



UNIVERSITY
OF
JOHANNESBURG

COPYRIGHT AND CITATION CONSIDERATIONS FOR THIS THESIS/ DISSERTATION

 creative
commons



- Attribution — You must give appropriate credit, provide a link to the license, and indicate if changes were made. You may do so in any reasonable manner, but not in any way that suggests the licensor endorses you or your use.
- NonCommercial — You may not use the material for commercial purposes.
- ShareAlike — If you remix, transform, or build upon the material, you must distribute your contributions under the same license as the original.

How to cite this thesis

Surname, Initial(s). (2012) Title of the thesis or dissertation. PhD. (Chemistry)/ M.Sc. (Physics)/ M.A. (Philosophy)/M.Com. (Finance) etc. [Unpublished]: [University of Johannesburg](https://ujcontent.uj.ac.za/vital/access/manager/Index?site_name=Research%20Output). Retrieved from: https://ujcontent.uj.ac.za/vital/access/manager/Index?site_name=Research%20Output (Accessed: Date).

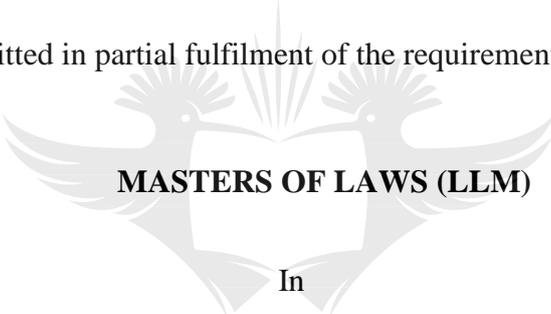
**DISREGARDING THE SEPARATE LEGAL PERSONALITY OF
CORPORATE ENTITIES USED BY DIRECTORS TO BREACH FIDUCIARY
DUTIES AND ESCAPE CONTRACTUAL OBLIGATIONS.**

BY

LELETHU MBANGI

MINOR-DISSERTATION

Submitted in partial fulfilment of the requirements for the degree



MASTERS OF LAWS (LLM)

In

CORPORATE LAW

In the

FACULTY OF LAW

At the

UNIVERSITY OF JOHANNESBURG

SUPERVISOR: PROF KE VAN DER LINDE

FEBRUARY 2016

TABLE OF CONTENTS

SUMMARY

- 1 INTRODUCTION
- 2 PIERCING OF THE CORPORATE VEIL
 - 2.1 What is piercing the corporate veil?
 - 2.2 Principles of piercing the corporate veil
 - 2.2.1 Evasion principle.
 - 2.2.2 Concealment principle.
- 3 APPLICATION OF THE PRINCIPLES TO CASES INVOLVING ABUSE OF JURISTIC PERSONALITY BY DIRECTORS TO BREACH FIDUCIARY DUTIES
 - 3.1 *CMS Dolphin Ltd v Simonet.*
 - 3.2 *Atlas Organic Fertilizers that (Pty) Ltd v Pikkewyn (Pty) Ltd.*
 - 3.3 *Canadian Aero Service Ltd v O'Malley.*
 - 3.4 *Da Silva v C H Chemicals (Pty) Ltd.*
 - 3.5 *Sibex Construction (SA) (Pty) Ltd v Injectaseal Close Corporation.*
- 4 APPLICATION OF THE PRINCIPLES TO CASES INVOLVING ABUSE OF JURISTIC PERSONALITY BY DIRECTORS TO ESCAPE CONTRACTS IN RESTRAINT OF TRADE
 - 4.1 *Le Bergo Fashions Close Corporation v Lee and Another.*
 - 4.2 *Die Dros (Pty) Ltd and Another v Telefon Beverages Close Corporation and Others.*
 - 4.2 *Gilford Motor Co Ltd v Horne.*

5 CONCLUSION

6 BIBLIOGRAPHY

6.1 Books and Articles

6.2 Legislation

6.3 Cases



UNIVERSITY
OF
JOHANNESBURG

SUMMARY

This dissertation analyses the reasoning and verdicts of local and foreign Courts in cases where a complaint is made that the separate legal personality of a company is abused by a director in order to breach fiduciary duties or escape contractual obligations. In this dissertation contractual obligations are discussed in the context of contracts in restraint of trade on directors. The facts, law and the judgment of the Court shall be stated in each of the cases analysed.

This analysis of the cases shall be confined to instances where a director of company A incorporates company B to use it to breach fiduciary duties he/she owes to company A and where a director has a contractual undertaking to company C but incorporates company D and trades through it thereby escaping restraint of trade obligations owed to company C.

The separate legal personality of a company principle is not absolute in law but a general rule hence the exception of piercing of the corporate veil is discussed. The discussion on piercing of the corporate veil commences by first discussing what piercing of the veil actually means and thereafter proceeds to explain the principles applicable in piercing the corporate veil and finally the application of the piercing principles to the various cases discussed.

In the analysis of cases where the Courts (local and foreign) adjudicated matters of abuse of separate legal personality of a company by directors, the Courts at times find it unnecessary to disregard the separate existence of a company's personality but rather elect to identify the company with the director.

Notwithstanding the known common law guidelines in English and South African jurisprudence for piercing the corporate veil such as façade, sham, fraud and *alter ego*, the United Kingdom Supreme Court in a recent case of *Prest v Petrodel Resources Ltd*¹ has streamlined the guidelines into two main principles being the evasion and concealment principles.

¹ 2013 3 WLR 1.

These principles as suggested by the UK Supreme Court do not introduce new grounds for piercing the corporate veil but they are merely new terminology for the piercing guidelines already mentioned above. It will appear in this dissertation under discussion of the cases that even though South African Courts were not employing the terminology as suggested by the UK Supreme Court when adjudicating cases, the substance of their judgments is either application of the concealment or evasion principles.

Going forward, the South African Courts in adjudicating cases involving the problem statement of this dissertation, they merely have to employ the terminology of the principles when applying legislative provisions and common law that is concerned with piercing of the corporate veil.



1 INTRODUCTION

The ancient case of *Salomon v Salomon* is the pioneer of common law jurisprudence of the principle that a company has its own legal personality which is a legal fictitious personality that shareholders of a company are able to rely on to isolate their personal assets from being liquidated by the creditors of the company. The principle of separate legal personality also confirms ownership of the assets of the company by the company instead of the shareholders.²

The rights that are inseparable with the principle of separate legal personality must be used for a proper and intended purposes for its legal development which such development is fully accounted for in the judgment in *Salomon v Salomon*.³ Where there is use of the separate legal personality in a manner that departs from the proper and intended purposes for its development, the Court may hold the person who controls and uses the company in such a manner personally liable.⁴

There are no set guidelines for veil piercing as the Courts have not set and defined a clear guideline for veil piercing. “It has even been said that there is no common unifying principle either in the UK or across the common law jurisdictions explaining the Court decisions to pierce the corporate veil. The difficulty lies in the fact that the Courts have not adhered to a coherent principled approach but opted instead for terms such as mere cloak or sham and façade”.⁵

Courts’ have stated that the general guiding principles would be the basis for piercing the veil are discussed hereunder in instances of abuse of the separate personality by directors in order to breach fiduciary duties and escape contractual obligations. These ancient guidelines are discussed under the evasion and concealment principles as laid down by the UK Supreme Court.

² HY Yeo and R Yeo “*Alter Ego Exception in Corporate Veil Piercing*”2015 27 Singapore Academy of Law Journal 178.

