Unveiling Reverse Piercing: Exploring Section 20(9)(*a*) of the Companies Act 71 of 2008*

1 Introduction

Section 20(9)(*a*) of the South African Companies Act 71 of 2008 (the Companies Act) empowers courts to pierce the corporate veil, disregarding the separate legal personality of a company, when conduct constitutes unconscionable abuse by shareholders (in some instances, a shareholder can also be a director of the company. For ease of reference in this note, reference will be made to the shareholder, except where expressly stipulated otherwise.) "Unconscionable abuse" refers to conduct that is not merely improper or unethical but goes beyond ordinary wrongdoing to become grossly unfair, dishonest or immoral. Section 20(9) of the Companies Act allows a court, upon application by an interested party or in any proceedings, to declare that the company should not be treated as a juristic person if the company or use thereof constitutes an "unconscionable abuse" of its legal personality (s 20(9)(*a*) of the Companies Act).

This note explores a potential interpretation of section 20(9)(*a*) of the Companies Act that allows courts to impose an individual's liabilities onto the company. This concept of reverse piercing enables interested parties, such as creditors and/or other parties, to transfer the liabilities of individuals, such as shareholders, onto the company, provided that specific conditions are met (when there is unconscionable abuse of the company and/or the incorporation of a company as stipulated in s 20(9)(*a*) of the Companies Act). By allowing an interpretation of reverse piercing, courts can further prevent the misuse of company structures to evade personal liabilities or commit fraud. Although it can be argued that this may erode the principle of limited liability, the author views it as an important development in promoting fairness, accountability and transparency in corporate governance (Institute of Directors of South Africa (IoDSA) *King IV Report on Corporate Governance for South Africa 2016* (2016)).

The possible application of reverse piercing under section 20(9)(*a*) of the Companies Act could reflect a growing judicial willingness to ensure that companies and company structures are not used to shield wrongful and/or fraudulent conduct by shareholders. In the evolving landscape of contemporary corporate law, this approach signifies an increased scrutiny of

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the boundaries between individual and corporate responsibility, requiring heightened diligence in the management of corporate affairs.

The veil of a company has long been considered a fundamental characteristic of company law, offering a distinct legal personality to a company (*Salomon v Salomon* [1897] AC 22). This separation provides significant protection for shareholders and members since they typically are not held personally liable for the company's debts or obligations (*Salomon v Salomon supra*; see also *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530). This principle promotes investment, entrepreneurship and economic growth by limiting the financial risk to shareholders.

However, the introduction of section 20(9) (with particular reference to paragraph (*a*)) in the Companies Act presents an intriguing modification to this traditional concept. This section provides for the possibility of reverse piercing of the corporate veil. Unlike conventional veil-piercing, where the personal assets of shareholders might be targeted to satisfy company obligations, reverse piercing can expose company assets to satisfying the personal liabilities of shareholders or members. (Section 20(9) of the Companies Act states: "If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may– *(a)* declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration.")

Reverse piercing essentially shifts the spotlight from the company to the individuals behind it, allowing courts to disregard the separate legal personality of the company in cases where there is unconscionable abuse. This might occur when a company's organisational form is used to perpetrate unfair conduct or injustice, or when shareholders abuse the company and the company form to hide assets (s 20(9)(*a*) of the Companies Act).

Despite its potential benefits, reverse piercing is a doctrine with complex implications and is not well known in South Africa. (The definition of the reverse-piercing doctrine remains relatively recent, as evidenced by the recent case of *Butcher Shop and Grill CC v Trustees for the Time Being of the Bymyam Trust* [2023] ZASCA 57; [2023] 3 All SA 40 (SCA); 2023 (5) SA 68 (SCA), which reaffirms the ideas that have developed lately in South African law concerning this matter. This case is significant as it reaffirms the relationship between s 20(9) of the Companies Act and the common law, and it addresses the intriguing notion of "reverse piercing", wherein a company's shareholder petitions a court to disregard the company's separate legal personality in which shares are held. Also see Marais "Supreme Court of Appeal Refuses 'Reverse' Piercing of the Corporate Veil" 2024 15(1) *Business Tax and Company Law Quarterly* 1–8.) Its application under section 20(9)(*a*) of the Companies Act necessitates a balanced approach to ensure it serves justice without undermining the foundational

principles of corporate law. The potential for misuse exists if courts were to apply reverse piercing too liberally, thus discouraging legitimate corporate endeavours by increasing risks for shareholders.

