

Juridical Analysis of the Capital Access Mechanism for BUMDes Without Legal Entity Status



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ABSTRACT: In the era of autonomy, local areas in Indonesia have been able to focus on valuable principles to achieve prosperity and improve the economic well-being of communities through the empowerment of villages. Villages are recognized as social units based on customs and laws, allowing them to govern their own affairs based on local traditions. The Indonesian government has introduced regulations, such as the Village Law of 2014, providing a new framework for village institutions like the Village Owned Enterprises (BUMDesa) to support local development. BUMDesa play a strategic role in rural areas by utilizing village resources and human capital to improve the economy and meet community needs. However, challenges arise for BUMDesa without legal status, as they are unable to access funding from banks due to the lack of legal recognition. To establish legal status, BUMDesa must meet certain requirements, including approval by village meetings, notary deeds, registration with the Ministry of Law and Human Rights, and the creation of organizational structures. Without legal status, BUMDesa face limitations in managing assets and obtaining financial assistance, resulting in personal liability for losses incurred by the organization's operators. The lack of legal recognition for BUMDes hinders their ability to manage assets, access financial aid, and differentiate between personal and business assets, leading to potential personal liability for financial losses. Ultimately, legal status is essential for BUMDes to unlock opportunities for growth, financial stability, and legal accountability.

KEYWORDS: Village-Owned Enterprises, Capital, Unincorporated

I. INTRODUCTION

This period of autonomy has greatly aided a region in focusing on values that are beneficial to achieving welfare and improving the economic well-being of the community. It has also helped a region become independent, which can be helpful in obtaining and increasing the region's initial income, including that of the village (Alfuraqan and Suyuti 2020).

According to the Republic of Indonesia's 1945 Constitution, villages are recognized as a region. According to local laws and customs, a village is a group of people who live in a particular location. Due to their shared political, economic, social, and security interests, villages are entitled to run their own affairs and have an elected government (Sembiring 2017). As a result, a village is a group of people who have the power to govern and supervise their own household interests. This can be done in accordance with the village's traditions and origins.

As stated in Law Number 6 of 2014 concerning Villages (henceforth referred to as the Village Law), the Indonesian government has established regulations that mark a new chapter for the government institution closest to the community, despite the fact that the village is a small unit within an institution in order to realize national development.(Hamzah 2021). Therefore, it is envisaged that this law will enable villages to set up village governance for the purpose of implementing community empowerment, coaching, and development. Therefore, in compliance with the Village Law, the government establishes Village-Owned Enterprises (BUMDes) as one of the ways to improve village autonomy in order to achieve independence and economic growth in villages. By using village resources and the availability of human resources capable of managing the village-owned enterprises, which are regarded as assets in driving the community's economy, BUMDes play a very strategic role in the community, particularly in rural areas. This can later be useful in meeting the community's needs, particularly basic needs.

The Law Number 6 of 2014 concerning Villages defines BUMDesa as a business entity whose entire or partial capital is owned by the village. This can be done directly from the separated village wealth in order to manage assets, services, and other businesses to provide welfare to the village community. This definition is based on the provisions of Article 1, paragraph 6.

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BUMDesa was born as a new approach in the effort to improve the village economy based on the needs and potential of the village. The management of BUMDesa is fully carried out by the village community, that is, from the village, by the village, and for the village. The way BUMDesa operates is by accommodating the economic activities of the community in the form of an institution or business entity that is managed professionally, while still relying on the village's original potential. This can make the community's businesses more productive and effective. In Indonesia in general, business entities are classified into two forms, namely legal entities such as Limited Liability Companies (PT), Foundations, and Cooperatives, and non-legal entities such as Commanditaire Vennootschap (CV) and Usaha Dagang (UD). Meanwhile, BUMDesa specifically cannot be equated with legal entities such as Limited Liability Companies, CV, and Cooperatives. Therefore, BUMDesa is a village-characterized business entity that, in addition to assisting the Village Government's administration, also aims to meet the needs of the village community in its activities.¹

II. RESEARCH METHODS

The research methodology for this study will be empirical juridical legal research. The empirical juridical research methodology is a technique that looks at written laws (the law found in books) and how they are implemented or enacted in each unique legal event. An empirical juridical approach to the study of law is a non-doctrinal social science.²

The non-doctrinal approach aims to directly observe the phenomena of the problems occurring and then analyze them to provide an analytical answer to the phenomena of the problems occurring.

