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NOTARIAL DEEDS RELATED TO DEFAULTS, FRAUD AND EMBEZZLEMENT

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Abstract

The aim of this study is to find out the crime of fraud (Article 378 of the Criminal Code) and the criminal act of embezzlement (Article 372 of the Criminal Code) can be charged to one of the parties in the agreement made by the notarial deed is considered to have committed default. This study uses normative juridical methods, which means that this study focuses on favourable laws such as Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary, the Civil Code, the Criminal Code, and other laws and regulations. Based on analysis, the results of this study revealed that if one of the parties in the agreement made by his notarial deed is considered to have committed a default, it cannot be charged with the crime of fraud (Article 378 of the Criminal Code) and the criminal act of embezzlement (Article 372 of the Criminal Code) based on Article 11 of Law No. 12 of 2005 concerning ratification of the International Covenant on Civil and Political Rights. Some judges' decisions with loose verdicts (slag van all rechttsvervolging), i.e., the act charged is proven, but the act of default does not constitute a criminal offence.

Keywords: agreements; defaults; embezzlement; fraud

1. INTRODUCTION

There is an exciting phenomenon even though it has long lived in some community members, especially in big cities in Indonesia, namely those related to agreements such as accounts receivable, buying and selling goods, etc. In parallel with this, citizens became the popular terminology "default," "fraud," and "embezzlement."

The terminology above, in its implications, gives rise to losses, so it is not surprising that the debtor reports the debtor to the police, with the allegation that the debtor is judged to have violated Article 378 of the Criminal Code (fraud) and Article 372 of the Criminal Code (embezzlement).

Fraud, as stipulated in Article 378 of the Criminal Code, reads:

"Whoever with the intent to benefit himself or others unlawfully, by using a false name or false dignity, by deceit, or a series of lies, moves another person to hand over goods to him, or to give a debt

or write off a receivable is threatened with fraud with imprisonment for not more than four years."

Meanwhile, embezzlement, as stipulated in Article 372 of the Criminal Code, reads:

"Whoever willfully and unlawfully possesses something which is wholly or partly the property of another, but which is in his power not for the crime of being threatened with embezzlement, with imprisonment for not more than four years or a fine of not more than nine hundred rupiahs."

The study about defaults, fraud and embezzlement have been conducted previously by some researchers. Andryanto (2018) showed the results of his study about '*Law Enforcement Against Fraud and/or Embezzlement (Study of KSP Intidana Central Java, Indonesia)*' that the implementation of investigation process against perpetrator of fraud and/or embezzlement of Intidana Cooperative in Central Java's Regional Police implemented

after police report. The next step which the Police took is to call and inspect victims or witnesses, arrest of suspect, detention of suspects and seizure of evidence. The investigation process by the investigator and the assistant investigator begins by contacting the complainant and completing the initial investigation administration then conducting the inspection of witnesses and the collection of evidence, determining and seeking, conducting the suspect's examination by arrest and detention of the suspect. The dimensions of criminal law enforcement in the conduct of investigation on the perpetrators of criminal acts of fraud and/or embezzlement of the Intidana Cooperative in Central Java's Regional Police is to minimize the occurrence of similar criminal acts, especially for the perpetrators in fraud and embezzlement cases in the future can be charged with criminal liability of fraud and embezzlement. Another similar study also conducted by Nahak (2020) that investigated three issues namely the legal consequences of Criminal Acts against Victims of Misappropriated Crimes by a Notary Officer, the factors cause a Notary Officer to commit a Criminal Act in the Legal District of the Denpasar District Court and the qualifications of criminal acts, responsibilities and formulations Criminal system for the perpetrators of embezzlement by a notary at the Denpasar District Court. Based on his analysis, it was found that criminal law consequences of perpetrators and victims of embezzlement crimes by a notary officer is that the perpetrators must be held accountable for their actions legally, whereas victims who suffer losses due to criminal acts are processed to be given criminal sanctions through the criminal justice process at the Denpasar District Court. Then, factors causing crime that are internal and external factors. There are some external factors, namely residence factor, economic factor, political factor and legal system factor. Furthermore, the forms of embezzlement are included in the forms/ qualifications of types of non-violent acts, embezzlement criminal responsibility is an individual criminal liability not a legal entity, the system of punishment against perpetrators of embezzlement is the application of criminal law sanctions through the criminal justice process so that against the crime of embezzlement convicted of committing sanctions in the form of imprisonment and fines.

Based on the description and the

previous studies above, it can be mentioned that the study about defaults, fraud and embezzlement need to conducted further research, however this present study is focused on the parties in the in the agreement made by the notarial deed is considered to have committed default, can it be charged with the crime of fraud (Article 378 of the Criminal Code) and the criminal act of embezzlement (Article 372 of the Criminal Code). Therefore, this study aims to find out the crime of fraud (Article 378 of the Criminal Code) and the criminal act of embezzlement (Article 372 of the Criminal Code) can be charged to one of the parties in the agreement made by the notarial deed is considered to have committed default.

