12, 5, 11

Transvaal African Teachers' Association.

Point at issue: Are Native Teachers in State-aided Schools Government servants or not?
(Registrate (Bantu) held: No
Transvaal Supreme Court / Appeal (Ct. Cape): Yes.

RECORD

OF THE

LEGAL PROCEEDINGS

OF THE

SALARY TEST CASE.

R.F. Alfred Hoernlé
1942.

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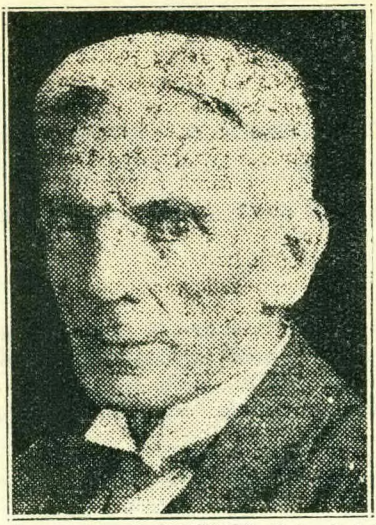
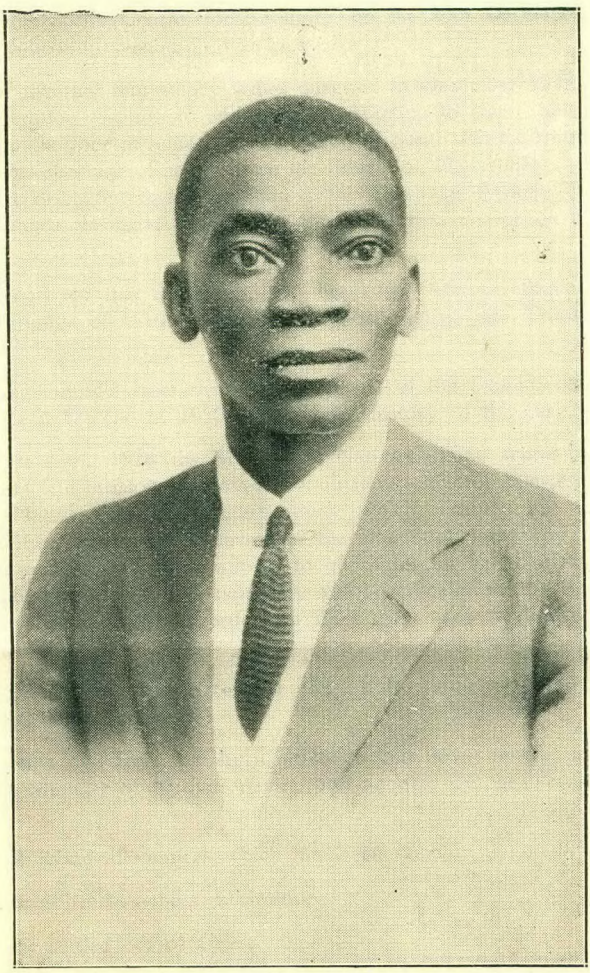


Late Mr. A. S. BENSON, B.A., L.L.B.
Solicitor for the Transvaal African Teachers' Association.



Mr. T. P. MATHABATHE,
President: Transvaal African Teachers' Association.
General Secretary: Federation of the South African Native Teachers' Association.

LITIGATION BETWEEN NATIVE TEACHERS AND THE TRANSVAAL ADMINISTRATION IN REGARD TO THE PAYMENT OF ARREARS OF INCREMENTS AND ALLOWANCES.

At the request of the Executive Committe of the Transvaal African Teachers' Association, a record of the Litigation between Native Teachers and the Administration in regard to the payment of arrears of increments and allowances is published for the general information of teachers in the Union, and of those who are interested in Native education.

After several unsuccessful interviews with the Administration, the Transvaal African Teachers' Association finally decided to test the matter in the Law Courts. Before this step was taken, however, the whole question of the salary scales was discussed at the biennial Conference of the South African Native Teachers' Federation, i.e., (The Cape, Natal, O.F.S. and the Transvaal provinces) which was held in the Gama Sigma Club room, Bantu Men's Social Centre, Johannesburg, on the 20th December, 1929. At that Conference the following resolution was passed :—

" In view of the fact that salary scales gazetted in December 1928, have not been fulfilled, the Federation resolves to undertake legal action to claim the money owing to all the teachers in the four provinces of the Union of South Africa, through one teacher who shall claim his shortage of salary from his Education Department. This Federation further resolves to delegate immediate action to the Transvaal African Teachers' Association ,and to finance the legal proceedings by a **pro rata** charge on each of its four branches."

On the strength of this resolution, the Transvaal African Teachers Association, seized the opportunity of taking immediate action against the Transvaal Provincial Administration.

The following extracts from the Annual Report of the Director of Education for the year ended 31st December, 1930 give a brief history of the case :—

" As from 1st April, 1928, the Minister of Native Affairs, acting on the advice of the Native Affairs Commission, approved certain new scales of salaries and allowances for teachers in Native Schools and institutions, which received the approval of the Executive Committee, and were published in the Handbook issued by the Department unfortunately in such a way as to appear to guarantee on behalf of the Province the full salary so laid down, instead of definitely and specifically stating that the Province would pay salary grants-in-aid according to the funds made available by the Native Affairs Department.

Early in July, 1930, a native teacher (Mr. J. R. Rathebe) sued the Director of Education for the non-payment of :

(a) Increments due from 1st April, 1928 as laid down in the scales of salaries approved by the Minister of Native Affairs, and adopted by the Transvaal Provincial Administration;

(b) Cost of living allowances which has been unpaid;

(c) Additional head-teachers' allowance.

The case was settled out of Court.

Protracted consultation then took place between the Honourable the Administrator and the Union Government, in regard to obtaining funds to pay out all the teachers to whom arrears of increments and allowances appeared to be due.

In the meanwhile the Solicitor, acting for the Transvaal African Teachers' Association, having waited in vain for the claims of his clients to be settled, issued 500 summonses against the Department in October for the arrears claimed to be due to them by individual teachers.

As a result of legal opinion taken by the Government in regard to the teachers' claims it was decided that the validity of the claims should be tested in a court of Law.

It was therefore agreed, between the Government Attorney (acting on behalf of the Department) and the solicitor for the plaintiff, that the 500 summonses should be withdrawn and seven fresh summonses issued which would cover the following pointts in dispute :—

(a) The claims for payments of increments.

(b) The claims for payment of cost of living allowances in certain areas.

(c) The claims for payment of cost of living allowances in the case of certain married women teachers.

(d) The definition of the term "Native Reserve."

The detailed judgments in the Lower Court will indicate the grounds on which the teachers won their cases, and in the Supreme Court the position changed and the teachers lost their case but won their Status.

TEACHERS REPRESENTING THE SEVEN TEST CASES.

Sitting: Left: Mr. B. M. Motaung, Mrs. W. Petje, Mr. J. R. Rathebe (General Secretary), Mrs. S. Ramphomane.
Standing: Right: Mr. J. Khomo, Mr. W. B. Molikoane, Mr. C. R. Ntuli, Mr. H. Madibana

MP.

Case No. 570.

1931.

FACTS FOUND PROVED AND REASONS FOR JUDGMENT IN THE CASE OF W. B. MOLIKOANE

v.

THE ADMINISTRATOR OF THE TRANSVAAL.

---

1. Plaintiff is the Head teacher of the Von Brandis Native Government aided School, Johannesburg, and is the holder of a P.T.3. teacher's certificate. He resides within the Johannesburg Municipal area with his wife and children. The case is one of seven brought by native teachers against the Defendant, based on various causes of action, the evidence in regard to each having been taken down in the record of this case by consent. The claim herein is for a sum of £65.5.0, being £16 in respect of annual increments of salary, and £49.10.0 cost of living allowance.

2. The claims are based on regulations framed under Sec. 28 Act 25, 1907 (Transvaal) and published in Administrator's Notice No. 170 on page 417 of the Provincial Gazette of the 13th March, 1929, and which came into force with effect from the 1st April, 1928. It is provided in Sec. 3 that salaries and allowances of approved teachers employed in schools for native children shall be in accordance with the scales and allowances laid down from time to time by the Minister for Native Affairs. A copy of the approved schedule was handed in Exhibit No. 2. and will also be found on page 8 of the handbook of regulations and instructions, published by the Transvaal Education Department for the guidance of Superintendents of native schools and teachers, Exhibit No. 1. and to which frequent reference was made during the trial.

