Reverse Piercing of the Corporate Veil

Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust
2023 (5) SA 68 (SCA)

1 Introduction

Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust (2023 (5) SA 68 (SCA)) (*Butcher Shop v Bymyam Trust*) dealt not with piercing the corporate veil (which is where a court is asked to ignore the separate legal personality of a company), but, unusually, with reverse piercing the corporate veil. The Supreme Court of Appeal (SCA) was faced with the question whether to reverse pierce the corporate veil to enable the Butcher Shop and Grill (Pty) Ltd (Butcher Shop), a lessee, to claim remission of rent payable to the lessor, the trustees of the Bymyam Trust (Bymyam Trust), in circumstances where *vis major* had interfered with the beneficial use and enjoyment of the leased property by a sublessee, Apoldo Trading (Pty) Ltd (Apoldo). The SCA had to decide whether to disregard the separate legal personality of Apoldo to allow Butcher Shop to raise, as a defence to the Bymyam Trust's claim for payment of rent, a defence that Apoldo, but not Butcher Shop, was entitled to raise.

In a judgment written by Goosen JA, with Van der Merwe, Mbatha, Carelse, and Weiner JJA concurring, the SCA held that there was no scope for the application of the remedy of reverse piercing the corporate veil under the existing principles of the South African common law to the facts of this case. It further held that this was not a case where the development of the common law was warranted to allow a court to reverse pierce the corporate veil. This note critically analyses the judgment and evaluates whether the court came to the correct decision. It also examines the distinction between traditional veil piercing, insider and outsider reverse piercing, and lifting of the veil, and considers whether reverse piercing of the veil ought to be recognised in South African law.

2 The facts

In 2014, Butcher Shop leased premises at Mouille Point, Cape Town, from the Bymyam Trust, from which it ran a restaurant business known as the Butcher Shop and Grill (*Butcher Shop v Bymyam Trust supra* par 2). At the time of the conclusion of the lease, Butcher Shop was a close corporation, but in 2017, it converted to a private company called The Butcher Shop and Grill (Pty) Ltd. In 2019, the Bymyam Trust became aware that the premises

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were occupied by Apoldo, who was conducting the business of the restaurant (*Butcher Shop v Bymyam Trust supra* par 3). Apoldo was related to the Butcher Shop in that they shared a shareholder, Mr Pick, who owned all the shares in both entities and controlled each of them (*Butcher Shop v Bymyam Trust supra* par 3). In August 2019, the Bymyam Trust entered into an addendum to the lease agreement with Butcher Shop, in terms of which it consented to the subletting arrangement between Butcher Shop and Apoldo (*Butcher Shop v Bymyam Trust supra* par 3). Under the addendum, Butcher Shop remained responsible for all the terms and conditions of the lease with the Bymyam Trust (*Butcher Shop v Bymyam Trust supra* par 8).

A national disaster was declared in South Africa in March 2020 in response to the COVID-19 pandemic, and a lockdown period with various restrictions was imposed under the Disaster Management Act (57 of 2002). The regulations under this statute restricted the operation of restaurant businesses, including restrictions on the sale of liquor and on the maximum seating capacity of restaurants (par 4). Butcher Shop suffered a loss of turnover owing to these restrictions and stopped paying rent to the Bymyam Trust (*Butcher Shop v Bymyam Trust supra* par 4). The Bymyam Trust brought an application for the outstanding rental amounts in the Western Cape High Court in October 2020 (*Butcher Shop v Bymyam Trust supra* par 5). Butcher Shop opposed the application and launched its own counter-application in which it sought a declaration that it was entitled to remission of the base rental payment arising from Apoldo's loss of beneficial occupation of the premises on account of *vis major* in the form of the regulations under the Disaster Management Act (*Butcher Shop v Bymyam Trust supra* par 5).

The nub of Butcher Shop's case was that it and Apoldo were no more than their joint sole shareholder and controlling mind, Mr Pick, in corporate guise, and therefore one business entity. It maintained that Mr Pick, as the sole shareholder, conducted a family business in which his son was also involved, that he did this via the two corporate entities, and that there was no *de facto* distinction between Butcher Shop and Apoldo (*Butcher Shop v Bymyam Trust supra* par 47). It contended that the facts that Apoldo had traded the restaurant since the start of the lease agreement, had paid the rental due to the Bymyam Trust, had submitted invoices for the rental, and the Bymyam Trust had drawn no distinction between the two entities save by formal consent to the sublease in August 2019, indicated that the Bymyam Trust treated Butcher Shop and Apoldo as a single trading entity (*Butcher Shop v Bymyam Trust supra* par 36 and 47). Butcher Shop argued that these facts rendered the matter exceptional and called for an equitable treatment of the two corporate entities (*Butcher Shop v Bymyam Trust supra* par 47 and 48). It contended that the common-law principles which allow the separate legal personality of a company to be disregarded ought to be applied to allow Butcher Shop to put up the loss suffered by Apoldo as a defence to the Bymyam Trust's claim for rent payable by Butcher Shop (*Butcher Shop v Bymyam Trust supra* par 36) and that the existing principles of the common law supported this outcome (*Butcher Shop v Bymyam Trust supra* par 37).