The court in *Butcher Shop and Grill CC v Trustees for the Time Being of the Bymyam Trust* (*supra* par 48) referred to the following:

> "Veil piercing is referred to as 'reverse veil piercing' when the persons who sought to have the veil set aside were the shareholders themselves. Thus, while the more usual situation is for a creditor to attempt to pierce the corporate veil in order to impose personal liability on the corporate members, in the case of a reverse piercing the members of the company attempt to pierce the corporate veil from within, usually by claiming that the court ought to treat them as the true owners of the business or assets of the company." (Joubert *LAWSA* 3ed Vol 6 Part 1 (2003) par 64)

This author does not entirely agree. While reverse veil-piercing might seem like a practical legal tool for shareholders to establish ownership over company assets, it is fraught with complications and legal inconsistencies. Allowing shareholders to claim assets as their own could undermine the foundational principle of separate legal personality that protects both shareholders and creditors. This could lead to abuse, where shareholders cherry-pick the benefits of limited liability while avoiding adverse consequences. Furthermore, reverse piercing can confuse creditor rights, creating uncertainty and potentially disadvantaging those who dealt with the company in good faith. The doctrine may open the floodgates for unjust claims, undermining corporate stability and trust in business transactions.

That is why the interpretation of section 20(9)(*a*) of the Companies Act must consider the context and should only be applied when truly justified by evidence of wrongdoing and the abuse of the company and its separate legal personality. The South African judiciary is tasked with the delicate job of establishing guidelines to balance accountability and protection. This involves assessing whether the piercing is necessary to rectify an unjust situation while maintaining the integrity of corporate law.

Section 20(9)(*a*) introduces a nuance to the concept of the corporate veil, highlighting the need for flexibility within legal frameworks to address the misuse and/or abuse of companies and their structures. It is a measure that aligns with broader considerations of fairness and justice, potentially fostering a more equitable commercial environment. A precise application of reverse piercing, however, is dependent on judicial prudence to ensure that it complements rather than destabilises the protective nature of the company and its separate legal personality.

2 Understanding section 20(9)(*a*) of the Companies Act

Section 20(9)(*a*) of the Companies Act is a legal provision that allows courts to invoke the doctrine of piercing the corporate veil in specific circumstances (unconscionable abuse of a juristic person as per s 20(9) of the Companies Act). Essentially, this means that if a company is formed or used, or carries

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out activities, in a way that amounts to unfair or unethical exploitation of its separate legal personality, the court can intervene upon application by an interested person (s 20(9) of the Companies Act. The Companies Act lacks a definition for "interested person". In *Bothaville Vleismark v Du Plessis* 1998 (1) SA 971 (O), the term "interested person" was explained in relation to s 65 of the Close Corporations Act 69 of 1984. This phrase should be interpreted neither too narrowly nor excessively broadly to encompass interests that are neither financial nor monetary in nature. The interpretation in the aforementioned case implies that any third-party interest in the company arising from an existing economic relationship between the parties would qualify the third party as an interested person.)

To grasp the significance of section 20(9)(*a*), it is essential to understand the concept of a company's separate legal personality. When a company is incorporated, it is recognised as a distinct legal entity, separate from the individuals who own or control it (such as shareholders or directors). This separation provides a critical protection: liability of shareholders for the company's debts is limited to the amount they have invested in the company, and they are generally not personally responsible for the company's obligations. This principle, known as limited liability, is foundational to corporate law and encourages investment and entrepreneurial risk-taking by protecting personal assets in the event of business failure.

