REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPEHIGH COURT, CAPE TOWN)

Case No: 18127/2012

Before: The Hon. Mr Justice Binns-Ward

In the ex parte application of:

STEPHEN MALCOLM GORE N.O

AND 37 OTHERS N.N.O.

(in their capacities as the liquidators of 41 companies

comprising King Financial Holdings Ltd (in liq.)

and its subsidiaries) Applicants

JUDGMENT: 13 FEBRUARY 2013

BINNS-WARD J:

[1] The order set out at the end of these reasons for judgment was made on 14 December 2012. It was made in terms of s 20(9) of the new Companies Act (Act 71 of

2008).[1] I indicated at the time that I would provide reasons for the order later.[2] Those reasons now follow.

[2] The order granted the relief sought by the liquidators of 41 companies to permit certain of the assets of those companies to be dealt with as if they were the property of the holding company. The relief that had been asked for entailed selectively disregarding the separate personalities of a number of companies in a group of companies and treating their residual assets (that is the assets remaining after the payment of the secured creditors and 'trade creditors' of each company) as the assets of the holding company for the purposes of settling what have been described as the 'investors' claims'. The essential basis for the application was the allegation that the relevant business of the group was conducted through the holding company with little or no regard to the distinction between that company's legal personality and that of its subsidiaries. The founding papers asserted that the application was brought under the common law, alternatively in terms of s 20(9) of the Companies Act, 2008.

[3] The application was described on the court roll as being one for the 'piercing of the corporate veil'; a familiar term in this context, locally and in the English common law jurisdictions, before the introduction of s 20(9) of the new Companies Act. Some might suggest that 'lifting' the veil was the more appropriate label in the circumstances. Staughton LJ offered the following basis for a distinction in *Atlas Maritime Co SA v Avalon Maritime Ltd,The Coral Rose (No. 1)* [1991] 4 All SA 769 (CA), at 779:

> 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 [in other words, to its controllers]for some legal purpose.

[1]The provision is quoted in full at para. [30], below.

[2]One of the causes for delaying the provision of the reasons was to enable me to update the description of the English jurisprudence on 'piercing the corporate veil' in the draft judgment I had prepared, with appropriate reference to the then awaited judgment of the UK Supreme Court in *VTB Capital Plc v Nutritek International Corp &Ors*[2013] UKSC 5(in which judgment had been reserved on 14 November 2012). The UKSC handed down judgment on 6 February 2013. I granted an order without reasons in December because it was desirable, in the interests of the creditors, that the applicants be enabled to implement the relief granted without further delay.

In *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254 (SCNSW), at 264, Young J described 'lifting the corporate veil' as meaning '[t]hat although whenever eachindividual company is formed a separate legal personality is created,courts will onoccasions, look behind the legal personality to the real controllers'.

[4] A broad consideration of the case law in several jurisdictions impels the conclusion that nothing really turns on the labels despite the documented debate therein about nuances in the terminology.[3] Indeed, the inconsistent and often confusing employment of the expressions 'piercing', or 'lifting', or 'looking behind' the veil lends support to Van Heerden JA's expressed wariness about the use of 'the veil' metaphor altogether.[4] What is entailed on any approach, whether it be called a 'piercing' or a 'lifting', is a facts-based determination by the courts in certain cases to disregard some or all of the characteristics of separate legal personality that statute law ordinarily attributes to a duly incorporated company.[5] Juristic personality is a legal fiction[6] (or a 'figment of law' as it has on occasion been referred to[7]) and thus, when the circumstances of a particular case make it appropriate to do so – inevitably in matters in which the concept has been used improperly, in a manner inconsistent with the rationale for the creation and maintenance of the legal fiction - courts

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[3]As Toulson J is reported to have observed in *Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia (No 2)* [1998] 1 WLR 294, 305, '*it may not matter what language is used as long as the principle is clear; but there lies the rub*' (quoted by Lord Neuberger in *VTB Capital* [UKSC] supra, at para. 118).

[4]*Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A), at 808E.

[5] See *Salomon v Salomon & Co* 1897 AC 22, [1895–9] All ER Rep 33 and *Dadoo, Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530, which are the seminal judgments in England and South Africa affirming the effects of the independent and self-standing juristic personality of companies.In *VTB Capital* [UKSC] supra, at para. 122, Lord Neuberger remarked that '*There is great force in the argument that*[Salomon v Salomon]*represented an early attempt to pierce the veil of incorporation, and it failed, pursuant to a unanimous decision of the House of Lords, not on the facts, but as a matter of principle. Thus, at 30-31, Lord Halsbury LC said that a "legally incorporated" company "must be treated like any other independent person with its rights and liabilities appropriate to itself …, whatever may have been the ideas or schemes of those who brought it into existence". He added that it was "impossible to say at the same time that there is a company and there is not"*'.

[6]Which is not to suggest that the existence of a company as a separate entity distinct from its members is a merely artificial and technical concept. On the contrary, it brings about that property vested in the company is not, and cannot be regarded as vested in all or any of its members; see *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A), at 565-6, following *Dadoo, Ltd and Others v Krugersdorp Municipal Council* at 550-551.

