



Liabilities of the Director of the Regional Limited Liability Company (Perseroda) In the Corporate Bankruptcy According to Positive Law

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Abstract

This research aims to analyze the liabilities of the director of the regional limited liability company (perseroda) in the corporate bankruptcy according to positive law. This research belongs to the type of normative legal research or also called doctrinal research; i.e. research that examines law as a separate system which is separated from various other systems that exist in community. Thus, it gives a boundary between the legal system and other systems. BUMD, according to Minister of Home Affairs Regulation No. 3 of 1998 concerning Legal Forms of BUMD, may be Regional Company or Limited Liability Company (LLC). For BUMD, in the form of Regional Companies, the provisions concerning Regional Companies as stipulated in Law No. 5 of 1962 concerning Regional Company. Meanwhile, BUMD, in the form of legal entities is Limited Liability Company that subjects to Law No. 1 of 1995 concerning Limited Liability Company which has been amended by Law No. 40 of 2007 concerning Limited Liability Company. Article 331 of Law No. 23 of 2014 concerning Regional Government states that regions can establish BUMD and may be in the form of Regional Public Liability Company whose establishment is determined by regional regulations. The establishment of this BUMD generally aims to provide benefits for regional economic development, organize public benefits in the form of providing quality goods and/or services for the fulfillment of people's livelihoods according to the conditions, characteristics and potential of the region based on good corporate governance, and obtain profit and/or profit. The board of directors, due to their negligence and mistakes, must be liable for the Regional Limited Liability Company that has been declared bankrupt; in this case it is jointly and severally over all obligations that are not repaid from bankrupt assets unless the directors can prove that they do not have to be liable (Article 104 paragraph (2) and (4) of UUPT).

Keywords: Bankrupt; Regional Company; Law

Introduction

Regional-Owned Enterprises (BUMD) are a business entity established by the region and aim to seek more profits. BUMD is used to explore and seek out potential in the region; thus, there will be many business entities established in the region. To establish and develop this institution, it budgets funds originating from the Regional Budget (APBD). In addition, the establishment of BUMD is intended as a problem solver against regional budget deficits to increase regional income.

Regional income originating from Regional Taxes and Retributions is considered still not sufficient enough to finance the development of an autonomous region. Thus, in order to increase Regional Original Revenue (PAD), the provincial and district governments consider that it is necessary to conduct other efforts to increase regional income sources.¹

To realize the receipt of provincial PAD through the results of the management of the separated regional wealth, this is carried out through the establishment of BUMD in various provinces/ regencies/ cities. The establishment of BUMD is expected to play a role in producing goods and/ or services needed by the community in order to realize the prosperity of the local community as much as possible. Therefore, the scope of BUMD in the province/ regency/ city is not focused on one area; however, it can also run businesses in the fields of development, agribusiness, strategic industry, construction, property, consulting, services/ trade, telecommunications, transportation (land, sea and air transportation), energy and mineral resources, marine and fisheries, tourism, aviation, infrastructure, banking, investment, insurance, and other businesses as necessary; as an effort to extend regional income and meet community needs.²

On the other hand, BUMD is also positioned as a business entity that seeks to remain independent and to earn profits; thus, it can support the continuity of its efforts to improve the welfare of the community in the autonomous region. The existence of BUMD is not like a State-Owned Enterprise (BUMN) which has been the mainstay of the government in the receipt of the State Budget (APBN). Moreover, the BUMD business is intended to improve the welfare of the professional community.³

To be able to optimize the role of BUMD and maintain its existence in the development of an increasingly open and competitive world economy, it is necessary to foster a culture of professionalism so that existing BUMD becomes more competitive in carrying out its business.⁴

In West Nusa Tenggara Province, the number of Regional-Owned Companies is estimated at 50 but there are only 5 healthy companies which include PT Bank Pembangunan of West Nusa Tenggara, Regional Water Supply Company, PT Bank Perkreditan Rakyat of West Nusa Tenggara, and PT Selaparang Finance of East Lombok. In this case, other companies burden the APBD.

The source of BUMD funds comes from the APBD which is funds from the community, which has never been accounted for by the managers of the BUMD. The loss of BUMD is generally caused by several factors as follows:

1. Kurniawan, *Professional and Competitive BUMD Empowerment in Improving the Regional Economy*, presented at the discussion on BUMD Empowerment in improving the Regional Economy at PT Gerbang NTB Emas, on March 28, 2015.