3. At a conference held at Capetown during Easter of 1930, it was decided by the native Affairs Department that in all Provinces one increment should be granted to native teachers for each completed period of five years of service. This took effect from the 1st July, 1930, when the scale providing for annual increments was superseded. Plaintiff has over ten years service to his credit and although there has been a break in his service he has been paid two increments of £3 each per annum for the period 1st July, 1930, to the 31st October, 1930, amounting to the sum of £2. This payment is somewhat inconsistent with the Defence that owing to a break in service he is not entitled to annual increments.

4. The regulations referred to in paragraph 2 were amended by Administrator's Notice No. 643 published on page 424 of the Provincial Gazette of the 29th October, 1930. It is therein provided that salary grants and allowances shall be in accordance with scales sanctioned by the Administrator, that the Department shall not pay full grants and allowances unless the necessary financial provision has been made and that the payment of increments on the prescribed scales shall be at the discretion of the Director. As a result it is admitted that the claim in the summons originally for the period ending 31st December, 1930, should be for the period ending 31st October, 1930.

5. Plaintiff alleges that prior to 1st April, 1928, he was in receipt of an annual salary of £66 on the scale £66—3—£108 and claims increments of salary from that date as follows :—

1.4.28 to 31.3.29	£3	
1.4.29 to 31.3.30	6	
1.4.30 to 31.12.30 . nths. at £9 p.a.	6.15.0	
	£15 15.0	

The amount actually claimed in the summons is £16. The sum of £2 already paid in circumstances related in para. 3 hereof should be deducted from this claim, likewise the sum of £10.10. in respect of the months of November and December referred to in paragraph 4. The correct amount claimed is therefore £12.5.

6. The Plaintiff also claims that he is entitled to cost of living allowance at the rate of £18 per annum for the period 1.4.28 to 31.12.30, amounting to £49.10. This claim

is admitted for the period ending 30th June, 1930, amounting to £40.10. From this must be deducted the amount of £13.10. already paid at the 1923 local allowance rate, authority for the payment of which will be found in Exhibits 7, 8 and 9. This leaves a balance of £27 in respect of which amount Plaintiff is entitled to judgment. I understand that the cost of living allowance in respect of the four months ending 31st October, 1930, has been paid to Plaintiff.

7. Defendant denies that Plaintiff is entitled in law to increments of salary on the approved scale as of right. In support of this attitude Mr. Curlewis quoted the case of Marshall v. Union Government, T.P.D. 1917, page 371, where it is laid down that a cavil servant is not entitled in the absence of a special contract to claim incremental pay as of right, See also Farr v. Union Government C.P.D. 1913 at page 833. It was further laid down in the case of Lavoipierre v. Union Government T.P.D. 1925, page 53, that the relationship between the Government or the Crown and its servants is not one of contract. This can be readily understood in view of the fact that the conditions of employment in the Public Service are adequately dealt with by legislation. This would also appear to be the position with reference to European teachers employed in Government Schools. Morgan v. Provincial Administration, O.F.S. O.P.D. 1925, page 278.

8. The first question for decision is whether or not native teachers are in the peculiar circumstances of their employment servants of the Government. Section 28, Act 25 1907 (Transvaal) lays down that the Minister (now the Administrator) may from time to time make grants in aid of anv school, class or institution for the instruction of coloured children or the training of coloured persons as teachers provided under the Superintendence of an European Missionary or of a person approved by the Director. The regulations are published under Sec. 90 (N) of the Act which is a general enabling provision. Quite clearly therefore the legislature contemplated grants-in-aid to schools or institutions provided by an extraneous body. It should be noted that the regulations referred to in paragraph 2 hereof made use of the terms salaries and allowances while the amendment referred to in paragraph 4 uses the expression salary grants. The latter is undoubtedly the more correct term. Generally speaking therefore the teachers who are employed by an extraneous body are not servants of the Government.

9. From the year 1923, the Government undertook to pay the salaries of approved native teachers employed in approved schools, or institutions, presumably in order to ensure uniformity, efficiency and adequate control regulations approximating to those in use in European Government Schools, were introduced. It will be necessary for me to scrutinise these regulations and the conditions of employment of native teachers generally in order to decide whether or not the payment by Government of their salaries brings them within the category of Government servants. If the reply is in the affirmative, the ruling in Marshall's case will apply. If the answer is in the negative, it will be necessary to consider the regulations as a contract between the parties.

10. The school fees received under regulation No. 6 are paid to the Superintendent and are applied by him for the purposes of the School. The Missionary Societies who usually foster these schools doubtless have other sources of income. The buildings used for native schools are invariably private property and no grant is made by Government towards their erection or maintenance. Equipment is supplied and maintained by the Superintendent although grants therefore have been made when funds are available.

11. Teachers are selected by the Superintendent, usually a Missionary, and approved by the Department. All the teachers in the seven cases before the Court have been so approved. In the event of a reduction in the establishment of a school becoming necessary, the responsibility rests with the Superintendent to decide which of the teachers shall be dispensed with. Teachers are not provided with Pensions, and there is no guarantee as to the continuity of their employment. They are not full time employees, as it is known that many of them are employed as Priests, Deacons or Catechists in the Churches to which they belong. They may be suspended by the Director, Inspector or Superintendent for any serious breach of discipline or for immorality, and if absent without leave or reasonable cause their employment may be terminated by the Department on the written recommendation of the Superintendent and the Inspector of Schools. Except as to the conclusion of services owing to absence without leave, the regulations are silent as to who actually gives effect to their termination, whether on notice or dismissal. It is clear however that in respect of the termination of Plaintiff's services at Pietersburg, the Department was merely advised. It would seem clear therefore that the Superintendent is the person responsible for such termination.

12. It is the duty of the Department to approve of the establishment of a school, which must be already in existence, of the appointment of teachers employed thereat and to pay the salaries and allowances due to such teachers. It prescribes the authorised Syllabus, lays down the number of staff it is prepared to pay, the circumstances under which uncertificated teachers may be employed, rules as to absence on sick or other leave, and the reports to be made in connection therewith. The Director has certain disciplinary powers, such as the right of summary suspension, for any serious breach of discipline or for immorality. No dismissal except on due notice expiring at the end of a school term can take place except with his approval, while there is a right of appeal to him against any such dismissal. The Department may also on the written recommendation of the Superintendent and the Inspector of Schools terminate the services of a teacher who is absent without leave or reasonable cause.

13. It will be seen therefore that the regulations as to responsibility for the termination of the services of teachers which will be found on pages 9 and 10 of the pamphlet Exhibit No. 1 are by no means clear. The teachers are undoubtedly engaged by the Superintendent, who is in consequence their employer and while the Director may possess certain plenary powers, the Department as such can only act by or through the Superintendent. Applying therefore the test laid down in Morgans case supra native teachers are appointed and their services terminated by or through the Superintendent, and they are not employed in a public office or building. The fact that they are paid salary grants provided by Government and that they are subject to conditions of employment laid down by regulation does not to my mind bring them within the category of Government servants. The Plaintiff and those associated with him are therefore entitled to succeed on their claims in respect of increments of salary.

14. The Defendant claims that Plaintiff was re-appointed a teacher as from the 1st January, 1930, and that for this reason he is not entitled to any increment. It appears that Plaintiff was formerly employed as head teacher at an established school at Pietersburg. During the latter half of the year 1927 he relinquished that appointment, and assumed the position of head teacher at the Eastern Township Salvation Army School, Johannesburg, then unregistered and therefore not recognized by the Department. The records of the Department show that he ceased employment at Pietersburg on the 13th June 1927, and that he was appointed at Eastern Township on the 1st April, 1928, and at Von Brandis on the 1st January, 1930. The 1st April, 1928, is therefore the date of his re-appointment.

15. The Plaintiff alleges that there was no break in his service and that he was transferred from Pietersburg to Eastern Township. He therefore claims increment of salary as from 1st April, 1928, being the sum of £12.5. as detailed in paragraph 5 hereof. Should it be found that he is only entitled to increment from 1st April, 1929, the amount of the claim is £4.10. being £3 for the year ending 31.3.30 and £1.10. being at the rate of £6 per annum for the three months ending 30.6.30.

16. It is quite clear that the Department is only called upon to pay salaries to teachers employed at established schools. Plaintiff is presumed to have been aware of this fact and if he was not it was the duty of the Superintendent to have informed him. The fact that a break in service can occur in this way serves to emphasise the difference in the conditions of employment as between European and native teachers. In the case of the former continuity is secured, in the case of the latter it is not. Plaintiff's service therefore dates from 1.4.28 and he is entitled to judgment for the sum of £4.10. as detailed in the preceding paragraph.

17. There will be judgment for Plaintiff for £4.10. increments and salary, £27 cost of living allowance, a total of £31.10. and costs.

