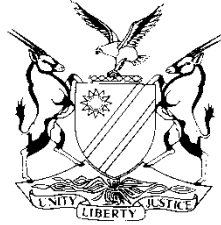


NOT REPORTABLE

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: I 497/2011

In the matter:

BETHOLD KAUKUETU

PLAINTIFF

and

TITUS MUHENJE

DEFENDANT

Case No. I 592/2011

In the matter:

TITUS MUHENJE

PLAINTIFF

and

EZEKIA KAUKUETU

DEFENDANT

Neutral citation: *Kaukuetu v Muhenje; Muhenje v Kaukuetu* (I 497-2011; I 592-2011)
[2015] NAHCMD 5 (26 January 2015)

Coram: VAN NIEKERK J

Heard: 24, 25, 26 October 2012; 26, 27 March 2013

Delivered: 26 January 2015

Flynote: Two cases heard together – First case is action for payment of balance of purchase price for vehicle sold – Plaintiff alleging that buyer contracted with him duly represented by plaintiff’s agent – Common cause that sale agreement was in name of alleged agent as seller – Plaintiff’s case based thereon that his identity as principal had been disclosed to buyer – Court holding that, on assumption that there was indeed mandate of agency, the agent acted on behalf of undisclosed principal – Plaintiff’s claim dismissed – Second case is action for restitution of part purchase price paid on contract induced by misrepresentation – Held that misrepresentation not proved on facts – Claim dismissed.

ORDER

1. In Case No. I 497/2011 the plaintiff’s claim is dismissed with costs.
2. In Case No. I 592/2011 the plaintiff’s claim is dismissed with costs.

JUDGMENT

VAN NIEKERK, J:

[1] In Case No. I 497/11 Mr Bethold Kaukuetu instituted action against Mr Titus Muhenje by way of simple summons for payment of the balance of the purchase price in respect of a Toyota Land Cruiser vehicle which was sold by the plaintiff to the defendant. In the declaration he relies on a partly written, partly oral, agreement allegedly entered into by himself, duly represented by Ezekia Kaukuetu, on the one hand, and Mr Muhenje on the other hand.

[2] In Case No I 592/11 Mr Titus Muhenje instituted action against Mr Ezekia Kaukuetu by way of combined summons alleging that an agreement of purchase and sale in respect of the Toyota was concluded between them. Relying on an alleged misrepresentation about the condition of the vehicle which induced Mr Muhenje to enter into the contract, he terminated the agreement on 7 December 2010 and demanded repayment of the amount of N\$148 000 already paid towards the purchase price while tendering the return of the vehicle. Mr Ezekia Kaukuetu having failed to re-pay the said amount, the action followed in which such repayment is claimed, plus interest and costs of suit. At a later stage it was agreed that the two matters should be heard together in the same trial.

[3] During pre-trial case management proceedings the parties agreed that the following were the issues of fact not in dispute: (a) that a contract of sale in respect of a vehicle was concluded between the plaintiff in Case No I 592/11 and the defendant in that case or the plaintiff and the defendant in Case No. I 497/11 and that the agreement was entered into on 20 July 2010; (b) that the purchase price for the vehicle was N\$220 000; (c) that the plaintiff in Case No I 592/11 took possession of the vehicle on or about 20 July 2010; (d) that on or about 7 December 2010 the plaintiff in Case No I 592/11 cancelled or purported to cancel the agreement and sought restitution; (e) that the plaintiff in Case No. I 497/11 received payment in the amount of N\$132 000 from the defendant (and not N\$148 000 as alleged in Case No. I 592/11, which amount was the result of a calculation error). At the start of the trial the parties further agreed that the agreement of purchase and sale was concluded at Opuwo.

[4] The issues of fact to be resolved during the trial were agreed to be as follows: (a) whether or not there was an agreement between the parties in Case No I 592/11 or an agreement between the parties in Case No. I 497/11; (b) whether or not the defendant in Case No I 592/11 warranted to the plaintiff in that case, that the said vehicle was never involved in an accident; (c) whether or not the vehicle was defective contrary to the warranty set out in (b) above; (d) whether or not the defect was such as to entitle the plaintiff in Case No I 592/11 to cancel the agreement and seek restitution on or about 7 December 2010.

