

Juridical Implications for Notaries Who Are Declared Bankrupt in the Concept of Legal Certainty

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Abstract. *This research aims to determine and analyze the juridical implications of notaries who are declared bankrupt in the concept of legal certainty and the legal position of deeds that have been made by notaries and declared bankrupt. The research approach method used in this thesis is qualitative analysis with a normative juridical approach with legislation as the basic basis for research and analysis based on library study materials as well as literature and other scientific works. The type of data used in this research is primary legal material which includes: the Constitution of the Republic of Indonesia of 1945, Law No. 2 of 2014 Amendments to Law No. 30 of 2004 concerning the Position of Notaries, the Civil Code and Secondary Legal Material which includes: Scientific works, legal journals, research results and tertiary legal materials including: legal dictionaries, encyclopedias, print and electronic media. The data analysis method used in analyzing the data is qualitative analysis. The results of the research show that as a result of the law a notary being declared bankrupt will lose all rights under his authority and will not have the obligation to carry out services for making authentic deeds, agreements and other legal acts and deeds that have been made by the Notary, still have permanent legal force and cannot be degraded into a deed that hand because there was no error in making the deed.*

Keywords: Bankruptcy; Certainty; Notary.

1. Introduction

Provisions contained in the Bankruptcy Law "Bankruptcy is a general confiscation of all the assets of the Bankrupt Debtor, the management and settlement of which is carried out by the Curator under the supervision of the Supervisory Judge as regulated in this Law."⁵ Court decisions that have permanent legal force which has decided that a debtor has been declared bankrupt, then indirectly all control and disposition of the debtor's assets is handed over to the curator for the benefit of the creditor from the time the bankruptcy decision is pronounced.

Bankruptcy is a commercial solution to get out of debt problems that are the responsibility of a debtor who no longer has the ability to pay these debts to his creditors. This bankruptcy case is not desired by the notary because it will bring down the reputation of the notary himself, the notary is a public official and it is fatal if a notary is bankrupted, so the author will hereby analyze the legal consequences for a notary who is declared bankrupt

Article 1 number 11 of Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (hereinafter referred to as the KPKPU Law) which explains that the subject of bankruptcy is a legal entity, and that there is an exception for bankruptcy assets regulated in article 22 of the KPKPU Law which essentially means that money The salary obtained from a position is not an object of bankruptcy assets. If declared bankrupt, you only lose the right to control assets and do not lose the right to be a notary in your position.

A notary is a public official who has the authority to make authentic deeds and other authorities as referred to in Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning the Position of Notaries (UUJN), as stated in Article 1 point 1 UUJN. A notary as a public official in question is a person who, in producing authentic evidence to carry out public functions of the state, has obtained attributive authority from the state. As a public official, a Notary has other authorities, namely that the Notary has the authority to make authentic deeds regarding all deeds, agreements and provisions required by statutory regulations and/or which are desired by interested parties to be stated in authentic deeds, guarantee the certainty of the date of making the deed, store the deed. , giving grosse,

As a public official, a Notary has other authorities, namely that the Notary has the authority to make authentic deeds regarding all deeds, agreements and provisions required by statutory regulations and/or which are desired by interested parties to be stated in authentic deeds, guarantee certainty of the date of making the deed, store the deed, provide grosse, copies and quotations of deeds, all of this as long as the preparation of the deeds is not also assigned or excluded to other officials or other people as determined by law.¹

According to H. Sobandi "Bankruptcy is a situation where the debtor is unable to make payments on the debts of his creditors. The state of incapacity is usually

¹Law concerning Notary Positions number 2 of 2014, art. 15 number 1.

caused by financial distress in the debtor's business which has experienced losses. Bankruptcy is a court decision².

A notary does not carry out his work with the aim of gaining profit or gain, he works based on his personal qualities, although he will receive payment for his services, but the amount has been regulated by UUJN. In the case of Notaries, public officials who carry out their duties have been regulated in the Law starting from Article 16, 4 authority, obligations, prohibitions, supervision, etc. have been regulated. Even sanctions have been regulated in the UUJN.

