"UNCONSCIONABLE ABUSE" – SECTION 20(9) OF THE COMPANIES ACT 71 OF 2008

Ex Parte Gore NNO 2013 (3) SA 382 (WCC)

1 Introduction

The remedy provided for in company law of "piercing of the corporate veil" was a remedy that only existed in the common law but has now been expressly incorporated into legislation under the Companies Act 71 of 2008 (hereinafter "the Act"). The "piercing of the corporate veil" statutory provision is contained in section 20 (9) of the Act. This provision does raise an important question as to how the courts will interpret the term "unconscionable abuse". The term "unconscionable abuse" is not defined in the Act and the section fails to provide any guidance on the facts or circumstances that would constitute an "unconscionable abuse" of the separate juristic personality of the company. This paper discusses the interpretation of the term "unconscionable abuse" in light of the judgment in *Ex parte Gore NNO* (2013 (3) SA 382 (WCC)) and seeks to provide clarity with regard to the implication of section 20(9) of the Act on the common-law grounds of piercing the corporate veil.

2 Facts

The application commenced by way of a rule *nisi*. The applicants were all liquidators of one or more companies which formed part of a group of companies referred to as "the King Group". The main holding company was King Financial Holdings Limited (hereinafter "KFH"), which was also undergoing liquidation proceedings, and the liquidators of KFH were included as the applicants in the proceedings (par 5).

The three King brothers (Adrian, Paul and Stephen) were directors of KFH and most of its subsidiaries and held a majority of the KFH shares, which enabled them to exercise control of the King Group (par 6).

The King brothers used the companies in the group to conduct business that entailed the provision of financial services. They achieved this by marketing investments in commercial and residential immovable properties. Their activities attracted the attention of the Financial Services Board ("FSB"), who carried out an investigation into the conduct of the business. The liquidators also commissioned an investigation by PriceWaterhouseCoopers ("PWC") concerning the receipt and distribution of investments by companies in the King Group (par 7). The investigations by FSB and PWC revealed that there was widespread irregularity in the manner in which the business activities were conducted and established that the affairs of the group were conducted in a manner that constituted no distinguishable corporate identity between the various constituent companies in the group. All the companies in

the group were operated as one entity through the holding company, KFH. The King brothers "treated all the companies as one" by transferring the monies that were solicited from investors between the various companies at will (par 7). The King brothers persuaded investors to enter into a "share conversion" scheme. In terms of this scheme, existing investments in one or more subsidiary companies could be converted into shares in KFH. The investigation by PWC revealed that the share-conversion scheme was dishonest from the outset. The shares were converted at markedly different values determined arbitrarily by the King brothers themselves. Shareholder certificates that were issued to investors were done so without copies being made for the company records. The shares in KFH were also sold to the public at a time when the company had not been converted from a private into a public company, and more shares were sold than had in fact been authorized (par 13). The King brothers also carried on the business of a financial service in the name of KFH, even though the only company in the group that was a registered financial service provider in terms of the relevant legislation was King Services (Pty) Ltd (par 8). These actions constituted no regard for the individual identity of the companies in the King Group (par 7–8).

The liquidators of the constituent companies encountered a number of difficulties in identifying the relevant corporate entities against which the investors and creditors might have had claims. This was largely due to the dishonest and maladministration of the affairs of the King Group of companies by the King brothers. The documentation relating to accounting records of the companies in the group as well as evidence relating to investments was ineptly prepared such that it was not possible to identify which particular company was the recipient of a particular investment. In fact, the funds were invested and allocated by the management of the King Group into whichever company they saw fit and was dictated to by which company was in need of funds at that particular time (par 12).

The liquidators of the companies approached the Western Cape High Court and asked that the court permit that certain assets of the constituent companies be dealt with as if they were the property of the holding company. The liquidators asked the court to disregard the separate juristic personality of various companies in the group of companies selectively and to consider their residual assets as the assets of the holding company for purposes of satisfying the claims of the investors.

