

Short notes on:

WHEN CAN YOU BE HELD PERSONALLY LIABLE WITHIN YOUR COMPANY AND HOW CAN THIS BE BROUGHT ABOUT?

Introduction

When a corporation is registered, an individualistic entity separate from that of its shareholders is created. This enables the corporation to function under its own name, as a juristic person. This separation is deemed 'the corporate veil'. However, although incorporation can provide for the limitation of liability of those persons behind the company, this principle may not be abused. *"The courts have made it clear that the law looks at the substance of things, rather than mere legal form. Courts will not allow a legal entity to be used to 'justify wrong, protect fraud or defend crime.'"*¹ There are certain circumstances that require this veil to be removed, known as 'piercing the corporate veil.'

Defining the Corporate Veil

*"A legal concept that separates the personality of a corporation from the personalities of its shareholders, and protects them from being personally liable for the company's debts and other obligations."*² There are, however, instances where the directors and/or shareholders of a company will be held personally liable where the protection usually afforded by the corporate veil can be pierced by way of judicial scrutiny.

Piercing the Corporate Veil

The concept 'piercing the corporate veil' can be defined as; *"where a court determines that a company's business was not conducted in accordance with the provisions of corporate legislation (or that it was just a façade for illegal activities) it may hold the shareholders personally liable for the company's obligations."*³

In our law, we have two instances in which courts can invoke the action of piercing the corporate veil namely; our statutory provision that is section 20(9) as read with section 7 of the Companies Act 71 of 2008 as amended (hereinafter referred to as 'the Act') and the common-law.

¹ Davis D et al *Companies and other Business Structures in South Africa* (Oxford Cape Town) 30.

² Anon "Business Dictionary" <http://www.businessdictionary.com/definition/corporate-veil.html> (Accessed 12 April 2018).

³ Anon <http://www.businessdictionary.com/definition/corporate-veil.html> (Accessed 12 April 2018).

How Do We Pierce The Corporate Veil In Terms Of Common – Law?

There is no specific outline, principles or requirements in which to apply the common – law to a matter such as this. There is nothing truly concrete to enable a certain and specific direction in the application of common – law.

As held in *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 2 SA 303 (C):

“Whatever form it takes, veil piercing is an "exceptional procedure" and, as pointed out by Scott JA in Hülse - Reutter & others v Gödde, a court has no general discretion simply to disregard the existence of a separate corporate identity whenever it considers it just or convenient to do so.”

How Is The Corporate Veil Peirced In Terms Of Statutory Law?

Where common – law follows the principle of ‘last resort’, Section 20(9) does not. The case of *Ex parte Gore* 2013 3 SA 382 (WCC) provided as follows:

“The newly introduced statutory provision affords a firm, albeit very flexibly defined basis for the remedy, which will inevitably operate, I think, to erode the foundation of the philosophy that piercing the corporate veil should be approached with an a priori diffidence. By expressly establishing its availability simply when the facts of a case justify it, the provision detracts from the notion that the remedy should be regarded as exceptional, or "drastic”.

Courts have been awarded more powers through Section 20(9) than with the common – law. This can be illustrated by the fact that the scope of the legal basis which Courts rely upon to institute the piercing of the corporate veil has been widened. Also, unlike common – law, regardless of whether another remedy is available or not, this will be an actionable remedy.

Conclusion

Where Section 20(9) is inadequate, the common – law approach may be resorted to. It is important to consider the provision of Section 7 of the Companies Act. What this entails is that all Sections in the Companies Act must be applied in such a manner that the Bill of Rights as provided for in the Constitution is upheld. Therefore, where common – law is to provide a guideline for the interpretation of Section 20(9), it must be done with the objective to ensure the Section is applied in a manner that will conform with the purpose of the Companies Act set out in Section 7. It has not been found whether the guideline factor of common – law may be applied conjunctively with statutory law or rather in the alternative.

What then is the preferred application? When a company is brought into existence, all entities and individuals believe that the company will conduct itself in a bona fide manner. Therefore, is it the protection of the company that is of more importance to the Court or the interest of any stakeholder that should be held in higher regard?

The writer is therefore of the opinion that the application of Section 20(9) is the more desirable remedy to rely upon as there is no alternative that must first be identified and applied. This would entail that the wrongdoer does not have an extra “shield” to be protected by and would be held accountable for his/ her wrongdoings in their personal capacity rather than have them hide within the company. Could this in turn prevent the future mala fide incorporation of a company or prevent actions of mala fide intentions if an individual no longer has the indulgence of having his/ her actions being safeguarded by the entity but rather, will have to defend their actions personally?

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