Notaries who do not comply according to the UUJN in carrying out their duties will receive sanctions and be dismissed from the Notary by the Minister. There are also two types of notary dismissal, namely temporary dismissal and dishonorable dismissal. The notary is not immediately sentenced to dismissal without the measure of the error. A notary can be temporarily dismissed from his position when he is in bankruptcy proceedings or has postponed debt payment obligations. 3 Temporary dismissal of a notary occurs when there is a report of bankruptcy against the Notary. Apart from that, Article 12, especially letter a of the Notary's Position Law No. 30 of 2004, states that the dismissal of a notary dishonorably discharged with a statement of bankruptcy.

In fact, in Indonesia there are notaries who have other professions as business people who, in order to carry out their business development activities, have taken legal action in their personal names, namely making capital loan agreements to third parties, both banks and individuals. Then, in carrying out his business, he did not experience any progress and even went bankrupt, which resulted in his debts not being able to be paid on time, so the final effort was made by the person concerned, namely submitting a Request for Postponement of Debt Payment (PKPU) at the Commercial Court.

This happened to Notary DC in the case of decision 20/Pdt.Sus-PKPU/2020/PN Niaga Sby, where Notary DC submitted a request for postponement of debt payments at the Surabaya Commercial Court which was requested for himself because the person concerned had a debt that was due but unable to pay more than one creditor. The PKPU application submitted by DC was approved so that DC was declared bankrupt with all the legal consequences. Meanwhile, Devi also serves as a Notary, so based on the provisions of Article 12 letter a UUJN, it is stipulated that a notary can be dishonorably dismissed from his position by the Minister at the suggestion of the Central Supervisory Council (MPW) if he is declared bankrupt based on a court decision that has permanent legal force. This incident occurred,

²H. Sobandi, 2021, Judge Litimacy Ideas for Reconstructing the Authority of Commercial Courts, RayyanaKomunikasindo, Jakarta, p. 62

Looking at the explanation above, if a notary is declared bankrupt by a court decision, then the provisions must also refer to the PKPU Law which is *lex specialis* as an inseparable legal norm. However, between the UUJN and the PKPU Law in the condition that a notary is declared bankrupt there is a clash of norms which has different legal implications where Article 12 letter a of the UUJN notary who is declared bankrupt by a court decision is dishonorably dismissed, whereas Article 22 of the KPKPU Law does not eliminate or terminate as a notary and only lose the right to control assets.

2. Research Methods

The research approach method used in this thesis is the Legislation approach research method. Legislation approach research is an approach carried out by analyzing the rules and regulations relating to the legal issue, by exploring various library sources as well as conceptual approaches such as Laws. Applicable laws and laws governing the cases that the author raises, as well as primary and secondary legal sources from various journals and books as well as scientific papers that discuss legal chapters. The analytical method used in analyzing the data is qualitative analysis with a normative juridical approach. Data collection methods include: document and library studies.

3. Results and Discussion

3.1. Juridical Implications for Notaries Who Are Declared Bankrupt in the Concept of Legal Certainty

As long as a Notary is a debtor, as long as he has fulfilled the provisions of Article 2 paragraph (1) of the Bankruptcy Law, a Notary can apply for a bankruptcy declaration, but the Notary's capacity must be considered as an individual because bankruptcy law is a special Civil Law. This specificity lies in the assets that are the object of the lawsuit, namely all assets that are the object of the lawsuit, excluding livelihood equipment.

According to Law No. 37 of 2004 concerning Bankruptcy, the construction of bankruptcy law provides an opportunity for termination, even though the bankruptcy decision has permanent legal force. Debtors who are declared bankrupt will lose the right to take legal action on their assets, but this does not mean that debtors who are declared bankrupt are not allowed to take other legal actions, such as the right to work or carry out a profession, because this will increase the debtor's bankrupt assets.

According to Article 100 paragraph (1) of the Bankruptcy Law, the curator must immediately start making records regarding the bankruptcy assets. This must be done two days after the curator receives the decision letter for appointment as

curator. The registration of bankruptcy assets, according to Article 100 paragraph (2) of the Bankruptcy Law, can be done privately as long as it is approved by the supervising judge. This means that it does not need to be done with an authentic deed. For the validity of the recording, Article 100 paragraph (3) determines that members of the temporary creditor committee have the right to attend the making of the recording.