2. Ibid

3. Ibid

4. Ibid

1. Financial problem. It is because the source of funds for the management of BUMD comes from regional capital budgeted from the APBD. It makes the BUMD managers have no innovation to advance the company because they assume that the problem of loss does not have to be accounted for, but the problem of lack of funds will get assistance from the local government through the APBD.
2. The managers of BUMD are mostly unprofessional, because the BUMD manager comes from the State Civil Apparatus that does not get structural positions or retired state employees or private people who get positions as remuneration for political assistance.
3. Legal issue. There are various kinds of laws and regulations that regulate the financial status of BUMD that cause confusion and cause norm conflicts which result in legal uncertainty.

The concept of state or regional finance in Law No. 17 of 2003 concerning State Finance was found to be ambiguous which is confusing public finance and private finance as well as conflicting legislation related to Law No. 19 of 2003 concerning State-Owned Enterprises, Law No. 37 of 2004 concerning Bankruptcy and Postponement of Obligations to Pay Debt, Law No. 40 of 2007 concerning Limited Liability Company (Persero) under Law No. 17 of 2003 concerning State Finance and Law No. 1 of 2004 concerning State Treasury. The occurrence of conflicting norms related to Regional Limited Liability Company's authority status raises legal issues about how the liability of Regional Limited Liability Company's Director is if bankruptcy occurs.

Article 1 of the State Finance Law confirms that what is meant by State Finance is all state rights and obligations that can be valued with money and everything in the form of money or goods that can be owned by the state and which relate to the implementation of these rights and obligations. Furthermore, the scope of state finance, based on Article 2 letter (g) of the State Finance Law, covers the wealth of the state/ region which is managed by itself or by other parties; in the form of money, securities, accounts receivable, goods, and other rights that can be assessed with money, including assets separated from the state/ regional company.

The occurrence of contradictions in norms governing the financial status of BUMD will create confusion in the management of BUMD finances. The problem will become even more complex if the BUMD's financial status is linked to Article 50 of the State Treasury Law which stipulates the prohibition of confiscation of state/ regional property or controlled by the state/ region due to debtors who are declared bankrupt which all debtor assets bankruptcy is in public confiscation. The management and settlement of the bankruptcy assets of the debtor is then carried out by the curator under the supervision of the supervisory judge.

In this case, BUMD experiencing financial difficulties cannot fulfill all or part of their liabilities to pay debts to creditors. It starts from finances that are not managed well which results in low productivity and continuous losses. Thus, they are unable to compete in business competition in the domestic market and in the global market. Poor management of the Limited Liability Company will result in not achieving a contribution to national economic development in general and the region in particular, regional revenues, public benefit management, and the fulfillment of the lives of many people. In fact, it will be a burden on the regional government. Based on the description of the above background, the author wishes to research about Liabilities of the Director of the Regional Limited Liability Company (Perseroda) in the Corporate Bankruptcy According to Positive Law

Research Method

According to the perspective of legal theory, the science of law is divided into normative law and empirical law. The positivistic view creates empirical law, while the normative view

creates normative law. Thus, the study of law can be conducted normatively and can also be conducted empirically, each of which has different characteristics and methods. Research method is procedure and technique to answer research problems. Therefore, the use of research method is always adapted to research needs.

This research belongs to the type of normative legal research or also called doctrinal research; i.e. research that examines law as a separate system which is separated from various other systems that exist in community. Thus, it gives a boundary between the legal system and other systems.

Based on the strength that binds it, legal material can be qualified as primary, secondary and tertiary legal resources.⁵

1. Primary legal resource is binding legal material obtained from legislation and related to the development of the principle of personal liability of shareholders, board of commissioners and directors in the Law on Limited Liability Company in Indonesia. In addition to legislation, the primary legal resources used are court decisions related to legislation which include:
 - a. 1945 Constitution of the Republic of Indonesia and all changes thereof.
 - b. Law No. 40 of 2007 concerning Limited Liability Company.
 - c. Law No. 17 of 2003 concerning State Finance.
 - d. Law No. 19 of 2003 concerning State-Owned Enterprises.
 - e. Law No. 23 of 2014 concerning Regional Government.
 - f. Government Regulation of the Republic of Indonesia No. 54 concerning BUMD.
 - g. Minister of Home Affairs Regulation No. 3 of 1990 concerning Management of Regional Property.

2. Secondary legal resource is a legal material that provides an explanation of primary legal resources such as books, research findings, scientific journals, articles and the like.

Secondary legal resources in the form of books, scientific journals and other articles were obtained from the Indonesia University library, Brawijaya University library and the Mataram University library. In addition, the author also searched through magazines, newspapers, and the internet.