The Western Cape High Court ruled in favour of the Bymyam Trust and dismissed the counterapplication. It granted the main application for the

payment of rental by the Butcher Shop in the amount of R2 703 191.17, which represented all the amounts due by Butcher Shop to the Bymyam Trust under the lease agreement (*Trustees, Bymyam Trust v Butcher Shop and Grill CC* 2022 (2) SA 99 (WCC) par 111). Butcher Shop subsequently obtained leave to appeal to the SCA.

3 Judgment of the SCA

The SCA held that although parties may limit or exclude the right to claim remission of rent in their lease agreement in circumstances of *vis major* (*Butcher Shop v Bymyam Trust supra* par 14), the lease agreement in this case did not preclude a claim for remission of rent arising from a *vis major* event (*Butcher Shop v Bymyam Trust supra* par 28). It said that while remission of rent is payable to a lessee who suffers loss arising from the interference with its use and enjoyment of the leased property, such remission of rent may be claimed only by the party who suffered the loss, that this loss had to be directly attributable to the *vis major* event, and had to be substantial (*Butcher Shop v Bymyam Trust supra* par 34). Since Apoldo, not Butcher Shop, had occupied the premises, the loss of beneficial use and enjoyment of the subleased premises was suffered by Apoldo, not Butcher Shop (*Butcher Shop v Bymyam Trust supra* par 35). It ruled that the existence of the subtenancy in law precluded a claim for remission of rent based on loss suffered by the subtenant (*Butcher Shop v Bymyam Trust supra* par 35), and therefore, Butcher Shop could not claim the remission of rent based on the loss suffered by its subtenant.

The SCA rejected Butcher Shop's argument that the common-law principles on piercing the corporate veil were sufficiently flexible to allow it to put up the loss suffered by Apoldo as a defence to the claim of the Bymyam Trust for rent payable by the Butcher Shop (*Butcher Shop v Bymyam Trust supra* par 36). The SCA ruled that the flexibility of the common-law principles did not entitle Butcher Shop to ignore the corporate personality of Apoldo so that it could assert rights which accrued to Apoldo (*Butcher Shop v Bymyam Trust supra* par 50), and that flexibility does not imply that the common-law guiding principles on piercing the corporate veil are jettisoned (*Butcher Shop v Bymyam Trust supra* par 49). Instead, the SCA said, it means no more than that careful consideration be given to the facts of the case and that the matter is not approached on the basis that the principles apply only in a set category of cases (*Butcher Shop v Bymyam Trust supra* par 49). The SCA thus held that there was no scope for applying the remedy of disregarding the corporate identity under the existing principles of the common law to the facts of the case (*Butcher Shop v Bymyam Trust supra* par 54). It also held that this was not a case where the common-law principles ought to be developed to make the remedy of reverse piercing the corporate veil available (*Butcher Shop v Bymyam Trust supra* par 63).

The SCA further rejected Butcher Shop's argument that fraud, dishonesty, or unconscionable conduct are not prerequisites for the remedy of piercing the corporate veil (*Butcher Shop v Bymyam Trust supra* par 50), and

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asserted that there was no authority for the proposition that the ordinary employment and use of a corporate form, involving no abuse, misuse, or unconscionable conduct, would entitle a court to ignore the separate legal personality of a company (*Butcher Shop v Bymyam Trust supra* par 50). It consequently dismissed the appeal with costs and held that the orders of the Western Cape High Court had to stand (*Butcher Shop v Bymyam Trust supra* par 65 and 66).

4 Analysis and discussion

4 1 Traditional piercing of the corporate veil

In considering whether the existing principles of the common law supported the outcome argued for by Butcher Shop, the SCA first questioned (par 38) whether section 20(9) of the Companies Act (71 of 2008) had replaced the common-law principles in relation to when corporate personality may be disregarded.

Section 20(9) of the Companies Act is a statutory provision that allows a court to disregard the separate juristic personality of a company. An application under section 20(9) may be brought by any "interested person". A court may pierce the corporate veil under section 20(9) even if the parties have not requested this if it finds in any proceedings in which a company was involved that there was an unconscionable abuse of the juristic personality of the company as a separate entity. If 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 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 (s 20(9)(*a*)). The court may also make any further orders it considers appropriate to give effect to this declaration (s 20(9)(*b*)). An "appropriate" order in this context would be any order the court considers to be suitable or proper (*Centaur Mining South Africa (Pty) Ltd v Cloete Murray NO* 2023 (1) SA 499 (GJ) par 25), but must always have the effect of fixing the right, obligation, or liability in issue of the company somewhere else (*Ex parte Gore* 2013 (3) SA 382 (WCC) par 34).

On the question whether section 20(9) had replaced the common-law principles on piercing the corporate veil, the SCA pointed out that there is no language in section 20(9) which expresses an intention either way (par 40). In *Ex parte Gore* (*supra* par 32), the Western Cape High Court held that there was no discord between section 20(9) and the approach to piercing the corporate veil set out in the cases on the common law. Based on this reasoning, the SCA affirmed (par 40) what was held in *Ex parte Gore*, that section 20(9) does not replace the common law but supplements it (see further *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO* 2018 (4) SA 71 (SCA) par 24).