[5] The issues of law agreed to be resolved were agree to be: (a) whether or not there was a misrepresentation by the defendant in Case No I 592/11 to the plaintiff to the effect that the vehicle was never involved in an accident; (b) if the answer to (a) is in the affirmative, whether or not the said misrepresentation induced the plaintiff in Case No I 592/11 to enter into the agreement; (c) in the event that the Court holds that there was inducement, whether or not the plaintiff in Case No I 592/11 has suffered damages of N\$132 000; (d) in the event of the Court holding that there was no such misrepresentation, whether the defendant in Case No I 592/11 should be held liable for latent defects in the vehicle (this issue later fell away); (e) whether or not there was an agreement between the parties in Case No. I 497/11 and whether the Defendant was in breach of such agreement; (f) in the event of the Court holding that there was an agreement between the parties in Case No. I 497/11, whether or not the defendant is indebted to the plaintiff in the amount of N\$88 000 for breach of contract.

[6] In order to make matters of reference easier, I shall refer to the parties by name or by their initials. Mr *van Vuuren* appeared for Mr Bethold Kaukuetu ("BK") in Case No. I 497/11 and for Mr Ezekia Kaukuetu ("EK") in Case No I 592/11. Mr *Kangueehi* appeared on behalf of Mr Muhenje ("TM") in both cases.

The evidence presented

[7] Evidence was first presented on behalf of BK. He testified in person and called two witnesses, EK and Mr Edward Louw, an expert in wheel alignment.

Bethold Kaukuetu

[8] He bought the vehicle in question, a Toyota Land Cruiser ('the Toyota') at an auction during approximately September 2009. He said the vehicle had a slight problem because it had previously been involved in an accident. The problem was that the roof, the bonnet and the right hand side fender were a little damaged. During cross-examination he stated that it looked as if a tree had fallen onto the roof. The vehicle had previously been used as a hunting vehicle. It used to have a set of rails which were fixed by brackets welded to the chassis and which could be used as a ladder to enter the vehicle. He bought some parts and took the vehicle to a panel beater to repair the damage. The repairs took about three weeks. He also registered the vehicle in his name.

[9] Thereafter the witness used the vehicle for about eight months. He also travelled with it to Botswana and never experienced any problems with the vehicle. He then bought another vehicle and decided to sell the Toyota. As he did not have time to do so himself, he asked his brother, EK, to drive with the vehicle to the North of Namibia to look for a buyer at a purchase price of about N\$240 000. This was roundabout April – May 2010. EK was accompanied by a member of the family, Mr Percy Nependa ("NP"). They stayed in the North for about a week, but were unsuccessful. The witness then instructed his brother to try at Opuwo. After three or four days in Opuwo EK telephoned and reported that they had met an elderly gentleman, TM, who was interested in buying the vehicle, but that they had to reduce the price. Later EK called again and suggested that they drop the price to N\$220 000 and the witness agreed.

[10] After a few days EK called again and reported that TM wanted to pay N\$102 000 in cash at that stage and pay the balance later by selling some of his cattle. EK stated that TM looked 'older than an elderly man' and that he trusted him, because he did not look like a person who would deceive them and besides, TM had a lot of cattle. BK consented to the suggested arrangement.

[11] On 20 July 2010 EK and TM then entered into a written agreement (Exh ""A") at Opuwo in terms of which the former, as seller, sold the vehicle to the latter, as buyer, for

N\$220 000, of which N\$102 000 was paid on 20 July 2010, the balance of N\$118 000 to be paid on 1 October 2010. The agreement also recorded that the engine, gearbox and axle were guaranteed for 12 months. The first instalment was paid into EK's bank account. EK reported this and further, that he and PN would be helping TM to gather the cattle to be sold. At a later stage he reported that they did not succeed in doing so, because the cattle were wild and the kraal not in a good condition and that it had been a struggle. After about a month EK and PN returned home to attend a funeral and handed the written agreement to the witness and EK transferred the money to BK's bank account.

[12] During this time EK reported to the witness that TM had telephoned and stated that the vehicle was in a good condition, but that he was experiencing problems with the tyres. The witness, who knew that the roads in the Opuwo area are rocky, thought that smaller tyres would suit the conditions better and instructed EK and PN to send smaller tyres to TM.

