A CRITICAL ANALYSIS OF THE CRIMINAL LIABILITY OF A PARENT COMPANY FOR THE HUMAN RIGHTS VIOLATIONS OF ITS SUBSIDIARY.

By

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ABSTRACT

Whilst corporate activities have many advantages, the fact that there may be adverse violations of human rights associated with it cannot be ignored. The Constitution of South Africa of 1996 has enshrined human rights in the Bill of rights and every natural and juristic person must respect those rights. However a significant question arises concerning the responsibility parent companies have for their subsidiaries. Our Criminal Procedure Act 51 of 1977 which does not recognise parent and subsidiary relationships has contributed greatly to parent companies being able to be absolved from responsibility for the actions of their subsidiaries. The main aim of this dissertation is to come up with solutions to fill the gap of corporate criminal liability that has been created by our legislatures. Contributing to this gap has been the principles of limited liability and separate personality which have led to a situation where the parent companies have become difficult to hold accountable. However this dissertation will demonstrate that there are approaches that could be developed to circumvent the principles and hold the parent company criminally liable.

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INTRODUCTION

The UK case of *Chandler v Cape Plc* 2012 EWCA civ 525 is an example of why parent companies need to be held accountable for the human rights violations of their subsidiaries. Mr Chandler was an employee of Cape Building Products, a subsidiary of Cape Asbestos plc and having worked for 50 years he was diagnosed with asbestosis.[1] Mr Chandler worked under unsafe conditions as he was producing bricks at the same site of a factory that produced asbestos.[2] The complication in this matter was that by the time Mr Chandler was diagnosed the subsidiary no longer existed.[3] Even if it had existed, it did not have insurance for asbestosis as it dealt with the production of bricks.[4] Therefore, the question arose as to whether the parent company could be held liable as it was still in existence and had enough resources to compensate Mr Chandler. Looking at these facts, it is clear that if no provision is made for holding parent companies liable, third parties would suffer greatly.

I have begun by giving an example of how a corporation can violate human rights in an attempt to outline why it is often important that parent companies be held responsible for the acts of their subsidiaries. Section 8 (2) of the Constitution provides that "*A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."*[5] This means that it is no longer legally possible to create a company that concentrates on making profits at the expense of human rights.[6] In other words companies have to make sure that they are not violating human rights in the process of conducting their business where they have obligations to do so.

Of particular importance to this discussion is how parent companies can be held criminally liable for the human rights violations of their subsidiaries. Parent companies for many years have been able to escape liability hiding behind the principle of limited liability and separate personality. Limited liability protects not only the people who want to invest in a business but

[1] *Chandler v Cape plc* 2012 EWCA civ 525.
[2] *Chandler v Cape* (n 1).
[3] *Chandler v Cape* (n 1).
[4] *Chandler v Cape* (n 1).
[5] Section 8 (2) of the Constitution of the Republic of South Africa, 1996.
[6] Gwanyanya "The South African Companies Act and the realisation of corporate human rights responsibilities" 2015 *Potchefstroom Electronic Law Journal* 3101 3114.

it protects each corporation from the other in a parent subsidiary situation.[7] Section 19(2) of the Companies Act 71 of 2008 provides that "*a person is not solely by reason of being an incorporator, shareholder or a director of a company, liable for any of the liabilities or obligations of the company…"* From this definition it is clear that no person will be automatically held accountable for the liabilities of the company. Limited liability allows only the actual capital of the company to be used for compensation to victims and the assets of the shareholders can only be touched up to the extent of the value of their shares in the company.[8] This means that if a third party is to sue the company for any liabilities because of the principle of limited liability they do not have direct access to the assets of the shareholders except in exceptional cases. Even in situations where the controlling shareholder is another company it also benefits from limited liability.[9] Difficulties may thus arise in trying to hold the parent company liable where it is separate to its subsidiary.[10]

It may be possible to hold the parent company liable by showing that it was the parent company that was in actual control of the events that led to the violations of the rights of the third party.[11] However such cases are hard to prove as the parent can claim that its subsidiary is a separate legal entity which it has little control over.[12] This means that the third party must now show that this is not so but the difficulty is that they do not always have the direct evidence needed for a finding of such direct control.[13]

Furthermore, on top of the harsh realities and limitations provided by the principle of limited liability in trying to hold a parent company liable, the criminal law provisions in South Africa do not make it any easier. Section 332 of the Criminal Procedure Act 51 of 1977 provides for the criminal prosecution of companies. However as will be illustrated later on in this dissertation, the provision fails to accommodate a situation where one company controls another.[14]

Such difficulties in holding the parent company liable which are caused by the limitations of the limited liability principle and separate entity doctrine have led to the development of the

[7] Blumberg "Limited Liability and Corporate groups" 1985-86 *Journal of Corporate law* 573 575.
[8] Muchlinski "Limited liability and multinational enterprises: A case for reform? 2010 *Cambridge Journal of Economics* 915 918.
[9] See (n 8).
[10] See (n 8).
[11] Muchlinski (n 8) 919.
[12] Muchlinski (n 8) 919.
[13] Muchlinski (n 8) 919.
[14] Muchlinski (n 8) 918.

enterprise analysis.[15] This analysis looks at the underlying economic reality of the two companies.[16] It goes beyond the separate entity doctrine and looks at the relationship of control and coordination of economic activities between a parent and its subsidiary.[17]

The purpose of this dissertation is to find approaches that can be used as exceptions to the principle of limited liability in holding parent companies liable. Of great importance is to establish principles that could disregard the separate entity of companies to hold the parent company liable. One such approach is the piercing of the corporate veil where the courts will look beyond the corporate form to establish who is in actual control. Other principles that do not disregard the corporate form but are still capable of holding the parent company liable will also be examined. These include the principle of vicarious liability where the employer is held accountable for the acts of the employee, the principle of duty of care, principle of agency and common purpose.

It shall be argued that exceptions to the principle of limited liability must be found so as to hold the parent company liable in cases where it is fair to do so. This does not detract from the fact that the commercial benefits of limited liability should not be undermined; indeed, it is clear that it encourages investment.[18] I shall conclude by arguing that the principle of piercing the corporate veil is the best approach that could be adopted by the courts in holding parent companies liable. Furthermore, our courts need to interpret section 332 of the Criminal Procedure Act 51 of 1977 to also include a situation where one company owns another. I shall also conclude by proposing a presumption of control on all parent companies so that the burden of proof can be shifted from the third parties to the parent companies.[19]

This dissertation shall be divided into four chapters. Chapter one shall begin by establishing the relationship between a parent company and a subsidiary in terms of section 3 of the Companies Act 71 of 2008. Under this chapter I will examine issues concerning how we define a subsidiary and why companies form subsidiaries. I will further examine the element of control to see what level of control is required for a parent company to be held accountable for the acts of its subsidiary. Furthermore I will examine the criminal liability of companies in terms of section 332 of the Criminal Procedure Act 51 of 1977. Under this section I will examine why it is important to hold a parent company criminally liable. I will examine

[15] Muchlinski (n 8) 919.
[16] Muchlinski (n 8) 919.
[17] Muchlinski (n 8) 919.
[18] Muchlinski (n 8) 925.
[19] Muchlinski (n 8) 923.

further under what circumstances the parent company could be held criminally liable under the current statutory provision.

Chapter two will explore the exception to the limited liability doctrine. Under this chapter I will look at the approach that could be used to disregard the corporate form of a separate entity and to hold the parent company liable. The approach that I will look at in this chapter is that of piercing the corporate veil. This approach will be examined in terms of s 20 (9) of the Companies Act 71 of 2008. I will analyse this statutory provision to establish whether it accommodates a company owned by another and also whether it can be used for criminal liability. Under this section I will also look at other jurisdictions to see how they have handled this approach with regards to holding parent companies liable.

Chapter three will examine approaches that do not disregard the separate entity principle but can still be used to hold the parent company liable. The principle of vicarious liability will be examined so as to establish a link between the two companies so that the one can be held liable for the acts of the other. The principle of duty of care will also be examined to see if our law imposes a duty of care on the parent company. Furthermore I will examine how this approach has been dealt with in other jurisdictions. I will also look at the principle of agency to see whether in a situation where there was a consensual agreement, it is possible to hold the parent company liable. I will further examine the principle of common purpose to see if the parent company could be held accountable under this principle. From this chapter, the reader will be able to see that regardless of which principle the court uses, the underlying question remains the same concerning issues of control.

Chapter 4 will be the conclusion. It shall be a critical analysis of which approach should be adopted in South Africa. I will engage with the principles discussed in chapter two and three to see how they fit and can be developed in terms of our law. Chapter four will answer the question of how the parent company should be held criminally accountable for the human rights violating acts of its subsidiary. I will propose that our courts need to fully develop the principle of piercing the corporate veil so that it includes situations involving parent company liability. Furthermore, the principle of vicarious liability needs to be developed so that it includes the parent and subsidiary relationship.

