IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA

NOT REPORTABLE

Case No.: 4132/2023

In the matter between:

VAN WILLING FUNERALS CC	First Applicant
Registration No.: 2005/057593/23	
CECIL BRIAN 'JUNIOR' VAN WILLING	Second Applicant

and

VISION DIRECT 155 (PTY) LTD t/a TRANSAFRICA	Respondent

JUDGMENT

EKSTEEN J:

[1] The applicants seek a final interdict restraining the respondent from passing off their business under the name, goodwill, and reputation of the first and second applicants, together with the further interdictory relief. The application is opposed.

[2] The first applicant, Van Willing Funerals CC (the close corporation) was incorporated in 2005 and registered as a funeral undertaker providing funeral and related services, which it says includes the provision of funeral policies. The second applicant, Mr 'Junior' van Willing (Mr van Willing), is the sole member of the close corporation. The respondent is Vision Direct 155 (Pty) Limited and is a Financial Service Provider (FSP), licenced under the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act), and intermediary trading under the name and style of 'Transafrica Group' (Transafrica). It is a group insurance specialist that offers a wide selection of tailor-made insurance benefits, including long-term, short-term, employee benefits, legal, funeral, credit, life, hospital and cellphone insurance. It was established in 2010 and has no involvement in the provision of funeral services, but it does offer a comprehensive range of funeral policies which are marketed nationally and internationally.

[3] Mr van Willing deposed to the affidavits on behalf of the applicants. He said that the close corporation has, since its inception, primarily conducted business in the areas of Kariega, Addo, Kirkwood, Paterson, Despatch, Humansdorp, Kwanobuhle, and Gqeberha, where it has developed a well-established client base. On 1 March 2023 Transafrica entered into agreements with three persons resident within this region, to whom it undertook to provide funeral policies. Mr van Willing said that it had fraudulently done so under the name and guise of the close corporation, without authorisation, and that the policy documentation contained a forgery of his signature. He annexed a full set of the documentation provided to each of the three identified individuals, and he contended that it amounted to passing off the business of Transafrica as that of the close corporation. I shall revert to the policy documentation.

[4] The applicants' complaint arises from the reference in the policy documentation to the name of the close corporation, and the covering letter addressed to the purchasers together with the provision of the policy documentation. The letter was written on the letterhead of Transafrica and has their logo and name prominently

displayed at the top of the page, and it sets out the address and contact details of Transafrica. Thereafter, the material portion of the letter, for present purposes, records:

‘ **TRANSAFRICA FUNERAL PROVIDER**

Policy Document

POLICY DOCUMENTATION

Van Willing Funerals

…

Dear …,

It is with pleasure that we forward your **Van Willing Funerals** policy document to you.

Thank you for placing your confidence in **Van Willing Funerals** and do not hesitate to contact us for any enquires you may wish to make.

Please ensure that you keep this letter and policy document in a safe place at all times. The policy is issued by **Van Willing Funerals**. The policy is underwritten by **CENTRIQ LIFE INSURANCE COMPANY** (FSP Number 7370).

…

The policy information, benefits and exclusions are as per the attached policy document. Please read and study it carefully …

We trust that this will be the beginning of a long and fruitful relationship and, should you require any assistance, kindly do not hesitate to contact us.

Yours faithfully

(Signature)

Junior Van Willing

Owner '

[5] Mr van Willing said that on 17 August 2023 the three purchasers were sent SMS messages by, or at the instance of, Transafrica confirming their policies with it, which messages were signed off under the name of the close corporation.

[6] In addition to these three policy sales Mr van Willing said that on 8 November 2023, Ms Annette Martin, a beneficiary of a funeral policy held with the close corporation,[1] had received an SMS sent by, or at the instance of, Transafrica advising her that a claim had been submitted to the claims department of the close corporation, and that a representative would be contacting her shortly in respect thereof. The SMS was signed off in the name of Van Willing Funerals.

