EGLER FARMING (PVT) LTD

and

HOSPEL ENTERPRISES

versus

STANBIC BANK

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE 22 and 23 March, 2012

**CIVIL ACTION**

*W. Muchandibaya* for the plaintiffs

*T. Nyamasoka* for the defendant

 MUTEMA J: The plaintiffs’ story can be gleaned from their declaration. It is this:

In August 2009 the plaintiffs entered into a partnership agreement in terms of which the first plaintiff would import day old chicks from LA CHIX (PVT) LTD, a South African Company, to be sold locally by the second plaintiff. On 27 October, 2009 the first plaintiff made a telegraphic transfer of ZAR 128 350-00 from its account number 0622018874001 held with the defendant in favour of LA CHIX’s Standard Bank South Africa account number 200240684 for the purchase of day old chicks. On 28 October, 2009 ZAR 15 390,00 was similarly transferred for the same purpose. Both amounts were for 30 000 day old chicks which had been ordered from the plaintiffs by Zimbabwean customers who were due to receive them on 12 November, 2009.

 Standard Bank South Africa sent back the money to the defendant on 6 November, 2009 citing absence of reason for the transfer as required by new South African banking regulations. The defendant failed to advise the plaintiffs of this development. The plaintiffs only became aware of it on 10 November 2009 when they attempted to collect the day old chicks at LA CHIX and were told that payment had not been effected. When the plaintiffs attempted to make the transfer once more before the date the deliveries were due the defendant’s managing Director Tapambwa advised the plaintiffs that the returned funds had not yet reflected in the first plaintiff’s account and that the money would only be reflected in the account after 30 days. This advice was contrary to terms governing telegraphic transfers.

 The plaintiffs went back to Standard Bank South Africa which advised that the money had been sent back to the defendant and gave the plaintiffs a reference number. With the aid of that reference number the plaintiffs ascertained that the money had been returned on 6 November, 2009 and that the defendant had been holding onto the money since that date. The plaintiffs funds were eventually released on 13 November, 2009 at 15:00 hours.

 When the plaintiffs arrived at LA CHIX the following day they were told that the next available date for collection of day old chicks was 27 November, 2009. By the time the plaintiffs eventually collected the chicks, the due date for supplying their customers had expired and some customers had cancelled orders and demanded refunds. The plaintiffs incurred a loss of $16 800-00 when 16 000 chicks died whilst still in their custody. The nub of the dispute is that had the defendant promptly acknowledged receipt of the returned funds and credited the first plaintiff’s account, plaintiffs would have managed to pay for the chicks and met the delivery deadline thereby avoiding the loss incurred.

 By reason of the defendant’s negligence, plaintiffs suffered damages as follows:-

 Refunds to customers $16 800-00

 Loss of profit $ 7 500-00

 Total $24 300-00

This is the amount being claimed with interest plus costs of suit on a legal practitioner and client scale.

 The defendant denied that it was negligent and that the plaintiffs suffered damages.

 The issues referred to trial were four, viz:

1. Whether or not the defendant acted negligently in discharging its

obligations

1. Whether the plaintiffs suffered any damages as a result of the

defendant’s negligence.

1. What amount of damages did the plaintiffs suffer?
2. Whether or not the plaintiffs’ funds were returned to the defendant on 6 November, 2009.

At the hearing of the matter the plaintiffs led evidence from two witnesses and closed their case. The defendant then applied for absolution from the instance.

 The plaintiffs’ first witness was Juliet Chikwanda. She is the first plaintiff’s administrator. She confirmed the partnership concluded between the two plaintiffs and that the funds alluded to in the declaration were transferred by the defendant to LA CHIX’s account. She produced exhibits 1 and 2 – forms filled in by the first plaintiff on 27 and 28 October 2009 respectively for transfer of the funds for the purchase of 300 boxes of day old chicks. The chicks were supposed to be collected on 12 November, 2009. On 4 November, 2009 LA CHIX advised that the money had not reflected in their account because there was no export number and that the funds would be rewired back to the defendant and should be able to get it from the defendant on 6 November, 2009. When contacted, the defendant said the money had not yet been returned.

 On 11 November, 2009, the day the chicks were supposed to be collected from LA CHIX, the defendant refunded ZAR 15 000-00. With that money the plaintiffs hired special trucks and went to LA CHIX to collect chicks. LA CHIX advised the plaintiffs that the money had been returned to the defendant and gave the plaintiffs reference numbers confirming return. She produced reference document for ZAR 128 350-00 as exhibit 3, and the other for ZAR 15 390-00 as exhibit 4. Mr Mazhande of the second plaintiff took the documents to the defendant where he was given the ZAR 128 350-00. However, they failed to get the chicks on 12 November, 2009 as they had been taken by other customers. They then booked 300 boxes of chicks on 13 November, 2009 to be collected on 28 November, 2009. Some of their customers cancelled their orders and got refunds while others did not.

 Moses Mazhande, a director with the second plaintiff confirmed entering into a verbal agreement with the first plaintiff to use the latter’s import licence to buy chicks from South Africa for re-sale in Zimbabwe and then share the profits.

