PIERCING THE CORPORATE VEIL:
A CRITICAL ANALYSIS OF SECTION 20(9) OF THE SOUTH AFRICAN COMPANIES ACT 71 OF 2008

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Abstract

When a company is incorporated it becomes a juristic entity with rights and obligations of its own and is distinct from its shareholders and directors. Hence, company liabilities are not those of its shareholders and directors. However, section 20(9) of the Companies Act 71 of 2008 grants the court the discretion to disregard the corporate veil where there is an unconscionable abuse of the juristic personality so as to impose personal liability upon directors or any other person involved in that transaction. However, the section fails to define what constitutes “unconscionable abuse” which is the key to the application of that provision. This research thus seeks to discover what constitutes unconscionable abuse of the juristic personality. Simply put, this research aims to identify the circumstances under which the corporate veil may be pierced. The results from this extensive inquiry are that the term ‘unconscionable abuse’ is a legislative derivate from the various terms used by the courts at common law to justify the disregarding of the separate legal personality of the corporate entity. Therefore, the inescapable conclusion reached is that just as those terms used at common law are confounding, so shall this rather legislative innovation remain to be confounding until a specific meaning is assigned to it by the parliament.

Keywords: Company, Director, Juristic Person, Lifting or Piercing the Corporate Veil, Juristic Personality, Unconscionable Abuse, Veil of Incorporation

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1. INTRODUCTION

In 1897, the House of Lords in the landmark case of Salomon v Salomon & Co Ltd it established the principle of separate legal personality of a company, which is now widely accepted by scholars as to the heart and foundation of the entire company law (Cassim, 2014). This principle entails that a company is
a person separate and distinct from its shareholders and directors. Lord Macnaghten for the House of Lords unequivocally held that:

The company is at law a different person altogether from the subscribers of the memorandum; and though it may be that after incorporation the business is precisely the same as it was before, and same persons are managers, and same hands receive profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act (Salomon v. A. Salomon, 1897, p. 55).

To elaborate further on the separate legal personality status of the company, Lord Halbury L. C. said:

Once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are (Salomon v. A. Salomon, 1897, pp. 30-31).

Based on these principles, the House of Lords held that Mr. A. Salomon cannot be held personally liable for the debts of the company. This case establishes two important legal principles in company law. That is the principle of corporate entity and that of limited liability which directly germinates from the first principle. The principle of corporate entity entails that the company is a juristic person separate and distinct from its shareholders and directors. Whereas, the latter entails that, due to the separate legal personality of the company, shareholders of the company cannot be held liable for the debts of the company in excess of their share capital.

The principle of corporate entity and that of limited liability have found codification in the Companies Act of South Africa (2008). See section 19(1)(a)(b)(c) which provides for the legal status of companies and section 19(2) respectively that:

(1) 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.

(2) 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.

However, the principles of a corporate entity are subject to limitations in terms of the doctrines of the piercing of the corporate veil. Presently, the common law principle of piercing the veil of incorporation has been codified in section 20(9) of the Companies Act (2008) which provides that:

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) (section 20(9)(a) and (b) Companies Act (2008)).

The aim of this paper is to bring out the meaning of the term ‘unconscionable abuse’ which lacks legislative definition. In other words, the paper examines which grounds, according to the legislature constitutes unconscionable abuse of the juristic personality of a company.

The structure of this paper is as follows: Section 2 reviews the relevant literature. Section 3 analyses the methodology that has been used to conduct empirical research. Section 4 provides the results of the study. Section 5 contains discussions on corporate veil piercing and Section 6 provides the conclusion of the entire paper.

2. LITERATURE REVIEW

To throw back the light, once the company is incorporated and registered in accordance with the provisions of sections 13 and 14 of the Act, metaphorically a veil is formed between the company and the directors. The veil dichotomies the company from its shareholders and directors. The corporate veil bestows the company with the legal personality status, distinct and separate from that of its shareholders and directors. Consequently, shareholders and directors of a company are protected from being liable for the debts and liabilities of a company because the two are considered in law as separate persons.
However, the principle of separate legal personality of the company is not a rigid principle as it is subjected to an exception, known as the piercing of the corporate veil. Nonetheless, piercing of the corporate veil is a controversial principle which the Act still fails to address. This paper pays focus on attempting to breakdown the question of what constitutes unconscionable abuse of the corporate structure as a separate legal entity in terms of section 20(9).

