

Notary's Responsibility for Making a Deed of Statement of Meeting Decisions Based on Circular Meeting Decisions as a Substitute for the General Meeting of Shareholders (GMS)

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Abstract. *This study aims to find out and analyze the notary's responsibility for making a deed of statement of meeting decisions based on circular meeting decisions as a substitute for a general meeting of shareholders (GMS) and to find out and analyze the position of the deed of notary made in connection with the existence of a lawsuit for unlawful acts resulting from the Deed of Statement of Meeting Decisions Based on Circular Meeting Decisions as a Substitute for the General Meeting of Shareholders (GMS). This study uses a normative legal library research method and from the results of the author's research, there are several problems that arise due to the making of a deed of amendment to the articles of association by a notary based on a circular decision. The results of the study show that notaries are not responsible for all kinds of substantial truth of the statements of the parties contained in the circular decision deed and the deed made because the existence of a lawsuit for an unlawful act does not automatically make it null and void by law if the elements of an unlawful act are not fulfilled.*

Keywords: *Circular; Company; Decision.*

1. Introduction

The rapid development of the economy and business world has an impact that the availability of legal instruments is very important today. Law, in this case the law will function to regulate business traffic so that order arises in the business world. The existence of law is expected to change society and support development.

The most minimized form of economic activity at this time is Limited Liability Company. On average, almost everyone who has medium to high capital chooses to invest or do business with a Limited Liability Company legal entity. The responsibility of shareholders in a Limited Liability Company is limited to the

amount of shares owned, so that if something happens to the Limited Liability Company, the shareholder's personal assets are safe. Currently, Limited Liability Companies are regulated in Law No. 40 of 2007 concerning Limited Liability Companies (Law No. 40 of 2007 or UUPT). Article 1 number 1 of the UUPT stipulates that:¹

"A Limited Liability Company is a legal entity which is a capital association, established based on an agreement, carrying out business activities with authorized capital which is entirely divided into shares and fulfilling the requirements stipulated in this Law and its implementing regulations."

Based on these rules, it can be interpreted that the basic concept of a Limited Liability Company is a business with a capital association from shareholders who have limited liability for their basic capital that is placed and deposited. Therefore, as a legal entity with a capital association concept, at least or minimally a Limited Liability Company is established by 2 (two) people based on an agreement made before a Notary to make a Deed of Establishment of a Limited Liability Company which also contains the Company's Articles of Association.

However, this concept was then expanded after the enactment of Law No. 11 of 2020 concerning Job Creation (hereinafter referred to as the Job Creation Law), one of the clusters of which changes and adds provisions to the UUPT, namely introducing a new form of legal entity, namely the Sole Proprietorship which is specifically for Micro and Small Business (MSE) actors with the aim of its formation, namely to facilitate the development of micro and small businesses by being able to form a legal entity with only 1 (one) founder or shareholder.

As previously explained, Limited Liability Company is the most popular form of economic activity today, because of its limited liability. Limited Liability Company also provides convenience for its owners (shareholders) to transfer their company to anyone by selling all the shares they own to the company (buyer).²

Article 7 paragraph (1) of the UUPT states that:³

"The Company is established by 2 (two) or more persons with a notarial deed made in Indonesian."

Based on this, the role of a notary is clearly needed because the law requires that the establishment and amendment of the Articles of Association of a Limited Liability Company must be made by a notarial deed. If the deed of establishment of the Limited Liability Company is defective, it can be a reason for the interested

¹Indonesia, Limited Liability Company Law, Law No. 40 of 2007, LN No. 106, TLN No. 4756, Article 1 number 1.

²Ahmad Yani and Gunawan Widjaja, Limited Liability Companies (Jakarta: Raja Grafindo Persada, 1999), p. 1.

³Op.Cit, Article 7 paragraph (1).

party to request the dissolution of the Limited Liability Company through the District Court. The legal defect referred to here can be caused by the failure to fulfill formal or material requirements.

The company as a legal entity is a "real reality", which is the same as the nature of human personality. Because like human personality, the company also has goals, intentions, and desires.⁴ In carrying out its business activities, a limited liability company has important organs that have their respective duties and authorities. Article 1 number 2 of the UUPT stipulates that there are three organs in a Limited Liability Company, namely the General Meeting of Shareholders (hereinafter referred to as the GMS), the Board of Directors, and the Commissioners.