Having answered this question, the SCA affirmed (par 43) four guiding common-law principles on piercing the corporate veil as enunciated by

Smalberger JA in the Appellate Division in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) (*Cape Pacific*):

(1) A court has no general discretion simply to disregard a company's separate legal personality whenever it considers it just to do so (*Cape Pacific supra* 803).

(2) As a matter of policy, the separate corporate personality ought to be upheld. Piercing of the corporate veil should not occur lightly, and then only when considerations of policy favour it (*Cape Pacific supra* 803).

(3) The balancing of policy considerations will only arise where there is some element of fraud, abuse, or dishonesty in respect of the corporate personality (*Cape Pacific supra* 803).

(4) The purpose of piercing the corporate veil is to fix with liability the persons responsible for abuse (*Cape Pacific supra* 804).

These principles were affirmed in *Hülse-Reutter v Gödde* (2001 (4) SA 1336 (SCA) par 20), where the SCA said that courts have no general discretion to pierce the veil whenever they consider it just or convenient to do so, and that there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which should result in some unfair advantage to them (see also *Department of Agriculture, Forestry and Fisheries v B Xulu & Partners Incorporated* [2022] 1 All SA 434 (WCC) par 18).

4 2 Availability of the remedy of piercing the corporate veil to creditors and other outside parties

In support of its argument that reverse veil piercing should be permitted, Butcher Shop argued that the remedy of piercing the corporate veil is not only available to an outside party or a creditor who seeks to ignore the consequences of the separate legal personality of a company in order to fix liability on the shareholders of the company (*Butcher Shop v Bymyam Trust supra* par 49). The SCA stated that this submission is accurate since none of the reported cases specify it as a requirement that piercing the corporate veil is available only at the instance of a creditor (*Butcher Shop v Bymyam Trust supra* par 50). This would mean that under the common law, the remedy of piercing the veil is available to creditors and other outside parties, and that non-creditor stakeholders affected by the abuse of a company's legal personality may likewise apply to court to pierce the corporate veil.

It is not, however, clear whether the same position applies with regard to the statutory piercing of the corporate veil under section 20(9) of the Companies Act, and whether both creditors and non-creditors may apply to court to pierce the veil under section 20(9). Section 20(9) refers to the application being brought by an "interested person", but this term is not defined in the Companies Act. In *Ex parte Gore* (*supra* par 35) the court stated that the standing of a person to seek a remedy under section 20(9) should be determined on the basis of well-established principles in *Jacobs v Waks* (1992 (1) SA 521 (A)) (but the court did not go into details of the

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specific principles), and also, if the facts implicate a right in the Bill of Rights, section 38 of the Constitution of the Republic of South Africa, 1996 (the Constitution) dealing with the enforcement of rights. In *Jacobs v Waks* (*supra* 533–535), the Appellate Division stated that a person who claims relief from a court must establish that he or she has a direct interest in that matter, which should not be remote, must be a real and not an abstract or hypothetical interest, and need not be measurable in monetary terms.

In *T J Jonck BK h/a Bothaville Vleismark v Du Plessis NO* (1998 (1) SA 970 (O) 986) (*Jonck v Du Plessis*), which dealt with the meaning of "interested person" in the context of section 65 of the Close Corporations Act (69 of 1984), dealing with the statutory piercing of the corporate veil of close corporations, the High Court stated that the term "interested person" is not to be interpreted too restrictively but also not so widely as to include an indirect interest. In direct contrast to what was held in *Jacobs v Waks*, the court in *Jonck v Du Plessis* (*supra* 986) said that the interest is limited to a financial or monetary interest.

Since the court in *Ex parte Gore* did not consider the interpretation of the term "interested person" in section 65 of the Close Corporations Act as expounded in *Jonck v Du Plessis* but relied in general terms on the principles established in *Jacobs v Waks* without going into specific details, it is unclear whether *Ex parte Gore* intended to adopt the principle in *Jacobs v Waks* namely, that the interest need not be measurable in monetary terms (see Cassim *et al Contemporary Company Law* 3ed (2021) 79). It is possible that if an "interested person" under section 20(9) of the Companies Act lacks a financial or monetary interest, a court may find that the interest is too remote (Cassim *et al Contemporary Company Law* 80).

Despite the decision of *Jacobs v Waks* being delivered by the Appellate Division, the interpretation of the term "interested person" as expounded by the High Court in *Jonck v Du Plessis* holds persuasive force given that the court was referring specifically to the meaning of "interested person" in the context of the statutory piercing of the corporate veil of close corporations in a provision worded very similarly to section 20(9) of the Companies Act. On the basis of the interpretation in *Jonck v Du Plessis*, to qualify as an "interested person" under section 20(9), the person must have a financial or monetary interest. This position would be much narrower than the position under the common-law piercing of the corporate veil, as enunciated by the SCA in *Butcher Shop v Bymyam Trust*. The legislature or judiciary must clarify whether non-creditors would qualify as "interested persons" under section 20(9) of the Companies Act.

