FORFEITURE BY A BENEFICIARY WHO CONSPIRES TO ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM: *DANIELZ NO v DE WET* 2009 (6) SA 42 (C)

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INTRODUCTION

A person who unlawfully kills another is not entitled to inherit from his or her victim (Voet *ad Pandectas* 34.9.6 (Gane's translation, 1956); Van Leeuwen *Censura Forensis* 1.3.4.42 (Schreiner's translation, 1883)). This exclusion can be arrived at in two ways. First, in terms of the general principle that no person may be enriched by his or her own unlawful conduct, or benefit from conduct that is punishable (Van Leeuwen *Het Roomsch Hollandsch Recht* 3.3.9 (Kotzé's translation, 1881); *Taylor v Pim* (1903) 24 NLR 484; *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) at 752D–E read with 752G–H; *Parity Insurance Co Limited v Marescia & others* 1965 (3) SA 430 (A) at 435A–B) and secondly, in terms of the principle of the law of succession that de bloedige hand en neemt geen erffenis. In terms of the latter principle a person lacks capacity to benefit from the deceased who unlawfully killed the deceased (Grotius *Inleiding* 2.28.42 (Maasdorp's translation, 1903)) or a close family member of the deceased (one of the deceased's conjunctissimi personae) (*Ex parte Steenkamp and Steenkamp* (supra) at 748A).

The exclusion of the killer is straightforward in cases of murder, but the extent to which the exclusion applies in other circumstances (i e those not constituting murder) in which a person unlawfully brings about the death of another is contested. Does forfeiture result from all cases of culpable homicide? Or from an unlawful killing that constitutes neither murder nor culpable homicide? With respect to negligent killing (culpable homicide), Van der Walt and Sonnekus have argued that forfeiture should not result from a death caused by mere negligence (in the sense of any departure from the objective standard) but should result only if there was an element of morally reprehensible conduct involved. They argue that this is in conformity with the Roman-Dutch approach to negligence in which (they say) a subjective test for negligence was employed so that forfeiture only resulted in cases of morally reprehensible conduct (see J C van der Walt and J C Sonnekus 'Die nalatige bloedige hand — neem dit "erffenis"?' 1981 *TSAR* 30 especially at 38 last para, 39–40, and 43 first para). The principle that negligent killing results in forfeiture in modern South African law was affirmed by McLaren J in *Casey NO v The Master & others* 1992 (4) SA 505 (N), but he was not prepared to accept the modifications to the test for exclusion suggested by Van der Walt and Sonnekus, and indicated that in his view forfeiture follows even from a death caused by negligent driving in the circumstances described by the authors, who had suggested that if a car leaves the road and overturns on a bend, killing the passenger, the driver should not be excluded from inheriting from the passenger (*Casey* (supra) at 510G in fine, Van der Walt and Sonnekus op cit at 30 third para read with 43 first para).

Against this background, which indicates that the limits of the 'bloedige hand' rule are unclear, the decision in *Danielz NO v De Wet & another* 2009 (6) SA 42 (C), [2008] 4 All SA 549 (C), which is the focus of this note, is particularly interesting.

THE FACTS

In May 2000 the late Mr de Wet (hereinafter 'the deceased') had a disagreement with his wife, Mrs de Wet, as a consequence of which she resolved to 'teach the deceased a lesson' (para 23 (a) & (f)) and for this purpose engaged the services of one Benting to assault the deceased in exchange for a sum of money (para 23 (f) & (g)). It was Mrs de Wet's intention that the deceased should be assaulted 'so severely that he would be confined to a wheelchair' (para 24). To this end, Mrs de Wet left the front door of their house open one evening and arranged for the live-in domestic help to be out of the way (para 23 (i)). That night one or more persons entered the house and shot the deceased eighteen times, thereby killing him (para 23 (j)). In due course, Mrs de Wet was convicted in the High Court of assault with intent to do grievous bodily harm to the deceased, as well as of conspiracy to so assault the deceased (para 10). The criminal court found that there was insufficient evidence that Mrs de Wet intended to kill the deceased, or foresaw that he would die, and accordingly she was acquitted on charges of murder (para 9 read with paras 10 & 25). In the civil proceedings it was not disputed that the deceased died as a result of the assault (para 21).