³ HY Yeo and R Yeo “*Alter Ego Exception in Corporate Veil Piercing*”2015 27 Singapore Academy of Law Journal 178.

⁴ HY Yeo and R Yeo “*Alter Ego Exception in Corporate Veil Piercing*”2015 27 Singapore Academy of Law Journal 178.

⁵ HY Yeo and R Yeo “*Alter Ego Exception in Corporate Veil Piercing*”2015 27 Singapore Academy of Law Journal 179.

2 PIERCING THE CORPORATE VEIL TO SAFEGUARD AGAINST ABUSE OF JURISTIC PERSONALITY.

2.1 WHAT IS PIERCING THE CORPORATE VEIL

The Court stated in *Dadoo Ltd and Others v Krugersdorp Municipal Council* that “a registered company is a legal persona distinct from the members who compose it”.⁶

In contemporary South African company law the separate legal personality of a company is recognised in section 19(1)(a) of the Companies Act⁷ which provides that from the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company;

- (a) Is a juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act.

A corporate veil is therefore a fictitious legal shield that separates the personality of a company from the personalities of its founders or members and directors. This legal insulation, as a general rule prevents any form of liability of the company being imposed on the founders or directors in their personal capacities.

Smalberger JA in his judgment in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*⁸ asserts that despite the general rule of separate legal personality, “it is settled law that a Court in certain circumstances would be justified in disregarding a company’s separate personality in order to fix liability elsewhere for what are ostensibly acts of the company and this is generally referred to as lifting or piercing the corporate veil”.⁹

⁶ 1920 AD 530 at 550.

⁷ 71 of 2008 as amended. References to Companies Act are to this act unless otherwise indicated.

⁸ 1995 4 SA 790 (A) 802 F-H.

⁹ 1995 4 SA 790 (A) 802F-G.

When the veil of a company has been disregarded by a Court, permission is actually granted to those seeking remedy to effectively have the ability to recover their losses against the estate of the natural person that perpetrated the abuse of the corporate personality of a company.¹⁰

2.2 PRINCIPLES OF PIECING THE CORPORATE VEIL

“I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil, suffice to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs”.¹¹ “The law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil. Each case involves a process of enquiring into the facts which, once determined, may be of decisive importance in determining whether or not it is legally appropriate in given circumstances to disregard corporate personality”.¹²

Section 20(9) of the Companies Act provides for disregarding the separate legal personality recognised in section 19(1)(a). Section 20(9) provides that if, on application by an interested person or in any proceedings in which the 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

¹⁰ 1995 4 SA 790 (A) 802 G-H.

¹¹ Corbett CJ *The Shipping Corporation of India Ltd v Evdomon Corportion and another* 1994 (1) SA 550 (A).

¹² Smalberger JA *Cape Pacific Case* 802.

- (b) make any further order the Court considers appropriate to give effect to a declaration contemplated in paragraph (a).

The provisions of section 20(9) are similar to the provisions of section 65 of the Close Corporations Act.¹³ For the sake of completeness I quote section 65 which provides that;

Whenever a Court on application by an interest person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf, or any use of, that close corporation, constitutes gross abuse of the juristic personality of the close corporation as a separate entity, the Court may declare that the close corporation is to be deemed not to be juristic person in respect of such rights, obligations or liabilities of the close corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration.

In 1989 pursuant to the enactment of section 65 of the Close Corporation's Act as quoted fully above, Larkin anticipated that in future company law will follow suit and develop a statutory provision for piercing the corporate veil as it has been done with section 20(9) of the Companies Act. In this regard he stated "the Close Corporation's Act can, in a very real way, be an excellent crystal ball for company law. It is often a very good indicator of what direction company law should take on a particular issue. If the Close Corporations Act inclined in favour of it, this is a good indication that the doctrine of piercing the veil is also right for company law. On this view, it ought to be developed in company law as a common law principle and possibly given statutory form at some future time."¹⁴

¹³ Act 69 of 1984.

¹⁴ Larkin "Regarding judicial disregarding of the company's separate identity" 1989 SAMLJ 277.

Indeed Larkin's prediction was accurate as the Companies Act was amended in 2011 to introduce section 20(9), the so-called statutory piercing provision.

The application of section 20(9) as the codification of the common law principle of piercing the corporate veil was considered in *Ex Parte Gore and Others NNO*¹⁵ where the Court referred to the codification as continuance of common law as opposed to creating its substitute.¹⁶ This position that has been asserted by the Court suggests as an answer to the question whether section 20(9) is intended to outdo the common law on piercing of the corporate veil.¹⁷

The legal position set out by the Court with regard to the codification of section 20(9) suggests that the legislative provisions of section 20(9) must be applied in conjunction with established common law. This is gleaned from the judgment where the Court asserts that "there is no express indication that the introduction of section 20(9) is intended to displace the common law" and where the Court stated that "the width of the provisions of section 20(9) appears to broaden the basis upon which the Courts in this country, and certainly those in England, have hitherto been prepared to grant relief that entails disregarding corporate personality".¹⁸

There exists no contradiction between section 20(9) and the law made by cases decided before it.¹⁹ It is clear from the wording of section 20(9) that disregarding the separate legal personality of a company is a matter that only the Court has the competence and or jurisdiction to decide.

The general guideline to piercing the corporate veil is summarised in *Ex Parte Gore* as follows:

- (a) The mere involvement of the company in a scheme intended to conceal wrongdoing doesn't itself justify piercing, the company must actually be used as means to achieve the impropriety;²⁰

¹⁵ 2013 3 SA 382 (WC).

¹⁶ *Gore* case 399.

¹⁷ *Gore* case 398.

¹⁸ *Gore* case 398-399.

¹⁹ *Gore* case 398.

²⁰ *Gore* case 392.

- (b) The Court will pierce the veil if there is *nexis* between the natural person concerned and the company;²¹ and
- (c) A company can be a façade for such purposes even though not incorporated with deceptive intent, the pertinent enquiry is whether it is being used as a sham at the time of the relevant transaction.²²

The UK Supreme Court in *Prest v Petrodel Resources Ltd* organised the well-known language of the guiding principles for piercing the corporate veil by creating two guiding principles known as the concealment and the evasion principle.²³

The terms “façade” or “sham” are too wide to provide a desired answer as to what constitute them. The failure of the Court’s in earlier judgments to provide guidance as to what the terms actually entail has delayed the casting of the guiding principles under clear principles being concealment and evasion.²⁴

Interrogation of the characteristics of the sham ground and those of the evasion principle as stated in *Prest* reveals that one could be able to actually conclude that there would be no contradiction if the sham ground is called the evasion principle same goes for the *alter ego doctrine* and the concealment principle.²⁵

In light of the characteristics of these principles in relation to the sham ground and *alter ego doctrine*, the *Prest* case preserves the legal principles of piercing the corporate veil but merely introduces new terminology and rationalises the broad guidelines in to these two principles.²⁶

In this dissertation, the fraud, façade or sham principle is discussed under the evasion principle whereas the *alter ego* or agency is discussed under the concealment principle.

²¹ *Gore* case 392.

²² *Gore* case 392.

²³ HY Yeo and R Yeo “*Alter Ego Exception in Corporate Veil Piercing*” 2015 27 Singapore Academy of Law Journal 198.

²⁴ Lord Sumption in *Prest v Petrodel Resources Ltd* 2013 3 WLR par 28.

²⁵ HY Yeo and R Yeo “*Alter Ego Exception in Corporate Veil Piercing*” 2015 27 Singapore Academy of Law Journal 199.