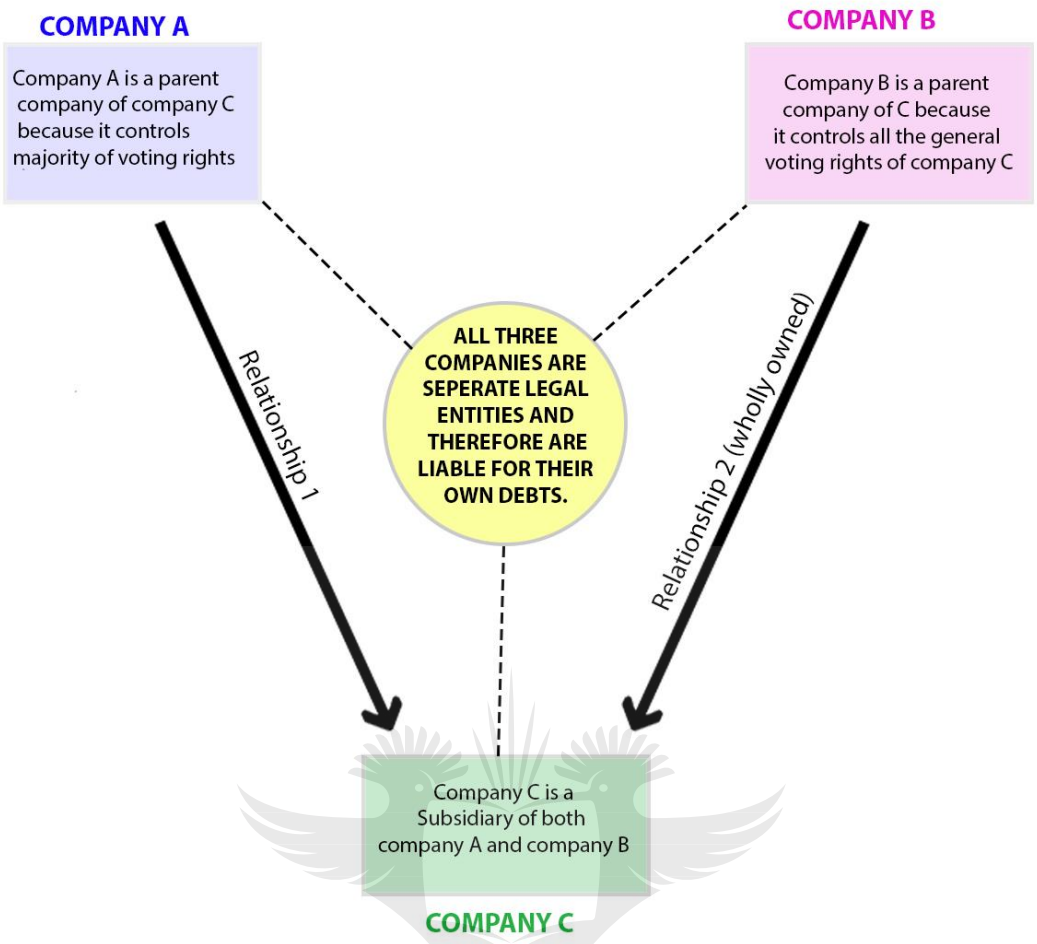
CHAPTER 1

RELATIONSHIP BETWEEN PARENT COMPANY AND SUBSIDIARY

1. Introduction

The purpose of this chapter is to give an overview of the relationship between a parent company and a subsidiary in terms of the South African Companies Act 71 of 2008. Further, this chapter will examine the level of control that courts consider to be enough to hold a parent company liable for the acts of the subsidiary company. The chapter will also consider the importance of criminal liability of parent companies. Section 332 will be thoroughly examined to see how best it can be developed to accommodate the liability of parent companies. At the end of this chapter the reader will have a greater understanding of the dynamics surrounding the parent and subsidiary relationship. Furthermore, it will be demonstrated that the presence of control alone is not enough to hold the parent company liable.

Diagram 1: illustration of the parent and subsidiary relationship.



2. *What is a subsidiary*

Section 3 (1) (a)[20] provides that a company is a subsidiary of another juristic person if that juristic persons

(i) *"is or are directly or indirectly able to exercise or control the exercise of a majority of the general voting rights….*

(ii) *Has or have the right to appoint or elect or control the appointment or election of directors of that company who control a majority of the votes at a meeting of the board"*

Section 3(1) (b)[21] provides that a company is a wholly owned subsidiary of another juristic person *"if all of the general voting rights associated with issued securities of the company*

[20] Companies Act 71 of 2008.
[21] Companies Act 71 of 2008.

are held or controlled, alone or in any combination by persons contemplated in paragraph (a).''

From the definition of subsidiaries above it is clear that if another company is able to control the voting rights of another company a parent and subsidiary relationship will have been created. It is also clear that shareholding is not at all a criterion to determine whether one company is parent of the other.[22] All that is needed is whether the parent company has the means to control the voting outcome at a general meeting of shareholders or at a meeting of the board.[23] Such voting control can be achieved from a shareholders agreement without involving the actual transfer of shares to the party who gains the voting power.[24] In terms of the definition of subsidiary, it is also possible for a person who does not hold any shares in the company to contract with a holder of securities that the latter will only vote according to the former's wishes.[25] In the above situation, if enough voting rights are controlled in this manner the company who exercises the control will be a parent company without holding any shares in the company.[26] Thus in terms of section 3(1) (a) of the Companies Act 71 of 2008 for there to be a parent and subsidiary relationship, the number one element that needs to be present is the exercise of control. This means the parent company does not necessarily need to be a shareholder in the subsidiary company.

However section 3(1)(b) of the Companies Act[27] provides for a second scenario that leads to the formation of a parent and subsidiary relationship. The section provides for a wholly owned subsidiary if all the voting rights are held or controlled by another juristic person. The distinction between s 3(1)(a) and 3 (1)(b) is that in the first scenario the parent company only needs to own majority of the voting rights and in the latter the parent company will own all of the voting rights. If the parent company is able to control the general voting rights of a company, this means that all the major decisions will not be conducted by the company without the parent company's approval. However it has been argued that in such a scenario it might be difficult to distinguish the acts of the parent from those of the subsidiary since the parent company has control of all voting rights.[28] However the fact that the shareholders or

[22] Locke "Governance of corporate groups" in Havenga et al *Corporate Governance Review* 2012 125 130.
[23] Locke (n 22) 130.
[24] See (n 22).
[25] See (n 22).
[26] See (n 22).
[27] 71 of 2008.
[28] Pike " Responsibility of the parent corporation for the acts of its subsidiary" 1938 *Ohio State University Law Journal* 311 314.

employees of the two corporations are the same does not operate to destroy the legal distinctiveness of either corporation.[29] Furthermore the fact that one corporation has a major control over the other does not bring the merger of the corporations into one.[30] It is clear that for there to be a parent and subsidiary relationship there needs to be an exercise of control by one corporation over the other. This goes on to show that for the parent company to be held accountable for the acts of the subsidiary a third party cannot just rely on the presence of control alone as it is the central element that makes up the said relationship.

3. Why form a subsidiary?

The underlying reason for the creation of subsidiaries is the diversification of risk.[31] Diversification of risk is used in the sense that if one company becomes insolvent and is liquidated, that company's failure will not affect the continued existence of the other.[32] Furthermore, this will reduce the exposure of the parent company's assets to third parties.[33] Thus the separate legal personalities of the two companies coupled with the principle of limited liability will protect the shareholders from direct liability.[34] Another reason why subsidiaries are formed is to enable the parent company effectively to conduct a particular type of business in another state when it might not be able to do so directly.[35] This enables the company to venture into a new business whilst not risking its brand identity or its goodwill.[36] Another reason why a subsidiary can be formed is because of the need to acquire outside investment.[37] This can be done by acquiring shares in the subsidiary thereby allowing the company to raise capital without losing its right to control the company.[38] Finally the creation of subsidiaries "allows for greater flexibility with respect to debt financing."[39]

[29] *Nel and others v Metequity Ltd and another* 2007 2 ALL SA 602 (SCA) par 11.
[30] See (n 29).
[31] Locke (n 22) 126.
[32] Locke (n 22) 126.
[33] Ramsay "Holding company liability for the debts of an insolvent subsidiary: A law and economic perspective" 1994 *University of South Wales Law Journal* 520 533.
[34] Locke (n 22) 126.
[35] Burgess "Liability of parent corporation for tort of subsidiary" 1963 *Cleveland Marshall Law Review* 176 183.
[36] Locke (n 22) 126.
[37] Ramsay (n 33) 534.
[38] Ramsay (n 33) 534.
[39] Ramsay (n 33) 534.