[7]*Ebrahim v Airports Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA), [2009] 1 All SA 330, at para. 15.

will disregard it.[8] Interestingly, in circumstances to be discussed presently, the UK Supreme Court recently left open the question of whether, in the absence of statutory provision, the courts in that jurisdiction truly possess the power to 'pierce the corporate veil'. It is evident, however, that, irrespective of the answer to the question, the courts there have acted in many matters over the years assuming that they do possess the power.[9] The basis upon which this has been done here and in various foreign jurisdictions will be considered later in this judgment.

[5] The applicants were all liquidators of one or more companies which formed part of a group of companies, referred to in the papers as 'the King Group'. The overall holding company was King Financial Holdings Limited ('KFH'), which is also in liquidation, and the liquidators of which are also amongst the thirty nine applicants.

[6] KFH's shares were held by three groups of shareholders, namely the trustees of the Adrian King Beleggings Trust, the Paul King Beleggings Trust and the Stephen King Beleggings Trust, respectively. The King Group was effectively managed and owned by the eponymous King brothers, Adrian, Paul and Stephen. The shareholding trusts were so-called family trusts set up for the benefit of the respective King brothers and their families. The King brothers were directors of KFH and most of its subsidiaries. At all times - even after the

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[8]ompare the observation by Angelo Capuano of MonashUniversity in his paper propounding a 'realist' approach to piercing the corporate veil, '*The realist's guide to piercing the corporate veil: Lessons from Hong Kong and Singapore*', (2009) 23 Australian Journal of Corporate Law: '*The corporate veil cannot be measured physically, nor can the corporation be touched, hand cuffed or made to do hard labour. This is not to say, while it may be true for some, that realists deny the existence of the corporate veil. It only exists, in law, if it has some pragmatic rationalisation and cause or some purpose <u>for which it is worthy to be recognised</u>. If the facts rationalise it and provide purpose for its existence, then its grounding in the pragmatic is evident.'* (emphasis supplied) In *VTB Capital plc v. Nutritek International* [2012] EWCA Civ 808, at para 87, Lloyd LJ (delivering a judgment jointly written by all three members of the court) stated that '*Veil piercing …is about substance, not form; …*'.

[9]Cf. e.g. the conclusion by Rose LJ in *Re H*[1996] 2 All ER 391; [1996] 2 BCLC 500 (CA), who, after referring to the dicta of Danckwerts LJ in *Merchandise Transport Ltd. v. British Transport Commission* [1962] 2 QB 173 at 206-7:

> *'... where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance.',*

and remarking that this statement had been endorsed by Slade LJ in *Adams v Cape Industries*, stated that '[c]*learly, <u>as a matter of law</u>, the corporate veil can be lifted in appropriate circumstances*'. (emphasis supplied)

‘share conversion’ scheme referred to below - the King brothers retained a majority of the KFH shares and exercised control of the group.

[7] From about 2004, the King brothers used the companies in the group to conduct business in the provision of financial services by way of marketing investments in commercial and residential immovable properties in the manner to be described below. In early 2008, their activities attracted the attention of the Financial Services Board (‘FSB’), which conducted a search and seizure operation at the address from which the business of the group was carried on. The FSB inspection report that followed spoke to widespread irregularity in the conduct of the business of the group and was one of the factors that precipitated the subsequent winding up of the companies in it. The liquidators also commissioned an investigation by accountants PriceWaterhouseCoopers (‘PWC’) into the receipt and allocation of investments by the companies in the group.

[8] The investigations established that the affairs of group were in material respects conducted in a manner that maintained no distinguishable corporate identity between the various constituent companies in the group. The entire group was operated, in effect, as one entity through the holding company. Funds solicited from investors were transferred by the controllers of the holding company between the various companies in the group at will, with no effectual regard to the individual identity of the companies concerned, and with grossly inadequate record keeping. The investigations bore out the admission by the King brothers that they ‘treated all their companies as one’. It is thus perhaps no cause for surprise that the King brothers expressly purported to carry on the business of financial service provider in the name of KFH, notwithstanding that the only company in the group that was registered as a financial service provider in terms of the applicable legislation was King Services (Pty) Ltd; KFH’s letterhead even misrepresented that *it* was a licensed financial service provider.

[9] Investments solicited by the King Group were structured predominately in the form of a purchase by the investor of shares in a member of the group, the shares being acquired from another member of the group. The acquisition of the shares was coupled with the contemporaneous extension of a loan by the investor concerned to the company of which he was becoming a shareholder; the concept being that the shares could not be dealt with other than together with the related loan account. All but a nominal amount of the investment comprised of money lent by the investor to the company in which he purchased share/s. The companies in which investments were ostensibly made on this basis were property owning entities.

[10] Initially, the King Group used a number of companies to hold already developed commercial properties. Most of these companies bore variations of the name 'Edrei', for example 'Edrei 1' or 'Edrei 13'. The Edrei companies were held by intermediate companies in the group structure. It was from these intermediate companies that the investors ostensibly purchased shares in the property holding entities. It was represented to investors that the loans made by them to the property holding entities would be secured, but no security was in fact provided.

