Proceedings
The 3rd International Conference in Social Science
University of Merdeka Malang, November 4-5 | Vol. 3(1), 2022
ISSN (Print): 2774-4132 | ISSN (Online): 2774-8383
https://jurnal.unmer.ac.id/index.php/iconiss

Legal Protection for Gestors from Dominus Who Default in the Zaakwarneming Engagement

Diyaul Hakki, Sis Nanda Kus Andrianto
Magister of Law, Postgraduate School, University of Merdeka Malang
Jl. Terusan Raya Dieng No. 62-64 Malang, 65146, Indonesia

Corresponding Author: E-mail: diyaulbdig@gmail.com

Abstract

The purpose of writing this article is to find out how legal protection is for the gestor from defaulting dominus in the Zaakwarneming engagement and what legal steps can be taken by the gestor when the dominus does not want to carry out the performance voluntarily. Zaakwarneming arises when the gestor performs voluntarily and secretly an act from the dominus that is not carried out without an order. Problems arise if the dominus does not want to compensate for what was issued by the gestor, and how is the legal protection. To find answers to the problems in this study, the researchers used normative research methods using 2 (two) kinds of approaches, namely the statutory approach (Statue Approach) and the Conceptual Approach (Conceptual Approach).

Keywords: Agreement, Default, Zaakwarneming

1. Introduction

An agreement is an event where a person promises to another person or where two people promise each other to do something. The agreement arises because there is a promise from the first party to the second or more parties and promise each other to carry out something. Not immediately the agreement was made. There are legal requirements for an agreement that must be met. The legal terms of the agreement are regulated in Article 1320 of the Civil Code/Burgelijk Wetboek (BW) which reads:

> *"In order for an agreement to be valid, four conditions are required: (1) Agreed those who hooked himself; (2) The ability to make an engagement; (3) A certain thing; (4) A lawful cause."*

An agreement can be said to be invalid if the agreement occurs due to an element of oversight, coercion, or fraud. This is explained in Book III of the Civil Code on Contracts. This agreement can be in the form of a written agreement in the form of a letter or an unwritten agreement. In the process of making an agreement, often the evidence used by the party concerned is evidence of letters/deeds. Often a letter/deed is made to facilitate the verification process, if there is a dispute at a later date.

Book III of the Civil Code / Burgerlijk Wetboek adheres to an open system. An open system here is defined as giving the widest possible freedom to the public to make or enter into agreements as long as they do not conflict with laws, applicable public order and decency. In the agreement, the law regulates several provisions which are said to be the principle of the agreement, including: (1) Open principle. The principle of openness is often referred to as the principle of freedom of contract. This principle is contained in Article 1338 Paragraph 1 of the Civil Code; (2) Consensuality principle. The principle of consensuality is based on Article 1320 Paragraph 1 of the Civil Code. With the agreement of both parties, the agreement can be said to be valid and rights and obligations arise for them to fulfill the agreement; (3) Principle of Pacta Sun

Servanda. The Pacta Sun Servanda principle or also known as the principle of legal certainty is the principle that third parties must respect the contents of the contract that has been made by the parties, as appropriate by law; (4) Principles of Good Faith. The principle of good faith is stated in Article 1338 paragraph 3 of the Civil Code. The principle of good faith is that the parties must carry out the agreement based on the trust or confidence or willingness of the parties.

Agreements born from an agreement are also caused by 2 (two) things, either because of the law alone or the actions of people whose consequences are regulated in the law. Like the act of voluntarily representing other people's affairs or what is called zaakwarneming. In essence, zaakwarneming is a moral act because it is based on one's own will without any orders, mandates, and delegation of power from the person it represents. Because zaakwarneming is an act of human instinct or a norm, then the person who does it is not entitled to any reward.

However, on the one hand, zaakwarneming, apart from being a moral act, can also be categorized as a civil act. Because the act is regulated in the law, of course the rights and obligations arising from the act are also regulated in the law. One thing that may be a concern for people who carry out zaakwarneming is about how legal certainty is for the zaakwarneming act. Seeing that one of the elements is either known or unknown by the person he represents, then it is likely that what will happen if the person he represents does not know what actions have been committed is that the person being represented has the possibility not to acknowledge the existence of an agreement between the two, so he will refuse to compensate for losses incurred by the person representing him.

The problem that is the focus of the author is how is the legal protection for the gestor from the default dominus in the zaakwarneming engagement? Why do gestors need to be protected? because, the gestor has the right to receive compensation from the default dominus, even without the knowledge of the silent dominus and gestor - binding himself to continue and resolve the matter. Dominus also has the right to make compensation to the gestor who has secretly continued and completed the matter. If there is no compensation, then Dominus has the right to default.