When all debtor obligations have been fulfilled, and all creditor receivables have been paid in full, the debtor's bankruptcy will end, therefore Article 215 of the Bankruptcy Law regulates that after the end of bankruptcy, either by reconciliation, payment of debts to creditors or distribution list

A notary who is declared bankrupt by the Commercial Court will lose his ability to manage his assets. All of the Notary's assets as a debtor can be in the form of movable or immovable objects, both tangible and intangible, whether they existed at the time the bankruptcy statement was made or will exist in the future during the bankruptcy period, with exceptions. The Bankruptcy Law excludes several things that are not included in bankruptcy assets (Article 22 of the Bankruptcy Law), namely: a. Objects, including animals that are really needed by the debtor in connection with his work, equipment, medical equipment used for health, beds and equipment used by the debtor and his family, and food for 30 days for the debtor and his family, which is in that place. b. Everything obtained by the debtor from his own work as a salary or from a position or service, as wages, pensions, waiting money or allowances, to the extent determined by the supervising judge. c. Money given to a debtor to fulfill an obligation to provide maintenance according to law.

The Law on Notary Positions only regulates the dishonorable dismissal of a Notary, and other matters related to bankruptcy are not yet regulated in the law, such as the regulation of the Notary's official documents if he is declared bankrupt, there is no regulation, whether These documents will be secured by the curator or secured by the Notary's organization itself, because we can see that all official documents belonging to the Notary are a matter of confidentiality between the Notary and the client.

According to Article 98 of Law No. 37 of 2004 concerning Bankruptcy, all letters and official documents belonging to the Notary will be secured by the curator, based on the duties and authority of the Curator. Basically, curators are obliged to act transparently before the parties involved in their control. The curator is also obliged to provide balanced material information to the parties involved in the bankruptcy. Apart from the obligation of transparency, on certain issues that are not mentioned by law, the curator is obliged to keep confidential matters relating to his control. The curator is not permitted to show and/or convey to any third

party confidential information obtained in the course of carrying out his duties as a curator or administrator.

Then, Article 22 letter b of the Bankruptcy Law states that everything obtained by a Notary as a bankruptcy debtor from salaries or wages obtained from the position he holds cannot be included in the bankruptcy object. Thus, if there are parties who link bankruptcy with things outside the bankruptcy debtor's assets, it is not appropriate and not appropriate. Bankruptcy is not a criminal act that makes the bankrupt debtor incompetent and has no authority in all matters. Debtors who work as Notaries who are declared bankrupt are only incompetent in managing their assets so that the debtor remains competent in carrying out other legal actions.

If a Notary is dishonorably dismissed from his profession then he will not receive an honorarium or income to be able to increase his bankruptcy assets, not only that, when a Notary is dishonorably dismissed then the Notary cannot be reappointed as a Notary, because in the Law the Notary's position is not There are specific regulations regarding the re-appointment of Notaries who have been declared bankrupt, while the Bankruptcy Law regulates bankruptcy rehabilitation, which is intended to enable bankrupt debtors to restore their good names through 80 Court decisions containing information that the debtor has fulfilled his obligations.

Carrying out his duties and positions when the Notary is in bankruptcy, the Notary must also carry out his duties and positions according to his capacity. Where carrying out their duties and positions must benefit the bankruptcy estate, such as not wasting office inventory and the Notary can make agreements with clients that can benefit the bankruptcy estate.

In principle, every person, as long as it is not otherwise determined by law, is considered competent or able to take legal action in this context to make an agreement to give rise to an agreement. People who are declared incompetent by law are prohibited from taking legal action, including making agreements. Article 1320 states that the second condition for the validity of an agreement is the ability to make an agreement (om eene verbintenis aan te gaan).³

In connection with Article 12 of the Law on the Position of Notaries, there is no further regulation as to whether a Notary can be reappointed as a Notary or not after he has fulfilled his obligations as a bankruptcy debtor. The Notary Position Law only regulates the reappointment of Notaries for Notaries who have been temporarily dismissed because they are in bankruptcy proceedings, so not

³J.Satrio, 1995, *The Law of Engagements, Engagements Born from Agreements*, Citra Aditya Bakti, Bandung, p. 1

because they were declared bankrupt by a court decision that has permanent legal force. He can submit a new application to be appointed as a Notary to the Minister after his rehabilitation as an individual has permanent legal force.

