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**JOSES TAHUA T/A TAHUA TRADING**

**v.**

**WILLIAM MORGAN**

Plaintiff

USP LIBRARY

11 1996

Defendant

PACIFIC COLLECTION

And

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**JOSES TAHUA T/A TAHUA TRADING**

**v.**

**AUGUSTINE TANEKO**

Plaintiff

Defendant

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High Court of Solomon Islands  
(Palmer J.)

Civil Case 424 of 1993 and  
Civil Case 425 of 1993

Hearing: 26 September 1995

Judgment: 14 November 1995

*A. Radclyffe for Plaintiff*

*P. Tegavota for Defendants*

**PALMER J:** The Plaintiff is a dealer in marine products, including bech-de-mer. The Defendants are suppliers of marine products and have a standing arrangement with the plaintiff whereby cash advances are obtained from him to enable them to make purchases of bech-de-mer in their villages and then selling them to the plaintiff. That arrangement included the purchase of bech-de-mer in the rural areas at a slightly lower price than they would be sold to the plaintiff in Honiara. The difference is what the defendants would get as their commission.

There are two separate claims against these two defendants but have been consolidated because the claims are somehow linked. For the purposes of this judgment however, I will deal with these claims separately where possible.

**Civil Case No. 424 of 1993**

The claim of the plaintiff in this case is for the sum of \$10,156.46. He alleges that a number of cash advances were made to the defendant William Morgan, for the purchase of bech-de-mer but that the value of the products supplied was insufficient to recover the costs of those advances when tallied up. The details of those cash advances or transactions are set out fully in the Further and Better Particulars filed on the 11th February 1994.

1. Payment of \$20,000.00 to the defendant on 27 October, 1992

In the Defence of the defendant filed on the 10th May 1994, at paragraph 2, he denied receiving the sum of \$20,000.00. In his evidence in chief and under cross-examination however, he admitted receiving that money at Gizo. He conceded too that the money was given for the purpose of purchasing bech-de-mer for sale to the plaintiff.

2. Additional cash float delivered to the defendant by Joseph Hiele on 4 December, 1992.

In his evidence on oath, the plaintiff alleges that this amount was delivered to the defendant through one of his employees, J. Hiele, on or about the 4th December, 1992. J. Hiele had been sent with the additional money to check out how the defendant was getting on with the purchases of the \$20,000.00 given in October, 1992.

In the defence of the defendant, at paragraph 3, there is an admission of receipt of a sum of \$10,000.00 as pre-purchase. Under examination in chief and cross-examination, however, the defendant denies receiving the sum of \$10,000.00 from J. Hiele. There is another payment of \$10,000 on the 29th December, 1992, of which the defendant acknowledges receipt. It appears that the admission in paragraph 3 of the defence of the defendant, referred to the payment of the 29th December. There is a copy of an acknowledgment of receipt submitted as Exhibit '6'. The defendant also expressly admitted receipt in his evidence under oath.

Was there an additional disbursement of money to the defendant through J. Hiele? Under cross-examination, the defendant was asked if J. Hiele had given him \$10,000.00. The defendant denied being given \$10,000.00. He stated that J. Hiele made the purchases himself and then took the 59 bags with him. However, later on, when he was asked how much he had paid for the 59 bags, he answered that the \$20,000.00 was completely used up. He further added that it was not enough to purchase the 59 bags with. He then clarified or admitted that he had made purchases together with J. Hiele. However, he denied knowledge as to how much money was used in those purchases. He was then asked if J. Hiele used that money to purchase bags for him. His answer was that he went with him. He was also asked how he had paid for those bags. His answer was that J. Hiele had used more than \$3,000.00 in the purchases that they made. In a question put to him from the court to clarify regarding the number of bags purchased with the \$20,000.00, he stated that he had bought about 40-50 bags. The total number of bags bought was 59.

Apart from the sworn statement of the plaintiff, there is no other evidence to support his allegation that the amount of \$10,000.00 was actually given in full to the defendant. Joseph Hiele was never called to give evidence in support and to answer the sworn evidence of the defendant that purchases of about \$3,000.00 plus were made by them. There is also no evidence to contradict the answer of the defendant that between 40 to 50 bags were purchased using the \$20,000.00. If the latter answer

is relied on as some guideline, then that works out to an average of between \$400.00 to \$500.00 per bag. If 19 bags were purchased (59 less 40), at \$500.00 per bag then the total amount of money spent would come to \$9,500.00. If 9 bags were purchased at \$400.00 per bag, the total amount of money spent would be \$3,600.00. If the mid figure of 45 is used for the number of bags purchased for \$20,000.00, the number of bags purchased by J. Hiele would be 14 at an average price of \$445.00. The amount spent then would be about \$6,230.00 ( $\$445.00 \times 14$ ).