²⁶ HY Yeo and R Yeo “*Alter Ego Exception in Corporate Veil Piercing*” 2015 27 Singapore Academy of Law Journal 179.

To the extent that our corporate law is influenced by English law, I believe that these principles will in time be entrenched and be recognised as the current terminology when the Court pierces the corporate veil in terms of section 20(9) of the Companies Act.

I now turn to deal with these two overarching principles.

2.2.1 EVASION PRINCIPLE

The evasion principle is concerned with use of and hiding behind the legal personality of a company to avoid application of a right against the person in control of it, usually a director or shareholder. The evasion principle then permits the Court to disregard the legal personality to allow enforcement of the right.²⁷

“No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever”²⁸

The evasion principle creates an all-encompassing piercing ground to which various general tests have been stated in the past. In examining the facts of a case in order to decide which principle of piercing applies a relevant question “is whether an existing incorporated or unincorporated trader uses a company as nothing more than an artificial device for the purpose of shielding themselves from their pre-existing liabilities under contract, tort or statute”.²⁹

An affirmative answer to this question would then lead to the application of the evasion principle.

²⁷ *Prest* case par 28.

²⁸ Lord Sumption in *Prest v Petrodel Resources Ltd* 2013 3 WLR par 18.

²⁹ Moore “A temple built on faulty foundations: Piercing the corporate veil and the legacy of *Salomon v Solomon*” 2006 *JBL* 183.

The evasion principle should be the new name for the sham, fraud and improper purpose exception for piercing the corporate veil. In earlier cases in South Africa before the decision of the UK Supreme Court in *Prest* it was held that “An element of fraud and or other improper conduct in the establishment and use of the company or the conduct of its affairs does not necessarily require that a company should have been conceived and founded in deceit, or never have been intended to function genuinely as a company, before its corporate personality could be disregarded”.³⁰

My view is that where a director bound by a contract in restraint or owing fiduciary duties to the company, incorporates a company that will trade under his control despite the legal limitations on his person, that company is founded in deceit even though the company may operate genuinely as a company. It remains means of evading the law and therefore the evasion principle must apply.

The law is concerned with the substance of things. Despite the legal personality of the company, in situations where the director is using it for improper purposes the form and technicalities are overlooked and focus rests on the reality of things hence in cases of piercing the corporate veil focus shifts from the company and moves to those who are in control of it.

“The Court will then be able to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie”.³¹

The relevant Latin maxim is *plus valet quod agitur quam quod simulate concipitur*. In plain English, this Latin maxim means “what is actually done is more important than that which seems to have been done”.³²

³⁰ Smalberger JA in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A) 804.

³¹ *Cape Pacific* case 803.

³² *Dadoo* case 547.

The evasion principle was applied in a well-known 20th century case; the sham or facade exception was spelled out in *Gilford Motor Co v Horne*,³³ a case which is also discussed further below. “In a unanimous judgment the Court of appeal felt justified in discarding the corporate veil thereby allowing the plaintiff an injunction effective against the company and the defendant through which he had been trading in breach of his contractual undertaking”.³⁴

In this matter the Court of first instance and the Court of appeal focused on the intention behind the creation of the company, which was to evade the covenant in restraint of trade. It appears in this matter and in the matter of *J Louw and Co (Pty) Ltd v Richter* cited below that the deciding factor in whether or not the veil should be pierced in order to get to the person subject of the restraint is the intention behind the creation of the company and not largely what business it is in.

It is demonstrated in the matter of *Richter* below that even in circumstances of clear breach of the restraint by a company formed by a restrained person, as long as it cannot be proved that the company was formed with the intention of being used as a sham, cloak or formed for improper purposes, the Court does not pierce the veil and or interdict it. However if it is proved that it was formed with such an intention then the Court intervenes by piercing the veil.

In *J Louw and Co (Pty) Ltd v Richter* 1987 2 SA 237 (N) “a covenant in restraint of trade was contained in a contract to which a company was not a party; X, who was such party, was the sole member and director of the company, the conduct of which, had it been such a party, would have involved a breach of the covenant; the Court refused to “lift the veil” and interdict the company from such conduct in the situation where

³³ 1933 Ch 935 (CA).

³⁴ Moore “A temple built on faulty foundations: Piercing the corporate veil and the legacy of *Salomon v Solomon*” 2006 *JBL* 183.

there was neither proof nor suggestion that X had formed the company with the intention of using it to evade the restraint”.³⁵

In this matter the Court rejected the proposition that the veil of the company should be pierced merely on the basis of the allegation that Richter is associated with it and that the company is his tool to evade the covenant in restraint of trade.³⁶

The Court refused to apply the evasion principle in this matter but instead applied the concealment theory which is discussed below. The point is that the company was not guilty of any wrongdoing and therefore there is no basis to burden it with an interdict especially in circumstances whereby the company “appears to have been established innocently, honestly and for purposes that were quite above board. It was certainly not conjured up so that Richter, disguised by it, might compete with Louw in tendering for and attending to the job now in hand”.³⁷

In this matter the company was viewed separately and distinguished from Richter and this therefore rendered any interdict sought against him to be academic as it would not affect the company which was effectively awarded the contract at the instance of Richter.³⁸

The judgment in this matter would have been similar with that in the matter of *Gilford Motor Co Ltd v Horne*³⁹ where the Court found that Richter formed the company with the specific intention of using it to evade the restraint by manipulating it so that it pursued opportunities he was not at liberty to pursue in his personal capacity.⁴⁰

³⁵ Delpont *Henocheberg on the Companies Act 71 of 2008* Vol 1 86.

³⁶ Didcott t J in *In J Louw and Co (Pty) Ltd v Richter* 1987 2 SA 241 (N).

³⁷ Didcott t J in *In J Louw and Co (Pty) Ltd v Richter* 1987 2 SA 242 (N).

³⁸ Didcott t J in *In J Louw and Co (Pty) Ltd v Richter* 1987 2 SA 242 (N).

³⁹ n 22.

⁴⁰ Didcott t J in *In J Louw and Co (Pty) Ltd v Richter* 1987 2 SA 242 (N).

It is clear from the judgment that the period of existence of the company that Richter was in control of, persuaded the Court to conclude that indeed the company was not formed in sin.

This is clear in the words of Didcott J when he held that “by the time the tenders were solicited the company had existed and functioned for some eighteen months”.⁴¹

The judgment of Didcott J is narrow and as such I differ with it. Even though the company may have been formed with an honest purpose and there is no intention at the time to commit wrongdoings with it, in the event the company is later dragged to sin by the director who is fully aware that but for the use of a company, personally he is barred by contract or fiduciary duties, the Court must not be only concerned with the case as pleaded, it must go beyond the pleadings and consider the whole evidence before it and pierce under the improper use of the juristic personality if there is evidence which proves that.

Authorities (Smalberger JA in his judgment in *Cape Pacific*) in our jurisdiction support my assertion especially a passage wherein the judge states that “It seems clear that a company can be a façade even though it was not originally incorporated with any deceptive intention, what counts is whether it is being used as façade at the time of the relevant transaction”.⁴²

“Thus if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for dishonest or improper purposes, there is no reason in principle and in logic why its separate personality cannot be disregarded in relation to the transaction in question (in order to fix the individual/s responsible with liability) while giving full effect to it in other respects. In other words, there is no

⁴¹ Didcott J in *J Louw and Co (Pty) Ltd v Richter* 1987 2 SA p 243 (N).