H. BRITTEN,

Magistrate.

Johannesburg,

13th April, 1931.

Case No. 571

MP.

1931.

FACTS FOUND PROVED AND REASONS FOR JUDGMENT IN THE CASE OF

B. M. MOTAUNG

v.

THE ADMINISTRATOR OF THE TRANSVAAL.

---

1. Plaintiff is the Head teacher of the Phokeng Government aided native school, situate in a native reserve in the Rustenburg district, and is the holder of a P.T.3 teaching certificate. He resides at Phokeng with his wife and 4 children, and claims a sum of £49, being £16 alleged to be due in respect of annual increments of salary and £33 cost of living allowance payable to a married teacher.

2. The claims are based on regulations framed under Section 28, Act 25, 1907 (Transvaal) and published in Administrator's Notice No. 170, on page 417 of the Provincial Gazette of the 13th March, 1929, and which came into force with effect from 1st April, 1928. It is provided in Section 3 that salaries and allowances of approved teachers employed in schools for native children shall be in accordance with the scales and allowances laid down from time to time by the Minister for Native Affairs. A copy of the approved schedule was handed in Exhibit No. 2 and will also be found in the handbook of regulations and instructions published by the Transvaal Education Department, for the guidance of Superintendents of native schools and teachers, Exhibit No. 1, and to which frequent reference was made during the trial.

3. At a conference held at Capetown during Easter, 1930, it was decided by the Native Affairs Department, that in all Provinces one increment should be granted to native teachers for each completed period of five years of service. This took effect from 1st July, 1930, when the scale providing for annual increments was superseded. Plaintiff, who has 15 years service to his credit was thus paid three increments of £3 per annum for the period 1st July, 1930, to 31st October, 1930, amounting to a sum of £3.

4. The regulations referred to in paragraph 2 were amended by Administrator's Notice No. 643, published on page 424 of the Provincial Gazette of the 29th October, 1930. It is therein provided that salary grants and allowances shall be in accordance with scales sanctioned by the Administrator, that the Department shall not pay full grants and allowances unless the necessary financial provision has been made and that the payment of increments in the prescribed scale shall be at the discretion of the Director. As a result it is admitted that the claim in the summons originally for the period ending 31st December, 1930, should be for the period ending 31st October, 1930.

5. Plaintiff alleges that prior to 1st April, 1928, he was in receipt of an annual salary of £66 on the scale £66—3—£108, and claims increments of salary from that date as follows :—

1.4.28 to 31.3.29	£3
1.4.29 to 31.3.30	6
1.4.30 to 31.12.30 (9 mths. @ £9 p.a.)	6.15.—
	£15.15.—

The amount actually claimed in the summons is £16. The sum of £3 already paid in circumstances related in paragraph 3 hereof should be deducted from this claim, likewise the sum of £1.10. in respect of the months of November and December, 1930, referred to in paragraph 4. The correct amount claimed by Plaintiff is therefore £11.5.0.

6. The Plaintiff also claims a sum of £33 being cost of living allowance due to a married teacher residing with his family in other than a Municipality or a native reserve. This is based on the rate of £12 per annum for two years and 9 months from the 1st April, 1928. It appears however that Phokeng falls within the definition of a Native reserve. The claim was therefore withdrawn.

7. Defendant denies that Plaintiff is entitled in law to increments in terms of the approved scale as of right. This defence was common to all seven cases heard by me

and my judgment on this point will be found in case No. 570 W. B. Molekoane v. The Administrator of the Transvaal in the record of which the evidence led in all cases was taken down by consent. In terms of that judgment Plaintiff is entitled to succeed in his claim for £11.5.0.

1931

8. There will be judgment for Plaintiff for £11.5.0 increments of salary with costs.

H. BRITTEN,
Magistrate.

Johannesburg,
13th April, 1931.

MP.

Case No. 572
1931.

FACTS FOUND PROVED AND REASONS FOR JUDGMENT IN THE CASE OF SAMUEL RAMPHOMANE

v.

THE ADMINISTRATOR OF THE TRANSVAAL.

---

1. Plaintiff claims on behalf of his wife Ann Elizabeth Ramphomane a teacher employed in the Dutch Reformed Native Government aided School, Sophiatown, within the Municipal area of Johannesburg, and to whom he is married in Community of Property according to Christian rites. Any further use hereinafter of the word Plaintiff will, except in the last paragraph, refer to Ann Elizabeth Ramphomane, the actual Plaintiff and not to her husband whose appearance is merely nominal. It is admitted that Plaintiff was married to her husband on the 15th February, 1930, and that she is the holder of a P.T.3 teacher's certificate. She claims a sum of £50.10, being £16 alleged to be due in respect of annual increments of salary and £34.10. married teachers cost of living allowance.

2. The claims are based on regulations framed under Sec. 28, Act 25, 1907 (Transvaal) and published in Administrator's Notice No. 170, on page 417 of the Provincial Gazette of the 13th March, 1929, and which came into force with effect from 1st April, 1928. It is provided in Sec. 3 that salaries and allowances of approved teachers employed in schools for native children shall be in accordance with the scales and allowances laid down from time to time by the Minister for Native Affairs. A copy of the approved schedule was handed in, Exhibit No. 2, and will also be found on page 8 in the handbook of regulations and instructions published by the Transvaal Education Department for the guidance of Superintendents of native schools and teachers, Exhibit No. 1, and to which frequent reference was made during the trial.

3. At a conference held at Capetown during Easter of 1930 it was decided by the Native Affairs Department that in all Provinces one increment should be granted to native teachers for each completed period of five years of service. This took effect from the 1st July, 1930, when the scale providing for annual increments was superseded. Plaintiff who has 14 years service to her credit has as a result been paid two increments of £3 each per annum for the period 1st July, 1930, to the 31st October, 1930, amounting to a sum of £2.

4. The regulations referred to in paragraph 2 were amended by Administrator's Notice No. 643, published on page 424 of the Provincial Gazette of the 29th October, 1930. It is therein provided that salary grants and allowances shall be in accordance with scales sanctioned by the Administrator, that the Department shall not pay full grants

and allowances unless the necessary financial provision has been made and that the payment of increments on the prescribed scales shall be at the discretion of the Director. As a result it is admitted that the claim in the summons originally for the period ending 31st December, 1930, should be for the period ending 31st October, 1930.

5. Plaintiff alleges that prior to the 1st April, 1928, she was in receipt of an annual salary of £54 on the scale £54—3—£90 and claims increments from that date as follows :—

1.4.28 to 31.3.29	£3
1.4.29 to 31.3.30	6
1.4.30 to 31.12.30 (9 mths. @ £9 p.a.)	6.15.—
	£15.15.—

The amount actually claimed in the summons is £16. The sum of £2 already paid in circumstances related in paragraph 3 hereof should be deducted from this claim, likewise the sum of £1.10 in respect of the months of November and December, 1930, referred to in paragraph 4. The correct amount claimed by plaintiff is therefore £12.5.

6. The Plaintiff also claims that she is entitled to cost of living allowance as a single woman for the period 1st April, 1928, to the 31st January, 1930, at the rate of £9 per annum or a total for this period of £16.10. She further claims cost of living allowance at the married rate of £18 per annum from February, 1930, to 31st December, 1930, also a total of £16.10. or a total under both headings of £33 the amount actually claimed in the summons is £34.10. I propose dealing with this claim first.

7. It is claimed by the Defendant that Plaintiff is only entitled to cost of living allowance while she was a single person, and that she has been paid any amount so due. As shown in the preceding paragraph the sum due in respect of this period of £16.10. As however she was not married until the 15th February, 1930, she is entitled to a further 7/6 being half the allowance for that month or a total of £16.17.6. The Plaintiff was however paid the 1923 local allowance of £6 per annum up to the 30th June, 1930, amounting to £13.10. This amount should be deducted from the claim of £16.17.6, leaving a balance of £3.7.6 to which she is entitled to judgment.

8. The claim to cost of living allowance by a female teacher after marriage stands on a different footing. The Department of Native Affairs laid down in a minute dated the 19th November, 1928 (see Exhibit No. 5), the following interpretations of the recently approved scales for native teachers in primary schools.
A. The phrase "married with a family" should be interpreted as meaning a male teacher married to and supporting a wife whether there be children or not of either spouse.

B. Marriage allowance should not be paid to widows nor to wives whether they are or are not receiving support from their husbands.

The evidence does not show whether Plaintiff and her husband are living together or not. Apparently he was at one time and he may still be a teacher. It makes no difference, however, whether or not he is a teacher or whether or not they are living together, Plaintiff is not since her marriage on the 15th February, 1930, entitled to cost of living allowance on any scale whatsoever.