2.1. Use of the separate legal personality of the company to evade a fiduciary duty

This ground applies to directors. Directors stand in a fiduciary relationship with the company, as a result, they owe the company a number of fiduciary duties which are mandatory. Hence, the directors can not be allowed to evade their fiduciary duties to the company by what so ever reasons. For instance, by interposing another company and hiding behind it in order to avoid a particular duty (Jooste, Cassim, M. F., Cassim, R., & Yeats, 2012). Put differently, the director is not permitted to use the separate legal personality of another company as a shield to escape the fiduciary duties owed to the other company, even after the expiry of the office term.

In Robinson v. Randfontein Estates Gold Mining Co Ltd (1921) the Appellate Division refused to recognise the separate legal personality of the subsidiary company which the plaintiff director intended to use as a shield to evade the fiduciary duty that he owed to the holding company. Both the subsidiary company and the holding company were treated as a single entity. Thereby disregarding the separate existence of the subsidiary company on the basis of that, the subsidiary company was interposed by the plaintiff as means to enable him to escape the fiduciary duties that he owed the holding company.

2.2. Use of the separate legal personality of a company to evade an existing contractual obligation

The use of the company’s separate legal personality to evade an existing contractual obligation is a strong ground for the courts to pierce the corporate veil. This ground for piercing the corporate veil has been raised mostly in respect of violation of the restraint of trade agreements. This is due to the fact that the law does not allow parties to a restraint of trade contract to use the company’s separate existence as a shield to elude contractual obligations. If the corporate personality is used to escape existing contractual obligations, the courts will not hesitate to pierce the corporate veil.

In Gilford Motor Co Ltd v. Horne (1933) where the defendant who was a party to a restraint of trade agreement which prohibited him to engage in any business similar to that of his previous employer, the plaintiff company, for a period of five years violated the restraint of trade clause. By: after his resignation, the defendant created the company in competition with the plaintiff company as a mechanism to help him escape the existing contractual obligation that he owed to the plaintiff company. The court ruled in favour of the plaintiff and refused to recognise the separate legal personality of the formed company on the ground that the company was created as a device and stratagem to aid the defendant to evade the contractual obligation that already existed between the parties.

Lord Hanworth M. R. in that matter, in reaching his judgment held that:

_I am quite satisfied that this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr. E. B. Horne. The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business which, on the contemplation of the agreement which had been sent to him just about seven days before the company was incorporated, was a business in respect of which he had a fear that the plaintiffs might intervene & object (Gilford Motor Co Ltd v. Horne, 1933, p. 114)._}

In addition, Lord Hanworth in support of his judgment quoted the decision established by Lindley L. J. in Smith v. Hancock (1894) where it was established that use of the company’s separate legal personality to evade a contractual obligation justifies the piercing of the corporate veil. He held that:

_If the evidence admitted of the conclusion that what was being done was a mere cloak or sham, and that in truth the business was being carried on by the wife and Kerr for the defendant, or by the defendant through his wife for Kerr, I certainly should not hesitate to draw that conclusion and to grant the plaintiff relief accordingly (p. 475)._}

Lawrence L. J. like Lord Hanworth concurred with Farwell J. of the court a quo that the evidence adduced by the plaintiff justifies that, ‘the defendant company was a mere cloak or sham for the purpose of enabling the defendant to commit a breach of his covenant against solicitation’, which justifies the piercing of the corporate veil which exists between the two defendants.

