



## The board of Directors personal responsibility for legal actions that harm third parties (Analysis of Supreme Court ruling No: 514 K/PDT. SUS-Bankruptcy/2013)

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### Abstract

The purpose of this research is to find out the responsibilities of the Board of Directors that led to the bankruptcy of the limited liability company. This research uses normative juridical research methods. It concluded that the Board of Director's responsibility towards the bankruptcy is a limited liability if the Board of Directors in carrying out the company's management duties in accordance to the principle of piercing the corporate veil and ultra vires and also have good faith and strive optimally for the company interest so that as not to suffer losses. However, if in carrying out the management duties of the company, a board of directors is found guilty or negligent, which then results in the company's bankruptcy, then the responsibility of the Board of Directors becomes unlimited and violates the principle of piercing the corporate veil which means the Board of directors must be personally responsible for the losses incurred. The Board of Directors' responsibility can be held in civil liability Article 1365 of the Civil Code and criminal Article 378 and Article 372 of the Criminal Code.

**Keywords:** board of Directors responsibilities, bankruptcy, piercing the corporate veil, ultra vires

### 1. Introduction

The Limited Liability Company (Ltd.), or called as the company, is a capital alliance legal entity, established by agreement, conducting business activities with a basic capital that is entirely divided into shares and also meets the requirements set by the law and regulations of its implementation. Meanwhile, in another definition, a Limited Liability Company is a legal entity or artificial person capable of taking legal actions through its representatives. Therefore the company is also an independent legal subject that has rights and obligations in a legal relationship <sup>[1]</sup>.

In exercising its rights and obligations, the company shall receive assistance from its organs consisting of the General Meeting of Shareholders (GMS), The Board of Directors and Commissioners. Each of these organs has their respective duties and authorities following the Articles of Association and Law of Republic of Indonesia No. 40 of 2007 on Limited Liability Company. Among the three organs of the limited liability company, the Board of Directors is an organ that has full authority over the company. The Board of Directors in carrying out its duties and authority must be based on two basic principles: fiduciary duty, meaning trust given by the company, and the duty of skill and care principle, refer to the ability and prudence of the actions of the Board of Directors.

Furthermore, Article 92 Paragraph (1), (2), and Article 97 Paragraph (2) govern the duties of the company's Board of directors. The Board of Directors became the determinant of the company's progress and development. Besides, the

Board of Directors forms a living company. Without the company's Board of directors, the company cannot carry out its obligations because the Board of Directors carries out all things related to its activities. Thus, the public perception considers that directors in a company are often interpreted as the owner. The duties and responsibilities of the Board of Directors are the duties and responsibilities as an organ, which is collegial responsibility between fellow members towards the company. It means any action taken or taken by one or more members of the Board of directors will bind the other members of the Board of Directors. However, it does not mean that there is no division of duties among the Board of Directors <sup>[2]</sup>.

Besides, the Board of Directors is one of the Limited Liability Company organs with full duties and responsibilities in the company management. It represents the company both inside and outside the court under the provisions of the Articles of Association. However, if the Board of Directors negligently carries out such duties and responsibilities will result in the company's losses causing bankruptcy. The Board of Directors shall be solely responsible for the losses. Furthermore, Article 97 paragraph (3) and paragraph (4) of the Law on Limited Liability Company governs the responsibility of the Board of Directors for the company's losses arising from negligence in carrying out the company's management duties.

Bankruptcy is a situation in which the debtor is unable to

<sup>1</sup> Hari Noor Yasin, Al. Sentot Sudarwanto, "Eksistensi Doktrin Piercing The Corporate Veil Di Dalam Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas Terhadap Tanggung Jawab Direksi Atas Terjadinya Kepailitan Perseroan Terbatas", *Jurnal Repertorium*, Volume III, No. 2 Juli-Desember 2016, hlm. 8.