9. It would appear however that these interpretations of the Native Affairs Department were disregarded as it was considered that they would result in hardship on teachers, especially those already drawing the local allowance of 10/- per month as provided in 1923. All teachers on the Witwatersrand and at Pretoria continued to draw this allowance up to the 30th June, 1930, and in this respect Plaintiff was paid the sum of £13.10 as stated in paragraph 7 hereof. The authority for the payment of this local allowance is contained in Exhibit No. 9 and such payments should have ceased when the regulations referred to in para. 2 came into force on the 1st April, 1928. On the 17th July, 1930, Circular No. 55, 1930, to Superintendents of Native Schools (Exhibit No. 6) laid down inter alia that a "married woman teacher whose husband is not "employed as a teacher will be paid the allowance applicable to a single teacher."

This authority is in conflict with the interpretation of the Department of Native Affairs that married cost of living allowance is only payable to a male teacher and is not payable to a wife or widow whether receiving suppor tfrom a husband or not. The Plaintiff is therefore not entitled to cost of living allowance since the date of her marriage on the 15th February, 1930.

10. Defendant denies that Plaintiff is entitled in law to increments as of right. This defence was common to all seven cases heard by me and my judgment on this point will be found in case 570 W. B. Molekoane v. The Administrator of the Transvaal in the 1931 record of which the evidence led in all cases was taken down by consent. In terms thereof Plaintiff is entitled to succeed in her claim for £12.5.

11. There will be judgment for Plaintiff for increments of salary £12.5, cost of living allowance £3.7.6, a total of £15.12.6 with costs.

H. BRITTEN,
Magistrate.

Johannesburg,
13th April, 1931.

MP.

Case No. 573
1931.

FACTS FOUND PROVED AND REASONS FOR JUDGMENT IN THE CASE OF

C. R. NTULI

v.

THE ADMINISTRATOR OF THE TRANSVAAL.

---

1. Plaintiff is an assistant native teacher at the Kilnerton Government aided native practising school, and is the holder of a P.T.3 teaching certificate. He is unmarried and claims £103.10.0, being £88.10 increase in salary and £15 cost of living allowance payable to a single teacher.

2. The claims are based on regulations framed under Sec. 28 Act 25 1907 (Transvaal) and published in Administrator's Notice No. 170 on page 417 of the Provincial Gazette of the 13th March, 1929, and which came into force with effect from 1st April, 1928. It is provided in Sec. 3 that salaries and allowances of approved teachers employed in schools for native children shall be in accordance with the scales and allowances laid down from time to time by the Minister for Native Affairs. A copy of the approved schedule was handed in Exhibit No. 2, and will also be found on page 8 in the handbook of regulations and instructions published by the Transvaal Education Department for the guidance of Superintendents of native schools and teachers (Exhibit No. 1) to which frequent reference was made during the trial.

3. At a conference held at Capetown during Easter of 1930, it was decided by the Native Affairs Department that in all Provinces one increment should be granted to native teachers for each completed period of five years of service. This took effect from the 1st July, 1930, when the scale providing for annual increments was superseded. Plaintiff who has 13½ years service to his credit was thus paid two increments of £3 each per annum for the period 1st July, 1930, to 31st October, 1930, amounting to a sum of £2.

4. The regulations referred to in paragraph 2 were amended by Administrator's Notice No. 643 published on page 424 of the Provincial Gazette of the 29th October, 1930. It is therein provided that salary grants and allowances shall be in accordance with scales sanctioned by the Administrator; that the Department shall not pay full grants and allowances unless the necessary financial provision has been made and that the payment of increments on the prescribed scales shall be in the discretion of the Director. As a result it is admitted that the claim in the summons originally for the period ending 31st December, 1930, should be for the period ending 31st October, 1930.

5. Plaintiff alleges that prior to the 1st April, 1928, he was in receipt of a salary of £66 per annum. He now claims salary on scale A. Grade E. £90—9—£180 as an assistant teacher in a native practicising school as follows :—

1.4.28 to 31.3.29, difference between £66 and £90	£24 — —
1.4.29 to 31.3.30 ,, ,, 66 and 99	33 — —
1.4.30 to 31.12.30 ,, ,, 66 and 108 for 9 months	31 10 —
	£88 10 —

This claim must fail, however, as the explanatory notes to Grade A lay down that native assistant teachers in practising schools receive the salaries of teachers in Native Primary Schools with an addition of £18 per annum for men which Plaintiff is receiving.

6. The Plaintiff however is entitled to be regarded as a claimant the same as the other six Plaintiffs for the annual increments provided under scale B, as follows :—

1.4.28 to 31.3.29	£3 — —
1.4.29 to 31.3.30	6 — —
1.4.30 to 31.10.30 7 mths. @ £9 p.a.	5 5 —
	£14 5 0

less the sum of £2 paid as related in paragraph 3 leaving a balance claimed of £12.5.

7. Plaintiff further claims that he is entitled to cost of living allowance as laid down in scale B, due to a single teacher in that he resides at Kilnerton which is not within the area of a Municipality or of a native reserve. He claims at the rate of £6 per annum for the period 1.4.28 to 31.12.30 or a total of £15. The correct claim for the period however should be £16.10. I propose dealing with this claim first.

8. The defence to this claim is that Kilnerton where Plaintiff resides and is employed is a native reserve. Kilnerton is situate near Pretoria in a distinctly European area and is a Native Mission Training Institution. No evidence in support of the contention was provided. Mr. Benson for Plaintiff offered the suggestion that a native reserve is an area of land large or small wholly or mainly inhabited by natives to the exclusion of the European races and possessing autonomous control by a Chief and his Council. This definition was not questioned by the defence. I am unable to in the absence of evidence commit myself to the acceptance of any definition as to what may or may not be a native reserve. I consider however that all the probabilities are against Defendant's contention. The Defence in the absence of proof must fail.

9. This however does not conclude the matter as there is a further defence that the cost of living allowance is not payable to Plaintiff at all. This is based on the contention that this allowance only applies to teachers on the Witwatersrand and the Municipal area of Pretoria. It would appear that a meeting of representatives of the Native Affairs Department, the Native Affairs Commission and Provincial Administrations held on the 23rd March, 1923, it was resolved to recommend that in purely European areas teachers should receive an allowance of £6 and in large towns and in places where the School Inspector certifies that the conditions are similar to large towns an additional six pounds (see Exhibit No. 7).

10. This recommendation was adopted by the Transvaal Provincial Administration by regulation published under Administrator's Notice No. 389 of the 10th September, 1923, which provided for the payment, subject to the provision of the necessary funds, of local allowance at the rate of £6 per annum to native teachers employed in schools in areas approved by the Director (see Exhibit No. 8). The payment of the allowance was applied to teachers employed in the Urban areas of Pretoria and the Witwatersrand (see Exhibit No. 9). The allowance was not at any time paid in the Transvaal outside this area although Plaintiff's evidence shows that he drew it for a time. Possibly Kilnerton was then regarded as one of the Urban areas of Pretoria.

11. The payment of this local allowance is superseded with effect from 1st April, 1928, by the cost of living allowance provided in the regulations referred to in paragraph 2 hereof. Where the allowance was paid however it was continued up to the 30th June, 1930. It is laid down in these regulations that teachers living in other than a Municipality or Native Reserve shall be paid a sum of £12 per annum for a married teacher with a family and £6 per annum for a single teacher. In a minute dated the 7th March, 1928, the Department of Native Affairs imposed a further limitation on the payment of the cost of living allowance when it laid down that such allowance should only be paid in respect of the Rand and the Municipal area of Pretoria (see Exhibit No. 3).

Quite clearly therefore the allowance cannot be paid in respect of teachers employed at Kilnerton which the evidence shows is outside the Municipal area of Pretoria.

12. There is no evidence that Superintendents or teachers were ever notified of this decision, although warning that an alteration was about to take place will be found in Exhibit No. 11. The restriction to the Rand and Pretoria of the payment of cost of living allowance was however merely carrying out the policy in existence in reference to the payment of local allowance as detailed in paragraphs 9 and 10. It is also within the powers possessed by the Minister for Native Affairs as laid down in Sec. 3 of the regulations, while the failure to advise Superintendents and Teachers of the limitation imposed is inexplicable, the decision of the Department of Native Affairs appears to be legally correct. The claim for cost of living allowance therefore fails.

13. Defendant denies that Plaintiff is entitled in law to increments in terms of the scale approved as of right. This Defence was common to all seven cases heard by me and my judgment on this point will be found in case No. 570 W. B. Molikoane v. The

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Administrator of the Transvaal in the record of which the evidence led in all cases was taken down by consent. In terms of trial judgment Plaintiff is entitled to succeed in his claim for £12.5.0.