However, while separate legal personality offers significant benefits, it can also be misused. Some individuals may seek to exploit a company's status as an independent entity to engage in unethical practices so as to shield themselves from liability or commit fraudulent activities. For example, directors or shareholders may transfer company assets to themselves, create complex corporate structures to avoid taxes or engage in business practices that defraud creditors or violate regulatory requirements, all while hiding behind the protection of limited liability.

2 1 The role of section 20(9): Addressing bad-faith use of the corporate structure

Section 20(9) of the Companies Act addresses potential abuse by empowering the courts to intervene when a company's separate legal personality is used in a way that is contrary to justice, fairness or good faith. Specifically, this provision enables a court to declare that the company's legal personality should be disregarded in relation to certain rights, obligations or liabilities. In other words, the court can "lift" or "pierce" the corporate veil, allowing the individuals behind a company to be held personally accountable (Staughton LJ's *dictum* in *Atlas Maritime Co SA v Avalon Maritime Ltd: The Coral Rose* (No 1) 1991 4 All ER 769 (CA), which sets out the position in English law: "To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose." It is

noteworthy that the terms piercing, going behind, drawn aside, or lifting the veil have been used interchangeably by authors and legal practitioners.)

For the court to exercise this power, there must be compelling evidence that the company's separate legal personality is being unconscionably abused. Common scenarios where section 20(9) might be invoked include fraud, alter ego, in the interest of justice, evasion of legal obligations, or deliberate misrepresentation of a company's financial status. This provision ensures that individuals cannot abuse the protections afforded by the corporate structure to escape liability for wrongdoing. It serves as a deterrent against the use of companies as vehicles for illegal or unethical conduct (*Ex Parte Gore* [2013] 2 All SA 437 (WCC), being the first case to deal with this matter under s 20(9)(*a*) of the Companies Act).

2 2 Application of section 20(9): The court's discretion and orders

Section 20(9) elaborates on a court's powers once it has decided to pierce the corporate veil. If a court concludes that the company's legal personality should not be recognised, it may issue additional orders, as it deems necessary, to give effect to its declaration (s 20(9)(*b*) of the Companies Act). These orders can vary depending on the specific circumstances of the case and are designed to ensure that the outcome aligns with principles of justice and fairness.

For example, a court may order that the individuals behind a company (such as shareholders, directors or beneficial owners) be personally liable for the company's debts, liabilities or obligations. This could involve making the responsible parties repay creditors, compensate victims of fraud, or fulfil legal obligations that the company itself has failed to meet. The court may also impose other remedies, such as injunctions to prevent further wrongdoing or the imposition of fines or penalties for unethical behaviour.

The goal of these provisions is to restore fairness and prevent unjust enrichment or avoidance of legal duties. By piercing the corporate veil, the court ensures that individuals who have exploited the corporate structure are held accountable for their actions, rather than allowing them to hide behind the façade of a company's separate legal personality.

2 3 Safeguarding justice: Preventing the misuse of corporate entities

The doctrine of piercing the corporate veil, as codified in section 20(9)(*a*) of the Companies Act, acts as a safeguard against the misuse of a company and its form. It serves as a vital legal mechanism to prevent individuals from abusing the limited-liability protection of companies for personal gain at the expense of creditors, employees or other stakeholders.

While the concept of limited liability is crucial to fostering economic activity, the provisions of section 20(9)(*a*) recognise that it must not be

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absolute. The law must strike a balance between encouraging entrepreneurship and protecting the integrity of the legal system. When individuals deliberately manipulate the corporate structure of a company to perpetrate fraud, evade legal obligations, or engage in other forms of misconduct, the court's ability to pierce the corporate veil ensures that justice prevails.

At its core, section 20(9)(*a*) reflects a commitment to upholding fairness in the business world. It ensures that the legal protections afforded to companies are not misused and that the corporate veil can be pierced when necessary to prevent injustice. These provisions reinforce the idea that, although companies are separate legal entities, the individuals who control them cannot abuse this separation for unethical or illegal purposes.