3. Tertiary legal resource is a legal material that can provide guidance and explanation of primary and secondary legal resources such as legal dictionaries, encyclopedias and the Black's Law Dictionary etc.

a. Legal Resource Collection Technique

Legal resource collection technique is carried out by conducting a search, collection and study of documentation on primary, secondary and tertiary legal resources in conventional or through information technology (Internet, CD-ROM). The tool for collecting conventional legal materials is a card system, which consists of an summary card, quotation card, and analysis card. The summary card summarizes the outline of the thoughts and opinions of the author substantially referred to authentically. The summary card contains the name of the author, title of the book, year of publication, name of publisher, and page where the citation is. The quotation card contains a note of the quoted opinions or thoughts. An analysis card (review card), as a

⁵ Soerjono Sekanto, Introduction to Research..., Op, Cit., page 52

special note, contains responses to the quoted views. Responses can be in the form of additions or explanations by criticizing or interpreting views or comments.⁶

b. Legal Resource Processing and Analysis

After legal resources have been collected, then they are processed through: structuring, describing, systematizing and then analyzing the legal resources like the common legal research; i.e. through legal reasoning processes that are logical, systemic and coherent by abstracting the laws and regulations relating to the regulation of liability of directors.

The method of analyzing legal resource in this research is a normative method in prescriptive optics⁷ with deductive-inductive reasoning to produce propositions or concepts in response to problems or research results/ findings.

Results and Discussion

Appointment and Dismissal of Director

The first time Limited Liability Company is established, director is appointed by the founders. Furthermore, the appointment is carried out by the General Meeting of Shareholders (GMS). According to Article 94 paragraph (1) and (2) Law of Limited Liability Company (UUPT) No. 40 of 2007, the authority of this GMS cannot be delegated to other Limited Liability Companies. Article 93 Article 8 paragraph (2) point B of UUPT No. 40 of 2007 requires that only individuals who can be appointed as directors are not permitted by legal entities serving as directors of the Limited Liability Company.⁸

According to Hasbullah F. Sjawie, what is determined by the UUPT No. 40 of 2007 is that members of the board of directors must be natural human beings right. It is because a legal entity cannot be represented in carrying out its daily activities by other legal entities because the legal actions and thoughts of a legal entity are only in the person authorized to represent them. Legal entities do not have the ability to act. There must be humans who act for and on their behalf because in reality a legal entity cannot carry out its own actions; such as actions representing other legal entities since other legal entities cannot act alone.⁹

UUPT No. 40 of 2007 requires members of the board of directors of Indonesian citizenship, as long as they fulfill the requirements set by the relevant agency, consisting of one or more people. According to Article 92 paragraph (2) of the UUPT No. 40 of 2007, when the Limited Liability Company has more than 1 member of the board of directors, one of whom is appointed as managing director. Article 92 paragraph (4) UUPT No. 40 of 2007 requires that the minimum number of directors is 2. Especially for the Limited Liability Company, the first is those whose business activities are related to raising funds or managing public funds, the second is those that issue letters of recognition to the public, and third is the Limited Liability Company. Nevertheless, there is not found one article in the UUPT No. 40 of 2007 which uses the word director, the UUPT No. 40 of 2007 always uses the words of a member of the board of directors to appoint someone as a director of the Limited Liability Company.

6 Lihat Winamo Surakhmad, *Scientific Introduction: Basic, Method, Technique*. Transito Bandung, 1994, page 263

7 B. Ahef Sidharta, *Reflection on.... Op., Cit.*, page 218.

8 Hasbullah F. Sjawie, *Regional Limited Liability Company Director and Corporate Criminal Liability*, Citra Aditya Bakti, Bandung, 2013, page 98

9 Ibid

According to article 93 paragraph 1 of the UUPT No. 40 of 2007 a person who is competent in law is the first requirement that allows a person to be appointed as a member of the board of directors. The second requirement is that the person, within 5 years prior to his/her appointment:

- a. never been declared bankrupt
- b. never been a member of the board of directors or board of commissioners who is found guilty so that he/she caused a Limited Liability Company to be declared bankrupt
- c. never been convicted of a criminal offense that is detrimental to the country's finances and/or is related to the financial sector.

