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Legal Protection of Minority Shareholders Through Derivative Lawsuits

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ABSTRACT

One of the principles known in legal science is the principle of "majority rule Minority Protection", this principle emphasizes that minority shareholders are considered for their interests and rights. This is because with a minority position, they tend to be less protected rights compared to majority shareholders. The legal protection of the majority shareholders is quite guaranteed, especially through the general meeting of shareholders (RUPS). While the protection of minorities this is a new thing and get less attention. The problem in this study is the regulation of legislation against minority shareholders in closed companies in Indonesia and how the legal remedies of minority shareholders related to violations of their rights. Law No. 40 of 2007 concerning Limited Liability Companies (PT Law) has stipulated that minority shareholders who are harmed due to members of the Board of directors making mistakes or negligence may file a lawsuit against the company (direct lawsuit) and file a lawsuit on behalf of the company (derivative lawsuit). This legal research used normative juridical approach. The data used were primary and secondary data which were analyzed using quantitative method. The results showed that the concept of derivative action provides a balance between effective recovery for shareholders on the one hand and on the other hand provides flexibility to the board of directors to make decisions that are free from shareholder interference. This concept is based on the principle that shareholders should not be involved in managerial matters within the company. In addition, the concept of derivative action plays a role in corporate governance, by providing a deterrent effect against members of the company's Board of directors or commissioners who commit irregularities or fraud. The court shall conduct a stage of testing or examination of errors that have been committed previously by the company concerned, if the company or the company is proven guilty then it can be summoned to a court which will thereafter be decided or tried, in court only accept and examine the derivative lawsuit, provided that the shareholders own at least 1/10 of the shares or 10% of the total number of shares with voting rights, if the commissioners and or directors make a mistake. Then it is considered effective if as long as the regulation is good and regulates certain existing or applicable laws. However, if as long as the court or shareholders see from the law does not match the existing regulations then it is said to be ineffective.

Keywords: *Legal Protection, Minority Shareholders, Derivative Lawsuit.*

ABSTRAK

Salah satu asas yang dikenal dalam ilmu hukum adalah asas "mayority rule Minority Protection", asas ini menekankan agar pemegang saham minoritas diperhatikan kepentingan dan haknya. Hal ini dikarenakan dengan posisi minoritas, mereka cenderung kurang terlindungi haknya dibandingkan dengan pemegang saham mayoritas. Perlindungan hukum terhadap pemegang saham mayoritas cukup terjamin, terutama melalui rapat umum pemegang saham (RUPS). Sedangkan perlindungan terhadap minoritas ini merupakan hal yang baru dan kurang mendapat perhatian. Permasalahan dalam penelitian ini adalah pengaturan peraturan perundang-undangan terhadap pemegang saham minoritas pada perusahaan tertutup di Indonesia dan bagaimana upaya hukum pemegang saham minoritas terkait pelanggaran haknya. Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas (UU PT) telah mengatur bahwa pemegang saham minoritas yang dirugikan karena kesalahan atau kelalaian anggota direksi dapat mengajukan gugatan terhadap perseroan (gugatan langsung) dan mengajukan gugatan kepada perseroan. atas nama perusahaan (gugatan turunan). Penelitian hukum ini menggunakan pendekatan yuridis normatif. Data yang digunakan adalah data primer dan data sekunder yang dianalisis menggunakan metode kuantitatif. Hasil penelitian menunjukkan bahwa konsep tindakan derivatif memberikan keseimbangan antara pemulihan yang efektif bagi pemegang saham di satu sisi dan di sisi lain memberikan keleluasaan kepada direksi untuk mengambil keputusan yang bebas dari campur tangan pemegang saham. Konsep ini didasarkan pada prinsip bahwa pemegang saham tidak boleh terlibat dalam urusan manajerial dalam perusahaan. Selain itu, konsep tindakan derivatif berperan dalam tata kelola perusahaan, dengan memberikan efek jera terhadap anggota direksi atau komisaris perusahaan yang melakukan penyimpangan atau kecurangan. Pengadilan melakukan suatu tahapan pengujian atau pemeriksaan atas kesalahan-kesalahan yang telah dilakukan sebelumnya oleh perusahaan yang bersangkutan, apabila perusahaan atau perusahaan tersebut terbukti bersalah maka dapat dipanggil ke pengadilan yang selanjutnya akan diputus atau diadili, hanya di pengadilan. menerima dan memeriksa gugatan turunan, dengan ketentuan pemegang saham memiliki paling sedikit 1/10 saham atau 10% dari jumlah seluruh saham dengan hak suara, jika komisaris dan atau direksi melakukan kesalahan. Maka dianggap efektif jika selama peraturan itu baik dan mengatur undang-undang tertentu yang ada atau berlaku. Namun jika selama pengadilan atau pemegang saham melihat dari undang-undang tidak sesuai dengan peraturan yang ada maka dikatakan tidak efektif.