Section 20(9)(*a*) provides a crucial tool for the courts to intervene in cases of corporate abuse. By piercing the corporate veil in appropriate circumstances, the law ensures that those who misuse the protections of corporate personality are held personally accountable, thereby promoting ethical business practices and protecting the interests of those who may be harmed by corporate misconduct.

3 Reverse piercing: a novel concept

The traditional doctrine of piercing the corporate veil is a legal concept allowing courts to look beyond a company's separate legal personality to hold its shareholders personally liable for the company's wrongful actions or debts (s 20(9) of the Companies Act). This typically happens in cases where the company and its corporate structure are used to perpetrate fraud, evade existing obligations, or stifle justice (*Ex Parte Gore supra* was the first matter in South Africa to deal with s 20(9) of the Companies Act).

By contrast, reverse piercing of the corporate veil is a relatively novel legal development in which a court can disregard the company's separate legal personality to hold it, the company, liable for the debts or obligations of its shareholder or member. Rather than exposing shareholders to corporate liabilities, reverse piercing allows a claimant to reach the assets of the company where the corporate structure is abused to shield an individual from personal liability. (This was attempted in *Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust supra,* but was unsuccessful. The court described the attempt as follows: "The third issue concerns a so-called reverse piercing of the corporate veil. Essentially, the question is whether, on the facts of this case, this Court should disregard the separate legal personality of Apoldo, to allow the Butcher Shop to raise as a defence to the Trust's claim for payment of rent, a defence that Apoldo would be entitled to raise against it" (par 11). The case revolves around the issue of a lessee claiming rent remission when a sub-lessee's beneficial use of a leased property is impeded by a *vis major* event, particularly during the COVID-19 pandemic. The Bymyam Trust, owners of a section of Amalfi in Cape Town, leased a section to The Butcher Shop & Grill in 2014. It subsequently withheld rent payments owing to government-imposed restrictions. The Trust launched an application for payment of rent and the

Butcher Shop counter-applied, arguing it was entitled to rent remission owing to the loss of beneficial use of the premises. The High Court dismissed the Butcher Shop's counter application and ordered it to pay R2 703 191.17 plus interest and costs. The central issue was whether the court should ignore sub-lessee Apoldo's separate legal personality, allowing the Butcher Shop to use a defence against the Trust's claim for rent payment.) This shifts the usual direction of blame or responsibility, focusing instead on how companies can be used to protect shareholders from liabilities they should bear. It is submitted that when looking at the specific wording of section 20(9)(*a*), it can be interpreted in the following way. Reverse piercing of the corporate veil is a legal principle allowing a court to disregard the legal distinction between a company and its shareholders, in contrast to conventional/traditional veil-piercing, which operates in an opposite manner. Traditional veil-piercing holds shareholders or owners accountable for a company's conduct, while reverse piercing assigns liability to the company for the debts or obligations of an individual shareholder or owner.

Examples of reverse piercing in practice include:

- *Creditor claims:* A creditor seeks to recover a debt from an individual shareholder who lacks adequate personal assets, while the company they oversee possesses substantial assets. The creditor aims to fulfil the shareholder's obligation by using the company's assets. In such a case, the creditor must be able to prove that the shareholder is unconscionably abusing the company and its separate legal personality, for example, to hide personal assets to avoid personal liability towards a creditor.
- *Fraud or evasion of liability:* An individual shareholder may have used the company as a protective barrier in an attempt to evade personal liability by moving personal assets into the name of the company.
- *Alter ego:* The term "alter ego" in relation to a company denotes a scenario in which, for example, a shareholder exercises such dominance over a company that they effectively ignore the separate legal personality of the company. In such instances, the company may be regarded as merely an "alter ego" or extension of the individual, rather than as an autonomous enterprise. This may justify a "piercing or reverse piercing of the corporate veil", whereby courts disregard the company's separate legal personality and impose liability on a company for a shareholder's debts and obligations. To classify a company as an alter ego, courts would typically examine indicators such as:
    - *Commingling of assets:* The individual integrates personal assets with the company's assets.
    - *Non-compliance with corporate formalities:* The company neglects to adhere to established corporate protocols, such as conducting board meetings and maintaining distinct records.
    - *Control and influence:* The individual possesses total authority over the activities and decisions of the company, which is devoid of any independence.

