corporate veil to still be pierced when circumstances justify the piercing, the courts need to engage in a balancing exercise.[272] The importance of upholding the principle of separate legal personality will be on the one end of the scale and the adverse moral and economic effects of allowing an unconscionable abuse of the principle by members of a company will be on the other end of the scale.[273] This research report has also found that each case which involves veil piercing and this balancing exercise needs to be decided based on its own merits (i.e., the focus needs to be on substance rather than form).[274] Consequently, research question 1.3.7 (namely: how have the courts attempted to balance upholding the separate legal personality afforded to companies and piercing of the corporate veil) can be answered by stating that the courts attempt to find this balance by looking at the facts and circumstances of each individual case and then determining whether it is appropriate or not to disregard the separate legal personality in that particular case.[275] It has proven very difficult to provide a general answer to this question.

6.6 Conclusion

In summary, the above chapter has provided conclusions for the entire research report and it has found that all research questions have been answered. Thus, this research report has provided an analysis of piercing the corporate veil and of striking a balance between the separate legal personality of a company in South Africa.

It is important to conclude by highlighting that this research report was based on the doctrinal method of research as explained in Chapter 1. As such, there are no first-hand conclusions from companies who have undergone veil piercing. Therefore, the researcher recommends that further research should be conducted on veil piercing using a quantitative research method in order to also have practical conclusions.

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[270] Cassim 2014 *SAMLJ* 329, 335; Nwafor 2015 *Corporate Board: Role, Duties and Composition* 151.
[271] Phiri 2020 *Corporate & Business Strategy Review* 25.
[272] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 31; *Knoop NO v Birkenstock Properties (Pty) Ltd* FSHC 04-06-2009 par [14-17] case no 7095/2008 at http://www.saflii.org/za/cases/ZAFSHC/2009/67.html [Accessed 20 April 2022].
[273] *Ibid.*
[274] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 32; *Knoop NO v Birkenstock Properties (Pty) Ltd* FSHC 04-06-2009 par [14-17] case no 7095/2008 at http://www.saflii.org/za/cases/ZAFSHC/2009/67.html [Accessed 20 April 2022].
[275] *Knoop NO v Birkenstock Properties (Pty) Ltd* FSHC 04-06-2009 par [14-17] case no 7095/2008 at http://www.saflii.org/za/cases/ZAFSHC/2009/67.html [Accessed 20 April 2022].

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