The Board of Directors has the main task of running and implementing the management (beheer, administration or management) of the company or it can be said that the company is managed, administered and regulated by the Board of Directors.⁵ In addition to being the administrator and manager of a company, the board of directors also has the capacity to represent the company, both outside and inside the court. While the commissioners have the function of supervising the performance of the company's board of directors. The commissioners are authorized to examine the books, reprimand the directors, provide instructions, and can dismiss the directors by holding a GMS to decide whether the directors will be dismissed or not.⁶

Based on Article 1 number 4 of the UUPT, the GMS is a company organ that has authority that is not given to the board of directors or board of commissioners within the limits specified in the UUPT and/or the company's articles of association. Therefore, the GMS is an organ that represents the interests of all shareholders in a Limited Liability Company. The authority of the GMS regulated in the UUPT includes amending the company's articles of association, approving the form of shareholder deposits in forms other than money, buying back issued shares, increasing or decreasing the company's capital, appointing and dismissing directors and commissioners, and others. Very important decisions as mentioned earlier, up to the decision to dissolve the company are given to the GMS.

Basically, the three organs have an equal and side-by-side position according to the separation of their authorities regulated in the UUPT, but if viewed from their authority, it can be said that the GMS has a higher position than the directors and commissioners. Each organ of a limited liability company can make a decision in

⁴Agus Budiarto, *Legal Status and Responsibilities for the Establishment of Indonesian Limited Liability Companies*, Second Edition (Jakarta: Ghalia Indonesia, 2009), p. 27.

⁵M. Yahya Harahap, *Limited Liability Company Law*, Seventh Edition (Jakarta: Sinar Grafika, 2019), p. 345.

⁶Muhibbuthabary, "Dynamics and Implementation of Corporate Organization Law in the Indonesian Legal System", *Jurnal Asy-Syari'ah* Volume 17 Number 3, (December 2015), p. 241.

accordance with the UUPT and the Articles of Association that have been previously agreed upon.

The articles of association are part of the Deed of Establishment of a Limited Liability Company which contains the rules of the company and determines all rights and obligations of the parties in the articles of association, both the company itself, shareholders, management (Board of Directors and Board of Commissioners) of the company. With the approval of the Minister, which means that the articles of association come into effect in their entirety for all parties, both the founders and other third parties who have an interest in the company, the articles of association of the company have practically become a law for its makers. However, hierarchically, the articles of association cannot deviate from the provisions of the underlying laws and regulations, namely the UUPT.

The notarial deeds required in UUPT consist of the deed of establishment and the deed of amendment to the articles of association. Amendments to the articles of association of a company that has been incorporated can be made based on the results of the decision of the General Meeting of Shareholders (GMS). Then the results of the decision will be stated in the minutes of the meeting in the form of a notary (deed release) or can also be in the form of private minutes. Based on the authority of the Board of Directors or the power of attorney granted by the GMS, the results of the decisions made in the form of private minutes will be brought to the Notary to be made a deed of Meeting Decision Statement (PKR).

In addition, to make changes to the company's articles of association, shareholders can also make binding decisions outside the GMS (circular resolution). Decision-making like this is done without holding a physical GMS, this Circular Resolution GMS is formed or implemented because a company does not easily gather shareholders in the same place and time, while the obligation to hold a GMS, especially the Annual GMS, must still be held, so to overcome this, the UUPT determines that a GMS can be held without the physical presence of shareholders through a Circular Resolution GMS. The physical presence of shareholders in a Circular Resolution GMS is not an absolute requirement, but the main determinant is that the decision must be approved by the shareholders.

The Circular Resolution of the GMS decision is taken by sending a written proposal to be decided to all shareholders and the proposal is approved in writing by all shareholders.⁷The results of the GMS decision regarding the changes to the articles of association must then be submitted for approval or notification to the Minister via the system.

Decision-making outside the GMS (circular decisions) is regulated in Article 91 of the UUPT, which states:

⁷Explanation of Article 91 of UUPT

“Shareholders may also make binding decisions outside the GMS on condition that all shareholders with voting rights agree in writing by signing the relevant proposal.”