[11] At a later stage the King Group extended its ventures to the development of commercial and residential properties. This area of enterprise was conducted mainly through entities in the group bearing the 'Kingvest' or 'Zelpy' names. Investments into the Kingvest or Zelpy companies were structured in essentially the same manner as those into the Edrei companies.

[12] As a consequence of the dishonest and chaotic administration of the affairs of the King Group of companies by the King brothers, the liquidators of the constituent companies have encountered serious difficulty in identifying the relevant corporate entities against which the individual investor-creditors might have claims. To illustrate: a creditor might have been

under the impression that he had invested in company A, and might even have been issued with documentation that purported to confirm as much, but the flow of funds might indicate a quite different reality. In many cases the documentation purporting to evidence an investment was so ineptly prepared that it did not identify into which company the particular investment ostensibly was being made. The invested funds were in fact 'allocated' by the management of the King Group into whichever company it saw fit, which, in effect, meant any company in the group which happened then to be in immediate need of funds. This happened without any properly kept accounting record. The first applicant avers that 'it was a matter of luck whether or not the investor was allocated to a financially sound company, or one that was insolvent'. (It has been suggested that some investors personally connected to the King brothers may have been preferred by being 'allocated' to subsidiaries 'where there is a surplus'.) The flow of funds within the Group appears to have been materially determined by the need of the King brothers to sustain their scheme by finding money to pay out existing investors who wished to withdraw their funds. Obviously it would become impossible to attract fresh investments if there were a default in payment to existing investors. Thus, during the period 1 July 2008 to 1 February 2010, of nearly R80 million received from investors for property investment only just under R32 million was applied for the stated purpose, with at least R15,5 million being used to repay investors in the King group who wanted to withdraw their investments.

[13] In the period leading up the collapse of the group the King brothers also persuaded investors to enter into so-called 'share conversion' transactions in terms of which ostensibly existing investments in one or more subsidiary companies could be converted into shares in KFH. The share conversion scheme was inept and dishonest. The investigation into it by PWC showed, for example, that the shares were 'converted' at markedly different (and apparently arbitrarily determined) values. Corresponding cashflows to support the realisation

of shares in a subsidiary for the acquisition of shares in KFH could not be found. Supporting documentation for many transactions was absent. Shareholder certificates were issued to investors without copies of the certificates being maintained in the company's records. Shares in KFH were also marketed and sold directly to the public notwithstanding that at the relevant time the company had not been converted from a private company into a public company. Moreover a greater number of shares was purportedly issued than had been authorised.

[14] These are but some of the examples apparent from the FSB and PWC reports of the manner in which the Group's affairs were conducted.

[15] It is evident from the reports that the disregard by the King brothers of the separate corporate personalities of the companies in the King Group was so extensive as to impel the conclusion that Group was in fact a sham. There was in reality no distinction for practical purposes when it came to dealing with investors' funds between KFH and the subsidiary companies. The relief that was granted allowing the consolidation of the residual assets in KFH and directing that all the investors' claims would lie against the fund thus created was given to afford a convenient and cost-effective means of dealing with the consequences.

[16] The application was commenced by way of a rule *nisi*, which was published in the national press and in the Government Gazette. Notice of the application was also given in some of the district newspapers circulating locally in areas in which concentrated numbers of investors were known to reside. The published notices provided a summary of the application and gave a web address at which the full set of founding papers could be accessed.

[17] Service was effected personally on Kobus Pienaar, Kortrustfin (Pty) Ltd and Pierre Daniel Smit. They were shareholders in two of the companies of the group who, for reasons

it is not necessary to describe, were expressly excluded from the definition of investors in terms of paragraph 1.3 of the order. They took no active part in the proceedings.

[18] Notice was also given to the Master of the High Court at Cape Town, who indicated that she abided the judgment of the court. The FSB filed an affidavit indicating that it supported the application.

[19] It is evident on a consideration of South African, English and Australian jurisprudence that the readiness of courts to pierce, lift, or look behind the corporate veil has varied quite considerably depending on the facts of given cases. It is impossible to categorise the results premised on any finitely definable principles. In *Amlin (SA) Pty Ltd v Van Kooij*2008 (2) SA 558 (C), at para. 15, Dlodlo J quoted from two Australian cases, including the comment of Rogers AJA in *Briggs v James Hardie& Co Pty Ltd* (1989) 16 NSWLR 549 (NSWCA)[10] that *'(T)here is no common, unifying principle, which underlies the occasional decision of the courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities.*' An Australasian academic, Professor John Farrar, reportedly described the Australian authorities on piercing the corporate veil as '*incoherent and unprincipled*' (J Farrar, 'Fraud, Fairness and Piercing the Corporate Veil' (1990) 16 *Canadian Business Law Journal* 474, 478, cited by Prof Ian Ramsay and David Noakes of the University of Melbourne in their paper '*Piercing the Corporate Veil in Australia*', (2001) 19 *Company and Securities Law Journal* 250-271).