The period of 5 years above, according to Gautama, seems to refer to a period of time that has been considered sufficient to forget and forgive (*vergeten en vergeven*) his/her actions¹⁰. In this context Gautama, questioned what if someone, less than 5 years ago, was convicted of a crime other than state finance; for instance, the crime of embezzling Limited Liability Company money. In this case, it seems that according to Law No. No. 40 of 2007 it is not a problem and the person is allowed to become a director. He argued that this should not be the case, so the limited formulation and requirements are inadequate. Then, Gautama proposed that those who can be appointed as members of the board of directors should be people who are dishonorable and not reprehensible¹¹.

Gautama's opinion above is acceptable because it is a reflection of his dissatisfaction with the terms of appointment of members of the board of directors where both the UUPT in 1995 and the UUPT No. 40 of 2007 only prioritizes criminal acts that are detrimental to state finances. As a result, someone who has harmed the Limited Liability Company's finance is not included in the clarification that is prohibited from being appointed as a member of the board of directors. In fact, if the Limited Liability Company's financial loss is caused by the crime, the party that suffers the loss is not only the Limited Liability Company but also all stakeholders including the state. Regarding Gautama's proposal, in the author's opinion it is too broad. However, the requirements needed for this need to be added in accordance with the proposals related to the losses of the Limited Liability Company beforehand and must be quantitative in the Law.¹²

It is also required to sign a statement stating that a person meets the requirements for appointment as a member of the board of directors. As required by article 93 paragraph 3 of the UUPT No. 40 of 2007, basically, it does not bring any legal consequences if someone knows that he/she does not fulfill the requirements and then he/she does not inform the GMS. In other words, he/she has given false information or fake information. Thus, the existence or absence of a statement of liability is to further strengthen the evidence that the person concerned has actually provided false information¹³.

In the event that the appointed member of the board of directors turns out to not meet the above requirements according to Article 95 of UUPT No. 40 of 2007, his/her appointment has become null and void since it is known by other members of the board of directors or by the board of commissioners. Within 7 days, the cancellation of the appointment of members of the Board of Directors must be announced in the newspaper and to the Minister to be listed in the Limited Liability Company list. Legal actions committed before the cancellation of the

10 Sudargo Gautama, Comments on 1995 Regional Limited Liability Company Law No. 1, Comparison with Old Regulations, Citra Aditya Bakti, 1991, page 86.

11 Ibid, page 86.

12 Hasbullah F. Sjawie, Op. Cit., page 102-103.

13 Ibid, page 103.

appointment are binding and become a liability of Limited Liability Company by not reducing the liability of the members of the board of directors to the losses of the Limited Liability Company. Legal actions taken after their appointment are null and void are invalid and do not bind the Limited Liability Company and become the personal liability of the members of the Board of Directors¹⁴.

UUPT No. 40 of 2007 does not regulate further how the subsequent consequences of the cancellation that should have taken place after the announcement at the Extraordinary General Meeting of Shareholders (EGM) must be held with an agenda affirming the cancellation that has occurred and appointing a new member of the board of directors and or board of commissioners. The EGM must be implemented no later than 30 days after the date of the announcement of the cancellation in the Newspaper. This period of time is sufficient for shareholders to look for replacement candidates to be determined by the GMS as members of the board of directors and or board of commissioners of the Limited Liability Company. In addition, 30 days is the time determined by Article 106 of UUPT No. 40 of 2007 to hold a GMS for the temporary dismissal of members of the board of directors by the board of commissioners. In an analogical way, the 30-day stipulation that authorizes a temporary dismissal can be used as a reference that in the case of cancellation of the appointment of members of the board of directors, the GMS must be held within 30 days.¹⁵

The GMS can appoint someone to be a member of the Board of Directors based on the allotment system provided that it is determined in its articles of association. For example, every shareholder who has at least 25% of all existing shares will receive a share of one member of the board of directors. In addition, it may be stated in the articles of association “*oligarchishe clause*” which is a clause in which the nomination of members of the Board of Directors is carried out by the founding shareholders of Limited Liability Company and the GMS selects directors from existing candidates¹⁶.

Appointment of members of the board of directors is the period of a certain term of office and when a person can be reappointed; for instance, if a person is appointed as a member of the board of directors for a five-year term and after that period has not been reappointed by the GMS, he/she is not authorized to represent the Limited Liability Company. The capacity to represent its Limited Liability Company ends at the same time as the term ends. In this case, the Limited Liability Company can only be represented by other members of the board of directors whose tenure has not ended¹⁷.

