

The Urgency of Debtor Protection from *Misbruik van omstandigheden* What Creditors do in the Execution of *Viat Parate* on Collateral Items

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Abstract. *The existence of HT agreements often creates opportunities Misbruik van omstandigheden or misuse of circumstances that often harm the debtor as a powerless party due to a low bargaining position, because the debtor is a party that needs loan funds from the creditor, one of which is in the execution of parate collateral objects. This article aims to analyze the urgency of debtor protection from Misbruik van omstandigheden which is carried out by creditors in the implementation of parate HT executions. The method used in this paper is normative juridical. Based on the analysis conducted, it can be seen that Article 6 and Article 20 of the UUHT, which are also supported by Article 1178 paragraph (2) of the Civil Code, have resulted in loopholes for misuse of circumstances or misbruik van omstandigheden by creditors against debtors in terms of implementing agreements related to the execution of mortgage collateral objects.*

Keywords: Creditor; Debt; Protection.

1. Introduction

The existence of Mortgage through the enactment of Act No. 4 of 1996 concerning Mortgage Rights in its development replaces the position of *Hypoteek and Credietvanband*,¹ Act No. 4 of 1996 in fact aims to provide legal protection and provide legal certainty for the parties involved in the agreement of debt or credit with the guarantee of immovable objects.²

¹Artje Tehupeory, 2019, Land As Credit Collateral, Indonesian Christian University, Jakarta, p. 3-4.

²Pandam Nurwulan, 2021, "Implementation of Electronic Mortgage Services for Creditors and Land Deed Officials", Journal of Law Ius Quia Iustum, No. 1, Vol. 28 p. 185-186.

The purpose of the Mortgage Right as stated above is clearly stated in the preamble to Act No. 4 of 1996 letter a which reads:³

Whereas with the increasing increase in national development which is focused on the economic sector, it is necessary to provide a large enough fund, so that it requires a strong security rights institution and is able to provide legal certainty for interested parties, which can encourage increased community participation in development to create a society which is prosperous, just and prosperous based on Pancasila and the 1945 Constitution.

This statement clearly shows the fact that today's Mortgage guarantees have become a necessity for financing economic activities or the needs of people's daily lives.⁴The community's need for Mortgage Rights is shown by data from the Central Java Statistics Agency which records that in 2021 there are 1,452,830 registered Mortgage Rights.⁵

Furthermore, Article 6 of Act No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land can also create loopholes for creditors to carry out the execution of mortgage objects in a one-sided manner,⁶Article 6 of Act No. 4 of 1996 Concerning Mortgage Rights on Land and Land-Related Objects mechanically also has various kinds of mechanical issues, these issues are mainly related to irregularities in the transfer of HT object rights in the form of land which basically contradicts Article 26 Act No. 4 of 1996 Concerning Mortgage Rights on Land and Objects Related to Land.⁷

The execution of the mortgage object is basically based solely on the Regulation of the Minister of Finance of the Republic of Indonesia Number

³Nurul Nadira, Electronic Mortgage Registration which will be implemented at the Agency for Land Affairs, Fairness and Justice: Scientific Journal of Science, Law p-ISSN: 1858-0106 e-ISSN: 2502-3926 Volume 17 Number II November, 2019, p. 164.<http://jurnal.unmuhjember.ac.id/index.php/FAJ/article/view/2801/2202>, accessed on 23 July.

⁴Zainuddin and Rahmat Ramadhani, The Legal Force Of Electronic Signatures In Online Mortgage Registration, Journal of De Jure Legal Research, Volume 21 Number 2, June 2021, p. 244-250.<https://ejournal.balitbangham.go.id/index.php/dejure/article/view/1739/pdf>. accessed on 12 July 2021.

⁵Central Bureau of Statistics, Data on the Number of Registered Mortgage Rights, Accessed viahttps://jateng.bps.go.id/indicator/153/447/1/lot_of_pembuatan-akta-ppat-menurut-kabupaten-kota-dan-tipe-data-provinsi-jawa-tengah.html, on July 12, 2021.

⁶Ariel Doni Dharmawan and Maryanto, 2018, "Legal Strength of Mortgage Certificates in the Event of Destruction of Mortgage Objects Due to Natural Disasters in Grobogan Regency", Journal of Deeds, Vol. 5 No. 1, p. 171-172.

⁷Gilang Bayuaji and Sukarmi, 2017, "Implementation of Settlement of Bad Loans Bound with Mortgage Rights at PT National Pension Savings Bank Mitra Usaha Rakyat Tegal Branch", Journal of Deeds, Vol. 4. No. 1, p. 9-10.

213/Pmk.06/2020 Concerning Instructions for Implementation of Auctions not entirely true, considering this in Article 26 and the explanation therein Act No. 4 of 1996 Concerning Mortgage Rights on Land and Objects Related to Land does not mention implementing regulations for the execution of existing mortgage collateral objects.