[7] For these reasons, Mr van Willing contended that Transafrica had unlawfully, and with the intention to pass off under his name and that of the close corporation, and with the intention to infringe on the goodwill, reputation and good names of the applicants, misrepresented and used their names in the policy documentation marketed and sold by Transafrica, without any authorisation to do so. He argued that by doing so Transafrica had misrepresented that the funeral policies had been issued by the close corporation, and they had, by forging his signature, fraudulently misrepresented that he had endorsed the policies.

[8] Transafrica did not dispute the policy documentation, nor the content of the letter or the SMSs but contended that it had occurred pursuant to an agreement between the

[1] The terminology is problematic. As more fully explained later in this judgment at paras [9] and [10] the policies are held by the insurer, in this case Centriq. The close corporation may only be authorised to render financial services on behalf of a licenced FSP.

parties, which had been concluded at the instance of the applicants.[2] The interaction that had occurred between them is set out below.

Background

[9] It is instructive to first consider the functions of the various players in the conclusion of the contentious insurance agreements. All three of the policies to which I have referred earlier were sold on 1 March 2023 and were underwritten by Centriq Life Insurance Limited (Centriq). Centriq is the insurer, and its function is to evaluate the risk and set the terms of the policy, and they bear the financial responsibility for the policies. Centriq appointed Transafrica as a binder holder to conduct binder and intermediary functions on its behalf. A binder holder is an entity authorised by an insurer to perform certain functions on its behalf, including the issuing of policies, collecting premiums and handling claims. The binder acts under a binder agreement, which specifies the scope and the authority granted by the insurer. The effect of a binder agreement is to place a substantial portion of the administrative side of the insurer's business in the hands of the binder holder.[3] In addition to being a binder holder Transafrica also acted as an intermediary. As adumbrated earlier, Transafrica offered intermediary services[4] on behalf of Centriq. An intermediary advises clients, helps them to understand their insurance needs, and assists in selecting appropriate insurance products. The functions of an intermediary constitute financial services, as defined in the FAIS Act. No one may act or offer to act as a FSP unless they have been issued a licence to do so.[5] However, a licenced FSP may appoint a representative[6] either in terms of a service contract or other mandate,[7] to perform certain functions under the licence of the FSP, on behalf of the FSP, and under the auspices of the FSP.[8]

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[3] Section 49A(1) of the Long-Term Insurance Act, 52 of 1998; and *Santam Structured Insurance Limited and Another v Pringle and Another* [2024] JOL 63607 (LC) at para [13].
[4] As defined in the FAIS Act.
[5] Section 7(1) of the FAIS Act.
[6] Section 7(1)(b) of the FAIS Act.
[7] Section 13(1)(b)(i)(aa) of the FAIS Act.
[8] Section 13(1)(b)(i)(bb) of the FAIS Act.

Thus, a representative may market and sell policies under the FSP's licence and under its control.

[10] As adumbrated earlier, Transafrica is a licenced FSP. Neither the close corporation nor Mr van Willing is. After its incorporation, the close corporation was initially licenced as an FSP, but its licence was withdrawn in 2014. Accordingly, the close corporation was, in law, not entitled to sell funeral policies in its name after 2014. It is unclear whether the close corporation sold policies thereafter and if so, on what authority. However, on 1 July 2020 the close corporation entered into an agreement with Structured Risk Solutions (Pty) Limited (Structured Risk), a licenced FSP, to act as a representative on their behalf. Thus, the close corporation was entitled, at least after 1 July 2020, to sell funeral policies again, and Mr van Willing said that he had sold 1 671 policies in the last three years, presumably under the licence of the Structured Risk.

