International Journal of Psychosocial Rehabilitation, Vol. 24, Issue 1, 2020
ISSN: 1475-7192

PERSONAL RESPONSIBILITY OF THE BOARD OF DIRECTORS TOWARDS COMPANY LOSS USING THE DOCTRINE PIERCING THE CORPORATE VEIL

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Abstract---*Management of limited liability companies is carried out daily by the directors. directors have the right and authority to act on behalf of and in the interests of the company within the limits permitted by applicable laws and regulations and their articles of association. However, in practice there are many directors who commit acts against the law to the detriment of others. The problem discussed in this study is how the directors' personal responsibility for company losses using the doctrine of piercing the corporate veil. This research uses the normative juridical method. The conclusion of this study is that directors must carry out their duties and authority in good faith in accordance with the articles of association and legislation. In the company law there is a concept of separation of the company's assets, but this can be set aside by using the doctrine of piercing the corporate veil. if the director makes a mistake or negligence, the board of directors can be sued up to his personal property. This doctrine has been accommodated in Law Number 40 of 2007 concerning Limited Liability Companies so that it has legal certainty for the community.*

Keywords--- *Directors, Companies, and Piercing the Corporate Veil*

I. Introduction

Limited Liability Company is a legal person (legal person, legal entity) and independent legal subject (*persona standi judicio*), who is capable of establishing legal relations or carrying out legal actions with other legal subjects. Limited Liability Company as a legal subject in the sense of artificial person, which is the result of legal creation, cannot exercise its rights and obligations on its own but must be assisted by the company's organs. The company's organs consist of General Meeting of Shareholders, Directors and Board of Commissioners.[3]

Indonesia as a country needs facilities to develop its economy that aims to prosper its citizens. In carrying out its role as a welfare state, a state must have the means to realize its ideals, namely the welfare of its people. In an effort to realize these goals, the state then formed a State-Owned Enterprise (BUMN). The BUMN can take the form of a company or public company (Perum).

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In accordance with its name, that is State Owned Enterprises (BUMN) it can be seen that the owner is the state, in this case the government. The background is State Owned Enterprises (BUMN) because the state cannot do business through the government, because the state is not a company whose purpose is to seek profits. The state can do business by establishing companies.[4]

BUMN is another term for State Owned Enterprise (SOEs). The term has only been known since the issuance of Government Regulation Number 3 of 1983. State Enterprises or now known as SOEs are corporate legal entities with capital owned, either in part or in full by the State through direct participation from the separated State assets.

Management of limited liability companies is carried out daily by the directors. The existence of directors in a company organ is a must in other words the company is required to have directors. This is because the company as an artifical person, where the company can not do anything without the help of members of the board of directors as a natural person. Based on fiduciary duty, directors of a company are given high trust by the company to manage a company. In this case, directors must have high standards of integrity and loyalty, appear and act in the interests of the company, on a bonafide basis.[5]

One of the BUMN owned by the Indonesian government is PT. Asuransi Jiwasraya which is engaged in insurance. Some time, the case of PT. Asuransi Jiwasraya has become a subject of much public discussion because of a default on its customers. Even though PT. Asuransi Jiwasraya Insurance is a company that has long existed and is a BUMN. Even some of the directors of PT. Asuransi Jiwasraya (the Company) was arrested by law enforcement officials because it was suspected as the cause of the company suffering a loss of Rp 10,000,000,000,000 (ten trillion rupiah).

The problems that ensnared PT. Asuransi Jiwasraya (the Company) is the directors fault. The Board of Directors is suspected of making investment mistakes by using company money so that it adversely affects the company current financial condition. Directors have an important role in running the company because they have the authority and power. However, in the concept of corporate law there is a separation between the founders assets and the company so that it brings the consequence that there is limited responsibility for the company organs (Saudi, 2018).

Based on the description above, according to the author it is interested to study about the directors' personal responsibility which causes loss to the company where on the other hand there is the concept of separation of legal entity assets and there is limited liability.