This approach method is used to address the issues formulated by the researcher, particularly regarding the systematic funding for BUMDesa that are not legal entities in accessing capital assistance. This research will examine the systematic mechanism of capital access from banks for BUMDesa that do not have legal entity status and the legal consequences in case of losses. This research is prescriptive in nature. Prescriptive research aims to provide an assessment (justification) of whether the object being studied is right or wrong and to offer recommendations on what should be done according to the law. This research prescriptively analyzes the justification for the opening of capital access by banks to BUMDesa without legal entity status. This research will use data that includes both primary and secondary data. Primary data is data obtained directly through observation, questionnaires, and/or interviews. In this research, it will be obtained through interviews with the Nagori "Maju Bersama" Owned Business Entity.

Suteki and Galang Taufani, on the other hand, define secondary data as information that can be gleaned indirectly from the research object through other sources, including government records, library books, laws, scientific publications, articles, and documents pertaining to the research topic.³

III. RESEARCH AND DISCUSSION

1. The Mechanism for Accessing Bumdes To Receive Bank Capital Without Legal Entity Status

In order to manage assets, services, and other companies for the maximum benefit of the local village community, the village administration directly participates in BUMDesa, a corporate entity whose entire or majority of capital is owned by the village. The source of BUMDesa's capital come from: ³

a. The village capital contribution comes from the Village Budget and other sources, namely from:

- 1) fresh funds;
- 2) Government assistance;
- 3) assistance from the local government; and
- 4) Village assets handed over to the Village Budget (APB Desa).

b. Community capital participation in the village.

The capital of BUMDesa includes village assets, according to Article 76 paragraph (1) of the Village Law, which states that village assets can include Village Cash Land (TKD), customary land, village markets, livestock markets, boat moorings, village buildings, fish auctions, agricultural product auctions, village-owned forests, village-owned springs, public baths, and other village-owned assets. Those village assets, if used as capital for BUMDesa, are provided as equity capital.

¹ Mahfirah, Shara Mitha, Adista Paramita, "Kajian Normatif Kedudukan Badan Usaha Milik Desa Sebagai Subyek Hukum" Jurnal Notaire, Vol. 4(1)

² Soemitro, Ronny Hanitijo, S.H., Metodologi Penelitian Hukum dan Jurimetri, (Jakarta: Ghalia Indonesia: 1988) hal. 35

³ Suteki dan Galang Taufani, Op.Cit., halaman 215.

³ Sekarningrum Tiyas, "Tanah Kas Desa Yang Menjadi Penyertaam Modal Dalam Badan Usaha Milik Desa" Jurnal Notaire Vol.2(1), hlm 117

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Considering the above description that TKD is a village asset, it can be used as capital for BUMDesa. The use of TKD as capital for BUMDesa requires understanding the existence of TKD when it is used as capital for BUMDesa. As stipulated in Article 21 of the Minister of Home Affairs Regulation Number 1 of 2016 concerning Village Asset Management (hereinafter referred to as PMDN No. 1 of 2016) regarding the deletion of village assets, which states that the deletion of village assets is the activity of removing/erasing village assets from the village inventory data book, in the event of transfer of ownership, destruction, or other reasons. The deletion of village assets that have changed ownership includes the transfer of village assets to another party; a court ruling with permanent legal force results in the village losing ownership rights, and the village assets must be removed from the village asset inventory list.

According to Minister of Home Affairs Regulation Number 4 of 2007 concerning Guidelines for Village Wealth Management, the National Land Agency may refuse to register rights to land that was previously designated as Village Cash Land in relation to the removal of village assets (TKD). This is because Village Cash Land may only be released for public interest purposes; no other rights release is allowed.