[11] Neither the close corporation nor Mr van Willing has entered into a service contract or other mandate agreement authorising them to act on behalf of Transafrica. However, in November 2022 Mr van Willing, acting on behalf of the close corporation, entered into an agreement (the underlying agreement) with Transafrica in terms of which Transafrica undertook to appoint Brijuwen CC (Brijuwen), a close corporation wholly owned by Mr van Willing and trading from the same premises as the close corporation, as mandated representative of Transafrica.[9] Mr van Willing nominated Brijuwen as the vehicle, together with twelve individuals, to be appointed as mandated representatives to sell funeral policies under Transafrica's FSP licence. Accordingly, Transafrica provided and forwarded the uncompleted representative agreements (the mandatory agreements) to Mr van Willing in the first week of December 2022. He arranged for the agreements to be completed and signed by Brijuwen and the nominated individuals and returned them to Transafrica on 7 December 2022. Mr van Willing arranged for the training of the individual representatives, which was provided by

[9] At para 48 of the replying affidavit Mr van Willing explained: 'At all material times hereto, it was the intention of myself and the first applicant, … in terms of the agreement between myself, on behalf of the first applicant, and the respondent, that Brijuwen was to be appointed as the mandatory representative of the first respondent and not the first applicant.'

Transafrica at the offices of the close corporation on 20 December 2022. All three of the contentious policies were sold by individuals so nominated by Mr van Willing, in terms of the underlying agreement concluded with Transafrica, who had been appointed as individual representatives in terms of the mandatory agreements.

[12] As I have said, Mr van Willing facilitated the completion and signature of the documentation for the appointment of the mandated representatives. Included in the documentation was a certificate of 'representative status' that was to be issued in terms of the FAIS Act to each mandated representative. Mr van Willing completed and signed the mandatory agreement, and the certificate of representative status, as the key individual, on behalf of Brijuwen. A certificate of representative status was completed, signed, and returned in respect of one Mr Billy Williams, one of the nominated individual representatives. It reflected that Mr Williams would function under the supervision of Mr van Willing, while all the remaining certificates of representative status reflected that the individual representative concerned would work under the supervision of Mr Billy Williams. Thus, all the individual representatives reported to Mr van Willing.

Factual Disputes

[13] Mr Smit, who deposed to the affidavits on behalf of Transafrica, said that the representative agreements came about at the instance of Mr van Willing, who had approached Transafrica in November 2022 to seek the appointment of the mandated representatives. Mr van Willing denied this and said that it was Transafrica that had approached the close corporation to conclude the underlying agreement. As I have explained, Mr van Willing nominated the vehicle and the individual representatives to be appointed, and he facilitated the completion of the documentation, which was duly signed on behalf of Transafrica upon receipt. Mr Smit said that in concluding the underlying agreement Mr van Willing had requested Transafrica to market the policies as 'Van Willing Funerals' policies. Hence the reference in the policy documents and the covering letter. He explained that they further agreed that the close corporation would be nominated as the beneficiary to receive the commission in respect of the sales of

funeral policies made by the mandated representatives pursuant to the agreement, and the commissions were paid to the close corporation.[10]

[14] These averments were met by a vehement but bald denial. The applicants did not request for the matter to be referred to oral evidence in order to resolve these disputes and Mr *Paterson*, who appeared on behalf of the applicants, acknowledged that, on an acceptance of the approach set out in *Plascon-Evans*,[11] the averments made by Mr Smit in this regard must prevail. Accordingly, it is accepted, for purposes of the adjudication of this matter, that the underlying agreement arose from the initiative of Mr van Willing and the close corporation, and that they had agreed that the policies should be sold as 'Van Willing Funeral policies', and the commissions earned should be paid to the close corporation.

The relief

[15] As I have said, the applicants sought a final interdict restraining Transafrica from:

> '(i) Passing off business under the name, goodwill and reputation of the first and/or second applicant;
>
> (i) passing off business with the use, adoption and imitation of the trade name of the first and/or second applicant, by sale, distribution or any other means, in any or funeral policies marketed and sold by the respondent; and
>
> (ii) forging the signature of the second applicant on or any funeral policy documentation passed off as that of the respondent.'