 The second plaintiff deposited money into the first plaintiff’s account held with the defendant who had advised that electronic transfer of funds was safer than carrying cash on person. He confirmed the two transfers alluded to by the first witness on 27 and 28 October, 2009, for the 300 boxes of chicks from LA CHIX.

 On 4 November, 2009, on enquiring with LA CHIX about the order to be collected on 11 November, 2009 he was advised that the money could not be transferred into LA CHIX’s account because LA CHIX had no export number which was a requirement in terms of the South African Reserve Bank regulations. He was told the money would be returned to the defendant on 6 November, 2009. The defendant was appraised of the position and the defendant assured the plaintiffs that everything would be processed and they should prepare to go and collect their day old chicks. This assurance was given to him by the defendant’s managing director Mr Tapambwa.

 On 11 November, 2009 he was refunded ZAR 15 000-00 that had been transferred back into the first plaintiff’s account. On 12 November, 2009 the first witness faxed him exhibits 3 and 4 which he took to the defendant and was given balance of the money which he took to LA CHIX on 13 November. He was only able to book chicks to be collected on 28 November, 2009. When the chicks ( 300 boxes ) were collected on 28 November, some customers had already cancelled their orders so only 140 boxes were taken. The rest of the chicks died and the plaintiffs hired transport to ferry the dead chickens for disposal. He valued the dead chicks at 16 800-00 and lost profit at $7 500.00. He also had to sell his property to raise refunds to customers who had cancelled their orders. After his evidence the plaintiffs closed their case and the defendant applied for absolution from the instance which the plaintiffs opposed.

 The test in deciding an application for absolution from the instance is well settled in this jurisdiction. GUBBAY C J in *United Air Charters v Jarman* 1994 (2) ZLR 341

(S) at p.343 B-C stated:

 “ A plaintiff will successfully withstand such an application if, at

 the close of his case, there is evidence upon which a Court,

directing its mind reasonably to such evidence, could or might

( not should or ought to) find for him.”

 Herbstein and Van Winsen in The Civil Practice of the Superior Courts in South Africa 3rd ed at p.462 state the test in these words:

 “ The lines along which the Court should address itself to the question of whether

 it will at that stage grant a judgment of absolution have been laid down in the

 leading case of *Gascoyne v Paul and Hunter* 1917 TPD 170, which contains the

 following formulation (per De Villiers JP at 173) :

 At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is:

 Is there evidence upon which a reasonable man might find for the plaintiff ?....

The question therefore is at the close of the case for the plaintiff, was there a *prima facie* case against the defendant, Hunter; in other words was there such evidence before the Court upon which a reasonable man might but not should give judgment against Hunter?

It follows from this that the Court is enjoined to bring to bear on the question the judgment of a reasonable man, and is bound to speculate on the conclusion at which the reasonable man of (the Court’s) conception not should, but might or could arrive. This is the process of reasoning which however difficult its exercise, the law enjoins upon the judicial officer.”

See also *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR.

 It has been held that an application of absolution from the instance stands much on the same footing as an application for the discharge of an accused person at the close of the State case in a Criminal trial: *Munhuwa v Mhukahuru Bus Service (Pvt) Ltd* 1994 (2) ZLR 382; *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 (S).

 Now, given the four issues referred to trial listed above vis- a- vis the plaintiffs’ evidence adduced by the close of their case, the question is whether there has been established a *prima facie* case against the defendant, in other words, is there such evidence before the Court upon which a reasonable man might or could give judgment against the defendant. I will deal with the issues hereunder.

WHETHER OR NOT THE DEFENDANT ACTED NEGLIGENTLY IN DISCHARGING ITS OBLIGATIONS.

 It is common cause that the contract was between the first plaintiff and the defendant. It is therefore legally not clear why the second plaintiff was joined as a party to the suit when there is no privity of contract between it and the defendant.

 Be that as it may, the contract was between the defendant and the first plaintiff with the former being mandated to transfer funds to South Africa for LA CHIX’s benefit. The evidence clearly shows that the defendant executed its mandate to the letter. Had it not been for LA CHIX not having sufficient documents ( the export number), this suit would not have been instituted at all, for the funds would have been credited into LA CHIX’s account by Standard Bank South Africa. The plaintiffs attempted to create negligence for the defendant by alleging that after Standard Bank South Africa had failed to transfer the funds into LA CHIX’s account it returned the money to the defendant timeously and had the defendant refunded plaintiffs then, plaintiffs would have been able to meet the 12 November, 2009 deadline for collection of the chicks and thus been able to deliver the chicks to their customers in time. It was established in cross-examination that the 1st plaintiff never advised the defendant that there was a deadline of 12 November for taking delivery of the chicks in question. Without this disclosure, the defendant could not have foreseen that any delay of refund would prejudice the plaintiffs not withstanding that the action was beyond the defendant’s control.