Based on Article 118 of the UUPT No. 40 of 2007, if it turns out that Limited Liability Company does not hold a GMS to reappoint members of the Board of Directors who have expired or do not appoint new members of the Board of Directors, Limited Liability Company has only one member of the Board of Directors, as mentioned in Article 107 point c UUPT No. 40 of 2007 where in this case the Board of Commissioners is authorized to represent the Limited Liability Company.

In an analogical way, this is the same as the situation that occurs when a member of the board of directors is absent because his/her appointment has been canceled. In this case, the

14 Ibid

15 Ibid

16 Munir Fuady, *Company Law in the Business Law Paradigm*, PT Citra Aditya Bakti, Bandung, 2002, page 44.

17 Ibid, page 56.

management duties are taken over by the Board of Commissioners up to the date of the appointment of new members of the Board of Directors by the GMS¹⁸.

When the membership of the board of directors expires, the GMS must be held within 30 days from the expiration date of the term. If it is not carried out directly or indirectly, there has been bad faith from the shareholders who take advantage of the situation that occurred in the Limited Liability Company whose interpretation was extended to article 3 paragraph (2) letter of the UUPT No. 40 of 2007. It was stated that if the liable shareholders personally if within 30 days have not or there is a decision of the GMS regarding the appointment of new members of the board of directors or there has been no cancellation of the appointment of members of the directors, the shareholders are personally liable.

The period stipulated in the appointment of someone as a member of the board of directors does not reduce the right of the GMS to dismiss members of the board of directors at any time by giving reasons as stipulated in article 105 paragraph 1 of the Company Law No. 40 of 2007. Thus, the GMS cannot perform termination with no cause.

a. Functions and Authority of the Board of Directors

The authority of the director in managing and representing the Limited Liability Company is different from the corporate capacity referred to as the power that can be carried out by the Limited Liability Company. The authority of the board of directors refers to the power granted to act as such in the articles of association. The authority of the board of directors cannot exceed corporate capacity, but the authority is not the same as corporate capacity at the Limited Liability Company.¹⁹

The management function is to lead the Limited Liability Company while the main representation function of the director is to represent the Limited Liability Company inside and outside the court. This principle causes Limited Liability Company to be bound by an agreement made for and on its behalf.²⁰

Running a Limited Liability Company management is one of the main tasks of the board of directors as intended in Article 1 number 5 article 92 paragraph 1 and 2 of the UUPT No. 40 of 2007; i.e. leading daily tasks to foster Limited Liability Company activities to achieve the objectives and objectives carried out in accordance with the right policies, expertise, opportunities and prevalence of similar businesses within the limits specified by the UUPT No. 40 of 2007 and the articles of association of directors. It is also not only the implementation of the Limited Liability Company policies and plans but also has the duty to: firstly, carry out their activities, secondly, manage their assets, and thirdly, represent them inside and outside the court²¹.

Each member of the board of directors is authorized to represent the Limited Liability Company unless otherwise stipulated by the articles of association and outside parties do not require evidence that for example the president director is unable to attend and a member of the other directors represents and acts for and on behalf of the Limited Liability Company. The articles of association can also determine that those who are entitled to represent the Limited

18 Hasbullah F. Sjawie, Op. Cit., page 105.

19 Hasbullah F. Sjawie, Op. Cit., page 105.

20 Ibid

21 Fred B. G. Collisions, Tasks and Authorities of Regional Limited Liability Company Bodies According to the Law on Regional Limited Liability Company, Paper Presented at the Seminar of the Indonesian Notary Association (INI), Jakarta, August 22, 2017, page 11.

Liability Company are only the president director or the president director together with another director or other arrangement.

The collegial principle for directors has been known for a long time in Indonesian law the Supreme Court through decision No. 2332 k PDT 1985 dated 17 April 1986 stating that the Director can directly show and file a lawsuit for and on behalf of the Limited Liability Company. For this reason, it is not necessary to obtain a special power of attorney in advance from the president director and shareholders because Limited Liability Company can be directly represented by each member of the board of directors²².

When the directors carry out the representation function, principally, he/she acts as an agent to his Limited Liability Company. The principles of agency law that apply here include the fiduciary duty principle between agents and principals, for instance, applies the principle that agents are not allowed to get hidden benefits. Thus, the law of the fiduciary duty principle also applies regardless of whether the Limited Liability Company law recognizes or does not apply this fiduciary principle.

