

## **WHY REPLY [CATE]?**

Traditionally, action proceedings involve a set of three documents exchanged: the particulars of claim, the plea, and the replication. Once a plea is filed, an age-old question arises: Should I replicate?

In this article, the authors will interrogate the replication and try to determine what it is, how it functions, and when its use is appropriate. It is worth noting that this article does not address counterclaims, etc., and focuses solely on a replication in a three-set pleading action.

### **What is the replication?**

As stated above, and as is the norm of practise for over 100 years, an action proceeding generally has three sets of documents exchanged between the plaintiff(s) and the defendant(s). At the tail end of the exchange, you will find the replication. It is the final opportunity for the plaintiff to set the boundaries of his/her/its claim.

In terms of High Court practice, the replication is allowed for by Rule 47 and states –

#### ***“Replication***

*47. (1) After service on him or her of a plea the plaintiff must, subject to subrule (2), on the date determined in terms of rule 23 where necessary deliver a replication to the plea and such replication must describe in sufficient detail all facts supporting the replication.*

*(2) No replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading is necessary, and in that event, an issue is considered as joined and pleadings are considered as closed in terms of rule 51(b).*

*(3) Where a replication or subsequent pleading is necessary a party may therein join issue on the allegations in the previous pleading and to such extent as he or she has not dealt specifically with the allegations in the plea or such other pleading, such joinder of issue*

*operates as a denial of every material allegation of fact in the pleading on which issue is joined.”*

Unlike the replying affidavit, the replication has a very specific function for very specific instances.

### *When do I file a replication?*

*Peté et al*<sup>1</sup> are of the view that a replication is only necessary if a defendant raises new averments in a plea that, if unchallenged, would prejudice the plaintiff's case.

They further state that this would occur where a plea of confess and avoid has been entered, which admits parts of the *facta probanda* as pleaded but sheds new light on the original averments.<sup>2</sup> However, they conclude that this will occur in only a minority of cases and that, in general, replication is not necessary.

Furthermore, any litigant who files a replication must exercise caution and only plead as much as is necessary regarding these new facts, as introducing a new cause of action or attempting a *plus petitio*,<sup>3</sup> constitutes a departure and may lead to the replication being struck out or challenged by exception.

*Daniels*<sup>4</sup> concurs with *Peté et al* and elaborates on the practical considerations. The learned author goes on to state that, in an instance where a defendant pleads that a compromise was entered, the plaintiff may, for instance, replicate that the compromise was obtained by fraud, and this does not constitute a departure. However, what the plaintiff is not entitled to do is vary the version of events if, in fact, he/she/it caused the non-performance or delivery of the agreement.<sup>5</sup>

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<sup>1</sup> See: S. *Peté, D. Hulme, M. du Plessis, R. Palmer. Civil Procedure: A Practical Guide 1<sup>st</sup> Edition. New Africa Books (Pty) Ltd. 2006. p. 200, pp. 2.4. to 2.4.1.*

<sup>2</sup> See: *Ibid.*

<sup>3</sup> Claiming more than is usually due

<sup>4</sup> See: H. *Daniels. Beck's Theory and Principles of Pleadings in Civil Actions 6<sup>th</sup> Edition. Lexisnexis Druban. 2007. p.116 to 117.*

<sup>5</sup> See: *Ibid.*

Certainly, perhaps the most well-known case in which a replication might be employed is when a vindictory claim is filed, and the defendant submits a plea asserting a superior right, such as under a rental agreement.<sup>6</sup> Then, in that instance, the plaintiff may replicate that the lease agreement was cancelled.<sup>7</sup>

Finally, another instance in which it would be appropriate to file a replication is when a plaintiff wishes to estop a defendant from alleging facts in a plea which would otherwise constitute a defence.<sup>8</sup>

A replication serves a very narrow function, and a litigant should be wary to file one unprovoked. And for the abundantly cautious among us, remember, not filing a replication does not constitute an admission of the plea and its allegations.<sup>9</sup>

In the landmark case of *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd*<sup>10</sup>, the South African Supreme Court of Appeal reinforced these boundaries:

- Amend, Don't Replicate: If the allegations in the plea cannot be addressed without departing from the original claim, the plaintiff should seek an amendment to the claim rather than filing a replication.
- Alternative Causes of Action: In *Extel*, the plaintiffs attempted to raise a claim for unjustified enrichment in their replication after their main contract claim was found to be tainted by bribery.
- The Ruling: The Court held that the defendant was entitled to ignore enrichment as a cause of action because it was not pleaded in the original declaration. New causes of action must be incorporated into the particulars of claim to be valid.

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*Faischt v Colonial Government* 20 SC 210.

*The Guardian Assurance Co. Ltd. v Passaportis* 1915 SR 140.

<sup>6</sup> See: *Graham v Ridley* 1931 TPD 476 at 479.

<sup>7</sup> See: *H. Daniels. Beck's Theory and Principles of Pleadings in Civil Actions 6<sup>th</sup> Edition. Lexisnexis Druban. 2007.* p.116 to 117.

<sup>8</sup> See: *Ibid.*

<sup>9</sup> See: *Breyten Colliers Ltd v Dennill* 1912 AD 121 at 128.

<sup>10</sup> See: 1999 (2) SA 719 (SCA)

Conclusion:

Before rushing to draft a replication, practitioners must critically assess the necessity of the pleading. Consider: Has the defendant pleaded a confession and avoidance that requires a response? Has the defence significantly distorted the perspective of the matter, or is there a valid claim for estoppel?

Unless a specific legal response is necessary to contest the issue, the most effective approach is often to allow the pleadings to close naturally. If your core claim needs to change to comply with the plea, remember: an amendment—not a replication—is the appropriate tool. If there are no new facts to allege, these authors strongly recommend asking yourself: why respond at all?

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