4. Control as a requirement for liability of parent companies

Section 2 (2) (a) of the Companies Act[40] provides that:

"a person controls a juristic person or its business if

a) in the case of a juristic person that is a company

i) that juristic person is a subsidiary of that first person as determined in section 3(1)(a) or

ii) that first person together with any related person or inter-related person is

aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with the securities of that company…or

bb) has the right to appoint or elect or control the appointment or election of directors of that company who control a majority of the votes at a meeting of the board."

From the section above, it is evident that a parent company needs to exercise some form of control over the other company to be called its subsidiary. Thus in order for the limited liability and separate entity principles to be disregarded, there has to be more than just mere control of the subsidiary company.[41] In order to do so, a sufficient amount of control has been held to include undue domination or influence over the subsidiary for the benefit of the parent company.[42] Undue domination or influence has been held to mean intrusive, hands on, day-to- day control with the parent leaving no discretion to the subsidiary.[43] Thus the subsidiary only exists as a separate entity on paper but in reality the parent is the one that makes all the decisions. The level of control required has been held also to include a situation where the parent company has dispositive and proprietary power over or in the property of the subsidiary which results in the domination of the subservient corporation.[44] This means that where the parent company has the final say on which property the subsidiary can acquire or

[40] 71 of 2008.
[41] Ballantine "Separate entity of parent and subsidiary corporations" 1925 *California Law Review* 12 17.
[42] Burgess (n 35)182.
[43] Rands "Domination of a subsidiary by a parent" 1998-1999 Indiana Law Review 421 437.
[44] Burgess (n 35) 182.

dispose of, the parent company will have excessive control. It has also been held that excessive control is a prerequisite to provide the basis to employ doctrines to hold parent companies liable.[45] However it has been held that "a parent company does not excessively control the subsidiary by determining its general policies, exercising supervision or controlling its finances or expenses."[46]

Furthermore, the separate legal personality will be disregarded where the affairs of the subsidiary are controlled in such a way as to make it merely an instrumentality of the parent company.[47] According to Burgess three elements must be proved for a subsidiary to be regarded as an instrumentality of the parent company.[48] These elements include "control of the subsidiary by the parent, that control is used by the parent to commit fraud or worse to perpetrate violation of statutory or other positive legal duties or a dishonest and unjust act in contravention of legal rights and that the control and breach of duty proximately cause injury or the unjust loss complained of."[49]

Some of the controlling circumstances for the liability of a parent company have been linked to the ownership of all stock of the subsidiary together with the control by the same person of the shares on both the parent and subsidiary company.[50] Excess control is also measured by the sufficiency or insufficiency of capitalisation of the subsidiary in comparison to that of similar competitive subsidiaries in the same line of business.[51] This refers to a situation where the subsidiary does not have enough capital to function on its own and relies on the parent company for all its financing. Moreover, in determining the level of control exercised by the parent company, consideration is also given to the degree that the subsidiary is supported financially by the parent company.[52]

Thus, as discussed above, for the principle of limited liability to be disregarded so as to hold the parent company liable, a third party cannot just rely on the presence of control. There is a need to establish a certain level of control which has been termed as 'domination' by the

[45] Rands (n 43) 436.
[46] See (n 45). See also the case of *Kingston Dry Dock Co v Lake Champlain transportation co* 31 F (2d)265,267, (C.C.A.2d, 31 1929) where the court held that "control through ownership of shares does not fuse the corporations even when the directors are common to each other."
[47] Anderson "Limitations of the corporate A treatise of the law relating to the overriding of corporate fiction" 1931 332 333.
[48] Burgess (n 35) 179.
[49] Burgess (n 35) 179.
[50] Anderson (n 47) 334.
[51] Anderson(n 47) 334.
[52] Anderson (n 47) 334.

parent company such that the subsidiary is only a separate entity on paper. The determination of the level of control present is important because it helps the courts in establishing the nature of the relationship that lies between the parent and the subsidiary.

5. Criminal liability

At the current moment the legislation that is relied upon in South Africa to hold corporations criminally liable is section 332 of the Criminal Procedure Act 51 of 1977. Section 332 (1) (a) and (b) provides that:

"(1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law-

(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and

(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body."

Section 332 above deals generally with the criminal liability of corporations for crimes they have committed and the provision allows for the prosecution of the corporation for the unlawful acts of its directors or servants.[53] In terms of section 332 a corporation can be held criminally liable for any crime and this includes where the violation of human rights constitutes a crime (such as murder, assault). Section 332 (1) makes it possible for a corporation to be held liable for crimes that require intention and negligence.[54] The section makes it also clear that the corporation will be held accountable for the acts or omissions of its directors or servants either with express permission or implied permission.[55] The section

[53] Farisani " Corporate homicide: what can South Africa learn from recent developments in English Law?" 2009 CILSA 210 211.
[54] Farisani (n 53) 215.
[55] Farisani (n 53) 217.

also states that the corporation will be held liable for the acts of its directors in the performance of his duties.[56] Furthermore, even if the officers have acted beyond the scope of their duty, the corporation will still be held liable if it is proven that the act was committed in the process of trying to further the interests of the corporation.[57] Thus failure to prove the elements above beyond a reasonable doubt will result in the corporation escaping liability.[58]

Criminal liability in terms of section 332 is transferred to the corporations via a principle of imputed liability. The imputation of liability justifies the holding of a corporation liable for crimes committed by its employees and members.[59] Thus, in a normal situation where we are only faced with one corporation and its employees, it will be easy to hold the corporation liable. The difficulty arises when we have a situation involving a parent company and a subsidiary. Our Criminal Procedure Act currently does not cater for the imputation of liability from one company to the other. The clear wording of the section shows that liability can only be imputed from directors and servants to the company. Thus, there is need for the legislature to consider whether to develop this section so that it also recognises situations where one company has significant control over the other.

6. Conclusion

It has been shown in this chapter that for there to be the existence of a parent and subsidiary relationship the parent company has to exercise control over the subsidiary. However it has also been shown that this control if it ends up being what has been termed 'domination', it will give room for the courts to disregard the limited liability principle and the separate legal entity principle. Furthermore, it has been shown that despite there being a parent and subsidiary relationship a parent company is not automatically liable for the acts of its subsidiary. It is thus important to consider an approach that could be used so as to be able to hold the parent company liable.

[56] Farisani (n 53) 217.
[57] Farisani (n 53) 217.
[58] *S v African Bank of SA Ltd and others* 1990 (2) SACR 585 (W).
[59] Farisani (n 53) 212.

CHAPTER 2

APPROACH THAT DISREGARD SEPARATE PERSONALITY OF A COMPANY

7. Introduction

The doctrine of separate legal personality was first expressed in the case of *Salomon v Salomon* in which the court held that every company is a separate legal person that cannot be identified with its members.[60] This doctrine helps to preserve the limited liability doctrine in that the acts of the company cannot be automatically attributed to the shareholders of the company or the directors of the company. However, some situations involving the abuse of the separate entity doctrine have led courts to come up with approaches that disregard the separate entity of the company so as to hold the true actors liable. One such approach is the principle of piercing the corporate veil. Lifting the corporate veil was defined in the case of *Cape Pacific v Lubner*[61]where the court held that it meant disregarding the division between a company and the natural person behind it and attributing to that person where he has misused or abused the corporate form.[62] The court went on to say that "in piercing the corporate veil the focus shifts from the company to the person controlling it and in that way personal liability is attributed to that person who misused the principle of corporate personality."[63] Therefore, the purpose of this chapter is to analyse the principle of piercing the corporate veil in terms of s 20(9) of the Companies Act.[64] Piercing the corporate veil will be analysed so as to see how best it can be used by courts in holding parent companies liable for the acts of their subsidiaries. I will also examine how other jurisdictions like the United Kingdom and Canada have used this principle in an attempt to hold the parent company liable. However, the main focus shall be to come up with a way in which piercing the corporate veil could be used for criminal liability in South Africa considering that it has been used for civil liability in general.

[60] *Salomon v Salomon and Co Ltd* 1897 AC 22.
[61] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A).
[62] *Cape Pacific v Lubner* (n 61).
[63] *Cape Pacific v Lubner* (n 61).
[64] 71 of 2008.

