25 Replication and plea in reconvention

(1) Within fifteen days after the service upon him of a plea and subject to subrule (2) hereof, the plaintiff shall where necessary deliver a replication to the plea and a plea to any claim in reconvention, which plea shall comply with rule 22.

[Subrule (1) substituted by GN R2021 of 5 November 1971, by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(2) No replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading shall be necessary, and issue shall be deemed to be joined and pleadings closed in terms of paragraph *(b)* of rule 29.

(3) Where a replication or subsequent pleading is necessary, a party may therein join issue on the allegations in the previous pleading. To such extent as he has not dealt specifically with the allegations in the plea or such other pleading, such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined.

(4) A plaintiff in reconvention may, subject to the provisions mutatis mutandis of subrule (2) hereof, within ten days after the delivery of the plea in reconvention deliver a replication in reconvention.

[Subrule (4) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(5) Further pleadings may, subject to the provisions mutatis mutandis of subrule (2), be delivered by the respective parties within ten days after the previous pleading delivered by the opposite party. Such pleadings shall be designated by the names by which they are customarily known.

[Subrule (5) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

Commentary

General. The replication is the plaintiff's answer to the defendant's plea. It is unnecessary to deliver a replication if the plaintiff wishes only to deny the allegations contained in the plea; by virtue of the provisions of subrule (2), the plaintiff is deemed to have denied all the allegations in the plea. It follows that a replication need be delivered only if the plaintiff wishes to plead fresh facts in answer to the defendant's plea. If the plea is a bare denial of the allegations made in the declaration or particulars of claim, a replication is unnecessary, and the rules do not provide for one in such a case; the pleadings are closed as soon as the plea is delivered. [1] It is submitted that if an unnecessary replication is delivered, costs thereof should not be allowed to the plaintiff if he is successful. [2]

The plaintiff is restricted to answering the allegations made by the defendant in his plea and may not in his replication introduce a fresh claim or a fresh cause of action. A replication which does introduce a fresh cause of action is known as a 'departure', and is bad. [3] If he does so the defendant may apply to have the replication struck out as an irregular step [4] or may except [5]

to the replication. To replicate that an alleged compromise was induced by fraud, [6] or that an alleged prescription has been interrupted, [7] does not amount to raising new matter or involve any 'departure' from the declaration or particulars of claim. Repetitions are not 'new allegations'. [8] If the plaintiff wishes to introduce a new cause of action after the defendant has delivered his plea, his correct course is to apply for an amendment of his summons. [9] It follows that new allegations may be made in reply only when they are called for by the plea.

If the plea is a confession and avoidance of the facts pleaded in the declaration or particulars of claim, the plaintiff may answer the avoiding allegations by pleading new facts. The test is whether in so doing he is relying upon the same cause of action as set out in the summons, and merely answering the defendant's avoidance, or whether he is introducing a new basis for his claim. If, for example, the declaration or particulars of claim alleges a breach of contract, and this is sufficiently answered in the plea, the plaintiff cannot in his replication alter the basis of his claim to fraud. [10]

An illustration of the contrary proposition is furnished by *Graham v Ridley*. [11] The plaintiff claimed an ejectment order against the defendant, and alleged merely that he was the owner of the premises, and that the defendant was in wrongful and unlawful occupation thereof. The defendant admitted that he was in possession of the property, but pleaded that this was under and by virtue of a lease granted to him by the plaintiff. To this the plaintiff replied that the lease had been cancelled on the ground of a breach by the defendant. It was held that the reply was not a departure, as it did not introduce a new cause of action. The history of the matter appeared different after the reply was filed, but the cause of action remained the same. The plaintiff was the owner, and was therefore entitled to possession, whether or not there happened to have been a lease which had been terminated or cancelled.

In the original service of this work it was stated that estoppel could be raised by a plaintiff only in his replication. [12] In *Makate v Vodacom Ltd* [13] the Constitutional Court, in its main judgment, was at pains to distinguish between estoppel and ostensible authority, [14] and held

that ostensible authority could be pleaded by a plaintiff in his particulars of claim. [15] In the minority judgment it was pointed out [16] that, depending on the circumstances of the case, estoppel and ostensible authority could be pleaded in particulars of claim or by way of replication.

Subrule (1): 'Where necessary.' See the notes s v 'General' above.

Subrule (2): 'A mere joinder of issue or bare denial of allegations.' In view of the provisions of this subrule, a formal replication which merely denies the allegations in the plea and joins issue is no longer necessary, and the costs thereof may be disallowed on taxation. [17]

'Issue shall be deemed to be joined and pleadings closed.' The fact that a plaintiff is barred from replicating does not debar him from proceeding with the action; the pleadings are merely deemed to be closed and the action may be set down for trial. [18]

This subrule makes it clear that failure to deliver a replication or subsequent pleading, does not amount to an admission of the allegations in the plea or other previous pleading. [19]

Subrule (3): 'Shall operate as a denial of every material allegation of fact.' If a replication or subsequent pleading is delivered, failure to deal specifically with allegations in the previous pleading does not amount to an admission of the allegations in the plea or other previous pleading.