The question whether Butcher Shop, the debtor company, was an "interested person" under section 20(9) did not arise, since Butcher Shop applied to reverse pierce the corporate veil under the common law. Arguably, on the basis that Butcher Shop did have a financial or monetary interest in the matter, it could be construed to be an "interested person" under section 20(9). Nonetheless, a company should not be allowed to pierce its own veil under section 20(9) in instances where the insider, such as the shareholder or director, was responsible for an unconscionable abuse of the juristic personality of the company as a separate entity since the remedy was never designed to benefit corporate insiders but to protect

against the abuse of the company's legal personality that prejudices external stakeholders or unduly benefits the company's directors (Olivier "A Purposive Perspective on Piercing the Corporate Veil under Section 20(9) of the Companies Act 71 of 2008" 2022 34(3) *SA Merc LJ* 348 380). An exclusion to the term "interested person" should be read into section 20(9) to exclude shareholders and other corporate insiders from relying on the remedy if they themselves had committed the unconscionable abuse of the company's legal personality (Olivier 2022 *SA Merc LJ* 378; Delport *Henochsberg on the Companies Act 71 of 2008* (2024) 1(36), 114(5)).

4 3 Reverse piercing of the veil

Two types of reverse veil piercing exist: "insider reverse piercing" and "outsider reverse piercing". With "insider reverse piercing", a corporate insider, usually a dominant shareholder or other controlling insider, attempts to pierce the corporate veil from within the company and to have the corporate entity disregarded for the corporate insider's own benefit (*Litchfield Asset Management Corporation v Howell* 70 Conn App 133 (Conn App Ct 2002) 149 (*Litchfield Asset Management Corporation v Howell*); *In re Phillips* 139 P 3d 639 (Colo 2006) (en banc) 645 (*In re Phillips*)). For an example of insider reverse piercing, see the seminal case of *Roepke v Western National Mutual Insurance Co* (302 N W 2d 350 (Minn 1981)).

"Outsider reverse piercing" occurs when an outside third party pursuing a claim against a corporate insider (such as a shareholder or director) attempts to pierce the veil to render the company liable for an obligation of the corporate insider (*Litchfield Asset Management Corporation v Howell supra* 149). Outsider reverse piercing is also used to impose liability on a subsidiary for the debts of its parent company (see, e.g., *FMC Finance Corp v Murphree* 632 F 2d 413 (5th Cir 1980) 421–422), as opposed to the usual configuration of holding the parent company liable for the debts of its subsidiary company where the subsidiary was in effect carrying on the business as the agent of the holding company (see, e.g., *Smith, Stone & Knight Ltd v Lord Mayor, Aldermen Citizens of the City of Birmingham* [1939] 3 All ER 116). Thus with outsider reverse piercing a creditor seeks to recover debts owed by a shareholder or director from the company itself, or seeks to recover debts owed by a holding company from its subsidiary, and contends that the company's assets should be made available to pay the personal debts of the shareholder or director (*Litchfield Asset Management Corporation v Howell supra* 149; *In re Phillips supra* 644; Allen "Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice" 2011 85(3) *St John's Law Review* 1147 1148). For an example of an outsider reverse piercing claim, see *Shamrock Oil & Gas Co. v Ethridge* (159 F Supp 693 (D Colo 1958)), where the court permitted the seizure of corporate assets to satisfy a claim against the controlling shareholder.

Both traditional piercing of the corporate veil and outsider reverse piercing involve third parties requesting a court to disregard a company's separate legal personality. With traditional veil piercing, the company is the primary

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debtor, and the third party seeks to make the shareholder or director liable and to reach the personal assets of the shareholder or director to satisfy a liability of the company (*Litchfield Asset Management Corporation v Howell supra* 149). By contrast, with outsider reverse piercing, the shareholder or director is the primary debtor and the third party seeks to make the company liable and reach the company's assets to satisfy the creditor's claim against the shareholder or director (Mujih "Piercing the Corporate Veil: Where is the Reverse Gear?" 2017 133(2) *Law Quarterly Review* 322 331). In essence, whereas traditional veil piercing allows third parties to reach individual assets, reverse veil piercing permits third parties to reach corporate assets (*In re Phillips supra* 649).

Courts in the United Kingdom do not explicitly recognise the distinction between traditional and reverse piercing of the corporate veil (see Mujih 2017 *Law Quarterly Review* 322–337), but the distinction is well developed in the United States of America (USA), where there is growing recognition of the doctrine of reverse piercing of the corporate veil (Allen 2011 *St John's Law Review* 1148; Bainbridge and Henderson *Limited Liability: A Legal and Economic Analysis* (2016) 182). A number of United States (US) state and federal courts have used reverse piercing and have recognised it as appropriate under certain circumstances to prevent fraud or to achieve equity (see, e.g., *State Bank in Eden Valley v Euerle Farms, Inc* 441 N W 2d 121 (Minn Ct App 1989; *Litchfield Asset Management Corporation v Howell supra*; and *C F Trust, Inc v First Flight L P* 580 S E 2d 806 (2003)). Nonetheless, the approaches taken in US states that have allowed reverse piercing have been inconsistent and are roughly evenly divided between those that accept the doctrine of reverse veil piercing and those that reject it (see Allen 2011 *St John's Law Review* 1148; Bainbridge and Henderson *Limited Liability* 185; and Muhleck "Restricting LLC Hide-and-Seek: Reverse Piercing the Corporate Veil in the State of Michigan" 2020 65(3) *Wayne Law Review* 659 660).