Again, in Le’Bergo Fashions CC v. Lee (1998), a similar decision was reached by the Constitutional Court. In that matter, the first
respondent entered into a restraint of trade agreement with the applicant, whereby she agreed not to engage directly or indirectly in any manner in the business similar to that of the applicant, the buyer of her business as an ongoing concern. The defendant breached the contract by forming a company that engaged in the business similar to that of the applicant. The applicant approached the court seeking the court to impose the restraint of trade agreement on the second respondent, the company formed by the first respondent, in the same manner as the contract was imposed on the first respondent. The applicant contended before the court that, the first respondent should not be allowed to evade contractual obligations by hiding behind the first respondent.

Hoffman A. J. in reaching judgment quoted with authority (Davies & Gower, 2003), that:

It also seems clear that a company can be a facade even though it was not originally incorporated with any deceptive intentions, what counts is whether it is being used as a facade at the time of the relevant transaction. Thus if the company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question (p. 133).

In that matter, the court disregarded the separate legal personality of the second respondent company on the ground that it was used for an improper purpose, to enable the first respondent to escape an existing contractual obligation. Hoffman A. J. further held that:

I am of the view that the facts relied upon by the applicant and enumerated above are sufficient to sustain the argument that the first respondent is guilty of improper conduct in using her company, the second respondent, as a facade behind which she has engaged in business in breach of the restraint of trade undertaking. I am satisfied that whether it be on the basis of veil piercing, or on the basis of interference in contractual relation, the second respondent must be interdicted in this matter (Le’Berigo Fashions CC v. Lee, 1998, pp. 614-616).

Therefore, the above case illustrates clearly that interposition of the separate legal personality of the company as a facade for dodging an existing contractual obligation is a ground that justifies the piercing of the corporate veil by the courts. Thus constituting unconscionable abuse of the juristic personality of the company in terms of the 2008 Act.

In Die Dros (Pty) Ltd v. Telefon Beverages (2003) the Constitutional Court also elaborated that the use of the separate legal personality of the company is a ground for piercing the corporate veil. In that matter, the court held that the separate legal personality of the company will undoubtedly be disregarded where the person who is subject to the restraint of trade contract uses the separate existence status of the company as a shield to engage in activities prohibited by the restraint of trade contract (para. 24).

Jones v. Lipman (1962) is another example of case law where the court pierced the corporate veil where the company’s separate legal personality was used as a device to evade an existing contractual obligation. In that matter, the defendant formed the company so as to enable him to escape specific performance in terms of the contract of sale that he had entered into with the plaintiff. The court per Russell J. held that even though the land was sold by the defendant to the defendant company, the defendant was still bound to perform in terms of the contract. Hence, the separate legal personality of the defendant company was disregarded by the court on the ground that, the company was a mere mask to enable the defendant to evade specific performance in terms of the existing contract.

It should be borne in mind that, piercing of the veil of incorporation on this ground, the motive for forming the company will not be considered. This was illustrated in the Cape Pacific Ltd v. Lubner Controlling Investments (Pty) Ltd (1995) the Appeal Court held that “it does not matter prior to the piercing of the corporate veil whether the company was formed with bad intention or good intention but was later improperly used” (p. 803). This implies that the courts will pierce the corporate veil where the separate legal personality of a company has been used to avoid an existing contractual obligation without looking into the intention of its formation.

2.3. Use of the separate legal personality of a juristic person as a sham or facade

If a company is used to appear to be something which in actual facts it is not, for the purposes of deceiving third parties, the court will pierce the corporate veil in order to reach the actual perpetrator. For instance, if the company is made to appear to possess certain legal rights and obligations which, in actual fact, it does not possess, the courts will definitely pierce the corporate veil.

It should be noted that a sham can be in a form of an act or document, however, what
matters most is the intention is to deceive a third party (Snook v. London, 1967, p. 802). In Nilesh Hirji Pankhania v. Kalavanti Narendra Chandegra (2012) by Lord Justice Patten though the matter related to a sham trust and not a company where he held as follows:

\textit{It must be shown both that the parties to the trust deed (in this case, the claimant and the defendant) never intended to create a trust and that they intended to give that false impression to the third parties or to the court} (para. 20).

The assertion that the use of separate legal personality of the juristic person as a sham constitutes unconscionable abuse was affirmed in \textit{Hitch v. Stone (Inspector of Taxes)} (2001) in which the court concluded that the separate legal personality of the juristic person may be disregarded if it is used as a sham.