3 Issue

The essential basis of the claim was that the business activities of the group were conducted through the holding company, KFH. It was alleged that KFH had carried on its business activities with little or no regard for the distinction between the various companies' legal personalities. The court had to decide on whether to ignore the separate legal personalities ("pierce the corporate veil") of the subsidiary companies and to attach liability to the holding company in terms of common law or alternatively section 20(9) of the Companies Act 71 2008 (par 1–2).

4 Judgment

Binns-Ward J based his decision on section 20(9) of the Act in that the actions by KFH constituted an "unconscionable abuse" of the juristic personalities of the subsidiary companies. The judge held that it was clear that the King Brothers disregarded the separate corporate personalities of the companies in the King Group. The court held that group of companies were in fact a sham. There was in reality no distinction for practical purposes when it came to dealing with the investors' funds between KFH and the subsidiary companies. The court held that the companies in the King group would not be regarded as juristic persons and that the only company that would retain its separate corporate personality would be KFH. The court granted the relief asked for by the liquidators and held that there had to be a consolidation of the residual assets (in other words, there had to be a single pool of assets) in KFH and directed that all the investors' claims should lie against the consolidated fund created in order to afford a convenient and cost-effective means of dealing with the claims of bondholders and investors. The court held that the separate legal existence of the King companies as a single entity had to be ignored and that KFH as the holding company had to be considered to be as if it were the only company (par 27).

5 Discussion

5 1 Piercing or lifting of the corporate veil

The application made in this case was described as being one of "piercing of the corporate veil". It is important at the outset to draw a distinction between the concepts of piercing the veil and lifting the veil. The courts sometimes refer to the phrase "piercing the veil" when the effect is to lift the veil and conversely. When the court pierces the veil, it treats the liabilities of the company as those of the shareholders or directors, and disregards the corporate personality of the company. On the other hand, when the court lifts the veil it is merely taking into account who the company's shareholders or directors are. This does not necessarily mean that the courts are ignoring the separate identity of the company when treating the liabilities of the company as those of the shareholders or directors. Staughton LJ in *Atlas Maritime Co SA v Avalon Maritime Ltd* ([1991] 4 All ER 769 779) explained the distinction as follows:

> "Like all metaphors, this phrase [piercing the corporate veil] can sometimes obscure all reasoning rather than elucidate it. There are, I think two senses in which it is used, which need to be distinguished. To pierce the corporate veil is an expression that I would do so for treating the rights or liabilities or activities of the company as a rights or liabilities or activities of the shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose."

In *Pioneer Concrete Services Ltd v Yelnah Ply Ltd* ((1986) 5 NSWLR 254 (SCNSW) 264) the court commented on the meaning of the phrase "lifting the veil" and stated "that although whenever each individual companies formed a separate legal personality is created, courts will on occasions, look behind the legal personality to the real controllers".

An example of a case where the court lifted the veil is the case of *Daimler Co Ltd v Continental Tyre and Rubber Co* ([1916] 2 AC 307). In *Daimler Co Ltd v Continental Tyre and Rubber Co* (*supra*) the House of Lords accepted that the company was a legal person distinct from its shareholders, but stated that this did not necessarily mean that the character of its shareholders was irrelevant to the character of the company because the rule against trading with the enemy depended upon the enemy's character (338). It stated that, for certain purposes, the courts had to look behind the legal or artificial person and take account of the persons who controlled the company (340). The court stated that a company might assume an enemy character if the persons in *de facto* control of its affairs were resident in any country or, wherever resident, adhered to the enemy or took instructions while under the control of enemies (345). The House of Lords was of the opinion that the plaintiff company was an alien enemy on the grounds that the persons in *de facto* control of the affairs of the company were resident in an enemy country and that the plaintiff company had been taking instructions from enemies. Thus, although the plaintiff company was an English company, the controllers of the company were based in Germany. The company had been taking instructions from persons resident in Germany, and accordingly the plaintiff company was regarded as an enemy company.

Despite the debate of the terms "lifting the corporate veil" and "piercing the corporate veil", the common view in various jurisdictions is that the use of either terms does not have any significant bearing on the outcome that may be adopted by the courts (*Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia* (No 2) [1998] 1 WLR 294).

