

Open Assessment of Proofs in Litigation

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Abstract

The key of existence and success in all domains of life to the entity of justice is the thorough compliance to the truth and justice. Therefore when a certain right is violated, liable or challenged entrusted to solve that, are the institutions of justice, rather the courts. Courts are competent to find the right path towards the truth applying different methods with intention to satisfy the justice. In this paper special attention we dedicated to the method of open assessment of proofs in litigation, that in fact is the subject of this research.

Keywords: Proof; truth; litigation procedure; contested procedure

Introduction

Open assessment of proofs in litigation is accepted in the legislation of Republic of Macedonia. The entire litigation procedure from the commencement to the court decision intends to reach the truth and solve the dispute and to satisfy the justice, respect of rights of legal entities (subject of rights) in order to enable rule of law as the right path of live within a safe and stable state and society.

Although the reveal of truth is the most desired result and goal of civil procedure, we are aware that the road towards the truth represents a labyrinth, whose exit is very difficult to be found. Even this procedure requires great dedication, attentiveness and research, still the basic help and tool towards reaching the court decision are the proofs. Due to this the aim of this paper is to emphasize and clarify the role of proofs in the course of the discovery of truth, rather the relevance of the method of open assessment of proofs and liability of judge during the application of this method.

The truth in litigation

The key principle of litigation that is the main reason why parties engage in civil proceedings without any doubt is the principle of demanding the truth, rather the truth itself.

Humans always seek for the truth in order to find solution of different problems they face with. "Whether it is a philosopher, scientist, artist or ordinary man they all aspire the truth, all call for it and no one denies it."¹ "Humans search for the truth

¹ Zoroska - Kamilovska, Tatjana, Burden of proof in civil proceedings, unpublished MA thesis, Skopje, (2203) p.7 from B. Duricin, Establishing the truth in a civil action, thesis, unpublished, Titograd,(1991)

is not a cognitive problem only, but it has ethical duty in the domain of practical business.”² While searching for the truth and its reveal in lower and greater extent, humans managed to reach solutions for personal problems in a way that provides certain satisfaction and peace not only for them, but for others as well. In a way it is related with a particular problem that is solved in the light of determined truth.

“The truth represents approval of human image (awareness) of previous events or the current state of a certain object. It is subjective reflection on objective reality, rather subjective image for objective reality.”³

The difficulties for determining the truth in the domain of the processing justice are disclosed in particular form comprised of key specifics in the endeavors of court for providing more qualitative legal protection of subjects demanding it, in order to establish equilibrium within the deteriorated legal order. The protection of subjective rights and the reestablishment of deteriorated legal order simultaneously represent double goal of the procedure that can be achieved only if the court order is correct, and it can be attained only if actual situation to which it is based concurs with the truth. Since the truth for the actual situation is one of the basis of the decision that solves the disputed terms (*praemissa minor*), the principle for seeking the truth is considered as main and basic principle of the litigation, to which more or less are related other principles of this procedure.

“The principle for determining the truth is a working method of the court used while gathering processing material and provides legality of the decision.”⁴

The truth in the litigation procedure represents harmonization of the information for the facts determined in the procedure with the reality of those facts. “The truth is the quality of cognitive reality of facts that are relevant for approval of decision; quality experienced by the court with its sights and logically formed during the procedure.”⁵

Speaking the truth is compulsory and determined by law. According the article 9 of Law on litigation “The parties and mediators are obliged to speak the truth in front of the court”.⁶

All contemporary legislations on civic trials, including the previous legislations as well are in line with the fact that that without truth there is no good judiciary, because if the court decision doesn’t represent final result of the absolute truth, then the justice is

² Zoroska - Kamilovska, *ibid*, p.7 of B.Kalin, *history of philosophy with selected writings of philosophers*, Zagreb, (1953), p.124

³ Georgievski Stefan, *Civil Procedure Law*, the first book Stefan Georgievski - Skopje, (2000), p.168

⁴ Stankovic, *ibid*, p.233

⁵ Zoroska - Kamilovska, *ibid*, p.13

⁶ Article 9 of Law on litigation;

not met and the entire procedure is invalid. At the same time the citizens are impaired and their trust to judiciary is lost.

The truth is something more than a principle of procedure – it is basic value on what the procedure is based and designed. The formulation of basic principles is relevant for the construction of the system of the process and adequate implementation of procedural law.

There should not be forgotten that the fair procedure, public, independence, contradiction and impartiality of the court, the denial for double trial and others, nowadays are not only principles on what is based the procedure for the sake of a certain general interest, but are established within the Constitution of Republic of Macedonia and international agreements for human rights and freedoms as affirmative personal rights of individual against the state.

We need to be aware of the fact that we can never claim with confidence that the truth on proofs determined by the court decision cannot be denied. Among others for this reason the legislator has introduced the institution legal remedies. Actually the legislator gives a second chance to the party to express his lack of satisfaction of court decision and at the same time by the review of the decision by an appellate court the possibilities for incorrect assessments of proofs can be eliminated.

Methods for determining the truth

In the assessment of the results of argumentation are used different methods. By the use of methods is obtained the right path towards fastest and most rightful solution of the dispute. Taking into account that the basic goal of the method is to achieve a particular goal always were made attempts to find a method for attaining the best results.

Main methods used to reach the truth in litigation procedure old as the procedural law are the legal method and the method of open assessment of truth. The legal method is not applied any longer in our judicial system, while the method or the principle of open assessment of proofs that is subject of this paper is applied in our judicial system.