In addition, to the test established in the case of \textit{Snook} above, Arden L.J. in \textit{Stone v. Hitch} (2001) held that “in determining whether the company is used as a sham, the facts of the case should be deeply scrutinised. For instance, if it is a document that is subjected to dispute the court may also examine extrinsic evidence that might be available and of necessity. Is such a case, the court should not only confine itself to the disputed document” (para. 65). Secondly, the parties to the agreement must have had the intention to create legal rights and obligations diverse from the ones that the juristic person actually possesses and to give a false impression about such rights and obligations. Therefore, to determine the intention of the parties the court must apply the subjective test (para. 66). Thirdly, the fact that the document is not a commercial or an artificial document, does not avert it from being a sham (para. 67).

Moreover, if the parties, later on, divert from the agreement that they have reached does not imply that they lack the required intention, i.e., the intention to deceive a third party (para. 68). Such a contract will be considered as if it is still existing and valid even though the parties to it have decided to cancel it. Lastly, it must also be proven that the parties to a sham contract possessed common intention to deceive third parties or court about the rights and obligations that they falsely created about the juristic person which are not similar to the one that the juristic person actually possess (para. 69). Thus, the last element justifies the decision reached by Lord Justice Patten that since there are no allegations raised or evidence that Ms. Ker and Optima had common intention to deceive the third part about the terms and the impact of the tenancy agreement, therefore, the agreement does not qualify as a sham (Nilesh Hirji Pankhania v. Kalavanti Narendra Chandegra, 2012, para. 22).

Again, in \textit{Hulse-Reutter v. Godde} (2002), Scott J. A. held that the fact that the appellants acted through Goldleaf company was a common cause that they intended to hide their identities as Harken’s “godmothers” (p. 218). Therefore the fact that there was some truth concealed by the appellants makes it justified for the court to pierce the corporate veil. Hence, indicating again that the use of a company’s separate legal personality as a sham is a ground for veil piercing (p. 218). This was also supported by Lord Keith in Woolfson v. Strathclyde Regional Council (1978) by observing that “it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts” (para. 96).

In the case of \textit{Trustor AB v. Smallbone (No 2)} (2001), it was alleged that Smallbone, the defendant, used the company as a vehicle to enable him to receive money from the Trustor. The submission made on behalf of the plaintiff was that the authorities allow the piercing of the corporate veil in three overlapping circumstances and these are: where the company was used as a sham or facade, where the company was involved in some form of impropriety and where the interests of justice so require. Sir Andrew Morriss came to the conclusion that the authorities allow the piercing of the corporate veil only in the first two circumstances provided that the impropriety is coupled with the use of the corporate structure to conceal or avoid liability. The Vice-Chancellor rejected the circumstance number three that the veil may be pierced if the interests of justice so require abased on the ruling established in \textit{Adams v. Cape Industries plc} (1991) where it was held as follows:

\textit{The court was entitled to ‘pierce the corporate veil’ and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or facade to conceal the true facts, thereby avoiding or concealing any liability of those individual(s) (para. 23).}

The above decision is similar to the one reached by Lord Keith of Kinkel in Woolfson v. Strathclyde Regional Council (1978) where it was held that “it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts” (p. 96).

Lord Sumption however, in \textit{Prest’s} case contends that there are challenges in identifying relevant wrongdoing and the use of terms ‘facade’ or ‘sham’ since it raises multiple questions that cannot be answered satisfactorily. He further argues that there are two distinct principles that lie behind these two protean terms and these are the
concealment principle and evasion principle. He attempts to distinguish these two principles by saying:

The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that interposition of a company or perhaps several companies so as to conceal the identity of the real actors ... In these cases, the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The invasion principle is different. It is that the court may disregard the corporate veil... (Prest v. Petrodel Resources Ltd, 2013, para. 26).