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This approach is frequently applied in instances where a company engages in fraudulent, wrongful or unjust conduct. (The focus is on instances when a company is used as an individual's alter ego and where the reversal of corporate veil-piercing is applicable. Also see *Citizens Life Assurance Co v Brown* (1904) AC 423 (CA) 426, *In re Moore* 379 B R 284 (Bankr N D Tex 2007) par 11, 21, 26 and 27; *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705; (1914-15) All ER Rep 280 (HL) 283.)

Courts generally exercise restraint with traditional veil-piercing and will have to do so with reverse piercing too because of the potential detriment it poses to other owners and creditors of the company who are not liable for the individual's personal obligations. Allowing for reverse piercing potentially broadens the scope of accountability, reflecting an evolving understanding of equity and responsibility within corporate law. It emphasises a balance between using the company and its corporate form to encourage investment and entrepreneurship while ensuring that it is not used as a shield against legitimate liabilities. However, this shift also stirs debate about its implications for the predictability and stability of companies and their corporate structures, as reverse piercing can unsettle traditional principles of limited liability that form the bedrock of corporate entities (*Salomon v Salomon supra*; also see *Dadoo Ltd v Krugersdorp Municipal Council supra*).

4 Legal basis for reverse piercing

Reverse piercing of the corporate veil is a valuable concept that can be used to ensure justice and accountability, particularly when individuals exploit companies and their corporate structures and separate legal personalities to commit fraudulent acts or evade responsibilities. As mentioned before, unlike traditional piercing, which is used to hold a company liable for the actions of its shareholders or operators, reverse piercing focuses on targeting the individual's assets by disregarding the corporate veil. This method would be applied when a company acts as an extension of the individual's identity, making it difficult for interested or external parties, like creditors to enforce their rights.

The doctrine serves primarily to prevent the misuse of companies and their separate legal personalities. The concept of an alter ego means that, when looking into a reverse piercing of the corporate veil, courts can examine whether the company is merely a shell or facade used to perpetrate fraud or circumvent legal obligations. Reverse piercing allows courts to adapt to complex situations where misuse occurs, particularly when the company and its corporate structure are manipulated to the detriment of interested and/or third parties.

The legal foundation for reverse piercing rests on equitable principles based on ensuring that the corporate form does not become an instrument of wrongdoing. This approach promotes fairness by recognising that individuals who hide behind their companies should not escape liability if they unjustly exploit the corporate entity. This is particularly relevant when traditional piercing fails sufficiently to address the intricacies of the situation,

as it might not reach the personal liabilities of those orchestrating the misconduct.

Overall, reverse piercing of the corporate veil helps uphold the integrity of the legal system by addressing manipulative behaviours that might otherwise go unchecked. It emphasises accountability and fairness, and seeks to balance the protection offered by corporate structures with the necessity to prevent and rectify abuses. In doing so, it safeguards the rights of third parties, ensuring that justice prevails even in the face of sophisticated corporate misuse.

5 Case law analysis

The legal basis for reverse piercing is rooted in equity and the principles of justice; it aims to ensure that the company and its corporate form are not used as an instrument of injustice. By allowing reverse piercing, courts can address and rectify situations where traditional piercing of the corporate veil might not adequately remedy abuses, thereby maintaining the integrity of the legal system and protecting the rights of third parties. The United States of America, and specifically Texas (reverse piercing of the corporate veil is a more well-known doctrine in Texas than in South Africa), are used to illustrate how section 20(9)(*a*) of the Companies Act can be interpreted to apply in reverse.