8. Historical background

Before the enactment of section 20(9) of the Companies Act[65], South African courts had different opinions regarding circumstances in which courts could pierce the corporate veil. However as shall be demonstrated the courts shared similar views in that fraud, dishonesty and improper conduct had to be present for a court to consider piercing the corporate veil. In the case of *Cape Pacific v Lubner,* the court was of the view that a company's separate personality should not be lightly disregarded except in situations where fraud, dishonesty or improper conduct is found.[66] The court held that the need to preserve separate corporate identity should be balanced against policy considerations.[67] The fact that the company should have been founded in deceit and never been intended to function genuinely is not necessary for deciding to pierce the veil.[68] The court was of the view that if a company that was legitimately established is abused, there is no reason why the veil cannot be pierced for that particular transaction.[69]

In the case of *Hulse reutter v Godde*[70], the court held that separate personality is to be disregarded in the most unusual circumstances.[71] It was also held that a court has no general discretion to disregard the separate identity whenever it considers it just or convenient.[72] The circumstances will depend on a close analysis of the facts of each case, consideration of policy and judicial judgement.[73] In the case of *Amlin v Rijk* the court was of the view that veil piercing is a drastic remedy.[74] The court held that it must be resorted to sparingly and as the very last resort in circumstances where justice will not prevail.[75] The court was of the view that piercing the corporate veil could not be used as an alternative remedy if another remedy existed.[76] Furthermore, the court held that the veil could be pierced in situation where there is a mere façade meaning where the company exists only to conceal the true state of affairs.[77] In

[65] 71 of 2008.
[66] *Cape Pacific v Lubner* (n 61).
[67] See (n 61).
[68] See (n 61).
[69] See (n 61).
[70] *Hulse-Reutter v Godde* 2001 4 SA 1336 (SCA).
[71] *Hulse v Godde* (n 70).
[72] *Hulse v Godde* (n 70).
[73] *Hulse v Godde* (n 70).
[74] *Amlin (SA) Pty Ltd v Rijk van Kooij* 2008 2 SA 558 (C).
[75] *Amlin v Rijk* (n 74).
[76] *Amlin v Rijk* (n 74).
[77] *Amlin v Rijk* (n 74).

the case of *Airport cold storage v Ebrahim* the court also expressed the same views that veil piercing would only occur where special circumstances existed.[78]

From the discussion above it is clear that courts were hesitant to pierce the corporate veil except if exceptional cases were present. To some extent, one can say the courts tried by all means to preserve the separate personality of the company. However one common element that could be noted from all these cases is that where there was evidence of abuse or fraud, this provided a key circumstance in which the company form was being abused. Thus, in summation, despite the different views by the courts, it is clear that the exercise of extreme control which led to abuse of the corporate personality could result in the veil being pierced.

9. Piercing the corporate veil in terms of the 2008 Companies Act

Section 20 (9) (a) of the Companies Act 71 of 2008 provides the statutory provision of piercing the corporate veil. It states that:

s 20 (9) "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;"

Section 20 (9) (a) was first interpreted in the case of *Ex parte Gore*.[79]The applicants of that case were liquidators of 41 companies that all belonged to the same group.[80] They were seeking permission for some of the assets of those companies to be dealt with as if they were the property of the holding company.[81] They were seeking the relief of disregarding the separate personalities of the companies in a group of companies.[82] They alleged that the business of the group was conducted through the holding company with little or no regard to

[78] *Airport Cold Storage (Pty) Ltd v Ebrahim and others* 2008 2 SA 303 (C).
[79] *Ex parte Gore No and Others* (2013) 2 ALL SA 437 (WCC).
[80] *Ex parte Gore* (n 79) par 2.
[81] See (n 80).
[82] See (n 80).

the distinction for the legal personalities of the companies.[83] The court in interpreting s 20(9) held that it provides a firm and very flexibly defined basis for the remedy.[84] The court also held that by expressly establishing its availability when the facts of the case justify it, the provision moves away from the notion that the remedy can only be used in exceptional cases.[85] The court defined the words 'unconscionable abuse' to mean conduct in relation to the formation or use of the company which constitutes a "sham, device and stratagem."[86] Essentially the court interpreted s 20(9) to mean that the provision brings about a remedy that can be available whenever the illegitimate use of the juristic person adversely affects a third person.[87]

In another recently decided case of *Van Zyl v Kaye,* appellants also tried to rely on section 20 (9) so as to disregard the separate entity of a trust.[88] In the *Van Zyl* case, the court held that the fact that a director or shareholder has full and effective control over a company affords no basis by itself to disregard the separate personality of the company.[89] The court went further and held that the person relying on s 20 (9) has to prove the unconscionable abuse of the corporate entity.[90] In the present case, the court refused to pierce the corporate veil because the appellants had not provided enough proof of the abuse of the corporate entity. This judgement just goes on to show that even though piercing the veil is now provided for in statute, the courts still respect the principle of separate personality especially in situations where there is not enough evidence to determine unconscionable abuse.

In summation, in terms of South African law courts will pierce the corporate veil if there is enough evidence to show that there is unconscionable abuse of the juristic personality. Through the cases that have been decided so far, it is clear that the courts can pierce the corporate veil in situations that involve a parent and subsidiary relationships. However, it is important also to note that so far the cases that are available have only found parent companies civilly liable. Thus, the principle of piercing the corporate veil needs to be developed so that it can be used to hold parent companies criminally liable as well.

[83] See (n 84).
[84] *Ex parte Gore* (n 79) par 34.
[85] See (n 84).
[86] See (n 84).
[87] See (n 84).
[88] *Van Zyl N. O. and another v Kaye NO and others* (1110/14) 2014 ZAWCHC 52; 2014 (4) SA 452 (WCC).
[89] *Van Zyl v Kaye* (n 88) par 33.
[90] *Van Zyl v Kaye* (n 88) par 33.

10. How other jurisdictions have handled veil piercing

The reason for looking at other jurisdictions is so that we see how other courts have handled the principle of piercing the veil in situations involving a parent company and its subsidiary. In the United Kingdom, the case of *Faiza Ben Hashem v Shayif,* is one good example that illustrates when English courts will be willing to pierce the corporate veil.[91] The court set out the following principles as guideline for piercing the veil:

> *"Firstly ownership and control of a company are not sufficient to justify piercing the veil. Secondly the court cannot pierce the veil even where there is no unconnected third party involved merely because it is thought to be necessary in the interests of justice. Thirdly the veil can be pierced only if there is some impropriety. Fourthly the court cannot pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability. Fifthly, 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 façade to conceal wrongdoing. Finally a company can be a façade for such purposes even though not incorporated with deceptive intent. The relevant question being whether it is being used as a façade at the time of the relevant transaction."*[92]

The court in *Faiza Ben Hashem v Shayif* even went further and held that the fact that the court pierces the veil for one purpose does not mean that it will be pierced for all purposes.[93] This case just goes on to show that veil piercing in the English courts is a bit stricter than in South Africa because not only does one need to prove the abuse of the corporate entity but there also needs to be a close link between the violation and the accused.

The court of appeal of the United Kingdom refused to pierce the corporate veil in the case of *Adams v Cape Industries* even though the evidence showed that the subsidiary had been created to disguise the role of the parent company.[94] Although the court held that what should be of critical importance should be the reality of the relationship between parent and subsidiary and not the technical legal form it takes, the court still refused to look at the

[91] *Faiza Ben Hashem v Shayif and another* 2008 EWHC 2380.
[92] *Faiza v Shayif* (n 91) par 159-164.
[93] See (n 91).
[94] *Adams and others v Cape Industries plc and another* 1991 1 ALL ER 929.

relationship in the present case.[95] The court did not dispute the evidence but maintained that each company in a group is a separate and independent entity.[96] This is another example that shows that although English courts acknowledge the existence of piercing the corporate veil they are not willing easily to disregard the separate entity principle.