Mrs de Wet was the sole nominated beneficiary under four insurance policies over the life of the deceased (para 26) and the issue was whether she was entitled to benefit from the proceeds of the policies amounting to almost R2 million (para 7) either directly, as nominated beneficiary of the policies (para 13 (a)), or indirectly as a co-owner of the joint estate if the policies were paid into the joint estate (para 13 (b)), or indirectly by way of inheritance in terms of the will of the deceased if the proceeds of the policies formed part of the deceased's estate (ibid).

THE DIRECT CLAIM AS NOMINATED BENEFICIARY OF THE POLICIES

With respect to Mrs de Wet's direct claim to the proceeds of the policies, as nominated beneficiary, Traverso AJP held that she was not entitled to benefit. Traverso AJP pointed out that an insured may not claim indemnification if he or she intentionally precipitated the risk insured against (para 27), nor if the insured 'render[s] himself/herself unworthy' by his or her intentional criminal conduct that is 'so connected with the risk [insured against] and so repugnant to good morals, that public policy requires that the assured cannot claim the benefit under the policy' (para 27). Exclusion under the second of these grounds 'will depend by and large on a value judgment of the court, based on the particular facts of each case' (para 30). Although Mrs de Wet

could not be excluded on the first ground because she did not intend to kill her husband (this is implicit in the opening sentence of para 30 read with paras 32–33), Traverso AJP held that public policy required that she be prevented from benefiting from her conduct in planning and participating in the vicious assault of her husband which ultimately caused his death (para 33).

Traverso AJP was supported in her conclusion on this point by a decision of the English Court of Appeal in *Gray & another v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 All ER 949 (CA), in which it was held that if the person seeking indemnity under an insurance policy was guilty of intentional and unlawful acts of violence, or threats thereof, that result in death then the insured cannot claim even though the death was unintended (*Danielz* para 31 read with paras 32 and 33, referring to *Gray* (supra) at 956 last para). In *Gray* (supra) the insured had taken a gun to the house of his wife's lover intending to threaten the lover and in the course of the ensuing altercation between them a shot was fired and the lover was killed, possibly as a result of a tussle between them or as a result of the gun being dropped: the facts were not clearly established. The insured was acquitted in criminal proceedings resulting from the incident, because the shot might have been an accident, but he was sued by the widow in a civil claim for compensation and he sought to be indemnified by an insurer against this claim in terms of a policy that covered him against liability to others arising from accidents. All three judges were agreed that in the circumstances of the case any such claim to indemnity must fail on grounds of public policy.

THE INDIRECT CLAIM AS AN HEIR OF THE DECEASED

With respect to the possibility of Mrs de Wet benefiting indirectly from the proceeds of the policy as an heir under the deceased's will, if the proceeds fell into the deceased's estate, Traverso AJP held that public policy would also prevent Mrs de Wet from benefiting under the will for the same reasons that she was prevented from benefiting from the policy directly (at para 36), namely because a beneficiary whose intentional and unlawful acts, or threats, of violence result in death cannot inherit even though the killing was unintended.

It is noteworthy that Traverso AJP did not find it necessary to rely on a specific ground upon which the courts would hold a beneficiary to be unworthy to inherit, and in particular did not rely on an intentional or negligent killing, since, in her view, '[t]he grounds are not static and the common law should be developed to include those grounds that presently offend the *boni mores* of society' (para 38). She was fortified in this view by the approach adopted in *Taylor v Pim* (supra at 493) in which Bale CJ cited Domat as saying '[t]he causes which may render the heir unworthy of the succession are indefinite, and the discerning of what may or may not be sufficient to produce this effect depends on the quality of the facts and circumstances' (*Danielz* para 38).

This approach to the grounds for unworthiness is contested. In *Ex parte Steenkamp and Steenkamp* (supra) Steyn J expressly doubted whether it is