Two approaches are adopted by US courts to reverse piercing: an inverse method of reverse piercing and an equitable results approach (Allen 2011 *St John's Law Review* 1167). The inverse method of reverse piercing, the more widely accepted approach, favours substance over form and entails the court simply taking the requirements of traditional veil piercing and applying them in the context of a reverse pierce (Allen 2011 *St John's Law Review* 1157 and 1158; Muhleck 2020 *Wayne Law Review* 664). By contrast, the equitable results approach involves the court imposing additional requirements to protect the diverse interests affected by reverse piercing, such as whether it would cause injury to the company's innocent shareholders and creditors (Allen 2011 *St John's Law Review* 1157).

In *Butcher Shop v Bymyam Trust,* the reverse piercing of the corporate veil would have enabled Butcher Shop and Apoldo to be seen as essentially one business to claim remission of rent (see Marais "Supreme Court of Appeal Refuses 'Reverse' Piercing of the Corporate Veil" 2024 15(1) *Business Tax & Company Law Quarterly* 1 6). Even though the SCA in *Butcher Shop v Bymyam Trust* did not distinguish between insider and outsider reverse piercing, it is submitted that the attempt to reverse pierce the corporate veil in this case would be regarded as an insider reverse

piercing case. The application was brought by Butcher Shop, the debtor company, to pierce the corporate veil for the benefit of its shareholder and controller, so that the separate legal personality of Apoldo would be disregarded in order to entitle Butcher Shop, the debtor, to claim a rental remission.

4 4 Is lifting the veil reverse veil piercing?

The question arises whether lifting of the corporate veil constitutes a reverse piercing of the veil. The terms "piercing the veil" and "lifting the veil" are often used interchangeably (*VTB Capital plc v Nutritek International Corp* [2013] UKSC 5 par 118), but there is a distinction between them. In *Atlas Maritime Co SA v Avalon Maritime Ltd*, *The Coral Rose* ([1991] 4 All ER 769 779), Staughton LJ distinguished between "piercing" and "lifting" the corporate veil by stating that piercing is reserved for treating the rights and liabilities or activities of a company as the rights or liabilities or activities of its shareholders, whereas "lifting" is to have regard to the shareholding in a company for some legal purpose. (On the distinction between piercing and lifting the veil, see also *Prest v Petrodel Resources Limited* [2013] UKSC 34 par 28 and *VTB Capital plc v Nutritek International Corp supra* par 118. For an example of a case where the court lifted the veil, see *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, where the court did not pierce the corporate veil but took into account the identity of the shareholders to determine whether the company was an enemy alien. For further discussion on lifting the veil, see Cassim *et al Contemporary Company Law* 59–62 and Delport *Henochsberg on the Companies Act 71 of 2008* (2024) 1(36) 86–89).

There has been long-standing confusion about whether the distinction between piercing and lifting the veil is recognised in South African law. But it was affirmed in *Tladi Holdings (Pty) Ltd v Modise* ([2015] ZAGPJHC 331 par 22) and *Engelbrecht NO v K and L Builders (Pty) Limited* ([2023] JOL 61674 (GP) par 81–82) that South African law does indeed recognise this distinction. In *Tladi Holdings (Pty) Ltd v Modise* (*supra* par 22), the court stated:

> "A corporate veil may be pierced or lifted where appropriate. It may be necessary in some cases to pierce the corporate veil, but in other cases it is only necessary to lift the corporate veil. In this regard, it has been accepted in our courts that where a corporation is found to be an instrument, or the alter-ego, agent or puppet or mask of its shareholders, then the court may not pierce the corporate veil but simply lift the veil and look to see what the transactions were."

Whereas traditional piercing of the corporate veil entails treating the company's liabilities as those of its shareholders or directors and disregarding the separate legal personality of the company, lifting the veil does not entail ignoring the separate legal personality of the company (Cassim *et al Contemporary Company Law* 59–60). Reverse piercing of the corporate veil entails disregarding the separate legal personality of the

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company, either by a corporate insider attempting to pierce the corporate veil from within the company or by an outside third party pursuing a claim against a corporate insider and attempting to pierce the veil to make the company liable for an obligation of the corporate insider. Since the company's separate legal personality remains intact with lifting the veil, but not so with reverse piercing of the veil, it is submitted that lifting the veil should not be construed as a form of reverse piercing of the veil.

4 5 Was reverse veil piercing appropriate in this case?

It is respectfully submitted that the SCA was correct in refusing to reverse pierce the veil in this case for two reasons.