[20] In *VTB Capital* [UKSC] supra, at para. 123, Lord Neuberger, addressing an argument that the courts enjoyed no power in law to pierce the corporate veil, remarked '*The notion that there is no principled basis upon which it can be said that one can pierce the veil of incorporation receives some support from the fact that the precise nature, basis and*

[10] Incorrectly cited in *Amlin* as '(1998) 16 NSWLR'.

meaning of the principle are all somewhat obscure, as are the precise nature of circumstances in which the principle can apply'. Indeed, in what is generally accepted to be the leading South African authority on the subject, *Cape Pacific Ltd*,[11]Smalberger JA (who expressly refrained from being drawn into making a semantic distinction between 'piercing' and 'lifting' the corporate veil) observed, '*The law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil. Each case involves a process of enquiring into the facts, which, once determined, may be of decisive importance…I do not deem it necessary or advisable in the present appeal to attempt to formulate any general principles with regard to when the corporate veil may be pierced*'.[12]

[21] Recent commentary by the editors of Cassim*et al* (ed.), *Contemporary Company Law*, Second Edition (Juta), 2012, is to the effect that '*…the grounds on which courts will pierce the corporate veil have been difficult to state with certainty. Courts have grappled with the correct approach to adopt in determining whether or not to pierce the corporate veil….*'.[13] The elusiveness of any clearly determinable principles may be illustrated with regard to such matters in the context of groups of companies by contrasting the robust approach evident in the English courts' judgments in *Littlewoods Mail Order Store Ltd v McGregor* [1969] 3 All ER 855 (CA), *Wallersteiner v More* [1974] 3 All ER 217 (CA) and *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3 All ER 462 (CA) with the strictly conservative approach taken in *Adams and Others v Cape Industries plc and Another* [1991] 1 All ER 929 (Ch D and CA).[14]

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[11] See note 4 above (at pp. 802-803).

[12]Compare the observation in C Mitchell, '*Lifting the Corporate Veil in the English Courts: An Empirical Study*' (1999) 3 *Company Financial and Insolvency Law Review* 15 about '*the courts' own disinclination to describe a set of principles by reference to which their decisions on the point should be taken: they would prefer to reserve a discretion to themselves to judge each case on its merits*' (see Ramsay and Noakes supra).

[13]Op cit at §2.4 (p. 42).

[14] The Court of Appeal's judgments in *DHN Food Distributors Ltd* had previously attracted adverse comment in the House of Lords' decision in *Woolfson v Strathclyde Regional Council* 1978 SLT 159 (HL) (accessible at *http://www.bailii.org/uk/cases/UKHL/1978/1978_SC_HL_90.html*). Lord Keith of Kinkel stated that it was doubtful whether the Court of Appeal had '*properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that is a mere façade concealing the true facts*'. See the discussion on the point in *Al-Kharafi& Sons v Pema and Others NNO* 2010 (2) SA 360 (W), at para. 34-

[22] The summary of the circumstances in which an English court will be prepared to pierce the corporate veil given in *Faiza Ben Hashem v. Shayif and Another* [2008] EWHC 2380 (Fam)[15] probably provides an accurate reflection of the current position in that jurisdiction, save that the suggestion that 'the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done' has been held to be incorrect (see *Antonio Gramsci Shipping v Stepanovs* [2011] 1 Lloyds Rep. 647, at para. 18-21,[16] and *VTB Capital plc v. Nutritek International* [2012] EWCA Civ 808, at paras. 79 and 82). In *Ben Hashem*,Munby J set out the following seven principles (at paras 159-164):

1. Ownership and control of a company are not of themselves sufficient to justify piercing the veil;
2. The court cannot pierce the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interests of justice;
3. The corporate veil can only be pierced when there is some impropriety;
4. The company's involvement in an impropriety will not by itself justify a piercing of its veil: [furthermore] the impropriety must be linked to use of the company structure to avoid or conceal liability;
5. It follows…. that if the court is to pierce the veil, it is necessary to show *both* control of the company by the wrongdoer *and* impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing;
6. A company can be a façade for such purposes even though not incorporated with deceptive intent, the relevant question being whether it is being used as a façade at the time of the relevant transaction(s).
7. And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.

On the assumption that the courts do have the power to pierce the corporate veil - as mentioned, a question that has been left open by the UK Supreme Court - that statement of

35. (In *VTB Capital* [UKSC] supra, at para. 121, Lord Keith's treatment of the concept of piercing the corporate veil was characterised as *obiter*, it being held that the decision in *Woolfson* does not afford any authority that English courts in fact enjoy the power to pierce the corporate veil.)

[15] Also reported at [2009] 1 FLR 115, [2008] Fam Law 1179 and accessible at http://www.bailii.org/ew/cases/EWHC/Fam/2008/2380.html.