The claim of \$10,000.00 has been challenged to the tune of between \$3,000.00 to \$9,500.00. This challenge, however, has not been satisfactorily rebutted. On the balance of probability, I will accept the mid-figure of about \$6,230.00 as the amount disbursed by J. Hiele in favour of the defendant to bring the number of bags to a total of 59. In other words, the claim that \$10,000.00 was disbursed to the defendant by J. Hiele on or about the 4th December, 1992, has not been proven on the balance of probability. The only amount which I accept as being established on the balance of probability is \$6,230.00.

### **3. Purchase of 59 Bags of Bech-de-mer**

These bags were brought to Honiara by J. Hiele. It included the bags originally purchased by the defendant with the \$20,000.00 given in October of 1992, and the other bags also bought together by the defendant and J. Hiele. This amount is strongly disputed by both defendants William Morgan and Augustine Taneko, as being insufficient payment for those 59 x 50 kg bags of bech-de-mer.

The plaintiff stated on oath that those bags were in different sizes; some were in 30 kg bags. On receipt they were graded and then priced. The details of these are contained in a document, copy of which has been produced as Exhibit "5". Under cross-examination he admitted that on receipt of those bech-de-mer the higher price in Exhibit "2" would be applicable, and was in fact applied.

The defendants main argument in contrast is that they had sent 59 bags of bech-de-mer, each weighing approximately 50 kgs. The price of \$25,607.65 paid for those 59 bags, as far as they were concerned was inadequate. In his evidence, William Morgan stated that the 59 bags sent each weighed 50 kilograms. He stated that he had weighed them before they were sent to Honiara.

The weight of the bech-de-mer bought by the Plaintiff for the sum of \$25,607.65 however came to about 1,608.4 kilograms. This is about 1,341.6 kilograms of bech-de-mer less than the alleged total weight sent of 2,950 kilograms (59 x 50). No explanation has been provided to counter the claim of the defendants regarding the total weight of bech-de-mer sent. There are no records to confirm what the weight of those 59 bags were when they were taken from the defendant. One of the grievances of the defendant was that he was not present when the bags were removed and that therefore he did not accompany the bags to Honiara, and was not present at the weighing of those bags. This defendant stated that had he known, he would have accompanied those bags to Honiara. The defendant, Augustine Taneko, also felt aggrieved by the fact that he was never contacted by the

Plaintiff to be present at the collection and weighing of those bags, despite the fact that he was present in Honiara at that time.

Has it been proven that all those 59 bags collected were all the bags actually received, weighed and paid for as contained in Exhibit "5"?

On one hand it is possible to argue that all those bech-de-mer listed in Exhibit "5", may not be all the bech-de-mer collected in the 59 bags, for the reason that the determinative witness (J. Hiele) had not been called to give evidence to confirm or otherwise, whether all the bags collected had been safely delivered to the plaintiff. On the other hand, we have the sworn evidence of the defendant that he personally weighed all those bags and that they each weighed 50 kgs; producing a total weight of approximately 2,950 kgs. There is however no other evidence to support his claim, either in the form of a tally sheet, showing the different species of bech-de-mer and their respective weights as sorted out by him and recorded, or in the form of receipts when purchases were made from local sellers. Accordingly, there is no way of checking whether the details contained in Exhibit "5" are correct or not. Further, no evidence has been adduced to show that the plaintiff may have been mistaken or that he may have acted improperly.

On the evidence before this Court it is arguable whether all the bagsw collected were safely delivered to the plaintiff. What is clear however is that the amount of \$25,607.65 was credited in favour of the defendant in respect of those 59 bags.

**4. Expenses Claim of \$2,126.92**

The plaintiff alleges that on or about the 28th of December 1992, the defendant produced a list of expenses including petrol costs, provisions, boat hire charges and money spent on casual workers. Unfortunately no receipt or document has been produced in support. With respect, this is not good business practice. Men in business in my view must develop good business habits in ensuring that records are kept of any commercial transactions and that receipts are obtained for any payments made. These can then be produced as evidence in support when required.