The principle of a company's separate juristic personality was first asserted in the House of Lords in *Salomon v Salomon and Co Ltd* ([1897] AC 22 (HL)). It is already recognized that proof of fraud or dishonesty might justify the separate corporate personality of a company being disregarded. In *The Shipping Corporation of India Ltd v Evdomon Corporaton* (1994 (1) SA 550 (A)) Corbett J confirmed that fraud, dishonesty, or improper conduct could provide grounds for piercing the corporate veil. The judge stated (566C–F) as follows:

> "It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of the company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law because in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company government. I do not find it necessary to consider, or attempt to define, the circumstances under which the court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words 'device', 'stratagem', 'cloak' and 'sham' have been used …"

5 2 A South African approach to piercing of the corporate veil

The law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil (*Hülse-Reütter v Godde* 2001 (4)

SA 1336 (SCA)). In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* (1995 (4) SA 790 (A) 802), the Appellant Division acknowledged that in certain circumstances, a court would be justified in disregarding the separate legal personality of a company, but remarked that the law was far from settled with regard to the circumstances in which it would be permissible to pierce the veil. Each case involved a process of inquiring into the facts which, once determined, might be of decisive importance. In determining whether or not based on the facts of a given case to disregard the separate corporate personality one had to bear in mind that:

> "the fundamental doctrine that the law regards the substance rather than the form of things – the doctrine common, one with think, to every system of jurisprudence and conveniently expressed in the maxim plus *valet quod agitur quam quod simulats concipitur*" (*Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 547).

The courts have consistently held that a court had no general discretion simply to disregard a company's separate legal personality whenever it considered it just do so (*Salomon v Salomon and Co Ltd supra*; *Botha v Van Niekerk* 1983 (3) SA 313 (W) 524A; Davies *Gower and Davies The Principles of Modern Company Law* 9ed (2012) 218–219; and Cilliers and Luiz "The Corporate Veil – An Unnecessarily Confining Corset?" 1996 59 *THRHR* 527).

The readiness of our courts to pierce or lift the corporate veil has varied depending on the facts of the particular case. This is also true of the courts in England as well as in Australia. The point in our law has not been reached where it is possible to state with great certainty or accuracy the circumstances in which the court will pierce or lift the veil. In *Amlin (SA) Pty Ltd v Van Kooij* (2008 (2) SA 558 (C) par 15) Dlodlo J quoted from the Australian judgment of *Briggs v James Hardie & Co Pty Ltd* ((1989) 16 NSWLR 549 (NSWCA)) where the court stated that:

> "(T)here is no common, unifying principle, which underlies the occasional decision of the courts to pierce the corporate veil although an *ad hoc* explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities."

(See also Farrar "Fraud, Fairness and Piercing the Corporate Veil" 1990 16 *Canadian Business LJ* 478, cited by Ramsay and Noakes of the University of Melbourne in their paper "Piercing the Corporate Veil in Australia" 2001 19 *Company and Securities LJ* 250–271.) In *Hülse-Reütter v Godde* (*supra* par 20) the Supreme Court of Appeal (SCA) asserted that the separate legal personality of the company had to be recognized and upheld, except in the most unusual circumstances. The court further stated that the court had no general discretion to disregard the existence of a separate corporate existence simply whenever it considered it just a convenient to do so. The court acknowledged that the circumstances in which a court would pierce the veil were far from settled, and stated that much depended on a close analysis of the facts of each case, considerations of policy and judicial management. The court emphasized (par 20) that:

> "as a matter of principle … there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter".

(See also Domanski "Piercing the Corporate Veil – A New Direction?" 1986 103 *SALJ* 224; and Larkin "Regarding Judicial Disregarding of the Company's Separate Identity" 1989 1 *SA Merc LJ* 296.) In *Amlin (SA) Pty Ltd v Van Kooij* (*supra*) the court agreed with approach adopted in *Hülse-Reütter v Godde* (*supra*). The judge in *Amlin (SA) Pty Ltd v Van Kooij* stated (par 23) that:

> "I accept that 'opening the curtains' or piercing the veil is rather a drastic remedy. For that reason alone it must be resorted to rather sparingly and the deed as the very last resort in circumstances where justice will not otherwise be done between two litigants. It cannot, for example, be resorted to as an alternative remedy if another remedy on the same facts can successfully be employed in order to administer justice between the parties … The guiding principle is that the veil is lifted only in exceptional circumstances."