In this study, the author emphasizes the dominus that defaults on the gestor and whether there are laws that can protect it. Actually, the law has explained that the dominus is obliged to compensate for what has been issued by the gestor to replace the dominus in continuing the act. The dominus cannot refuse or even not compensate for what has been issued by the gestor for the dominus, in that case the dominus can be said to be in default or a debtor cannot fulfill his obligations to the creditor. Even though there is no agreement between the dominus and the gestor, the dominus still has the right and obligation to compensate the gestor.

2. Methods

The approach method used in this study is the normative juridical approach. According to Soekanto and Mamuji (2011), a normative juridical approach is legal research carried out by examining literature or secondary data as the basis for research by conducting a search of regulations and literature related to the problem under study. The research method applied in this study is to use normative research methods. Normative research is legal research conducted by examining literature or secondary data.

Normative legal research is carried out by examining laws related to zaakwarneming and default as a solution to the problem of dominus who defaults on gestor. The normative juridical approach applies laws and legal theories of the protection of the gestor from defaulting dominus.

This study uses 2 (two) types of approaches, namely the first approach using a statutory approach (Statue Approach) and the second using a Conceptual Approach (Conceptual Approach). The research studied is based on primary sources of law, namely sources of law based on laws. The legal material used in this research comes from the literature. Therefore the technique of collecting legal materials used in this research is by collecting data from the literature. The collection of legal material is carried out by tracing, namely: (1) Tracing the norms related to zaakwarneming; and (2) Analyzing in depth so as to answer the problem formulation.

3. Results

An engagement that is born from the actions of someone who is lawful or legally lawful, such as for example zaakwarneming as an act on behalf of another person that is carried out voluntarily. At a glance, zaakwarneming is an act that is done voluntarily without getting an order to do so. Actually, zaakwarneming often occurs in our daily lives, but we ourselves are less aware of it. Zaakwarneming is strengthened in Article 1354 of the Civil Code.

In engagements, we recognize creditors as people who owe and debtors as people who owe. And this time in zaakwarneming, the creditor as the person who owes a debt is called the gestor and the debtor as the person who owes is called dominus. Judging from the article, the gestor is a person who voluntarily

carries out the action of continuing and completing other people's affairs in a situation where the person he represents or the dominus is unable to carry out the action. So because of this, the gestor acts secretly without orders from the dominus and with the knowledge and without the knowledge of the dominus.

Related to zaakwarneming, there are elements in it, namely: (1) Actions are done voluntarily: On their own awareness without expecting anything in return. The person who commits the act does not have any interest, except for the benefits for those who are interested in it. In this case he acts solely out of a willingness to help fellow human beings, fellow family members, fellow friends; (2) Without receiving orders: those who commit the act act on their own initiative without any verbal or written orders; (3) Representing other people's affairs: acting to represent the affairs or interests of other people without giving the slightest advantage to himself; (4) With the knowledge or not of the person represented: Of course, because the zaakwarneming act was carried out voluntarily and secretly, then this action could be known or not by the person it represented. Even if it is known by the person represented, he does not get any mandate or order; (5) Obliged to continue the action: The party representing must really continue and complete the action until the party being represented can again take over the action. If the party represented dies, then he is obliged to continue the action until the heirs of the party being represented can continue or take over the action. So as long as he fully represents the act he is responsible as a good housewife; (6) Act according to a lawful cause: He acts or represents the act provided that the act he represents does not conflict with applicable laws or norms, so that he performs his obligations in accordance with the provisions of the law and remains in line with the will of the person he represents.

Provisions for representing the affairs of other people in zaakwarneming must represent the affairs voluntarily without any orders or authorization from the person they represent, because in civil law, in terms of representing we know 2 (two) ways either voluntarily or with an order or contract agreement . The thing that needs to be emphasized in determining the representation is whether he was ordered or not, because if he is not ordered we will find a term of giving power of attorney or lastgeving. The granting of power of attorney is based on a contract or agreement made by a person. This is based on Article 1792 of the Civil Code.

Of course if we look at this article a person who is given the power to represent other people's affairs is a form of an agreement based on the agreement and awareness of each party. The granting of power of attorney to represent one's affairs can be in the form of a deed, written under the hand, even in a letter or orally. This can also happen secretly and is concluded from the exercise of power by the authority. This provision can be seen in Article 1793 of the Civil Code.

This is of course completely different from zaakwarneming which is based on the will of the person representing or gestor without any orders or without the knowledge of the person he represents, namely dominus. Zaakwarneming is not an agreement or contract because it is done without the consent of the party represented. So because it was carried out without the consent or order of the party represented, there is 1 (one) gap that allows the dominus to refuse to compensate for losses or acknowledge an agreement between the two.