Again, in the leading South African case of Ex parte: Gore No (2013), in which the provisions of section 20(9) were applied it was held that the reports submitted to the court were evident enough that the disregard by the King Brothers of the separate legal personalities of the companies in the King Group was so extensive to justify the conclusion that Group was a sham which justifies the piercing of the corporate veil. In this matter Binns-Wards J. attempted to define unconscionable abuse of the juristic personality of the company as follows:

The term "unconscionable abuse of the juristic personality of a company" postulates conduct in relation to the formation and use of companies diverse enough to cover all the descriptive terms like "sham", "device", "stratagem" and the like used in that connection in the earlier cases, and - as the current case illustrates - conceivably much more. The provision brings about that a remedy can be provided whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced (para. 36).

2.4. Use of the separate legal personality of the juristic entity to commit fraud

Defining corporate fraud has never been an easy task for the courts (Keay, 2006). It has in many cases been considered as a ground for piercing the corporate veil. In Daniels v. Daniels (1978) it was held that corporate fraud is the violation of fair dealing or unconscionable conduct or abuse of power between the trustee and the shareholders in the company management. To determine whether a particular company intends to defraud a third party, the inference has to be drawn from the manner in which the company conducts its businesses.

Maugham J. in Re William C Leitch Brothers Ltd (1932) is of the view that intent to defraud a third party can be extrapolated in the following circumstances:

If a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud (p. 77).

Denning L. J. in his famous dictum in the case of Lazarus Estates Ltd v. Beasley (1956) said:

No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgment, contract and all transactions whatsoever (p. 712).

However, Menzies J. in Hardie v. Hanson (1960) emphasised that for an act of the company to qualify as the fraud it must be interwoven with misrepresentation. He stated that:

Even if the chances of payment of all creditors in full were so remote that it belonged to the realms of hope rather than belief, it seems to me that the fault, grievous though it may be, falls short of fraud unless it is coupled with something else, such as misrepresentation of the position (p. 467).

2.5. Affixation of the ostensible acts of the company to the rightful individuals

In Faiza Ben Hashen v. Ali Shayif (2008) the court had held that the corporate veil may be pierced by the courts if necessary to remedy the wrong done by the controlling minds of the company. Munby J. held:

In all of the cases where the court has been willing to pierce the corporate veil, it has been necessary or convenient to do so to provide the claimant with an effective remedy to deal with the wrong which has been done to him... It seems to me that the veil, if is to be lifted at all, is to be lifted for the purposes of the relevant transaction (para. 168).

Additionally, to illustrate that the courts will pierce the veil of incorporation in order to affix the wrong caused by ostensible acts of the company to the rightful individuals, the Appeal Court per Smallberger J. A. in Cape Pacific Ltd v. Lubner Controlling Investment (Pty) Ltd (1995) held that:

It is trite law that (a) registered company is a legal persona distinct from the members who compose it. (Dadoo Ltd v. Krugersdorp Municipal Council, 1920 AD 530 at 550). Equally trite is the fact that a court would be justified in certain circumstances in
disregarding a company’s separate personality in order to fix liability elsewhere for what are ostensibly acts of the company. This is generally referred to as lifting or piercing the corporate veil (p. 802).

However, the mere involvement of the company in wrongdoing does not warrant the piercing of the corporate veil. Instead, the veil of incorporation will be pierced where the company is involved in wrongdoing only to remedy the wrong done by the controllers of the company (Faiza Ben Hashen v. Ali Shayif, 2008, para. 683). Again, the wrong in which the company is involved must be “dehor the company”. This means that the fraudulent misuse of the company must be an ordinary business of the company (Antonio Gramsci Shipping v. Stepanovs, 2011, para. 15).