⁴² Smalberger JA *Cape Pacific* case 804.

reason why what amounts to piercing the veil *pro hac vice* should not be permitted”.⁴³

In *Ex parte Gore NO and Others NNO*⁴⁴ the Court asserted that “the term unconscionable abuse of the juristic personality of a company used in section 20(9) of the Companies Act postulates conduct in relation to the formation and use of companies is diverse enough to cover all descriptive terms such as ‘sham’, ‘device’, ‘stratagem’ and conceivably much more”.⁴⁵

Section 20(9) presupposes abuse of the separate legal personality of a Company in three instances namely;

- (a) Incorporation of the company;
- (b) Any use of the company; and
- (c) Any act by or on behalf of the company.

At the time of incorporation the company, the intention of the natural person in control of it is of no legal consequence, the important enquiry is whether at the time of the deal under consideration the company was being used as a façade.⁴⁶

The introduction of section 20(9) of the Companies Act has afforded the Courts comfort on the instances wherein separate legal personality may be disregarded as section 20(9) is a pertinent statutory provision which contains the answers to the question of whether and in what circumstances a Court could pierce the corporate veil.

In this regard the Court stated that “the newly introduced statutory provision affords a firm albeit very flexible defined basis for the remedy which will inevitably operate to erode the foundation of the philosophy

⁴³ Smalberger JA *Cape Pacific* case 804.

⁴⁴ 2013 2 All SA 437 WC.

⁴⁵ Binns-Ward J par j *Gore* case 383.

⁴⁶ Binns-Ward J par 22 *Gore* case 392.

that piercing the corporate veil should be approached with a *priori diffidence*".⁴⁷

The Court stated that the provision introduced an injunction that protects third parties against unscrupulous businessman that evade legal consequence and or conceal the true state of affairs in relation to their companies.⁴⁸

"South African authorities demonstrate that despite the repeated affirmation that the Courts enjoy no general discretion to disregard the separate legal entity of a company merely because it would be just and equitable to do so, Courts will ignore or look behind the separate legal personality of a company where justice requires it and not only when there is no alternative remedy. The involvement of fraud or other improper conduct has generally been present in the cases in which the veil has been lifted or pierced".⁴⁹

2.2.2 CONCEALMENT PRINCIPLE

"The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is the interposition of a company or perhaps several companies so as to conceal the identity of the real actors which will not deter the Courts from identifying them, assuming that their identity is legally relevant".⁵⁰

The doctrine of *alter ego* is in essence agency as it presupposes a situation whereby the roles are reversed and the company is a representative of the director instead of the company being the principal to the director.⁵¹The company then is directed to carry out what is in essence the business of the person in control of it, the so called principal

⁴⁷ Binns-Ward J par 34 *Gore* case 382.

⁴⁸ Binns-Ward J par 34 *Gore* case 399.

⁴⁹ Binns-Ward J par 28 *Gore* case 382.

⁵⁰ Lord Sumption, *Prest* case par 28.

⁵¹ HY Yeo and R Yeo "Alter Ego Exception in Corporate Veil Piercing" 2015 27 Singapore Academy of Law Journal 195.

and in such a case notwithstanding the separate legal personality legal effect is not given to it.⁵²

The Yeos' state that "*alter ego*" and "corporate veil piercing" are different principles.

They explain this declaration by asserting that "corporate veil piercing has to do with treating the acts or liabilities of the company as the liabilities and acts of the shareholder hiding behind the veil-that is treating the business of the company as that of its controlling shareholder whereas on the other hand, they state, *alter ego* has to do with the rules of attribution where one has to ascertain which acts of the people [that is human agents] will count as acts of the company".⁵³

In *Green v Bestobell Industries Pty*⁵⁴ an Australian Court treated a company into which contracts had been channelled as the alter ego of the director. In a recent judgment in the Western Cape Division of the High Court of South Africa, in terms of the *alter ego* doctrine a company was held to have been the *alter ego* of its shareholder and therefore immovable property owned by the company was vested in the shareholder instead of the company.⁵⁵

In testing the facts and circumstances of a case in order to apply the *alter ego* doctrine and thereby pierce the corporate veil, the Courts will look to the total dealings of the corporation and individual.⁵⁶

The specific factors which are relevant include: lack of corporate governance; thin capitalisation; recognition of separate ownership of property by company; extent of shareholding and control of the individual concerned; and whether there was no recognition of the separate legal personality.⁵⁷

⁵² Blackman Lawsa (1st Reissue) Volume 4, Part 1 para 46.

⁵³ HY Yeo and R Yeo "*Alter Ego Exception in Corporate Veil Piercing*" 2015 27 Singapore Academy of Law Journal 193.

⁵⁴ 1984 W.A.R 32-40.

⁵⁵ *Van Zyl No v Kaye and others* case no 1110/14(WC) (not reported).

⁵⁶ *O' Donnel case* 277-278.

⁵⁷ *O' Donnel case* 277-278.

Alter ego is not a ground of piercing but rather a diagnostic tool to identify the person in control of the company for a legal purpose.⁵⁸In essence, the doctrines (*alter ego and veil piercing*) are different and not synonyms as *alter ego* is not veil piercing but rather a diagnosis to detect concealment of the true substance of things.⁵⁹

3 APPLICATION OF PRINCIPLES TO CASES INVOLVING ABUSE OF JURISTIC PERSONALITY TO BREACH FIDUCIARY DUTIES

“At common law the duty to act in good faith and in the best interest of the company is the paramount and overarching fiduciary duty of directors from which all other duties flow”.⁶⁰ In the Companies Act, the fiduciary duties of directors are spelled out in section 76.

The focus of the analysis below is to evaluate the reasoning and decision by Courts upon acceptance of evidence proving abuse of the separate legal personality of a company to breach fiduciary duties. The application of the piercing principles (evasion and concealment) is illustrated by reference to cases where the Courts adjudicated cases of abuse of corporate personality. Many cases will fall in both categories, but in some circumstances the difference between them may be critical.⁶¹

3.1.1 *CMS DOLPHIN LTD V SIMONET*

The abuse of the separate legal personality of an entity used by a director to breach the fiduciary duty to act in the best interest of the company by usurping corporate opportunities was considered in *CMS Dolphin Ltd v Simonet*⁶² wherein loss of profit was claimed as a result of corporate opportunities routed by Simonet to his company Blue.⁶³

⁵⁸ HY Yeo and R Yeo “*Alter Ego Exception in Corporate Veil Piercing*”2015 27 Singapore Academy of Law Journal 194.

⁵⁹ HY Yeo and R Yeo “*Alter Ego Exception in Corporate Veil Piercing*”2015 27 Singapore Academy of Law Journal 194.

⁶⁰ Cassim *Contemporary Company Law* (2012) 523.

⁶¹ *Prest case* par 28.

⁶² 2001 2 BCLC 704 par 98-105.

⁶³ *Simonet case* par 82.

There were two (2) questions of law that had to be considered and adjudicated. The enquiries were as follows:

- (a) Whether fiduciary duties require a director not to take with his own company contracts in line of business of the former company;⁶⁴and
- (b) Whether fiduciary duties require a director to declare profits made by his company to his former company from such contracts.⁶⁵

The case against Simonet was that he breached the fiduciary duty requiring him to act in the best interest of the Company by diverting corporate opportunities properly belonging to *CMS* to his corporate vehicle *Blue* and for that reason he should pay over such profits.⁶⁶

This form of an allegation or complaint against Simonet and the latter question of law, spelled out above, which the Court had to consider is the essence of this dissertation. An answer in the affirmative, will raise a further question; how and in what manner is the director and or the company made to account for the profits.