Kata Kunci: *Perlindungan Hukum, Pemegang Saham Minoritas, Gugatan Derivatif.*

Introduction

Legal relations between the subjects of law have developed into complex relationships. Such legal relations occur not only between people, but also between legal entities and legal entities, and between legal entities and people[1]. The emergence of complex legal relations between the subjects of law occurs because today people tend to choose business entities in the form of legal entities, such as limited liability companies, as a means to achieve their goals in business[2].

In Article 1 Number 1 of Law No. 40 of 2007 concerning limited liability companies, it is stipulated that: "a limited liability company, hereinafter referred to as a company, is a legal entity that is a capital partnership, established by agreement, conducting business activities with authorized capital which is entirely divided into shares and meets the requirements stipulated in this law and its Implementing Regulations."

Because it is a legal entity, a Limited Liability Company is also included as a legal subject that has rights and obligations like humans. This is in line with the opinion of Chidir Ali who explained that humans are supporters of rights and obligations known as the subject of law (*subjectum juris*). But man is not the only subject of law, because there are still other subjects of law, that is, everything that according to the law can have rights and obligations, which is called a legal entity *(rechtpersoon)*[3].

A legal entity is a legal subject created by humans by fixing the legal entity as if it has functions and Wills like people[4]. From this opinion, it can be seen that although a Limited Liability Company is a legal entity, it is different from a human being, because a Limited Liability Company is an artificial person[5], it can only perform legal actions through human beings as its representatives. Because a Limited Liability Company is not a human being, in order for a Limited Liability Company to become a full legal subject, a management organ is needed, namely the Board of directors whose duty is to carry out the management of the limited liability company. The definition of what is meant by the Board of Directors can be found in Article 1 (5) of Law Number 40 of 2007 concerning Limited Liability Companies which stipulates that: "the Board of Directors is the authorized Organ of the company and is fully responsible for the management of the company for the benefit of the company, in accordance with the purposes and objectives of the company and represents the company, both inside and outside the court in accordance with the provisions of the articles of association".

Based on the definition of the Board of Directors as stipulated in Article 1 (5) of Law Number 40 of 2007 concerning limited liability companies, it can be seen that the authority and responsibility of the Board of Directors to manage a Limited Liability Company is an authority obtained based on the provisions of the law. In carrying out the management of this Limited Liability Company, the Board of Directors acts not for itself, but for the benefit of the

[1] Try Widiyono, *Direksi Perseroan Terbatas* (Jakarta: Ghalia Indonesia, 2008), ttps://lib.ui.ac.id/detail.jsp?id=101243.

[2] Widiyono.

[3] Chidir Ali, *Badan Hukum*, 1st ed. (Bandung: Alumni, 1991), https://opac.perpusnas.go.id/DetailOpac.aspx?id=79057.

[4] Widiyono, *Direksi Perseroan Terbatas*.

[5] Nike K. Rumokoy, "Pertanggungjawaban Perseroan Selaku Badan Hukum Dalam Kaitan Nya Dengam Gugatan Atas Perseroan," *Jurnal Hukum Unsrat* 17, no. 1 (2011): 14, https://ejournal.unsrat.ac.id/v3/index.php/jurnalhukumunsrat/issue/view/1234.

company so that the Board of Directors basically has a fiduciary duty.