In the United States of America, the courts will only pierce the corporate veil if there is fraud, absence of formalities, inadequate capitalisation of assets and control.[97]Absence of formalities refers to a situation where the business transactions and records of the two companies are not kept separately.[98] Inadequate capitalisation refers to a situation where the subsidiary does not have a separate financial unit enough to meet normal strains such that it is fully financed by the parent company.[99] In the United States courts have also even considered the presence of misrepresentation on the part of the subsidiary as a ground for piercing the corporate veil.[100] Misrepresentation in this sense refers to a situation where the subsidiary has falsely acted as an agent of the parent company to the detriment of a third party.[101]

In Australia, the courts will only pierce the veil if the corporate form has been used for fraud to shield the parent company from an existing legal obligation.[102] Thus the courts rely on the sham or façade basis. With regards to corporate groups the court will pierce the corporate veil where the level of control is so complete that the parent company is regarded to be directly liable for activities of the subsidiary.[103]

11. Conclusion

The discussion in this chapter has shown that it is possible for a parent company to be held accountable for the acts of its subsidiary if the corporate veil is pierced. This chapter has also shown us that even before section 20(9) of the Companies Act was enforced, courts only pierced the corporate veil if there was abuse of the separate personality. Furthermore, from the discussion above it is evident that although the courts will pierce the corporate veil they

[95] See (n 98).
[96] Gobert and Punch *Rethinking corporate crime* 2003 153.
[97] Ramsay "Holding company liability for debts of an insolvent subsidiary: A law and economics perspective" 1994 *University of South Wales Law Journal* 520 528.
[98] Burgess " Liability of parent corporation for tort of subsidiary" 1963 *Cleveland Marshall Law review* 176 177.
[99] See (n 98).
[100] Anderson "Piercing the veil on corporate groups in Australia: The case reform" 2009 *Melborne University Review* 333 part iv.
[101] See (n 100).
[102] See (n 100).
[103] See (n 100).

are not immediately willing to disregard the separate personality of the company. Thus it is important that other approaches that do not disregard the separate entity of the company be explored so that the parent company can still be held accountable in a situation where the court does not accept that it should pierce the veil.

CHAPTER 3

APPROACHES THAT DO NOT DISREGARD THE SEPARATE PERSONALITY OF A COMPANY

12. Introduction

As we have seen in the previous chapters the principle of separate legal personality and limited liability has been at the core of why it is difficult for parent companies to be held liable for the acts of its subsidiaries. Much of the reasons have been centred on the fact that courts are not willing to disregard the corporate form. Hence it is important for other approaches to be explored so that in the event that the courts do not pierce the corporate veil they can still rely on those approaches. A few of those approaches that will be examined in this chapter include the principle of vicarious liability, the principle of duty of care, the principle of agency and the common purpose principle. Most of these approaches have not yet been applied in situations that involve a parent and subsidiary relationship in South Africa. Therefore the purpose of this chapter is to unlock each principle to see how best it can be developed so that it can be possible to hold a parent company liable through it.

13. Vicarious liability

The principle of vicarious liability provides that an employer is liable for the acts committed by his employee in the course and scope of the latter's employment.[104] The employer does not need to be at fault but the delict of the employee is transferred to the employer.[105] In South Africa, the common law principle of vicarious liability has been used by courts in cases involving delictual claims and has not been applied in criminal cases. What this means is that the principle has been used to try and get damages from the employer and not to actually hold the employer criminally liable. Although section 332(1) of the Criminal Procedure Act 51 of 1977 provides for some form of imputed liability which is akin to vicarious liability, this provision still does not clearly apply to a situation involving parent and subsidiary

[104] *Stein v Rising tide productions CC* 2002 2 ALL SA 22 (C).
[105] See (n 104).

relationships. Section 332(1) has been criticised for imposing a form of vicarious liability without providing an opportunity of raising a defence.[106] In terms of that provision a company may be held vicariously liable for a crime even though it had reasonable precautions in place to prevent a crime from happening.[107]

Vicarious liability as a principle has been criticised for being over inclusive and under inclusive.[108] It is over inclusive since despite the absence of fault, a company can be held liable for an offence committed by another person.[109] "It is under inclusive since a company cannot be held liable for an offence if the individual's actions did not fulfil the requisite elements of a particular offence despite the degree of corporate fault."[110] However in the South African case of *K v Minister of Safety ('K')* the Constitutional court developed the principle of vicarious liability to try and eliminate the problems stated above.[111] The applicant had sought damages in delict from the respondent, the Minister of safety, on the basis that she had been raped by three uniformed and on duty police officers. In developing the principle of vicarious liability, the court held that in considering vicarious liability section 8(1) and s 39(2) of the Constitution must be considered.[112]

In the *K* case, the court said the difficulty with vicarious liability arises when the delict has been committed intentionally and there has been a deviation from the normal scope of business.[113] The court held that an intentional deviation does not automatically mean that an employer will not be liable.[114] The court stated that there is a two part question that needs to be asked. Firstly, were the wrongful acts done solely for the purposes of the employee?[115] This question is a factual one and requires a consideration of the employee's state of mind.[116] Secondly even if the acts were done solely for the purpose of the employee is there a close link between the employee's acts and the business of the employer?[117] This question raises a

[106] Borg –Jorgensen and Van der Linde "Corporate criminal liability in South Africa-time for a change?" 2011 *TSAR* 684 699 (part 2).
[107] Borg –Jorgensen and Van der Linde "Corporate criminal liability in South Africa-time for a change?" 2011 *TSAR 452 458* (part 1).
[108] Borg- Jorgensen (n 107) 688.
[109] See (n 108).
[110] See (n 108).
[111] *K v Minister of safety and security 2005*(9) BCLR 835 (CC).
[112] *K v Minister* (n 111) par 19.
[113] *K v Minister* (n 111) par 25.
[114] *K v Minister* (n 111) par26.
[115] *K v Minister* (n 111) par 32.
[116] See (n 115).
[117] See (n 115).

question of law in relation to what is sufficiently close to give rise to vicarious liability.[118] The court held that it is in answering this question that courts should give effect to the spirit, purport and objects of the Bill of rights.[119] The court also held that it is not sufficient for the employer to rely on the defence that the employee breached the terms of his employment contract.[120] However it remains a factor to be considered in determining whether the connection between the wrong and the employment is sufficiently close.[121] From the case above we learn that vicarious liability cannot be imputed in every situation and there has to be a close link between the employer and the act of the employee.

In another South Africa case of *F v Minister of safety* the court also touched on the link that needs to be present for vicarious liability to be imputed to the employer and held that the link must be real and sufficiently close.[122] This case raised the question whether the Minster should be held vicariously liable for the rape of a young girl by a policeman who was on standby duty. The court held that "employees are extensions of their employers because they are the hands through which employers do their work."[123] If the employees prove to be inefficient the employers could be held liable for creating a risk of harm to others.[124] The potential risk imposes an obligation on the employers to ensure that the employees would not do the opposite of what they are instructed to do.[125] However if the employees act inconsistently with the employer's core business, some link between the conduct and the business must be established before the employer can be held vicariously liable.[126]

From what has been discussed above, it is clear that the principle of vicarious liability does not require the separate personality of the company to be disregarded so that the employer could be held accountable. All that is required is that a close link be established between the act and the business of the employer for the employer to be liable. The principle of vicarious liability seems to be a principle that could easily be developed to also include parent and subsidiary relationships where the parent could be held vicariously liable for the acts of the subsidiary. This could be done as it was done in the K and F cases where the common law was developed. Hence even though vicarious liability looks mainly to employment

[118] See (n 115).
[119] See (n 115).
[120] K v Minister (n 111) par 55.
[121] See (n 120).
[122] *F v Minister of safety and security and another* 2012 (3) BCLR 244 (CC) par 48.
[123] F v Minister (n 122) par 45.
[124] See (n 123).
[125] See (n 123).
[126] See (n 123).

relationships, the common law could be developed so that it can be used in other relationships such as parent and subsidiary relationships.

14. Duty of care

In an attempt to preserve the separate personality of companies courts have resorted to using the principle of duty of care to impose liability on the employer or the company. However, it should be noted that South African courts and even courts from other jurisdictions have mainly used this approach in delictual matters and not criminal matters. However, in the *Carmichele v Minister of safety* case, the court held that in developing our common law as required by s39 (2) of the Constitution, the element of wrongfulness for omissions needs to be developed beyond existing precedents.[127]

In South Africa, the Supreme Court of Appeal developed the principle of duty of care in the case of *Van Eeden v Minister of safety*.[128] This case involved a 19 year old woman who had been sexually assaulted by a known criminal who had escaped police custody. The appellant claimed that the police owed her a duty to take reasonable steps to prevent the criminal from escaping and that they negligently failed in that duty. The court in analysing the principle of duty of care held that it involved the determination of wrongfulness of an omission.[129] The court held that an omission is wrongful if the accused is under a legal duty to act positively to prevent the harm suffered by the plaintiff.[130] It was also held that legal a duty exists if it is reasonable to have expected the defendant to take measures to prevent the harm.[131] Reasonableness is determined by the court making a value judgement based upon the perception of the legal convictions of the community and considerations of policy.[132] With regards to the legal convictions of the community, the court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong.[133] It is concerned with whether or not the community regards a particular act as delictually wrongful.[134] The court went on to say that legal convictions of the community include the

[127] *Carmichele v Minister of safety and security and another (centre for applied legal studies intervening)* 2001 (4) SA 938 (CC).
[128] *Van eeden v Minister of safety and security (women's legal center trust as Amicus Curiare)* 2003 (1) SA 389 (SCA).
[129] *Van eeden v Minister* (n 128) par 9. Omission in terms of the oxford dictionary also means failure to do, it also means to negligently overlook to do something.
[130] *Van eeden v Minister* (n 128) par 9.
[131] See (n 130).
[132] See (n 130).
[133] *Van eeden v Minister* (n 128) par 10.
[134] See (n 133).