But apart from these problems, of course the author will describe the obligations that must be carried out by the gestor as long as he represents the dominus affairs so that it shows a fairness that on the basis of the obligations carried out by the gestor, he is also entitled to get the rights he should get from the consequences the duty he has undertaken to serve the interests of the dominus. Therefore we return to the discussion at the beginning which explains the obligations that should be carried out by the gestor as long as he represents the dominus in his affairs.

Article 1355 of the Indonesian Civil Code explains the obligation of the gestor to continue dominus acts. This article explains that it is explained that the gestor is responsible for what he represents until the dominus or heir of the dominus returns to carry out the thing he has represented. Therefore, if a loss occurs to the person he represents due to a negligence committed by the gestor or due to improper implementation by the gestor, then the gestor is fully responsible for this matter depending on the circumstances that caused the management to not be as it should be. This is confirmed in Article 1356 of the Civil Code.

After these things have been fully fulfilled by the gestor, then he has the right to get compensation for all the expenses he has made while representing the act, even the gestor has the right of retention to hold the things he represents or the property of the person he represents until the losses he had incurred while representing dominus, were paid for by dominus.

Of course, the compensation for losses issued by the gestor does not include the wages that must be paid by the dominus. Because in the case of zaakwarneming or a person who commits an act voluntarily he is not entitled to get any wages for the voluntary act he has done. This is explained in Article 1358 of the Civil Code. So when there are no rights that must be fulfilled at that time there is also no obligation that must be carried out. This means that in this case the gestor does not get any rights except for the compensation

he has issued and the dominus has no obligation whatsoever other than to compensate for the losses that have been incurred by the gestor.

After looking at all of the descriptions presented above, there is one tendency or most likely to occur, namely that the dominus denies its attachment to the gestor. This indication was taken from the analysis that the dominus did not know and did not order the gestor to represent his actions, so that there would be disagreements from both parties. So at such times, law comes to provide certainty from each party and protect the interests of each of these parties. Returning to the understanding of Article 1354 of the Indonesian Civil Code that the act committed by the gestor is an act that is legal and protected constitutionally, even if the act was carried out without the knowledge of the dominus.

Therefore, all matters relating to these actions have been stipulated in law. So that if there is a conflict from the dominus or denies the actions that have been carried out by the gestor, the dominus has indirectly violated the law. Of course when we talk about the law that discusses the agreement, we will be familiar with the term default. Another word for default is the non-fulfillment of the debtor's obligations. In the legal dictionary it is stated that default is negligence, negligence, breach of contract, not fulfilling its obligations in the agreement.

Default is a condition according to the law of the agreement, where a person does not carry out the performance as agreed. And if there is a default, it must occur against legal interests, an interest that is regulated and protected by law (Sinaga et al., 2022). A debtor can be said to be negligent if he does not fulfill his obligations or is late in fulfilling them but not as promised. Default is also explained in Article 1243 of the Civil Code.

When zaakwarneming gives birth to rights and obligations, at that time there must also be a party that gets the rights and performs an obligation. In the event that the gestor has performed an act to represent the dominus, for example, say the gestor has spent some funds to represent the dominus' affairs, then the dominus is obliged to compensate for the expenses made by the gestor in respect of the affairs he represents. Because we describe zaakwarneming as an engagement, if one of the parties does not fulfill the obligations that must be carried out in the engagement, we call this event a default. Therefore if the dominus refuses to compensate for the expenses incurred by the gestor then he has actually refused to perform the feat. Of course, because Dominus deliberately refuses to fulfill its obligations, then Dominus has met the material elements or requirements to be said to be in default. Furthermore, to fulfill the formal requirements, the gestor must give a subpoena to the dominus. Somasi is a warning for debtors to excel. The term subpoena is actually unknown in BW, but usually subpoena is used for a warning, order or warning. This is regulated in Article 1238 of the Civil Code. Because a subpoena is a reprimand or warning so that the debtor or dominus immediately performs an achievement, a subpoena may only be made when the debtor or dominus still has not made an achievement. Summons are issued up to 3 (three) times by the gestor or creditor, although the time limit is not regulated by law, in general, each letter is issued within 1 (one) week. In the I-to-last subpoena, the debtor or dominus ignores the letters without a valid reason, so this has caused the debtor or dominus to be in a state of negligence. Therefore the debtor must be responsible for the legal consequences of his negligence.