14. There will be judgment for Plaintiff for £12.5. and costs.

H. BRITTEN,

Magistrate.

Johannesburg,

13th April, 1931.

MP.

Case 574

1931.

FACTS FOUND PROVED AND REASONS FOR JUDGMENT IN THE CASE OF WALTER PETJE

v.

THE ADMINISTRATOR OF THE TRANSVAAL.

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1. Plaintiff claims on behalf of his wife Rahab Petje, a teacher employed in the Salvation Army native Government aided School, Western Township, within the Municipal area of Johannesburg, and to whom he is married in Community of Property, according to Christian rites. Any further use hereinafter of the word Plaintiff will, except in the last paragraph, refer to Rahab Petje, the actual Plaintiff and not to her husband whose appearance is merely nominal. It is admitted that Plaintiff resides with her husband, who is in business as a boot repairer and that they were married in the year 1926. She claims a sum of £39 being £3 increments of salary and £36 married teachers cost of living allowance.

2. The claims are based on regulations framed under Sec. 28 Act 25 1907 (Transvaal) and published in Administrator's Notice No. 170 on page 417 of the Provincial Gazette of the 13th March, 1929, and which came into force with effect from 1st April, 1928. It is provided in Sec. 3 that salaries and allowances of approved teachers employed in schools for native children shall be in accordance with the scales and allowances laid down from time to time by the Minister for Native Affairs. A copy of the approved schedule was handed in, Exhibit No. 2, and will also be found on page 8 in the handbook of regulations and instructions published by the Transvaal

Education Department for the guidance of Superintendents of Native Schools and Teachers, Exhibit No. 1, and to which frequent reference was made during the trial.

3. At a conference held at Capetown during Easter of 1930 it was decided by the Native Affairs Department that in all Provinces one increment should be granted to native teachers for each completed period of five years of service. This took effect from 1st July, 1930. when the scale providing for annual increments was superseded. As the Plaintiff's record of service dates from the year 1929 she has not yet benefitted by this provision.

4. The regulations referred to in paragraph 2 were amended by Administrator's Notice No. 643 published on page 424 of the Provincial Gazette of the 29th October, 1930. It is therein provided that salary grants and allowances shall be in accordance with scales sanctioned by the Administrator that the Department shall not pay full grants and allowances unless the necessary financial provision has been made and that the payment of increments on the prescribed scales shall be at the discretion of the Director. As a result it is admitted that the claim in the summons originally for the period ending 31st December, 1930, should be for the period ending 31st October, 1930.

5. Plaintiff alleges that she is the holder of a P.T. 2 teacher's certificate and that after a break in service she resumed teaching in the year 1929. It would appear that she resumed employment on the 11th March, 1929, which for salary purposes is regarded as the 1st March. Since that date she has been paid a salary of £30 per annum, the amount payable to an uncertificated teacher. She claims that she is entitled to one increment of £3 on the scale £54—3—£81. This however is the P.T.2 scale of a male teacher, the scale for a female being £42—3—£69. Her correct claim would appear to be £2 being increment of £3 per year for the four months ending 30th June, 1930, at the rate of £6 per annum. It is not clear why Plaintiff has not claimed the difference between £30 and £42 the minimum salary of a P.T.2 teacher as that scale came into force from the 1st April, 1928.

6. The Plaintiff further claims that she is entitled to cost of living allowance due to a married teacher with a family amounting to £18 per annum or a sum of £36 in all. This claim is obviously incorrect. For the period 1.3.29 to 31.10.30, viz., 20 months at £18 per annum, the correct sum is £30. The Plaintiff has been paid local allowance at the 1923 rate of 10/- per month for 16 months endin 30th June, 1930, amounting to £8 and cost of living allowance at the single rate of £9 per annum for the 4 months ending 31st October, 1930, amounting to £3, a total over the whole period of £11. When deducted from the claim of £30 this leaves a balance of £19, the correct amount of the claim should it be found to be due.

7. The Defence to the claim for increments of salary is that Plaintiff is an uncertificated teacher, that as such her salary is £30 per annum which she has been paid. If it is proved that she is a certificated teacher, the defence common to all these cases is raised that she is not entitled in law to increments as of right.

8. It would appear that Plaintiff entered the Kilnerton Training Institution in July, 1915, the entrance qualification for which at that time was Standard V and passed the first year examination in June, 1916. She failed the second year examination in June, 1917, and June, 1918, but appears to have been permitted to proceed to the third year course which she failed in 1919. She alleges that she was informed by the Superintendent of the Institution, then the Rev. Briscoe, that she had passed the second year examination in 1918. There is no corroboration of this statement. If she had passed the third year examination doubtless the failure of the second year would have been condoned. The Plaintiff has been employed at registered schools at various times since the year 1919 and was always regarded as an uncertificated teacher.

9. As stated above prior to the year 1925 the qualification for entrance to a training institution was Standard V, the course was for 3 years, at the end of each year an examination was held and at the end of the third year on a satisfactory pass being obtained, a provisional certificate was issued. This became unprovisional after three years' teaching experience and automatically led to a rise in grade. In 1925 it was decided to raise the entrance qualification to Standard VI. The course as before is one of three years, an examination is held at the end of each year, the first being known as P.T.1, the second year as P.T.2, and the third as P.T.3. This was included in the Syllabus of 1925 and the first examination thereunder took place in 1926.

10. Previous to the year 1926, when the entrance standard was lower, three years training was essential. Since 1925, with the higher entrance qualification, it is possible to obtain recognition as a P.T. 1, 2 or 3 teacher according to the number of years of training performed and the examinations passed. The Plaintiff's case fails for the reason

that she did not pass either the second or the third year examination of the course she undertook, and thus she remained an uncertificated teacher. The subsequent condition that a student passing the second year examination may be regarded as a P.T.2 teacher is not retrosspective even if she had as she alleges passed a second year examination as this condition is based on a higher entrance qualification. It is not therefore necessary to deal with the defence that the Plaintiff is not entitled in law to increments as of right.

11. In connection with the claim for cost of living allowance the defence set up is that Plaintiff as a married woman is not entitled to this allowance. Further that Plaintiff has no family and on this ground also is not entitled to the allowance. The latter defence need not be further considered in view of the fact that the uncontradicted evidence of Plaintiff shows that she is the mother of two children.

12. The Department of Native Affairs laid down in a minute dated the 19th November, 1928, Exhibit No. 5, the following interpretations of the recently approved scales for native teachers in primary schools.

A. The phrase "married with a family" should be interpreted as meaning a male teacher married to and supporting a wife whether there be children or not of either spouse.

B. Marriage allowance should not be paid to widows nor to wives whether they are or are not receiving support from their husbands.

Plaintiff is therefore precluded from receiving cost of living allowance on any scale whatsoever.

13. It would appear however that these interpretations of the Native Affairs Department were disregarded as it was considered they would result in hardship on teachers especially those already drawing the local allowance of 10/- per month as provided in 1923. All teachers on the Witwatersrand and Pretoria continued to draw this allowance up to the 30th June, 1930, and in this respect Plaintiff was paid the sum of £8 as stated in paragraph 6 hereof. The authority for the payment of this local allowance is contained in Exhibit No. 9 and such payment should have ceased when the regulations referred to in para. 2 came into force on the 1st April, 1928. On the 17th July, 1930, Circular No. 55, 1930, to Superintendents of native schools (Exhibit No. 6) laid down inter alia that a married woman teacher whose husband is not employed as a "teacher will be paid the allowance applicable to a single teacher." By virtue of this authority Plaintiff was paid a sum of £3, as stated in paragraph 6. This payment is in conflict with the interpretation of the Department of Native Affairs that cost of living allowance is not payable to a married female teacher. Plaintiff is not therefore entitled to the cost of living allowance claimed by her.

14. As both claims fail there will be judgment for Defendant with costs.

H. BRITTEN,

Magistrate.

Johannesburg,
13th April, 1931.

MP.

Case No. 575

1931.

FACTS FOUND PROVED AND REASONS FOR JUDGMENT IN THE CASE OF

H. MADIBANA

v.

THE ADMINISTRATOR OF THE TRANSVAAL.

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1. Plaintiff is the Head teacher of the St. Peter's Crown Mines Government aided Native school, and is the holder of a P.T.3 teaching certificate. He resides within the Johannesburg Municipal area with his wife and children. He claims a sum of £98.5.0, being £16 alleged to be due in respect of annual salary increments, £49.10. cost of

living allowance and £33 allowance to a head teacher of a school having Standard V and VI classes.