During carrying out the duties of managing a Limited Liability Company, it is possible that the Board of Directors may make mistakes or omissions that may cause losses to the limited liability company. If the limited liability company suffers a loss, then the shareholders as the party investing in the Limited Liability Company will of course also suffer a loss. The possibility of shareholders experiencing losses due to errors or omissions made by members of the Board of Directors in the management of this limited liability company certainly needs to be balanced with adequate legal protection for shareholders.

Basically, the legal protection of the majority shareholder in a Limited Liability Company is guaranteed. This is because in Article 87 paragraph (1) jo. Article 87 paragraph (2) of Law No. 40 of 2007 concerning Limited Liability Companies has stipulated that the decision of the General Meeting of shareholders is taken based on deliberation to reach a consensus, but in the event that a decision based on deliberation to reach a consensus is not reached, a decision will be made based on a majority vote.

The provisions of the principle of majority vote in decision making at the General Meeting of shareholders cause the majority shareholder to be the party that has the dominant position. This is because in Article 84 (1) of Law No. 40 of 2007 concerning limited liability companies, it has been regulated that each share has one voting right. Based on this provision, the more shares owned by the majority shareholder, the more voting rights he has in the General Meeting of shareholders. On the other hand, legal protection for minority shareholders tends not to be fully guaranteed. This is because minority shareholders only own a small portion of the total number of shares in a limited liability company so often minority shareholders cannot fight for their interests in the General Meeting of shareholders due to insufficient votes. With the limited number of votes owned by minority shareholders, then looking for a way out through the mechanism of the General Meeting of shareholders may not necessarily be able to solve the existing problems if there is no support vote of the majority shareholders behind it.

In overcoming this situation, Law No. 40 of 2007 concerning limited liability companies gives the right to the aggrieved minority shareholders to be able to fight for their interests by making certain legal efforts, namely filing a lawsuit for and on behalf of the company (derivative lawsuit) filed by minority shareholders to members of the Board of directors who have made mistakes or omissions as stipulated in Article 97 (6) and Article 114 (6) of Law No. 40 of 2007 concerning limited liability companies.

The requirements that must be met by minority shareholders in filing a lawsuit on behalf of the company to members of the Board of directors who have made mistakes or omissions to cause losses to the Limited Liability Company can be found in Article 97 (6) of Law Number 40 of 2007 concerning Limited Liability Companies which stipulates that: "on behalf of the company, shareholders representing at least 1/10 (one tenth) of the total number of shares with voting rights may file a lawsuit through the District Court against members of the Board of directors who by mistake or negligence caused losses to the company". [6]

[6] Yatny Nur Afrianty and Wira Franciska, "Legal Protection Against Minority Shareholders for The Implementation of a General Meeting Of Shareholders (GMS) That Expused Time," *International Journal On Human Computing Studies* 3, no. 1 (2021): 12–

Article 114 (6) of Law No. 40 of 2007 concerning Limited Liability Companies stipulates that: "on behalf of the company, shareholders representing at least 1/10 (one tenth) of the total number of shares with voting rights may sue members of the Board of Commissioners who by mistake or negligence cause losses to the company".

Methodology

This used normative juridical method with primary, secondary, and tertiary library data. The data collected were analyzed systematically. For further analysis, descriptive analysis was performed from secondary data processes related to the research problem. The data were then compiled, described, and interpreted to draw a conclusion related to legal protection of minority shareholders through derivative lawsuits.

Discussion

1. **The Characteristics of a Derivative Lawsuit**

The term 'derivative action' means a lawsuit originating from something else. Something else in this case is the company itself, while those who carry out the lawsuit are its shareholders who are at the same time a task force for him. As a legal terminology, derivative suit means a lawsuit based on the primary right of the company, but carried out by shareholders on behalf of the company which is carried out because of a failure in the company. Or in other words, derivative action is a lawsuit made by shareholders for and on behalf of the company.