In the Defence of the defendant filed on the 18th of March, 1994 at paragraph 5, he stated that the above amount of \$2,126.92 was payment made to the defendant for supplying trochus to the plaintiff. In his statement under oath however, the defendant simply made a flat denial of this claim. No receipt or documentary evidence has also been produced by the defendant in support of his defence. On the balance of probabilities I accept the plaintiff's claim that it was for an expenses claim of the defendant.

**5. Commission for 59 x 30 kg - \$2,000.00**

The amount of \$2,000.00 was supposedly paid for Commission, but in reality it is a gratuitous payment, because as far as the plaintiff was concerned, no commission was due to the defendant. The plaintiff explained that when the bech-de-mer were brought to Honiara, they were bought at the higher price listed in Exhibit "2". He also pointed out that the details of those bech-de-mer received and bought are contained in the list in Exhibit "5". The total amount paid for those bech-de-mer came to \$25,607.65. According to the plaintiff, he had given to the defendant, a total of \$30,000.00 to buy bech-de-mer with. The amount of bech-de-mer supplied however and bought at the higher price came to less than \$30,000.00. This meant that there was no commission due. The plaintiff explained that he paid the \$2,000.00 to help the defendant and also because he was a new customer and he wanted to retain him.

In his defence, the defendant admitted receiving the above amount, but when giving his evidence under oath he denied receiving it. He did however admit to receiving a sum of about \$3,000.00 on or about the 29th of December, 1992. On the balance of probabilities, I accept the evidence of the plaintiff that \$2,000.00 was paid to the defendant and reject that of the defendant.

**6. Additional Cash Float to Defendant - \$10,000.00**

This amount was given to the defendant on or about 29 December, 1992, at Honiara. There is documentary evidence in support of this produced in the form of a receipt, a copy of which is marked Exhibit "6".

The defendant does not dispute receipt of this sum. He however counter-claims for losses amounting to \$1,100.00 arising from 11 bags of bech-de-mer weighing approximately 550kgs sent to the plaintiff sometime in February/March of 1993.

The evidence of the plaintiff however on this is that only about 268.9 kgs worth of bech-de-mer were sent by the defendant, as recorded in the yellow tally form, in the bundle of documents marked exhibit "7". The total price paid was \$3,787.55.

In his evidence on oath, the defendant says that he accompanied those 11 bags. He has not refuted however, the claim of the plaintiff that he only received about 268.9 kgs of bech-de-mer, or that they were only worth \$3,787.55. The defendant says that he personally accompanied those eleven (11) bags to Honiara, but did not say if he was also present at the weighing and sale of his eleven (11) bags. One would expect him to be present and to witness what was being done about his bech-de-mer. If something was amiss then one would have expected him to point this out to the plaintiff straightaway. There is no evidence that this was done. There is also no other documentary evidence from the defendant to support his claim that the 11 bags shipped weighed a total of approximately 550 kgs. Again on the balance of probabilities, I accept the evidence of the plaintiff and reject that of the defendant.

7. Additional Cash Float Delivered to Defendant By J. Hiele - \$3,000.00

This amount was admitted by the defendant at paragraph 7 of his defence as having been received on the 11th of January, 1993.

8. Purchase of Products - \$3,787.55 (3/2/93)

This has been covered in Part 6 above.

9. Cash Float Delivered to Defendant By Dick Maitaki - \$1,000.00 (19/5/93)

This amount is also admitted by the defendant in paragraph 7 of his defence.

10. Purchase of Products - \$321.39 (26/5/93)

This amount is also admitted by the defendant in paragraph 7 of his defence.

11. Counter Claims of the Defendant

- (i) Balance of payment for 11 bags of bech-de-mer shipped to the plaintiff in February of 1993: \$1,100.00.

In the counter-claim of the defendant at paragraph 4, he stated that on or about February 1993, he shipped on the M.V. Regina 11 bags of first grade bech-de-mer, weighing a total of approximately 550 kgs. He says that the plaintiff took delivery of those bags and told him that the purchase price of all those bags was not more than \$10,000.00. The defendant however claims that the purchase price should have been \$11,000.00, and with a 10% commission on that, he should have earned \$1,100.00; hence the basis it seems for his counter-claim for that amount.