(See also *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) par 9; and *Al-Khafari & Sons v Pema NNO* 2010 (2) SA 360 (W) par 36.)

5 3 An English approach to piercing of the corporate veil

In *VTB Capital Plc v Nutritek International Corp* ([2013] UKSC 5) the court, in considering the powers of the court to lift the corporate veil, stated (par 123) that:

> "The notion that there is no principled basis upon which it can be said that one can pierce the veil of incorporation receives some support from, the fact that the precise nature, basis and meaning of the principle are all somewhat obscure, as are the precise nature of circumstances in which the principle can apply."

In *Faiza Ben Hashem v Shayif* ([2008] EWHC 2380 (Fam)) the English court (par 159–164) set out the following principles regarding when a court may pierce the corporate veil:

- Ownership and control of a company are not of themselves sufficient to justify piercing the veil.
- The court cannot pierce the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interests of justice.
- The corporate veil can only be pierced when there is some impropriety.
- The company's involvement in an impropriety will not by itself justify a piercing of its veil: [furthermore] the impropriety must be linked to use of the company structure to avoid or conceal liability.
- It follows ... that if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer and impropriety in the sense of a misuse of the company as a device or facade to conceal wrongdoing.
- A company can be a facade for such purposes even though not incorporated with deceptive intent, the relevant question being whether it is being used as a facade at the time of the relevant transaction(s).

- And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.

The principle set out in *Faiza Ben Hashem v Shayif* (*supra*) that that "the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done" has been subsequently held to be incorrect (see *Antonio Gramsci Shipping v Stepanovs* [2011] 1 Lloyds Rep. 647 par 18–21; and *VTB Capital Plc v Nutritek International supra* par 79–82).

The judge in the Australian judgment of *Gorton v Federal Commissioner of Taxation* ([1965] HCA 1; (1965) 113 CLR 604), stated that an unduly rigid approach to piercing the corporate veil led the law into "unreality" and "formalism". In *AGC (Investments) Ltd v Commissioner of Taxation* (Cth) ((1992) 92 ATC 4239; 23 ATR 287), Hill J stated that the "circumstances in which the corporate veil may be lifted are greatly circumscribed". This statement reflects the legal position in judgments relating to piercing of the corporate veil not only in Australia but in England and South Africa (see the cases of *Adams v Cape Industries pic* [1991] 1 All ER 929 (Ch D and CA); *Wambach v Maizecor Industries (Edrns) Bpk* 1993 (2) SA 669 (A) 675D–E; and *Macadamia Finance BK v De Wet NNO* 1993 (2) SA 745 (A) 748B–D).

5 4 Piercing the corporate veil under the Act

For the first time in our company law, a statutory provision has been enacted on the court to disregard the separate juristic personality of the company. We have never had a statutory provision in the Companies Act that gives the courts the authority to pierce the corporate veil. In terms of section 20(9) of the Act a court is empowered to pierce the corporate veil. Section 20(9) provides:

> "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
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> (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)."

Such a provision is not new to the Close Corporations Act. Section 65 of the Close Corporations Act enables the court in the appropriate circumstances to disregard the separate legal personality of a close corporation. Section 20(9) is closely similar to but not exactly the same as s 65 of the Close Corporations Act. A difference between the two sections is that section 65 of the Close Corporations Act deems a corporation not to be a juristic person in instances of a "gross abuse" of the juristic personality of the corporation as a separate entity, whereas section 20(9) of the Act deems a

company not to be a juristic person where there is an "unconscionable abuse" of the juristic personality of the company as a separate entity.

