The Position of SEMA Number 3 of 2023 Against Law Number 37 of 2004 Concerning Bankruptcy and Postponement of Debt Payment Obligations on Bankruptcy Applications for Developers Who Cannot be Bankrupted

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Abstract. Housing is a fundamental human need, prompting both government and private sectors to prioritize adequate housing for urban and rural communities. To expedite settlement development, developers are granted streamlined access to licensing, land acquisition, banking supervision, and other necessary arrangements related to development, sales, and financing. In running the housing business, both private companies and companies under the central or regional government have the risk of facing various financial problems which result in bankruptcy applications filed by creditors and developers as debtors. However, with the issuance of SEMA No.3/2023 which states that developer companies cannot be bankrupted, which is considered contrary to Law No.37/2004, it needs to be studied thoroughly from various perspectives. The author then researches using normative juridical methods by using various literature and laws and regulations. Where the results of this theoretical research found that in the hierarchy of legislation SEMA does not have a position as a rule of law, because based on Permendagri No. 55 of 2010 Circular Letters are only notification letters about certain matters that are considered urgent. Then in the application of SEMA No.3/2023, judges' discretion is needed not to override the bankruptcy rules regulated in Law No.37/2004 which has a higher degree than the SEMA itself.

Keywords: Developer, Bankruptcy, PKPU, Law, SEMA

1 Introduction

Bankruptcy is something that haunts all business actors in building and running their business. This is certainly influenced by a good management system from the business entity itself. Poor management policies and business strategies can bring the company to ruin and vice versa if the policies are right and good financial processing then the company will run well and can develop quickly. Being in a system where all things affect each other, there are many things that must be considered in company management. Based on the research of experts, it is stated that there are

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several indicators that can be used as a benchmark assessment of the company whether it is in a healthy state or not, among others:

a. Management skills
b. Advantages
c. Effective, efficient and productive financial synergy
d. Balanced financial performance between rentable and solvable
e. Significant development of the company
f. HR Effectiveness and Utilization
g. Guaranteed company existence

Although influenced by various factors, the company's financial factor is a very central factor in bankruptcy, this is due to the dynamics of the business world which in its operations involves the banking sector as a source of funding and payment regulation, so then the company's ability and whether the company is healthy or not can be seen from the flow of banking transactions.

In the author's study of developer companies, bankruptcy situations like this are not unusual, because until now there are many developer companies that have also experienced bankruptcy. Even bankruptcy in property companies also hit other countries such as China, the poor condition of the property business caused by bad credit that forced the bankruptcy of property companies has had an impact on the country's economic growth.[1] even the international economy because as economic actor's companies are active in moving the money circulation in a country.

Likewise, the property business in Indonesia has also experienced ups and downs during the 1998 monetary crisis. The bankruptcy of the property company at that time did not take long to get back up after the economic crisis because in 2003 the Indonesian property business rose again and gradually recovered.[2] The property market in Indonesia is still traditional, requiring property companies to provide sufficient initial funds (capital) and funds from other parties are only additional capital for the company despite the fact that loans are often greater than the initial capital of the company concerned. To increase business volume, business institutions usually expect additional capital assistance from banks and / or other financing institutions, especially in the face of very fierce business competition, even leading to cheating. [3]

Capital with larger loans is then very risky when conditions occur where there are many bad debts from consumers or slow sales of property units by developers which result in slow money circulation and developers cannot pay off payment bills to the bank. While on the other hand the bank really wants the debt repayment by the developer as a debtor on time. The difference in interests between the parties, where the developer as a debtor and the bank as a creditor can then become a dispute that requires careful handling.

By considering the stability of the country's economy and providing an opportunity for developers to be responsible for their receivables to the bank, the government has regulated it through Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations. This arrangement is done so that the developer company as a debtor has the opportunity to pay off its debts, because basically a company that is proven in the commercial court to be unable to pay debts will be declared bankrupt,[4] or under certain conditions, the company may bankrupt itself in order to avoid debt obligations.

