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.