To get through the enquiry of how and in what manner must the director hiding behind a company must be held liable, the Court in revealing its thought asked the question: “Does it make a difference to the remedy for account of profits whether the director exploits the opportunity personally or through a partnership, or through a company controlled by him”.⁶⁷

⁶⁴ *Simonet* case par 81.

⁶⁵ *Simonet* case par 81.

⁶⁶ *Simonet* case par 82.

⁶⁷ *Simonet* case par 98.

The Court answered this question in the negative by stating that “for the purposes of corporate opportunity rule it makes no difference whether the opportunity in question is taken up by the director himself or by a corporate vehicle established by him for the purpose of taking the opportunity, the Court may hold the director and his company jointly liable for misappropriating a corporate opportunity as the directors are equally liable with the corporate vehicle formed by them to take unlawful advantage of the business opportunities and the Court stated, the reason is that they have jointly participated in the breach of trust”.⁶⁸

The reasoning of the Court was further that “it does not make a difference whether the business is taken up by the corporate vehicle directly, or is first taken up by the directors and then transferred to a company as *Cook v Deeks* shows that a director who places the benefit of the business opportunities in a partnership or a company will be liable for the whole profit, and also make it clear that a director who is the active agent in breach of a fiduciary duty cannot evade responsibility by transferring the benefit to others”.⁶⁹

“I do not consider the liability of the directors in *Cook v Deeks* would have been in any way different if they had procured their new company to enter into the contract directly, rather than (as they did) enter into it themselves and then transfer the benefit of the contract to a new company. Alternatively (although it is my view rather artificial to so treat it) the company may be liable to account for the profits on the basis of knowing receipt of trust property (including profit deriving from a breach of trust) and the director / shareholders who set it up will be liable as principal wrongdoers. Whatever the analysis they will be constructive trustees of the profits and liable to account to the beneficiary even if those profits are no longer available”.⁷⁰

⁶⁸ *Simonet* case par 103.

⁶⁹ *Simonet* case par 104.

⁷⁰ *Simonet* case par 104.

The approach taken by the Court in *Simonet's* case is that it is not necessary to even go to extent and resort of piercing the corporate veil. In my view the breach of trust remedy is two pronged and wide in that it captures both the director and the corporate entity and impose liability.

Simonet's case is a classical concealment of the true controllers with which the company must be identified with and therefore the Court in its verdict applied concealment principle as it did not desist from identifying the real controllers merely because of the interposition of a company to conceal the controllers' actual identity. When the concealment principle (it does not require piercing of the veil) is applied, the façade is not disregarded as the Court is only looking behind it to discover the facts which the corporate structure is concealing.⁷¹

In *Bray v Ford* regarding the principle of constructive trust, Lord Herschell asserted that “it is an inflexible rule of the Court of equity that a person in a fiduciary position is not, unless otherwise authorised entitled to make a profit; he is not allowed to put himself in a position where his interests and duty conflict”.⁷² In constructive trust, where profit was made, “beneficiaries acquire rights over those profits, and the trustees must pay that money or the money's worth back to the beneficiaries”.⁷³

Recently constructive trust was considered and clarified by the Supreme Court of the United Kingdom in the marathon case of *FHR European Ventures LLP v Cedar Capital Partners LLC*.⁷⁴ Lord Neuberger stated “the centrally relevant issue is that, at least some cases where an agent acquires a benefit which came to his notice as a result of his fiduciary position, or pursuant to an opportunity which results from his fiduciary position, the equitable rule (“the rule”) is that he is to be treated as

⁷¹ *Prest* case par 28.

⁷² 1896 AC 44.

⁷³ *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd & Others* 2007 EWHC 915 (Ch) (30 April 2007).

⁷⁴ 2014 UKSC 45 (16 JULY 2014), This matter concerned a legal question whether a bribe or secret commission received by an agent is held by the agent on trust for his principal, or whether the principal merely has a claim for equitable compensation in a sum equal to the value of the bribe or commission.

having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal.

In such cases, the principal has a proprietary remedy in addition to his personal remedy against the agent, and the principal can elect between the two remedies”.⁷⁵ “It must be noted that constructive trusts have found no place in South African trust law much of the functions performed by the constructive trust can be achieved through the law of obligations”.⁷⁶

Having regard to the fact that constructive trust is not recognised in South Africa, in order to come close to the principles articulated in *Simonet's* would be for compelling evidence to be led, in our days, to ground an argument for section 20(9) of the Companies Act to be invoked.

Alternatively a claim for unlawful competition would have to be made out on the basis that the director has committed a wrongful act of trading through another company in contravention (breach of fiduciary duties) of an express statutory prohibition which will be the fiduciary duties as spelled out in section 76 of the Companies Act which also covers confidential corporate information which they will be privy to.

A claim of unlawful competition by a company against a director would rest on the principle that “a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication”.⁷⁷

⁷⁵ *Cedar Capital Partners* case par 7.

⁷⁶ E Cameron “*Constructive Trusts in South African Law: The Legacy Refused*” 1999 ELR 341.

⁷⁷ *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* 1960 RPC 128 CA referred to in *Multi Tube Systems (Pty) Ltd v Ponting and Others* 1984 (3) SA (D) at 189B-I.

3.1.2 *ATLAS ORGANIC FERTILIZERS (PTY) LTD V PIKKEWYN (PTY) LTD*

In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn (Pty) Ltd*⁷⁸ this was an action for an interdict and damages based on unlawful competition in relation to the manufacture and sale of various fertilizers. The director of Pikkewyn was earlier in charge of Atlas and it was alleged that he embezzled corporate opportunities to this company that he formed during his notice period.⁷⁹ In so doing it was alleged that he impoverished Atlas by deliberately making it lose contracts and soliciting employees.⁸⁰

The Court ruled in favour of Atlas and stated that the director of Pikkewyn breached his fiduciary duties by usurping contracts and soliciting employees.⁸¹ As far as setting up a competitive company, the Court rejected the contention that the incorporation and preparation to trade by a company amounted to breach of fiduciary duties.⁸² The Court could not find anything illegal and against acceptable behaviour in society in facilitating alternative future means of income.⁸³

The injunction sought against Pikkewyn for unlawful completion did not succeed but the Court allowed a claim in delict in favour of the plaintiff jointly and severally against the director of Pikkewyn and Pikkewyn on the strength of the proven case of usurping contracts and lobbying employees of Atlas.⁸⁴

⁷⁸ 1981 2 SA 173 (T).

⁷⁹ *Pikkewyn* case 177.

⁸⁰ *Pikkewyn* case 178.

⁸¹ *Pikkewyn* case 197.

⁸² *Pikkewyn* case 199.

⁸³ *Pikkewyn* case 199.

⁸⁴ *Pikkewyn* case 206.

In my view the company Pikkewyn was held liable in terms of the concealment principle, as the company replaced Lion Cachet, its director, in doing business personally. The company therefore became his conduit directly involved and must therefore be liable for all damages flowing therefrom. The Court did not concern or find it necessary to pierce the veil, the mere fact that Lion Cachet was identified with the company, it was enough to ground liability.

As I have stated above that in order for a company to be found liable or its veil pierced, it does not have to have been formed in deceit, even if formed for a noble purpose, the moment it is later used or involved by its controller in deceit then it falls to be liable.