II. Literatire Review

The term Limited Liability Company (PT) used today was formerly known as (*Naamloze Vennootschap abbreviated NV*). How the origins of the term Limited Liability Company and the abbreviated PT are used cannot be traced.[6] The term "limited liability company" consists of two words, namely limited liability company. The Company refers to PT capital consisting of shares or shares. The word limited refers to the responsibilities of shareholders whose extent is limited to the nominal value of all shares owned.[7]

[4] Gatot Supramono, *Limited Liability Company Law*, Cet.5 (Jakarta: Djambat, 2009), p.343.

[5] Ridwan Khairandy, *Limited Liability Company Doctrine, Statutory Regulations, and Jurisprudence*, Cet.2 (Yogyakarta: Kreasi Total Media, 2009), p.207.

[6] *Ibid.*

[7] *Ibid*

Limited liability company is a company in the form of a legal entity established based on an agreement from its founders, to carry out business activities with authorized capital, where the authorized capital is divided into shares, by fulfilling the requirements stipulated in the relevant laws and regulations other invitation.[8]

The concept of a company as a legal entity whose wealth is separate from its shareholders is a trait that is considered important for the status of the corporation as a legal entity that distinguishes it from other forms of company. The nature of limited liability in a nutshell is a statement of the principle that shareholders are not personally responsible for the obligations of a company as a legal entity whose wealth is separate from its shareholders. This is what distinguishes it from a civil partnership (partnership) as a legal entity. Civil alliance still maintains the principle of personal liability for its allies or partners.[9]

A limited company as an artifical person or an artificial legal subject may not be able to act alone. This condition is different from humans, who are naturally given the tools to carry out actions in their life activities. Because a limited liability company is an artificial subject, it requires people who have the will to run the company in accordance with the aims and objectives of the company establishment.[10]

Basically the directors' accountability is limited. However, in certain circumstances this limited responsibility can be a personal responsibility or joint responsibility of fellow members of the board of directors. This mainly relates to the concepts below:[11]

a) *Piercing the corporate veil*;

b) Ultra vires

The term *piercing the corporate veil* is used to exclude limited liability within a legal entity. With this doctrine, the court can override the principle of limited liability.[12]

Ultra vires comes from Latin which means outside or exceeds power (outside the power), that is outside the power permitted by law for legal entities. The term ultra vires is used specifically for the actions of companies that exceed their authority as provided by their articles of association or regulations which form the basis of the company.[13] Article 3 of the articles of association of the company must include the intent and purpose and business activities of the company. This must be considered by the directors. If it turns out that the directors have carried out the company's business activities outside or deviated from the provisions of Article 3 of the company's articles of association, then there is ultra vires which in this case the company can declare itself unattached, so the third party can only sue to the directors themselves.[14]

In general, an action is said to be ultra vires if it is done without or exceeds the authority (authority) to perform the act. For the company, the act is ultra vires if it is done outside or exceeds the authority of the directors as stated in the articles of association and laws and regulations. The extent to which actions can be said to deviate from the company aims and objectives, and therefore can be categorized as ultra vires, can be seen from the habits or custom that occur in the practice of the business world.[15]

A legal action is deemed to be outside the company aims and objectives when fulfilling one of the criteria:[16]

a) Legal acts are expressly prohibited by the articles of association.

[8] Munir Fuady, *New Paradigm Limited Liability Company*, Cet.1 (Bandung: Citra Aditya Bakti, 2003), p.1.
[9] Abdulkadir Muhammad, *Indonesian Civil Law*, Revised Matter (Bandung: Citra Aditya Bakti, 2010), pp.26-27.
[10] Zaeni Asyhadie and Budi Sutrisno, *Corporate and Bankruptcy Law*, (Jakarta: Erlangga, 2012), p.92
[11] Chatamarrasjid Ais, *Breaking the Company's Veil and Actual Legal Problems*, Cet.1 (Bandung: Citra Aditya Bakti, 2004), p.75.
[12] Ridwan Khairandy, op.cit, p.260.
[13] *Ibid.*
[14] Rudhi Prasetya, *Limited Liability Company, Theory and Practice*, Cet.1 (Jakarta: Sinar Grafika, 2011)., P.27
[15] Ridwan Khairandy, *op.cit*, p.229.
[16] *Ibid*.

b) By taking into account special circumstances, the legal action in question cannot be said to support the activities mentioned in the articles of association.

c) By taking into account special circumstances, the relevant legal actions cannot be interpreted as supporting the interests of a limited liability company.