Regulation of the Minister of Finance of the Republic of Indonesia Number 213/Pmk.06/2020 Concerning Instructions for Conducting Auctions also not included in implementing regulations which in this case carry out from Article 6 and Article 14 Act No. 4 of 1996 Concerning Mortgage Rights on Land and Objects Related to Land. In addition, according to Article 7 of Act No. 12 of 2011 concerning the Formation of Legislation, the implementation of Article 6 and Article 14 Act No. 4 of 1996 Concerning Mortgage Rights on Land and Objects Related to Land should be based more on *HERZIEN INLANDSCH REGLEMENT* (HIR) and the provisions of the Regulation of the Minister of Finance of the Republic of Indonesia Number 213/Pmk.06/2020 Concerning Instructions for Conducting Auctions can't be contradicted *HERZIEN INLANDSCH REGLEMENT* (HIR). Given the position of the Minister of Finance of the Republic of Indonesia Regulation Number 213/Pmk.06/2020 Concerning Instructions for Conducting Auctions it is not clear and if you look at Article 7 Act No. 12 of 2011 concerning the Formation of Legislation, the position of the Minister of Finance of the Republic of Indonesia Number 213/Pmk.06/2020 Concerning Instructions for Conducting Auctions is under *HERZIEN INLANDSCH REGLEMENT* (HIR).

The various explanations that exist show that the position of the debtor is very fragile in terms of the practice of the execution agreement parate object collateral Mortgage. This can be seen in the execution of mortgage rights in the village of Dadapan, Kabat District, Dewi Anjarwati as the debtor owes the capital institution which in this case acts as a creditor with collateral in the form of a land certificate she owns, in its development Dewi is in arrears for two installments, without As far as Dewi's collateral object is auctioned by the creditor on the pretext of a default, after the auction is held, the creditor informs the debtor that this is clearly detrimental to the debtor.⁸ The fact that unilateral executions do not involve the debtor in terms of negotiations, which he clearly stated above, is clear broadly can also hinder economic growth, resulting in the violation of the First, Second, and Fifth Precepts of Pancasila, Fourth Paragraph of the 1945 Constitution of the Republic of Indonesia, and Article 2 of Act No. 8 1999 concerning Consumer Protection, this also violates provisions regarding the validity of agreements on the basis of lawful and clear objectives as stipulated in Article 1320 of the Civil Code. This is shown by the lawsuit against Article 14 and Article 20 of Act No. 4 of 1996 concerning Mortgage Rights on Land and Objects

⁸<https://news.detik.com/berita-jawa-timur/d-4467623/8-tahun-menunggu-lahan-sengketa-ini-tak-kunjung-dieksecusi>, Downloaded on May 1, 2020.

Related to Land in the Constitutional Court. Eliadi as the plaintiff's representative emphasized that the articles only focused on providing legal certainty to creditors. This is because the creditor can execute the mortgage object immediately (automatically) if the mortgagee (debtor) is in default without considering the reasons for the default of the debtor's default.⁹

2. Research Methods

The method used in this paper is normative juridical. Juridical-normative research is a form of scientific research activity that uses library materials and laws and regulations.¹⁰

3. Result Discussion

3.1. Juridical Analysis of the Provisions of Article 6 of Act No. 4 of 1996 Concerning Mortgage Rights on Land and Objects Related to Land

Juridically, in its development, Article 6 UUHT states that:

If the debtor defaults, the holder of the first Mortgage has the right to sell the object of the Mortgage on his own power through a public auction and collect the settlement of his receivables from the proceeds of the sale.

The elements that are intertwined into the essence of Article 6 UUHT are:

- 1) the debtor defaults;
- 2) The creditor holding the first Mortgage Right is given the right;
- 3) The right to sell the Mortgage object on its own authority;
- 4) Terms of sale through public auctions;
- 5) The creditor's right to collect the settlement of his receivables from the sale proceeds;
- 6) The creditor's right to collect the settlement of his receivables is limited to the right to claim.

⁹<https://www.hukumonline.com/berita/baca/lt5ebcf2ecb8a50/giliran-aturan-execution-hak-nggungan-dipersoalkan-di-mk/>, Accessed May 1, 2020.

¹⁰Indah Rahmawati, Juridical-Normative Analysis of the Role and Actions of Telemarketing in Digital Transactions, Cakrawala Hukum Journal, Volume 11 No. 1 April 2020, Merdeka University Malang, p. 61. <https://jurnal.unmer.ac.id/index.php/jch/article/view/4047/pdf>. accessed on 12 June 2021.

The elements contained in Article 6 UUHT show that there are 2 (two) things that are important when the debtor defaults, namely the transfer of rights and the exercise of rights for the creditor holding the first mortgage. The substance of Article 6 UUHT is similar to Article 1178 paragraph (2) BW in that they both regulate "selling" collateral objects in public, and the difference is that Article 6 UUHT regulates "selling on their own power", while Article 1178 paragraph (2) BW regulates "authorized to sell", so that in Article 6 UUHT, the creditor's right in the event that the debtor defaults, to sell the Mortgage object through auction, has been given its own law to the Creditor holding the first Mortgage Right.