[10] The payments of commission were paid into the nominated account at Absa Bank. The 'Notices of Payment' provided by Mr Smit reflect 'payment to Van Willing Funerals'. The account, it transpired, was in fact that of 'Brijuwen'.

[11] *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634G-I.

[16] The cause of action, they said, was passing off. In *Capital Estate*[12] passing off was explained as follows:

> 'The wrong known as passing off consists of a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to passing off, one enquiries whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another … Whether there is a reasonable likelihood of such confusion arising is, of course, a question of fact which will have to be determined in the light of the circumstances of each case.'[13]

[17] It is a species of unlawful competition in trade or business and it is wrongful because it results in, or is calculated to result in, the improper filching of someone else' trade and/or an improper infringement of his goodwill and/or causing injury to that other's trade reputation.[14] It usually applies where one person passes off his merchandise as that of another, but it is not limited to goods.[15]

[18] In order to succeed in a claim for passing off a plaintiff is required to prove two things, namely first, that the trademark, get up, service mark, or trade name which he or she says has been imitated has become distinctive, that is that it has acquired with the public a reputation associated with his or her goods, service or business, and secondly, that the defendant's conduct is likely, or is calculated, to deceive the public.[16]

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[12] *Capital Estate and General Agencies (Pty) Limited and Others v Holiday Inns Inc and Others* 1977 (2) SA 916 (A).

[13] *Capital Estate* at 929C-E. See also H*oechst Pharmaceuticals (Pty) Ltd v The Beauty Box (Pty) Ltd (in liquidation) and Another* 1987 (2) SA 600 (A) at 613D-F.

[14] W*illiams t/a Jenifer Williams & Associates and Another v Life Line Southern Transvaal* 1996 (3) SA 408 (A) and *Pioneer Foods (Pty) Limited v Bothaville Milling (Pty) Limited* [2014] 2 All SA 282 (SCA) at para 7.

[15] See *Law of South Africa* (2nd ed) vol 2, part 2 at 252 and the authorities referred to therein.

[16] *Law of South Africa* vol 2, part 2 p. 252 para 264 and the authorities set out in fn 11.

[19] The requirements for a final interdict were set out in *Setlogelo*[17]. An applicant for an interdict is required to establish a clear right, an injury actually committed or reasonably apprehended in respect of such right, and that he has no alternative remedy.

The clear right

[20] As I have explained earlier, the applicants contend that their right to the relief sought arises from the policy documentation together with the covering letter and the SMSs that followed. Their cause of action is passing off. In *Caterham Car Sales*[18] the Supreme Court of Appeal (SCA) considered the first component, namely the reputational issue. They said at para [20]:

> 'The correct question can be distilled from the judgments on passing-off of this Court mentioned earlier … In general terms, it appears to me to be whether the plaintiff has, in a practical and business sense, a sufficient reputation amongst a substantial number of persons who are either clients or potential clients of his business.'

[21] The applicants contended that their trading name, Van Willing Funerals, has established a substantial reputation amongst members of the public in the areas in which they trade in relation to funerals and all related services. Mr van Willing explained that the business, Van Willing Funerals, had existed for many years prior to the incorporation of the close corporation in 2005, as a family business that was started by Mr van Willing's grandfather in 1938. After the incorporation of the close corporation it continued to trade under the name of Van Willing Funerals, and Mr van Willing said that the business had established a reputation for quality services over many years in the minds of the public.

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[17] *Setlogelo v Setlogelo* 1914 AD 221.

[18] *Caterham Car Sales & Coachworks Limited v Birkin Cars (Pty) Limited and Another* 1998 (3) SA 938 (SCA).