The function of representatives of the editors of the Board of Directors was also agreed upon by the Supreme Court as its decision No. 268 K/SIP/1980 above, from which the rule of law is obtained that lawsuits concerning legal obligations that become liability Limited Liability Company must mention their current management because the liability of a legal entity is inherent in the legal entity itself. There is no personal liability from members of the board of directors for Limited Liability Company activities as long as there is no authority exceeded by the board of directors when he/she acts for and on behalf of the Limited Liability Company, the cases of this case position are as follows:²³

Herman Rahmat filed a lawsuit against Mrs. Maryam Abbas in her position as a person and as director of PT Cikembang. The case began with the plaintiff's receivables at PT Cikembang originating from the delivery of building materials. When the lawsuit was filed, Mrs. Maryam Abbas was no longer serving as Director of PT Cikembang because she had resigned and had also been decided by the GMS 6 (six) months before the lawsuit was filed.

The Supreme Court stated that the legal obligations of a Limited Liability Company when a lawsuit was filed before a court were attached to the legal entity itself.

The Supreme Court considered that the comparative lawsuit filing an appeal against Mrs. Maryam Abbas as a person was out of place. In this case, the one who can be sued is PT Cikembang with its current management because it is a liability to debt from PT Cikembang.

The same thing was also determined by the Supreme Court through decision No. 419/PDT/1988 dated January 20, 1993 in the case of PT Persero Asuransi for the loss of Jasa Raha Raja Setia Chord as a person and as Director of PT Graha Gapura as defendant 1 and Pharaoh Rubianto Argon Hamid Jojo as person and as President Director of PT Rencong Aceh Semen as defendant 2. The Supreme Court ruled that the Limited Liability Company was a legal entity and legal subject and in this case PT Graha Gapura and PT Rencong Aceh Semen carried out legal actions in the form of compensation agreements with the plaintiff so that the lawsuit should be filed against PT Graha Gapura and PT Rencong Aceh Semen and not to the person of the board of directors so the plaintiff's claim is declared unacceptable.

22 Hasbullah, *Ibid*, page 113.

23 *Ibid*

b. Position of Authority and Liability Duties

The relationship between the directors and the Limited Liability Company is something unique in which Gautama calls it an agency relationship. This agency relationship arises from the possibility that the member of the board of directors can continue the liability of the Limited Liability Company to the GMS as principal if he/she is asked for personal liability due to his/her actions or based on the approval of the previous GMS. This is based on the principle of agency law in Article 1809 of the Criminal Code; i.e. the principle of liability for the actions of its agents insofar as their actions are carried out with the principle of prudence and are still within the scope of agency.²⁴

Meanwhile, Fred B. G. believes that there are fiduciary relationships or beliefs that create fiduciary duties for director between the director and the Limited Liability Company. This relationship is created from the duties and liability of the directors which originated from 2 (two) things. The first is the dependence of the Limited Liability Company on directors as a body that is trusted by the Law for the management of Limited Liability Company. Secondly, Limited Liability Company is the reason for the existence of directors since no Limited Liability Company means no director.²⁵

According to Gautama, regarding whether or not there is a labor relationship between the directors and the Limited Liability Company, in the Netherlands, a member of the board of directors is considered an employee of the Limited Liability Company or on the basis of a work contract with a Limited Liability Company for a certain period. Meanwhile, board members are not considered employees. In the UK, members of the board of directors are considered as officers. According to Gautama, they are not employees of the Limited Liability Company even though in practice the directors are often appointed based on work agreements.²⁶

In the context of Indonesia concerning labor relations between members of the board of directors and Limited Liability Company, Yahya Harahap believes that members of the board of directors are not employees or employees because their appointment is carried out by the GMS, while employees are appointed by the board of directors of Limited Liability Company.

Munir Fuady believes both members of the board of directors and the board of commissioners belong to the category of workers for the Limited Liability Company as long as they are paid. If the member of the board of directors is not from a Limited Liability Company employee and because the director's position is temporary, he/she is categorized as a seasonal worker; i.e. the working period is regulated based on the articles of association. Regarding the phenomenon of display commissioner members, namely board members who are not actively working and not professionals, it is more appropriate if they are not considered as Limited Liability Company employees because directors are employees who are entitled to severance according to legal provisions if they are fired²⁷.

