

# Piercing the corporate veil through the shadow of “trusts”

*The notion "piercing the corporate veil" remains one of the most contested areas of litigation within the corporate law context, yet it is the least understood subject. The general principle is that companies or corporate entities are regarded as legal entities with their own juristic personalities, separate from their shareholders and directors. As such, corporate obligations remain that of the company and not the share-holders and directors acting in its interest.*



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On the other hand, a trust is a relationship where a person or company (the trustee) is under a legal obligation to deal with property owned by the trust (trust property) for the benefit of some other person(s) (beneficiaries) or for some specific purpose or purposes (objects). Although in some instances it may be referred to as a separate legal entity as a result of being created by a contract (a trust deed), it is not a legal persona or a juristic person.

In *V.Z Dianne Windsor Morrell and V.Z Demo and others* 2014, it was accepted that:

*"...persons are generally entitled to organize their financial affairs to maximum advantage without fear of opprobrium. Trusts are well recognized as permissible vehicles for estate and financial planning. The separateness of a company from its shareholders is recognized in law as is the shelter a trust provides for its beneficiaries..."*

Piercing the corporate veil refers to a situation where the courts disregard the company as a separate legal person, solely responsible for the debts it incurs, and imposes those debts on the shareholders and directors of a company in their personal capacity.

Section 20(9) of the Companies Act (71 of 2008), contemplates that:

*"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;*

*(b) and make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)."*

The purpose of this article is to establish if s20(9) of the Companies Act is the solution to directing the courts and tribunals on the principles to be applied when adjudicating on whether a corporate veil should be lifted or not with regard to trusts.

In the case of *Van Zyl N.O and another v B Kaye N.O and others* 2014 ZAWCHC 52; 2014 (4) SA 452 (WCC):

*"The applicants sought invocation by the court of its power under common law to disregard 'the veneer' of the trust or go behind it for relief sought in respect of the Cape Town Property. They rely on the provisions of Section 20(9) of the Companies Act 71 of 2008 for the relief sought in respect of the Plettenberg Bay property.*

*The alleged delinquent discharge by trustees of their responsibilities giving Kaye sole and unfettered de facto control of trust assets, gave rise to the accusation by the applicants in their founding papers that the trust was a 'sham'."*

Although the applicants were not successful, the court did acknowledge that *"going behind the trust form, that is piercing its veneer, is an essential representation of provision by a court of an equitable remedy to a third party affected by an unconscionable abuse of the trust form. It is a remedy that will be afforded in suitable or appropriate cases."*

In *V.Z Dianne Windsor Morrell and V.Z Demo and others* 2014 SGHC it was stated that the courts are entitled to *"lift"* or *"pierce"* the *"corporate veil"*, which is done only in exceptional cases.

In summary, Demo had failed to pay his maintenance order as he had no assets in his personal name because he had placed all his assets in four trusts. The Applicant sought an order directing that the veils of the trust be pierced and, amongst other orders, to declare the assets as those of Demo. The court ordered that the assets, which fell under the four trusts, be deemed personal and/or Demo's personal assets.

The common law remedy of piercing the corporate veil is applied when the interests of creditors are weighed against the duties of company directors to run the business in the best interests of its shareholders. The main aim of piercing the veil is to remove the limited liability afforded to directors and/or shareholders presented by the company structure. This mostly happens when directors and/or shareholders are involved in fraudulent activity.

In conclusion, the core element of a trust is that there should be separation of ownership from enjoyment of the trust assets. If assets are transferred into a trust but dealt with as before, there can be no separation of ownership. As a result, courts are entitled to disregard the "veneer" of a trust. In the same breath, courts have no discretion to disregard the existence of a separate corporate entity whenever it considers it just or convenient to do so. It may be permitted in instances where the corporate entity is the alter ego of a controlling person.

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