Providing opportunities for debtors to pay off their debts can be done by applying for a postponement of debt payments so that the company avoids bankruptcy. The postponement of

creditors' obligation to make debt payments is not only used to prevent bankruptcy from the perspective of economic stability and law enforcement, because if viewed from a different perspective, postponement of debt payment obligations does not actually guarantee the continuity of the debtor's business even though it has made good faith in repaying debts to creditors. Some things that need to be known are that; *First*, the period of postponement of debt payment obligations is relatively short; *Second*, the peace process is determined by the creditor so that the creditor's approval determines whether or not the postponement of debt payment obligations mechanism can run; *Third*, there is still an opportunity to cancel the peace decision that has been approved by the commercial court.[5]

Debtors as applicants can carry out debt structuring by recording all assets and assets of the company so as to provide certainty to creditors regarding the ability to pay debts by debtors.[6] Which is statutorily regulated based on Article 222 paragraph (2) of Law Number 37 of 2004, namely:

> *Debtors who are unable or expect to be unable to continue paying their debts that are due and collectible, may request a postponement of debt payment obligations, with the intention of proposing a peace plan which includes an offer of payment of part or all of the debt to the Creditor."*

The regulation of debtor obligations is also regulated in various laws and regulations and their amendments, also considering various related aspects and not only considering the interests of creditors and debtors alone, because the consequences of not handling debt delays that result in the bankruptcy of a company have a huge impact on employment issues.

Because it also has a domino effect on other sectors, the problem of bankruptcy has a long process and regulations that must be taken by debtors and creditors. Because basically the government as a policy maker in the country will try to deal with companies that will go bankrupt with various schemes including; Bailout; Merger of several companies that are considered unhealthy; Sale of companies to other investors.

This handling is done to avoid a company going bankrupt because the effects of bankruptcy of a company will cause new problems with increasing levels of unemployment in the country which will certainly be more difficult to handle, because it still causes other consequences such as increased crime. However, this does not mean that because of the above reasons, an unhealthy company can be bankrupted, because it is impossible for the government to maintain companies that have no positive effect on the country's economic growth or even provide exceptions for companies in certain industries.

Like a privilege, property companies in Indonesia were given an exception, where at the end of 2023 the Supreme Court issued SEMA No.3/2023 which in the special civil chamber states that:

> *Bankruptcy and PKPU applications against developers of apartments and/or flats do not qualify as simple proof as referred to in the provisions of Article 8 paragraph (4) of Law Number 37 Year 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.*

Thus, the bankruptcy/PKPU requirements contained in Law Number 37 Year 2004 do not apply to companies in the developer sector. In fact, what is meant by the phrase "simple" in the requirements for bankruptcy/PKPU applications is evidence that is clearly visible and does not have different interpretations between debtors and creditors. This Supreme Court decision is considered

to have an impact on companies in other fields that are not given the same rights as developer companies, or even other impacts that are not yet known.

Based on the explanation above, the author feels interested in raising this issue into a scientific research and writing because it still needs to be explained: Whether the position of SEMA Number 3 of 2023 can be considered higher than Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, and what if a trial decision at the Commercial Court uses SEMA as the legal basis for the judge's consideration.

2 Methodology

The research in this paper is conducted in a normative juridical manner. Where the author conducts theoretical research using various legal literature, which is useful for the *statute approach*.[7] Normative legal research is conducted to produce new arguments, theories or concepts as prescriptions in solving the problem at hand using literature books, official documents, and laws and regulations.[8] Then the data owned by the author is analyzed to obtain a legal argument.

3 Results and Discussion

In Article 8 paragraph (4) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, Bankruptcy is defined as a general confiscation of all assets of the Bankrupt Debtor whose management and administration are carried out by the Curator under the supervision of the Supervisory Judge.[9] Thus, bankruptcy is not only seen as a situation but also a legal process because bankruptcy itself is a court decision that has legal force.[10]

The bankruptcy process will only begin if the creditor reports to the court regarding the debtor's failure to repay the loan to the creditor that has passed the payment limit or due date. Based on this report, the court will appoint a curator to recalculate the debtor's assets and manage the sale of assets of the debtor company that has failed to pay debts, and then the money from the sale of these assets will be used to pay off debts to creditors.

In Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, it is regulated that an application for a bankruptcy statement must be granted if there are facts or circumstances that are proven simply, such as:[11]

a. Debtors who have two or more creditors
b. Failure to pay in full at least one debt that is due and collectible,
c. Declared bankrupt by a Court decision, either on its own petition or on the petition of one or more of its creditors.

The bankruptcy declaration itself in reality can not only be filed by creditors but can also be filed by debtors, depending on who has an interest in this matter. In the event that the applicant for bankruptcy is a creditor, the respondent, in this case the debtor, can apply for a Postponement of

Debt Payment Obligations (PKPU). This application for postponement of debt payment obligations is taken to avoid bankruptcy which ends with the liquidation of the debtor's assets.

However, with the issuance of SEMA No. 3/2023, companies in the developer sector seem to have legal immunity, which based on the causal assessment will result in:

a. Creditors will experience difficulties in fighting for their rights in the form of collecting the Company's receivables.
b. Consumers have no legal certainty if development projects are stalled
c. Debtors can freely avoid debt if the project does not proceed

The formulation of the Law of the Plenary Meeting of the Special Civil Chamber number 2 letter c, in SEMA No. 3 of 2023, there are now many bankruptcy applications that have been granted by judges in trials at the Commercial Court, whose decisions are based on assessments according to Law No. 37 of 2004. So then the issuance of SEMA No.3/2023 which requires supervisory judges to conduct evidence such as:

> *Supervisory judges in carrying out their duties refer to the information available on the Financial Information Service System (SLIK) at the Financial Services Authority (OJK) which is always updated with data from the bank concerned to determine the status of the debtor*.

This rule is considered to have limited several things that are considered fundamental, namely; *First*, the independence of judges in carrying out their duties because proof must be based on evidence at trial only, and not based on the existence of instructions as regulated in Article 2 paragraph (1) of Law Number 37 of 2004; *Second*, there will be difficulties for debtors who submit voluntary bankruptcy applications, because these will automatically be rejected and will not get a leeway for the payment period; *Third*, debtors who cannot file bankruptcy applications have no legal steps to fight for their rights.

The issuance of SEMA No.3/2023 is also considered controversial because it does not correspond to the existing legal norms in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. Theoretically, in the science of legislation and hierarchy, we recognize the principle of *lex superior derogate legi inferiori*, i.e. lower legislation should not contradict higher legislation. Therefore, SEMA should not contradict the law.

The creation and regulation of such norms should not be made through SEMA but made in the form of a law, either through a new law or a revision of the law; either regarding developers, regarding flats or regarding bankruptcy, so that it does not become a multi-interpretation in the use of rules by Law Enforcement Officials (APH).

Referring to Article 7 of Law Number 12 of 2011 concerning the Formation of Legislation, the hierarchy of Legislation according to its degree is:

a. Pancasila
b. 1945 Constitution of the Republic of Indonesia;
c. MPR Decree;
d. Law/Perpu;
e. Government Regulation;
f. Presidential Regulation;
g. Provincial Regulation;
h. District Regulation.

So, if we discuss where the position of the Circular Letter is, we must consciously say that based on the General Manual of Office Manuscripts, printed in the First Edition of January 2004, in *conjunction* with Article 1 point 43 of Permendagri No. 55 of 2010 concerning Office Manuscripts within the Ministry of Home Affairs, explains that Circular Letters are not categorized as laws and regulations (regeling), because they only contain notifications about certain matters that are considered urgent .[12]

In its capacity as a letter of notification on certain matters Circular Letters (*Beleidsregel* and *pseudo wetgeving)* are legal products whose contents are materially binding on the public but are not laws and regulations due to the absence of the authority of the formers to form them as laws and regulations, so that to implement them, it is mandatory for the institution that issued the Circular Letter itself.

We can theoretically test the position of SEMA by using what is written in Article 24A of the 1945 Constitution which reads:

> *The Supreme Court has the authority to hear cases at the cassation level, to examine laws and regulations under the law against the law, and has other powers granted by law.*

Thus, if we follow the formulation of this article, the Supreme Court is authorized to examine all types of laws and regulations that are hierarchically below the law such as Presidential Regulations, Presidential Decrees, Presidential Instructions, Ministerial Regulations, Ministerial Decrees, Regional Regulations and others.