[22] I pause to record that in the founding papers the applicants had made no mention of their agreement with Transafrica and contended that Transafrica had unlawfully and fraudulently misrepresented that Mr van Willing had endorsed the policies and that they had acted with the intention to infringe on the goodwill, reputation, and good name of the applicants. In this regard it has been held that where a party had acted with fraudulent intent, it may not be necessary to prove reputation.[19] Upon receipt of the answering affidavit, in which Mr Smit had introduced reference to the various contractual relationships that I have referred to earlier, the applicants sought to file a supplementary founding affidavit, which was not objected to, in order to establish their reputation, no doubt because the case for the alleged bad faith on the part of Transafrica had been considerably undermined. Indeed, I do not consider, for the reasons fully set out later, that there can be any merit in the suggestion that the misrepresentation was calculated to deceive. However, for purposes of interdict proceedings, it is not necessary to allege either an intention to deceive or negligence.[20]

[23] I revert to the issue of reputation. Mr *van* As, who appeared for Transafrica argued that the applicants had not established the kind of reputation that has to be proved for purposes of passing off. In seeking to establish the reputation of the close corporation, Mr van Willing annexed numerous newspaper articles, published over time allegedly reflecting the standing of the close corporation in the eyes of the public, and of Mr van Willing's father, to his supplementary founding affidavit. Most of the articles were not dated nor is the publication in which they appeared identified, and in some instances, they were entirely illegible. Similarly, a number of 'testimonials', allegedly received from clients, have been annexed, but none of the authors have deposed to supporting or confirmatory affidavits. These documents do not advance the applicants' case. However, at least one article published in the Evening Post newspaper, which was widely circulated in the Eastern Cape, in January 1993 does record Mr van Willing's father as the owner of 'one of the largest funeral undertaking firms' in the region. This does lend support to Mr van Willing's evidence on oath.

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[19] *Appalsamy v Appalsamy and Another* 1977 (3) SA 1082 (D) at 1086.
[20] See *Kenitex Africa (Pty) Limited v Coverite (Pty) Limited and Others* 1967 (3) SA 307 (W).

[24] Mr van Willing said that when his grandfather died in 1970, the business had already established a reputation as a minority non-white funeral parlour, and that his father had run the business thereafter, still under the family name. As I have said, the close corporation was registered in 2005, and it continued with the business.

[25] Transafrica has raised nothing to gainsay the reputation of the close corporation, and I consider that the applicants have established its reputation and that of the trade name, 'Van Willing Funerals', in the minds of the public in relation to funeral services within the area where it trades. The same cannot be said of Mr Van Willing's reputation in the industry. He became a member of the close corporation after his father died in 2020, and there is no evidence of his involvement in the industry before that. At best, the evidence shows that he has sold 1671 funeral policies over the past three years.

[26] The second question that arises is whether the defendant's conduct was likely to, or was calculated to, deceive the public. Deception, whether conscious or unintentional, is the gist of the action[21] and the test is whether, in the light of all the circumstances of the case, there is a reasonable likelihood that ordinary members of the public, or a substantial section of them, might be confused or deceived into believing that the business or the merchandise of Transafrica is the same as, or is connected with, that of the applicants.[22] This is not a legal conclusion, but a question of fact, and while evidence indicating that people have actually been deceived may not be essential, it may in some cases be decisive.[23] In the present case the applicants relied on the sale of three funeral policies. None of the purchasers attested to supporting affidavits and the applicants did not allege that the purchasers had been confused or deceived in any manner. Similarly, Ms Martin, the alleged recipient of the SMS on 8 November 2023, did not attest to a confirmatory affidavit and it was not alleged that she had been confused or deceived.

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[21] *Blue Lion Manufacturing (Pty) Limited v National Brands Limited* 2001 (3) SA 884 (SCA) at para 4.
[22] *Brian Boswell Circus (Pty) Limited and Another v Boswell-Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (A) at 478; *Pioneer Foods* at para 7; and *Van der Walt and Midgley: Principles of Delict* (4th ed) at 90.
[23] See *Royal Beech-nut (Pty) limited v United Tobacco Co Limited* 1992 (4) SA 118 at 126E-F; and *Pioneer Foods* para 23.