The regulations for Notaries who are declared bankrupt are still unclear and there is no detailed explanation or technical instructions regarding this matter, so if a Notary becomes bankrupt and must be dismissed from his position, then obstacles may arise for the Notary Supervisory Board to propose such dismissal to The Minister is to: 1. Interpret the meaning of bankruptcy as intended in Article 89 12 letter a of the Law on the Position of Notaries, and determine appropriate benchmarks in determining whether or not a Notary who is declared bankrupt can be proposed to be dismissed from his position. 2. Because the process of dismissing a Notary is initially in the Supervisory Council (MPD, MPW, MPP), the Notary's supervisory council, some of whose members are Notaries, has a very heavy moral burden to propose such a dismissal. And will act very carefully.⁴

A notary who has been declared bankrupt must first pass an examination carried out by the Regional Supervisory Council, so that the Regional Supervisory Council can provide a recommendation to the Regional Supervisory Council to provide a written warning and provide a proposal to the Central Supervisory Council whether the Notary can be given a temporary suspension or dismissal. disrespect. Then it is submitted to the Commercial Court to request bankruptcy from a Notary.

However, here it returns to the provisions of bankruptcy law where a person who has been declared bankrupt is only incompetent regarding his assets, so it is better for the Notary to still be able to carry out his duties and position as a Notary even though he has been sentenced to bankruptcy, this aims to ensure that the Notary can increase the bankrupt's assets for can pay his debts. Bankruptcy can also happen to individuals, as experienced by DC, who is also attached to his profession as a notary. Based on research by researchers through the Supreme Court website which contains information on court decisions,

Based on his application, DC explained that his work was as a private person, not as a notary, so that he had two legal subjects, namely as a person and as a notary as a profession. The problem in this case is that the DC himself also works as a notary even though the PKPU application was in the name of an individual who was later declared bankrupt. Meanwhile, the Regional Supervisory Council

⁴Evelin Fifiana, Siti Malikhatun Badriyah, 2022, Legal Effects of Bankruptcy Decisions on Debtors Who Work as Notaries, Volume 15 Number 2. url <https://ejournal.undip.ac.id/index.php/notarius/article/view/35974/pdf>

(MPW) has reported the DC notary to be dishonorably dismissed after the Surabaya Commercial Court judge decided to declare him bankrupt.

This is based on the provisions of Article 12 letter a UUJN which states that: "A notary is dishonorably dismissed from his position by the Minister on the recommendation of the Central Supervisory Council (MPP) if he is declared bankrupt based on a court decision that has permanent legal force." Since the decision on Decision Number 20/Pdt.Sus-PKPU/2020/PN Niaga Sby was decided on July 10 2020 and there were no legal appeals to the Supreme Court, the decision was declared to have permanent legal force.

In bankruptcy cases, regarding the decision of the Commercial Court at the first instance, and especially regarding the bankruptcy petition and the postponement of the obligation to pay debts based on Article 11 Paragraph (1) of the KPKPU Law, the legal remedy that can be submitted against the decision on the bankruptcy declaration application is cassation to the Supreme Court. Meanwhile, the creditors of PT. Bank OCBC NISP, Tbk has also announced the auction of bankrupt assets belonging to notary Devi Chrisnawati, namely several plots of land and buildings held by the Surabaya State Property and Auction Service Office (KPKNL) which was held on January 11 2021. Notaries are indeed the subject of bankruptcy in the UUJN It has been widely studied in law considering that there is a problem of unclear legal norms in Article 12 letter a UUJN.