[16] Also reported at [2012] 1 All ER (Comm) 293, [2012] 1 BCLC 561, [2012] BCC 182 and accessible at http://www.bailii.org/ew/cases/EWHC/Comm/2011/333.html.

principle appears, subject to the qualification that I have mentioned, to enjoy broad endorsement by the Court of Appeal and the Supreme Court in *VTB Capital*.[17]

[23] The facts and matters in issue in *VTB Capital* were conveniently summarised on the UK Supreme Court website as follows (insofar as relevant):

> The Appellant is a London-based bank. In 2007 the Appellant entered a Facility Agreement with a Russian company ("RAP"). Under that agreement the Appellant loaned RAP $225m to fund the purchase of six Russian Dairy Plants ("the Dairy Companies") from the First Respondent.
>
> RAP subsequently defaulted on the loan. In 2010 the Appellant began claims in deceit, alternatively conspiracy to defraud, against the Defendants. In May 2011 the Master granted permission to serve the claims on the Defendants out of the jurisdiction. In August 2011 the Appellant obtained a worldwide freezing order against the Fourth Defendant.
>
> In October 2011 the Appellant applied to amend its Particulars of Claim to add a claim for breach of contract against the Second, Third and Fourth Defendants. The Appellant alleged the Defendants had fraudulently misrepresented that RAP was a purchaser in separate control that was buying the Dairy Companies from the First Respondent under an arm's length transaction. In fact, RAP was controlled by the Second, Third and Fourth Defendants, who deliberately misused RAP's corporate structure in order to defraud the Appellant.
>
> Arnold J refused the Appellant's application to amend the Particulars of Claim. …….

(As explained in the judgment of the Court of Appeal, the reason that the appellants sought to amend their particulars of claim to introduce a claim founded in contract - for which they required RAP's corporate veil to be pierced - was to provide an alternative basis for establishing the jurisdiction of the English court for its claims against the defendants.[18])

[24] The issue for determination was stated thus in the website summary:

> If a person uses a puppet company to enter a contract with a third party in order to perpetrate fraud on that third party, can the court pierce the corporate veil and treat that person as a party to the contract?

The UK Supreme Court answered that question in the negative, holding that even if the court could in principle pierce the corporate veil, doing so in the postulated circumstances would

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[17]See para 79 of the Court of Appeal judgment and para. 128 of Lord Neuberger's judgment in the Supreme Court.

[18]See *VTB Capital plc v. Nutritek International* [2012] EWCA Civ 808, at para 44.In *Antonio Gramsci Shipping Corporation and Others v. Stepanovs*[2011] EWHC 333 (Comm); [2011] 1 Lloyd's Law Reports 647 and *Alliance Bank JSC v. Aquanta Corporation and Others* [2011] EWHC 3281 (Comm), Burton J held that allegations comparable to those which the appellants in *VTB Capital* sought to introduce by way of amendment to their particulars of claim made out 'a reasonable cause of action'. The court of first instance (Arnold J in the Chancery Division) and the Court of Appeal disagreed in *VTB Capital* – see also *Alliance Bank JSC v Aquanta Corporation and Others* [2012] EWCA Civ 1588 (12 December 2012) at para 32. So also did the majority in the Supreme Court.

be tantamount to extending the concept in a manner contrary to principle. The principles which Lord Neuberger thought would be offended by such an extension appear to have been firstly, the absence of any necessity for the exceptional course of disregarding the RAP's corporate personality because the law of tort afforded VTB a remedy for negligent or fraudulent misrepresentation[19] and secondly, the allegations that VTB wished to introduce into its founding pleading would not make out a case that RAP had been used as a 'façade to conceal the true facts'. Lord Neuberger, however, expressly allowed that the interposition of pertinent statutory provisions could determine a different conclusion on the question of whether, and in what circumstances, a court could pierce the corporate veil. Section 20(9) of the Companies Act 71 of 2008 (discussed below) is a manifestation of such a provision. It is not necessary to determine the question, but it does not seem clear that the UK Supreme Court would necessarily have come to the conclusion it did if a statutory provision like s 20(9) of our new Companies Act had been applicable.

[25] In Australia, in *Gorton v Federal Commissioner of Taxation* (1965) 113 CLR 604, Windeyer J remarked that an unduly rigid approach to piercing the corporate veil led the law into '*unreality and formalism*'. Trending in the opposite direction, however, Hill J, in the Federal Court, is reported[20] as having commented in *AGC (Investments) Ltd v Commissioner of Taxation (Cth)*(1992) 92 ATC 4239; 23 ATR 287 (which was not available to me) that the '*circumstances in which the corporate veil may be lifted are greatly circumscribed*', thus reflecting the entrenched judicial attachment to formalist legal doctrine commonly discernible in judgments on the subject not only in Australia, but also in England and in South Africa.

[26] In their article analysing the approach of Australian courts to piercing the corporate veil, Ramsay and Noakes identify 'group enterprises' as one of five categories of 'factors' that might lead to a decision to pierce the veil.[21] It is a factor that is evident in cases in which

[19]See *VTB Capital* [UKSC] supra, at para. 139.
[20]In Ramsay and Noakes'*Piercing the Corporate Veil in Australia*' (see para [19], above).
[21] Ibid.

the '*circumstances* [indicate that] *a corporate group is operating in such a manner as to make each individual entity indistinguishable, and therefore it is proper to pierce the corporate veil to treat the parent company as liable for the acts of the subsidiary*'.