This summarised analysis synthesises the complex approach that Texas courts have adopted concerning reverse piercing of the corporate veil, when company assets are sought to satisfy the debts of controlling shareholders or individuals intertwined with the company. (While this list highlights significant cases on reverse piercing under Texas law, it represents a selection rather than an exhaustive compilation; additional case law may provide further insights or nuance.)

5 1 Yaquinto v Ward 558 BR 771 (Bankr ND Tex 2016): doctrine overview

Reverse piercing, an extension of the traditional piercing doctrine, is employed to access corporate assets for the debts of shareholders by establishing an alter ego relationship. In *Yaquinto v Ward*, a Texas court clarified that reverse piercing is not an independent cause of action but rather a remedial tool, thus reinforcing the idea that this doctrine cannot stand alone without a specific underlying claim.

The case emphasised that reverse piercing is a remedy, not an independent claim. Its application within divorce proceedings to incorporate corporate assets into community property underlines its flexibility in family-law contexts.

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5 2 In re Smith 192 SW 3d 564 (Tex 2006): post-judgment net-worth proceedings

In *In re Smith*, reverse piercing was examined in determining a debtor's net worth in the context of judgment suspension, thus illustrating reverse piercing in a post-judgment context. The Texas Supreme Court found that when an individual's identity is intertwined with a corporate entity to the extent that corporate separateness is blurred, the company's assets can be attributed to the individual.

This case underscores that determining an alter ego is key when assessing liability, as it ensures that those controlling an entity cannot evade financial obligations by hiding behind a company and its separate legal personality.

5 3 In re Moore (Cadle Co v Brunswick Homes LLC) 379 BR 284 (Bankr ND Tex 2007): Ownership and the alter ego doctrine

The case of *In re Moore* significantly shaped Texas reverse-piercing jurisprudence, especially around the ownership requirement. Here, Mr. Moore's involvement in the company's operations – although his wife was the sole shareholder – was sufficient for the court to find *de facto* ownership.

The case reflects Texas's adherence to strict standards for reverse piercing, requiring clear ownership or an alter-ego status, thus preventing misuse of the doctrine and protecting legitimate company shareholders and/or stakeholders.

5 4 In re Bass (Roberts v J Howard Bass & Assocs Inc) 2011 WL 560418 (Bankr WD Tex 2011)

The *In re Bass* ruling furthered the principle of *de facto* ownership, finding that an individual's deep involvement in a company can fulfil ownership requirements for alter-ego claims.

This case supported the precedent set in *In re Moore* (*supra*) that reverse piercing applies when an individual has substantial, if not formal, control over a company, reflecting Texas's stance that protections given by a company and its separate legal personality cannot shield fraudulent personal behaviour.

5 5 Clement v Blackwood No 11-16-00087-CV, 2018 WL 826856: Actual fraud for direct benefit

In *Clement v Blackwood*, reverse piercing allowed the plaintiffs to hold Clement Cattle LLC (limited liability company) liable for debts personally

benefiting the Clements family. It reinforced the need to prove actual fraud to pierce the corporate veil.

Texas law mandates proof of actual fraud, often requiring intent to deceive or dishonesty. Here, the company was found to benefit directly from the mortgage, despite the defendants' arguments that it served only the Clements' personal interests.

5 6 Transfirst Group Inc v Magliarditi 2017 WL 528776 (ND Tex 2017): Extending jurisdiction over alter-ego entities

The case of *Transfirst Group Inc. v Magliarditi* confirmed reverse piercing's applicability across state lines, asserting jurisdiction over entities alleged to serve as the alter egos of judgment debtors.

The court noted reverse piercing's common-law roots, finding that when company insiders use companies to shield/hide personal assets, such assets become liable for individual debts. This broadens the doctrine's reach, especially in multijurisdictional settings where asset concealment is suspected.

5 7 E & S Land Development LP v Shuomali 2016 WL 4991490 (Bankr ED Tex 2016): Challenges with single-member LLCs

The court in *E & S Land Development* highlighted that reverse piercing, particularly with single-member LLCs, challenges the traditional protection given by a company and its separate legal personality, often owing to a member's pervasive control.