Meanwhile, if you look at the provisions of the norms in Article 1 Paragraph (3) of the KPKPU Law, it states that what is meant by "a debtor is a person who has a debt due to an agreement or law whose repayment can be claimed before the court". A fairly basic reason for bankruptcy debtors not allowing notaries to be reappointed is because the provisions in the "UUJN do not regulate the reappointment of notaries who have been dishonorably dismissed 92, except for notaries who have been temporarily dismissed because in the bankruptcy process a request for reappointment can be submitted. As for the re-appointment mechanism for notaries who have been temporarily dismissed as a result of being in bankruptcy proceedings or violating other criminal acts, no specific regulations have been found to regulate this.

Based on the description above, the author here agrees that Notary bankruptcy refers more to Law No. 37 of 2004 concerning Bankruptcy because in this law there is a more complete and specific explanation regarding Bankruptcy, in accordance with the theory of legal certainty. The rule of law is essentially a state which in its activities is always based on law in order to guarantee and realize justice for its citizens, 112 and is strengthened according to legal experts, one of whom is Gustav Radbruch, who stated 4 (four) basic things related to the meaning of legal certainty, namely: First, that law is positive, meaning that

Positive law is legislation. Second, that law is based on facts, meaning it is based on reality. Third, that facts must be formulated in a clear way so as to avoid errors in meaning, as well as being easy to implement. Fourth, positive law must not be easily changed.

As a result of the notary being dishonorably dismissed due to bankruptcy, the legal consequence will be that he loses all rights under his authority and has no obligation to carry out services as regulated in Article 15 UUJN. In the sense that the position of notary attached to him has been lost so that he no longer has the skills to carry out some of the activities of state duties, namely making authentic deeds, agreements and other legal acts.

Another legal consequence is that if a notary is declared bankrupt and dishonorably dismissed, even though Article 215 to Article 221 of the KPKPU Law regulates rehabilitation for parties declared bankrupt, the position of notary who has been dismissed after rehabilitation is granted by the court does not immediately happen the bankrupt debtor does not cause the notary to be reappointed. Rehabilitation is the restoration of the good name of a debtor who was originally declared bankrupt, through a court decision containing information that the debtor has fulfilled his obligations.

3.2. The legal position of a deed that has been made by a notary and declared bankrupt

About an event and signed by the person concerned and the authorized official.⁵According to R. Subekti, the word deed in Article 108 of the Civil Code above does not mean a letter but must be interpreted as a legal act, derived from the word "acta" which in French means action.⁶So it can be concluded that what is meant by a deed is a writing that is made to be used/used as evidence of a legal act, namely in the form of writing that is intended to prove something. Proof by writing is done in authentic writing or by handwriting.

It should be noted that in the case of making an authentic deed, whether partij deed or relaas deed, the main basis for making the deed is the desire or will (willing) and request from the parties concerned, if there is no desire and request from the parties then Public officials cannot make deeds by themselves. In making an authentic deed, an attorney must be careful in every element, both the formal and material elements of the deed he or she will make. Because when making an authentic deed it can be canceled by law if it is not clear or unclear in formal or material terms. Authentic notarial deeds include notarial agreement

⁵Subekti, 2005, Law of Evidence, PT. Pradnya Paramitha, Jakarta, p. 25

⁶Subekti, 2001, Basics of Civil Law, Intermedia, Jakarta, p. 29

deeds, so every notarial deed in the sense of any deed must contain 4 elements, namely: clarity, completeness, correctness,

According to Djamanat Samosir, a private deed is a deed made independently by interested parties without the assistance of public officials with the intention of being used as evidence.⁷ According to Soedikno Mertokusumo, a private deed is a deed that is deliberately made for proof by the parties without the assistance of an official. So it is solely made between interested parties,⁸ for the purpose of serving as evidence at a later date.