In *Hülse-Reütter v Godde* (*supra* par 20) the SCA held that in order for the court to pierce the corporate veil there had to be some abuse of the distinction between the corporate entity and those who controlled it which resulted an unfair advantage afforded to the latter. In terms of section 20(9) of the Act the test that the courts must apply when deciding whether to pierce the corporate veil must be whether there was an abuse of the juristic personality of the company as a separate entity, and whether the abuse constitutes "unconscionable abuse". The fact that the abuse must result in an unfair advantage being afforded to those who control the company is not a requirement under section 20(9) of the Act as contemplated by the court in *Hülse Reütter v Godde* (*supra*). The term "unconscionable abuse" is not defined in section 20(9) of the Act nor does the section provide any guidance as to what would constitute an "unconscionable abuse" of the separate juristic personality of the company. Section 65 of Close Corporation Act above states that a close corporation will not be a juristic person in instances where there has been a "gross abuse" of the separate juristic personality of the close corporation.

5 5 Interpretation of the term "unconscionable abuse"

It is useful to consider a few examples in case law where the courts have regarded the abuse of the juristic personality of a close corporation as a separate entity to be a gross abuse under section 65 of the Close Corporation Act.

In *Ebrahim v Airports Cold Storage (Pty) Ltd* (2008 (6) SA 585 (SCA)), Cameron JA adopted a more liberal approach than the approach adopted by the English courts. In *Ebrahim v Airports Cold Storage (Pty) Ltd* (*supra*) the court *a quo* held that the Ebrahims were personally liable under section 64(1) of the Close Corporation Act 69 of 1984 (Close Corporations Act) because the CC's business was conducted recklessly or for fraudulent purposes or with intent to defraud its creditors. The court also granted a declaratory order in terms of section 65 of the Close Corporation Act to the effect that the corporation was deemed not to be a juristic person, and held the defendants liable jointly and severally to the plaintiff for the amounts owing to the plaintiff by the corporation (*Ebrahim v Airports Cold Storage (Pty) Ltd supra* par 3).

In *Ebrahim v Airports Cold Storage (Pty) Ltd* (*supra*), Cameron JA compared the approach of our courts to those of England when dealing with a case in which section 64(1) Close Corporations Act above, was applicable. The judge stated (par 22) that:

> "In contrast with the United Kingdom, where it seems the equivalent provisions have in recent years 'been very rarely used' to fasten directors with personal liability, the jurisprudence of this Court evidences claimants' spirited reliance on the provision. Though courts will never 'lightly disregard' a corporation's separate identity, nor lightly find recklessness, such conclusions when merited can only help in keeping corporate governance true.''

Cameron JA dismissed the appeal and held that Ebrahims were personally liable for the debts of the Close Corporation under section 64(1) of the Close

Corporations Act (*Ebrahim v Airports Cold Storage (Pty) Ltd supra* par 26). The judge found it unnecessary to consider the application of section 65 of the Close Corporation Act to the facts of the case because it found that the appellants had acted recklessly in the running of the corporation's business.

The court *a quo* in *Airport Cold Storage (Pty) Ltd v Ebrahim* (2008 (2) SA 303 (C)) concluded that there had been a gross abuse of the juristic personality of the corporation in that case. The court arrived at this conclusion based on the fact that, the close corporation had formed part of a conglomerate of associated family businesses; the business was conducted with scant regard for the separate legal personalities of the entities concerned; the close corporation had not kept proper accounting records; the close corporation had conducted its business without an accounting officer and that the close corporation had a assumed debts owing by the family business including debts from the time of the commencement of business which amounted to reckless trading (*Airport Cold Storage (Pty) Ltd v Ebrahim supra* par 52).

In *Mncube v District Seven Property Investments CC* ([2006] JOL 17381 (D)) the court stated that in terms of section 65 of the Close Corporation Act, abuse of corporate personality would occur where the fact that a corporation was a person separate from its members was used for some "nefarious purpose" (14). The use of the term "nefarious purpose" was arguably just as vague and unclear as the "unconscionable abuse". At which point would the court consider the nefarious conduct to be unconscionable abuse was the question that the courts would have to consider when interpreting section 20(9) of the Act?

The court in *Haygro Catering BK v Van der Merwe* (1996 (4) SA 1063 (C)) held that the members of a close corporation together with the close corporation were jointly and severally liable for the debts of the close corporation where the name of the close corporation had not been displayed anywhere on the corporation's business premises, documents or correspondence. The court held that failure to display the name of the corporation constituted a gross abuse of the juristic personality of the corporation as a separate entity in terms of section 65 of the Close Corporations Act (1070A–B).