 Also, the first plaintiff having signed the MT/103 ( exhibits 1 and 2 ) which contain a disclaimer clause at the back limiting defendant’s liability for acts or delays beyond its control, the effect is that the defendant is protected against any such liability in the absence of the negligence on its part: *Cotton Marketing Board of Zimbabwe v* *National Railways of Zimbabwe* 1988 ( 1) ZLR 304 (SC).

WHETHER OR NOT PLAINTIFF’S FUNDS WERE RETURNED TO THE DEFENDANT ON 6 NOVEMBER, 2009.

 The basis for the cause of action which seems to be interwoven with the first issue of alleged negligence dealt with above appears to be that the funds were returned to the defendant on 6 November, 2009 but the defendant without just cause, held onto them. However, in the process of international transfer of funds and as adduced in cross-examination, by 6 November, 2009 the funds had not yet been debited but were still held by Standard Bank South Africa and not by the defendant. It came out in cross –examination of the first witness that the plaintiffs simply relied on what LA CHIX told them as opposed to official information by Standard Bank South Africa or the defendant.

 It was established that when Standard Bank South Africa advised the defendant the reasons why funds could not be credited into LA CHIX’s account and that the electronic transfer would be treated as null and void, the defendant credited the funds into the 1st plaintiff’s account on 11 and 12 November, 2009. Exhibits 3 and 4 relied upon by the plaintiffs do not show that the funds were returned on 6 November, 2009. To the contrary, they confirm an enquiry generated by the defendant on 6 November, 2009. It was never proven that on 6 November, 2009 the funds had been returned and the defendant was holding onto them without just cause.

 The following exchanges while the plaintiffs’ first witness was being cross-examined corroborate the foregoing finding:

“Q: What is your grievance against the defendant?

A: They delayed in transferring the money.

Q: How exactly did the defendant delay?

A: Money was supposed to be returned on 6 November but was returned on 11 November.

Q: Who advised you that the money was supposed to be returned on 6 November?

A: LA CHIX

Q: So it was not Standard Bank South Africa or the defendant?

A: Standard Bank advised LA CHIX and LA CHIX told us.

Q: Where is the communication between Standard Bank and LA CHIX to that effect?

A: There is none.

Q: On exhibits 3 and 4 where is it marked “funds returned”?

A: Date stamp

 Question repeated

A: Where it is written “re-routed”

Q: So your understanding of it is funds returned?

A: Yes

Q: Defendant will say status of exhibits 3 and 4 was of enquiry and not that funds were returned?

A: Yes

Q: Where did you get re-routed means refund?

A: I just thought so

Q: On 6 November you went to the defendant to enquire on status of transfer?

A: Yes

Q: Confirm in terms of e-mails on same day the defendant made the necessary enquiries?

A: Yes

Q: At that point the defendant acted swiftly?

A: Yes

Q: Here is e-mail from Standard Bank dated 11 November, 2009. Confirm as of that date that is when Standard Bank advised the defendant to return the funds to the plaintiffs?

A: Yes

Q: So from moment the defendant got instructions from Standard Bank if duly acted swiftly and released the funds into your account?

A: Correct

Q: So from 6 November to about 10 November the defendant was waiting for a response from South Africa?

A: I think so

Q: So you still maintain the defendant delayed refunding you?

A: No”

WHETHER THE PLAINTIFFS SUFFERED ANY DAMAGES AS A RESULT OF

THE DEFENDANT’S NEGLIGENCE, AND IF SO WHAT IS THE QUANTUM?

 The averment in this regard is that:-

 “ By reason of defendant’s negligence, the plaintiffs suffered damages as follows:

 Refunds to customers $16 800-00

 Loss of profit $ 7 500-00

Total $24 300-00

Well, having already found above that the defendant was not negligent in any way, it inevitably follows that it did not occasion any damages or loss to the plaintiffs. In any event, plaintiffs had a duty to mitigate their alleged loss but they did not. When they got the money on 11 and 12 November, 2009 they rushed to South Africa to make a purchase without confirming with LA CHIX whether or not they were still in time to make a purchase that would still meet the delivery date of 12 November.

 They also did not confirm with their clients if the orders were still standing. There was no evidence adduced – save for the mere say so – regarding orders placed by the respective clients, no evidence regarding the alleged refunds made to the aforesaid clients. The second plaintiff’s witness said he sold his own property to cushion such refunds but no evidence to that effect was adduced. Without such evidence plaintiffs cannot sustain the claim for damages as it is not clear how such loss arose. Plaintiffs fell short of proving a *prima facie* case that had the transaction proceeded according to plan, they would have made profit of $7 500-00 which would justify them being put in that position.

 In the result, on the evidence adduced by the plaintiffs, no reasonable Court might make a mistake and find for the plaintiffs. There is nothing the defendant should answer as it owed no obligation to either plaintiff having discharged its mandate in terms of the instructions given. The application for absolution from the instance therefore succeeds with costs.

*Muchandibaya & Associates*, plaintiffs’ legal practitioners

*Atherstone & Cook*, defendant’s legal practitioners