III. Reseach Method

This type of research is normative juridical research by exploring data through literature studies, legislation, international legal instruments, and documents relating to the object under study to seek answers to the problems under study.

The object of this research is the personal responsibility of the directors of the company which caused the loss. This research uses the technique of gathering legal material through literature study. The approach used is the statutory approach, then the research results are analyzed qualitatively, and presented in a descriptive analytical form.

IV. Results and Discussion

The existence of directors in the company is a must, or in other words the company is required to have directors, because the company as an artifical person can not do anything without the help of directors as natural persons. Directors in Limited Liability Companies are like lives for the company. It is impossible for a company without directors. Conversely, there might not be a board of directors without a company. Therefore the existence of directors for the company is very important. Even though a limited liability company as a legal entity has separate assets from the directors, but it is only based on legal fiction, that the company is considered as a legal subject, just like humans.[17]

Actually directors are only entitled and authorized to act on behalf of and in the interests of the company within the limits permitted by applicable legislation and its articles of association. Every action taken by the board of directors outside the authority granted to it is referred to as an ultra vires action. Legal conduct of directors is said to be ultra vires if it exceeds the limits of authority listed in the articles of association and legislation. The Board of Directors in managing the company is not only bound to what is explicitly stated in the aims and objectives and business activities of the company but can also support or expedite its duties (secondary), but it is still within the limits permitted or still within the scope of its duties and obligations (intra vires) provided that it is in accordance with habits, fairness, and propriety (no ultra vires).

In principle, the directors in the company have limited responsibilities, but this does not apply absolutely. In the law of limited liability companies, there is a concept whereby the company's organs are not personally liable for the engagement made on behalf of the company and are not responsible for personal property in the event of a loss.

Cases that occurred at PT. Asuransi Jiwasraya (Persero) can be said to have errors and/or negligence committed by the directors or company organs. This can be seen from the amount of losses and also the causes of problems at the company. Losses experienced by PT. Asuransi Jiwasraya (Persero) has caused losses for many people because they cannot get their rights due to the directors' mistakes in managing the company. Indication of an error made by the directors of PT. Asuransi Jiwasraya (Persero) is quite strong, because the Attorney Generals Office of the Republic of Indonesia has examined and arrested several directors of the company.

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[17] Muhammad Gary Gagarin Akbar, *Business Judgment Rule As Legal Protection for the Directors of the Company in Conducting Business Transactions*, Journal of Legal Science ISSN 2528-2638 Vol 1, N0 1, 2016.

If the directors in the case are protected by the concept of limited responsibility, of course, it will cause injustice for the community, especially for the people who are directly disadvantaged. Therefore, in company law there is the doctrine of piercing the corporate veil. Piercing the corporate veil is an act of breaking through, tearing the curtains / veil of the company in relation to these limited responsibilities. So, through this doctrine it is possible for directors to be held responsible for their personal assets. However, to be able to hold directors accountable personally is not enough with just a doctrine, meaning that the doctrine must also be listed in the legislation in force in Indonesia.

Directors are required to take full responsibility for the management of the company for the interests and purposes of the company, as well as representing the company, both inside and outside the court. Directors in good faith and full responsibility must carry out duties for the interests and business of the company. Directors can be sued personally to the district court if the company suffers losses due to errors or negligence.

In connection with the doctrine of piercing the corporate veil it has been adopted in Law Number 40 of 2007 on Limited Liability Companies. If a member of the board of directors abuses his position as a company trustee or if he is guilty or negligent in carrying out his duties which causes the company to suffer losses, then each member of the board of directors is personally responsible. This is in accordance with Article 97 paragraph (3) of Law Number 40 of 2007 on Limited Liability Companies which stipulates that each member of the board of directors is personally responsible for the company losses if the person concerned is guilty or negligent in carrying out their duties in managing the company. Furthermore, in Article 97 paragraph (4) of Law Number 40 of 2007 on Limited Liability Companies stipulates that if the board of directors consists of 2 (two) or more board members, the personal responsibility applies jointly to each member of the board of directors. However, if the members of the board of directors can prove as determined by Article 97 paragraph (5) of Law Number 40 of 2007 on Limited Liability Companies, the members of the board of directors are not personally responsible. This article states that members of the board of directors cannot be held personally liable for damages to the company if he can prove it.

