Lanari – Corporate Law

PIERCING THE CORPORATE VEIL IN THE COURTS OF LABOR

"If the above arrangement results negative, in light of the liability of the members, pursuant to articles 592 and 596 of the Code of Civil Procedure, combined with subsection V of art. 04 of Law 6.830/1980 and articles 1024, 1025 and 1032 of the Civil Code, secondarily applicable to the labor litigation, I order that the corporate veil of the Respondent be lifted for the litigation to proceed against them in the case of non-existence of assets in company's name capable of being attached on the basis of articles 28 of the Code of Civil Procedure, art. 50 of the Civil Code, and of art. 8, sole paragraph, of the Consolidated Labor Laws."

Judgment rendered in a court of labor[1].

This article aims to make a brief − and as such not exhaustive - analysis of the characteristics and consequences of the principle of piercing the corporate veil by the Courts of Labor. However, before addressing the matter solely as far as

[1] [1]Excerpt of an interlocutory decision in a labor claim tried in São Paulo, whereby it was ordered that summons be served on the defeated party.

the Courts of Labor themselves are concerned, it is of the utmost importance to explain first what this concept is about, and to exemplify the cases in which it is or should be used in an ideal system.

Piercing the corporate veil[2] is a procedure that, in theory, should be used as a measure of the last resource, when the abuse of legal personality − that is to say, when the corporate personality is diverted from its purpose to protect illegitimately the personal property of its partners or members − is verified as a common practice in fraudulent transactions and in other legally permitted cases in which the partners or members must respond with their respective personal property for liabilities originally undertaken by or attributable to the company, as a fictitious entity with its own personality and capacity to respond to asset-related liabilities.

From this idea of lifting the corporate veil, two legal theories have evolved: the broader and the narrower. The broader theory advocates the corporate veil should only be lifted if certain cases of abuse of legal personality and diversion of purpose are verified, or otherwise, in general terms, when the legal personality is used in bad faith.

[2]Law 10.406/2002, Article 50: In the event of abuse of corporate personality, characterized by diversion of purpose or commingling of assets, the court may rule, at the request of the party or of the Public Prosecutor's Office, whenever the latter's interference is applicable, that the effects of certain definite relations of obligations be extended to the private property of officers or members of the company.

Law 8.078/1990, Article 28. The judge may lift the corporate veil when, to the detriment of the consumers, the acts involve abuse of law, excess of power, violation of law, illegal acts or facts, or violation of the bylaws or articles of association. The corporate veil is also commonly pierced in

cases of bankruptcy, insolvency, winding-up or inactivity of the legal entity caused by mismanagement.

Law 6.404/1976, Article 158. Officers are not personally liable for the obligations they may contract on behalf of the company and by virtue of regular acts of management; they will be civilly liable, however, for the damages caused, when:
I – in the scope of their duties, they commit acts of negligence or fraud;
II – they act in violation of the law or of the company's bylaws.

The narrower theory, in turn, states that only the company's insolvency, i.e., the inability to settle its obligations as they become due and payable, alone, would be a sufficient condition for members' personal property to be affected, in such a manner that such property of the members – in their capacity as individuals – can be used to settle the company's obligations. This implies departing from the firm premise that legal personality is only and solely fiction, but that there are ultimately individuals behind it, who would then be on the intermediate level of liability for all corporate obligations.

Both theories may be subject to reasonable critique. The first theory − the broader one − for presupposing a wrongful act (which may be "camouflaged" by the company's managers or even does not actually exist) and only upon the evidence of such act is there the possibility of seeking solvency through the partners. The proof of such fraudulent conduct, which is, in its nature, hard to obtain, would virtually make it infeasible to effect and use this resource in case this theory were to be applied in its pure form.

As far as the narrower theory is concerned, the conceptual problem lies in the

fact that, by definition, the legal personality is created precisely to separate the members' obligations with respect to the equity responsibility, so that the risks inherent to the business activity are limited to the company's assets.

Therefore, with both theories briefly described, the adoption by Brazilian law, as a general rule (except for the Consumer Protection Code) of the broader theory is demonstrated. This means Brazilian law protects the corporate personality and only disregards it in specific cases of abuse, as provided in the aforementioned art. 50 of the Civil Code.

The problem addressed in this article is specifically related to Labor Justice. In labor courts, the routine seen has been the adoption of the narrower theory, based on the principle of employee protection, although the legal system intrinsically limits lifting the corporate veil to the application provided for in the broader theory (except in specific cases such as the already mentioned, of the Consumer Protection Code).

Although the Civil Code does not specifically address aspects related to Labor Courts, the applicability of the principle is ensured, to the extent that it is a general rule − and the Consolidated Labor Laws do not cover any special provision related to lifting the corporate veil.

In addition to this fact, there are two statements of the Federal Council of Justice that limit the possibility of corporate veil piercing. They are:

> Statement 7 – Lifting the corporate veil is a measure to be applied only when there is the commission of an irregularity, and, even so, in a manner limited to the officers or members who have committed it.
>
> Statement 51 - The theory of lifting the corporate veil – among us the doctrine of disregarding the corporate personality − is included in the new Civil Code, **with the existing parameters in micro legal systems** and in the legal construction of the matter being maintained. *(emphasis added).*

In conclusion, in our view the application of the narrower theory of corporate veil piercing should not be used in Labor Courts only based on the allegation of compliance with the principle of protecting the employee for absolute lack of a legal provision for such applicability.

The treatment of this matter is grounded on a principle that is too vague, to the detriment of what is expressly established in the law, to the extent that, given the lack of a specific provision in the Consolidated Labor Laws, the provisions of the Civil Code, which reflect the broader theory of corporate veil piercing, should be applied.

The situation, as far as the Labor Justice is concerned, is completely different from what happens, for example, in the Consumer Protection Code, where it is expressly provided that lifting the corporate veil is possible in the case of simple insolvency of the company.

As already discussed in a previous article, the adequacy of corporate capital to the company's activity would avoid many of the corporate veil piercing situations, as the company, in theory, would not assume obligations (including labor obligations) in excess of its own assets.

For this reason, lifting the corporate veil in labor litigation is a practice used in several situations in which it should not be (considering the lack of legal basis) and, especially, in light of an entirely vague reason based on a generic principle.

The fact is that the problem lies mainly in the rationale, as the Civil Code provides for the possibility of corporate veil piercing in cases where abuse of corporate personality is evident. In other words, one might contend that hiring an employee if the company is in a potentially insolvent situation would be considered an abuse of corporate personality.

The argument set out above could, on entirely legal grounds, warrant lifting the corporate veil in the cases where evidence would be available to establish that the company's members were aware that the situation was potentially insoluble, but − and this even explains the preparation of this article -, the case law has been massively based on the argument guided by the generic principle of employee protection.

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