With the concept of derivative action, minority shareholders are given the right to take extraordinary actions through the courts with the aim that the company's rights can be restored and / or not harmed, especially by actions taken by the board of directors.

The concept of derivative action can be identified for the first time in the Company Law in Indonesia in Law Number 1 of 1995 concerning Limited Liability Companies, which then the concept is re-contained in Limited Liability Law Number 40 of 2007, although in both laws do not explicitly mention the term derivative action. Shareholders ' losses that trigger derivative actions, especially in the event of alleged irregularities committed by the board of directors, for example using the company's money for personal interests, paying more than market value, and so on to the detriment of shareholders.

For public companies, shareholders ' losses can be triggered by the decline in the value of shares caused by the actions of the board of directors that harm the company. When a claim is filed through a derivative lawsuit, recovery or compensation will be paid to the company, while shareholders only receive benefits in the form of increased share prices. Minority shareholders in acting on behalf of the company in court as a derivative action, is considered as a breakthrough.

The majority shareholder at a specially convened general meeting, free from the general rule of law on the subject under the provisions of the articles of association, has the power to bind all entities, and each corporation is deemed to have entered into a corporation after the entry into force of the provisions of the articles of association. How then can this Court Act in a case because it constitutes, if it is to be assumed, for the purposes of argument, that the powers of the owning body still exist, and may be

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lawfully exercisable for such purposes as I have suggested.

Law No. 40 of 2007 concerning Limited Liability Companies provides the right for every shareholder to file a lawsuit against the company if it is harmed because of the company's actions that are considered unfair and without reasonable grounds as a result of the decision of the General Meeting of shareholders, directors, and/or board of Commissioners.

The concept of derivative lawsuit is different from the concept of direct action. A direct suit is an action taken by a shareholder on the basis of direct losses suffered by the shareholder concerned. In this case, the shareholders based on Article 61 of Law No. 40 of 2007 concerning Limited Liability Companies Act on behalf of their own interests, and not on behalf of or representing the company. Direct lawsuits are generally related to the legal or contractual rights of shareholders, related to the shares themselves, or related to ownership of shares and other matters related to the position as shareholders.

A direct suit basically contains a request for the company to stop adverse actions and take certain steps, both to overcome the consequences that have arisen and to prevent similar actions in the future.

In the case of a direct action for which there is no requirement of ownership of a minimum number of shares, damages will be paid to the plaintiff shareholder if the plaintiff shareholder wins the action. Whereas in a derivative lawsuit that in Indonesia requires ownership of at least 10% (ten percent), compensation will be paid to the company. The practical reasons for using derivative instruments for losses suffered by the company due to the fault of the board of directors are as follows:

1) Avoid lawsuits filed many times by various shareholders.
2) Derivative claims guarantee that all shareholders who suffer losses will benefit proportionately from the damages paid to the company.
3) Protect creditors and major shareholders against the transfer of company assets directly to plaintiff shareholders

In this regard, the American Law Institute's Corporate Governance Project stipulates a provision that allows courts to treat derivative works as direct actions involving a closed company, if they would not result in a double action, harm the interests of creditors, or interfere with the equitable distribution of damages to interested parties.[7]

In practice, it also happens that the majority shareholder is involved in conspiring with the wrong actions of members of the board of directors that result in losses for the company. In this case, to the minority shareholders who obtain unfair treatment, if the compensation demanded to the wrong members of the board of directors, will be paid to the company which will also be enjoyed by the majority shareholders. Therefore, in the event of such a condition, it is appropriate if the payment of damages is decided by the court to be paid directly to the plaintiff as a minority shareholder.

In the event that a shareholder is going to file a derivative lawsuit, the

[7] Sandra Dewi and Andrew Shandy Utama, "Responsibility of the Board of Directors to the Non-Performing Loans in Banking Company Based on Law Number 40 of 2007," in *PROCEEDING CelSciTech-UMRI* (Pekanbaru: Universitas Muhammadiyah Riau, 2019), 7–10, https://ejurnal.umri.ac.id/index.php/PCST/article/view/1737/1015.

shareholder must previously request the company to take action against the board of directors who have made mistakes that have resulted in losses for the company. If the request is rejected by the company, the shareholders may file a derivative lawsuit against the board of directors who made a mistake. The shareholders will act on behalf of the company because the board of Directors has failed to perform its duties for the benefit of the company.