However, many BUMDesa want to expand the fields of business they operate. For that reason, additional capital is needed for the BUMDesa to develop the business it runs. BUMDes runs its business through a management organization that is separate from the Village Government structure. The BUMDes organization consists of Advisors, Operational Executives, and Supervisors. However, there is currently no clarity in the legislation regarding the status of BUMDes as a business entity in the form of a legal entity or not. This provision is regulated in Article 87 paragraph (1) of the Village Law, which states that:

"BUMDes specifically cannot be equated with legal entities such as limited liability companies, partnerships, or cooperatives."

Therefore, BUMDes is a village-characteristic business entity that, in its activities, not only helps in the administration of village governance but also meets the needs of the village community. BUMDes can also perform functions in service provision, trade, and other economic development.

The ambiguity regarding the status of BUMDesa ultimately results in the division of BUMDesa's accountability into legal entity BUMDesa and non-legal entity BUMDesa. For BUMDesa with legal entity status, there will be a separation of individual and corporate liability from the business entity as regulated in the Limited Liability Company Law.

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However, for BUMDesa that is not a legal entity, the responsibility of the business towards other parties will jointly and severally become the responsibility of the business management. In the event of a loss, this responsibility attaches to the management, but it also attaches to the owners' responsibility. This is what clearly distinguishes companies that are not legal entities.

Additionally, in companies that have not yet attained legal entity status, the company cannot own assets in its own name. This is due to the company's status not being a legal entity, resulting in no separation of ownership. As a result, the assets owned by the company are considered personal property, so legally, these assets cannot be recorded in the name of the company or the separately owned business.⁴

The bank must conduct a thorough assessment of various factors affecting the debtor, such as character, financial capability, capital, collateral, and business prospects. This assessment aims to evaluate the debtor's intent, capacity, and willingness. Therefore, each bank is required to formulate and adhere to the credit guidelines established by Bank Indonesia. Village-Owned Enterprises (BUMDes) must have legal entity status. Banks require guarantees of the legality and identity of BUMDes before approving credit.

2. Legal Consequences For Bumdesa That Have Not Yet Obtained Legal Entity Status

BUMDes is an entity that, in carrying out its activities, can experience profits or suffer losses. There is an investigative audit on BUMDes based on the order of the Village Council or Inter-Village Council. Based on Government Regulation Number 11 of 2021, Article 62 concerning Village-Owned Enterprises, it is stated that:

⁴ Listyowati, Nunuk, Tanggung Jawab Hukum Perseroan Terbatas Yang Belum Berstatus Badan Hukum, Jurnal Spirit Patria Vol.1(2), 2015, hlm. 33

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"If the results of the inspection/audit as referred to in Article 61 find losses in BUMDes, the advisor, operational executor, and/or supervisor are fully personally responsible for those losses."

In the event that BUMDes incurs losses due to mistakes or negligence, the responsibility for those losses will fall on the advisors, operational implementers, and/or supervisors of BUMDes, unless proven otherwise. They must prove that they have carried out their duties and authorities in good faith, with caution, and for the interests and objectives of BUMDes.

Village-Owned Enterprises (BUMDes) function as a driver of the village economy by improving public services and maximizing village assets. BUMDes aims to improve the welfare of the village community through business activities. The main objective of BUMDes is to provide services and products that are beneficial to the villagers, as well as to create job opportunities and additional income. Therefore, to ensure that the objectives and responsibilities of this business entity are clear, BUMDes must have legal entity status. BUMDesa that does not have legal entity status can result in BUMDesa not being able to become a legal subject in an obligation. Therefore, the obligation is carried out in the personal name of one or jointly and severally among several BUMDesa administrators bound by an accessory agreement.

In the event of a loss occurring in a BUMDes that is not yet a legal entity, the responsibility for compensating the loss will be imposed on the BUMDes management personally. This is because BUMDes that are not yet legal entities do not have a legitimate share structure or assets to manage, and there is no clarity regarding the separation of wealth and responsibilities through the Articles of Association or Bylaws⁵. If the Articles of Association and Bylaws exist, these documents can be changed at any time according to the management's decision, which creates legal uncertainty. BUMDes that have legal entity status, in the case of changes to their Articles of Association, must obtain approval from the Ministry of Law and Human Rights, which acts as the supervisor and guarantor of legality.⁶

The form of accountability of BUMDes, which is not a legal entity, towards village assets managed as collateral is the responsibility of BUMDes as long as the operational executor acts within their authority (*intra vires*). If this is insufficient, the operational executor, advisor, and supervisory board are jointly responsible up to their personal assets, referred to as joint liability.