3.1.3 *CANADIAN AERO SERVICE LTD V O'MALLEY*

In *Canadian Aero Service Ltd v O'Malley*⁸⁵ it was asserted that O'Malley and Z who were high-ranking employees, but not directors, owe fiduciary duties to Canaero. These highly skilled employees resigned and started their own company which secured contracts envied by Canaero.⁸⁶

The Court stated that “their relationship had betokened loyalty, good faith and avoidance of a conflict of duty and self-interest. As fiduciaries O'Malley and Z were liable to Canaero for breach of a fiduciary duty in diverting to themselves, or to another company associated with them a maturing business opportunity that the company was actively pursuing”.⁸⁷ O'Malley and Zarzycki's company Terra Surveys Limited was joined in the action as the vehicle through which they usurped the contract which Canaero had been bargaining for.

⁸⁵ 1973 40 DLR 3d 371.

⁸⁶ *Canaero* case 594.

⁸⁷ *Canaero* case 593.

The Court applied the concealment principle in rejecting the defence of O'Malley and Zarzycki by reasoning that the evidence shows that it is them who are in control of the company even though they assert that the company is a separate legal personality.

The court looked over the form in which they had cast the exploitation of the contract and had regard of the real state of affairs.⁸⁸ The Court stated that “there is no doubt that Terra Surveys Limited was conceived as a company through which O'Malley and Zarzycki could pursue the same objects that animated Canaero”.⁸⁹

O' Malley and Z were precluded from hiding behind the corporate veil and thereafter claim immunity based on the principle of separate existence of a company. Yet again this was a classic case of concealment of identity of the true actors of the company. The defence advanced by O' Malley and Z that it is the company not them is clear attempt escape the arm of the law which required them not to breach fiduciary duties. The company was identified with them and their acts and deeds were recognised through the eye of equity.

3.1.4 DA SILVA V C H CHEMICALS (PTY) LTD

*Da Silva v C H Chemicals (Pty) Ltd*⁹⁰ was a similar case with that of *Atlas Organic Fertilizers* discussed above wherein Da Silva, a managing director of CH Chemicals (Pty) Ltd resigned and whilst serving out his notice period he had acquired two shelf companies; had changed their names to Resinex Plastics (Pty) Ltd and Resinex Southern Africa (Pty) Ltd was appointed a director of both companies and had hired premises for the two companies.⁹¹

⁸⁸ *Canaero* case 594.

⁸⁹ *Canaero* case 596.

⁹⁰ 2008 6 SA 620 SCA.

⁹¹ *Da Silva* case par 13.

“Da Silva went further. It will be recalled that whilst still with the plaintiff, but acting for and behalf of the second defendant, he purchased three containers of LLDPE which is a plastic product which he arranged to be sold-on by the second defendant (Resinex)”.⁹² “The Court held that Da Silva should have pursued the transaction for CH instead of Resinex and his conduct amounted to breach of fiduciary duty owed to CH Chemicals”.⁹³

Even though Da Silva had pursued the opportunity through Resinex not personally the Court held that he breached his fiduciary duties. The Court stated that “I am satisfied that the transaction in the instant case was one which Da Silva while still the managing director of CH Chemicals was obliged to pursue for the benefit of the company he was serving and not for the benefit of the second defendant (new shelf company)”.⁹⁴

In this matter the claim was against Da Silva personally and against the two shelf companies acquired by him to acquire the opportunities. The Court reasoned in a similar fashion as in the *CMS Dolphin* case discussed above by lifting the veil to see Da Silva and held him liable even though he was concealing his identity by through a company.⁹⁵

Unlike in the *CMS Dolphin* case where the court had latitude to impose liability in terms of constructive trust, the second defendant Resinex’s conduct was scrutinised and found improper under unlawful competition which I dealt with briefly towards the end of the content under heading 3.1.1 above.⁹⁶

⁹² *Da Silva* case par 55.

⁹³ *Da Silva* case par 55.

⁹⁴ *Da Silva* case par 55.

⁹⁵ *Da Silva* case par 56.

⁹⁶ *Da Silva* case par 55.

There is no indication in the judgment of the Court that a claim was made to pierce the corporate veil of the second defendant as the vehicle that Da Silva utilised to usurp the LLDPE opportunity and as such the Court does not deal with issues of piercing of the corporate veil in order to impose liability also on the second defendant. At the time this matter was decided the *Prest* case which the piercing principles are introduced in wasn't decided yet however in essence the manner of imposing liability of the incumbent director is consistent with the concealment principle. This confirms my earlier assertion that the piercing principles merely introduce new terminology instead of suggesting new law.

The trend of the Courts in cases involving breach of fiduciary duties and introduction of intervening companies is that they find liability by looking (lifting instead of piercing) behind veil to look at the true state of affairs then impose liability on both the company and the director in terms of the concealment principle.

3.1.5 SIBEX CONSTRUCTION (SA) (PTY) LTD V INJECTASEAL CLOSE CORPORATION

In *Sibex Construction (SA) (Pty) Ltd v Injectaseal CLOSE CORPORATION*⁹⁷ Sibex sought an interdict against Injectaseal upon apprehending that an entity controlled by former employees of Sibex was about to be engaged by Sasol and Natref their main clients. The interdict was not successful and an interim order was issued effectively directing withdrawal of quotes and preventing further submissions pending the final judgment.⁹⁸

⁹⁷ 1988 2 SA 54 (T).

⁹⁸ *Sibex* case 69.

In prohibiting Injectaseal the Court stated that “there is a probability that the setting up of injectaseal was the result of a conspiracy between its members at a time when both of them still owed a duty of good faith to Sibex”.⁹⁹

The Court interdicted Injectaseal the Close Corporation with separate legal personality together with its members on the reasoning that the members of Injectseal owed Sibex a duty of good faith. The Close Corporation was held liable on the basis that the members of Injectseal used confidential trade secrets obtained in the course of employment by Sibex and the use of such trade secrets for the benefit of Injectseal against Sibex constituted unlawful competition.¹⁰⁰ South African courts are consistent in imposing liability in terms of unlawful completion as we do have a remedy in our law called constructive trust.

The members of Injectaseal perhaps contemplated that by using a Close Corporation it will shield them from being held to be in breach of their fiduciary duties but the law sees through that and deals with the substance of the legal personality over form. Despite the interdict the Court did not go further to pierce the corporate veil of Injectaseal in order to found liability on its founders and therefore the concealment principle was applied instead of the evasion principle.

In an English case of *Gencore ACP Ltd v Dalby*¹⁰¹ it was held that the presence of a legal entity between the directors and former company to which fiduciary duties are owed, does not limit the reach of the arm of law from making effective judgments. The Court will not ever be barred by the legal personality of the company from finding the nature of its association with the director alleged to have breached fiduciary duties.¹⁰²

⁹⁹ *Sibex* case 68.

¹⁰⁰ *Sibex* case par 63-64.

¹⁰¹ 2000 BCLC 734.

¹⁰² *Prest* case par 31.

4 APPLICATION OF PRINCIPLES TO CASES OF JURISTIC PERSONALITY ABUSE BY DIRECTORS TO ESCAPE CONTRACTS IN RESTRAINT OF TRADE

4.1 *LE BERGO FASHIONS CLOSE CORPORATION V LEE AND ANOTHER*

The use of a separate legal entity to evade contractual obligations was further considered in *Le Bergo Fashions CC v Lee and Another*.¹⁰³ This matter was given rise to by a contract in restraint of trade, in terms of which Lee agreed not to have another business similar to that which she sold.