A derivatives lawsuit basically involves two separate claims, namely the principal claim of the company against a third party (a member of the board of directors or commissioners) and the demand that the shareholders should be allowed to act on behalf of or on behalf of the company.

From another point of view, it can also be seen that derivative action is in principle a triangular litigation. In addition to involving the plaintiff's shareholders and the company as the plaintiff, litigation also involves parties who are suspected of making mistakes that harm the company or take personal benefits from the company in an unjustified way, who are domiciled as the defendant. The claim directed to the defendant is certainly the essence or essence of the derivative action, and the company's interest in this matter is directly contrary to the interests of the defendant. Therefore, it is common practice in common law countries that the defendants in a derivatives lawsuit case will be represented by their personal advocate and not by the advocate or legal consultant of the company.

The concept of derivative action provides a balance between effective recovery for shareholders on the one hand and on the other hand giving flexibility to the board of directors to make decisions that are free from shareholder interference. This concept is based on the principle that shareholders should not be involved in managerial matters within the company. In addition, the concept of derivative action plays a role in corporate governance, by providing a deterrent effect against members of the board of directors or commissioners of the company who commit irregularities or fraud.

2. The Effectivity of Derivative Lawsuits

Related to legal issues related to the protection of minority shareholders, we can refer to the provisions set forth in Law No. 40 of 2007 concerning Limited Liability Companies, in particular: the authority of shareholders in filing a lawsuit against the company if injured as a result of the decision of the General Meeting of shareholders, The board of directors and/or the Board of Commissioners in Article 61 (1) of Law No. 40 of 2007 concerning Limited Liability Companies "every shareholder without looking at what percentage of the minimum shares he has is entitled to file a lawsuit against the company to the court if the shareholder suffers losses due to unfair actions and without reasonable grounds, carried out by the board of Directors, Board of Commissioners or by the General Meeting of shareholders.

The authority of the shareholders in requesting the company that its shares can be repurchased due to the shareholders ' disapproval of the company's actions regarding amendments to the articles of association, transfer or guarantee of the company's assets whose value is more than 50% and merger, consolidation, takeover or separation (Article 62 of Law No. 40 of 2007 concerning Limited Liability Companies) "every shareholder has the right to request the company to purchase its shares at a reasonable price if the person concerned does not approve the company's actions that harm

shareholders or the company, in the form of: Amendment of the articles of association, transfer or guarantee of the company's assets that have a value of more than 50 % (fifty percent) of the company's net assets; or merger, consolidation, takeover, or separation".

Authority to hold shares for the holding of the General Meeting of shareholders, without the authority to decide on the holding of the General Meeting of shareholders (Article 79 (2) of Law No. 40 of 2007 concerning limited liability companies) "if we read the articles of aquo, we will get the impression that Law No. 40 of 2007 concerning limited liability companies requires the board of directors to call the GMS.

Article by article describes the order in which the General Meeting of shareholders can be held, starting from the request for the General Meeting of shareholders from the party or parties representing one tenth of all shares with voting rights or at the request of the Board of Commissioners and also if submitted by registered letter along with the reason, namely Article 79 (4) of Law Number 40 of 2007 concerning Limited Liability Companies."

The authority to represent the company to file a lawsuit against a member of the board of directors who caused the company's losses (Article 114 (6) of Law No. 40 of 2007 concerning Limited Liability Companies ". Determines that each member of the board The commissioner is personally responsible for the company's losses if the person concerned is guilty or negligent in carrying out their duties. In Article 114 (5) of Law No. 40 of 2007 concerning limited liability companies, it also determines that members of the board of commissioners cannot be held responsible for the above losses if they can prove:

1) Has conducted supervision in good faith and prudence for the benefit of the company and in accordance with the purposes and objectives of the company.
2) Not having a personal interest either directly or indirectly in the management of the board of directors resulting in losses.
3) Has provided advice to the board of directors to prevent the arising or continuation of such losses. If the errors or omissions of the members of the board of directors result in the company suffering losses, the shareholders have the right to file a derivative lawsuit.