[27] Our own jurisprudence contains an *en passant* acknowledgment of the apparent trend during the 1960's and 70's towards an readier willingness to ignore the separate personality of individual companies in the group context (see *Ritz Hotel Ltd v Charles of the Ritz Ltd and Another* 1988 (3) SA 290 (A), at 314H-316B), but the more recent conservative trend by the English courts evidenced in *Adams* has been endorsed in subsequent South African judgments: see e.g. *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (A), at 675D-E and *Macadamia Finance BK en 'n Ander v De Wet en Andere NNO* 1993 (2) SA 745 (A), at 748B-D. A judicial philosophy that the separate personality of juristic persons should be disregarded only in exceptional circumstances and as a last resort under the common law has been articulated in some recent South African judgments, cf. *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA), at para 23, *Amlin* supra, at 567J-568C,[22] *Airport Cold Storage (Pty) Ltd v Ebrahim and Others* 2008 (2) SA 303 (C), at para. 9, and *Al-Khafari& Sons v Pema and Others NNO* 2010 (2) SA 360 (W), at para. 36. Our courts nevertheless do in some senses adopt a discernibly more liberal approach to the issue than the English courts. Cameron JA compared the approach of our courts to those of England in the following terms in *Ebrahim v Airports Cold Storage (Pty) Ltd*[23], at para. 22, when dealing with a case in which ss 64(1) and 65 of the Close Corporations Act 69 of 1984[24] had been invoked: '*In contrast with the United*

[22]See para. [19], above.
[23]Note 7.

[24] Section 64 of the Close Corporation Act provides:

> *If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.*

Section 65 provides:

Kingdom, where it seems the equivalent provisions have in recent years "been very rarely used" to fasten directors with personal liability, the jurisprudence of this Court evidences claimants' spirited reliance on the provision. Though courts will never "lightly disregard" a corporation's separate identity, nor lightly find recklessness, such conclusions when merited can only help in keeping corporate governance true.'[25]

[28] A consideration of the South African authorities shows that despite the repeated affirmation that the courts enjoy no general discretion to do so merely because it would be just and equitable, courts will ignore or look behind the separate legal personality of a company where justice requires it, and not only when there is no alternative remedy. The involvement of fraud or other improper conduct has generally been present in the cases in which the veil has been lifted or pierced. Corbett CJ - appearing to broadly endorse the approach of the English Court of Appeal in *Adams*, while expressly eschewing any necessity to'consider, or attempt to define, thecircumstances under which the court will pierce thecorporate veil' - observed, '*In this connection the words "device", "stratagem", "cloak" and "sham" have been used…*'.[26] Davies and Worthington, *Gower and Davies'Principles of Modern Company Law* 9th ed (2012). at p. 219, make the point that it is '*well-recognised'* that the separate personality of a company will be disregarded *'when the corporate structure is a "mere façade concealing the true facts" – "façade" or "sham" having replaced an*

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

[25]The approach reflected in the dictum of Cameron JA seems consistent with that stated by the Canadian Supreme Court in *Kosmopoulosv. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, at para. 12: '*As a general rule a corporation is a legal entity distinct from its shareholders: Salomon v. Salomon & Co., [1897] A.C. 22 (H.L.) The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L. C. B. Gower, Modern Company Law (4th ed. 1979), at p. 112.'*

[26] See *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* supra,at 566F.

assortment of epithets[27] *which judges have employed in earlier cases.*[28] *The difficulty is to know what precisely may make a company a "mere façade".'* (In *VTB Capital*, however, Lord Neuberger questioned the usefulness of applying such epithets as any sort of touchstone, saying '*…such pejorative expressions are often dangerous, as they risk assisting moral indignation to triumph over legal principle, and, while they may enable the court to arrive at a result which seems fair in the case in question, they can also risk causing confusion and uncertainty in the law*'.[29])

[29] In my view the determination to disregard the distinctness provided in terms of a company's separate legal personality appears in each case to reflect a policy based decision resultant upon a weighing by the court of the importance of giving effect to the legal concept of juristic personality, acknowledging the material practical and legal considerations that underpin the legal fiction, on the one hand, as against the adverse moral and economic effects of countenancing an unconscionable abuse of the concept by the founders, shareholders, or controllers of a company, on the other. The courts have shown an acute appreciation that juristic personality is a statutory creation and that '*their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted*'.[30]

[30] Section 20(9) of the Companies Act, 2008, has introduced a statutory basis for piercing or lifting the corporate veil of companies.[31] It provides:

> 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

[27] "Device", "creature", "stratagem", "mask" and "puppet" are cited as examples.
[28] The authors were referring to cases which had preceded the judgments in *Adams*, supra.
[29] *VTB Capital* [UKSC] supra, at para. 124.
[30] In *ADT Security (Pty) Ltd v Botha and Others* [2010] ZAWCHC 563, at para.s 16-18, I remarked upon what I considered to be the '*generally flexible approach*' indicated in the *Cape Pacific Ltd* judgment as being applicable when piercing of the corporate veil falls to be considered and determined; an observation illustrated with reference to Scott JA's remark in *Hülse-Reutter* supra, at para.20 that '*Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment*'.
[31] The provision was inserted into the Act by s 13(d) of the Companies Amendment Act 3 of 2011 and came into operation upon the commencement of the principal statute on 1 May 2011. The same provision had previously been contained in s 163(4) of the Act, but its transfer to s 20 was effected before the Act came into operation.