[13] At a later stage TM again telephoned PN, who reported to the witness that TM wanted rails for the bakkie. The witness obtained the rails. At a later stage after 1 October 2010 had passed EK reported that TM had called to say that he had money to pay for the vehicle. As there also happened to be a funeral to take place at Opuwo, the witness travelled there with EK and PN. They took the rails with them, as well as, at TM's further request, some bearings, a certain seal for the engine and the new licence of the vehicle. By this time it was near the end of October 2010. The party arrived on a Friday and first attended the funeral. They met with TM on the Sunday. The latter paid them for the parts and the licence. They arranged to go to the bank the next day to obtain the rest of the money.

[14] The next day EK and TM went to the bank and TM gave him N\$30 000 towards the balance of the purchase price. He handed it to BK. Afterwards they discussed the matter with TM and stated that the vehicle should be kept at the police station until the balance of N\$80 000 is paid. However, when TM said that he would pay the balance roundabout 14 – 16 November 2010, BK said that "they" (by which I understood him to refer to EK and NP) could not take the vehicle to store it at the police station as TM had

already paid a large amount towards the purchase price and as the period of time until 14 – 16 November 2010 was not long. He asked EK and PN whether they could not wait until that date for the money to be paid. TM also undertook to pay for the rails and the tyres then. It was then agreed as BK suggested. However, at some stage ‘they’ indicated that ‘they’ would leave and return on the agreed date. BK, EK and PN then returned to Windhoek.

[15] On 16 November 2010 BK instructed EK to telephone TM, who said that there was a problem which could not be discussed over the telephone. He said that EK and PN should travel to Opuwo to discuss the problem. BK gave them travel money and they left for Opuwo. EK later reported to the witness that TM had produced a document which indicated that there were certain problems with the vehicle. As I understand the evidence, this was Exhibit “C”, a report by TM’s expert witness, Mr van Blommestein of Deon’s Garage. BK instructed EK to bring the vehicle to Windhoek to be tested by experts there as well. As became clear later during the trial, this was eventually done during July 2012. It is common cause that a dispute ensued because of the problems found by Mr van Blommestein, the upshot of which was that TM refused to pay the balance and cancelled the agreement, where after the witness instituted action against him.

[16] The witness denied that the chassis of the vehicle was bent. He also indicated that the signs of welding on the chassis had to do with the brackets which held the rails previously used as a ladder when the vehicle was a hunting vehicle.

[17] During cross-examination BK agreed that he never spoke to the buyer at all before the agreement was concluded. He gave EK authority to sell his vehicle because he did not have time to do it himself. BK never indicated to the buyer that he was the owner of the vehicle. He agreed that TM could not see from Exh “A” that BK was the owner and further agreed that the agreement was between EK and TM.

[18] During re-examination he stated that he TM for the first time on or about 26 October 2010 but that they did not discuss anything about the vehicle.

Ezekia Kaukuetu

[[19] He saw the vehicle for the first time during 2009 'at home' after BK had bought it. The roof was bent slightly and there was damage to the bonnet and the right front fender. He thought that it could have been damaged by a tree having fallen onto the roof because there were a lot of leaves and 'branches' (twigs) on the roof and the vehicle itself. BK bought a new bonnet and fender and had the vehicle repaired. After this both BK and EK used the vehicle for some time. After BK bought another car, they decided together that they could not maintain two big vehicles at home and that the Toyota should be sold.

[20] He confirmed BK's evidence that the latter gave him 'permission and authority to go and sell the vehicle in the northern part of Namibia' for a price of N\$240 000. Accompanied by NP he left for the North and later for Opuwo to try to sell the vehicle. While in Opuwo they met the defendant, who was interested in the vehicle, but did not want to buy it at N\$240 000. The defendant said that he first wanted to test drive and examine the vehicle. The defendant's son test drove the vehicle accompanied by PN. On his return the son reported to the defendant that the vehicle had no problems. Then the defendant and his son left with PN to test the four wheel drive in a mountainous area. Upon their return they reported to the witness that the four wheel drive did not function well. He asked them whether they knew how to operate it, but he received no clear answer. EK stated that they could test it again on another day. The vehicle was then left in the possession of the defendant's son for a day or two.

[21] After this the four of them drove with a load of three drums of fuel to a certain place about 70 kilometres outside Opuwo where the drums were offloaded. The defendant drove the vehicle. On the way back they tested the four wheel drive again in a river bed. At this stage PN was driving, but the vehicle became stuck in the sand. After EK also attempted to drive the vehicle out, an unknown white man assisted them and drove the vehicle out of the sand. This man told the defendant that there was no problem with the 4 x 4. The defendant accepted this. They returned to Opuwo.