<sup>2</sup> Muskihah, Tanggung Jawab Direksi Dalam Penerapan Prinsip Good Corporate Governance, *Jurnal Ilmu Hukum Inovatif*, volume 2, No. 3, Tahun 2010, hlm. 126.

make payments on the debts of the creditors<sup>[3]</sup>. This situation is usually due to the financial distress of debtor companies that have suffered setbacks/losses. Bankruptcy is a way to get out of the debtor's debt problem, in which the debtor no longer can repay the debts to his creditors. The terms of bankruptcy under the provisions of Article 2 paragraph (1) of the Law of the Republic of Indonesia No. 37 of 2004 on Bankruptcy and Delay of Debt Payment Obligation state that the debtor who has two or more creditors and does not pay off at least one debt that has fallen in time and can be billed, is declared bankrupt by a court ruling, either on own application or on the request of one or more creditors<sup>[4]</sup>.

The main objective of bankruptcy is to share the debtor's assets to creditors by the curator. The curator is appointed and selected by the court. The duties are to manage and settle the assets of the bankrupt debtor under the supervision of the Supervisory Judge. Besides, bankruptcy aims to avoid separate confiscation or separate execution by creditors and replace it by holding joint confiscations so that the debtor's assets can be distributed to all creditors by their respective rights. Furthermore, Indonesia's bankruptcy law principles are generally stipulated in Article 1131 of the Criminal Court and the specific principle stipulated in Law no. 37 of 2004 on bankruptcy and delay of debt payment obligations<sup>[5]</sup>.

The Board of Directors is not personally responsible for actions committed for and on behalf of the company based on their authority. That is because the actions of the directors are seen as actions of a limited liability company, which is an independent legal subject so that the company should be responsible for the losses resulting from the company's actions, which in this case is represented by the Board of Directors. However, if the Board of Directors' authority is not exercised properly and with full responsibility as regulated in Article 97 Paragraph (2) and (5) of the Law of the Republic of Indonesia regarding Limited Liability Company, then the Board of Directors is fully responsible personally.

The ruling of the Indonesian Supreme Court No. 514 K/PDT. SUS-Bankruptcy/2013, in cases experienced by Mandiri Agung Jaya Utama Ltd. (MAJU Ltd.,) where the Board of Directors of this company borrowed money from Galena Surya Gemilang Ltd. (GSG Ltd.,) behind the commissioner of MAJU Ltd. The loan money obtained is not given to the company and is not used for the benefit of the company. However, it was sent to the personal account of the Board of Directors, so that the company was declared bankrupt by the Central Jakarta Commercial Court because it had a debt bill worth Rp 17.8 billion against GSG Ltd. and Indomineral Makmur Ltd. with a bill of Rp 2.5 billion. In the verdict, the Board of Directors of MAJU Ltd. was found guilty of abusing authority on behalf of the company, resulting in MAJU Ltd. was declared bankrupt by the Central Jakarta Commercial Court. Furthermore, the Board of Directors of MAJU Ltd. has been found to have violated

Article 97 Number 3 of the Law on Limited Liability Company, where full responsibility is imposed on the Board of Directors whose management is negligent and intentionally guilty, resulting in the company's bankruptcy. Furthermore, in the first-degree ruling of the Commercial Court at the Central Jakarta District Court No. 34/PDT. SUS-Bankruptcy/2013/PN. The judge grants the Applicant's Bankruptcy Declaration Application and declares the respondent bankrupt, MAJU Ltd., bankrupt with all legal consequences. Besides, in the cassation level ruling, the Supreme Court of Judges rejected the application for cassation from the applicant of cassation MAJU Ltd. and punished the cassation applicant for paying the costs of the case in this cassation rate of Rp5,000,000.00 (five million rupiahs).