The implementation of the execution as intended by Articles 6 and 20 of the UUHT can basically result in legal disharmony between the execution law according to the UUHT and the material civil execution law and the law on the transfer of ownership rights to collateral objects and is also contrary to the consumer protection law. Including the rule of law in Indonesia. This is because the provisions of Article 6 and Article 20 of the UUHT open loopholes for misuse of circumstances and conflicts of law, execution in parate according to Articles 6 and Article 20 of the UUHT with the statement Article 26 UUHT which requires the execution of mortgage objects through Article 224 HIR which strictly requires execution of collateral objects through *aanmaning* in court.

3.2. Execution of HT viat Parate Against Mortgage Collateral Objects

In its development, the existence of weaknesses in aspects of the provisions of Article 6 and Article 20 UUHT which are also supported by Article 1178 paragraph (2) of the Civil Code, has resulted in loopholes for misuse of circumstances or *misbruik van omstandigheden* by creditors against debtors in terms of implementing agreements related to the execution of collateral rights objects dependent. The term abuse of circumstances in Indonesian law is the equivalent of the terms *misbruik van omstandigheden* and undue influence.¹¹In the common law system, apart from undue influence, it is also known as unconscionability, which are both different, although they have something in common, namely that both are based on an imbalance in the bargaining position of the parties. If the contract is formed on the basis of impropriety or injustice that occurs in an unequal relationship between the parties, then it is called undue influence (a one-sided relationship), but if injustice occurs in a situation, then this is called unconscionability (a condition). which is one-sided). In the decision of the case of *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, Deane J. stated that the doctrine of undue influence was seen from the effect of the imbalance on the giving of agreement from the affected

¹¹NE Algra et.al, Fockema Andreae Dutch Indonesian Dictionary of Legal Terms, Binacipta, Bandung, 1983, p. 301.

party,¹² Then in the case of undue influence there must be some form of exploitation by one of the parties over the weaker party. A party seeking to cancel a transaction on the basis of undue influence must prove that the transaction was dishonest, that he or she is an innocent party who has been harmed. Other parties must protect themselves by proving that professional and independent advice has been given before the transaction is entered into.¹³ In its development, Nieuwenhuis always linked his discussions with arrestens found in the Netherlands. The inclusion of the provisions on abuse of circumstances into the NBW, more or less, is motivated by legal considerations in various judges' decisions.¹⁴

The formation of the teaching about the abuse of circumstances was due to the absence (at that time) of the Burgerlijk Wetboek (Netherlands) provisions governing this matter. In the event that a judge finds a situation that is contrary to custom, a judge's decision is often found which cancels the agreement in whole or in part.¹⁵ It turned out that the judge's considerations were not based on one of the reasons for canceling the agreement, namely the classic defect of will (article 1321 of the Civil Code) in the form of:

- a. straying (*dwaling*);
- b. coercion (*dwang*);
- c. fraud (*bedrog*) (article 1321 of the Civil Code).

If you look at the various mortgage agreements between creditors and debtors, most of the agreements made by creditors only benefit creditors. This can be seen from the majority of mortgage agreements when it regulates provisions related to the execution of mortgage objects only looking at the provisions of Article 6 and Article 20 UUHT as well as Minister of Finance Regulation Number 27/PMK.06/2016 concerning Auction Implementation Guidelines alone, without balanced with the existence of a proof system in the form of a financial audit beforehand against the debtor, even though this contradicts the elucidation of Article 26 UUHT and also Article 224 HIR.

¹²Hardjan Rusli, Indonesian and Common Law Treaty Law, Sinar Harapan, Jakarta, 1993, pp.113-115.

¹³Arthur Lewis, Fundamentals of Business Law, translator Derta Sri Widiowatie, Nusa Media, Bandung, 2009, p. 132.

¹⁴Henry P. Panggabean, Misuse of Circumstances (Misbruik van Omstandigheden) As (New) Reasons for Cancellation of Agreements (Various Legal Developments in the Netherlands), Liberty, 1991, Jogjakarta, p. 41.

¹⁵Loc, cit.

This is shown by the guarantee agreement on mortgage rights which was determined unilaterally by the creditor from the start, not negotiated with the debtor so that when there is arrears in the debtor's debt, it is immediately considered a breach of contract without being given space to prove the reasons for the arrears through fair negotiations, this is clearly included in deception. It can even be categorized as fraud, because the information on the contents of the agreement made by the creditor is not fully understood, and usually the creditor persuades with the promise of fast disbursement of funds if the mortgage agreement is quickly signed without providing detailed information regarding the contents of the guarantee rights agreement. Dependents to be signed by the debtor. This clearly includes deception and fraud which are also included in the category of misuse of circumstances.

4. Conclusion

Article 6 and Article 20 of the UUHT, which are also supported by Article 1178 paragraph (2) of the Civil Code, have resulted in loopholes for misuse of circumstances or *misbruik van omstandigheden* by creditors against debtors in terms of implementing agreements related to the execution of parate collateral objects.

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