[22] The defendant then indicated that he would approach his bank about buying the vehicle. About four days later the defendant said that he was interested in purchasing the vehicle, but the price was too high. EK then told the defendant that the vehicle was registered in his brother's name, 'but we are selling it together' and that he must first telephone BK to hear what he says about the price. He called BK, who indicated that the lowest price he would accept was N\$220 000. A few days later EK met the defendant again, who offered to pay N\$220 000. A few more days lapsed. However, before he made any payment the defendant told EK and PN that 'his son or someone' had called him from Windhoek and had told him that the vehicle had been in an accident. EK said yes, he had noticed damage to the vehicle before, which he described, to the defendant as 'the roof was a little bit bent and the fender and the bonnet was (*sic*) also damaged, but it was fixed.' He said the defendant could take it or leave it. The defendant however stated that he was interested in the vehicle and whether it had been in an accident or not, he wanted it.

[23] A few days later on 20 July 2009 the defendant called to arrange that they meet at the bank in order to make payment. The defendant stated that he could pay N\$102 000 that day and would pay the balance later after having sold some cattle. EK suggested that they meet at the police station to draw up an agreement. However, the police did not want to be involved in the matter, so EK wrote the agreement (Exh "A") which he and the defendant signed. They agreed that the balance of N\$118 000 would be payable on 1 October 2010 because the defendant needed time to round up his cattle to be sold and because they still had to be kept in quarantine for a month. The defendant then transferred the amount of N\$102 000 to EK's bank account. After his return home after about a month and a half EK 'gave' the money to BK after subtracting his expenses.

[24] EK and PN remained in Opuwo because the defendant said that if they wanted the balance of the purchase price fast, they should help him round up his cattle to be sold. They agreed to do so and assisted the defendant on his farm and various other places to gather the cattle in the veld and to drive them to the kraal. The defendant drove the vehicle along various roads during this time. After about 1½ to 2 months EK and

Nependa returned home to Windhoek. On or about 1 October 2009, the due date for payment of the balance of the purchase price, EK telephoned the defendant, who said that he did not have the full amount, but that he was still collecting cattle to sell.

[25] They waited. At times the defendant would call him or PN to ask that they send him tyres, bearings, sealer and rails for the load box. Then the defendant called to say that he had the money and that they should come to Opuwo. At that stage they did not have time to travel to Opuwo, but a friend of the family died and so it happened that EK and NP travelled with BK towards the end of October 2010 to attend the funeral and to conclude the business regarding the vehicle. They took the rails with them.

[26] At Opuwo they met the defendant who then said that he only had N\$30 000 and that he would pay the balance together with the N\$4 000 for the tyres and the N\$5 000 for the rails within about 14 days. EK at first suggested that the vehicle be kept at the police station until payment was received, but BK said that they should not do this, saying that the 'old man' looked honest and that he needed the Toyota for transport and to collect his cattle. So the vehicle was left with the defendant. They agreed to give the defendant 14 days to pay the balance. BK returned to Windhoek with the N\$30 000 and EK and PN left for the North.

[27] When they had returned to Windhoek, the defendant called PN to say that they should come to Opuwo as there was a problem. They went there. The defendant showed them a document from a garage in Otjiwarongo which stated that there was a problem with the wheel alignment of the vehicle. EK wanted to know whether he had any wheel alignment done after the defendant had changed the tyres. However, there were some communication problems and this issue was not resolved. Eventually the defendant said that the vehicle should be taken to the garage in Otjiwarongo to be repaired at the cost of the seller, but EK disagreed and said that the vehicle should rather be taken to Windhoek. He also called BK and discussed the matter with him. The latter also suggested that the vehicle should be brought to Windhoek for testing. However, the parties could not agree and were just quarrelling. So he and PN left the vehicle with the defendant and returned to Windhoek, where after legal action followed.

[28] During cross-examination EK explained that, even though he and TM were the 'actors' as far as the transaction was concerned, BK also had a role to play in that he was the one who gave him permission or authorisation to sell the vehicle and he was also EK's advisor. Even though BK was not personally present during the negotiations, every time EK was negotiating with the defendant, he informed BK, who gave the green light', for instance, to reduce the price to N\$220 000.

[29] During cross-examination he stated for the first time that when he informed TM about the fact that the vehicle was registered in BK's name and that the latter had given him permission or authorisation to sell the vehicle, he also produced the vehicle's documents, which included the registration document, the licence certificate and the police clearance.