Texas courts disregard procedural formality compliance for piercing purposes in LLCs, focusing instead on fraud or personal benefit. This aligns with section 21.223 of the Texas Business Organizations Code, underscoring that fraud is the primary determinant in piercing.

5 8 In re Packer 520 BR 520 (Bankr ED Tex 2014) and Hill v Orea (In re Juliet Homes LP) 2011 WL 6817928 at 18 (Bankr SD Tex, Dec 28, 2011): Bankruptcy limitations

In *In re Packer*, the court refused a reverse-piercing claim owing to a lack of creditor standing within bankruptcy, illustrating that bankruptcy protection prioritises an estate's preservation over creditor access to LLC assets.

Conversely, in *In re Juliet Homes*, the court found grounds to claim non-debtor company assets through reverse piercing, provided the companies operated as alter egos of the owner-debtors.

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Reverse piercing is narrowly construed in Texas, where courts seek to balance creditor rights against the need to preserve the integrity of a company structure. (The Texan approach should also be followed in interpreting s 20(9)(*a*) of the Companies Act when assessing reverse piercing of the corporate veil in South Africa.)

Each case demonstrates that ownership (*de facto* or formal) and a clear demonstration of alter-ego status are crucial for reverse piercing. Actual fraud or clear personal benefit must be shown, particularly where entities serve as personal-asset shields. The specifics of each case, such as involvement in company operations, extent of benefit, and fraud indicators, guide the courts' willingness to allow reverse piercing. (The same willingness and caution should be applied in South African courts.)

Through these rulings, Texas courts convey the need for caution in expanding reverse piercing, underscoring that it remains a remedy contingent on strict adherence to corporate law principles.

6 Guidelines for reverse piercing of the corporate veil

Reverse piercing of the corporate veil in Texas, as seen above, allows creditors to reach a company's assets to satisfy the debts of shareholders, contingent on establishing an alter-ego relationship between the individual and the company. This remedy, however, is not an independent cause of action and must be supported by an underlying claim. (There must be unconscionable abuse of the juristic personality of the company as a separate entity.) Key requirements and/or limitations and/or guidelines for reverse piercing of the corporate veil in South Africa potentially include, but are not limited to:

- *Alter-ego relationship:* The individual and corporate entity must have an intertwined identity that blurs the line of corporate separateness. Courts can assess the depth of the individual's involvement and control over the company, considering both *de facto* and formal ownership.
- *Ownership requirement:* Formal or *de facto* ownership in the company is crucial for reverse piercing. If an individual does not have direct ownership but exercises substantial control over the company, this may be sufficient to satisfy the ownership criterion.
- *Actual fraud for personal benefit:* Texas law requires proof of actual fraud committed by the individual for their direct benefit. (Section 20(9) of the Companies Act states that unconscionable abuse must be present. Actual fraud can fall within the scope of unconscionable abuse as it is unreasonably unfair to one party or otherwise unacceptably offensive to public policy.) This includes demonstrating an intent to deceive, or conduct that benefits the individual personally at the expense of others.
- *Single-member companies and procedural formalities:* For single-member companies, courts may overlook formalities like company meetings when assessing reverse piercing. Instead, they should focus on fraud, personal benefit, and the individual's control over the

company's operations. However, compliance with section 20(9)(*a*) of the Companies Act, which requires unconscionable abuse to be present, remains essential.

- *Bankruptcy limitations:* In bankruptcy proceedings, creditors often lack the standing to pursue reverse-piercing claims, as priority is given to preserving the bankruptcy estate. However, courts may allow reverse piercing if the company is proved to operate as an alter ego of the debtor, thus including company assets as part of the individual debtor's estate.
- *International jurisdiction:* If a corporate entity is used to hide assets from creditors, courts should recognise reverse piercing across jurisdictions, thus allowing creditors to pursue assets shielded by companies in other countries.