convictions of policy makers such as the legislature and judges.[135] Still on the issue of legal convictions the court held that they must now incorporate the values of the Constitution.[136] The court also held that it is not a pre-requisite to establish the relationship between the plaintiff and the defendant for imposing a legal duty.[137] It should just be regarded as one of the elements to be considered in dealing with reasonableness.[138]

In the recently decided case of *Minister of Justice v X*, the court also re-affirmed the principles of duty of care established in the *Van Eeden* case.[139] This case involved a five year old girl who had been abducted and raped. The mother claimed that the conduct of the South African police service and the prosecutor had been negligent because they had released a dangerous criminal thereby giving him an opportunity to rape her daughter.[140] The court held that liability for negligence arises if the defendant would foresee the reasonable possibility of his conduct injuring another and he failed to take reasonable steps to prevent the harm.[141] The court also held that the ultimate criterion for the negligence test is whether the conduct falls short of the standard of a reasonable person.[142] The court also held that the greater the foreseeability of harm the greater the possibility of a legal duty to prevent harm existing.[143] Thus, in terms of South African law for a duty of care to be imposed it is measured by the standards set out above and as developed by the values of the Constitution. Hence, if there is a violation of human rights by a subsidiary, it should not be too difficult to impose liability on the parent company if reasonable foreseeability has been established in accordance with the afore-mentioned principles.

Bilchitz in his article "Corporate law and the Constitution"[144], considers the development of the reasonableness foreseeability test in relation to corporations. Applying this to a parent company, he suggests the following enquiries to be considered: 'a) Would a reasonable company in the same circumstances as the parent company have taken have taken reasonable

[135] See (n 133).
[136] *Van eeden v Minister* (n 128) par 12. The court even went further in explaining the importance of human rights by saying that " the entrenchment of fundamental rights and values of the Bill of rights enhances their protection and affords them a higher status in that all law, state actions, court decisions and even the conduct of natural and juristic persons may be tested against them."
[137] Van eeden v Minister (n 128) par 23.
[138] See (n 137).
[139] *Minister of Justice and constitutional development v X* 2015 (1) SA 25 (SCA).
[140] Minister v X (n 139) par 8.
[141] Minister v X (n 139) par 20.
[142] *Minister v X* (n 139) par 21.
[143] *Minister v X* (n 139) par 34.
[144] Bilchitz "Corporate Law and the Constitution: Towards binding human rights responsibilities for corporations" 2008 *SALJ* 754 788.

steps to acquire knowledge of the human rights violation? b) Would such company have foreseen the reasonable possibility of the human rights violation? c) If so would a reasonable company in the position of the parent company have taken steps to guard against the possibility of the violation? d) Did the actual parent company in question fail to take steps which it should have taken to guard against the possibility of the violation?'[145]

The test above implies that it is not enough for a company to claim that it had no knowledge of the human rights violations by its subsidiary.[146] Rather, it must prove that it was reasonable as a parent company not to make enquiries to establish whether human rights violations were occurring.[147]

Unlike in South Africa where the duty of care has not been used in cases involving parent company liability, English courts have actually preferred this principle over the principle of piercing the corporate veil. In the United Kingdom the duty of care was formulated by the court in the case of *Lubbe v Cape.*[148] The court held that whether a duty of care arises is dependent on a three stage test.[149] Firstly was the harm foreseeable?[150] Secondly was there sufficient proximity between the parties and, thirdly, is it fair, just and reasonable to impose a duty of care?[151] The court held that a parent company which is proved to exercise de facto control over the operations of its subsidiary owes a duty of care to the workers and the people staying around the area it conducts its business.[152] Furthermore the court also held that a company which knows through its directors that its operations involve risks to the health of the workers employed by its subsidiary owes a duty of care to those employees.[153] The court was of the view that just as much as product liability recognises a proximity between a manufacturer and a consumer even in the absence of a contractual relationship, the same should happen with parent companies.[154] It was held that a duty of care should be imposed

[145] Bilchitz (n 144) 788.
[146] Bilchitz (n 144) 789.
[147] Bilchitz (n 144) 789.
[148] *Lubbe v Cape* 2000 UKHL 41.
[149] *Lubbe v Cape* (n 148).
[150] See (n 148).
[151] See (n 148).
[152] *Lubbe v Cape* (n 148).
[153] *Lubbe v Cape* (n 148).
[154] Lubbe v Cape (n 148).

especially on parent companies that have involvement in processes which it is foreseeable may cause harm to others.[155]

When dealing with cases involving a duty of care, Australian courts look at the relationship that exists between the parties. This was the situation in the case of *CSR v Wren* which involved a claim by a victim of a wholly owned subsidiary.[156] The New South Wales court held that it was important to look at the relationship between CSR and Wren so as to see if it gave rise to a duty of care to protect Wren from foreseeable harm.[157] The court held that CSR had a duty of care.[158] This decision was based on the fact that it had brought itself into a relationship with the employees of its subsidiary by putting its staff in the management role at its subsidiary.[159] It had therefore created a direct relationship with the employees of its subsidiary.

The case of *Chandler v Cape* also advanced the issue of duty of care with regards to parent companies.[160] Mr Chandler alleged that he was owed a duty of care by Cape because it had employed a medical doctor responsible for overseeing health and safety across the group that included its subsidiary.[161] The essential issue was whether Cape had assumed responsibility for its subsidiary.[162] The court held that as much as the test of foreseeability of harm, proximity and reasonableness applied to an individual it also applied to a parent company.[163] It was held that if a parent company has responsibilities towards the employees of the subsidiary, it does not mean that they depend on each other for everything.[164] The court maintained that a subsidiary and a parent company are separate entities.[165] Therefore, there is no assumption of responsibilities the real question is whether what the parent company did amounted to taking on a direct duty of the subsidiary's employees.[166] The court concluded by saying that in certain circumstances the law may impose a duty of care on a parent company for the health and safety of its subsidiary.[167] Those instances include

[155] Lubbe v Cape (n 148).
[156] *CSR v Wren (*1998) 44 NSWLR 463.
[157] *CSR v Wren* (n 156).
[158] See (n 156).
[159] See (n 156).
[160] *Chandler v Cape Plc* 2012 EWCA CIV 525.
[161] See (n 160).
[162] See (n 160).
[163] See (n 160).
[164] *Chandler v Cape* (n 160).
[165] *Chandler v Cape* (n 160).
[166] See (n 160).
[167] *Chandler v Cape* (n 160) par 80.

"where the business of the parent and the subsidiary is the same, where the parent has or ought to have superior knowledge on some relevant aspect of health and safety in the particular industry, the subsidiary's system of work is unsafe as the parent company knew or ought to have known and the parent knew or ought to have foreseen that the subsidiary or its employees would rely on it using that superior knowledge for the employee's protection."[168]

In the Netherlands' case of *Akpan v Royal Dutch Shell* the court applied the test for imposition of duty of care expressed in the *Chandler* case.[169] The plaintiffs submitted that Royal Dutch was aware of the frequency of oil spills in Nigeria and had influenced its subsidiary's activities.[170] Therefore it had assumed control over its subsidiary's operations since the prevention of environmental destruction was a key policy objective.[171] The court held that imposing a duty of care for an international oil group over the population close to its pipelines would create a situation where an unlimited group of people could claim from the defendants.[172] The court was of the view that the damage was so indirect such that at best the parent company could be blamed for failing to enable its subsidiary to prevent the harm.[173] Although the court acknowledged that the parent company knew that the business of its subsidiary involved risk to third parties it held that a duty of care would not be imposed as their line of business was not the same.[174]

The discussion above just goes on to show that it is possible for the duty of care to be imposed on the parent company especially in relation to the protection of human rights since it is already enshrined in our Constitution jurisprudence. Although the notion of duty of care does exist in our criminal law in determining what a reasonable person would do for example in doctor-patient relationships, the law still needs to be developed so that it also includes parent-subsidiary relationships.

15. Agency

The principle of agency has been used in South Africa in the context of holding the employer liable for the acts conducted by its agent. It has been used in situations once again involving

[168] *Chandler v Cape* (n 160) par 80.
[169] *Akpan and Another v Royal Dutch Shell Plc and another District court of the* Hague 2013 LJNBBY98 54/HZA 09-1580.
[170] Mc Connell "Establishing liability for multinational oil companies in parent /subsidiary" 2014 *Environmental law Review* 50 54.
[171] Mc Connell (n 170) 54.
[172] Mc Connell (n 170) 54.
[173] Mc Connel (n 170) 54.
[174] Mc Connel (n 170) 54.

delictual claims and not in holding the employer criminally liable. Therefore, it is submitted that if the courts develop this principle in line with the Constitution it could be used as an approach to hold parent companies liable without disregarding the separate legal personality principle.