[30] During cross-examination it was put to EK that the agreement (Exh "A") was only drawn up after EK and PN had assisted TM in his efforts to collect cattle to sell in order to make up the purchase price. However, EK denied this throughout.

[31] It was also put to EK that the phone call which TM received from Windhoek was from his daughter, who informed him that the vehicle had been in an accident and that this phone call took place long after the agreement was concluded. However, EK denied this, stating that this phone call occurred before the agreement was concluded and that it was this phone call which prompted TM to ask them several questions about the vehicle.

[32] Counsel for TM also put various instructions relating to questions which TM had asked EK about the vehicle. These questions included pertinent questions about whether the vehicle had not been in an accident and whether it had not overturned before. EK's answers were to the effect that he did indicate to TM that the vehicle had been in an accident in the sense that a tree had fallen onto the vehicle. However, these questions were asked, according to EK after TM had received the phone call, which occurred before the agreement was signed. As a result of certain answers given by TM during cross-examination, with which I shall deal later, I do not deem it necessary to traverse the questions allegedly posed by TM in any further detail.

[33] After Mr Louw testified, BK's case was closed. Evidence was then presented on behalf of TM, who testified in person. Mr Deon van Blommestein of Deon's Garage, also gave expert evidence on his behalf.

Titus Muhenje

[34] TM confirmed that he met EK and PN in about July 2010. They had a Land Cruiser to sell. They eventually settled on a purchase price of N\$220 000. The actual seller was EK. PN was just accompanying EK. TM asked them asked who the owner was and whether the vehicle 'is your car', to which EK answered that it was his vehicle and that he had bought it from an old farmer from Gobabis. TM further asked if he bought it like that or painted the vehicle because the paint did not look like the original paint from the factory. EK answered that they had painted the vehicle another colour so that it would look nice. TM asked if the car had any other problem and to which the answer was 'no'. TM testified that he asked these questions because he wanted to buy the car.

[35] They then agreed that TM would pay the purchase price when he had sold some of his cattle. They agreed to go to the cattle post the next day. They stayed there for two weeks. TM then said to them that they could not find the cattle and maybe it would take too long to collect them; that he had N\$ 102 000 in bank to give them; that he would look for cattle later in his own time; and that he would pay the rest of the money later. They agreed. They drove back to Opuwo and the next morning drew up the agreement and he paid N\$102 000. They further agreed that he should pay the balance by 1 October 2010.

[36] Towards the end of October 2010 'they' phoned him and said that 'they' would come to collect the money. He told 'them' that he did not have the money as he had not sold any cattle yet. 'They' asked for some of the money and he agreed to pay some of it. EK and NP came to Opuwo and this time BK also with them. TM referred to BK as 'the gentleman who is sitting here in front, in court'.

[37] He discussed the matter with EK and PN and explained that he could only pay an amount of N\$30 000 because he had not sold his cattle. He transferred the money into EK's bank account. Later EK, PN and BK went to TM's house to discuss the matter

further. EK said that the vehicle should be kept at police station until the whole amount is paid. TM then said it is fine, but then all the money paid should also be kept at the police station. Then BK spoke for first time and said that they should leave it, as most of the money had already been paid. BK also said that if they (referring to EK and PN) were to take the vehicle, with what must TM go to collect the cattle to sell for the rest of the money? They then left the vehicle with TM and gave him the vehicle's new licence disc. It was agreed that TM would pay the balance within two weeks. BK never said that he was the owner of the vehicle.

[38] The three men returned to Windhoek and TM proceeded to his cattle post to collect his cattle to sell. Then his daughter phoned and during the conversation she informed him that there used to be a vehicle at the Kaukeutus' home that had been involved in an accident and had overturned. She asked him what kind of vehicle he had bought and whether TM had not taken the vehicle for a check-up. TM denied that his daughter already phoned before the agreement was concluded. About two days later he noticed that canopy and roof were not in good condition as they looked a bit skew when observed from the top. He then took the vehicle to Deon's Garage in Otjiwarongo to be inspected. He was informed that the vehicle had overturned at some stage before and he was given a written report. (Exh "C").