2. METHOD

This study uses normative juridical methods, which means that this study focuses on favorable laws such as Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary, the Civil Code, the Criminal Code, and other laws and regulations.

3. DISCUSSION

The provisions contained in Article 1 number 1 of Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary, define a Notary are:

"A general officer authorized to do an authentic deed and have other powers as referred to in this law or under any other law."

The definition of a notary as a general official shows that the Notary has the authority to do authentic deeds, which are written evidence of the parties' legal actions in the civil law field (Waluyo, 2001:63). In addition, the meaning contained in the notary sense listed in article 1 number 1 of Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary, only the Notary as a general officer is authorized to do authentic deeds as long as other officials do not prescribe it to do original deeds. They are related to faithful acts found in Article 1 number 7 of Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary, mentioning authentic deeds made by or before a notary according to the form and procedures stipulated by law. In this case,

the law referred to is Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary.

The authority of a notary in authentic deeds is stated in Article 15 of Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary. It can be qualified as follows (Aji, 2008:78):

General authority based on Article 15 paragraph (1) of Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary, consisting of the authority to do deeds in general with restrictions:

Not to be excluded from other officials established by law;

Concerns deeds that must be made or authorized to do authentic deeds regarding all deeds, agreements, and provisions required by the rule of law or desired by the person concerned;

Regarding the subject of law (person or legal entity) for whose benefit the deed was made or selected by the interested person.

Special authority based on Article 15 paragraph (2) of Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary in question is beyond doing authentic deeds, consisting of:

Certify the signature and establish the certainty of the date of the letter under the hand by registering in a particular book;

Posting letters under the hand by registering in a particular book;

Make a copy of the original letter under the hand in the form of a document containing the description as written and described in the letter in question;

Attestation of the compatibility of the photocopy with the original letter;

Provide legal counselling in connection with the making of the Deed;

Do a Deed relating to land; or

Make a Deed of auction minutes.

The authority to be determined based on Article 15 paragraph (3) of Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary in question, among others:

Certify transactions made electronically (cyber notary); and

Make a deed of waqf pledge and an aircraft mortgage.

Based on their authority, notaries must comply with the Notary Position Law, which has gone through changes as a philosophical basis for the realization of guarantees of legal certainty, order, and protection that instil legal truth. Through the deed he made, the Notary must be able to provide confidence and legal protection to the people who use the services of a Notary (Sjaifurrachman & Adjie, 2011:7).

The position, function, and authority of the Notary to make authentic deeds and the authority of the notary position, which is given by Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary, is a form of public trust in a notary to carry out a noble notary position and not only required expertise in the field of notarial science, but must also be in line with that regulated in Article 16 paragraph 1 letter (a) of Law No. 2 of 2014. Regarding changes to Law Number 30 of 2004 concerning the Position of Notary in carrying out his position, Notaries must act honestly, independently, carefully, impartially, and maintain the interests of related parties in legal actions.

Notary has a strategic position because it has the authority to do authentic deeds made before or by a notary with legal certainty. There is a guarantee of the continuity of the Agreement. Besides that, an original act is perfect evidence and can be used as evidence in court (Koesoemawati & Rijan, 2009:93).

The notarial deed in its form has been formally determined in Article 38 of Law No. 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary. Materially, the notarial deed, both the act under the hand and the authentic deed, must meet the formulation regarding the validity of an agreement regulated in Article 1313 of the Civil Code, which states that a contract is an act in which one or more persons bind themselves to one or more other people.

The terms of validity of the Agreement are regulated in Article 1320 of the Civil Code, including:

Agreement of the Parties

The agreement has the meaning of the existence of free will conformity between the parties regarding the principal matters desired in the contract. In this case, the parties have the free will to bind

themselves. The agreement was declared unequivocal or silenced. Freedom means no oversight, coercion, or deception.

Covenanting Skills

Referring to the provisions contained in Article 1329 of the Civil Code, everyone can generally make agreements. However, there is an exception for people determined not to have statutory proficiency.

A person is said to be capable (be warm) of performing legal acts (including agreements) if he is 21 years old or not yet 21 years old but has been married, sensible, not sick in memory, or is a waste which the court, therefore, decides to be under guardianship and a woman who is still married.

A certain thing

A sure thing means that what is promised, the rights and obligations of the parties and at least the goods intended in the agreement are determined by the type and interests that can be traded.

Lawful cause

The legal cause is the content of the agreement itself, which describes the goals to be achieved by the parties. The treaty's content is not contrary to law, decency, or public order.

The terms of the validity of the above agreement after it has been fulfilled and the deal is made by agreement of the parties relating to what is agreed, including the rights and obligations of the parties. However, in the implementation of the agreement, it is often found that parties commit defaults (breaking promises), namely not carrying out the rights and obligations that have been agreed upon between the two parties, thus implicating the emergence of legal problems.