2. The claims are based on regulations framed under Section 28, Act 25, 1907 (Transvaal) and published in Administrator's Notice No. 170 of page 417 of the Provincial Gazette of the 13th March, 1929, and which came into force with effect from 1st April, 1928. It is provided in Sec. 3 that salaries and allowances of approved teachers employed in schools for native children shall be in accordance with the scales and allowances laid down from time to time by the Minister of Native Affairs. A copy of the approved schedule was handed in (Exhibit No. 2) and will also be found on page 8 in the handbook of regulations and instructions published by the Transvaal Education Department, for the guidance of Superintendents of native schools and Teachers (Exhibit No. 1) and to which frequent reference was made during the trial.

3. At a conference held at Capetown during Easter of 1930, it was decided by the Native Affairs Department that in all Provinces one increment should be granted to native teachers for each completed period of five years of service. This took effect from the 1st July, 1930, when the scale providing for annual increments was superseded. Plaintiff who has 8½ years service to his credit, has as a result been paid one increment of £3 per annum for the period 1st July, 1930, to 31st October, 1930, amounting to a sum of £1.

4. The regulations referred to in paragraph 2 were amended by Administrator's Notice No. 643, published on page 424 of the Provincial Gazette of the 29th October, 1930. It is therein provided that salary grants and allowances shall be in accordance with scales sanctioned by the Administrator; that the Department shall not pay full grants and allowances unless the necessary financial provision has been made and that the payment of increments on the prescribed scales shall be at the discretion of the Director. As a result it is admitted that the claims in the summons originally for the period ending 31st December, 1930, cannot extend beyond the period ending 31st October, 1930.

5. Plaintiff alleges that prior to 1st April, 1928, he was in receipt of an annual salary of £66 on the scale £66—3—£108, and claims increments of salary from that date as follows :—

1.4.28 to 31.3.29	£3
1.4.29 to 31.3.30	6
1.4.30 to 31.12.30 (9 mths. at £9 p.a.	6.15.—
	£15.15.—

The amount actually claimed in the summons is £16. The sum of £1 already paid in circumstances related in paragraph 3 hereof should be deducted from this claim, likewise the sum of £1.10. in respect of the months of November and December, 1930, referred to in paragraph 4; the correct amount claimed by Plaintiff is therefore £13.5.0.

6. The Plaintiff also claims that he is entitled to cost of living allowance at the rate of £18 per annum for the period 1.4.28 to 31.12.30, amounting to £49.10. The claim is admitted up to the period ending 30.6.30, amounting to £40.10, subject to a deduction of £13.10. already paid at the 1923 local allowance rate laid down in Exhibit No. 9. This leaves a balance of £27, in respect of which Plaintiff is entitled to judgment. I understand that the amount of cost of living allowance in respect of the four months ending 31st October, 1930, has already been paid.

7. Plaintiff further claims that as the head of a school with Standard V and VI classes, he is entitled to an allowance of £12 per annum from 1.4.28 to 31.12.30, amounting in all to £33. The claim is admitted up to the period ending 30th June, 1930, amounting to £27, and Plaintiff is also entitled to Judgment for this amount. Presumably the amount has been paid in respect of the four months ending 31st October, 1930.

8. Defendant denies that Plaintiff is entitled in law to increments in terms of the scale approved by the Minister of Native Affairs as of right. This defence was common to all seven cases heard by me, and my judgment on this point will be found in case 570
—— W. B. Molekoane v. The Administrator of the Transvaal in the record of which 1931
the evidence led in all cases was taken down by consent. In terms of that judgment Plaintiff is entitled to succeed in his claim for £13.5.0.

9. There will therefore be judgment for Plaintiff for £13.5.0 increments of salary, £27 cost of living allowance, £27 allowance in respect of Standards V and VI classes, a total of £67.5.0 with costs.

H. BRITTEN,
Magistrate.

Johannesburg,
13th April, 1931.

13th April, 1931.

MP.

Case No. 2544

1931.

FACTS FOUND PROVED AND REASONS FOR JUDGMENT IN THE CASE OF

JONA KHOMO

v.

THE ADMINISTRATOR OF THE TRANSVAAL.

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1. Plaintiff is the Head teacher of the Dutch Reformed Church Mission School, Middelburg (Transvaal) within the Municipal area of Middelburg. He is the holder of a P.T.3 teacher's certificate, is a married man with a family and claims a sum of £65.10. being £15 alleged to be due in respect of annual increments of salary and £49.10. cost of living allowance payable to a married teacher.

2. The claims are based on regulations framed under Sec. 28 Act 25.1907 (Transvaal) and published in Administrator's Notice No. 170 on page 417 of the Provincial Gazette of the 13th March, 1828, and which came into force with effect from 1st April, 1928. It is provided in Sec. 3. that salaries and allowances of approved teachers employed in schools for native children shall be in accordance with the scales and allowances laid down from time to time by the Minister for Native Affairs. A copy of the approved schedule was handed in, Exhibit No. 2. and will also be found in the handbook of regulations and instructions published by the Transvaal Education Department for the guidance of Superintendents of native schools and teachers, Exhibit No. 1. and to which frequent reference was made during the trial.

3. At a conference held at Capetown during Easter of 1930, it was decided by the native teachers for each completed period of five years of service. This took effect Native Affairs Department that in all Provinces one increment should be granted to from the 1st July, 1930 when the scale providing for annual increments was superseded. Plaintiff who has 15 years service to his credit was thus paid three increments of £3 per annum for the period 1st July, 1930 to 31st October, 1930 amounting to a sum of £3.

4. The regulations referred to in paragraph 2. were amended by Administrator's Notice No. 643, published on page 424 of the Provincial Gazette of the 29th October, 1930. It is therein provided that salary grants and allowances shall be in accordance with scales sanctioned by the Administrator; that the Department shall not pay full grants and allowances unless the necessary financial provision has been made and that the payment of increments on the prescribed scales shall be in the discretion of the Director, as a result it is admitted that the claim in the summons originally for the period ending 31st December, 1930, should be for the period ending 31st October, 1930.

5. Plaintiff alleges that prior to 1st April, 1928, he was in receipt of an annual salary of £66 on the scale £66-3 £108 and claims increments of salary from that date as follows:

1.4.28 to 31.3.29	£3
1.4.29 to 31.3.30	6
1.4.30 to 31.12.30 (9 mths. @ £9 p.a.)	6.15.—
	£15.15.—

The amount actually claimed in the summons is £16. The sum of £3 already paid in circumstances related in paragraph 3 hereof should be deducted from the claim, likewise the sum of £1.10. in respect of the months of November and December, 1930, referred to in paragraph 4. The correct amount claimed by Plaintiff to therefore £11.5.

6. The Plaintiff also claims a sum of £49.10. being cost of living allowance due to a married teacher residing with his family in a Muncipality being for two years and 9 months from the 1st April, 1928 at the rate of £18 per annum. The defence to this claim is that in terms of the scale approved by the Minister for native affairs the cost of living allowance areas and therefore has no application at Middelburg where Plaintiff is employed. I propose dealing with this claim first.

7. It would appear that at a meeting of representatives of the Native Affairs Department, the Native Affairs Commission and Provincial Administrations held on the 23rd March, 1928, it was resolved to recommend that in purely European area teachers should receive an allowance of six pounds and that in large towns and in places where the School Inspector certifies that the conditions are similar to large towns, and additional six pounds (see Exhibit No. 7).

8. This recommendation was adopted by the Transvaal Provincial Administration by regulation published under Administrator's Notice No. 389 of the 10th September, 1923, which provided for the payment subject to the provision of the necessary funds of local allowance at the rate of £6 per annum to natice teachers employed in schools in areas approved by the Director (See Exhibit No. 8). The payment of the allowance was applied in respect of teachers employed in the Urban areas of Pretoria and the Witwatersrand. (See Exhibit No. 9). The allowance was not at any time in the Transvaal outside this area.

9. The payment of this local allowance is superseded with effect from the 1st April, 1928, by the cost of living allowance provided in the regulations referred to in paragraph 2 hereof. The allowance was in fact paid up to the 30th June, 1930. It is laid down in these regulations that teachers living or boarding within the boundaries of any Municipality shall be paid a sum of £18 per annum for a married teacher with a family and £9 per annum for a single teacher.

10. In a minute dated the 7th March, 1928, the Department of Native Affairs imposed a further limitation on the payment of the cost of living allowance, when it laid down that such allowance should only be paid in respect of the Rand and the Municipal area of Pretoria (see Exhibit No. 3). There is no evidence that Superintendents or teachers were ever notified of this decision although warning that an alteration was about to take place will be found in Exhibit No. 11. The decision to so restrict the payment of cost of living allowance to the Rand and Pretoria is in accordance with the practice which formerly existed (see paragraph 8 hereof) and within the powers of the Minister for Native Affairs, as laid down in section 3 of the regulations. While the failure to advise Superintendents and Teachers of the limitation imposed is inexplicable, the decision is legally correct and the claim for cost of living allowance fails.