A private deed that is legalized before a notary is a deed that must also be signed by the notary or authorized official. Ratification means that the notary guarantees that it is true that the names in the deed are the person who signed the deed and the notary must really guarantee that the date of signature must match the date of ratification of the deed. A private deed that is recorded (*gewarmerken*) is a deed that has been signed on the day and date stated in the deed by the parties, and the signature is not in front of a notary/authorized official. Bookkeeping means that the deed actually exists on the day and date of registration or bookkeeping by a notary

In addition to containing incidents and/or occurrences which are deliberately included as an evidentiary basis, for a letter to be classified as a deed, the letter must be signed by the parties. This requirement for signature is implied in Article 1869 of the Civil Code. The requirement for a signature has no other purpose than to differentiate one deed from another. So the function of a signature on a deed is to characterize a deed or to individualize a deed.⁹ If here the Notary does not carry out his obligations as stated in Article 16 paragraph (1) letters a to letter m of Law No. 2 of 2014 concerning the Position of Notary Public which is the obligation of a Notary as a state official, then he may be subject to sanctions in the form of: written warning, temporary dismissal, honorable dismissal, and dishonorable dismissal. If one of the conditions as intended in Article 16 paragraph (1) letter m states that the Notary is obliged to read the deed in front of an audience in the presence of at least 2 (two) witnesses or 4 (four) special witnesses for making the deed of will privately, and signed at that time by the presenter, witness, and notarization is not fulfilled then the relevant deed only has evidentiary power as a private deed.

This will cause losses for the parties, because the deed made before a Notary is not perfect and becomes a private deed. So that the parties can demand

⁷Djamanat Samosir, 2011, *Civil Procedure Law Stages of Settlement of Civil Cases*, Nuansa Aulia, Bandung, p. 225

⁸Soedikno Mertokusumo, 2006, *Indonesian Civil Procedure Law*, Liberty, Yogyakarta, p. 125

⁹Soedikno Mertokusumo, 1979, *The Discovery of Law An Introduction*, Liberty, Yogyakarta, p. 175

compensation from the Notary. The evidentiary power of a private deed requires confirming (acknowledging) or denying the signature. If the signature is denied, the judge must order that the veracity of the deed be checked. Only if the signature is acknowledged by the person concerned, then the private deed has force and becomes perfect evidence. 139 So it can be concluded that as a private deed, its evidentiary value depends on the parties and the judge who evaluates it.

The Law on the Position of Notaries explains that those who are declared *paliti* are only Notaries who are unable to pay their obligations as a debtor. Meanwhile, the Notary's responsibility is only at the time of making the deed, which starts from the Notary's approval of the parties' request until the deed is completed and then the legal risk passes from the Notary to the parties to carry out what has been agreed in the contents of the deed.

A deed can be null and void by applying for cancellation of the deed in the District Court. When the Notary is negligent or careless in making the deed, this can be used as a basis for the Notary to be declared insolvent. Because in this case the Notary is bankrupt in carrying out his duties and responsibilities as a Notary. It's different when a Notary goes bankrupt because of debts, the deed he made is not null and void because there was no error in making the deed, and it will forever remain with the parties. Based on the concept of legal responsibility, it is an obligation to do something or behave in a certain way without deviating from the existing situation. And reinforced by experts, Hans Kelsen stated regarding responsibility that "A person is legally responsible for a certain act or because he bears that legal responsibility, which means he is responsible if he commits an act that is contrary to the law". In terms of official accountability, it is closely related to the legal actions carried out by the official, in this case the Notary. It is called a legal action of office if the legal action is carried out by the official in the context of carrying out the authority of the position or carrying out legal action for and on behalf of his position.

So a deed that has been made by a Notary, still has permanent legal force and cannot be degraded into a deed that has been made by hand because there was no error in making the deed.

4. Conclusion

A notary who is dishonorably dismissed due to bankruptcy will have the legal consequences of losing all rights under his authority, namely making authentic deeds and other authorities and having no obligation to carry out services as regulated in Article 15 UUJN. In the sense that the position of notary attached to him has been lost so that he no longer has the skills to carry out some of the activities of state duties, namely making authentic deeds, agreements and other

legal acts. Another legal consequence is if the notary is declared bankrupt and dishonorably dismissed, even though Articles 215 to 221 of the KPKPU Law regulate rehabilitation for parties declared bankrupt, However, for notary positions that have been dismissed after rehabilitation has been granted by the court, it does not necessarily mean that the bankrupt debtor will not have the notary reappointed by the Ministry of Law and Human Rights. Rehabilitation is the restoration of the good name of a debtor who was originally declared bankrupt, through a court decision containing information that the debtor has fulfilled his obligations.

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