First, Butcher Shop's argument that fraud, dishonesty, or unconscionable conduct were not prerequisites for the remedy of piercing the veil contradicts established common-law authority on piercing the corporate veil. Under the common law, a court will pierce the corporate veil only where there is some element of fraud, dishonesty, abuse, or improper conduct in respect of the corporate personality and the misuse or abuse of the distinction between the corporate entity and those who control it (see *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A) 566; *Cape Pacific supra* 803; *Hülse-Reutter* par 20; *AJVH Holdings (Pty) Ltd v Steinhoff International Holdings NV* 2021 JDR 0192 (WCC) par 41; and *Coogal Finance (Pty) Ltd v Sumeil (Pty) Ltd* 2021 JDR 2109 (FB) par 22). There is no authority for the proposition that the ordinary employment and use of a corporate form, involving no fraud, dishonesty, or improper conduct, would entitle a court to ignore the separate legal personality of a company (see *Butcher Shop v Bymyam Trust supra* par 50). With regard to the statutory piercing of the corporate veil, section 20(9) of the Companies Act clearly contemplates an "unconscionable abuse" of the juristic personality of the company as a separate entity before the remedy may be relied on. As there was no fraud, dishonesty, abuse, or improper conduct which would have justified the SCA's piercing the corporate veil on the facts of *Butcher Shop v Bymyam Trust*, the SCA was correct in refusing to reverse pierce the corporate veil.

The fact that Mr Pick was the sole shareholder and sole director of both Butcher Shop and Apoldo and had full control over the companies was not, in itself, sufficient to disregard the legal personality of Apoldo. It does not, on its own, indicate fraud, dishonesty, abuse, or improper conduct in respect of the company's corporate personality. This is affirmed in *Nel v Metequity Ltd* (2007 (3) SA 34 (SCA) par 11), where the SCA said that the mere fact that a company had only one shareholder who was in full control of the company did not constitute a basis, by itself, to disregard the separate legal personality of the company (see also *Van Zyl v Kaye NO* 2014 (4) SA 452 (WCC) par 33 and *AJVH Holdings (Pty) Ltd v Steinhoff International Holdings NV supra* par 33). The mere fact that two companies have the same shareholder and the same director, as was the case with Butcher Shop and Apoldo, likewise does not constitute a basis for disregarding the separate legal personalities of the two companies (see *Nel v Metequity Ltd supra* par 11).

Second, if the SCA had reverse pierced the corporate veil, it would have permitted Mr Pick, who was regarded as the person conducting the business, to have it both ways. In *Ochberg v Commissioner for Inland Revenue* (5 SATC 93 100), De Villiers CJ asserted that to say that a company has a separate legal personality and, in the same breath, to argue that in substance the person holding all the shares is the company is an attempt to have it both ways, which cannot be allowed. In a similar vein, in *Tunstall v Steigmann* ([1962] 2 All ER 417 (CA) 420–421), the Court of Appeal in England stated that a shareholder could not say that she was entitled to take the benefit of any advantage that the formation of a company gives to her, without at the same time accepting the liabilities arising therefrom, nor could she say that she herself is carrying on a business and at the same time say that her liability is limited as provided in the Companies Act. In this case, Butcher Shop could not disregard, for its own benefit, the separate corporate personality of Apoldo in circumstances where their joint shareholder, Mr Pick, had deliberately arranged that Apoldo operated the restaurant even though Butcher Shop was the lessee of the Bymyam Trust (*Butcher Shop v Bymyam Trust supra* par 54).

The question arises whether the SCA was correct in refusing to develop the common law to make available the remedy of reverse piercing the corporate veil. This question is canvassed below.

4 6 The development of the common law in this case

A court's injunction to develop the common law arises in the context of its inherent jurisdiction to do so, in the interests of justice (see s 173 of the Constitution). When interpreting any legislation and when developing the common law, a court must promote the spirit, purport, and objects of the Bill of Rights (s 39(2) of the Constitution). In exercising their powers to develop the common law, judges must be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary (*Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) par 36).

The SCA rejected Butcher Shop's case for the development of the common law because it found that its case was not based on a claim that an existing common-law rule conflicted with a provision of the Constitution, and that a proper case had not been made on which the court could engage in developing the common law in a constitutional context (*Butcher Shop v Bymyam Trust supra* par 55 and 56). Instead, Butcher Shop had based its argument about the development of the common law on the particular facts of the case and had failed to raise any general policy considerations as a conceivable basis for the development of the common law (*Butcher Shop v Bymyam Trust supra* par 58). Its proposition was that the common law ought to recognise the availability of reverse veil piercing as a generally available equitable remedy to meet the exigencies of its case (*Butcher Shop v Bymyam Trust supra* par 58).

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The remedy of piercing the corporate veil, as established in South African common-law cases, does not support its application in the interests of justice. Mere fairness on its own is not sufficient as a justification to pierce the corporate veil (*Botha v Van Niekerk* 1983 (3) SA 513 (W) 523). As the SCA said in *Butcher Shop v Bymyam Trust* (*supra* par 64), South African law does not support a casuistic resort to equity and fairness to circumvent statutory provisions or the rules of the common law (see also *S v Zuma* 1995 (2) SA 642 (CC) par 18 and *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) par 52). Under the balancing approach advocated in *Cape Pacific* (*supra* 803), the need to preserve a company's separate corporate identity must be weighed against policy considerations that favour piercing the corporate veil. *Ex parte Gore* (*supra* par 29) expressed the balancing approach as weighing up the importance of giving effect to the legal concept of juristic personality against the adverse moral and economic effects of tolerating an unconscionable abuse of the juristic personality of the company (on the balancing approach see further Cassim "Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction" 2014 26(2) *SA Merc LJ* 307 322–329). In applying the balancing approach, considerations of equity and fairness may be taken into account (Marais 2024 *Business Tax & Company Law Quarterly* 3). But this does not render the remedy an equitable one, particularly since the balancing of policy considerations arises only when there is some element of fraud, abuse, or dishonesty in respect of the company's corporate personality (*Cape Pacific supra* 803).