In South Africa, the principle of agency was recently re- affirmed in the case of *Maye Serobe v Lewusa Obo*.[175] The issue in that matter was that the employer had sent its employee to the CCMA for conciliation just to find out what the dispute was all about.[176] However the employee ended up participating in the conciliation which resulted in an agreement being signed.[177] The applicant was seeking an order to set aside the agreement based on the fact that the employee did not have the mandate to enter into the agreement.[178]

The Labour court in the *Maye* case defined agency as a consensual relationship created by contract or by law.[179] Thus, in other words, in an agency relationship both parties have to be willing to enter into this contract. Agency relationship involves a situation where one party the principle grants authority to the agent to act on his behalf with either a curtailed or open mandate and under the control of the principal.[180] The relationship is fiduciary in nature therefore the actions of the agent will be binding on the principal.[181] Thus, the acts of the agent will be treated as if they were of the principal. The court also stated that, in agency relationships, to determine liability, the question often asked is whether the principle acted in such a manner as to make others believe that the person was his agent.[182] This refers to whether the principle gave the agent apparent or ostensible authority to act on his behalf.[183] "Ostensible or apparent authority refers to authority as it appears to others."[184] "It refers to actual authority, in other words was the agent given actual authority and not authority based on assumption."[185] Furthermore to hold the principal liable on the basis of ostensible

[175] *Maye Serobe (Pty) Ltd v Lewusa Obo members and others* (J2377/12) 2015ZALCJHB 116 (9 April 2015).
[176] *Maye v Lewusa* (n 175) par 15.
[177] See (n 176).
[178] See (n 176).
[179] *Maye v Lewusa* (n 175) par 18.
[180] *Maye v Lewusa* (n 175) par 18.
[181] *Maye v Lewusa* (n 175)par 18.
[182] *Maye v Lewusa* (n 175) par 18.
[183] *Maye v Lewusa* (n 175) par 18.
[184] *Hely-Hutchnison v Brayhead Lt and another* 1968 1 QB 549. In explaining the principle of ostensible authority the court in this case also stated that "when the board one of their members to be managing director they invest him not only with implied authority but also ostensible authority to do all such things which fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of managing director. However sometimes ostensible authority exceeds actual authority."
[185] See (n 184).

authority the accusing party has to prove that a representation by words or conduct was made by the appellant.[186] The representation should be in such a form such that the principal would have reasonably expected that another outsider would act on its strength.[187] There must also have been a reasonable reliance on the representation which should have led to prejudice on the third party.[188]

Such representation in a principal-agent relationship needs to be authorised by the principal and it is a unilateral act.[189] The authorisation is usually contained in a contract but sometimes it arises by operation of law.[190] Thus "the term 'agent' is reserved for a representative who is bound by contract with a principle to carry out a mandate and also authorised to create, alter or discharge legal relations for the principle."[191]

In *Maye v Lewusa* case, the court held that in a situation where the agent has acted without authority and the actions are prejudicial, the party standing to suffer the prejudice will be the one who raises issues of defence.[192] If the principal raises the defence that the agent lacked authority or that the agent was authorised but went above his mandate, he will succeed with the defence if he can actually prove these claims.[193] The court also held that consideration will be given to the other party who concluded the agreement in good faith believing that the agent had the necessary authority.[194] The third will be allowed to rely on the doctrine of estoppel to prevent the principle from denying that the agent had authority.[195] The court also went on to say that a representation by authority and the powers conferred on the agent are different things.[196] Therefore an agent may be authorised to represent his principle but without being given certain mandates.[197] Therefore, it is the responsibility of the agent to act with its mandate as much it is the responsibility of the principal to clearly state the mandate to the agent.[198] The court also stated that the principal and agent relationship is coupled with

[186] *Northern Metropilitan local council v Company Unique Finance* (36/11) 2012 ZASCA 66 (12 May 2012) par 28.
[187] Northern Metropolitan v Company Unique (n 186) par 28.
[188] See (n 186).
[189] *Joel Melamed and Hurwitz v Cleveland Estates Pty Ltd* 1984 (3) 155 (A) 164G.
[190] See (n 189).
[191] See (n 189).
[192] *Maye v Lewusa* (n 175) par 24.
[193] *Maye v Lewusa* (n 175) par 24.
[194] *Maye v Lewusa* (n 175) par 24.
[195] *Maye v Lewusa* (n 175) par 24.
[196] *Maye v Lewusa* (n 175) par 25.
[197] *Maye v Lewusa* (n 175) par 25.
[198] *Maye v Lewusa*(n 175) par 25. The Labour court also defined mandate by saying that "it is an agreement between two or more persons whereby one or more persons undertakes to represent and perform some lawful task for another." Par 36.

inherent risk.[199] This is so because the terms and conditions of the agreement between the parties are not obvious to third parties; therefore, the mandate has the result of residual authority too.[200] The court gave an interesting example of a builder contracted to build a house by saying the builder is also given implied authority to find all the material necessary to complete the building.[201] It lies within the discretion of the principal expressly to limit the implied authority of his agent.[202]

The major lesson that can be drawn from the *Maye v Lewusa* case above is that in terms of South African law, for a principal and agent relationship to be present both parties have to be willing to enter into such a contract. Furthermore, the principal could be held liable for the acts of the agent even if there was no express authority. As long as implied authority can be derived from the actions of the principal, he will be liable. Therefore this principle in my view is apposite to situations where we have a parent and subsidiary relationship. If it is evident that the parent gave the subsidiary authority to act on its behalf there should be no reason why that subsidiary cannot be treated as an agent of the parent company. International courts have also tried to use this approach in holding the parent company liable for the acts of the subsidiary.

In the case of *Doe v Unocal,* the English court also touched on the issue of whether a subsidiary can be treated as an agent of the parent company.[203] According to the plaintiff's, the defendant's had been complicit with the military and the police force violently and forcefully to relocate whole villages and farmers living in an area of a proposed pipeline.[204] The court held that the presence of minimum contact between the parent and the subsidiary is not sufficient to create liability on the part of the parent.[205] It was also held that a parent company may be directly involved in the activities of its subsidiary without incurring liability so long as the involvement is consistent with parent's investor status.[206] The court also stated that an agency relationship is evidenced by parental control of the subsidiary's internal affairs

[199] *Maye v Lewusa* (n 175) par 28.
[200] See (n 199).
[201] See (n 199).
[202] See (n 199).
[203] *Doe v Unocal Corp 27* F Supp 2d 1174 (CD Cal 1998)
[204] See (n 203).
[205] *Doe v Unocal* (n 203).
[206] The court in *Doe v Unocal* got this statement from the case of *United States v Bestfoods* (1998) USSC 65 141 L.Ed ed 43. "Appropriate parental involvement was said to include monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions and articulation of general policies and procedures."

or daily operations.[207] The court held that the agency test is satisfied by showing that the subsidiary functions as the parent company's representative in that it performs services that are sufficiently important to the parent company.[208] Furthermore, these services performed by the subsidiary are so important such that if it did not have a representative to perform them its own officials would undertake to perform the services.[209] Thus, if a subsidiary performs the services above then it merely functions as an incorporated department of the parent company.[210] Thus, the question to ask is not whether the subsidiary can formally accept orders from their parent but whether the subsidiary's presence substitutes for the presence of the parent.[211]

Ultimately, the principle of liability based on agency requires that there be a consequential understanding between the parties. Furthermore, if it is evident that the agent is carrying out the work of the principal then the principal will be held accountable for the acts of the agent. This same analogy should be adopted by our courts so that in situations where it is clear that the subsidiary is in existence to help out the parent company, the parent company should be held accountable for its acts. However this principle has been mainly used in civil cases there is still therefore need for more development so that it can be used in the imputation of criminal liability.

16. Common purpose

The common law principle of common purpose is another doctrine that could be developed by our courts so that it can be used to hold the parent company liable for the acts of its subsidiary. The advantage about this doctrine is that unlike the other approaches discussed in this chapter, this approach is already used in criminal cases to hold another person jointly liable for a crime whose actus reus is committed by another.