Subrule (5): 'Designated by the names by which they are customarily known.' The 'further pleadings' to which reference is made in this subrule are seldom required in practice. The full set of pleadings which can be exchanged between parties is as follows:

PLAINTIFF	DEFENDANT

• Declaration (Deklarasie)	• Plea (Pleit)
• Particulars of claim (Besonderhede van vordering)	
• Replication (Replikasie)	• Rejoinder (Dupliek)
• Surrejoinder (Tripliek)	• Rebutter (Tweede dupliek)
• Surrebutter (Tweede tripliek)	

1 See rule 29(1)*(a)*; *Uranowsky v Herzberg Mullne Automatic Products Ltd* 1933 CPD 423; and see *Moghambaram v Travagaimmal* 1963 (3) SA 61 (D); *Milne NO v Shield Insurance Co Ltd* 1969 (3) SA 352 (A).

2 See *Phiroz v Weinberg Bros* 1918 CPD 414; *Black v Hajie* 1919 CPD 83.

3 *Joerning v The Paarl Ophir Gold Mining and Milling Co Ltd* (1898) 5 Off Rep 9; *Broad v Bloom* 1903 TH 427.

4 In terms of rule 30.

5 In terms of rule 23. See also *Joerning v The Paarl Ophir Gold Mining and Milling Co Ltd* (1898) 5 Off Rep 9; *Broad v Bloom* 1903 TH 427; *Faischt v Colonial Government* (1903) 20 SC 210; *Farrar v Geldenhuis GM Co* 1908 TH 16; *Fourie NO v Oberholzer* 1914 TPD 227; *De Beer v Minister of Posts and Telegraphs* 1923 AD 653 at 657; *Seventh Day Adventists v Carey* 1930 CPD 243; *Butler v Swain* 1960 (1) SA 527 (N).

6 *Schultze & Co v Rosen Bros & Co* 1904 TH 153.

7 *Butler v Swain* 1960 (1) SA 527 (N).

8 *Butler v Swain* 1960 (1) SA 527 (N) at 529B–D.

9 *Faischt v Colonial Government* (1903) 20 SC 210; *De Beer v Minister of Posts and Telegraphs* 1923 AD 653 at 657; *United Dominions Corporation (Rhodesia) Ltd v Van Eyssen* 1961 (1) SA 53 (SR) at 58C; *Knightsbridge Investments (Pvt) Ltd v Gurland* 1964 (4) SA 273 (SR) at 279C.

10 See *United Dominions Corporation (Rhodesia) Ltd v Van Eyssen* 1961 (1) SA 53 (SR).

11 1931 TPD 476. The same point arose in *Loesch v Crowther (2)* 1947 (3) SA 251 (O). Further illustrations of replies which have been upheld as valid, and as not introducing fresh causes of action, are to be found in *Schultze & Co v Rosen Bros & Co* 1904 TH 153; *Reid & Co v Logan* (1906) 23 SC 731; *British SA Co Ltd v NZ Insurance Co Ltd* 1913 SR 138; *Heywood v Theron* 1930 NPD 144; *Van der Berg v Scholtz* 1938 TPD 129. In the following cases the reply was held to be bad as constituting a departure:
(a) the summons alleged a contract consisting of a written offer and a verbal acceptance; the reply alleged a written acceptance (*Titshall v Cole* (1913) 34 NLR 161);
(b) the summons claimed damages for breach of contract; the reply alleged that there was an express warranty which had been breached (*De Beer v Minister of Posts and Telegraphs* 1923 AD 653);
(c) the summons claimed on a written contract; in the reply reliance was put on a subsequent variation and addition thereto (*Maisel v Anglo African Furnishing Co* 1931 CPD 223);
(d) the claim was for damages for the non-delivery of certain luggage at Johannesburg; the plea alleged that the luggage had by plaintiff's direction been returned to Cape Town; the plaintiff replied that the defendants had contracted to deliver the luggage at Cape Town (*Faischt v Colonial Government* (1903) 20 SC 210). See also *Seventh Day Adventists v Carey* 1930 CPD 243; *Broad v Bloom* 1903 TH 427; *Fourie NO v Oberholzer* 1914 TPD 227; *The Guardian Insurance Co Ltd v Passaportis* 1915 SR 140; *Cycle Trade Supply Co v Elliot* 1915 JDR 195; *Oblowitz v Norwich Union Insurance Co* 1922 JDR 79; *De Villiers NO v Pretsch* 1932 SWA 5.

12 The cases relied upon for the statement were *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (GW) at 107D and *Rosen v Barclays National Bank Ltd* 1984 (3) SA 974 (W) at 983I.

13 2016 (4) SA 121 (CC).

14 At 137D–142B.

15 At 143C–D.

16 At 160B–162D.

17 *Matiwane v Minister of Police* 1979 (3) SA 312 (E); *Van Tonder v Minister van Landbou* 1982 (2) SA 594 (O).

18 See *Moghambaram v Travagaimmal* 1963 (3) SA 61 (D).

19 The subrule gives effect to the decision in *Breyten Collieries Ltd v Dennill* 1912 TPD 875.