permissible to extend the grounds of unworthiness (at 751H in fine), even though he had been referred to Bale CJ's judgment in *Taylor v Pim* and to the passage from Domat there cited (see his discussion at 750F–751H). According to Steyn J, the Domat passage was referred to by Bale CJ merely in passing and was not necessary for the decision in that case (*Steenkamp* (supra) at 750H in fine), because a man who failed to provide medical assistance to the deceased during her illness and who provided or procured for her intoxicating liquor in quantities that caused her death — which was the situation pertaining in *Taylor v Pim* — can be excluded from inheriting on the recognised grounds without any necessity for extending them (*Steenkamp* (supra) at 750H–751A). Accordingly, Steyn J did not accept the judgment in *Taylor v Pim* as clear authority for the permissibility of extending the categories of those who are unworthy (*Steenkamp* (supra) at 751A). Steyn J was also referred to a passage by the Roman-Dutch authority Matthaeus who (according to Steyn J) states that since forfeited benefits no longer go to the State — the reason why extension of the grounds for forfeiture was hitherto anathema — it is now permissible to extend the categories of unworthiness to situations involving equally serious injury (see Steyn J's summary of Matthaeus' views at 751A–B). However, Steyn J also doubted the correctness of this view since, he argued, the swelling of the coffers of the State was not the sole objection to extending the categories of unworthiness (*Steenkamp* (supra) at 751B). Steyn J pointed out that the fact remains that declaring a person to be an indignus involves a taking away, and consequently any extension of the categories of unworthiness would be oppressive and odious (at 751C–D). He stated that for this reason other old authorities were reluctant to permit extension of the grounds for unworthiness even on the basis of analogous circumstances (at 751D). Extending the grounds would also, he believed, be contrary to the principle of testate succession that anyone can inherit unless it is expressly forbidden for the person to do so (at 751E–F). Steyn J was fortified in this view, that the grounds should not be extended, by a case referred to by the German jurist Leyser in which a beneficiary who was guilty of incest during his wife's lifetime, and of unlawful sexual relations after her death, was permitted — against the wishes of the deceased's heirs — to take a benefit promised to him in the marriage contract and confirmed in the will (at 751G–H). The court held that he was not unworthy, and did not forfeit his rights, because there was no law that stipulated for unworthiness in those circumstances (ibid). Accordingly, Steyn J stated that he would be hesitant to accept that it is permissible to extend the grounds of unworthiness (at 751H in fine). In the event, it was unnecessary for him to finally decide the point because he found that, even if he had such a power, on the particular facts of the case before him it would not be an appropriate circumstance in which to do so (at 751H–752C). Although Traverso AJP was not bound by Steyn J's opinion on this issue it is unfortunate that she did not consider his arguments in her judgment.

The question of extension of the categories of unworthiness also arose in *Pillay & others v Nagan & others* 2001 (1) SA 410 (D), in which the deceased in

fact died intestate but one of her sons, the first defendant, procured the transfer of a major asset in the estate, a house, into his name on the strength of a will which he had forged (*Pillay*'s case (supra) at 411C–H read with 423F–G). In an action for the setting aside of the transfer of the house, after the first defendant had confessed to his misconduct, the question arose whether the first defendant was unworthy to take the benefits of an intestate heir by virtue of his fraudulent act by which he had sought to deprive his brothers and sisters of their rightful inheritances. McCall J referred to the rule — stated in Voet 34.9.2 and referred to but not decided on in *Yassen & others v Yassen & others* 1965 (1) SA 438 (N) at 440H–441A — that a legatee who is found to have concealed the will of the testator is unworthy to inherit that which was given to him in the will, which consequently accrues to the heir (*Pillay*'s case (supra) at 424F–H). After briefly referring to the doubts expressed in *Steenkamp*'s case as to whether the categories of unworthiness can be extended (*Pillay* (supra) at 424E), McCall J, who was clearly not convinced by the arguments advanced there, held that public policy required that the grounds of unworthiness be extended by analogy to render unworthy the person who, by the fraudulent act of forging a will, seeks to deprive his or her co-heir on intestacy of his or her rightful inheritance (*Pillay* (supra) at 424H–425B); and he expressed the view that the fraudster's share on intestacy ought to accrue to his brothers and sisters (see *Pillay* (supra) at 424I–J). (It is interesting to note that if the fraudster in *Pillay* had descendants, something that is not apparent from the judgment, then it seems that the share forfeited by him ought to have devolved on his descendants per stirpes in terms of the provisions of s 1(7) of the Intestate Succession Act 81 of 1987, not on his brothers and sisters as McCall J envisaged.)

I submit that the approach adopted in *Pillay*, in terms of which a gradual development of the forfeiture rules is permissible, is to be preferred because a degree of flexibility in the categories of unworthiness is desirable and the approach in *Steenkamp* would fossilize and stultify the law. However, caution should be exercised and I question whether the radical departure from the status quo envisaged by Traverso AJP is wise or justified. It would be better if changes were incremental and limited to circumstances analogous to the existing grounds of unworthiness. It was not necessary to extend the existing grounds in order to exclude Mrs de Wet from benefiting because the existing principle is that a person who unlawfully causes the death of the deceased is unworthy. This does not call for the beneficiary to be guilty of any particular crime. Mrs de Wet was a party to the assault on the deceased and it was this very assault that brought about his death. Accordingly, it is doubtful whether an extension of the recognised categories of unworthiness, much less a wholesale jettisoning of the traditional categories in favour of an overarching principle based on untrammelled public policy, was necessary. Since Mrs de Wet in fact repudiated the benefits under the joint will (para 39), Traverso AJP's views on the basis for exclusion of the indignus in the context of succession would seem to be obiter.

