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Council member conflicts: *a growing Ombudsman interest*

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What I'll speak about

- local government in SA
- council members' obligations & conflict of interest responsibilities
- two SA Ombudsman investigations into council member conflict
- subsequent District Court action
- take away message & future directions



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Local government in SA

- SA Constitution provides for the continuance of local government
- state parliament determines how it is constituted and the nature and extent of its functions and powers
- *Local Government Act 1999 (SA)*
- SA has 68 councils - 707 elected member positions
- voting is not compulsory - voter participation is poor
- local government influence should not be underestimated



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Council member role & responsibilities

Council members:

- are statutory office bearers under the Local Government Act subject to the administrative law framework - although in other senses, 'politicians'
- are not volunteers
- receive an annual allowance and reimbursement of expenses
- through collective decision making, they decide on policy direction and strategic management plans and allocation of resources
- represent the interest of residents and ratepayers in their community
- have statutory responsibilities regarding their conduct, including conflict of interest



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Council member conflict of interest - definition

Local Government Act

A conflict of interest will arise where the council member or a person with whom the council member is *closely associated* would, *if the matter were decided in a particular manner*, receive/suffer or have a reasonable expectation of receiving/suffering:

- a direct or indirect pecuniary benefit or detriment
- a non-pecuniary benefit or detriment

not being a benefit or detriment that would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons

(s 73 Local Government Act)



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In the event of a conflict of interest ...

Local Government Act

In the event of a conflict of interest at a council meeting, the council member must:

- disclose the interest
- not propose or second a motion relating to the matter
- not take part in discussion by the council relating to that matter
- not, while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed
- vote in relation to that matter

(s74 Local Government Act)



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Two Ombudsman investigations & court decisions

Cr Daryl Pain

Wakefield Regional Council

Petrovski v Pain [2013] SADC 6

Mayor Dean Dolling

District Council of Barunga West

Petrovski v Dolling [2013] SADC 27





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Two Ombudsman investigations & court decisions

- SA Ombudsman has the jurisdiction to conduct council member conduct investigations
- Ombudsman has broad powers to conduct investigations as we see fit, and to make remedial recommendations to rectify any error
- standard of proof on the balance of probabilities
- but need to apply the *Briginshaw* test to the quality of the evidence - *Briginshaw v Briginshaw* (1938) 60 CLR 336
- investigations have potentially serious ramifications for council members



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Investigation - conflict of interest - *Cr Pain*

First matter

- Cr Pain's father's tender was one of three tenders submitted to the council for the purchase of the council's former works depot
- a motion was put to the council decide on the successful tenderer
- Cr Pain did not disclose an interest and voted
- the Ombudsman and later, the court found Cr Pain had a conflict of interest and breached the Local Government Act



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Investigation - conflict of interest - *Cr Pain*

Second matter

- Mr Pain had been a regular correspondent with the council over the previous 18 mths about the CWMS
- a motion was put to cease correspondence with him
- Cr Pain did not disclose an interest and voted
- the Ombudsman and the court found Cr Pain had an interest, and breached the Local Government Act



Investigation - conflict of interest - *Cr Pain*

The court's observations

- Cr Pain submitted he had not received any conflict of interest training and that this should be taken into consideration in assessing the seriousness of his contravention.
- the court : *'training is hardly necessary for a councillor to understand that he or she should not be involved in council business concerning that councillor's own father'*.
- despite Cr Pain's interest being 'notorious or obvious', none of the other elected members raised their concern that he was conflicted
- that an elected member would be prevented from raising a matter of such 'obvious' importance to the business of the council defied logic and common sense.



Investigation - conflict of interest - *Mayor Dolling*

- Mayor's sister held shares in a company which stood to benefit from a development at 'Fishermans Bay'. Fishermans Bay consisted of over 400 shack sites, and was owned by Fishermans Bay Management P/L (the company) which held the property in trust for Fishermans Bay Proprietors, a partnership
- the sister was a shareholder in the company and a partner of Fishermans Bay Proprietors since the 1970s
- the sister also occupied a shack site at Fishermans Bay.
- in 2007, Mayor was warned by the Minister's representative that he was conflicted in matters concerning Fishermans Bay, based on Crown advice
- Mayor was warned that contraventions may result in a complaint being lodged against him in the court



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Investigation - conflict of interest - *Mayor Dolling*

- it was not in doubt that the sister stood to receive a benefit as a result of the successful subdivision and consequent sale of the land at Fishermans Bay
- this benefit was not shared with a substantial proportion of ratepayers
- the sister was 'closely associated' with Mayor Dolling



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Investigation - conflict of interest - *Mayor Dolling*

First council meeting:

- *That the CEO be empowered to work through the Fishermans Bay freeholding land division and seawall levee matters, with the assistance of planning consultants, lawyers and staff as required*
- Mayor disclosed an interest

Second council meeting, the Mayor put forward two notices of motion:

- *That the [above] motion be rescinded*
- *That the CEO be accompanied by at least one councillor, at all discussions with Fishermans Bay Management and associated lawyers, regarding the freeholding negotiations*



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Investigation - conflict of interest - *Mayor Dolling*

Following this

- a point of order was raised that the Mayor was conflicted
- the Mayor ruled against the point of order
- the Mayor moved each of his two previous motions about the CEO and Fishermans Bay
- the Mayor used his casting vote to ensure that each motion carried



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Investigation - conflict of interest - *Mayor Dolling*

Our investigation

- sought written submissions from the council
- interviewed the Mayor and the CEO
- we learned of the Crown advice warning the Mayor about disclosing conflicts on interest - this had not been disclosed by the Mayor
- evidence was not in dispute
- provided the Mayor with our provisional view that he was conflicted, and noted the Crown advice
- the Mayor did not concede
- the Mayor was anxious that the Fishermans Bay development go through, and he believed that the CEO needed to be assisted by lawyers and another councillor



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Investigation - conflict of interest - *Mayor Dolling*

The Ombudsman's broad view

- the Mayor had an interest in the 'matter', namely the 2 motions that he put forward
- the 'matter' was the development of Fishermans Bay
- the sister stood to benefit from the decisions, as they progressed Fishermans Bay development
- aggravating aspects - the Crown advice; the Minister's warning; the Mayor proposed the motions and exercised his casting vote

The court's narrow view

- the Local Government Act doesn't deal with 'conflicts at large'
- did not accept that who would be part of the council negotiating team for Fishermans Bay would result in a benefit or detriment for the sister
- a benefit or detriment should not be speculative, and effectively needs to be determined by considering the wording of the motion itself



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Take away message & future directions

Conflict of interest

- the court's narrow view of what conflict of interest means under the Local Government Act does not match community expectations
- we have recommended amendment to the Local Government Act, including addressing perceived conflict of interest

Recent amendments to Ombudsman powers

- expansion of power under ICAC framework, and effective enforcement of Ombudsman recommendations

For our investigations

- the risk of a court 'overturning' the investigation and finding
- despite the evidence, a court will not necessarily find that it is a duck



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