The constitutionality of this approach was dealt with in the case of *S v Thebus*.[212] This case involved a group of residents who were protesting against several reputed drug dealers in their area.[213] They allegedly went to where the drug dealers stayed and caused damage to

[207] *Doe v Unocal* (n 203).
[208] *Doe v Unocal* (n 203).
[209] *Doe v Unocal* (n 203).
[210] *Doe v Unocal* (n 203).
[211] *Doe v Unocal* (n 203).
[212] *Thebus and another v S* 2003 JOL 11400 (CC).
[213] *Thebus v S* (n 212) par 2.

property at one of the houses.[214] As they approached the intersection the drug dealers opened fire on them and the group returned fire.[215] In the resulting cross fire, a seven year old girl was fatally shot and two other people were wounded.[216] Thereafter, Thebus and colleague were arrested and charged with murder based common purpose. In the Constitutional court, the court had to decide whether this common law doctrine was in line with the South African constitution and the rights provided for in the Bill of rights.

The Constitutional court held that the doctrine of common purpose refers to a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person the commission of a crime.[217] The qualities that make up the doctrine are that if two or more people who have a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them is imputed to the other.[218] The court held that the liability requirements for common purpose fall into two categories. The first type involves a situation where there is a prior agreement, express or implied, to commit an offence.[219] In the second type, no such prior agreement exists or is proved.[220] The liability arises from the active association and participation in a common criminal design with the adequate blameworthy state of mind.[221] If there is no proof of prior agreement, the following requirements must be met for the perpetrators to be found guilty of common purpose.[222] It must be proved that the perpetrators were actively present at the scene of the crime and not just as passive spectators.[223] Proof must also be shown that the perpetrators were aware of the crime and had intended to make common cause with the others committing the crime.[224] Furthermore, the perpetrator must have performed an act of association with the conduct of the others and they must have intended to kill or contribute to the death.[225]

[214] See (n 212).
[215] See (n 212).
[216] See (n 212).
[217] *Thebus v S* (n 212) par 18. The court also quoted Burchell and Milton who define the doctrine as referring to a situation where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise. Each of them will be responsible for the specific criminal conduct committed by one of their member which falls within their common design. Liability arises from their common purpose to commit a crime.
[218] *Thebus v S* (n 212) par 18.
[219] *Thebus v S* (n 212) par 19.
[220] *Thebus v S* (n 212) par 19.
[221] *Thebus v S* (n 212) par 19.
[222] *S v Mgedezi and others* 1989 2 ALL SA 13 (A).
[223] *S v Mgedezi (*n 222).
[224] *S v Mgedezi* (n 222).
[225] *S v Mgedezi* (n 222).

The Constitutional court also held that a causal connection between the conduct of each of the participants to the crime and the unlawful consequence caused by one or more in the group is not a requirement.[226] Therefore unlike normal crimes where the accused will be found guilty if they were directly linked to the crime, in common purpose cases, the prosecution does not need to establish a causal connection. As long as the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention he will be found guilty.[227] The principle object of common purpose is to criminalise collective criminal conduct and thus satisfy the social need to control crime committed by a group.[228] Therefore, in crimes such as murder or damage to property, it would be difficult to establish the causal connection between each person to the crime and to try to do so would render ineffectual the object of common purpose.[229]

The doctrine of common purpose is one doctrine that could be developed and be used to hold parent companies liable for the acts of their subsidiaries. The advantage about this approach is that it does not require a proximate link between the crime and the accused. Thus, even in a situation where the parent company just authorised an act of the subsidiary and is prejudicial to a third party, the parent could be held accountable. However, the problem that this doctrine might have is the need to prove the required intention for the commission of the crime. In such a situation the mens rea of the subsidiary would have to be imputed to the parent company for the requirements of common purpose to be met. This might cause problems on the complainant because it has to be proved beyond a reasonable doubt. Regardless of the complications associated with this approach, it is something that our courts should consider.

17. Conclusion

The discussion in chapter three has managed to show us that there are other approaches that could be developed to hold the parent company liable without disregarding the limited liability principle. Although these approaches have been used in many scenarios that do not involve the parent and subsidiary relationship, I believe that they can be developed to apply too in that scenario. Many of these approaches are only found in delict and would need to be adapted to criminal law context What is similar about all these approaches is that they focus

[226] *Thebus v S* (n 212) par 22.
[227] *Thebus v S* (n 212) par 34.
[228] *Thebus v S* (n 212) par 34.
[229] *Thebus v S* (n 212) par 34.

on the relationship that exists between the parties and if it is close enough, one person will be held accountable for the acts of the other.

CHAPTER 4

CONCLUSION AND SUGGESTIONS FOR REFORM

Corporate criminal liability in South Africa is currently governed by section 332 of the Criminal Procedure Act 51 of 1977. As was discussed in my analysis, this statutory provision does not recognise relationships involving one company that controls another. The section even states that the liability of employees and servants will be attributed to the employer. Thus, this specific identification of people whose liability can be attributed to the company is the number one problem that limits the liability of parent companies. It is my submission that the first step to holding the parent company liable is the amendment of our Criminal Procedure Act. Section 332 (1) of the Criminal Procedure Act should be amended to also include parent and subsidiary company relationships. However as we discussed the courts would have to establish the relationship between the parent and subsidiary company. If the exercise of control by the parent is so great as to amount to 'domination' there should be no reason why the subsidiary should not be regarded as a servant for purposes of the act.

Thus, having established that the first stage to holding parent companies liable starts with a reform of our Criminal Procedure Act, the second stage involves the development of an approach that could be used to circumvent the principle of limited liability. As I discussed in my essay, limited liability prevents the liabilities of one company to be attributed to the other company. I also identified that courts have been able to go around this principle by piercing the corporate veil so that they establish the true relationship which exists. However, piercing the corporate veil has its limitations in that as much as it is statutorily provided for; the courts will use it at their own discretion in very limited circumstances.[230] Furthermore, I have also identified that our courts are still hesitant to use this provision as they do not want to disregard the principle of limited liability. This is so because it is drastic and can undermine the corporate form particularly in parent-subsidiary relationships. Furthermore, this approach

[230] Section 20(9) of the Companies Act 71 of 2008.

provides a greater burden to the prejudiced party as they are the ones that have to prove the presence of unconscionable abuse. Thus, in terms of criminal law where it has to be proved beyond a reasonable doubt, the third party might have great difficulties proving their claim. As we have seen in the case of *Van Zyl v Kaye*, the court is not willing to pierce the veil if there is not enough evidence.[231] Therefore, because of the high standard of proof required in criminal law, I propose that there be a legal presumption of excessive control of the parent company over the acts of the subsidiary.[232] A presumption of excessive control gives advance notice to the parent of the risk of liability and places the onus on the parent to rebut the presumption with conclusive proof of the independence of the subsidiary.[233] Thus, this could lessen the burden on the prejudiced party of proving the abuse by the parent company and addressing the complicated relationships within a corporate structure or group. The parent company will be the one who needs to prove that their subsidiary is a separate legal entity. I believe that if there is presumptions of excess control not only will the courts stop being hesitant to pierce the corporate veil but it will also encourage parent companies to take more responsibilities in the way they behave towards their subsidiaries and to separate out from them. Thus, it is my submission that piercing the corporate veil if fully developed in line with the Constitution, could turn out to be the best way of holding parent companies criminally liable.

In my analysis I discussed approaches that could be adopted by the courts to hold parent companies liable. One of the difficulties I stated was that principles like vicarious liability, duty of care and agency have been used mainly in civil cases. Further, they have been used in connection with relationships involving employers and employees. Nevertheless, in my submission, there is a close analogue between features of the employer and employee relationship and that of the parent and subsidiary relationship. In all relationships, there is one party that controls the other. Therefore, these approaches should be able to be used in a situation involving a parent and subsidiary relationship. I also discussed the fact that one advantage to these approaches is that the separate personality of the company does not need to be disregarded. What is common about these approaches is that determining the level of control is a priority. Thus, if the control is extreme, the other party will be held responsible for the acts of the other party.

[231] *Van Zyl v Kaye* (n 88).
[232] Muchlinski (n 8) 923.
[233] Muchlinski (n 8) 923.

Another approach that I discussed was the common purpose approach. On the face of it, this approach might seem attractive to use in holding the parent company liable as it does not require direct participation. However, I think the problem would arise in situations where the third party will have to prove the intention beyond a reasonable doubt for criminal liability. This might prove to be difficult for the third parties or the state as they do not always have access to the information about the relationship between the parent and the subsidiary. Thus as much as it is an approach that does not disregard the separate personality of a company, it comes with complications that might frustrate the prejudiced party.

I began my essay with a discussion of a set of facts just to illustrate how parent companies could contribute to the prejudice of third parties. Therefore it is my submission that our law has the resources to close the accountability gap that currently exists and the legislature should seize upon the opportunity to bring our law in respect of parent-subsidiary relationships fully in line with the requirements of the Bill of rights.

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