[27] As I have said, the close corporation's certificate of incorporation reflects that it carries on business as a funeral undertaker and related services. Neither it nor Mr van Willing is licenced as a FSP and they are not permitted by law to sell funeral policies in their own name. They do so on behalf of a licenced FSP by virtue of a mandate agreement, and, as adumbrated earlier, it is unclear whether they had done so from 2014 to 2020. Transafrica conducts business as insurance specialists, offering a variety of tailor-made insurance benefits, including funeral policies. It is not a funeral undertaker. In considering whether there is a reasonable likelihood of confusion in the mind of the public, the absence of a common field of activity is a factor to be taken into account.[24] In this matter there is no common field of activity, save that the close corporation sells funeral policies on behalf of Structured Risk, but the question remains whether in all the circumstances of the case there is a reasonable likelihood that confusion of the kind mentioned may arise in the minds of ordinary members of the public, and it is a factual one.

[28] That brings me back to the policy documentation. Throughout the policy documentation the insurer is unequivocally identified as Centriq Life Insurance. Included in the documentation that the applicants rely on in each of the three policies was a document headed in bold print '**Important Information – please read carefully – disclosure and other legal requirements'**. The document identifies Transafrica as the FSP and sets out the contact details of Transafrica, which are the same as those reflected on the covering letter. It records that Transafrica is an authorised FSP in terms of the FAIS Act and that it accepts liability for all financial advice and intermediary services provided by their representative. It discloses that Transafrica is a binder holder in terms of a binder holder agreement with the insurer, Centriq, and thereby earns a binder fee of 9,43% of the gross written premium for binder services performed, which includes claims settlement. Accordingly, the documentation provided together with the covering letter unequivocally discloses the role of Transafrica and Centriq in the transaction. It is true that the policy documentation refers to the policies as 'Van Willing

[24] *Capital Estate* 929F-G.

Funerals' policies, but explains that they are provided and underwritten by Centriq. Thus, the role of the entities is clearly explained in the documents, and Mr *van As* argued accordingly, that no confusion in the minds of ordinary members of the public could arise.

[29] The information expressly provided does not detract from the clear terms of the covering letter and the trade name 'Van Willing Funerals' used in identifying the policy. The use of the name constitutes an express representation, at best for Transafrica, that there is an association between the policies and the business of the close corporation[25] which, ordinarily, is likely to give rise to confusion of the kind mentioned in the minds of the public within the area where the close corporation trades. However, to found a case of passing off, and in particular for an interdict, the representation must be both false and unauthorised.[26] The underlying agreement, and the mandatory agreements, are set out earlier. It was by agreement between the parties and thus by consent that the policies were sold as Van Willing Funerals policies.[27] The agreement was concluded in November 2022, and the three contentious policies were sold early in 2023. The covering letters were all dated 22 April 2023 and the date of inception of each policy is reflected as 1 March 2023. Mr Smit said that no further policies were sold under the mandatory agreements after 8 March 2023. Thus, the representation reflected in the policy documentation and the covering letter was authorised at the time it was made. An authority of this nature may, of course, be withdrawn at any time and a demand was made by Van Willing Funerals in September 2023 calling on Transafrica to stop using their name in any further policy documentation, which they said was a misrepresentation made without authority. For the reasons set out earlier I have concluded that the representations were authorised at the time and Transafrica have not sold any further policies in the name of the close corporation since the letter of demand.

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[25] See *Jenifer Williams* at 418D-E.
[26] *Amler's Precedents of Pleadings* (9th ed) p. 291.
[27] See *Nino's Coffee Bar & Restaurant CC v Nino's Italian Coffee & Sandwich Bar CC and Another; Nino's Italian Coffee & Sandwich Bar CC v Nino's Coffee Bar & Restaurant CC* 1998 (3) SA 656 (C) at para [40].