Based on the above description, this paper is interested in discussing The Board of Directors Personal Responsibility for Legal Actions That Harm Third Parties (Analysis of Supreme Court Ruling No: 514 K/Pdt. Sus-Bankruptcy/2013). With this problem, researchers focused on researching and analyzing one research issue, how the Board of Directors' responsibilities in case number 514 K/PDT. SUS-Bankruptcy/2013 which led to the bankruptcy of a limited liability company?

## 2. Research methods

This research uses normative legal research methods, specifically, legal research that positions the law as a norms system building. The norms system built is about the principles, norms, rules of law, court rulings, roles, and doctrines<sup>[6]</sup>. A statute approach is used in this study, which means reviewing all laws and regulations linked to the legal issues being addressed. Also, the researcher uses a case approach, which means the researcher sees in terms of the ratio decidendi, namely the legal reasons used by the judge to come to his verdict. The data collection techniques are carried out through library studies by collect the literature, written materials, and references relevant to the research that is being conducted.

## 3. Result and Discussion

A board of directors' responsibility to the company or limited liability company for losses arising from negligence in carrying out the company's management duties shall be governed by Article 97 paragraph (3) and paragraph (4) of the Law on Limited Liability Company, the members of the Board of Directors are personally responsible for the company's losses. The Board of Directors may be liable until their personal property if the Board of Directors follows:

- a. The Board of Directors does not carry out the fiduciary duty to the company. The Board of Directors who intentionally or negligently carry out fiduciary duty obligations, are not responsible and do not do good faith in carrying out the management of the company then the Board of Directors is personally responsible under Article 97 paragraph (3) of the Law on Limited Liability Company.
- b. The Board of Directors is guilty and causes the company bankruptcy. It can be classified as follows:
  1. There is an element of error (willfulness) or negligence

<sup>3</sup> Dedy Tri Hartono, "Perlindungan Hukum Kreditor Berdasarkan Undang-Undang Kepailitan", *Jurnal Ilmu Hukum Legal Opinion*, Edisi I, Volume 4, Tahun 2016, hlm. 2.

<sup>4</sup> Tata Wijayanta, "Kajian Tentang Pengaturan Syarat Kepailitan Menurut Undang-undang Nomor 37 Tahun 2004", *Mimbar Hukum*, Volume 26, Nomor 1, Februari 2014, hlm. 3.

<sup>5</sup> Syamsudin Sinaga, *Hukum Kepailitan Indonesia*, Tatanusa, Jakarta, 2012, hlm. 34.

<sup>6</sup> Mukti Fajar Dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif Dan Empiris*, Cetakan Iv, Pustaka Pelajar, Yogyakarta, 2017, Hlm. 33.

- from the Board of Directors (with ordinary proof).
2. To paying the debt and bankruptcy costs, first, it must be taken from the company's assets. If the Company's assets are insufficient, then from the personal assets of the Board of Directors.
  3. There is inverse proof (*omkering van bewijslast*) for members of the Board of Directors who can prove that the company's bankruptcy is not due to errors (intentional) or negligence. If the Board of Directors is found to be wrong or negligent in carrying out its management (in good faith) resulting in the company's loss, shareholders representing at least 1/10 part of the total number of shares with valid voting rights, by the existing provisions, shall have the right to sue the Board of Directors to be held fully accountable by applying to the district court.

However, if the Board of Directors can prove that the bankruptcy is not due to its fault or negligence, then the Board of Directors shall not be jointly responsible for the loss. As Article 97 paragraph (5) of the Law on Limited Liability Company states that members of the Board of Directors cannot be held accountable for the losses of the Limited Liability Company as referred to article 97 paragraph (3) if they can prove <sup>[7]</sup>:

- a. The loss is not due to his fault or negligence;
- b. Has carried out and carried out management in good faith and prudence, and for the company interest and under the aims and objectives of the company;
- c. Do not have a conflict of interest, either directly or indirectly, over management actions that result in losses to the company; and
- d. Has taken action to prevent such damages from arising or continuing.