In sum, reverse piercing of the corporate veil should be cautiously applied and should require substantial evidence of fraud, alter-ego relationships and personal benefit, to prevent the unconscionable abuse of corporate entities to shield individual assets.

7 Implications and challenges

Reverse piercing under section 20(9)(*a*) of the Companies Act involves holding a company liable for the actions or debts of its shareholders, rather than the traditional piercing where shareholders are held liable for the company's actions. This legal mechanism aims to prevent the misuse of corporate entities by individuals seeking to shield themselves from personal liability. The possible application of reverse piercing in South Africa carries significant implications for corporate governance and liability.

One of the primary benefits is the ability to combat fraudulent or abusive practices where individuals hide behind a corporate veil to avoid personal accountability. By allowing courts to reach a company's assets, reverse piercing can deter those who might otherwise exploit a company and its corporate structures for illicit purposes. However, navigating the legal criteria for reverse piercing can be challenging, as courts have to balance the need for accountability with fair treatment of corporate entities. This often involves a complex analysis of fairness and justice, given that innocent creditors of a company could be affected by such decisions.

Procedural complexity is another major challenge. Litigants seeking reverse piercing must prove not only the misuse of the corporate form but also that traditional remedies are inadequate. This necessitates a thorough understanding of both corporate law and the specific circumstances of the case. A high burden of proof ensures that reverse piercing cannot be invoked lightly, but it can also make the process cumbersome and costly.

Potential abuse by litigants is a concern, as creditors might attempt to use reverse piercing to target corporate assets unjustly, leading to strained judicial resources and potential unfairness to innocent parties. Courts must

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be vigilant in differentiating legitimate cases from those seeking unjust enrichment.

In practice, these challenges necessitate a careful approach. Legal practitioners must navigate the fine line between preventing company abuse and protecting legitimate company interests. For corporate governance (regulated by the King IV Report), the threat of reverse piercing emphasises the importance of maintaining clear separations between personal and company finances and ensuring compliance with legal standards. Corporate entities may need to revisit governance structures and practices to mitigate potential exposure to reverse-piercing claims.

Overall, while reverse piercing serves as a crucial tool in upholding corporate accountability, its implications for corporate governance require careful consideration. Balancing its benefits and challenges is essential to fostering a fair and effective corporate legal environment.

8 Conclusion

The introduction of section 20(9)(*a*) into the Companies Act has undoubtedly codified our understanding of corporate structures, particularly through the possible concept of reverse piercing of the corporate veil. This legal mechanism allows courts to attribute liabilities or legal characteristics of individual members to the company itself, thus aiming to prevent injustice or fraudulent activities that unfairly benefit controlling members. Unlike traditional veil-piercing, which focuses on holding shareholders or directors accountable for the company's liabilities, reverse piercing shifts the focus onto the company, scrutinising its association with individual members when their conduct necessitates action to ensure justice or fairness.

This innovation is significant as it addresses the intricate and often opaque relationships within business entities, stressing the importance of transparency and accountability among both companies and their controlling members.

However, the implementation of section 20(9)(*a*) is not without its obstacles. The principle of limited liability, a cornerstone of corporate law, encourages investment and entrepreneurial risk-taking. Thus, applying reverse piercing requires a nuanced approach to ensure that it does not inadvertently discourage these beneficial economic activities. Courts, therefore, have the challenging task of balancing the protection of corporate structures against the need to rectify abuses that harm legal or ethical interests.

Moving forward, reverse piercing is anticipated to bring about significant changes in corporate governance. It places a responsibility on both companies and their members to engage in ethical practices, with the understanding that courts may intervene if actions lead to unjust enrichment or violate legal norms.

As jurisprudence around these sections evolves, it is likely to foster a culture of responsibility, pushing corporate entities towards more ethical behaviour and reinforcing the credibility and fairness of corporate

interactions. Such a shift towards greater ethical accountability is poised to enhance the integrity of business practices in the modern corporate landscape.

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