In the agreements for sale of the business, the purchase price of certain excess stock of fabric was not included and Lee saw an opportunity of selling through her company the fabric to customers of the business she just sold.¹⁰⁴ In opposing the case made against her and her company she asserted that it was not the agreement of the parties that the restraint will apply to her company.¹⁰⁵

Hoffman J asserted that the restraint was sought to be enforced on the company whereas the intention was to only restrain Lee.¹⁰⁶ The judge asserted further that notwithstanding the fact that it could not be found that the company had ever anticipated being bound by the restraint clause, it is however alleged that Lee is hiding behind the company in order to make a case that the restraint is not applicable to the company.¹⁰⁷

¹⁰³ 1998 2 SA 608 C.

¹⁰⁴ *Le Bergo Fashions* case 611-612.

¹⁰⁵ *Le Bergo Fashions* case 611.

¹⁰⁶ *Le Bergo Fashions* case 613.

¹⁰⁷ *Le Bergo Fashions* case 613.

The factors which are taken into account to make a decision whether a legal entity is used as a conduit are discussed under the concealment principle and these factors being lack of corporate governance, thin capitalisation, recognition of separate ownership of property by company, extent of shareholding and control of the individual concerned and whether there was no recognition of the separate legal personality were relied on to contend that the restraint should be applicable to the company;¹⁰⁸

These factors collectively were advanced to sustain the argument that the respondent had been guilty of improper conduct using her company as a façade behind which she had engaged in business in breach of the restraint of trade.

The Court concluded that the restraint had been breached and that even though the company had not been a signatory to the restraint agreement, its competition with the applicant had amounted to deliberately supporting the first respondent to breach her undertaking in the restraint clause and such assistance is wrong in law and it calls for an interdict.¹⁰⁹

In essence the Court applied the concealment approach by identifying Lee with the close corporation and therefore imputed Lee's actions to it as it was carrying out what Lee was restrained for.

It seems as if the approach taken by the Court in this matter could be applied in similar circumstances where a fiduciary duty is breached. I assert so for reason that the Court stated that "I am of the view that the factors relied upon by the applicant and enumerated above are sufficient to sustain the argument that the first respondent is guilty of improper conduct in using her company, the second respondent, as a *façade*

¹⁰⁸ *Le Bergo Fashions* case 613.

¹⁰⁹ *Le Bergo Fashions* case 614.

behind which she has engaged in business in breach of the restraint of trade undertaking”.¹¹⁰

In the end the Court did not make an order as to whether it is piercing the corporate veil or not but stated that “it is satisfied that whether be it in the basis of veil piercing, or on the basis of interference in contractual relations, the second respondent must be interdicted”.¹¹¹

The principle applied by the Court in this matter was the concealment principle, as it did not pierce the veil but identified Lee as her identity was legally relevant. The relevance of her identity is to assess whether her deeds should be imposed on the company as it was alleged that she is acting through the company.

4.2 *DIE DROS (PTY) LTD AND ANOTHER V TELEFON BEVERAGES CLOSE CORPORATION*

*Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others*¹¹² was yet another matter involving restraint of trade stipulations in a franchise agreement between the applicant, fourth respondent and Van Der Westhuizen who were members of a Close Corporation.¹¹³ The applicants alleged non adherence to the restraint by the first and a fourth respondent by using the third respondent Martiq 631 CC as their *alter ego* to conduct the business of a De Kelder Restaurant.¹¹⁴ The contention was primarily based on the argument that the Close Corporation was acting on the instructions of the fourth respondent and as such the law must prevail and apply the restraint on the fourth respondent.¹¹⁵

¹¹⁰ *Le Bergo Fashions* case 614.

¹¹¹ *Le Bergo Fashions* case 616.

¹¹² 2003 4 SA 207.

¹¹³ *Die Dros* case par 11.

¹¹⁴ *Die Dros* case par 22.

¹¹⁵ *Die Dros* case par 22.

The fourth respondent refuted the allegations and distanced himself from the operation of the De Kelder Restaurant in order to escape the burden of the restraint.¹¹⁶

Van Reenen J held that “Courts permitted the separate legal personality of a Close Corporation or company to be disregarded where a natural person who was subject to a restraint of trade used a Close Corporation or company as a front to engage in the activity that was prohibited by an agreement in restraint of trade. On that basis, the fourth respondent could have been restrained if the applicants could prove, first, that the restraint clause was binding on the fourth respondent and, secondly, that the fourth respondent was using the third respondent as a front to engage in the activities prohibited by the clause”.¹¹⁷

The Judge further held that “the applicants’ description of the first respondent as merely a corporate vehicle through which the fourth respondent conducted business as a franchise was redolent of the first applicants being the *alter ego* of the fourth respondent and held further that there was an almost total absence of primary facts that showed that the fourth respondent was using the first respondent as a mere instrumentality or business conduit for the promotion of his personal affairs”.¹¹⁸

The Court found that there was no proof that the first respondent was the fourth respondent’s *alter ego*.¹¹⁹ The application was dismissed on the basis that the applicants failed to show that the provisions of the restraint clause of the franchise agreement are binding on the fourth respondent. In rejecting the *alter ego* argument the Court stated that “the applicants have failed to show that the company was used in a manner that constituted unconscionable abuse of its corporate personality.

¹¹⁶ *Die Dros* case par 17.

¹¹⁷ *Die Dros* case par 24.

¹¹⁸ *Die Dros* case par 26.

¹¹⁹ *Die Dros* case par 29.

The fact that it may have been controlled by Kaye and that its property was consequently used to secure the obligations of other companies in which Kaye had a controlling interest did not constitute an abuse of Bella Densel's corporate personality".¹²⁰

The Court took a narrow approach in adjudicating this matter by focusing on the approach that upon proof that the Close Corporation is an *alter ego* of the fourth respondent, then piercing of the veil shall follow and in failing to do so, the fourth respondent shall be permitted to trade through juristic person even though subject of a restraint. Had the Court understood the application of the concealment principle, it would not have placed much reliance on whether the restraint is binding or not in the Close Corporation but to rather examine closely the relationship between the fourth respondent and the Close Corporation.

The examination of the relationship would have provided an answer as to whether the Close Corporation should be identified with the fourth respondent for the purpose of imposing liability, which would not have been to pierce the veil of the Close Corporation.

4.3 ***GILFORD MOTOR CO LTD V HORNE***

*Gilford Motor Co Ltd v Horne*¹²¹ was another matter involving a contract in restraint wherein Horne a former managing director of Gilford Motor Co Ltd bound himself and agreed not be involved in an occupation of business similar than that which he had resigned from for a period of five years thereafter. Horne formed his own company and did exactly that which was prohibited. Gilford applied for an interdict against Horne as well as the company. Horne's defence was that the company has a separate legal personality and therefore it is only it that must be looked upon for recourse.¹²²

¹²⁰ *Kaye* case par 33.

¹²¹ n 22.

¹²² *Prest* case par 29.