[39] TM went back to Opuwo. Then PN called him about the outstanding money and TM said they should come to Opuwo as there is a problem with the vehicle. EK and PN arrived some days later and TM told them that they had sold him a vehicle which had overturned and that they had not informed him of this fact, i.e. that they sold the vehicle "under pretences". EK denied that the vehicle had overturned. TM told them what his daughter had said and that the vehicle she had referred to was a Land Cruiser. He asked them where the vehicle was that had overturned which previously had been at their house and they said they sold it to another person. EK and PN denied that the Land Cruiser had overturned and EK said that a tree had fallen on it. TM asked why he had not told him this. EK said that they did tell him. They further discussed the issue. TM said that he would have the vehicle repaired and pay them the balance after the repair costs have been deducted. If the costs were more than the outstanding balance,

TM would pay the difference to Deon's Garage from his own pocket. Initially they agreed that EK and PN would meet him at Deon's Garage. He gave them N\$ 400 to travel back. TM then went to Otjiwarongo and telephoned them. They said they would come the following day. However, the next day NP phoned and said that they would not be coming, they only want their money. At a later stage he received the summons from BK.

[40] TM was cross-examined on several issues. It is not necessary to deal with all these aspects. He testified that he took EK's word that he was the owner of the vehicle and that he never saw the vehicle's registration papers or that they reflected BK as being the owner. He only saw the new licence disk when it was handed to him at a later stage. He denied that EK in fact showed him any documents relating to the vehicle. He did not notice that EK copied the engine and VIN numbers from any document. He just noticed these numbers in the sale agreement when he signed it. The first time that he realised that the vehicle was the property of someone other than EK was when he received BK's summons.

[41] Crucially, TM repeatedly stated during cross-examination that before they concluded the agreement he never asked questions relating to the issue of whether the vehicle had ever been in an accident or ever had overturned. Even when Mr van Vuuren put it to him that the issue of the vehicle having been in an accident was indeed discussed before the agreement was concluded, he firmly denied it. He repeatedly stated that this discussion only took place after his daughter had telephoned him and when EK and PN came to Opuwo the third time, i.e. during November 2010. From the evidence it is clear that this discussion occurred after he had taken the vehicle to Deon's Garage for the inspection by Mr van Blommestein. Clearly TM deviated in his testimony from the instructions he had given his counsel and on the basis of which EK was cross-examined about the questions asked by TM about the vehicle before the agreement was concluded and about the answers allegedly given by EK.

[42] After Mr van Blommestein testified, TM's case was closed.

Evaluation of the evidence and findings

[43] The first issue which is convenient to be determined is who concluded the sale agreement with TM, i.e. who was the seller of the vehicle? Was it BK or EK?

[44] In the first place it is relevant to note that the agreement was concluded without any indication that EK was acting on behalf of BK. The agreement was concluded in EK's name and he signed as seller. As the parties are lay persons and as EK may not have realised the importance of stating that he was acting in a representative capacity, I shall not consider this fact as conclusive on the issue in dispute.

[45] BK never testified that EK was acting as his agent. In fact he never even used words in his evidence indicating that EK acted as his agent or representative. He testified that he authorised EK to sell the vehicle 'for him', or merely that EK was authorised to sell the vehicle. It is so that words to the effect that a person 'acted on behalf of' another may be taken to indicate a relationship of principal and agent (*Lind v Spicer Bros (Africa) Ltd* 1917 AD 147). The only time these words were used while BK testified was when his counsel posed the following question (Record, p7): 'Now when you instructed your brother Ezekiel (*sic*) to go and sell the vehicle on your behalf, did you tell him how much you want for the vehicle?'

[46] When BK was asked to explain why the sales agreement was drafted in EK's name he stated (Record, p11):

'Because I give (*sic*) the authority to my brother to sell the vehicle and everything that they negotiate will be between my brother and the buyer or anyone who is going to buy the vehicle and the money was supposed to even be received by my brother, that is why.'

[47] This answer does not tend to convey that there was a mandate of agency by BK, but even if I assume in favour of BK that there may have been a tacit mandate, his answer tends to convey that the intention was not to disclose the existence of him as the principal.

[48] When EK testified he also never expressly stated that he acted as BK's 'agent'. During evidence in chief he never indicated that he acted on BK's behalf or as his representative. He only stated that he acted with BK's permission or authority to sell the vehicle. He only began to state that he acted as BK's representative or on his behalf during cross-examination when it was put to him that he never indicated to TM that he was acting in a representative capacity.