Since Butcher Shop did not make out a proper case for the development of the common law, and the remedy of piercing the veil is not available as an equitable remedy under the current cases on the common law, it is submitted that the SCA was correct in not developing the common law to permit the reverse piercing of the veil in the form requested by Butcher Shop.

4 7 Should reverse veil piercing be recognised in South African law?

The case of *Gien v Gien* (1979 (2) SA 1113 (T)) is regarded as the only example where the court reverse pierced the corporate veil in the South African common law. The applicant, a farmer, brought an application for an interdict in the context of a nuisance-related complaint against his brother, who lived on an adjacent farm. The applicant did not own the farm, but it was owned by a company. The nature of the nuisance-related complaint required the application to be instituted by the property owner complaining about the nuisance. Even though the applicant lacked legal standing to bring the application as he did not own the farm, the court still regarded him as the "*juridiese eienaar*" (juridical owner) of the property (*Gien v Gien supra* 1120). Although the court acknowledged that legally a distinction must be drawn between the applicant as a natural person and the company as the legal entity which was the legal owner of the property, the court held that since the case was conducted as though the applicant was the juridical owner of the property, the court considered the applicant's rights as though he were the juridical owner of the property (*Gien v Gien supra* 1120).

The court addressed its approach in very brief terms. It failed to explain its reasons for this approach or why it permitted a reverse piercing of the corporate veil. This omission casts doubt on whether *Gien v Gien* truly serves as a strong authority for reverse piercing the corporate veil. Notably, in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* (1993 (2) SA 784 (C) 820), the court *a quo* stated, in the context of its discussion about piercing the corporate veil, that it could not support the decision in *Gien v Gien*. Significantly, *Gien v Gien* was not cited by Butcher Shop in support of its argument that reverse piercing of the corporate veil should be permitted at common law.

It is submitted that insider reverse piercing should not be allowed or applied in South African law as it enables shareholders and directors to act opportunistically because even though they arranged their affairs using the corporate form, after their situations change, they attempt to revisit their choice and disregard the corporate form (Bainbridge and Henderson *Limited Liability* 199). A person cannot both approbate and reprobate with regard to the separate legal personality of the company. Permitting insider reverse piercing claims would also overlook the fact that third parties, such as creditors, have relied on the separate legal personality of the company in establishing a relationship with it and conducting business with it. Thus, permitting inside reverse piercing would cause uncertainty as stakeholders would not be sure whether the corporate form would be respected (Bainbridge and Henderson *Limited Liability* 199).

It is submitted that outsider reverse piercing should also be rejected in South African law. It has the potential to prejudice innocent shareholders unfairly as their interests may be adversely affected if the company's assets, in which they have an interest, could be directly attached by the outsider to satisfy its claim against the insider liable for wrongdoing (*Cascade Energy and Metals Corp v Banks* 896 F 2d 1557 (10th Cir 1990) 1577; *Litchfield Asset Management Corporation v Howell supra* 152). Shareholders legitimately expect that the company's assets will be insulated from the claims of the creditors of a controlling insider (*In re Phillips supra* 646). Outsider reverse piercing thus significantly affects the expectations of shareholders with regard to the risks and liabilities to which their investment might be exposed.

A further reason not to apply outsider reverse piercing in South African law is that it bypasses the usual method of collecting a judgment against a shareholder in terms of which the creditor attaches the debtor's shares in the company and not the assets of the company (*Cascade Energy and Metals Corp v Banks supra* 1577). Therefore, unsecured creditors who relied on the company's assets in lending money to it would be disadvantaged (Bainbridge and Henderson *Limited Liability* 189). Outsider reverse piercing thus significantly affects creditors' expectations regarding the risks and security of their collateral (*In re Phillips supra* 649).

In *Cargill, Inc. v Hedge* (375 NW 2d 477 (Minn 1985)), the defendant and his wife had placed their farm in a family farm company in which the wife was the sole shareholder (*Cargill, Inc. v Hedge supra* 478). A creditor of the

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defendant obtained a judgment against him for unpaid farm supplies. Under Minnesota law, a statutory provision exempted from seizure or sale a home occupied by the debtor as his dwelling place, together with the land upon which it was situated. Only after instituting legal action for the debt did the creditor become aware that the farm had been placed in a company. The wife intervened in the execution proceedings in her capacity as the sole shareholder of the company and applied to exempt from execution the portion of the farm constituting the couple's homestead. Even though this exemption did not apply to a company, the Minnesota Supreme Court reverse pierced the veil, disregarded the corporate entity, and treated the farm as though owned by the defendant and his wife, thereby entitling them to claim the homestead exemption. The court thus ruled that the creditor's execution sale was void (*Cargill, Inc. v Hedge supra* 480).