The authority of the shareholders to conduct an audit of the company, on suspicion of adverse unlawful acts committed by the company, the Board of directors or commissioners. (Article 138 (3) of Law No. 40 of 2007 concerning Limited Liability Companies) "affirms that by requesting an examination of the company, in the event that there is an allegation that the company, members of the Board of directors or Commissioners of the company have committed unlawful acts to the detriment of the company or shareholders or third parties".

The authority of the shareholders to apply for the dissolution of the company (Article 144 (1) of Law No. 40 of 2007 concerning Limited Liability Companies) "the Board of Directors, Board of Commissioners or 1 (one) shareholder or more representing at least 1/10 (one tenth) of the total number of shares with voting rights, may submit a proposal for the dissolution of the company to the General Meeting of shareholders.

The plaintiff's claim to the board of Directors is a violation of fiduciary duty, and therefore derivative claim is the company's right. The court determined that the plaintiff had failed the maker of the request to the board of directors

(demand), and hence the derivative lawsuit could not be accepted. The thing that can make a lawsuit unacceptable is if the shares owned are less than 1/10.

The procedure for formal and material examination is based on steps written or contained in existing laws, and then decide when the relevant limited liability company is examined. Of the 1/10 shares owned is sufficient formal requirements which further complement the material requirements. Obstacles that occur in derivative lawsuits often come from formal defects, which are meant by a formal defect is an imperfection or incompleteness of the law, whether a regulation, agreement, policy, or something else.

This is because it is not in accordance with the law so it is not legally binding. Judgment declaring the lawsuit inadmissible (*niet ontvankelijke verklaard*). This decision is a decision that states that the lawsuit cannot be accepted, the responsibility for the decision of the lawsuit is borne by the company. In addition, the obstacles that are often faced in this case is a lawsuit that has been filed with the court, often the court in handling it is passive. Based on this, shareholders or plaintiffs who must be active in handling derivative lawsuit cases when associated with the duties of the court because the court here is passive when handling derivative lawsuit cases.

The activeness of the parties in handling this case is needed and the parties concerned must be prepared with the rules and evidence that will be carried out in court later. An error or omission and resulting loss in the company, as the basis for derivative claims, is unclear criteria.

This lack of clarity results in it is not easy to qualify that the actions of the Board of directors or commissioners have occurred in error or negligence, then the shareholders can also take part in dealing with these problems when the company it runs suffers losses caused by the Board of directors or Commissioners. To resolve these issues, you can use a lawsuit filed personally or through a lawyer, by taking legal or legal standing based on 1/10 of the share ownership.

The court must conduct a stage of testing or examination of errors that have been made previously by the company concerned, if it is proven that the company or the company is proven guilty, it can be summoned to a court which will then be decided or tried.

Therefore, the court only accepts and examines the derivative lawsuit, and sees from 1/10 of the shares owned by the shareholders, if the commissioners or directors make a mistake that they do in their ownership of 1/10 of the company's shares.

Then it is considered effective if as long as the regulation is good and regulates certain existing or applicable laws. However, if as long as the court or shareholders see from the law does not match the existing regulations then it is said to be ineffective.

Conclusion

The concept of derivative action provides a balance between effective recovery for shareholders on the one hand and on the other hand giving flexibility to the board of directors to make decisions that are free from shareholder interference. This concept is based on the principle that shareholders should not be involved in managerial matters within the company. In addition, the concept of derivative action plays a role in corporate governance, by providing a deterrent effect against members of the board of Directors of the company who commit irregularities or fraud.

One of the legal protections for minority shareholders in the Limited Liability Law is to give the right to the

shareholders of the company representing at least ten percent of the total number of shares with valid voting rights to file derivative claims for and on behalf of the company against the Board of Directors and or Commissioners of the company, which by mistake or negligence has caused losses to the company.

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