THE INDIRECT CLAIM AS CO-OWNER OF THE JOINT ESTATE

With respect to the possibility of Mrs de Wet benefiting indirectly from the policy by virtue of her claim to a half share of the joint estate, Traverso AJP held that the joint estate terminated ex lege on the deceased's death (para 42) and that it is only after the deceased's death that rights in respect of the death benefits arose (para 43), for before that date the proceeds of the policies did not exist (para 41), and there was not even certainty that a claim would ever be made under the policies because the deceased may have surrendered them before he died (ibid). Accordingly, Traverso AJP held that the joint estate had no claim to the proceeds of the policies and, therefore, Mrs de Wet could not benefit from them indirectly by virtue of her right to a half share of the joint estate (paras 43–44). In the circumstances, there was no discussion of the problematic question whether an indignus married in community of property who unlawfully kills his or her spouse forfeits the benefits of the marriage (cf *Ex parte Vonzell* 1953 (1) SA 122 (C) and *Nell v Nell en 'n ander* 1976 (3) SA 700 (T), to the effect that there is no forfeiture of benefits, contra *Leeb & another v Leeb & another* [1999] 2 All SA 588 (N), in which it was held that forfeiture of benefits can be ordered).

Whether Traverso AJP's ruling that the proceeds of the policy did not fall into the joint estate is correct is open to some doubt. Regarding the treatment of a life policy in the estate accounts, Meyerowitz states that '[i]f the insurance policy is payable to the deceased and was on his life the full proceeds of the policy should be shown in the account' — he makes no reference to the policy constituting separate property of the deceased where there is a joint estate (see D Meyerowitz *The Law and Practice of Administration of Estates and Estate Duty* (2007) § 15.35, and see also § 15.46 where his list of the property that does not fall into a joint estate does not include the proceeds of such a life policy). A careful consideration of the point would involve delving into the law of insurance and the cases concerning the ownership of a life policy, an exercise which is beyond the scope of this note. Suffice it to say, however, that the relevant cases are not consistent (compare, for example, the view expressed in *Hees NO v Southern Life Association Ltd* 2000 (1) SA 943 (W), especially at 948D–E, with that expressed in *Warricker & another NNO v Liberty Life Association of Africa Ltd* 2003 (6) SA 272 (W), especially in para 12).

If the proceeds of the policy do fall into the joint estate, contrary to Traverso AJP's view, this need not inevitably mean that the indignus benefits from the policy. The principle that no person may be enriched by his or her own unlawful conduct or benefit from conduct that is punishable (discussed above) should apply to deprive the indignus of that portion of the joint estate. However, it should be noted that obtaining an order for forfeiture of the benefits of the marriage in community, as was envisaged in *Leeb v Leeb* (supra), would not necessarily prevent the indignus from sharing in the proceeds of the policy. The effect of such an order is not to deprive the indignus of all claim to share in the joint estate. Its effect is that the indignus takes either half of the joint estate or the sum of his or her contributions to

the joint estate, whichever is the lesser (*Leeb* (supra) at 597 fourth para). But in the case of an insurance policy, the premiums that have been paid during the subsistence of the marriage will have come out of the joint estate, and it would seem to follow that the proceeds of the policy are fruits of joint contributions by the spouses. This would mean that an order for forfeiture of the benefits of the marriage would not necessarily deprive the indignus of the benefit of the insurance payment that flows from the unlawful killing.

CONCLUSION

The outcome in *Danielz* is clearly correct, even though the particular basis on which Mrs de Wet was prevented from indirectly benefiting from the policy as co-owner of the joint estate is perhaps doubtful.