If this rule is followed, then within the authority of the Supreme Court, a Circular Letter cannot be tested against a law. Thus, a Circular Letter cannot be categorized as a legislative product. This is proven by the Supreme Court decision Number 23P/HUM/2009. Where the content of the decision is to cancel the Circular Letter of the Director General of Mineral and Coal and Geothermal No. 03.E/31/DJB/2009 concerning Mineral and Coal Mining Licensing Prior to the Issuance of Perppu No. 4 Year 2009. The Panel of Judges of the Supreme Court in their consideration stated that:

> *"Although Circular Letters are not included in the order of laws and regulations, based on the explanation of Article 7 of Law No. 10 of 2004, Circular Letters can be categorized as a legal form of legislation, so they are subject to the order of laws and regulations."*

Another opinion was then expressed by the Institute for Criminal Justice Reform (ICJR), which considered that based on the main principles in the formation of laws and regulations, SEMA should be an internal rule of the Supreme Court that binds inwards and not as a new source of law that also regulates and binds Indonesian citizens as a whole. Likewise, the Indonesian Center for Law and Policy Studies (PSHK) argues that SEMA is not a legislative product, but only an internal administrative instrument. A Circular Letter is intended to provide further guidance on a general norm of legislation.

The Supreme Court began to frequently issue Circular Letters in 1951, which functioned as part of the Supreme Court's regulation (regelende functie) of its own institution. Other state institutions also use Circular Letters as a necessity for their institutions. Thus, answering the question of SEMA's position, some legal scholars argue that SEMA is also not included in state

administrative decisions (*beschikking*), but rather a policy regulation (beleidsregel) or *pseudo* legislation (*pseudo wetgeving)*.

The theoretical test above can then be compared with what the author concentrates on assessing the Position of Sema Number 3 of 2023 Against Law Number 37 of 2004 concerning Bankruptcy and Delay of Debt Payment Obligations on Bankruptcy Applications to Developers Who Cannot Be Bankrupted.

So then the Supreme Court Circular Letter (SEMA) No.3/2023 does not become mandatory to be implemented by creditors and cannot be used as a legal basis to annul Law Number 37 of 2004, especially if it is related to the hierarchy of laws and regulations. So that Circular Letters should not appear to replace existing regulations so that they are ambiguous (double), and Circular Letters must not deviate from the material regulated in higher legislation products.

Furthermore, how to resolve bankruptcy and PKPU, whether to use the rules in SEMA No.3/2023 or what is contained in Law Number 37 of 2004, of course, is to use Law Number 37 of 2004. However, sometimes in undergoing the legal process there will often be debates because the parties in a trial have different interests. However, this explanation can be used as a reference in legal arguments.

Although it is undeniable that in undergoing civil matters in litigation, the court's decision will be based on the judge's discretion and ability to assess the subject matter and legal arguments presented by the parties before the court. However, it should be avoided so that it does not happen that in giving a decision then a law that has a clear position in the hierarchy of legislation must be subject to what the contents of the rules are in a Circular Letter which is not a legal product.

This cannot be seen as something simple because of Indonesia's position as a state of law that makes law (legal products) as a foundation or state administration based on law not on rules that are not an official memorandum, Circular Letter or Appeal Letter.

4 Conclusions and Suggestions

4.1 Conclusion

Circular Letters have no position in the hierarchy of legislation. Theoretical testing to show that where the position of the Circular Letter according to Article 24A paragraph (1) of the 1945 Constitution. So, in this authority, the Supreme Court cannot test a Circular Letter against a law. Thus, the Circular Letter cannot be categorized as a legislative product. So then in the management of bankruptcy, the position of the contents of SEMA No.3/2023 cannot be said to override the bankruptcy rules that have been regulated in Law No.37/2004. The position of Law No.37/2004 in legislation clearly has a general binding force.