In his evidence under oath, the defendant produced receipts numbers 31, 32 and 33 (Exhibit "9"), as the receipts obtained in respect of those 11 bags. The total price paid came to \$5,712.70. Under cross-examination, the defendant stated that he accompanied those 11 bags to Honiara. If that was true, then he should have been in a position to witness and to confirm whether receipts 31, 32 and 33 correctly reflected the true weight and species of bech-de-mer delivered by him to the plaintiff, and the price paid. The defendant says that a total of approximately 550 kgs of bech-de-mer was shipped. The total weight recorded by those three receipts however was only 348.7 kgs. If what the defendant alleges in his counter-claim is true, then why didn't he raise any complaint or objection with the plaintiff at the weighing in and purchase of his products. The defendant raised a lot of fuss about not being able to accompany his 59 bags transported to Honiara in December of 1992. In March of 1993, he was able to accompany his bags of bech-de-mer and one would presume that he also presented himself at the weighing and sale of his bech-de-mer. If he was not present, then he did not say so in his evidence. But what is more important is that there is no evidence of any complaint raised about the details contained in receipt 31, 32 and 33.

The evidence in contrast of the plaintiff on this is very brief; admitting only that he did receive those eleven bags.

I am satisfied that on the evidence before me, the value of those eleven bags shipped by the defendant in March of 1993 has been proven only to the value of \$5,712.70 and not \$10,000.00.

**WAS THERE AN AGREEMENT OF A COMMISSION BETWEEN THE PARTIES TO BE CALCULATED AT 10%?**

With respect, there is very little evidence of such an agreement. It was never raised in the pleadings and no references to the existence of such an agreement was ever mentioned in evidence before this court. The plaintiff was also never cross-examined on this point. Accordingly, I am not satisfied on the balance of probabilities that such an agreement existed between the parties.

The commission claimed of \$1,100.00 therefore is without basis and must be dismissed. I also point out here that there is no evidence of any sort to support the allegation based on the calculation of a 10% commission, of a price or value of those 11 bags totalling \$11,000.00. There is also no evidence either, of a balance of payment for those 11 bags for \$1,100.00.

However, I must point out here that the sum of \$5,712.70 which was paid towards bech-de-mer supplied by the defendant, was not included in the Further and Better Particulars, filed on the 11th of February, 1994, by the plaintiff under his list of cash dealings between the parties. It is my view that this should have been included and off-set with the outstanding sum of \$10,156.46; reducing the amount outstanding straightaway to \$4,443.76.

- (ii) Value of 11½ bags of bech-de-mer supplied to the plaintiff in mid May 1993 and had not been paid for by the plaintiff: \$9,220.00.

In the counter-claim of the defendant at paragraphs 8 and 9, he claims that the 11½ bags of bech-de-mer were delivered to the plaintiff's representative at Korovou for shipment to Honiara. The total weight was approximately 575 kgs. He also stated that he received an Invoice/statement from the plaintiff attached to a tally sheet. No invoice/statement however has been filed in support. The defendant further asserts that there was a shortfall of approximately 257 kgs valued at some \$9,220.00. Again no documentary evidence has been filed in support, for instance to prove that the total weight of those 11½ bags was about 575 kgs. In his evidence, the defendant asserts that those bags were collected by the plaintiff's representative, Dick Maitaki. This was in May of 1993.

The plaintiff's defence in contrast to this claim was that he believed that those 11½ bags had been paid for by his representative, Dick Maitaki. Under examination in chief, the plaintiff placed the value

of bech-de-mer belonging to the defendant as amounting to only \$321.39, which was paid on or about 26 May 1993. Under cross-examination, the plaintiff argued strongly that his representative had paid for those bags of bech-de-mer and that he was shown their expenses and what the defendant was paid. However, no documentary evidence has been produced in support whatsoever. Secondly, that officer was not called to give evidence in support of his defence. The evidence of the plaintiff in real terms is based entirely on hearsay evidence; that is, what Dick Maitaki told him. In contrast, I have the sworn evidence of the defendant that he was never paid for those 11½ bags. I do note that under cross-examination it was suggested to him that Dick Maitaki had paid for those 11½ bags and that was the reason why he had not accompanied those bags in the usual manner to Honiara. The defendant however pointed out that the bags were delivered to the plaintiff's representative at an agreed place and taken to Honiara. He denied receiving any payments from the plaintiff. There is no receipt produced from the defendant or the plaintiff that any such payments were actually made.

In his evidence under oath, the plaintiff states that Dick Maitaki was his employee. The purchases that Dick Maitaki did therefore may be seen as being done by him in his capacity as the agent of the plaintiff and therefore they should be off-set to the defendant's credit. What is not clear from the evidence is whether the purchases done by Dick Maitaki were done in his separate individual capacity, with his own money, or by the plaintiff's money. As already pointed out, the dealings between the parties have not been done in true business-like manner; hence the confusions, allegations and claims that have arisen.