Furthermore, in the Explanation of Article 91 of the UUPT it is stated:

“What is meant by “decision making outside the GMS” in practice is known as a circular resolution. This kind of decision making is done without holding a physical GMS, but the decision is taken by sending a written document of the proposal to be decided to all shareholders and the proposal is approved in writing by all shareholders. What is meant by a “binding decision” is a decision that has the same legal force as a GMS decision.”

Based on the above quote, that shareholder decision-making outside the GMS is carried out by circulating a written proposal to shareholders and has binding force as a GMS decision, on the condition that all shareholders give their approval and sign the circular decision unanimously without exception. However, a Notary in making a deed related to the company, especially a circular GMS, must know how the law regulates the place where the GMS is held, the quorum, who is entitled to attend the GMS, and others related to the GMS. In addition to the GMS itself, a Notary also needs to understand the authorities of the company's organs, namely the GMS, the Board of Directors, and the Board of Commissioners. This aims to ensure that the circular GMS has been made legally and there are no procedural defects.

The problem that then occurs in the field is when the GMS is implemented through a circular resolution, not all shareholders agree with the contents of the circulated circular resolution document, especially if the shareholders are not in the company's domicile, the company's business area, or even in the territory of the Republic of Indonesia, even acts of forgery of signatures from shareholders in the circular resolution document are often found. Added to this, the agenda in the circulated circular resolution is regarding changes to the company's composition, namely the dismissal of one of the board of directors.

2. Research Methods

The data collection method used in this research is through literature study or document study. According to Abdulkadir Muhammad, "literature study is a study of written information about law that comes from various sources and is widely published and is needed in normative legal research."⁸ Data analysis in this study was carried out qualitatively by managing all the collected data well and analyzing it systematically, classifying, categorizing and classifying it, and then connecting it with each other, then interpreting it to understand the meaning of the data, as

⁸Abdulkadir Muhammad, *Law and Legal Research*, Third Edition, (Bandung: Citra Aditya Bakti, 2004), p. 81.

well as interpreting it from the perspective and knowledge of the researcher after understanding the overall quality of the data.⁹

3. Results and Discussion

3.1. Notary's Responsibility for Making a Deed of Statement of Meeting Decisions Based on Circular Meeting Decisions as a Substitute for a General Meeting of Shareholders

The responsibility of a notary as a profession arises from the obligations and authorities given to him, these obligations and authorities are legally and bindingly effective since the notary took his oath of office as a notary. The oath that has been taken is what should control all actions of the notary in carrying out his office. Therefore, notaries are expected to pay attention to all provisions in accordance with the regulations and do not violate existing legal customs when making deeds.

The GMS must basically be carried out directly by meeting face to face at the company's domicile or at the place where the company carries out its main business activities as determined by the articles of association as regulated in Article 76 paragraph (1) of Law No. 40 of 2007. The holding of the GMS is also said to be mandatory in the territory of the Unitary State of the Republic of Indonesia (NKRI) and closes the possibility of it being held abroad as stated in Article 76 paragraphs (3) and (4) of Law No. 40 of 2007.

However, Law No. 40 of 2007 also provides a loophole for the implementation of the GMS, namely that it can be done indirectly or face to face, namely by using teleconference, video conference or other electronic media that allow all GMS members to see and hear each other directly and participate in the meeting. Apart from these two methods, there is also another way to make GMS decisions, namely by making GMS decisions circularly.

In practice, the GMS decision-making mechanism is circular. This is done through discussion and communication with shareholders. intensive both directly physically and non-physically using technology communication, which will later produce points regarding the things that will be determined, then these points will be summarized and summarized into one unit and poured into the "shareholders' decision". The shareholders' decisions will then be distributed to the shareholders. shareholders and the approval of the shareholders is requested. After the decision is approved, the decision will be continued with making a deed of statement of meeting decisions by a notary to become a deed authentic which has strong and perfect evidentiary power.

⁹Bambang Sunggono, *Legal Research Methods*, (Jakarta: PT Raja Grafindo Persada, 2001), p. 134.

If the statement of the meeting decision has been completed by the notary, then the agreement of the shareholders has fulfilled Article 1868 of the Civil Code. The concrete legal consequence as a perfect evidentiary force is that the deed does not require additional evidence. However, a Notary in making a deed related to the company, especially a circular GMS, must know how the law regulates the place where the GMS is held, the quorum, who is entitled to attend the GMS, and others related to the GMS. In addition to the GMS itself, the Notary also needs to understand the authorities of the company's organs, namely the GMS, the Board of Directors, and the Board of Commissioners. This aims to ensure that the circular GMS has been made legally and there are no procedural defects.