In carrying out their duties to take care of a Limited Liability Company, directors are required to carry out their duties by referring to the principle of good faith.[18] The principle of good faith and full responsibility is affirmed in Article 97 paragraph (2) of the Law Number 40 of 2007 on Limited Liability Companies that applies to all directors. Good faith and full responsibility are two things that can not be separated in carrying out a task or job. Company management by carrying out work based on good faith and full responsibility, it is desired that each member of the board of directors can avoid acts that benefit personal interests at the expense of the company.[19]

Based on the description above, the existence of these articles shows that the doctrine of piercing the corporate veil has been adopted in the Limited Liability Company Law so that it has legal certainty for the affected community. The Board of Directors must be responsible for what he has done if indeed found facts that there are mistakes or omissions from the directors.

V. Conclusion

Based on the description above, the following conclusions can be drawn:

1. In principle, the directors in the company have limited responsibilities, but this does not apply absolutely. In the law of limited liability companies, there is a concept whereby the company organs are not personally responsible for the agreements made on behalf of the company and are not responsible for personal property in the event of a loss.

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[18] Binoto Nadapdap, Limited Liability Company Law, Cet.1 (Jakarta: Permata Aksara, 2013), p.92.
[19] Gatot Supramono, op.cit, p.191.

2. Such limited liability can be set aside through piercing the corporate veil doctrine. The doctrine can ask the directors personal responsibility if it is proven to have made a mistake or negligence in the management of the company. The doctrine also exists in Law Number 40 of 2007 on Limited Liability Companies

VI. Recommendation

1. The Board of Directors must perform every task and authority based on good faith.
2. Company organs must supervise each other in order to prevent irregularities in the management of the company.

REFERENCES

[1] Abdulkadir Muhammad, *Indonesian Civil Law*, Revised Matter (Bandung: Citra Aditya Bakti, 2010).
[2] Binoto Nadapdap, *Limited Liability Company Law*, Cet.1 (Jakarta: Permata Aksara, 2013).
[3] Chatamarrasjid Ais, *Breaking the Company's Veil and Actual Problems with Company Law*, Cet.1 (Bandung: Citra Aditya Bakti, 2004).
[4] Gatot Supramono, *Limited Liability Company Law*, Cet.5 (Jakarta: Djambat, 2009).
[5] Jono, *Bankruptcy Law*, Third Printing, First Edition, (Jakarta: Sinar Grafika, 2008).
[6] Munir Fuady, *New Paradigm Limited Liability Company*, Cet.1 (Bandung: Citra Aditya Bakti, 2003).
[7] Ridwan Khairandy, *Limited Liability Company Doctrine, Statutory Regulations, and Jurisprudence,* Cet.2 (Yogyakarta: Kreasi Total Media, 2009).
[8] Rudhi Prasetya, *Limited Liability Company, Theory and Practice*, Cet.1 (Jakarta: Sinar Grafika, 2011).
[9] Saudi, M.H.M., Sinaga, O. & Rospinoedji, D., The role of tax education in supply chain management: A case of Indonesian supply chain companies, Polish Journal of Management Studies 18(2):304-319, December 2018.
[10] Zaeni Asyhadie and Budi Sutrisno, *Corporate and Bankruptcy Law*, (Jakarta: Erlangga, 2012).

Scientific articles :

[11] Muhammad Gary Gagarin Akbar, Business Judgment Rule As Legal Protection for the Directors of the Company in Conducting Business Transactions, Journal of Legal Science ISSN 2528-2638 Vol 1, N0 1, 2016.

Laws and regulations :

[12] Law Number 40 of 2007 on limited liability companies
[13] Law Number 19 of 2003 on State-Owned Enterprises