On the balance of probabilities, I accept the evidence of the defendant that he did supply to the plaintiff in mid-May 1995, 11½ bags of bech-de-mer and that he had not been paid for them, and reject the evidence of the plaintiff.

The defendant places the value of those 11½ bags at \$9,220.00. There is however, no evidence to show how the calculation of this amount was arrived at. The more correct thing to do is to get the plaintiff to account for the purchase of those 11½ bags to Dick Maitaki. Judgment should then be entered in favour of the defendant for that amount.

**SUMMARY OF DISBURSEMENTS AND PURCHASES MADE BY THE PLAINTIFF**

(a) The total amount of money disbursed in favour of the defendant for purchase of bech-de-mer, as found on the evidence before this court is as follows:-

(i)	Cash loaned to Defendant (27/10/92)	\$20,000.00
(ii)	Additional cash float delivered via J. Hiele (4/12/92)	\$6,230.00
(iii)	Additional cash float (29/12/92)	\$10,000.00
(iv)	Additional cash float delivered by J. Hiele (11/1/93)	<u>\$3,000.00</u>
	<b>Total:</b>	<b><u>\$40,230.00</u></b>



(b) The total amount of money paid to the credit of the defendant as found on the evidence is as follows:

(i)	Payment of expenses claim (28/12/92)	\$2,126.92
(ii)	Purchase of 59 x 50 kg bags of bech-de-mer (17/12/92)	25,607.65
(iii)	Commission for 59 bags of bech-de-mer (29/12/92)	2,000.00
(iv)	Purchase of products (3/2/93)	3,787.55
(v)	Purchase of products (26/5/93)	321.39
(vi)	Purchase of 11 bags of bech-de-mer (Feb. 1993)	<u>5,712.70</u>
	<b>Total:</b>	<b><u>39,556.21</u></b>

The amount outstanding therefore would come to only \$673.79 and not \$10,156.46 as claimed. However, in view of the order requiring the plaintiff to account for the moneys paid to Dick Maitaki for the 11½ bags purchased in May of 1993, the amount of \$673.79 should be deducted from that judgment sum to get the final judgment sum awarded in favour of the defendant.

**ORDERS OF THE COURT**

1. Judgment for the plaintiff in the sum of \$673.79.
2. Judgment for the defendant in his counter-claim for the moneys paid to Dick Maitaki in respect of the 11½ bags sent by the defendant.
3. The plaintiff is ordered to account for the said moneys and this shall form the judgment sum.
4. The judgment sum of \$673.79 in paragraph (1) is to be off-set with the judgment sum in favour of the defendant in paragraph 3.
5. The counter-claim for the sum of \$1,100.00 is dismissed.
6. Costs (see orders in CC425/93).

**Civil Case 425 of 1993**

The claim of \$8,000.00 by the plaintiff against the defendant was not disputed and accordingly judgment had already been entered.

The defendant however, counter-claims against the plaintiff for the balance due from the purchase of the 59 x 50 kgs of bech-de-mer in December of 1992. In his counter-claim, the defendant claimed

that each of those bags weighed 50 kgs each, and not 30 kgs or less, or in different sizes of bags with different weights. The defendant also claimed that the average price agreed upon was at \$20.00 per kilogram. The total weight of those bags being 2980 kilograms, the total value would be \$59,000.00. He further stated that he had been paid \$31,000.00 and therefore claims the balance of \$28,000.00.

It is clear that the 59 bags referred to here is the same 59 bags referred to in CC424/93. The evidence of the defendant concerning those bags with respect, is based almost entirely on what the defendant in CC424 had stated. Mr Taneko was not present when those bags were filled and prepared for transporting to Honiara. He was not present when those bags were collected by the plaintiff's representative and shipped to Honiara. He was also not present when they were collected at the wharf at Honiara and then weighed and priced according to the agreed price list between them. Quite obviously, the fact that he had not been informed by the plaintiff that those bags had arrived in Honiara and that he was not present when the bags were weighed, was the major cause of the subsequent falling out between the parties, and since that incident, the defendant has refused to have any more dealings with the plaintiff. Despite this, the fact remains that he had no personal knowledge of those bags and relies entirely on the evidence of William Morgan in CC424/93.

In my analysis of William Morgan's evidence, I concluded that the assertion of the defendant (W. Morgan) that there was a shortfall in the total weight of bech-de-mer received, was an arguable issue. Here, Mr Taneko seeks to go a step further and assert that the shortfall amounted to a loss to him of \$28,000.00. I have considered the question whether the calculation used by the defendant to arrive at the figure of \$28,000.00 justifiable. The defendant relies on this figure based on what he claims was a verbal agreement between him and the plaintiff sometime on or before October 1992 at the rate of \$20.00 per kg.