> company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may-
>
> (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
>
> (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)

The provision is closely similar to, but not exactly the same as, that in s 65 of the Close Corporations Act 69 of 1984.[32]

[31] The introduction of the statutory provision has given rise to some debate on whether the subsection has replaced the common law on piercing the corporate veil. Certainly there is no express intention apparent to that effect, as for example to be seen in s 165(1) of the Act (concerning derivative actions), but, equally, there is no express indication that the intention is not to displace the common law, like that to be found in s 161(2)(b) (concerning remedies available to protect the rights of the holders of securities in companies).

[32] The language of s 20(9) is cast in very wide terms, indicative of an appreciation by the lawgiver that the provision might find application in widely varying factual circumstances. The statute enjoins that its provisions be construed with appropriate regard to subsections 5(1) and (2) read with s 7 of the Act (including, to the extent appropriate, a consideration of foreign company law). Approaching the interpretation of s 20(9) of the Companies Act in that manner I am unable to identify any discord between it and the approach to piercing the corporate veil evinced in the cases decided before it came into operation.

[33] If anything, the width of the provision appears to broaden the bases upon which the courts in this country, and certainly those in England, have hitherto been prepared to grant relief that entails disregarding corporate personality. Thus in the current case, as in *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C), in which the application of s 65 of

[32] See note 24.

the Close Corporations Act was under consideration, the conduct of the business of the group of companies with scant regard for the separate legal personalities of the individual corporate entities of which it was comprised would in itself constitute a gross abuse of the corporate personality of all of the entities concerned.[33] In the current case I would have difficulty in finding a basis on the approach adopted in the English decisions to disregard the separate personality of the individual companies in the King Group. The reason for the difficulty would be that it is not apparent that the improprieties in dealing with investors' funds involved the use of the companies to conceal the true facts (see the fourth and fifth of the six principles distilled in *Ben Hashem*[34]). The relevant improprieties involved in the current case involved the controllers of the companies treating the group in a way that drew no proper distinction between the separate personalities of the constituent members and in using the investors' funds in a manner inconsistent with what had been represented. The first mentioned category of impropriety, in my view, constituted an unconscionable abuse by the controllers of the juristic personalities of the relevant subsidiary companies as separate entities and brought the case within the ambit of the statutory provision.

[34] The newly introduced statutory provision affords a firm, albeit very flexibly defined, basis for the remedy, which will inevitably operate, I think, to erode the foundation of the philosophy that piercing the corporate veil should be approached with an *à priori* diffidence. By expressly establishing its availability simply when the facts of a case justify it, the provision detracts from the notion that the remedy should be regarded as exceptional, or 'drastic'.[35] This much seems to be underscored by the choice of the words '*unconscionable abuse*' in preference to the term '*gross abuse*' employed in the equivalent provision of the Close Corporations Act; the latter term having a more extreme connotation than the former.

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[33]See the discussion in Cassim et al (ed), *Contemporary Company Law* 2nd ed (Juta) 2012 at pp61-2.
[34]Set out in para. Error: Reference source not found, above.
[35] See *Amlin (SA) Pty Ltd v Van Kooij*supra, at para. 23; *Knoop N.O. and Others v Birkenstock Properties (Pty) Ltd and Others* [2009] ZAFSHC 67, at para. 23.

The term ‘unconscionable abuse of the juristic personality of a company’ postulates conduct in relation to the formation and use of companies diverse enough to cover all the descriptive terms like ‘sham’, ‘device’, ‘stratagem’ and the like used in that connection in the earlier cases, and - as the current case illustrates - conceivably much more. The provision brings about that a remedy can be provided whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced.[36] Having regard to the established predisposition against categorisation in this area of the law[37] and the elusiveness of a convincing definition of the pertinent common law principles, it seems that it would be appropriate to regard s 20(9) of the Companies Act as supplemental to the common law, rather than substitutive. The unqualified availability of the remedy in terms of the statutory provision also militates against an approach that it should be granted only in the absence of any alternative remedy.[38] Paragraph (b) of the subsection affords the court the very widest of powers to grant consequential relief. An order made in terms of paragraph (b) will always have the effect, however, of fixing the right, obligation or liability in issue of the company somewhere else. In the current case the ‘right’ involved is the property held by the subsidiary companies in the King Group and the obligation or liability is that which any of them might actually have to account to and make payment to the investors.