[49] In my view it is improbable that, if the agreement (whether express or tacit) was that EK should act as BK's agent, that both BK and EK would testify in this manner without making the matter clear in evidence in chief. However, even if I assume in favour of BK's case that there was indeed a mandate of agency given to EK, it must nevertheless be determined whether EK ever disclosed to TM that he was selling the vehicle on behalf of BK as is alleged by BK. If EK informed TM that he was acting as agent, TM's claim against BK must fail. If EK did not inform TM of the agency, then EK is a party to the sale agreement on the basis of the doctrine of the undisclosed principle, as counsel for TM submitted with reliance on *Katzeff v City Car Sales (Pty) Ltd* 1998 (2) SA 644 (C) at 647A.

[50] EK attempted to bolster his evidence that he did disclose the fact that BK was the vehicle's owner (which, of course in itself does not mean that he acted as BK's agent, as it is so that in law a person may sell property of which he is not the owner) by showing TM the vehicle's papers, which TM denied. However, EK's evidence is not satisfactory. Firstly, during evidence in chief he merely mentioned that he placed these documents on the counter at the police station at the time when the parties' intention was to draw up the agreement under the auspices of the police. He mentioned nothing further about the documents. During cross-examination he mentioned for the first time that he showed the documents to TM when he informed him that the vehicle was registered in BK's name and that he also copied the engine and VIN numbers from the vehicle's registration document.

[51] EK also contradicted himself on this issue. During evidence in chief he stated that he told TM that the vehicle was registered in BK's name during a conversation about reducing the purchase price which occurred four days after they had tested the 4 x 4 in

a riverbed and became stuck. During cross-examination he stated that he told TM this and showed TM the documents when TM's son started to test the vehicle, which happened already a day or two before they drove to the place where they tested the vehicle in the riverbed.

[52] It is common cause that BK was never introduced, nor did he introduce himself to TM when he travelled all the way to Opuwo at the end of October 2010. It is also common cause that it was not revealed to TM that the third person with EK and PN was in fact the owner of the vehicle or the actual seller or BK's principal. This being the case, I find it highly improbable that this would have occurred if EK had indeed disclosed to TM before the sale that BK was in fact the owner and that he was merely selling the vehicle on BK's behalf and even showed him the registration documents on two occasions, especially in circumstances where further negotiations were to be conducted because TM could not come up with the full outstanding balance. Their conduct of non-disclosure during October 2010 is more consistent with TM's version that EK did not inform him before the agreement was concluded that BK was the owner and that he was acting on behalf of BK. In fact, I have the impression that BK was intent during his testimony upon indicating that he was not really involved in the further negotiations, because he made a point of correcting himself when he testified about his suggestion that TM be allowed to keep the vehicle and that it not be kept at the police station, when he first stated that 'we cannot take the vehicle...' and then changed his testimony to 'they [meaning EK and PN] cannot take the vehicle to keep at the police station...' and also by questioning whether 'they', meaning EK and PN, could not wait until 14 – 16 November 2010 for the last payment.

[53] In my view the evidence is such that the probabilities indicate that, even on the assumption that EK acted as BK's agent, EK did not disclose that he was acting on BK's behalf, but that EK concluded the agreement in his own name as seller. BK's case is that it was disclosed to TM that EK was acting on his behalf. For the reasons stated above, this case is not supported by the available evidence on a balance of probabilities and must therefore be dismissed.

[54] I now turn to a consideration of TM's case against EK. This case is based on the allegation that TM was induced to purchase the vehicle by EK's misrepresentation that the vehicle had never been involved in an accident. However, as already discussed earlier, this case is completely undone by TM's answers during cross-examination. Clearly the alleged misrepresentation was not proved on TM's evidence.

[55] In light hereof it is not necessary to consider the evidence given by the two experts or to determine whether the vehicle suffered from defects indicating that it had indeed been involved in an accident.

Order

[56] In the result the following order is made:

1. In Case No. I 497/2011 the plaintiff's claim is dismissed with costs.
2. In Case No. I 592/2011 the plaintiff's claim is dismissed with costs.

(Signed on original)

K van Niekerk

Judge

APPEARANCE

Case No. I 497/2011

For the plaintiff:

Mr J van Vuuren
of Krüger, van Vuuren & Co.

For the defendant:

Mr K Kangueehi
of Hengari, Kangueehi & Kavendjii Inc.

Case No. I 592/2011

For the plaintiff:

Mr K Kangueehi
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For the defendant:

Mr J van Vuuren
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