Danielz demonstrates that the flexibility inherent in the common law treatment of unworthiness is desirable, and outweighs the disadvantage of the uncertainty that exists regarding the precise circumstances in which a person is unworthy at common law (as to which uncertainty see the discussion on disqualification from inheriting in South African Law Commission Report (Project 22) *Review of the Law of Succession* (June 1991) ch 4, and South African Law Commission Working Paper 19 (Project 22) *Review of the Law of Succession* (September 1987) ch 2). This flexibility would be lost, and the law would be impoverished, if the rules were to be codified or recorded in statutory form in the interests of greater certainty.

Danielz lends support to the argument that all unlawful killing results in forfeiture because the case was decided on the basis that Mrs de Wet did not intend to kill her husband. On the other hand, because the *Danielz* judgment treats the principles of unworthiness as operating seamlessly across the different areas of law in which they may be relevant, such as insurance law and succession, it is interesting to note that in the context of insurance claims there is a greater degree of flexibility in the forfeiture rule. Thus in *Shooter t/a Shooter's Fisheries v Incorporated General Insurances Ltd* 1984 (4) SA 269 (D) Friedman J stated with respect to possible forfeiture of an insurance claim that

> 'public policy is a rather fluid concept which may vary according to time, to place and to facts and circumstances, [and] it seems to me that the only principle to be deduced from the aforegoing is that, depending upon the nature of the crime and upon all other relevant facts and circumstances, it *may* be against public policy to permit a claim under a policy of insurance where the accused has been guilty of either illegal or unlawful activities' (at 284B–D, emphasis supplied (although this case was reversed on appeal it was not on this point)).

Furthermore, it has been held that public policy does not necessarily prevent the insured from claiming indemnification from the consequences of the insured's own negligent, or even reckless, unlawful conduct (*Shooter* (supra) at 283D–E & *Nathan NO v Ocean Accident and Guarantee Corporation Ltd* 1959 (1) SA 65 (N) at 72D–73B). If forfeiture in the law of succession is to be based on the direct application of a broad public policy principle rather than on the gradual development of specific grounds of unworthiness which

have their origins in public policy, then the greater flexibility in insurance law might influence the development of the forfeiture rule in the law of succession and create scope for bringing the strict rules relating to forfeiture of an inheritance (which, according to *Casey*, must apply in all cases of negligent driving resulting in death) into line with what would seem to be the actual practice of not enforcing the forfeiture rule in motor accident cases (see N J van der Merwe & C J Rowland *Die Suid-Afrikaanse Erfreg* 2 ed (1974) at 97, who point out that the forfeiture rule is apparently not being enforced in such cases. It needs to be borne in mind, however, that in the insurance context there can be different policy considerations which are not relevant to succession, and in particular that in the insurance context public policy also requires freedom of contract (*Nathan* (supra) at 72B–C), which means that an insurer should be held to its bargain.

Traverso AJP's approach of applying the principles governing unworthiness seamlessly across the various areas of law may prove to be controversial. Professor Sonnekus has previously argued, in connection with the issue whether an indignus should forfeit the benefits of a marriage in community of property, that the forfeiture principles in the law of succession are 'historically founded, quasi-private law penal measures in law of succession that should not be projected on to matrimonial property law' (South African Law Commission Report (Project 22) *Review of the Law of Succession* (op cit) at 82 para 4.5).

In so far as the *Danielz* decision is based on unworthiness rather than on unjustified enrichment principles, the judgment operates on the basis of a broad criterion of public policy and eschews reliance on the specific categories of unworthiness recognised by the old authorities. This is a major departure from the way in which unworthiness has been treated in other cases. If this approach is correct then we are not limited to specific categories of unworthiness recognised by the old authorities. As I have indicated in my discussion of *Steenkamp* (supra) and *Pillay v Nagan* (supra), the propriety of extending the forfeiture rules beyond those grounds recognised by the old authorities has been contested in *Steenkamp*, although in *Pillay v Nagan* McCall J was of the view that the grounds recognised by the old authorities can be expanded to cover analogous circumstances. *Danielz*, however, represents a major departure from both these approaches in basing its finding of unworthiness directly on the principle of public policy rather than on applying or developing one of the grounds for unworthiness recognised by the old authorities. In this respect the decision is on shaky ground.

Danielz takes a novel approach to the question of the ownership of a life policy, or at any rate of the reversionary interests of the insured under such a policy, if the insured was married in community of property and the nominated beneficiary does not take when the insured dies. Traverso AJP's view that in such circumstances the proceeds of the policy constitute separate property of the deceased that does not fall into the joint estate is open to question, but a critique thereof requires a detailed analysis of insurance law that is beyond the scope of this note.