On another occasion, Munir Fuady argued that the members of the Limited Liability Company directors are not paid because they are not employees of the Limited Liability Company. If they receive a salary, the member of the board of directors becomes a Limited Liability Company employee; therefore, the law on labor applies to members of the board of directors in *mutatis mutandis*. However, the entry into force of the labor law does not apply in its

24 Ibid

25 Fred B. G. Tumbuan, Op. Cit., page 117.

26 Munir Fuadi dalam Hasbullah F. Syawijie, Ibid

27 Ibid

entirety to them. For example, a labor regulation that does not apply to members of the board of directors is about dismissing a director by a GMS that does not require the intervention of a labor dispute settlement committee or a union because UUPT No. 40 of 2007 has determined decisively that this is the authority of the GMS.²⁸

Regarding the discussion of the duties and authority of the directors in carrying out their duties and authorities, the board of directors must depart from the basis that the duties and positions obtained are based on the principle of trust or fiduciary duty given by the Limited Liability Company to him. This principle requires the Directors to always act in good faith, sincerity, full of liability. UUPT No. 40 of 2007 does not include formal abilities that must be possessed by someone to be appointed as a member of the board of directors, but good faith and liability are dominant factors that must be owned by a member of the board of directors according to article 97 paragraph (2) of the UUPT No. 40 of 2007.

The duty and obligation of the directors to take care of the Limited Liability Company's daily activities and management gave them a unique position as the body of the Limited Liability Company. In this case, the other Limited Liability Company bodies include the GMS and the board of commissioners who do not have such duties and obligations. In carrying out this task, according to Article 92 paragraph (2) of the UUPT No. 40 of 2007 and its explanation, directors must do it with and according to policies that are deemed appropriate, i.e. policies based on expertise, available opportunities and prevalence in similar business worlds. It must be based on skill expertise that refers to the need to have extensive knowledge and skills in accordance with the experience they have. Another ability that directors must have is the ability to see opportunities for the Limited Liability Company to obtain benefit, which must be taken in accordance with the conditions suitable for the Limited Liability Company, all of which must be based on the prevalence of the business world.

The directors Limited Liability Company os charged with the obligation to create and keep a register of shareholders and hold and hold a special list. Conflict of interest between members of the board of directors and Limited Liability Company can be more easily detected if a special list is available. Management actions, which contain conflicts of interest, are categorized as actions in bad faith. If a conflict of interest occurs, the member of the board of directors is not entitled to represent Limited Liability Company. Those who are entitled to represent the Limited Liability Company are members of another board of directors or board of commissioners; if there are no members of the board of directors who do have conflict of interests or third parties appointed by the GMS if all members of the board of directors and board of commissioners have a conflict of interest.

Furthermore, according to Article 97 paragraph 3 of the UUPT No. 40 of 2007 members of the board of directors must be liable for the losses of the Limited Liability Company arising from errors or omissions in carrying out management duties.

UUPT No. 40 of 2007 put forward the principle that the guilty party is a liable party. Article 97 paragraph 3 imposes a personal liability to each member of the board of directors for the loss of the Limited Liability Company if he/she is guilty or negligent in carrying out his/her duties.

In this context, even though there are joint and several liabilities for directors in the case of members of the Limited Liability Company board of more than 1 person, as referred to in

28 Ibid

article 97 paragraph (2) through paragraph (3), there is a possibility that a member of the board of directors of Limited Liability Company has no liabilities if he/she can prove that:

- a. the loss is not due to error or negligence;
- b. he/she has made arrangements in good faith and prudence for the interests and in accordance with the intent and purpose of the Limited Liability Company;
- c. he/she does not have a direct or indirect conflict of interest over the management action which results in a loss; and
- d. he/she has taken action to prevent the loss or continuation of the loss.

Civil liability is reaffirmed in Article 104 paragraph (2) especially in the case of Limited Liability Company bankruptcy. It happened as a result of the directors' error or negligence and insolvent assets not enough to cover all liabilities of Limited Liability Company. Therefore, each member of the board of directors are jointly and severally liable for all obligations that are not repaid from the bankrupt assets. The liability, according to Article 104 paragraph (3) of the UUPT No. 40 of 2007, also applies to the wrong or negligent member of the board of directors who has served as a member of the board of directors within a period of 5 years before the decision on the bankruptcy statement is declared. Directors are not liable for the bankruptcy of the Limited Liability Company if he/she can prove that:

- a. bankruptcy is not due to errors or omissions;
- b. he/she has carried out management in good faith, prudence, and full liability for the benefit of the Limited Liability Company, and in accordance with the intent and purpose of the Limited Liability Company;
- c. he/she not have a conflict of interest directly or indirectly over management actions; and
- d. he/she has taken action to prevent bankruptcy.

Meanwhile, criminal liability for someone who serves as a member of the board of directors and the board of commissioners is regulated in Articles 59, 398, and 399 of the Criminal Code.