As stipulated in Article 1278 of the Civil Code (KUHPerdata), it is stated that joint and several liability occurs when several creditors are given the right to demand the fulfillment of all debts. This obligation occurs if in the proof of agreement, each creditor is expressly given this right. So it can be interpreted that according to Article 1278 of the Civil Code, if one member cannot pay his debt, all members of the group are obliged to cover it. Therefore, when one of the defendants pays the material damages, the other defendants are exempted from paying.

In our research, we found that many BUMDes are not legal entities. However, in practice, the business activities are like a savings and loan cooperative, but because there is no collateral, the business activities are not developed and it is difficult for the BUMDes to obtain capital, especially from banks. In its implementation, many members of the savings and loan often do not make installment payment obligations, resulting in bad debts and cannot be executed due to the absence of collateral. The implication of the provisions of Article 1278 of the Civil Code on the debts of the cooperative is that members have an obligation to pay principal savings, mandatory savings, and loan installments provided by the cooperative. The difference lies in the management of obligations, where the settlement of group obligations is the responsibility of all group members. All members' obligations must be settled during the group meeting, and the group representative will deposit the obligations with the bank. If there are members who have not settled their obligations, the responsibility to do so lies with all group members. However, although the loan is jointly and severally liable, there is one coordinator who is responsible for coordinating the repayment of the loan. In general, the joint responsibility loan coordinator has the following duties and obligations:

- a. If the recipient of the guarantee fails to fulfill its obligations, the guaranteeee is obliged to bear and repay the debt to the creditor.
- b. If one of the debtors succeeds in repaying his debt, the other debtors are released from responsibility to the creditor.
- c. If a group member is not in good faith in paying the arrears, the group is responsible for the management of the cash.

⁵ Aisyah, Siti, "Kedudukan Badan Usaha Milik Desa yang Tidak di Daftarkan Badan Hukum" di Madura, Jurnal Ilmu Hukum dan Tata Negara Vol 2(1), Maret 2024

⁶ Parika, Liliyan, Lalu Pria Suhartana, Chrisdianto Eko Purnomo, "Tanggung Jawab Pengurus Bumdes Berdasarkan Prinsip Pengelolaan Perusahaan Yang Baik", Jurnal Kertha Semaya, Vol. 10 (4), hlm 739

IV. CONCLUSION

1. BUMDes is a business entity owned by the village with the aim of improving the welfare of the village community through asset and business management. The capital of BUMDes comes from various sources, including the Village Budget (APB Desa), government assistance, and community contributions, with village assets such as Village Land Fund (TKD) being able to be used as capital. However, BUMDes that are not yet a legal entity face obstacles in asset management and access to capital, as there is no separation between personal assets and business assets. Additionally, BUMDes that are not yet a legal entity cannot access capital assistance from banks, which usually require legal guarantees. To obtain legal entity status, BUMDes must meet various requirements, including approval through village deliberation, establishment with a notarial deed, registration with the Ministry of Law and Human Rights, and the preparation of Articles of Association and Bylaws. With legal entity status, BUMDes can access capital more easily and operate its business with legal certainty. Meanwhile, banks in providing credit to legally established BUMDes will assess financial capability, collateral, and business prospects, in accordance with the guidelines set by Bank Indonesia.
2. The liability for loans held by a non-legal entity BUMDesa will jointly and severally become the responsibility of the BUMDesa management through their personal assets. For BUMDesa that is not a legal entity, it cannot become a shareholder or legally own assets, which causes various obstacles in management and access to capital, including the inability to operate as a Microfinance Institution. In addition, BUMDes that are not legal entities do not have a separation between personal assets and business assets, which risks making the management personally liable for any losses incurred.

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