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[36] The term and the context in which it is used in s 20(9) is distinguishable from the expression ‘*onduldbareonreg*’ (translated as ‘*unconscionable injustice*’) used by Flemming J in *Botha v Van Niekerk en 'n Ander* 1983 (3) SA 513 (W), at 525F, and referred to in *Cape Pacific Ltd* supra, at 805D-F, as postulating ‘too rigid a test’. The expression in the statute relates to the conduct giving rise to the remedy, whereas that used in the judgments related to the consequences of the conduct.

[37] See Cassim et al (ed), *Contemporary Company Law* op cit supra, at §2.4.1.

[38] The judgment of the Supreme Court of Appeal in *Hülse-Reutter* supra, has sometimes been misunderstood to imply that a piercing or lifting of the corporate veil should not be undertaken if the claimant has an alternative remedy. That is not the effect of the judgment. If it had gone that far it would have stood in contradiction of the observation to the contrary effect in *Cape Pacific Ltd* supra, at 805G. The judgment goes no further than to state that, depending on the facts of a given case, the existence of an alternative remedy may be a relevant consideration; see *Hülse-Reutter* at para. 22-23. (In *Antonio Gramsci Shipping*[2011] 1 Lloyds Rep. 647, at para 18, Burton J gave a number of examples in English jurisprudence where the veil was pierced notwithstanding that an effective remedy could have been afforded without doing so. See also *VTB Capital PLC v. Nutritek International*[2012] EWCA Civ 808 at paras 79 and 82, where Lloyd LJ agreed in principle with the submission that ‘*it does not follow that a piercing of the veil will be available only if there is no other remedy available against the wrongdoers for the wrong they have committed*’.)

[35] Relief in terms of s 20(9) of the Companies Act may be granted on application by any 'interested person', or *mero motu* in any proceedings in which a company is involved. The term '*interested person*' is not defined. I do not think that any mystique should be attached to it. The standing of any person to seek a remedy in terms of the provision should be determined on the basis of well-established principle; see *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A), at 533J-534E, and, of course, if the facts happen to implicate a right in the Bill of Rights, s 38 of the Constitution. There can be no doubting that the applicants have a direct and sufficient interest in the relief sought so as to qualify as 'interested persons' within the meaning of the provision.

[36] In conclusion it is appropriate to record my appreciation for the assistance provided in the helpful written argument submitted by counsel for the applicants, Mr *Newdigate*SC.

[37] The order made on 14 December 2012 provided as follows:

1. 1.1 It is hereby declared, in terms of section 20(9) of the Companies Act 71 of 2008 (as amended), that the companies listed in annexure A hereto ("the King companies"), with the exception of King Financial Holding Limited (in liquidation) (Reg No. 2001/006894/06), shall be deemed not to be juristic persons in respect of any obligation by such companies to the "investors" (as defined in paragraph 1.3, below).

   1.2 Pursuant to the declaration in paragraph 1.1, the King companies shall be regarded as a single entity by ignoring their separate legal existence and treating the holding company, King Financial Holdings Limited ("King Financial Holdings"), as if it were the only company.

   1.3 The order in paragraph 1.2 is applicable only to "investors", where "investors" refers to individuals or entities that invested in the King companies by purchasing shareholdings in and loan accounts against one or more of the King companies, and includes those individuals and entities who purported either to convert investments in King companies other than King Financial Holdings to shares in King Financial Holdings as well as those who purported to purchase shares in King Financial Holdings from 2008; and "investors" does not include

creditors who loaned funds to King companies and secured such loans by means of mortgage bonds, nor does “investors” include trade creditors of the King companies, nor Kobus Pienaar, Kortrustfin (Pty) Ltd or Pierre Daniel Smit;

1.4 The Applicants (other than the liquidators or King Financial Holdings) are directed to transfer all monies that might remain in each of the King companies after payment of all liquidation costs, bondholders’ claims and claims other than claims by investors to the liquidators of King Financial Holdings to be administered by the liquidators of King Financial Holdings as a single pool of assets available for distribution to the investors;

1.5 The Second and Third Applicants, being the liquidators of King Financial Holdings, shall:

1.5.1 call upon the investors to submit claims to proof against King Financial Holdings rather than against any other of the King companies;

1.5.2 require such investor claims to be forChapman29 the capital amount invested only (i.e. not to include interest or capitalised interest);

1.5.3 convene necessary meetings of creditors for proof of such investor claims;

1.5.4 employ dedicated personnel to administer the investors’ claims;

1.5.5 admit investor claims that are rejected at creditors’ meetings, in the event that they are satisfied with those claims;

1.6 The costs of this application shall be treated as costs in the winding-up of King Financial Holdings.

A.G. BINNS-WARD

Judge of the High Court

Dates of hearing:	11 October and 19 November 2012
Order made:	14 December 2012
Reasons furnished:	13 February 2013
Judge:	Binns-ward J
Applicants' counsel:	J.A. Newdigate SC
Applicants' attorneys:	Edward Nathan Sonnenberg Cape Town