The responsibility of the Board of Directors to company bankruptcy is limited liability. If the Board of Directors in carrying out the company following the principles of piercing the Corporate veil and ultra vires, where the Board of Directors in carrying out the company has under the prevailing provisions and has good faith and strives to the maximum possible so that the company does not suffer losses. However, if in carrying out the management duties of the company, the Board of Directors is wrong or negligent, resulting in the loss/bankruptcy of the company, then the responsibility of the Board of Directors becomes unlimited, which means its creditors can personally bankrupt the Board of Directors. The personal assets of the Board of Directors can be used in paying off all liabilities/debt of the company if the company's assets are insufficient in paying off the company's debts.

Responsibility means that a person is obliged to bear everything, give answers, and bear the consequences of what has been done. Legal responsibilities can be divided into two types, namely responsibility in civil law and responsibility in criminal law. According to Hans Kelsen, a person who is legally responsible for a particular act means it can be penalized in the opposite act case. Normally sanctions are imposed against the delinquent (subject)

because of his actions, which is his responsibility <sup>[8]</sup>.

As for the responsibility of the Board of Directors against third parties or parties who are harmed for losses arising from the negligence of carrying out the company's management duties can be classified as follows:

#### a. Liability in civil law

The Board of Directors or directors of a company may be held liable for contractual liability with other parties <sup>[9]</sup>

#### 1. Board of Directors' responsibilities in violating the contract of authority

A board of directors can be held accountable for their actions with third parties and realize that they have no authority to do in the promised (agreed) terms. Then the Board of Directors who has violated a contract that has been agreed with a third party can be held accountable. In accordance with Article 1365 of the Civil Code, which stated: "Every act that violates the law and brings harm to others, obliges the person who caused the loss due to his mistake to compensate for the loss."

#### 2. Responsibility for collateral guarantee

Agreements made by the company with third parties or banks in the event of receivables agreements that require the company's officers (directors) to provide guarantees, and while the guarantee (the main liability fails), then the outside party may sue/hold the insurer accountable (director).

#### 3. Responsibilities in un-formed companies case

A prospective director can sign an agreement with an outside party to be held accountable for the agreement. In addition to civil liability Article 1365 of the Criminal Code on Indemnity, a prospective director has also violated Article 14 paragraph 1 of the Law on Limited Liability Company as follows

"Legal action on behalf of the company that has not obtained legal entity status may only be done by all members of the Board of Directors together with all founders and all members of the board of commissioners of the company, and they are joint responsibility for such legal actions."

#### 4. Responsibility in criminal law

A director may be held liable for any damages incurred and may be sued in the case of:

##### 1. Fraud

A director may be held liable if he or she commits fraud to a party or third party in conducting an agreement. The act violates Article 378 of the criminal code, which reads:

"Anyone with the intent to unlawfully benefit himself or others, by using a false name or false dignity, by deception, or a series of lies, move others to hand over something to him, or to owe or abolish receivables threatened with fraud with a maximum prison sentence of four years."

##### 2. Embezzlement

A director may be held accountable if he or she commits embezzlement intentionally and unlawfully. The act violates Article 372 of the criminal code:

"Whoever knowingly and unlawfully possesses something

<sup>7</sup> Prasetyo, I Gusti Ketut Rachmi Handayani, Lego Karjoko, Albertus Sentot Sudarwanto, "Dilemma in the Implementation of Business Judgment Rule In Commercial Transactions of State-Owned Enterprises", *Talent Development & Excellence*, Vol.12, No.2s, 2020, hlm. 1541.

<sup>8</sup> Jimly Asshiddiqie, M Ali Safa'at, Teori Hans Kelsen Tentang Hukum, Setjen Kepaniteraan Mk Ri, 2006, hlm. 61. Dalam Yudho Taruno Muryanto, *Tanggung Jawab Pengelolaan Bumd*, Kajian Empirik Mengenai Tugas, Wewenang & Tanggung Jawab Pengelolaan Bumd, Setara Press, Malang, 2018, hlm. 22.