[30] I turn to the SMS sent to Ms Martin on 8 November 2023. The SMS acknowledged the receipt of a claim under the policy in issue, and it promised that a representative would contact the claimant shortly thereafter. It is not in dispute that the SMS emanated from Transafrica, but Mr Smit explained that as financial advisor and approved FSP licence holder for all the policies sold by the mandated representatives Transafrica was required, in terms of the Insurance Act, the FAIS Act, and the Policy Holder Protection Rules[28] to contact and service the policy holders. Claims, he said, were normally submitted to Transafrica's management representative, who was then obliged to forward the claims to Transafrica on behalf of the policy holders. Transafrica then evaluated and paid the claims directly to the beneficiary on behalf of the insurer.[29] Mr Smit declared that the process had been followed since the signing of the mandatory representative agreements. This accorded with the 'important information', referred to earlier, provided together with the policy documentation and related to a policy sold as a Van Willing Funerals policy during the subsistence of the mandate.

[31] To summarise, I consider that the applicants have established that the trade name of the close corporation, Van Willing Funerals, was known in the market and had acquired a public reputation within the areas in which they conduct their operations. There is no evidence to support a conclusion that Mr van Willing (Mr Junior van Willing) had developed a similar reputation, as distinct from the close corporation, in the trade. However, by the conclusion of the mandatory agreements with Transafrica the close corporation and Mr van Willing had consented to, and encouraged, the use of the trade name in the sale of funeral policies underwritten by Centriq.

[32] I do not lose sight of the signature reflected at the foot of the covering letter. It is not a forgery, in the sense of an imitation, and the signature applied to the document bears no resemblance to that of Mr van Willing. However, as demonstrated earlier, it is identified as being that of Mr van Willing. Mr Smit acknowledged that it was an error. He explained that the covering letter was a computer-generated document and it ought

[28] Issued in terms of s 62 of the Long-Term Insurance Act 1998.
[29] See para 9 above.

to have reflected the details of Transafrica at the foot of the page. He said that it had been a bona fide error and that it had been corrected. The applicants argued that the signature, so identified, on the covering letter created the impression with the public that the second applicant had endorsed such policies. As adumbrated earlier, the second applicant has not demonstrated a reputation of his own, in the sense required in a case of passing off. His reputation in the minds of the public is bound to that of the close corporation. In concluding the underlying agreement, the applicants had authorised their representation that the policies were endorsed by and associated with the close corporation. Accordingly, the applicants have not demonstrated a clear right to relief sought in the notice of motion.

Injury actually committed or reasonably apprehended

[33] Mr van Willing contended that the conduct of Transafrica was likely to result in members of the public being confused, or misled, to believe that policies marketed and sold by Transafrica were authorised, issued, and endorsed by the applicants. This, he argued, would result in substantial prejudice to their established goodwill, reputation, and name, which would consequently lead to significant financial and reputational damage.

[34] As I have demonstrated, by concluding the underlying agreement the applicants did authorise and endorse the sale of the Centriq policies as Van Willing Funerals policies. In any event, while an applicant for an interdict is not required to prove actual prejudice, they must show that loss is likely to result.[30] I have referred earlier to *Capital Estate* where it was said that the absence of a common field of activity will not always bar a party from obtaining relief for passing off as the crucial question in every case is whether there is a reasonable likelihood of confusion. However, the SCA proceeded to observe:

[30] See *Van Heerden and Neethling: Unlawful competition* at p. 194.