In contrast, the plaintiff states that that rate was offered in respect of the 46 bags of bech-de-mer which the defendant had promised to sell to him in October of 1992, when he cleared off the defendant's obligations with Hai-Way International (a local company), and one of the commercial banks. The plaintiff states that he waited for those bags, but none was sent, until the defendant requested a sum of money from him to purchase bech-de-mer at an agreed price and then sell to him at a higher price.

The evidence before me points to a number of separate dealings between the parties. The first relates to the discussions held between the plaintiff and the defendant in or before October 1992. Those discussions revolved around the issue of supply, sale and purchase of bech-de-mer. The plaintiff was interested in the defendant as a possible source of supply for bech-de-mer, and that he was interested in entering into some contractual arrangements with him. The evidence showed that there was some mention of about 46 bags which could be delivered to the plaintiff by the defendant, but that there were some prior commitments with other buyers which the defendant needed to extricate himself from first before he could be in a position to supply those bags to the plaintiff. The

plaintiff stated clearly under oath, that he was told by the defendant that he had 46 bags at his village in the Shortlands, but that he could not sell to him until he had cleared off his obligations. The evidence of the defendant in contrast was that his reference to 46 bags was only an estimate of the number of bags which he could supply.

In that meeting, the defendant also stated that he was told by the plaintiff that he was offering to buy his bech-de-mer at an average price of \$20.00 per kg. This has not been denied by the plaintiff. He however, pointed out that this was in respect of the 46 bags promised to be sent to him by the defendant.

Then there was another transaction involving the disbursement of \$20,000.00 in favour of William Morgan to purchase bech-de-mer and then sell them to the plaintiff.

My analysis of the evidence points in favour of accepting the evidence of the plaintiff, that the rate of \$20.00 per kg applied only to references to those 46 bags and rejecting the defendant's evidence. The transaction involving the \$20,000.00 was a separate transaction, the terms of which was based on the prices lists in Exhibits "1" and "2". Accordingly, there is no basis for the application of that average rate of \$20.00 per kg to the 59 bags of bech-de-mer which were received in December of 1992. The counter-claim of the defendant for the balance of \$28,000.00 accordingly, must be set aside.

In civil case 424/93, I expressed the view that it was arguable whether all those bech-de-mer collected in those 59 bags were received in one piece by the plaintiff and correctly recorded as contained in Exhibit "5". I pointed out that the crucial witness who would have been in a position to clarify this issue was J. Hiele, and that he should have been called. At the same time, I note that no evidence has been adduced to show that the plaintiff may not have recorded correctly, all the bech-de-mer received; that some may have been stolen or gone missing, or that the plaintiff may have acted improperly.

It is equally possible in the absence of any other evidence in support, in particular, documentary evidence, that the defendant (William Morgan) may have been mistaken as to the total weight of those 59 bags, and that all those bech-de-mer were in fact the ones as recorded in the list in Exhibit "5". Under cross-examination, both defendants did not deny that it was possible that all those bech-de-mer were the ones in the list in Exhibit "5". As pointed out in CC424/93, their major grievance was that they were not included in the actual weighing in and sale of their bech-de-mer, and especially when they felt that they should have obtained a lot more than the \$25,607.65 received.

Further, it is my view, that the defendant should have enquired with the plaintiff whether J. Hiele would be called as a witness, and to require that he be called to be examined as to whether all the

bags of bech-de-mer collected were safely delivered to the plaintiff or not. And if he had refused to attend, then a *sub poena* should have been issued.

I also note that Counsel for the defendant did not put to the plaintiff during cross-examination, that there was a shortfall in the weight of the bech-de-mer purchased, and to give the plaintiff opportunity to explain.

When all the above factors are taken into account, I am not satisfied on the balance of probability that the counter-claim of the defendant should be granted.

**ORDERS OF THE COURT**

1. Judgment for the plaintiff for \$8,000.00.
2. Counter-claim of the defendant is dismissed.
3. Each party to bear their own costs.

**NOTE:**

*It is noted that in CC424/93, judgment was given in favour of the defendant for his counter-claim. The defendants in both cases are brothers and so if they should wish to consent to have the judgments in both cases off-set against one another, then that can be done.*

**A. R. PALMER**

**JUDGE**