The court emphasised that, when determining whether to reverse pierce the corporate veil, a court should examine three factors. The first is the degree of identity between the individual and the company and the extent to which the company is the *alter ego* of the shareholder (*Cargill, Inc. v Hedge supra* 479). The court found that there was a close identity between the couple and their company, and that although they maintained some corporate formalities, they operated the farm as their own (*Cargill, Inc. v Hedge supra* 479). Second, there must be strong policy reasons to justify a reverse piercing of the veil (*Cargill, Inc. v Hedge supra* 479). The court held that reverse veil piercing would further the purpose of the homestead exemption, as Minnesota had long recognised the importance of a debtor's home to be a sanctuary despite the just demands of creditors (*Cargill, Inc. v Hedge supra* 479). The third factor is to determine whether third parties would be adversely affected by the reverse veil piercing. Since the wife was the sole shareholder, the court found that no other shareholders would be harmed by the reverse piercing (*Cargill, Inc. v Hedge supra* 479). The court did not regard the impact on the creditor as significant because the creditor was unaware of the company's existence when it extended credit to the defendant and was under the impression that it was extending the credit to the defendant personally (*Cargill, Inc. v Hedge supra* 479).

Cargill v Hedge clearly illustrates how reverse piercing affected the interests of the creditor. The reverse piercing of the veil significantly harmed the creditor's interests. The homestead exemption applied to individuals, not companies. It was not clear that, in passing the homestead exemption, the legislature intended to give individuals who chose the corporate form the additional benefit of the homestead exemption, and it is plausible that the legislature wanted those using the corporate form not to receive that additional benefit (Bainbridge and Henderson *Limited Liability* 184).

5 Conclusion

This note critically analysed the SCA decision in *Butcher Shop v Bymyam Trust* to refuse to reverse pierce the corporate veil so as to enable a lessee to claim remission of rent payable to the lessor in circumstances where the sublessee, but not the lessee, was entitled to raise this defence. The note examined the distinction between traditional veil piercing, insider and outsider reverse piercing, and lifting the veil, and argued that lifting the veil

should not be construed as a form of reverse piercing the veil. Even though the SCA did not distinguish between insider and outsider reverse piercing, it was argued that the attempt to reverse pierce the veil in this case was that of insider reverse piercing.

As a general comment, it was argued that, whereas the remedy of piercing the corporate veil may be available to both creditors and non-creditors under the common law, as remarked by the SCA in *Butcher Shop v Bymyam*, the statutory remedy of piercing the corporate veil under section 20(9) of the Companies Act may well be confined to creditors. The legislature or judiciary must clarify this distinction.

It is respectfully submitted that the SCA in *Butcher Shop v Bymyam Trust* was correct in refusing to reverse pierce the veil. In holding that the doctrine of piercing the corporate veil in South African law did not encompass a reverse piercing of the corporate veil, the SCA reaffirmed the overarching principle laid down in *Salomon v A Salomon and Co Ltd* ([1897] AC 22) that a company is a separate legal person independent of and distinct from its shareholders. It is submitted that three pertinent legal principles may be discerned from the SCA's judgment in relation to the doctrine of piercing the corporate veil. First, for a court to pierce the corporate veil, there must be fraud, dishonesty, improper conduct, or unconscionable abuse. Second, the mere fact that a company has only one shareholder who is in full control of the company does not, by itself, constitute a basis to disregard the company's separate legal personality. Third, the mere fact that two companies have the same shareholder and the same director likewise does not constitute a basis for disregarding the separate legal personalities of the two companies.

This note argued that reverse piercing should not be recognised in South African law, even though it is well developed in the USA, where there is a growing recognition of the doctrine of reverse piercing the corporate veil. The South African common law does not recognise reverse veil piercing as a generally available equitable remedy, as is the approach adopted in the USA. As the SCA said in *Butcher Shop v Bymyam Trust* (*supra* par 59), to develop the South African common law to recognise the availability of piercing the corporate veil as a generally available equitable remedy would constitute an abrogation of the established common-law principles on piercing the corporate veil.

It is submitted that neither insider nor outsider reverse piercing should be applied in South African law. Insider reverse piercing would enable shareholders and directors to act opportunistically and to benefit from the company's separate legal personality while avoiding its disadvantages. It would also overlook the fact that third parties, such as creditors, rely on the separate legal personality of the company in establishing a relationship with it and conducting business with it. Insider reverse piercing would cause uncertainty, as stakeholders would not be sure whether the corporate form would be respected. In addition, outsider reverse piercing has the potential to prejudice innocent shareholders unfairly. It also disadvantages unsecured creditors who relied on the company's assets in lending money to it and

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significantly affects the expectations of creditors with regard to the risks and security of their collateral.

Butcher Shop v Bymyam commendably makes it clear that reverse veil piercing, and in particular insider reverse piercing, has no place in South African common law. As was succinctly stated by Young J in a decision of the New South Wales Court of Appeal (*Morgan v 45 Flers Avenue Pty Ltd* (1987) 5 ACLC 222 225), if persons choose to arrange their affairs by incorporating a company, they must take the consequences of this choice "for better or worse for richer or poorer in commercial sickness or commercial health".

Rehana Cassim
BA (cum laude) LLB (cum laude) LLM (cum laude) LLD
Professor, University of South Africa, Pretoria
Attorney and Notary Public of the High Court of South Africa
https://orcid.org/0000-0001-6179-2361