The problem that then occurs in the field is when the GMS is implemented through a circular resolution, not all shareholders agree with the contents of the circulated circular resolution document, especially if the shareholders are not in the company's domicile, the company's business area, or even in the territory of the Republic of Indonesia, even acts of forgery of signatures from shareholders in the circular resolution document are often found. Added to this, the agenda in the circulated circular resolution is regarding changes to the company's composition, namely the dismissal of one of the board of directors.

The role of a notary becomes important and very central considering that a notary is a public official who is authorized to express and confirm the wishes of the parties, in this case by making a deed of statement of the decision of the meeting regarding changes to the company's articles of association to dismiss one of the members of the board of directors based on a circular resolution. Based on Article 105 paragraph (3) of the UUPT, it also explains that decisions outside the GMS (circular resolution) regarding the dismissal of a member of the Board of Directors must be notified in advance of the planned dismissal and given the opportunity to defend themselves before the decision to dismiss is taken. This opportunity to defend themselves is also the same as Article 105 paragraph (2) of the UUPT which provides the opportunity to defending themselves for the Board of Directors.

So in line with this, the notary's obligation is not merely to formulate or formulate everything that is discussed and decided in the GMS and then to put it in an authentic deed, but the Notary as a public official who is given authority and trust by law must be more careful and cautious in observing everything related to the validity of the procedure for submitting an application for approval or notification of changes to the articles of association to the Minister.

The nature of circular resolution is that it is only a textual document that does not involves two-way communication between the shareholders of a PT causing a tug of war over documents just to revise the contents or clauses from the circular resolution if there are shareholders who do not agree with the contents *circular resolution* said, and it is quite time consuming in terms of circular resolution is circulated until decisions are made the signing of the circular resolution by all

shareholders, especially if the shareholders are not located in the territory of the Republic of Indonesia, so that the delivery time for the circular resolution document also takes quite a long time.

The implementation of the GMS through circular resolution with consideration of effectiveness and efficiency in making decisions quickly in determining a company's policies, this also cannot be used as an indicator of the effectiveness and efficiency of the GMS method with this circular resolution, this can happen because not all shareholders necessarily agree with the contents of the circular resolution document that is circulated, the circulation of the circular resolution which takes quite a long time to send, especially if the shareholders are not in the company's domicile, the company's business area, or even not in the territory of the Republic of Indonesia. In the UUPT itself, there is no clear regulation regarding restrictions on what matters can be discussed through a circular resolution which can lead to multiple interpretations and different understandings.

No matter how carefully a general legal regulation or a specific agreement regulation is made, in its implementation there are always many oddities, so in making an agreement both parties must pay attention to the purpose of the legal regulation so that there is a balance of various interests. If the circular resolution is not in accordance with Article 91 in conjunction with Article 105 paragraph (3) of the UUPT, the decision is considered invalid or null and void by law so that the decision other than all shareholders agree in writing to what has been decided regarding the dismissal of the Board of Directors, there must be prior notification to the Board of Directors if they are to be dismissed and given the opportunity to defend themselves if the person concerned feels they do not have the right to be dismissed due to an error that was not caused by them.

Therefore, after all provisions in the UUPT regarding the implementation and decision-making in the GMS, even circularly, have been fulfilled, then if in the future there is a matter that is questionable regarding the notary's responsibility for the deed he made which is based on the circular decision brought by the power of attorney contained in the decision, the notary cannot be blamed if there are members of the board of directors who object to his dismissal, because the notary made the deed in accordance with the formal truth brought before him. If the notary makes the words in accordance with the statement of the person appearing without reducing or exaggerating the statement given, then the notary cannot be prosecuted criminally or civilly for being responsible for the deed he made, because the deed was made based on the statement or will of the person appearing.