The appeal Court rejected Horne's resistance and prohibited the company and Horne personally. The Court saw through the separate legal personality as Horne was abusing the purpose for which the corporate veil was developed for by doing through it actions which he is prohibited from undertaking. The injunction was granted on the concealment principle against Horne.¹²³

The Court in this matter might have justified the restriction by applying the identification principles in order to identify Horne as the natural person in control of the company to ground an equitable remedy against it.¹²⁴ Lord Sumption's view about this matter was that "the company was restrained in order to ensure that Horne was deprived of the benefit which he might otherwise have derived from the separate legal personality of the company".¹²⁵

6 CONCLUSION

I agree with Lord Sumption, that "there are two types of cases in the past, which is before the *Prest* case, where judges have described their decisions as being based on piercing the veil, namely those concerned with concealment and evasion".¹²⁶

These principles shall in time be entrenched in our terminology as they are not intended to abolish the law of corporate veil piercing as far as it is stated in leading authorities such as the *Cape Pacific* case. In my view the concealment and evasion principles are distinguishable as the former is associated with lifting the corporate veil whereas the latter is associated with piercing the corporate veil.

¹²³ *Prest* case par 29.

¹²⁴ *Prest* case par 29.

¹²⁵ HY Yeo and R Yeo "Alter Ego Exception in Corporate Veil Piercing" 2015 27 Singapore Academy of Law Journal 185.

¹²⁶ HY Yeo and R Yeo "Alter Ego Exception in Corporate Veil Piercing" 2015 27 Singapore Academy of Law Journal 183.

“To lift the corporate veil means to have regard to the shareholding in a company for some legal purpose”¹²⁷ when the Court lifts a corporate veil, it does not mean that liability from the company is attached to the shareholders or controller and “To pierce the corporate veil is an expression reserved for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders”.¹²⁸

Examination of cases in our jurisdiction and those of Courts in the jurisdictions such as England and Canada with regards to the substantial application of the concealment and evasion principles in instances of abuse of corporate personality reveal the extensiveness of a strict ethic in this area of law.¹²⁹

In my view both these grounds for the purpose of South African law constitute unconscionable abuse of the separate legal personality which therefore justify disregarding of the separate personality of the company in terms of section 20(9) of the Companies Act. There will be no anomaly in law if the concepts are employed, moreover the Court in terms of section 20(9) may go beyond piercing the corporate and make any order against the shareholder or member in the case of non-profit companies to ensure that the piercing of the veil takes practical effect.

It is clear that the Courts do not always consider the approach of piercing the corporate veil as necessary since *Cook v Deeks* shows clearly as does *Canadian Aero Services Ltd v O'Malley* that directors are equally liable with the corporate vehicle formed by them to take unlawful advantage of the business opportunities in terms of the concealment principle.

As it was seen in *Sibex Construction (SA) (Pty) Ltd v Injectaseal Close Corporation and Da Silva v C H Chemicals (Pty) Ltd* South African Courts also prefer the approach of holding the director and the company used as a vehicle to usurp corporate opportunities jointly liable for breach of fiduciary duties and for unlawful competition. Unlawful competition is an alternative remedy in South Africa as liability based on constructive trust is not recognised.

¹²⁷ *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 1 Lloyd's Rep 563.

¹²⁸ *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 1 Lloyd's Rep 563.

¹²⁹ *Canaero* case 607.

Similarly in instances of use of a company or a Close Corporation to overcome contractual obligations as it was seen in *Le Bergo Fashions Close Corporation v Lee and Another and Gilford Motor Co Ltd v Horne* that Courts prefer the approach of interdicting both the director and the company or Close Corporation used as a vehicle to overcome the contractual obligations instead of piercing the corporate veil. The basis of imposing liability or allowing the interdict on the basis that the juristic personalities were used to conceal the identity of the true actors in order to evade legal obligations.

Having regard to all the cases discussed in this dissertation including the recent case of *Prest*, it is clear that when a person (director) is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control, the Court may¹³⁰ then pierce the veil for the specific purpose and only for the purpose, of depriving the company or its controller of the advantage they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the evidence will in practice disclose the connection between the company and its controller which will render it impractical to pierce the corporate veil.¹³¹

UNIVERSITY
OF
JOHANNESBURG

¹³⁰ The use of the word suggests that the Court has a discretion to pierce the corporate veil depending on the circumstances, it may take the route of the concealment principle or evasion principle.

¹³¹ *Prest* case par 35.

7 BIBLIOGRAPHY

7.1 BOOKS AND ARTICLES

Blackman M

Commentary on the Companies Act

Vol 1

Juta & Co

Claremont

(2011)

Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J and Yeats J

Contemporary Company Law

Second edition

Juta & Co Ltd

Claremont

(2012)

Delpert

Henochsberg on the Companies Act 71 of 2008

Vol 1

Lexis Nexis

Durban

(2014)

Pretorius JT, Delpert P A, Havenga M and Vermaas M

Hahlo's South African Company Law through cases

Juta, sixth edition

Claremont

(1999)

Cameron “Constructive Trusts in South African Law: The Legacy Refused”, 1999, ELR, 34.

Moore “A temple built on faulty foundations: Piercing the corporate veil and the legacy of Salomon v Solomon” 2006 *JBL* 180.

Larkin “Regarding judicial disregarding of the company’s separate identity” 1989 SAMLJ 277.

HY Yeo and R Yeo “Alter Ego Exception in Corporate Veil Piercing” 2015 Singapore Academy of Law Journal 27.

7.2 LEGISLATION

The Companies Act 71 of 2008 as amended.

The Close Corporations Act 69 of 1984.

7.3 CASES

South Africa

Atlas Organic Fertilizers that (Pty) Ltd v Pikkewyn (Pty) Ltd 1981 (2) SA 173 (T).

Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995 (4) SA 790.

Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 550.

Da Silva v C H Chemicals (Pty) Ltd (2009) 1 All SA 216 (SCA).

Die Dros (Pty) Ltd and Another v Telefon Beverages Close Corporation and Others 2003 (4) SA 207.

Ex parte Gore NO and Others NNO 2013 2 All SA 437 WC.

J Louw and Co (Pty) Ltd v Ritcher and others 1987 (2) SA 237 (N).

Le Bergo Fashions Close Corporation v Lee and Another 1998 (2) SA 608.

The Shipping Corporation of India Ltd v Evdomon Corporation and another 1994 (1) SA 550 (A).

Robinson v Randfontein D Estates Gold Mining Co Ltd 1921 AD 168 at 177.

Sibex Construction (SA) (Pty) Ltd v Injectaseal Close Corporation 1988 (2) SA 54 (T).

Van Zyl No v Kaye and others case no 1110/14(WC) (unreported).

Australia

Green v Bestobell Industries Pty 1984 W.A.R 32, 40.

Canada

Cook v Deeks 1916 1 AC 554 (PC).

Industrial Development Consultants Ltd v Cooley 1972 1 WLR 443.

Canadian Aero Service Ltd v O'Malley 1973 40 DLR 3d 371.

England

Atlas Maritime Co SA v Avalon Maritime Ltd [1991] 1 Lloyd's Rep 563.

Bray v Ford 1896 AC 44.

CMS Dolphin Ltd v Simonet 2001 2 BCLC 704.

FHR European Ventures LLP v Cedar Capital Partners LLC 2014 UKSC 45 (16 JULY 2014).

Gilford Motor Co Ltd v Horne 1962 1 All ER 442.

Gencore ACP Ltd v Dalby 2000 BCLC 734.

Salomon v A Salomon & Co Ltd 1897 AC 22.

Sinclair Investment Holdings SA v Versailles Trade Finance Ltd & Others 2007 EWHC 915 (Ch) (30 April 2007).

Prest v Petrodel Resources Ltd 2013 3 WLR.

VTB Capital Plc v Nutritek International Corporation 2012 2 Lloyd's Rep 313.