According to J. Satrio, the legal consequences of ignoring subpoenas are that the creditor or gestor has the right to sue: (1) Engagement fulfillment; (2) Fulfillment of the agreement and compensation; (3) Compensation; (4) Mutual agreement cancellation; (5) Cancellation of the engagement and compensation.

If the subpoena filed by the gestor against the dominus is ignored for no apparent reason, the dominus is said to be negligent towards the gestor, resulting in default. As a result of the law, the dominus default against the gestor has the right to sue: (1) Engagement fulfillment; (2) Fulfillment of the agreement and compensation; (3) Compensation; (4) Mutual agreement cancellation; (5) Cancellation of the engagement and compensation.

4. Discussion

The “Discussion” part, highlights the rationale behind the result answering the question “why the result is so?” It shows the theories and evidence from the results. The part does not just explain the figures but also deals with this deep analysis to cope with the gap that it is trying to solve. It is important to state the possibility of contribution result of the research for science development.

5. Conclusion

The definition of zaakwarneming is regulated in Article 1354 of the Civil Code. In zaakwarneming, the term creditor is known as the gestor and the debtor is known as the gestor. This article explains that a gestor is a person who voluntarily continues or completes the affairs of other people in circumstances where the dominus cannot continue the act, so the gestor acts secretly to complete or continue affairs without orders with the knowledge or without the knowledge of the dominus. There are several elements

in zaakwarneming, namely, the act is carried out voluntarily, without receiving orders, representing other people's affairs, with the knowledge or not of the person represented, is obliged to continue the act, and act according to lawful reasons. In civil law, there are 2 (two) known ways to represent, either voluntarily or by an order or contract agreement made.

The gestor has the right to get his rights and dominus obligations to the gestor who has continued or continued his affairs. This has been explained in Article 1365 of the Civil Code. If the dominus cannot fulfill its rights and cannot continue its obligations to the gestor, then the dominus can be said to have defaulted on the gestor. Dominus can be said to be in default because he cannot give his rights and obligations to the gestor. In default, the dominus has fulfilled the formal conditions of default, namely that he has been negligent in fulfilling his obligations and the dominus may not let go of the gestor's hands for compensation issued by the gestor to replace him in continuing the act. So in this case, the gestor can ask the dominus to compensate what the gestor has issued. And if the dominus does not make compensation, the gestor can send a warning letter or commonly known as a subpoena.

Summons is a warning letter to the debtor or dominus to immediately carry out achievements even though the deadline has passed. Summons can be submitted 3 (three) times as long as the dominus has not made an achievement. The purpose of subpoena is to immediately carry out his achievements. If the subpoena is ignored, the dominus can be said to be negligent, so that the default on the dominus also applies. The legal consequence of dominus default against the gestor is that the gestor has the right to claim compensation.

References

Aries, A. (2013). *Tentang bukti perjanjian tidak tertulis*. Hukumonline. Diambil dari: https://www.hukumonline.com/klinik/detail/review/lt51938378b81a3/tentang-bukti-perjanjian-tidak tertulis/

Bawono, A.C. (2012). *Apa itu somasi?* Hukumonline. Diambil dari: https://www.hukumonline.com/klinik/detail/review/cl483/somasi/

Harahap, Y. (1986). Aspek hukum perjanjian. Bandung: Alumni Cetakan Kedua.

Hendrawan, A.F., Suhariningsih, S.H., & Masykur, H. (2014). Perlindungan hukum bagi gestor yang telah melakukan zaakwaarneming (perwakilan sukarela) tanpa disetujui pembayaran biaya oleh dominus. *Kumpulan Jurnal Mahasiswa Fakultas Hukum, 1*(1), 1-20.

Kitab Undang-Undang Hukum Perdata

Undang-Undang Nomor 37 Tahun 2004 tentang *Kepailitan dan Penundaan Kewajiban Pembayaran Utang*.

Satrio, J. (2012). *Wanprestasi menurut hukum perdata, doktrin, dan yurisprudensi*. Bandung: Citra Aditya Bakti.

Simanjuntak, P.N.H. (2009). *Pokok-pokok Hukum Perdata Indonesia*. Jakarta: Jembatan.

Sinaga, P. H. W., Wiratama, F. P. B., Indriati, F., Rahayu, D. A., & Sunarjo, S. (2022). Social control of government policy through the citizen lawsuit mechanism. *Jurnal Cakrawala Hukum*, *13*(2), 123-134.

Soekanto, S., & Mamuji, S. (2001). *Penelitian hukum normatif (Tinjauan singkat)*. Jakarta: Rajawali Pres.

Subekti. (2007). *Kode sipil*. Jakarta: PT. Percetakan Arga.

Volmar, H.F.A. (1989). *Pengantar studi hukum perdata*. Jakarta: Elang.