> 'The related question whether damage can arise in a case where businesses are not carried on in a common field, is likewise one of fact. Regard must be had to the facts of each particular case, and it cannot be accepted as axiomatic that damage cannot arise where there is no common field of activities. …'[31]

[35] The activities of the close corporation and Transafrica have been described earlier. The nature of their business activity differs, but there is an area overlap. The close corporation, albeit as representative of Structured Risk, sells funeral policies in the areas in which they conduct funeral undertakings. I have referred earlier to various newspaper articles annexed to Mr van Willing's supplementary affidavit in order to establish the reputation of the close corporation. In one of the undated articles which allegedly appeared in an undisclosed publication the history of the family business was described. It recorded that Mr van Willing's father had realised that members of the public laboured under the misconception that if they had purchased a funeral policy from an undertaking firm they were obliged to use the services of those undertakers to perform the burial. The article proceeded to explain how Mr van Willing (Senior) had walked from door to door to advise the public that an insured was entitled to use the proceeds of a funeral policy held with any firm in order to engage the services of Van Willing Funerals. This remains the legal position, and whereas neither Transafrica nor Brijuwen are funeral undertakers any policy sold under the name of Van Willing Funerals is likely to result in the engagement of the close corporation to perform these functions. This, no doubt, underlies the close corporation's request that the policies should be sold as 'Van Willing Funerals' policies, and, from this perspective the close corporation is bound to benefit.

[36] The loss arising from filching of trade could arise only from the deprivation of commissions which flow from the sale of policies. But, in this case, Mr van Willing had nominated Brijuwen and the individual representatives, all of whom function under the supervision of Mr van Willing. As I have said, the agreement reached was for the

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[31] *Capital Estate* 929F-H.

commissions to be paid to the close corporation. Accordingly, there is no loss of commission, albeit that the account number nominated for the payment of the said commission is that of Brijuwen.

[37] As adumbrated earlier the applicants contend that the conduct of Transafrica will result in prejudice to their well-established goodwill, reputation, and name, which Mr van Willing said would lead to significant financial and reputational damage. The misappropriation of a business's trade name may infringe the right to goodwill of the business concerned in two ways. First, it may injure or damage the reputation or good name of the performance of the aggrieved party, usually referred to as disparagement. This is the case where the perpetrator's performance is of a bad or an inferior quality and the public, because of their contact with this performance, lower their assessment of the aggrieved party's performance as a result of the association between the performances. Secondly, there is a danger that the conduct complained of may lead to the dilution of the advertising value of the aggrieved party's trade name.[32] In this case the applicants have not alleged any poor or inferior quality product or service. It is not contended that the policy underwritten by Centriq is inferior to any other, nor has there been any suggestion of poor or inferior service by Transafrica to policy holders. I do not consider that a case has been made for disparagement and the applicants could hardly rely on dilution where they themselves have authorised the policies to be marketed as 'Van Willing Funerals' policies. Accordingly, I do not consider that the applicants have demonstrated a reasonable apprehension of harm.

Costs

[38] Mr *van As* urged me to make a punitive costs order against the applicants. In support thereof he alluded to the applicants' failure to disclose in its founding affidavit the contractual relationship which gave rise directly to the mandatory agreements appointing the representatives who sold the contracts. He drew attention to the failure on the part of the applicants to provide confirmatory affidavits by the purchasers of the

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[32] *Unlawful Competition* p. 209.

three contentious policies or any of the authors of the 'testimonials' annexed to the supplementary founding affidavit in respect of the alleged reputation of the close corporation. He categorised the application as 'frivolous' and argued that the applicants had attempted to rely on selective and unsubstantiated evidence. Whilst there may be merit in many of these submissions, I do not consider that they justify the categorisation of the application as 'frivolous' and, in the exercise of my discretion I do not think that a punitive costs order is justified.

[39] In the result:

1. The application is dismissed.

2. The applicants, jointly and severally, the one paying the other to be absolved, are directed to pay the respondent's costs, the costs of counsel to be taxed on Scale B.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Applicants: Adv N Paterson
Instructed by: Karsans Inc
GQEBERHA

For Respondent: Adv E van As
Instructed by: Bennecke Thom Inc
c/o Van Heerden Attorneys Inc

	GQEBERHA
Date Heard:	2 May 2025
Date Delivered:	17 June 2025