3.2. The Position of a Notarial Deed Made in Relation to a Lawsuit for Unlawful Acts Resulting from a Deed of Statement of Meeting Decisions Based on Circular Meeting Decisions as a Substitute for a General Meeting of Shareholders (GMS)

The deed of circular decision statement made by a notary is included in the making of a party deed. Parties or parties are those who have the desire or may have a desire that the deed made before a public official be evidence of the oral statements they express in writing for all actions they take.¹⁰Lumban Tobing stated that a party deed is a deed made by a notary based on information provided by the parties appearing before him, so that their actions are confirmed by the notary in the form of an authentic deed.¹¹In other words, the interested parties come to a notary to have a deed made for the actions they have carried out, which the notary then, based on the statements of the parties, sets out in a deed as long as the actions are carried out in accordance with what has been regulated by laws and regulations and do not conflict with the law.

An authentic deed containing a circular decision is made with a procedure, namely the directors who are appointed as the power of attorney come before the Notary with the circular decision which will be stated in the authentic deed. The Notary will then request the completeness of the documents needed in making the deed originating from the circular decision, after all the completeness needed to make the deed originating from the circular decision has been fulfilled, the Notary will prepare the deed in accordance with the circular decision brought before him. In this case, the Notary may not make his own interpretation or interpretation of the circular decision, so it is sufficient to state it according to what is contained in the circular decision, if the deed has been completed, the deed is then read by the notary and signed by the directors or shareholders who are given power of attorney, witnesses and the notary.

In making a deed of party, the Notary records what the parties want in the deed, as stated as the Notary's authority in Article 15 Paragraph (1) of the Law on the Position of Notary without having the slightest authority to adjust the deed on his own initiative without the consent of the parties in the deed. In a deed of party, the Notary only makes a counter based on what is explained or told by the parties to the Notary in carrying out his position and for which purpose the parties deliberately come before the Notary, so that the information or actions are confirmed by the Notary in an authentic deed. This is because the initial creation of the deed comes from the parties, the notary is not responsible for the truth of what is stated by the parties. Moreover, if there is a problem that occurs due to the existence of the circular decision statement deed, the notary is not responsible for all kinds of substantial truth of the information of the parties stated in the deed. The position of a notary in making a circular decision statement deed is only as a witness to the deed made, it is different if the notary makes a mistake in recording the substance or a mistake in the formality of the deed which can result in the deed being degraded into a private deed. If an error like this occurs, the parties can sue the notary for damages, especially if the recording of the contents

¹⁰Komar Andasasmita, 1981, Notary I, Bandung: Sumur Bandung, p. 48.

¹¹GHS Lumban Tobing, Notary Position Regulations, 3rd ed., Erlangga, Jakarta, 2007, p.30

of the deed results in what is contained in the deed not being in accordance with what was explained by the parties who appeared. If the notary makes a deed in accordance with the information from the person appearing, without reducing or exaggerating the information provided, then the notary cannot be prosecuted criminally or civilly for being responsible for the deed he made.

4. Conclusion

The notary's responsibility in making circular resolutions outside of the general meeting of shareholders is the notary not directly involved in the manufacturing process. When making a deed, a notary provides legal advice and at the same time provides an understanding that includes technical matters, the legal basis for making a circular decision deed, and the legal consequences of matters that have been decided in the circular decision. This is in accordance with what has been regulated in Article 15 paragraph (2) of the Notary Law. If there is a problem that occurs due to the existence of the circular decision statement deed, the notary is not responsible for all kinds of substantial truth of the statements of the parties stated in the deed. The position of the notary in making this circular decision statement deed is only limited to being a witness to the deed made, it is different if the notary makes an error in recording the substance or an error in the formality of the deed which can result in the deed being degraded to a private deed. If an error like this occurs, the parties can sue the notary for losses, especially if the recording of the contents of the deed results in what is contained in the deed not being in accordance with what was explained by the parties who appeared. The position of a Notarial deed made in relation to a lawsuit for an unlawful act due to the Deed of Statement of Meeting Decisions based on Circular Meeting Decisions as a Substitute for the General Meeting of Shareholders (GMS) does not immediately make the deed null and void. The elements of an unlawful act must be proven and fulfilled in order to be said to have committed an unlawful act by the notary who made the deed. Considering that in making a circular decision deed, the notary does not play a direct role during its implementation, the notary only makes the deed based on the circular decision and the statements of the witnesses who come to him. If the notary makes a deed in accordance with the information from the person appearing, without reducing or exaggerating the information provided, then the notary cannot be prosecuted criminally or civilly for being responsible for the deed he made.

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