11. With refernce to the claim in respect of increments of salary, the Department has not pleaded thereto, but refers to an arrangements entered into with Plaintiff's Attorney. It is understood however that the defence is the same as in all th other cases, i.e. a denial that Plaintiff is entitled in law to increments of salary as of right. My judgment on this point will be found in case No. 570 B. W. Molekoane v. The Administrator of

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1931

the Transvaal, in the record of which the evidence led in all cases was taken down by concent. In terms thereof Plaintiff is entitled to succeed in his claim for increments of salary in the sum of £11.5.

12. There will be judgment for Plaintiff for £11.5. and costs.

H. BRITTEN,
Magistrate.

Johannesburg,
13th April, 1931.

IN THE SUPREME COURT OF SOUTH AFRICA.

(Transvaal Provincial Division.)

J. S. SMIT N.O.

Appellant,

versus

W. B. MOLIKOANE

Respondent.

DE WAAL J.P.: This is an appeal from a decision of the Chief Magistrate of Johannesburg.

Respondent is the head Pupil Teacher of the Von Brandis Native primary school and has been such since prior to April 1928. In his summons he claimed that in terms of regulations published under Government Notice 170 of 13th March 1929 he is entitled to a salary of £65 per annum rising £3 per annum until his salary reaches the sum of £108. He claimed further that he was entitled to married allowances, alleging that payment of annual increases and allowances have been withheld from him amounting to (a) annual increment £16, and (b) married allowances £49.10.9. He further claimed interest at the rate of 6% on these amounts. The defendant, in his plea, denied that the plaintiff was entitled as of right to any rise of salary and to interest thereon, but admitted the plaintiff's right to allowances. He pleaded however that the allowances amounted to £40.10.0 and not to £49.10.0, and that he has paid a sum of £13.10.0 on account thereof leaving a balance due to plaintiff of £27. The magistrate gave judgment for plaintiff for an amount of £4.10.0 increments of salary, and £27 for living allowonces, and dismissed the claim for interest. The present appeal is directed against the judgment for £4.10.0, and respondent cross-appeals claiming that he is entitled to interest on both amounts namely £4.10.0 and £27.

This action was brought as a test case. Over seven hundred summonses have been issued against the appellant and as will be noticed from the record, evidence was actually led in seven cases.

The magistrate in his judgment came to the conclusion that the regulations established a contractual relationship between the plaintiff and the Department of Education and that therefore the plaintiff was entitled as of right to claim the annual increment of salary. The appellant denied that a legal contract existed between the plaintiff and the Department contending that the respondent was a servant of the Crown and that therefore he was not entitled to claim an increment of salary as of right. The sole question therefore to be determined in the appeal is whether the respondent was a servant of the Crown, and in order to determine that question it will be necessary to refer to the regulations in detail.

Now the Transvaal Education Act of 1907 section 28 (a) makes provision for the establishment or maintenance of schools and institutions, as may be deemed necessary or expedient, for the instruction of coloured children or persons, and under sub-section (b) the Minister may from time to time make grants in aid of any such school or institution for the instruction of coloured children or persons, such school or institution being under the superintendence of an European Missionary or a person approved of by the Director. From time to time grants in aid were made to such schools, and eventually regulations were framed, to come in operation with effect as from 1st April 1928, dealing with such schools or institutions, and with the grants in aid out of public funds to be made thereto.

Now before a native school or institution becomes entitled to a grant in terms of the Act it must be "established." Before schools or institutions can be established they must be shown to be under the control of a Superintendent, who is either an European Missionary or some other person approved by the Director. Then certain conditions are laid down as to how and when application for the establishment of a native school shall be considered by the Department of Education. Once a school has at its head a Superintendent, and the conditions as to establishment are complied with, and the application for establishment has been sanctioned and school teachers have been appointed to such school with the approval of the Department, then such teachers become entitled to the salaries and allowances laid down by the regulations, which salaries and allowances shall then be paid by the Department. In terms of regulation (3) the salaries and allowances of approved teachers employed in such schools shall be in terms of the

scales of allowances laid down from time to time by the Minister of Native Affairs. In terms of regulation (13), the Department from time to time prescribes the syllabuses that must be followed in all such schools. Then under regulations framed under Administrator's notice 757 of 21/11/1928, provision is made dealing with the regulation, suspension and dismissal of teachers. The Director of Education retains full control over such teachers in terms of regulation (1). A teacher in receipt of a government grant who fails to resume duty at the commencement of a term shall be deemed to have vacated his post as from the last day of the previous term, unless the Director is satisfied that failure to resume duty was due to unavoidable causes. Under regulation (2) provision is made for voluntary resignation with the approval of the Director. Then regulation (3) provides for summary suspension either by the Director or by the Inspector of Native Schools or the Superintendent of the school where he is employed, but he shall not be dismissed, save with the approval of the Director. A teacher who is dismissed by the Superintendent of his school has the right to appeal against his dismissal to the Director. Under regulation (4) the Superintendent shall report full information to the Inspector regarding the absence from his post of any teacher in receipt of a Government grant; and under regulation (6) the Department, on the written recommendation of the Superintendent and the Inspector, may terminate the appointment of a teacher who has absented himself from his post without leave or without reasonable cause.

From the foregoing regulations it will be seen therefore that before grants in aid can be made out of public funds the Superintendent of the School must be approved by the Department. After the Superintendent has been approved and the establishment of the school sanctioned, the salaries of teachers appointed to schools are paid only provided their appointment has been sanctioned by the Department. Having been appointed to such schools the teachers must follow the syllabuses as laid down by the Department and under the regulations framed under Government Notice No. 757, it is abundantly clear that the Department exercises control over the teachers as regards suspension, dismissal and leave of absence.

But the control by the Department over native teachers becomes even more apparent when one looks at the manner of payment of teachers followed by the Department. Teachers in regular employ of native schools are paid their salaries at the end of each month. Before the end of the month the Superintendent fills in a form, which he certifies as being correct, showing the names of the teachers on the teaching staff during that month and the emoluments to which each is entitled, and on the receipt by the Department of that form, duly completed and signed, the Department forwards to the Superintendent individual cheques for the salaries of the teachers.

Relying on these regulations and notices it was contended by the appellant that the respondent was a servant of the Crown and that as such he was not entitled to claim his increment as of right.

Mr. CURLEWIS, for the appellant, has contended that the tests that have been applied in a number of cases that have come before the Courts as to whether a person is a public servant or not, are thefollowing :

(1) Who makes his appointment.

(2) Who pays his salary.

(3) Who controls his work.

(4) Who dismisses him

and (5) Who controls the buildings in which he works; and that if these tests, or the other of them, are applied, it becomes clear that the respondent was a servant of the Crown.

Now it is clear from the decided cases that if he is a servant of the Crown he would not be entitled to claim his increment, is clear.

In **Marshall v. Union Government** (1917 T.P.D. 371), it was decided that a servant of the Crown is not entitled, in the absence of a special contract, to claim incremental pay as a matter of right. At page 374 DE VILLIERS J.P. says this :

" With regard to the first contention, namely, whether the Plaintiff was entitled to claim increments as a matter of right, I may say at once I have come to the conclusion that he was at no time entitled to claim them as a matter of right. The law is clear."

And on the succeeding page the learned Judge says this:

"All he (i.e. the plaintiff) says is that it was generally understood—and that is so, because everybody in the service naturally, upon good behaviour, expected—that he would receive these amounts. But it never grew to a right. It could not be claimed. The finances of the country, to mention but one thing, may in any particular year not warrant it. Therefore unless there was some special agreement made, which is not the case here, nobody could claim it as a matter of right."

The decision in **Lavoipierre v. The Union Government (Minister of Justice)** (1925 T.P.D. 47) is to the same effect. There the Court had to interprete the effect of Section 13 (1) Act 27 of 1923 which provided that:

"The Governor-General may, on the recommendation of the Commission, prescribe scales of salaries, wages or allowances applicable to the various classes of officers and their employment in the public servie and may likewise from time to time alter such scales or prescribe new scales and in the case of persons appointed, or promoted to any higher grade, between the twenty-eighth day of March, 1923, and the commencement of this Act, may apply such scales as from the date of such appointment or promotion."