In *TJ Jonck BK h/a Bothaville Vleismark v Du Plessis NO* (1998 (1) SA 971 (O)) the court held that the member of the close corporation was personally liable for the debt of the debts of the corporation in terms of section 64 of the Close Corporations Act. The court held further that the plaintiff could also have succeeded in terms of section 65 of the Close Corporation Act because the member's action had constituted a gross abuse of the juristic personality of the close corporation (986E–G/H). In this case the member of the close corporation had made significant loans to the close corporation even though he was aware that the corporation was insolvent. He also made a written authorization for the registration of a notarial bond over the movable property of the corporation as security for his loans to the corporation. Sometime later he obtained an order which entitled him to take possession or dispose of all the movable assets of the corporation in terms of the notarial bond as he saw fit. The court held that the member had protected his own loan to the corporation in such a way that if the corporation encountered any difficulties

he would be able to take over the movable assets immediately and in doing so leave an empty shell for all the creditors (986E–G/H). The court concluded that this constituted a gross abuse of the separate juristic personality of the close corporation (986A–B and B/C–E; and see also *De Villiers v Axiz Namibia (Pty) Ltd* 2009 (1) NR 40 (HC)).

Section 20(9) of the Act deems a company not to be a juristic person when there was an "unconscionable abuse" of the juristic personality of the company as a separate entity. According to Binns – Ward J the term "gross abuse" as stated in the Close Corporations Act *supra* has a more extreme meaning than the term "unconscionable abuse". The judge was willing to accept that the term "unconscionable abuse of the juristic personality of the company" will encapsulate conduct that is associated with circumstances where the formation of companies are used as a "sham", "device", and "stratagem" (par 34).

There has been much debate as to whether the introduction of a statutory provision will override the common-law instances of piercing the corporate veil. It has been suggested that where the requirements of section 20(9) were not met and could not be relied on, the common-law remedy of piercing the veil would still apply, because section 20(9) did not override the common-law instances of piercing the veil (Cassim, Cassim, Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 2ed (2012) 58). In fact, the principles that had been developed by the common-law with respect to piercing the corporate veil might serve as useful guidelines in interpreting section 20(9) of the Act and deciding whether there had been an unconscionable abuse of the juristic personality of the company. According to this interpretation of section 20(9) of the Act, the court stated that it was unable to identify any discord between section 20(9) and the approach to piercing the corporate veil evinced in cases decided before it came into operation (par 32). In light of the fact that there were no set categories of instances when a court would pierce the corporate veil at common law (*Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd supra*) the court held that it was appropriate to regard section 20(9) as supplemental to the common law, rather than substitutive (par 34).

At common law, piercing the corporate veil is regarded as a drastic remedy that must be resorted to sparingly and as a last resort in circumstances where justice will not otherwise be done (see *Hülse-Reütter v Godde supra*; and *Amlin (SA) Pty Ltd v Van Kooij supra*). The question was whether section 20(9) would also be utilized as a remedy of last resort or whether an applicant could rely on section 20(9) despite other remedies being available. The language of section 20(9) is drafted in very wide terms, which may be indicative of an appreciation by the legislature that the section may be applied widely in varying factual circumstances (par 31). This may mean that section 20(9) may be relied upon despite other remedies also having been available. The courts will now have a wider discretion to pierce the corporate veil under section 20(9) of the Act compared to the discretion under the common law where the remedy of piercing the veil was used as a last resort (*Hülse-Reütter v Godde supra*).

In *Ex parte Gore NNO* (*supra*) the court stated that section 20(9) introduced a firm and flexible basis for piercing the veil, and that it would erode the foundation of the philosophy that piercing the corporate veil should be

approached with "a *priori* diffidence" (par 34). The court stated that the unqualified availability of the remedy in terms of section 20(9) militated against an approach that the remedy should be granted only in the absence of any alternative remedy. The court concluded that section 20(9) was available as a remedy simply when the facts of a case justified it, and not simply utilized as an exceptional or drastic remedy to be used only as a last resort (par 34; see also Cassim "Hiding Behind the Veil" 2013 *De Rebus* 37; and "Piercing the Corporate Veil: Section 20(9) of the Companies Act 2008", March 2008 http://reference.sabinet.co.za/webx/access/electronic_journals/taxpro/taxpro_2013_n2a4.pdf).