The method of open assessment of proofs

As it was already stated the notion “open assessment” has standard meaning. By this term is understood the entire activity of the court while gathering proofs, whose probative value is further assessed based on logical and empirical approach.

The principle of open assessment of proofs is comprised in the article 8 the Law on litigation that states: “The decision on what fact to be taken as valid is made by the court in its discretion and based on conscience and careful assessment of each proof

separately and all proofs collectively based on the results of the entire procedure.” By the provisions of this article is expressed the principle of free judicial assurance and open assessment of adduced proofs. This means that the judge cannot assess the proofs by his credence, or simply based on his feelings or some abstract believe, but must do that based on the laws of logic, as reasonable, impartial, fair and educated man, aware of the complexity of his judicial duty. Actually the court can not elaborate in the decision the assessment of proofs with the phrase “based on his free judicial believe”, but through the disclosure of the course of thought and impressions, that incited him/her to consider the proof as valid or invalid, rather as proven or unproven. “In this regards the court can even consider that a certain fact if proven by the results of the entire procedure, addressing to the conclusions that derive from other undisputed facts and the entire state of affairs.”⁷

The instructions and the methods that are deriving from the article 8 of the Law on litigation do not obstruct the manifestation of perceptual and intellectual affinities of members of jury of those of a particular judge. These instructions in no way limit the court in assessment of proofs, but in contrary only guide to analyze and proceed the proofs and based on that establish their judgment.

In the first phase of the presentation of evidences, the court achieves partial overview of the real value and factual claims that were subject of the argumentation in the concrete case.

The knowledge achieved as a result of used proof means represents basic for the final act in the procedure of proof assessment.

The assessment of proofs represents the phases of evidence activities that leads towards the supposed final result of evidence procedure – the believe that the court for the true value of actual claims of the parties or his thesis for the existence or nonexistence of some particular facts. Since the final product of evidence procedure is established in this part of evidence activities, it is reasonable that the assessment of proofs is determined as the most relevant phase in the argumentation procedure.

The system of open assessment of proofs doesn't take into account legal norms in the process of determination of legal power of proofs, but all that is on the discretion of the court. Based on free assessment, experience, and intellectual abilities the court selects the proofs and creates subjective image for objective reality, that will be very instrumental in the segment of court decision.

The exemption from this principle is made only in terms of the proof – hearing the parties for what is stipulated subsidiary. It means only when there are no other proofs,

⁷ Cavidar Kiril, Law of Civil Procedure - commentary, case law, practical application and subject Registry Agency "ACADEMIC" - Skopje, (2006), p.24.

or when the court will consider that it is necessary to hear the parties in order to establish relevant facts (article 249, p.2 of Law on litigation).

The method of “open assessment of proofs” is neither new, nor specific for our procedural law.

The time of struggle for establishment of this method is not far from us. Nowadays it is not disputed the question whether the method of open assessment of proofs is the only rational way to achieve the truth for the facts.

Anyhow apart from the fact that the Law on litigation has accepted the method for open assessment of proofs, still there are foreseen some exceptions in terms of the probative force of some particular proofs.

Those exceptions are:

- If the opposite party admits the facts, it binds the court, even the court can order to be tested these facts as well, if the courts considers that the party by this admission intends to have in disposal demands that are beyond its scope.⁸
- The final verdict of the criminal court by which the defendant agrees guilty, binds the court in the litigation in terms of the existence of criminal offence and responsibility of the perpetrator.
- “The public standpoint proves the veracity of what is proven by it”⁹, but it is allowed to prove that misleadingly are determined the facts or the correction is done invalidly.

Even the application of the legal assessment of proofs remains in the history and is replaced with the open assessment of proofs, the latter one regardless the advantages still brings uncertainty on how in practice the proofs are assessed appropriately. The fact that the open assessment of proofs in the litigation procedure is made by judges that differ, leads towards the ambiguity on how much they are meticulous and capable to assess argumentation value of the proofs. This of course does not relate to all judges, because it is undisputed that there are such real professional judges that are very attentive in the course of the free assessment of proofs, but very often when we see a court decision, we regret why it is not applied any longer the principle of legal assessment of proofs. Due to this, the assessment of proofs is not always appropriate.

If there is established invalid assessment of proofs, the decision in the trial court can be disputed, rather if there are violations of litigation provisions, or due to wrong or incomplete factual situation.

⁸ Article 207 paragraph 1 Law on litigation;

⁹ Article 215 paragraph 1 Law on litigation;

Due to these omissions, the appellate court has the right to cancel the decision from the trial court and return the case to that court for retrial. (article 356 paragraph 1 of the Law on litigation), even if the party didn't appellate the decision due to wrong or incompletely establish factual situation, if within the resolution of the court decision appears a justified suspicion that the facts on what lays the trial court decision are appropriately determined.¹⁰

Anyhow the appeal court can assess the proofs differently such as: when took place the court hearing, when assessed or indirectly presented proofs, when based on some facts were taken a different decision. In that case, the appellate court can establish different factual situation and reverse the trial court decision.

Conclusion

This research, in its focus has mostly the free method of evaluating the evidence in the contested procedure.

The key aim of this research was the theoretical analysis of the open assessment of proofs in litigation procedure, the value of this method, the advantages and weaknesses that characterize it, rather the responsibility and the role of the judge during the implementation of this method of open assessment of proofs within the litigation procedure.

Through experience we gained during the treatment of a scientific work - research, it becomes clear how the theoretical merits affect the realization of a sketch to develop and implement it.

This paper is just an appendix to the endless theory of civic right and its pretensions are to incite much more detailed analysis of the method of open assessment and its issues.

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