Relating to criminal liability, granting exemption and repayment by the GMS on management and supervision liability carried out by directors and board of commissioners. When the annual report is approved by the GMS, it does not mean that there has been a release of liability in a criminal manner because this is not the authority of the GMS. In addition, the provision of *aquit et de charge* only means that the GMS has granted liability exemption to the directors and the board of commissioners on matters reflected in the annual report. If there is something that is not reflected in the annual report, it becomes the personal liability of the Limited Liability Company directors and/or commissioners. Liability for this matter is not taken over by the Limited Liability Company because the liability exemption given by the GMS is insufficient and does not cover matters not reflected in the annual report.²⁹

This director's liability is confirmed by Article 97 paragraph (6) and (7) of the UUPT No. 40 of 2007. In the name of Limited Liability Company, shareholders, representing at least 1/10 of all shares with voting rights, may file a lawsuit through a district court against a member of the board of directors which causes a loss to the Limited Liability Company due to an error or negligence. In addition, members of the board of commissioners can file a claim on behalf of the Limited Liability Company to members of the board of directors who cause losses to the Limited Liability Company due to their errors or omissions.

29 Hasbullah F. Jyawijie, Ibid, page 118.

The board of directors is not obliged to always be submissive and obedient in carrying out the decisions of the GMS decision and has the right not to carry out or deviate the decision of the GMS if in its consideration the decision of the GMS is contrary to the interests or harms the Limited Liability Company. If shareholders participate in carrying out daily activities at the Limited Liability Company by giving instructions to the directors and the GMS, the shareholders can be categorized as shadow directors. That causes unlimited liability of shareholders and the court to be able to reveal the Limited Liability Company. It is decided in Forum bank Arrest 1959 No. 43 dated January 21, 1955 that as long as the directors carry out their obligations in accordance with the duties and authorities granted to them, directors do not need to heed GMS instructions as referred to in Article 66 of UUPT No. 40 of 2007.

In addition, the liability that must be given by the directors to the GMS once a year shows that the GMS cannot give instructions on the daily tasks carried out by the directors. It is the same as the board of commissioners because the duties and authorities as well as the liability of the board of commissioners are not in the management of the Limited Liability Company. Therefore, it is contrary to the division of functions and authority between the existing Limited Liability Company bodies if the directors must follow the instructions of the board of commissioners in carrying out the Limited Liability Company daily activities.

Conclusion

1. BUMD, according to Minister of Home Affairs Regulation No. 3 of 1998 concerning Legal Forms of BUMD, may be Regional Company or Limited Liability Company (LLC). For BUMD, in the form of Regional Companies, the provisions concerning Regional Companies as stipulated in Law No. 5 of 1962 concerning Regional Company. Meanwhile, BUMD, in the form of legal entities is Limited Liability Company that subjects to Law No. 1 of 1995 concerning Limited Liability Company which has been amended by Law No. 40 of 2007 concerning Limited Liability Company. Article 331 of Law No. 23 of 2014 concerning Regional Government states that regions can establish BUMD and may be in the form of Regional Public Liability Company whose establishment is determined by regional regulations. The establishment of this BUMD generally aims to provide benefits for regional economic development, organize public benefits in the form of providing quality goods and/or services for the fulfillment of people's livelihoods according to the conditions, characteristics and potential of the region based on good corporate governance, and obtain profit and/or profit.
2. Liability of directors for the loss of Limited Liability Company resulting in bankruptcy is determined in other matters that must be observed in the appointment of directors as specified in Article 41 of the Minister of Home Affairs Regulation No. 37 of 2018 which determines the indicators of appraisal of fit and proper tests is an understanding of the administration of the Regional Government (Article 41 letter e). This provision is not in accordance with the philosophy of a Limited Liability Company, the core of which is to seek profits. No matter how good the experience in managing the company, if the administration of the regional government is not properly understood, the candidate will not be able to become a Regional Limited Liability Company director. In further analysis, there are indications of a conflict of interest in determining the candidates for Regional Limited Liability Company director.

Suggestion

1. Let's improve the quality of services from BUMD since there are so many BUMD whose services are careless to the community. It is better if the government strictly monitors this

BUMD because the practice of corruption, collusion and nepotism often occurs. We, as a community, must also participate in supervising these BUMDs.

2. The board of directors, due to their negligence and mistakes, must be liable for the Regional Limited Liability Company that has been declared bankrupt; in this case it is jointly and severally over all obligations that are not repaid from bankrupt assets unless the directors can prove that they do not have to be liable (Article 104 paragraph (2) and (4) of UUPT);

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