The advantage of having a statutory provision that relates to piercing the corporate veil is that it provides the courts with more certainty as to when to pierce the corporate veil, but the courts must always keep in mind that piercing the veil it is a remedy that must not be overutilized (Cassim *et al Contemporary Company Law* 58–59).

Binns-Ward J stated that section 20(9) of the Act broadened the grounds upon which a court might disregard the separate legal personality of an entity. The judge stated that in *Airport Cold Storage (Pty) Ltd v Ebrahim* (*supra*) as in that case the conduct of the business of the group of companies was conducted with scant regard for the separate legal personalities of the individual corporate entities and that would in itself constitute a gross abuse of the separate corporate personality of all the entities concerned (par 33). In this case the judge stated that he had found difficulty in basing his conclusion with regard to piercing the corporate veil of individual companies in the King group on English jurisprudence (see the principles in *Faiza Ben Hashem v Shayif supra*). This was so, because according to the judge, it was not apparent that the improprieties in dealing with investors' funds involved the use of the companies to conceal the true facts. Binns-Ward J stated that the improprieties in this case involved the King brothers who might be referred to as a controllers of the companies treating the group of companies in a manner that constituted no proper distinction between the separate personalities of the constituent members and also using the investors' funds in a manner inconsistent with what had been initially represented. This, according to the judge constituted an "unconscionable abuse" by the controllers of the juristic personalities of the relevant subsidiary companies as separate entities and therefore made section 20(9) applicable to this case (par 33; and see also the fourth and fifth of the six principles distilled in *Faiza Ben Hashem v Shayif supra*). The judge concluded that it was the conduct of the King brothers that constituted an unconscionable abuse of the juristic personalities of the relevant subsidiary companies as separate entities (par 33).

6 Concluding remarks

In light of the decisions by our courts it is clear that our courts will not pierce the corporate veil merely because it would be just and equitable. The courts may pierce the corporate veil and ignore the separate legal personality of a company when justice requires it and not only in circumstances where there is no alternative remedy. It is important for courts to give due consideration to the legal concept of "juristic personality" acknowledging the practical and dual considerations that are the basis of this well-established concept of "separate

juristic personality" and at the same time consider the possible moral and economic effects of an "unconscionable abuse" that may be perpetrated by the founders, shareholders and controllers of the company. Owing to the fact that section 65 Close Corporations Act and section 20(9) of the Act are so similar it will be left to the courts to interpret whether there is a difference between the interpretation of the terms "gross abuse" and "unconscionable abuse" and to what extent must the abuse go to before it may be considered to be "unconscionable". The judgment of *Ex parte Gore NNO* (*supra*) is important in the context of the interpretation of section 20(9) of the Act. The significance of the judgment is that, while section 20(9) is not out of harmony with the piercing of the veil judgments that have been previously handed down by the courts, it in fact broadens the basis on which a court may disregard the corporate personality and makes the remedy one that is generally available whenever there has been an illegitimate use of the juristic personality of a company, especially in cases where this illegitimate use affects the interests of a third party adversely. In light of this judgment the piecing of the corporate veil in terms of section 20(9) will no longer be as the courts previously held in terms of the common-law principles, and stated in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* (*supra*) as being an exceptional remedy, drastic remedy or a remedy of last resort. Section 20(9) must be seen in light of the judgment in *Ex parte Gore NO* (*supra*) as supplementing the common law rather than substituting it, and that piercing of the corporate veil is not available only in the absence of an alternative remedy. Perhaps the courts in their endeavour to interpret the meaning and extent of the words "unconscionable abuse" in section 20(9) of the Act will adopt a similar approach of the court in this case by using the interpretation of the term "gross abuse" in section 65 of the Close Corporations Act as a point of reference.

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