2.6. Impropiety use of the company’s separate legal personality in order to avoid or conceal liability

The veil of incorporation may be pierced if there are improprieties involving the use of the company’s separate legal personality. This was buttressed by Munby J. in Faiza Ben Hashen v. Ali Shayif (2008) quoted in Linsen International Ltd v. Michael Howard QC (2011) where he held that “It is clear that there must be some impropriety before the corporate veil can be pierced” (Faiza Ben Hashen v. Ali Shayif, 2008, p. 161). He further emphasised that mere involvement of the company in certain impropriety does not grant the courts the power to pierce the corporate veil. Instead what is required is that the impropriety in which the company is involved must be linked to the use of the company structure to avoid or conceal liability” (Faiza Ben Hashen v. Ali Shayif, 2008, p. 162)

Furthermore, Sir Andrew Moritt V. C. in Trustor AB v. Smallbone (No 2) (2001) concurs with the decision of Munby J. above that the impropriety to suffice for the piercing of the corporate veil should have been done in order to avoid or conceal liability. He said:

Companies are often involved in improprieties. Indeed there was some suggestion to that effect in Salomon v. A Salomon & Co Ltd (1897) AC 22. But it would make undue inroads into the principle of Salomon’s case if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough (Trustor AB v. Smallbone (No 2), 2001, para. 22).

In addition, Munby J. emphasised further in Faiza Ben Hashen case that it is not enough to only prove that the company’s structure was involved in some impropriety as a means or facade to avoid liability. Instead, it must also be shown that the perpetrator has control over the company in question. It is noteworthy that a company can qualify as a facade though it was incorporated with the bona fide intention if it is later on involved in some mala fide conducts (Faiza Ben Hashen v. Ali Shayif, 2008, para. 164; Linsen International Ltd v. Michael Howard QC, 2011, para. 15).

2.7. Policy considerations

The decision of the court to pierce the corporate veil is based on policy consideration (Ex parte: Gore No, 2013, para. 29). This requires the court to strike the balance between the importance of retaining and giving the effect the principles that underpin the separate legal personality of the company which is the cornerstone of the company law in relation to the unconscionable abuse of the juristic personality of the company by its controlling minds. Binns-Ward J. in elucidating that the courts will doubt pierce the corporate veil where there is the abuse of the company’s separate legal personality regardless of the necessity to retain and protect the separate legal personality of companies. He held:

The courts have shown an acute appreciation that juristic personality is a statutory creation and that “their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted” (ADT Security (Pty) Ltd v. Botha, 2010, para. 16).

However, prior to the piercing of the corporate veil, the court must first strike a strong balance between the facts favouring the piercing of the corporate veil against those factors in favour of its protection.

3. RESEARCH METHOD

The method adopted is mainly doctrinal. A doctrinal research methodology deals with what the law is on a particular issue. It mainly analyses legal doctrines, their development, and their application. The choice of this research method is motivated by the fact that the researcher intensively analysed the common law doctrine of piercing the corporate veil which is now codified in section 20(9)(a)(b), in order to bring out the circumstances which constitute unconscionable abuse of the juristic personality of a company. The research methodology adopted also involved the study of primary and secondary sources such as legislation, case law, textbooks, and journal articles, which are known as the ‘black letter of the law’. The study is also desktop-based, this implies that information was also obtained from the internet sources.
The writer also employed a comparative approach, which entailed reference to the law as applied in other jurisdictions in this field of study. A comparative approach was used in order to enhance a better understanding and development of company law in South Africa. Great references were made to English law solely because the South African company law is an embodiment of substantial elements of English law.

4. RESULTS

The above analysis exhibits that, the term ‘unconscionable abuse’ as contained in section 20(9) of the South African Companies Act (2008), refers to those common law grounds of the piercing of the corporate veil. In other words, section 20(9) of the Companies Act merely codifies those common law grounds for the piercing of the corporate veil. Hence, just like those common law grounds, section 20(9) piercing of the corporate veil remains confounding. However, it is within the discretion of the courts to decide, as to when to pierce or not the veil of incorporation on given circumstances.

5. DISCUSSION

Despite, the importance of the principle of the separate legal personality of a company, this principle is undisputedly a mere fictitious concept of law. This is attributed to the fact that, in true senses, the company cannot be said by a person who exists on its own because, in reality, it is an association of the shareholders who compose it. Thus, to bridge this gap the management of the company’s affairs is endowed to company directors who able to perform transactions that are inherently human in nature on behalf of the company (section 66(1) of the Companies Act). As a results directors have a fiduciary duty to their companies to ensure that they perform their duties honestly and in the best interests of the company.