The plaintiff, a Government servant, brought his action for a declaration "that he was on the 24th January, 1923, appointed a second grade additional magistrate in the service of the Union Government and then placed upon the scale of £700, rising by annual increments of £25 to £750 and that he is entitled to receive payment of salary at the rate of £725 per annum with relative local allowance upon that scale as from 1st December, 1923, and thereafter to proceed to the maximum of that scale."

The plaintiff alleged that in terms of a minute from the Secretary for Justice on behalf of the Union Government, he became entitled as of right to claim certain increments of pay referred to in the minute. The Court however dismissed his action holding that he was not entitled as a matter of right to such increment.

CURLEWIS J.P., in dealing with the plaintiff's claim based on section 13 (1) of the Act on the minute, says this:

"Now, if this minute or letter were a letter written from an ordinary employer to his employee, it is clear it would create an obligation on the part of the employer to employ the employee from the 1st April on this higher grade and to pay him on the scale of salary there set out, and if he did not employ him from the 1st April in that way the employee would have a right of action for damages against the employer. But the relationship as between the Government or the Crown and its servants is not one of contract. Therefore, though such a letter might give rise, had it been between an ordinary employer and his employee, to an action for damages, in case the employer did not engage the employee to fill the position from the 1st April and draw the salary set out, such an action would not arise as against the Crown."

The next case to which I wish to refer is **Wentzel v. Krige and another** (27 S.C. 123). Krige was a teacher in the Stellenbosch Public School having received his appointment from the College Council who had the power to dismiss him, the Government, however, having the right to veto his appointment or dismissal. The Government made a grant in aid to the School and in that way therefore indirectly contributed towards the payment of his salary. The Government also paid his good service allowance. Krige was elected a member of the Municipal Council of Stellenbosch, whereupon the ratepayer applied to have his election set aside on the ground that as a school teacher and as such holding an office of profit under the Government he was not capable of being or continuing as a Councillor of the Municipality. In deciding the matter the Chief Justice there said this:

"The test, after all, should be, whose servant is he? the words 'under Government' would seem to apply to service under the Government. Now, whose servant is respondent in the present case? Clearly he is not the servant of the Government. He receives his appointment from the College Council, and the Council may dismiss him. The only thing the Government may do is to put a veto on his appointment or dismissal, but I do not think it would be right to hold that the mere fact that the Government has that veto makes the respondent a servant of the Government, and not of the Council. There is truth in the saying that 'no man can serve two masters,' and the argument of Counsel for the applicant really comes to this, that the respondent is the servant of two masters—he is the servant of the Council and he is the servant of the Government. Now, to my mind he is the servant of the Council, and the fact that the Government contributes towards the payment of his salary, and also pays the good

service allowance, does not make him a servant of the Government. It is the policy of the Legislature that the Government should contribute liberally towards education. But I do not think that it was the intention of the Legislature to prohibit teachers from becoming Municipal Councillors merely, because of the indirect control exercised by the Government, and the grants in aid made by the Government."

In **Ex Parte Van Der Merwe in re Havenga's Election** (1916 O.F.S. 26), the Court was called upon to decide whether a member of the Executive Committee of the Provincial Council held an office of profit under the Crown within the meaning of Section 53 (d) of the South Africa Act. The learned Chief Justice, after referring to **Wentzel v. Krige and Another** and after discussing certain other tests whether the applicant was a servant of the Crown or not, and the difficulties in the case of these tests only were to be applied, said this at Page 32:

"We are on firmer ground, however, when we came to the question as to who pays the wage or salary—the respondent receives the emoluments of his office from the public funds, and must be held to be in the employ of the Government whose wage he draws. The respondent cannot deny being in the service of the person whose wage he draws."

In **Rex v. Borke** (1915 A.D. 145), it was held that the appellant, a Registrar of the Supreme Court, was a person employed in the Public Service by the reason of the nature of his duties, e.g., in that he was appointed by the Governor, carried on public duties in a public room or office and was paid a salary out of public funds.

Now applying these decisions and the tests 1, 4 and 5 referred to above it is true that, according to the regulations, the respondent's appointment is made by the Superintendent of the school and not by the Department, and that the Superintendent likewise has the right to dismiss him; and that the respondent carries on his work in a building not owned by the Department. But to say the least, the Department exercises a supervisory control, both as regards the respondent's appointment and his dismissal, and over the building where his work is performed. — Before a grant can be made in respect of his salary the respondent's appointment must have been approved of by the Department (Regulation 2). And orders for his suspension or dismissal, although made by the Superintendent, do not become operative unless they are made to the satisfaction and with the approval of the Director. The Department therefore exercises a real, although not the exclusive control, over the respondent as regards his appointment, suspension or dismissal. — Then as regards school buildings, it is clear from the regulations that they cannot be placed on the "established" list of such schools until the Department has granted its approval.

But if one comes to consider the application of tests Nos. 2 and 3, it is clear that the respondent is a public servant, in the employ of the state. His salary is fixed by the Department, he is paid monthly by the Department, and he works according to a syllabus prescribed by the Department. — When one person carries out the orders of another, accepts employment according to scale of pay fixed by him and receives his pay from that other, it seems idle to contend that he is not the servant of such other.

I have come to the conclusion that the respondent is a servant of the Administration, and that, as such, he cannot claim incremental pay as of right. The appeal with regard to the sum of £4.10.0 must therefore succeed.

The only remaining question is whether the respondent should succeed on his claim for interest on the sum of £27, married allowances, for which he got judgment, and to which he was admittedly entitled. The magistrate came to the conclusion that as there was no formal demand, interest became due from the 21st October, 1930, which was fixed as the date of demand by consent of the appellant in the appeal.

It appears that after judgment was given evidence was heard in order to ascertain whether a formal demand had been made for payment. According to the evidence of a member of a deputation of the Transvaal African Teachers' Association, an interview took place between the deputation and the Director of Education assisted by a certain Burrough. At the interview the member of the deputation stated that payment was demanded of salaries and allowances under the new scale. The deputation apparently took up the attitude that the amounts were provided by regulation and that it was expected that they would be paid. It was admitted that the amounts due to individual teachers was not fixed or discussed. Bourrough said in evidence that he heard no formal demand made for payment and before the numerous summonses were issued he was not aware that any demand had been made. He was under the impression that the deputation accepted the position stated by the Director that there were no funds, but

if the Native Affairs Department provided the money, the teachers would be paid.

During the hearing of the evidence Counsel for the appellant consented to the date of 21st October, 1930, being fixed as the date of demand. That was the date when the first of the numerous summonses was issued and subsequently withdrawn.

As pointed out in the case of **West Rand Estates v. New Zealand Insurance Co.** (1926 A.D. at p. 195), liability for the payment of interest through delay in the performance of his obligation or duty by the defendant may arise in one of two ways: "Interest may be due from the nature of the case where, for instance, the time for performance is fixed either by agreement or the law (mora ex re); or where, in the absence of such agreement, the defendant has been called upon to perform his obligation (mora ex persona). In the former case no interpellation is necessary; in the latter the debtor must be formally called upon for performance. But we must bear in mind that a defendant cannot be said to be "in mora" unless he knows the nature of his duty or obligation; that is to say when and how much he has to pay."

By deciding that the respondent is a servant of the Crown, this Court has come to the conclusion that he is not entitled as of right to claim the increment prescribed in the scale laid down, and it must follow as a necessary corollary from the cases to which reference has already been made, that in the absence of some special agreement a servant of the Crown is not entitled as of right to claim the prescribed scales of salaries, wages or allowances applicable to the various classes of officers in the employment of the Crown. So that the respondent as a servant of the Crown cannot maintain that he has a right to claim the local allowances prescribed. The liability to pay interest can only arise when an obligation or duty exists and the appellant can only be "in mora" from the moment that a formal call is made on him to perform his obligation. The defendant in the Lower Court was under no obligation or duty to the teachers in respect of allowances, because a teacher could not claim increment or allowance as of right. The obligation to pay the allowance only arose when the defendant in the lower court admitted owing a balance of £27, due in respect of living allowance. No admission of liability or formal demand for payment could be established by the respondent for the evidence led in the lower Court, and it was apparently because of the decision in the West Rand Estates case, that the appellant consented to the date of 21st October, 1930, being treated as the date of formal demand.

It follows that the respondent in the cross appeal could not be "in mora" until after the admission in his plea. The magistrate's decision, therefore, was in the circumstances correct and the cross appeal must be dismissed.

In the result, the appeal succeeds, and the judgment must be altered to one of £27 in the Court below, and the cross appeal fails on the ground that the defendant was not "in mora" prior to the 21st October, 1930. The appellant is entitled to costs in this Court.

(Sgd.) D. DE WAAL,

Judge of the Supreme Court.

BARRY. I concur.

Pretoria ,

18th August, 1931.