Violation of Default is regulated in Article 1243 of the Civil Code, which reads:

"Reimbursement of costs, losses, and interest due to non-fulfilment of an agreement, only begins to be required if the debtor, after being declared negligent in fulfilling his agreement, continues to neglect it, or if something that he must give or make, can only be given or made within a grace period that has exceeded it."

The interpretation of default above means not carrying out obligations on time but not according to the proper (Harahap, 1986:60). The performance of default is

more complete as negligence or negligence in the form of (Subekti, 1979:45).

Not doing what is required;

Carry out what he promised, but not as promised;

Do as promised, but too late; or

Do something that according to the agreement should not be done.

Based on both interpretations as outlined above, in essence, a person who commits an act done not by promised is called a default.

The party who commits a default, even if it is not by the agreement signed and stated in the notarial deed but cannot be subject to criminal penalties. This is as set out in:

Article 11 of the International Covenant on Civil and Political Rights (ICCPR) through Law No. 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights states that no person should be imprisoned only based on his inability to fulfil his contractual obligations;

Article 19 paragraph (2) of Law Number 39 of 1999 concerning Human Rights (Human Rights Law) states that no one, upon a court decision, may be sentenced to imprisonment or confinement based on the reason of inability to fulfil an obligation in a debt-receivable agreement;

Several decisions of the intermediate judges in the case: (i) Judgment No.1631/Pid.B/2003/PN. Say, jo Supreme Court Ruling. No.208K/Pid/2013; (ii) Judgment No. 1349/Pid.B/PN.Mks, jo Judgment of the Supreme Court. No.1905 K/pid/2010 and (iii) Judgment No. 2.533/Pid.B/2013/PN.Mdn has been decided by the judge with a judgment of release (*onslag van all rechttsvervolging*). This means that the act charged with committing an act stipulated in Article 378 of the Criminal Code is proven, but the act does not constitute a criminal act. By *ruling onslag*, the act is an act of default, not a criminal act of fraud.

The Notary cannot be held accountable when the element of fraud and error is committed by the appellants because the Notary only records what is conveyed by the parties to be poured into the deed. This is often known as the *partij* deed. Thus, the Notary is only liable when the deception originates in the will and desire of a notary (Harahap, 2000:36).

A person who commits the default can

only be subject to a criminal act if he meets the elements of the criminal act of fraud, namely if he has malicious intentions and meets the illegal part of fraud as regulated in Article 378 of the Criminal Code:

"Whoever with the intention of benefiting himself or others unlawfully, by using a false name or perpetuating a false name, by deception or by a series of lies, moves others to hand over goods to him, or to give debts or write off receivables is threatened with fraud with a maximum imprisonment of 4 (four) years".

Similarly, a person who commits a new default may be subject to the criminal act of embezzlement if it meets the elements stipulated in Article 372 and Article 374 of the Criminal Code.

The provisions, as referred to in Article 372 of the Criminal Code, read:

"Whoever knowingly and unlawfully possesses something which is wholly or partly the property of another, but which is in his power not for the crime of being threatened with embezzlement, with imprisonment for not more than four years or a fine of not more than nine hundred rupiahs."

Other criminal acts of embezzlement are contained in Article 374 of the Criminal Code, which reads:

"Embezzlement committed by a person whose possession of the goods is due to an employment relationship or because of a search or because of obtaining wages for it is punishable by imprisonment for not more than five years."

The criminal act in Article 374 of the Criminal Code, according to Soesilo (1989) is embezzlement with impunity. For example, a Notary in carrying out his position has received an honorarium for legal services based on his authority from the parties. But the Notary did not issue the deed he made for quite a long time because he had used the honorarium for personal or other interests, so the parties who used his legal services were harmed.

Notaries other than those mentioned above can be subject to criminal acts if they meet the formulation of Article 55 paragraph (1) of the Criminal Code, which states: Convicted as a criminal offender who commits, who orders to do, and who participates in committing acts and who by giving or promising something, by abusing power or dignity, by force, threats or misdirection, or by providing opportunities,

means or information, deliberately encouraging others to do deeds.

4. CONCLUSION

Based on the preceding, it can be concluded that if one of the parties in the agreement made by his notarial deed is considered to have committed a default, it cannot be charged with the crime of fraud (Article 378 of the Criminal Code) and the criminal act of embezzlement (Article 372 of the Criminal Code) based on Article 11 of Law No. 12 of 2005 concerning ratification of the International Covenant on Civil and Political Rights, mentioning no one should be imprisoned only based on the inability to fulfil his contractual obligations; Article 19 paragraph (2) of the Human Rights Act states that no one, upon a court decision, may be sentenced to imprisonment or confinement on the grounds of inability to fulfil an obligation in the agreement. Some judges' decisions with loose verdicts (*slag van all rechttsvervolging*), i.e., the act charged is proven, but the act of default does not constitute a criminal offence.

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