Directors as humankind, however, have in many cases abused the corporate structure. For instance by using the corporate structure to commit fraud or dodge an existing legal obligation. In order to curb such abuse, the legislature and the courts have allowed an exception to the principle of separate legal personality of the company where there is an abuse of the corporate structure by directors or anyone involved with the company. This exception is known as ‘the doctrine of piercing or lifting the corporate veil’, which allows for the disregarding of the corporate veil in certain justified circumstances. This principle is described by Lord Sumption of the House of Lords in Prest v. Petrodel Resources Ltd (2013) as ‘the true exception to the principle established in Salomon’s case. The term piercing or disregarding the corporate veil is not defined in the Act. However, Lord Sumption in the case of Prest described piercing the corporate veil as follows:

“Piercing the corporate veil” is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company. There is a range of situations in which the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality... But when we speak of piercing the corporate veil, we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in Salomon v. A Salomon and Co Ltd [1897] AC 22, i.e., where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control (para. 16).

Despite the prodigious acceptance of the codification of the principle of piercing the corporate veil the courts are still struggling to determine the clear circumstances under which the corporate veil may be pierced. This challenge is due to the fact that the Act fails to define what constitutes unconscionable abuse of the juristic personality of the company or to provide guidance as to the circumstances under which the veil of incorporation may be pierced.

Nonetheless, failure by the legislature to clearly define unconscionable abuse cannot be said to be a total failure. This is due to the fact that the Act fails to define what constitutes unconscionable abuse of the juristic personality of the company or to provide guidance as to the circumstances under which the veil of incorporation may be pierced.

Therefore, failure by the legislature to define what constitutes unconscionable abuse of the juristic personality of the company should not be a matter of much concern. Instead, minds should be glued on trying to come up with clear guidelines as to what constitutes unconscionable abuse of the juristic personality of the company as grounds for piercing the corporate veil as stated in the 2008 Act. However, it is crucial to note also that: piercing of the corporate veil is done only in respect of a particular right, duty or transaction and it does not imply non-
recognizes the company's legal personality (Faiza Ben Hashen v. Ali Shayif, 2008, para. 682). Thus, if the court disregards the separate legal personality of the company it does not mean that the company is deemed not to exist at all rather, the court is only disregarding the separate status of the company only in respect of a particular transaction. As such, the company's separate existence status, in general, remains unaffected.

However, Nwafor (2015) provides a diverging but interesting argument on the piercing of the corporate veil. He posits that where the courts have disregarded the separate legal personality of the company and treated it as a single entity with its controllers such should rather be seen as the recognition of the company's separate existence as opposed to ignoring it.

6. CONCLUSION

From the above discussion, it is justified to conclude that, the term 'unconscionable abuse' is a legislative derive from the various terms used by the courts to justify the piercing of the separate legal personality of the corporate entity. Just as those terms used at common law are confounding, so shall this rather legislative innovation remain confounding until a specific meaning is assigned to it. Hence, even though attempts have been made to bring out what constitutes “unconscionable abuse” based on the previously decided cases; internal and external and any other legal sources of information. The term unconscionable abuse, however, remains unclear but leading to those common law confounding grounds.

Given the challenges relating to the interpretation and application of the section. It cannot be disputed that there is a need for the legislature to look into the section again. In doing so, the legislature should try to provide a specific meaning or guidelines as to what constitutes unconscionable abuse of the juristic personality of a company. Hence, this paper and other scholar documents which have been written by various scholars should be consulted by the legislature in this regard. However, prior to such time, the term unconscionable abuse should be taken as wide enough to cover all those common law grounds for the piercing of the corporate veil.

The current research paper is a doctrinal kind of research, which means that dependence was made largely on the primary and secondary sources of legal information such as statutes, case laws, textbooks and article journals. No interaction was made with the companies that have undergone the process of the piercing of the corporate veil, thus making it difficult to have solid practical conclusions on certain aspects. Therefore, the researcher recommends that future research be conducted on this aspect from the quantitative point of research.

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