<sup>9</sup> Nicholas Bourne, Principle of Company Law, Cavendish Publishing Limited, Swansea Uk. 1998, P148, Dalam Yudho Taruno Muryanto, *Op. Cit.*, Hlm. 23-24.

that is entirely or partially belonging to another person, but which is in his power not because of a crime is threatened with embezzlement, with a maximum prison sentence of four years or a maximum fine of Nine hundred rupiah.”

Considering the law, the Panel of Judges of the Commercial Court in the Central Jakarta District Court examined and decided the case for bankruptcy declaration between MAJU Ltd. Against GSG Ltd., strongly upheld the Supreme Court’s ruling. When observed with aspects of legal certainty, judging by the rules used, it is known that the judge only considers Law No. 37 of 2004 on Bankruptcy and Delay of Debt Payment Obligation to make a decision. The judge should consider Law No. 40 of 2007 on Limited Liability Company in Supreme Court Decision No: 514 K/Pdt. Sus-Pailit/2013, in which the Board of Directors in running a company must apply the principles of Piercing The Corporate Veil and Ultra Vires.

Based on the analysis, there is a legal fact that the Supreme Court Decision No: 514 K/Pdt. Sus-Pailit/2013 is deemed incompatible with the provisions in Law No. 40 of 2007 on Limited Liability Company where the authority of the Board of Directors, in this case, is not carried out in good faith and full responsibility as stipulated in Article 97 Paragraph (2) and (5) of the Law on Limited Liability Company, then the Board of Directors is personally responsible.

The Board of Directors of PT. MAJU, currently a former board of directors, has committed a legal action "Musi Rawas Iron Stone Trade Receivable Debt Agreement." Where the act is categorized as an unlawful act by violating a contract that has been agreed with a third party, this may be subject to civil liability article 1365 of the Civil Code and has intentionally committed acts of fraud and embezzlement against third parties, which may be subject to criminal liability article 378 and 372 of the Civil Code. The Board of Directors has also violated Article 117, Limited Liability Company Law in terms of committing an act for the benefit of the company and the company, a board of directors must obtain approval or assistance from the Board of Commissioners. However, in certain legal actions without/not getting approval or assistance from the Board of Commissioners, legal action will remain binding on the Company as long as the other parties in the legal action are in good faith.

#### 4. Conclusion

This research concluded that the Decision of the Panel of Judges of the Commercial Court in the District Court of Central Jakarta that examined and decided the case for bankruptcy declaration between MAJU Ltd. against GSG Ltd. strengthened by supreme court ruling No: 514 K/Pdt.Sus-Bankruptcy/2013 is considered inappropriate if the panel of judges decides and concludes that MAJU Ltd. was declared bankrupt with all legal consequences. If this is examined and examined further, the actions of the directors who are now former directors are illegal acts that harm third parties because what the former directors have done was done deliberately in bad faith and acting for their interests where the proceeds from the receivables sent to a private account. However, the legal action is on behalf of MAJU Ltd. Thus, the legal actions of the former directors have harmed third parties and can be held civil liability Article 1365 Civil Code of Law on Indemnity and criminal liability Article 378 of the Criminal Code on Fraud and Article 372 on embezzlement of money.

#### 5. Suggestion

- a. For MAJU Ltd., the researcher recommends filing a Civil lawsuit based on Article 1365 of the Civil Code on Indemnity as well as a criminal lawsuit Article 378 of the Criminal Code on Fraud and Article 372 on embezzlement of money against the former directors of MAJU Ltd., So that the company does not bear too much loss.
- b. For the government, CQ. The President and the House of Representatives, there needs to be an update/revision to Law No. 40 of 2007 concerning Limited Liability Company, especially regarding the personal responsibility system of the Board of Directors. In order to create a balance of arrangements to protect the interests of the company and third parties.

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