THE SIGNIFICANCE OF THE BURDEN OF PROOF FOR CONTRACTORS

Key words
Burden of proof, cause of action, evidentiary burden, facts to be proved, building contracts, building subcontracts, decision to declare a dispute.

Introduction

One of the most essential considerations when thinking of initiating dispute resolution procedures as well as when entering into correspondence on a matter which can lead to dispute is whether you have the evidence that will prove your case. If such evidence is not available or is not convincing, there is no point to spending good money to chase bad. Contractual litigation is not about proving a point, it is about economic considerations.

The facts that must be proved

The starting point in all such cases is to establish the basic matter in dispute. This is not always easy to determine. Once the issues have been determined the cause of action probably becomes much clearer. The cause of action tells you what facts are required to be alleged and proved to be successful and from this is then extracted what evidence is available to prove the case. All these stages have specific legal expressions which help the discussion.

Cause of action was defined in Read v Brown (1888) 22 QBD 131 as “... every fact which it would be necessary for a plaintiff to prove, if traversed [asof afsonderlik weerspreek] in order to support his right to a judgement of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.” It was quoted in SA Law in the case of McKenzie v Farmer’s Co-operative Meat Industries Ltd 1922 AD 16 at 23. I do not know of many lay people who understand this definition so it is easier to try to explain it as the facta probanda. The time when a cause of action comes into being (i.e. the facta probanda are all present) is also very significant in determining when prescription starts running although this may not always be the sole basis.

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1 See Christie p. 556
2 See Potgieter p. 160

The significance of the burden of proof in building contracts and subcontracts
**Facta probanda** are the facts that need to be proved for an action to succeed. In a claim for damages for breach of contract these would briefly be the contract, the existence of the term relied on, a breach of the term and the existence of some prejudice. Within these brief words, lies a multitude of relevant detail and this is why we need legal practitioners.

Within these two concepts, which are inter-related, lies the essence of any decision as to the correspondence and documentation that is essential to guide a dispute to a successful outcome. It is therefore essential that when dealing with a particular problem, correspondence be generated that provides a written source of evidence that satisfies the facta probanda and provides a good cause of action.

**The burden of proof**

In any court case, the court uses the principle of the burden of proof to assist it in determining the matter before it. Schwikkard quotes at p. 559 from Heydon & Ockelton, Evidence: Cases and Materials, 4th Edtn, (1996) 15 in explaining onus as “the obligation of a party to persuade the trier of facts by the end of the case of the truth of certain propositions.”

The burden of proof in criminal cases is the ubiquitous ‘beyond reasonable doubt’ of the TV programmes whereas in civil cases it is only ‘on a preponderance of probabilities’, subject to any legislation changing this onus in specific situations. Therefore a party who bears the burden of proof, or ‘onus’ as often called, succeeds only if he tips the balance of probability in his favour. If the trier is uncertain or in doubt as to whether the balance has been so tipped then the onus has not been discharged and the other party is successful.

Court cases are sometimes fought virtually exclusively on the basis of the burden of proof because neither party has sufficient evidence to prove its case. Therefore, the party on whom the burden of proof lies will fail.

The principle regarding who bears the burden of proof is contained in the broad statement that he who avers must prove. In general the plaintiff who seeks an award in his favour must prove his entitlement thereto. However, this rule may change depending on the pleadings and the law in relation to the dispute. For example, in a contract for the hire of goods or property, the tenant bears the onus of proving that any damage to the hired product during the hire period was not due to his fault. Similarly, where the pleadings include an admission and a special defence (Confession and avoidance) such as an admission of assault but the defence of self-defence, the burden is on the defendant to prove his defence.

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3 See Schwikkard p. 558
4 See Ley v Ley’s Executors 1951 3 SA 186 (A)
5 See Schwikkard p. 581
6 See Schwikkard p. 580 who quotes Lord Denning in Miller v Minister of Pensions 1947 2 All ER 372 374: “If the evidence is such that the tribunal can say ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not”. This judgment was adopted in Ocean Accident and Guarantee Corporation Ltd v Koch 1963 4 SA 147 (A).

The significance of the burden of proof in building contracts and subcontracts
All authors in this subject highlight the fact that the above burden of proof is not the same as the evidentiary burden which moves between parties as the case progresses. The evidentiary burden lies on the party who bears the burden of proof until a prima facie case has been built up from the evidence where after it shifts to the other party who must produce evidence to counter it. This burden may swing backwards and forwards between the parties during the progress of the dispute.

How the rules affect contractors and subcontractors

Schmidt at para 2.2.1.2 2 (a) to (d) at pp. 2-14 to 2-17 clarifies matters and Schwikkard summarized it as follows in footnote 6 on p. 572: [note this is not a verbatim quotation]

“Plaintiff has to prove the existence and relevant terms of the contract as well as any prerequisites in respect of the Defendant’s liability e.g. that he suffered damages or that he performed his own contractual obligations. If the Defendant denies the existence of a contract between him and the Plaintiff, the latter will carry the burden of proving the contract because the Defendant’s defence is a flat denial. The same approach would be followed if the Defendant were to allege that the Plaintiff never suffered any damages or had failed to perform his own contractual obligations. However, ... the Defendant would carry the burden of proof should he ... plead one of the following [special defences]: (a) that the Plaintiff had released him from the amount due; (b) that the Plaintiff’s claim has prescribed; or (c) that the contract was unlawful... Interruption of prescription must be proved by the Plaintiff.”

The law that contracts are enforceable means that, when making a claim in terms of a contract, the claimant must prove the existence of the contract and its terms. The problem faced by a claimant is that where a defendant denies liability on the basis of a clause excluding liability, the burden remains on the claimant to prove that the clause does not exist in the contract7. This is sometimes referred to as ‘proving a negative’. The implications of this requirement can be extremely onerous and embarking on an action wherein it becomes necessary to prove a negative should be undertaken with great care. This accentuates the need to ensure that there is proper contract documentation in place as well as to cover such possible areas in correspondence.

Conclusion

Construction contracts often extend over long periods, often more than a year, and contractors and subcontractors do not know what potential disputes they will face. Although there are people who believe an open-ended and vague contract offers more opportunity for claims, that is a matter that will depend on who the claimant is. If a party wants to claim on such a vague contract, it will potentially face an insurmountable obstacle when it gets to trial. It is therefore far preferable to ensure the contract is clear and comprehensive. In addition, early correspondence that addresses issues that will need to be proved can also come to the assistance of the party who wishes to lay

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7 See Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd 1979 3 SA 754 (A) wherein the respondent alleged a clause excluding liability for damage and the applicant could not satisfactorily prove to the court that there was no such clause.
down a foundation. Even if the correspondence results in a dispute as to a fact, this is still advantageous because it clarifies and can limit the issues which need to be referred for dispute resolution.

BIBLIOGRAPHY AND REFERENCES USED


Such correspondence normally excludes any exchanges prior to the agreement of a written contract because of the parol evidence rule as well as the normal 'entire contract' clauses included in most building contracts.