SEMA No.3/2023 in the special civil chamber that rejects the bankruptcy petition of the developer company has various implications where; Creditors cannot collect receivables that are in arrears and; Consumers do not have legal certainty if the development project is stalled; The developer company as a debtor can avoid its responsibility from creditors as well as from customers, and; Creditors cannot file voluntary petitions for bankruptcy. Due to these

conditions, SEMA No.3/2023 can be considered as having no principle of benefit for the parties who have the potential to dispute in the commercial court for bankruptcy issues.

4.2 Suggestions

To avoid ambiguity in interpreting statutory orders, the existence of SEMA No.3/2023, which is considered controversial, should not be used as a legal basis. The discovery of new rules that are considered better than existing rules should be replaced at the same hierarchical level of legislation. This means that rules that are considered irrelevant should be replaced or revised with new legislation, not by issuing implementing rules that contradict the orders of the law. Thus, there is no overlap in the laws and regulations that lead to the birth of various different legal interpretations from Law Enforcement Officials (APH).

And to avoid various implications that will be experienced by both consumer creditors and creditors, the rules regarding bankruptcy applications and postponement of debt payment obligations in Law No.37/2004 should still be used as a legal basis because it provides more legal certainty to the parties. In addition to the position of Law No.37/2004 which has a higher degree in the hierarchy of legislation, the use of this law is considered to place the interests of creditors and debtors in an equal position in law. Meanwhile, regarding SEMA no.2/2023, namely in the special prdata room, it should be immediately revoked or replaced with other statutory products that are clear both in terms of content and position so as not to cause legal debates which theoretically could have been resolved earlier and not resolved in litigation settlement.

Reference

[1] S. X. B. Zhao, H. Zhan, Y. Jiang, and W. Pan, "How big is China's real estate bubble and why hasn't it burst yet?," *Land use policy*, vol. 64, pp. 153–162, May 2017, doi: 10.1016/j.landusepol.2017.02.024.

[2] H. Hill and T. Shiraishi, "Indonesia After the Asian Crisis," *Asian Economic Policy Review*, vol. 2, no. 1, pp. 123–141, Jun. 2007, doi: 10.1111/j.1748-3131.2007.00058.x.

[3] R. D. Naja, *Pengantar Hukum Bisnis*. Yogyakarta: Pustaka Yustisia, 2009.

[4] Ishak, "Upaya Hukum Debitor terhadap Putusan Pailit," *Kanun: Jurnal Ilmu Hukum*, vol. 17, no. 1, pp. 189-215L, 2015, Accessed: Apr. 12, 2024. [Online]. Available: https://jurnal.usk.ac.id/kanun/article/view/6059/4993

[5] S. Anisah, *Perlindungan Kepentingan Kreditor dan Debitor dalam Hukum Kepailitan di Indonesia*. Yogyakarta: Total Media, 2008.

[6] R. A. Lontoh, D. Kailimang, and B. Ponto, *Penyelesaian Utang-Piutang Melalui Pailit atau Penundaan Kewajiban Pembayaran Utang*. Bandung: Alumni, 2001.

[7] P. M. Marzuki, *Penelitian Hukum*, Keenam. Jakarta: Kencana Prenada Media, 2010.

[8] S. Soekanto, *Pengantar Penelitian Hukum*, Cet. 3. Jakarta: UI Press, 2005.

[9] H. Basri, E. Israhadi, and R. Riswadi, "Legal Protection of Creditors in Implementing Bankruptcy Redemption," in *Proceedings of the 3rd International Conference on Law, Social Science, Economics,*

and Education, ICLSSEE 2023, 6 May 2023, Salatiga, Central Java, Indonesia, EAI, 2023. doi: 10.4108/eai.6-5-2023.2333453.

[10] A. Kurniawan, A. Redi, and H. Bakir, "Juridical Analysis of General Securities of Bankruptcy," in *Proceedings of the 3rd International Conference on Law, Social Science, Economics, and Education, ICLSSEE 2023, 6 May 2023, Salatiga, Central Java, Indonesia*, EAI, 2023. doi: 10.4108/eai.6-5-2023.2333421.

[11] *Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations*. 2004.

[12] *Minister of Home Affairs Regulation (Permendagri) Number 55 of 2010 concerning the Administration of Official Documents within the Ministry of Home Affairs*.